MEADOR LECTURE SERIES 2007–2008: EMPIRE

CONTEMPORARY FOREIGN INVESTMENT LAW: AN "EMPIRE OF LAW" OR THE "LAW OF EMPIRE"?

José E. Alvarez[*]

My topic is the relationship between modern international economic law and empire. At the outset, I face a challenge: many historians and international lawyers think there is no connection between the two. To serious scholars of empire, the two phenomena simply do not overlap. Empire, derived from the Latin "imperium," is absolute rule of the sort deployed by the Roman consul. It implies power to command; in the Roman Empire, the power to control non-Romans. Empire in the ancient sense entails rule over others.[1] An imperium rules "extensive, far-flung territories" (namely the periphery) beyond the metropole.[2] It acknowledges no overlord or rival for power vis-à-vis the imperial center.

In ancient usage, an imperium aspired to universality.[3] Its self-understanding was all-encompassing, a world unto itself. An empire was a harmonious, autonomous cosmos confronted otherwise only by chaos. Those outside its domain remained uncivilized savages to the extent they did not integrate. As this suggests, a true "empire" did not share power with others.[4]

Since those outside the imperium were considered "barbarians," to be brought under imperial rule by conquest was thought, as in the ancient

---

* Hamilton Fish Professor of Law & Diplomacy, Columbia Law School. A version of this Essay was originally presented as the Daniel J. Meador Lecture at the University of Alabama School of Law on April 15, 2008. For a related piece by the same author, see *Contemporary International Law: An "Empire of Law" or the "Law of Empire"?* (forthcoming American University International Law Review 2009). Many thanks to my colleagues Michael Doyle, Robert Ferguson, and Karl Sauvant for useful comments on a prior draft. All remaining errors are my own.

1. *See, e.g.*, CHARLES S. MAIER, AMONG EMPIRES 36 (2006).
2. STEPHEN HOWE, EMPIRE: A VERY SHORT INTRODUCTION 13–14, 30 (2002).
3. *Id.* at 13.
4. *See* Emmanuelle Jouannet, The Disappearance of the Concept of Empire in Europe in the 18th Century: Its Passage From "Concept" to "Idea" and Fantasy 21 (Mar. 13–15, 2008) (unpublished manuscript, on file with the Alabama Law Review) (permission to cite granted) ("Genghis Kahn proclaimed himself 'universal emperor.' The Egyptians believed that total disorder reigned beyond their empire. The Romans claimed to be the one and only empire. The Emperor of China demanded that everyone recognize the "sovereignty of the son of Heaven.").

world of Rome, to be an act of charity.[5] Roman imperial rule was seen (at least by Romans and their apologists) as bringing "civilization and true religion" to the ungodly.[6] Its very essence was what has come to be called the "civilizing mission."[7] Imperial conquest was divinely ordained and morally justified. It achieved control over the periphery by "just war" (and winning the conquest meant by definition that the war was "just").[8] Empire was marked by accumulating lands abroad by conquest, authoritatively ruling those lands, and making sure that those conquered accepted their subordination with respect to both their foreign and domestic affairs. Unlike confederations, commonwealths, or other associations of equals, the imperial state did not recognize the political or "sovereign" equality of the conquered.[9] It was not subject to law other than that which it proclaimed for itself and was certainly not subject to legal constraints on the ability to deploy force vis-à-vis others. Real imperial rule was by definition unequal; the imperium alone determined who ruled the subject society's political life, and the imperium was subject to no higher authority because it was the reflection of the divine.[10]

Defined in this way, the concept of empire would appear to have nothing to do with international law and seems, on the contrary, to be its very opposite. Accordingly, for scholars of empire such as Emmanuelle Jouannet, absolute empire ended with the turn to modern conceptions of statehood, which emphasizes separate sovereigns each reigning supreme over their own national territories; or more precisely, it ended with the work of one of the founders of international law, the Swiss philosopher Vattel, in the mid-1700s, and his conception of the modern state.[11] Vattel argued in favor of interstate rules that would, upon their acceptance by sovereigns, govern their relations and, to this extent, prove supreme over national rulers who would adhere to *pacta sunct servanda* (pacts must be obeyed) and the "golden rule" of sovereigns (states cannot complain when each is treated as it treats others).[12]

The very notion of international law, of reciprocally binding treaties and rules of custom formed by mutual assent in accord with ancient usage, is contrary to virtually every conception of the imperium described above. Under international law each state must yield to those rules to which it has

5. *See* HOWE, *supra* note 2, at 14.
6. *Id.*
7. *Id.* at 42; *see also* MICHAEL W. DOYLE, EMPIRES 82–103 (1986) (describing the Roman Empire).
8. *See generally* Diego Panizza, Alberico Gentili's *De Armis Romanis*: The Roman Model of Just Empire (Mar. 13–15, 2008) (unpublished manuscript, on file with the Alabama Law Review) (permission to cite granted).
9. HOWE, *supra* note 2, at 15.
10. *See, e.g.*, *id.* at 13–14.
11. Jouannet, *supra* note 4, at 5–6.
12. *See id.* at 13–14.

consented, enjoys formal sovereign equality vis-à-vis others, and does not yield to the imperial policies of any other—Pope or emperor. These fundamental characteristics of the modern international legal regimes seem incompatible with the concept of empire as understood in the ancient world.

Under this view, post-eighteenth-century claims of empire—the Napoleonic Empire or the British, French, or German colonial empires—are but pale reflections of the real thing grounded in historical misunderstanding or national claims to grandeur.[13] Those more modern "empires" are more properly described as only states with imperialist policies. For serious students of ancient empire, the colonial age is characterized by the displacement of the *jus gentium* imperial with the fundamentally different conception of interstate law. From this perspective, the misnamed "emperor" Napoleon was as much a mere head of state as Queen Victoria—despite the fact that both extended their dominion over far-flung territories. Neither was the equivalent of the Roman Emperor.

Other historians and political scientists, however, would extend the relevant shelf-life of the concept of empire by redefining the concept. My colleague at Columbia, Michael Doyle, for example, takes a broader view of the concept of empire. He defines empire as a relationship, formal or informal, in which one state (the metropole) controls the effective political sovereignty of another political society ("a periphery linked to the metropole by a transnational society based in the metropole").[14] In this view, empire can be achieved not only by forceful conquest (as by the Romans), but by political collaboration, or by economic, social, or cultural dependence—as through imperial practices exercised during the colonial age. Doyle (and others) therefore have no trouble accepting British claims that theirs was a colonial "empire."[15]

But if we insist, along with Doyle, that empire requires the effective control of both the foreign *and* domestic policies of the periphery by the metropole, there are, it would appear, precious few instances of real empire left in the world today. The current "U.S. Empire" might perhaps embrace Puerto Rico and a few islands in the Pacific (at least until the recent installation of a government-occupied Iraq), but not many other places around the globe. And, as with Jouannet's view of ancient empire, one reason for the decline of colonial empire would appear to be the concomitant rise in international law—after all, it was the decolonization movement brought about by international lawyers' turn to self-

13. *Id.* at 19.
14. DOYLE, *supra* note 7, at 81.
15. *Id.* at 104–22 (discussing the Ottoman, Spanish, and English Empires).

determination and its implementation by the UN that has helped to nearly eradicate colonial empires.[16]

What this means is that under either Jouannet's or Doyle's view, it is scarcely tenable to draw much of a connection between empire and my subject, namely today's global legal regulation of investment capital. Empire either ended with Vattel in the eighteenth century or with decolonization by the middle of the twentieth century. Either way, it seems foolish to assume, as I do here, some connection between empire and modern international law.

One way out of this dilemma would be simply to ignore the serious scholarship on empire and go for its pop-cultural equivalent. As we all know, labels like "empire," "hegemony," "colonialism" (or "post-colonialism"), "imperialism," and "neo-imperialism" have been, for quite some time, used interchangeably (and carelessly) to describe particularly the role of the one remaining superpower left—namely the United States—or of the United States and its Western allies, particularly (but not exclusively) in Europe. There is no scarcity of current books and articles arguing that, particularly when it comes to how the world is governed with respect to monetary policies, trade, and investment after the Cold War, the transatlantic alliance of capitalist democracies have won the battle. Capitalism—and particularly the forms it has taken in Europe and the United States—is now said to rule the world. It is but a short step to describe Europe and the United States as constituting a new form of imperialist or neo-colonialist empire. Thus, in his recent book, *God and Gold*, Walter Russell Mead describes the modern world in terms that sound like a description of an "Anglo-American Empire."[17] Mead describes Anglo-American predominance in world affairs resting on what he calls a unique cultural fit between those societies and the challenges demanded by rapid capitalist development; he describes a modern world in the throes of simultaneously liberating and destabililizing capitalism that infuses the religions, values, and perceptions of Anglo-Americans but generates resistance in the periphery from those seeking to preserve their own values and preferences.[18]

Of course, calling the United States (with or without its "Anglo" allies) an empire comes with heavy political baggage. Branding the United States of today an empire or an imperialist nation are fighting words, frequently deployed by the left against the right within the U.S. political spectrum. Calling the United States—which was after all created after a

16. *See, e.g.*, IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 595–98 (4th ed. 1990) (discussing the principle of self-determination).

17. WALTER RUSSELL MEAD, GOD AND GOLD: BRITAIN, AMERICA, AND THE MAKING OF THE MODERN WORLD 3–17 (2007) (describing an "Anglo-American ascendancy" to global power).

18. *See id.* at 317–18, 337–38.

revolution in order to secede from the British Empire—itself an empire seems un-American, particularly in the politically "red" states within the United States. But beyond the political risks attached to such labeling, one of my contentions here is that it is simply incorrect to describe either the origins or the continued existence of modern regimes of international economic law, such as that governing foreign investment, in terms of Anglo-American empire.

Empire, as classically understood, means conquest and annexation. Even when the United States has used force over the past two decades—whether in Vietnam, the Dominican Republic, Grenada, Panama, Libya, Afghanistan, or Iraq—it has not aspired to stay in order to exercise permanent control over the vanquished as the Romans did. The United States version of the "civilizing mission" is, unlike it was with respect to the Romans, not a fiction (even if it was and is a grievous mistake of policy). At least in recent times, and particularly since the end of the Cold War, the United States more often than not has genuinely aspired to leave the peripheries alone to determine their own political fate.[19] U.S. leaders appeared to have too much faith in the virtues of democracy to do otherwise. They have, more often then not, believed (perhaps wrongly given recent developments in China and Russia, among other places) that democratic practices will necessarily prevail in the marketplace of ideas and political governance structures. Unlike Rome, which was described by Gibbon as an absolute monarchy disguised as a commonwealth with merely the form but not the reality of a free constitution,[20] the U.S. remains under a real constitution subject to checks, balances, and periodic elections.[21] As is suggested by the controversies attached to the Bush Administration's apparent attempts to promote the conception of a "unitary executive,"[22] the U.S. government as a whole (and presumably most of its people) continue to resist the attractions of being ruled by an emperor with absolute, divinely inspired power, even given the prospect that such rule permits the kind of expeditious action some believe is needed in the age of terrorism. And our resistance to such rule for ourselves makes it difficult to credibly impose such rule on others. Nor, despite Mead, is it entirely convincing to suggest that economic globalization has much to do with "Anglo-American," Judeo-Christian beliefs (or what once was called the "Protestant work ethic");[23] as is further addressed below, modern forms of *capi-*

19. For a thoughtful examination of whether the United States can be described as an empire, see, for example, MAIER, *supra* note 1, at 24–77.

20. *See* EDWARD GIBBON, THE HISTORY OF THE DECLINE AND FALL OF THE ROMAN EMPIRE (1789).

21. *See, e.g.*, *id.* at 69.

22. *See, e.g.*, Christopher S. Yoo, Steven G. Calabresi & Anthony J. Colangelo, *The Unitary Executive in the Modern Era, 1945–2004*, 90 IOWA L. REV. 601 (2005).

23. See, most famously, MAX WEBER, THE PROTESTANT ETHIC AND THE SPIRIT OF CAPITALISM

talism should not be associated with a particular set of religious beliefs. Despite President Bush's suggestions that we are on a pro-democratic crusade in the Middle East[24] and Samuel Huntington's purported "clash of civilizations,"[25] there is not much evidence that the West is seriously engaged in a genuinely global religious crusade, whether with respect to the Middle East or elsewhere.

The continued relevance of Doyle's concept of colonial empire to the globe as a whole is also contestable. Although the United States has experimented with colonialism intermittently and arguably continues to do so with respect to Puerto Rico in particular, most of its overt imperial exercises ended long ago.[26]

At the same time, I do not wish to rely on the prevalence or use of international law as the reason to resist the continued relevance of the label "empire." I do not want to suggest that the reason the United States ought not to be seen today as an empire rests on its compliance with international law, although both apologists for U.S. power and its detractors sometimes do so. U.S. government officials commonly justify their actions abroad on the premise that their actions adhere to the norms under which all states have agreed to be governed and, at least since WWII, turn to international organizations, consistent with the rules imposed by the UN and other organizations such as the IMF, the WTO, and the World Bank. U.S. government officials sometimes deny accusations of empire in ways that are broadly consistent with the thesis that authentic decolonization and the rule of international law, prompted in the wake of the rise of pluralist institutions such as the UN, make the concept of empire irrelevant or at least less relevant today.[27]

Thus, the United States argues today that its political or economic policies are fully consistent with legal rules established by treaty among sovereign equals, including the 1949 Geneva Conventions or treaties such as NAFTA. For all the talk of U.S. unilateralism and accusations that the United States, particularly during the Bush Administration after 9/11, has acted like a lawless or "rogue" nation, the principal rhetoric of our leaders has been to resist such charges. Even Bush Administration officials were at pains to argue, whether credibly or not, that U.S. foreign policy—whether with respect to counterterrorism, the control of weapons of mass

---

(Talcott Parsons trans., George Allen & Unwin Ltd. 1930) (1905).

24. *See, e.g.*, President George W. Bush, President Bush Discusses Importance of Democracy in Middle East (Feb. 4, 2004), *available at* http://merln.ndu.edu/MERLN/PFIraq/archive/wh/20040204-4.pdf.

25. *See* SAMUEL P. HUNTINGTON, THE CLASH OF CIVILIZATIONS AND THE REMAKING OF WORLD ORDER (1996).

26. *Cf.* MAIER, *supra* note 1, at 24–77 (suggesting that where Rome and Britain conquered, the United States has emancipated (or tried to)).

27. *See generally* John B. Bellinger, III, *Reflections on Transatlantic Approaches to International Law*, 17 DUKE J. COMP. & INT'L L. 513 (2007).

destruction, the invasion of Iraq or Afghanistan, the occupation of Iraq, or the treatment of trade and investment—remains consistent with relevant treaty obligations, including binding decisions by the UN Security Council and the policies undertaken by other multilateral bodies such as the international financial institutions.[28] These officials argue that U.S. economic decisions impacting on others—whether with respect to aid, central bank policies, internal tariffs imposed on foreign goods, or national laws that impact foreign investors—adhere to international law, including rules established under bilateral investment treaties, World Bank and IMF policies, rules reached within the Basel Committee of Central Bankers, or the WTO Appellate Body.[29]

Of course, detractors of U.S. "hyperpower," particularly in Europe, also turn to international law for legitimation. They just disagree with many of the interpretations of the relevant agreements articulated by U.S. government officials. They often argue that the United States has breached its international law obligations—as by violating the UN Charter in invading Iraq, violating the Geneva Conventions or human rights instruments in its on-going war on terror, or by dragging its feet in complying with decisions issued by dispute settlers under NAFTA or the WTO.[30] Alternatively, they contend that the United States is violating an emerging duty to cooperate multilaterally prior to taking unilateral action by resorting to the extraterritorial use of U.S. law in a multitude of areas rather than attempting to negotiate or adhere to multilateral treaties.[31] The central point is that on both sides of the Atlantic, there appears to be widespread agreement that the risk of either imperial or hegemonic rule emerges when the wielder of power withdraws from international legal regimes.[32] This underlies criticism of the United States for staying aloof from treaties such as the ABM, Comprehensive Nuclear-Test-Ban, Biological and Toxin Weapons Convention, the Kyoto Protocol, the Statute of the ICC, the Convention on the Law of the Sea, the Convention on Biological Diversity, the Mine Ban Convention, and numerous human rights treaties such as CEDAW, Convention on the Rights of the Child, International Covenant on Economic,

28. *See, e.g., id.*; William H. Taft IV & Todd F. Buchwald, *Preemption, Iraq, and International Law*, 97 AM. J. INT'L L. 557 (2003) (presenting the legal justifications of two U.S. government lawyers for Operation Iraqi Freedom).

29. *See generally* ANDREAS F. LOWENFELD, INTERNATIONAL ECONOMIC LAW (2002).

30. *See, e.g.*, José E. Alvarez, *The Closing of the American Mind*, *in* CANADIAN COUNCIL OF INTERNATIONAL LAW, RECONCILING LAW, JUSTICE AND POLITICS IN THE INTERNATIONAL ARENA: PROCEEDINGS OF THE 32ND ANNUAL CONFERENCE 74 (2004); Bellinger, *supra* note 27.

31. *See, e.g.*, Pierre-Marie Dupuy, *The Place and Role of Unilateralism in Contemporary International Law*, 11 EUR. J. INT'L L. 19, 22 (2000) (describing the general scope of the duty to cooperate); Bruno Simma, *From Bilateralism to Community Interest in International Law*, 250 RECUEIL DES COURS 217 (1994).

32. For criticism of this "idealization" of the contrast between hegemony/politics and international law, see Nico Krisch, *International Law in Times of Hegemony: Unequal Power and the Shaping of the International Legal Order*, 16 EUR. J. INT'L L. 369 (2005).

Social, and Cultural Rights, and Protocol One to the International Covenant on Civil and Political Rights.[33] Tensions have also arisen to the extent that U.S. courts appear to resist giving effect to international legal obligations, as the U.S. Supreme Court has repeatedly refused to do with respect to orders rendered by the International Court of Justice (ICJ) when interpreting the Vienna Convention on Consular Relations.[34]

Adherence to international law is regarded by the United States—and many others—as a powerful counterargument to colonialist critiques. To many international lawyers, although the history of international law is replete with many instances in which that law served as the instrument of empire—and particularly of colonial empire—that age has passed. Many assume that today's international legal rules and its institutions are far more enlightened than when Francisco de Victoria served as legal apologist for the Spanish conquest of the New World.[35] There is considerable merit to such a view. It is true, after all, that today's international lawyers no longer distinguish the rules applicable to the "civilized" versus "uncivilized" worlds in order to use the former to dispossess the latter. In educated circles today, no one would dream of emphasizing that only general principles of law "recognized by civilized nations" ought to be used by the ICJ in deciding disputes, even though that embarrassing qualifying phrase appears in the ICJ's Statute.[36] Those once seen as uncivilized are today full members of the polity that makes and enforces international law. All states, large or small, enjoy sovereign equality under the UN Charter. In the United Nations, along with its specialized agencies, all states aspire to, and have largely achieved, universal participation.[37] Today—when the majority of multilateral treaties are negotiated in forums such as the UN, where all states have the right to participate, and where other international rules emerge from relatively transparent bilateral negotiations frequently involving the representative legislatures of fellow democracies—international law is most often seen as a counter-hegemonic tool among sovereign equals.[38] Moreover, the fact that, at least with respect to international economic law, all states (including the United States) are subject to

33. *See, e.g.*, Alvarez, *supra* note 30, at 80; UNILATERALISM AND U.S. FOREIGN POLICY: INTERNATIONAL PERSPECTIVES 1–41, 421–29 (David M. Malone & Yuen Foong Khong eds., 2003).

34. *See, e.g.*, Medellin v. Texas, 128 S. Ct. 1346 (2008); Sanchez-Llamas v. Oregon, 548 U.S. 321 (2006); Medellin v. Drake, 544 U.S. 660, 664–67 (2005) (refusing to address Vienna Convention problems on habeas petition when opportunity existed to enforce the obligation in state court).

35. For a definitive account of how the colonial encounter has shaped contemporary international law, see ANTONY ANGHIE, IMPERIALISM, SOVEREIGNTY AND THE MAKING OF INTERNATIONAL LAW (2005).

36. Statute of the International Court of Justice art. 38(1)(c), June 26, 1945, 59 Stat. 1031.

37. For consideration of whether the turn to modern international organizations has "democratized" international law-making, see JOSÉ E. ALVAREZ, INTERNATIONAL ORGANIZATIONS AS LAW-MAKERS 630–40 (2005).

38. *See* Alvarez, *supra* note 30; Krisch, *supra* note 32, at 377–78.

relatively hard forms of enforcement of their international obligations through binding dispute settlement by neutral arbitrators beholden to no state, empire or not (as under the global trade and investment legal regimes), makes this part of international law appear immune from imperial critiques.

But things are not so simple. This relatively rosy view of international law suggested by both apologists for the United States and many of its detractors relies on a misleading simple binary: law versus empire. As a number of critical international law scholars have argued, international law's role as aider and abettor to forms of empire did not end with decolonization and the turn to modern IOs.[39] At the same time, my point here is different from many of those critical scholars who contend that international law and its institutions continue to be instruments of national or imperial power, or that to some extent international lawyers continue to use their law to dispossess those who reside in the Global South. There is considerable merit in the work of post-colonial theorists such as Antony Anghie, Makau Matua, B. S. Chimni, and James Gathii—all of whom argue that the colonial legacy of international law lives on in the weighted voting schemes that defer to power at the UN Security Council, the World Bank, or the IMF.[40] Indeed, my own scholarship has suggested that the most prominent decisions of the UN Security Council since 9/11—types of global legislation that attempt to deal with the anticipatory use of force, WMDs, measures against alleged terrorists, and the occupation of Iraq—are forms of "hegemonic international law."[41] There is much to be said for seeing the rules produced and enforced by contemporary multilateral institutions, or my principal subject here—under investment treaties—as the instrumentation of rule by the powerful, including by the United States. Indeed, a number of scholars make a compelling case that institutions now charged with making international economic law—from NAFTA to the WTO—principally reward winners in the North and West at the expense of losers in the periphery (and the least powerful within the metropole itself).[42]

---

39. *See, e.g.*, ANGHIE, *supra* note 35, at 196–244; B. S. Chimni, *An Outline of a Marxist Course on Public International Law*, 17 LEIDEN J. INT'L. L. 1, 5–11 (2004); Susan Marks, *Empire's Law*, 10 IND. J. GLOBAL LEGAL STUD. 449 (2003).

40. *See* ANGHIE, *supra* note 35, at 235–44; Chimni, *supra* note 39, at 7–11; *see also* James Thuo Gathii, *Imperialism, Colonialism, and International Law*, 54 BUFF. L. REV. 1013 (2007); Makau Mutua, *Savages, Victims, and Saviors: The Metaphor of Human Rights*, 42 HARV. INT'L L.J. 201, 214–15 (2001). For a critique of international law's cultural biases that is less Eurocentric, see Onuma Yasuaki, *Eurocentrism in the History of International Law*, *in* A NORMATIVE APPROACH TO WAR: PEACE, WAR, AND JUSTICE IN HUGO GROTIUS 371, 371–86 (Onuma Yasuaki ed., 1993).

41. *See* José E. Alvarez, *Hegemonic International Law Revisited*, 97 AM. J. INT'L L. 873 (2003).

42. *See, e.g.*, RICHARD PEET, UNHOLY TRINITY: THE IMF, WORLD BANK AND WTO (2003); JOSEPH E. STIGLITZ, GLOBALIZATION AND ITS DISCONTENTS (2003).

But it is not news that international law is not merely a utopian constraint on the powerful but remains what it has always been: a tool of apology for state power. That has been clear in practice since the days when the father of international law, Hugo Grotius, sought the freedom of the seas on behalf of his client, the East India Company. And it has been clear in academic scholarship at least since Martti Koskenniemi reduced all of international law to structural arguments extending *From Apology to Utopia*.[43]

Rather than focusing, as others have done, on how modern international economic regimes replicate hegemony or the colonial encounter, I want to suggest that if we were inclined to describe the present moment as evincing elements of empire, our illustrative models should not be limited to the colonial period and that we should not ignore those ancient regimes which gave rise to the term "empire." Contemporary legal regimes, such as those governing foreign investment, share elements with some of those ancient empires.

Consider the Athenian Empire. Although as a non-historian I venture into classical history with trepidation, I need to sketch briefly the growth of Athenian power which began roughly in 478 B.C. and collapsed in 405 B.C. As Doyle, relying on Thucydides's *History of the Peloponnesian War*, tells us, the Athenian Empire emerged from an alliance among Hellenic states against Persia.[44] In 454 B.C., Athens reorganized the alliance and established a joint treasury at Delos which collected contributions from its allies.[45] Under Athenian leadership, the independent states sent representatives to a temple at Delos where decisions were made in a general congress. The Delian League came to include captured cities (whose populations were enslaved and whose land was colonized) and members who had once rebelled and were compelled back into the League and forced to give tribute. As Doyle describes it:

> The Delian League thus became an empire in which Athens exercised imperial control, largely by informal means. The allies, including those Thucydides calls the "allies of the tribute-paying class", each had a legally independent, formally sovereign government, generally a democratic assembly. Athens nonetheless determined both their foreign relations and their significant domestic policies.[46]

---

43. MARTTI KOSKENNIEMI, FROM APOLOGY TO UTOPIA: THE STRUCTURE OF INTERNATIONAL LEGAL ARGUMENT (Cambridge Press 2006) (1989).

44. DOYLE, *supra* note 7, at 55. Much of Doyle's account is drawn from THUCYDIDES, HISTORY OF THE PELOPONNESIAN WAR (Rex Warner trans., 1954).

45. DOYLE, *supra* note 7, at 55.

46. *Id.* at 56 (citation omitted).

Doyle's use of the term "informal" should not mislead, however. As he acknowledges, the Athenian Empire was sustained by two principal means: military intervention as well as the voluntary acquiescence of the populations and elites of the periphery who sometimes feared, hated, or revered Athens, but who were generally aware that integration into the League conferred concrete economic benefits, including access to the Athenian market, Athens's protection from piracy, and other imperially provided "collective goods."[47] Unlike Sparta's hegemonic alliance, the Peloponnesian League (which only controlled the foreign relations of its allies), Athens was more ambitious. It collected tribute, imposed the jurisdiction of its courts, regulated the commerce of its subject allies, and sought to impose a "democratic" form of government over indigenous traditions of government.[48] The last proved to be the League's Achilles' heel since these required more active control and ultimately proved less stable.[49]

As Doyle tells the story, the brief Athenian Empire was motivated by Athenian concerns for its security (e.g., fear of Persia, avoidance of Spartan hegemony), material self interest (including the need to sustain a commercial society dependent on open sea lanes, open trade, access to raw materials, reliable food supplies, and captured slaves to form a labor force for Athenian mines and estates), and self-confidence in spreading the Athenian way of life.[50] While it is true that the Delian League was sustained by periodic military interventions and, as Thucydides' account makes clear, that Athenian ascendency was dependent on a ruthless military policy backed up by a strong navy,[51] for my purposes here the nonmilitary (or more commercial reasons) underlying Athenian rule are especially instructive.

As suggested by Pericles' "Funeral Oration," Athens was to be a model for others as its democracy reflected the energy and creativity of its people.[52] Thucydides also identified as a source of Athens's power the "adventurous spirit" encouraged by Athenian democratic institutions, including its constitution, which recognized Athenians as equal and free, opened political leadership beyond a particular class, and encouraged the citizens to identify with the laws that they helped make to govern themselves.[53] As Doyle puts it:

---

47. *Id.* at 56–57.
48. *Id.* at 59.
49. *See id.* at 74.
50. *Id.* at 60–62.
51. *See, e.g.*, THUCYDIDES, *supra* note 44, at 212, 400.
52. DOYLE, *supra* note 7, at 62.
53. *Id.* at 65–66.

> Highly participatory democracy, in which each citizen is both statesman and soldier, produces an ideology of action, a ferment of policies, an attitude of aggressive problem solving—the spirit of adventure that Thucydides described as being behind Athenian expansion. Since there is no mediation between the state and the citizen, the state being the people assembled, what each citizen proposes or votes for in the assembly is both for himself and for the public. Private passions both inspire and are shaped by public honor. This is the source of the honor behind Athenian imperialism: a joint undertaking of the people of Athens, their empire is "of the people, by the people."[54]

Doyle also points out that the Athenian Empire was built on its democratic armed forces because its democratic navy was "inherently superior to a nondemocratic navy since the latter is likely to employ slave rowers who in the heat of battle cannot be called upon to fight."[55]

The Delian League was sustained, at least in part, by its private entrepreneurs. Doyle writes that the nonslave labor force of Athens, freed of the restraints of overlords, was thrown into the commercial economy of small-scale manufacture and exchange, and benefited from "an international division of labor in which Athens exchanges advanced agricultural commodities (olive oil and wine), skill-intensive manufactured goods (pottery), and certain metals (silver from the slave-worked mines) for raw materials."[56] He argues that foreign commerce (what today we would call international trade) contributed to Athenian power by: (1) adding to its treasury through the taxation of trade in goods; (2) accumulating money and goods that could be used to exercise influence and control (as through bribing foreign officials, supplying armies, and purchase goods not produced at home but needed to supply fleets and armies abroad); (3) encouraging others to want to associate with the Athenian league since they would otherwise be excluded from trading in the League's markets; and (4) creating stakes overseas that had to be defended.[57] As Doyle suggests, to a considerable extent the Athenian "flag followed its trade" as much as trade followed its flag.[58] "[T]rade," Doyle writes, "provided a special incentive, a large and 'defensive' argument for maintaining and expanding imperial rule."[59] Doyle concludes that the Athenian Empire relied, for a time, on a virtuous circle: "Slave agriculture, imperial tribute, and imperial mines produced monetary supremacy, which in turn produced

54. *Id.* at 66.
55. *Id.* at 67.
56. *Id.*
57. *Id.* at 71.
58. *Id.* (internal quotation marks omitted).
59. *Id.* at 72.

commercial superiority, which in turn, through its stimulation of shipping, produced naval superiority, which in its turn sustained the empire."[60]

It is not hard to draw comparisons between the Athenian League and today's United States—or what Mead might call the "Anglo-American Empire." The Athenian example suggests that empire can be built by an adventurous and proud democratic society intent on spreading its democratic way of life to others, especially when that proud society is backed by the threat of effective military (or in the case of Athens, naval) force. The Delian League suggests that empire can be grounded on conceptions of the market, private property, liberalized free trade among what we would today call nation-states, and that it can spread through an effort to propound rules of law applied extraterritorially. It suggests that an empire built on trade can still have an impact on the periphery's foreign *and* domestic affairs.

It is certainly possible to see parallels between today's United States, the Athenian metropole, and modern international economic regimes. At the same time, as my description of the foreign investment legal regime will suggest, it is not entirely right to describe that regime as a product of the United States, of Anglo-Americans, or as a conduit for imposing those nations' views on others. A description of that regime as the product of rules imposed by one nation or group of nations on another would be descriptively inaccurate. More importantly, such an account would miss a principal source of that regime's legitimacy and power.

Ancient empires such as Athens's suggest that the concept of empire can be based on universal rules of law. Ancient pre-colonial empires suggest that there can be such a thing as an empire of legal rules that is distinguishable from, or at least not identical to, rule *by national or territorial empire*.[61] At the same time, the modern international investment regime may be something different from territorially based empires, ancient or colonial, insofar as its domain and continued efficacy is no longer grounded in an extension of rule by one national territory onto another.

Defenders of the United States are right to say that it is unduly simplistic and misleading to compare the *global power* of the United States with how the British or French extended their territorial reach over their colonies. Whether or not the United States can be said to continue to have

60. *Id.* at 63.

61. *See* Note, *Aspiration and Control: International Legal Rhetoric and the Essentialization of Culture*, 106 HARV. L. REV. 723, 738 (1993) ("[T]he idea of international law as an ordering mechanism that draws its categories from an essential culture and yet stands apart from its cultural context continues to command considerable rhetorical power."); *see also* Emmanuelle Jouannet, *Universalism and Imperialism: The True-False Paradox of International Law?*, 18 EUR. J. INT'L L. 379 (2007) (arguing that while international law is the reflection of a particular (Western) culture, it attempts to universalize the values that it conveys). Of course, many would contend that the United States itself, quite apart from its reliance on international law, has a tendency to universalize its own values as a nation, such as its particularized notions of what constitutes a legitimate democracy.

imperial ambitions (as with respect to alleged aspirations to control the production of oil within Iraq or to continue to enjoy privileged access to military bases in that country), its defenders are also right to distinguish U.S. actions today—including its war on terror, along with the international law that is influenced by its actions—from Roman forms of all-out conquest or imperial rule. At the same time, global economic law, which the United States has had a prominent role in constructing, resembles the characteristics of some ancient empires.

Consider the global investment regime. Although the WTO regime governing sale of goods has gotten the bulk of scholarly attention, over the past twenty years the amount of trade in goods associated with the vast flows of foreign direct investment (FDI)—capital intended to be invested either in new companies (Greenfield investment) or in mergers and acquisitions—has vastly exceeded the transnational sale of goods (exports and imports) not connected to FDI. Today's investment flows, unprecedented in world history, are the principal engine of globalization. FDI is the main tool of globalized or integrated production systems, is central to the world economy, and is regarded by mainstream economists as indispensable to most countries' prospects for development. Foreign investors around the world sold some $19 trillion of goods in 2005, as compared to $11 trillion in world exports that year.[62] Current direct investment flows exceed $1.5 trillion, and the United States remains (at least through 2007) the world's leading exporter of capital flows but also the world's leading *recipient* of foreign investment capital.[63] Among developing countries, China remains by far the leading recipient, and while the United States and Europe remain the leading exporters of direct investment capital, leading less developed countries (LDCs), such as the so-called BRICs (Brazil, Russia, India and China), are now joining them as major capital exporters.[64] Indeed, about one-tenth of the stock of foreign direct investment capital, or about $1.8 trillion, accounting for some 17% of global trade, is attributed to multinational corporations (MNCs) from emerging markets.[65] While the bulk (some 80%) of direct capital still moves from the developed West to the rest of the world, it is no longer accurate to suggest that global investment flows are invariably uni-directional—not when both China and the United States are the leading hosts of foreign capital as well as the home

62. Karl P. Sauvant, *A Backlash Against Foreign Direct Investment?*, *in* WORLD INVESTMENT PROSPECTS TO 2010: BOOM OR BACKLASH? 71, 71 (2006), *available at* http://vcc.columbia.edu/pubs/documents/WIP_to_2010_SPECIAL_EDITION.pdf.

63. Lisa E. Sachs & Karl P. Sauvant, *BITs, DTTs, and FDI Flows: An Overview*, *in* THE EFFECT OF TREATIES ON FOREIGN DIRECT INVESTMENT: BILATERAL INVESTMENT TREATIES, DOUBLE TAXATION TREATIES, AND INVESTMENT FLOWS, at xxvii, xxviii–xxxi (Karl P. Sauvant & Lisa E. Sachs eds., 2009).

64. *Id.* at xxxii.

65. *Id.*

to many capital exporters. Further, as is suggested by the controversy surrounding the Dubai Ports deal in the United States, foreign takeovers of national companies, including former public utilities, remain a flash point of debate over the power of sovereigns to influence employment, patrol national security, preserve local jobs, prevent outsourcing, encourage technological innovation, or protect intellectual property or national security, not only among developing countries but in Anglo-American capitals such as the United States.[66]

The world's investment flows have been encouraged by an intricate web of national and international laws. Virtually all countries on the planet, including communist holdovers such as Cuba, have liberalized their internal law in an effort to attract more FDI, typically by opening more sectors to foreigners, privatizing formerly state-owned industries, reducing obstacles for the operation of foreign affiliates, providing investment incentives, and making guarantees (such as protecting against expropriation).[67] According to the United Nations Conference on Trade and Development (UNCTAD), of over 2,000 changes in national FDI laws from 1991 through 2004, 93% were in the direction of making the investment climate more welcoming to FDI.[68] At the global level, while the WTO contains a number of investment-related protections (under the GATS and in the Agreement on Trade Related Investment Matters (TRIMs)), the vast bulk of regulation has occurred through over 2,500 bilateral investment protection treaties (BITs) and another nearly 300 regional free trade agreements with investment guarantees (such as NAFTA).[69] While these treaties are not identical, they generally contain assurances that once admitted, foreign investors will: (1) receive the better of the treatment the host state gives to any other foreign investor (most favored nation, or MFN, treatment) or the treatment it accords its own investors (national treatment); (2) receive "fair and equitable treatment" and "full protection and security" in accordance with international law; (3) be able to transfer profits and other capital out of the country without unreasonable currency

66. For an example of the political controversy generated by the (since aborted) Dubai Ports deal, see Press Release, U.S. Senator Carl Levin, Opening Remarks at Senate Armed Services Committee Briefing on Port Security (Feb. 23, 2006), *available at* http://levin.senate.gov/newsroom/release.cfm?id=251838. For a survey of general concerns raised by the flows of foreign investment both within the United States and elsewhere, see generally, EDWARD M. GRAHAM & PAUL R. KRUGMAN, FOREIGN DIRECT INVESTMENT IN THE UNITED STATES (3d ed. 1995).

67. *See, e.g.*, Mireya Navarro, *Cuba Passes Law to Attract Greater Foreign Investment*, N.Y. TIMES, Sept. 7, 1995, at A12.

68. *See* Sauvant, *supra* note 62, at 72; *see also* UNCTAD, WORLD INVESTMENT REPORT 2005: TRANSNATIONAL CORPORATIONS AND THE INTERNATIONALIZATION OF R&D 26 (2005).

69. Sachs & Sauvant, *supra* note 63, at xxxiv, xliii; *see also* James Zhan, Joachim Karl & Jörg Weber, *International Investment Rulemaking at the Beginning of the 21st Century: Stocktaking and Options for the Way Forward*, *in* THE EVOLVING INTERNATIONAL INVESTMENT REGIME (José E. Alvarez et al. eds., forthcoming 2009).

restrictions; and (4) receive prompt, adequate, and effective compensation if expropriated directly or indirectly.[70] Additionally, some investment agreements, such as most of those concluded by the United States, provide international assurances that investors' contracts with the host state will also be respected (under a so-called "umbrella clause").[71]

Most importantly, virtually all investment agreements provide that foreign investors from either party will be able to forego local courts and have direct access to international binding arbitration to resolve any and all disputes under the treaty between them and the host state.[72] Significantly, investor-state disputes, which typically are heard under rules established by the World Bank's International Centre for Settlement of Investment Disputes (ICSID), do not involve the investors' home nation. What this means is that, unlike the case with the WTO, which relies on governments to file claims against one another, the investment regime is enforced by the roughly 80,000 multilateral enterprises that are believed to engage in FDI, along with their "more than 800,000 foreign affiliates" around the world.[73] These firms, not their home states, are the regime's private attorneys general and are in the driver's seat when it comes to determining the issues that will be raised in the course of investor-state disputes.[74] Accordingly, in this regime private, non-state parties play a crucial role in enforcing the relevant international legal guarantees and in determining their interpretation and development. The private attorneys general, after all, write the claimants' briefs and choose at least one of the arbitrators hearing their complaints.[75] Defendant states being sued are put in the defensive

70. *See* R. DOAK BISHOP, JAMES CRAWFORD & W. MICHAEL REISMAN, FOREIGN INVESTMENT DISPUTES: CASES, MATERIALS AND COMMENTARY 10–11 (2005). The text of the Model BIT, as well as the history of the U.S. BIT program, is contained in KENNETH J. VANDEVELDE, UNITED STATES INVESTMENT TREATIES: POLICY AND PRACTICE app. A–3 (1992) (reproducing the 1984 Model BIT in full) [hereinafter 1984 U.S. Model BIT]. For the full text of the U.S.–Uruguay BIT, see http://www.state.gov/documents/organization/56650.pdf [hereinafter U.S.–Uruguay BIT]. For the full text of the latest model BIT, see 2004 U.S. Model BIT, *available at* http://www.ustr.gov/assets/Trade_Sectors/Investment/Model_BIT/asset_upload_file847_6897.pdf.

71. *See* 1984 U.S. Model BIT, *supra* note 70, art. II(2) (providing that "[e]ach Party shall observe any obligation it may have entered into with regard to investments").

72. *See, e.g.*, 1984 U.S. Model BIT, *supra* note 70, art. VII.

73. *See* Sachs & Sauvant, *supra* note 63, at xxix (relying on numbers produced by UNCTAD in 2007).

74. For criticism of the foreign investment dispute settlement system precisely because of this fact, along with its reliance on party-appointed, non-permanent arbitrators, see GUS VAN HARTEN, INVESTMENT TREATY ARBITRATION AND PUBLIC LAW, at vii (2007) (outlining this critique as the central claim of his book).

75. *See* International Centre for Settlement of Investment Disputes [ICSID], *ICSID Convention, Regulations and Rules*, at 99–117, ICSID/15 (Apr. 10, 2006), *available at* http://icsid.worldbank.org/ICSID/ICSID/RulesMain.jsp; ICSID, *ICSID Additional Facility Rules*, at 43–63, ICSID/11 (Apr. 10, 2006), *available at* http://icsid.worldbank.org/ICSID/ICSID/AdditionalFacilityRules.jsp; *see also* Susan D. Franck, *The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law Through Inconsistent Decisions*, 73 FORDHAM L. REV. 1521, 1540–45 (2005) (providing a brief summary of ICSID arbitration procedure).

posture of trying to defend their behavior; their reactive interpretive posture may, of course, influence the subsequent interpretation of the law, but states cannot simply declare certain topics to be off limits or not subject to arbitral interpretation. For these reasons, the emerging (and ever more abundant) arbitral investment case law is at least as much the creation of corporate investors as it is of the states that enter into BITs. Today, the numbers of investment disputes vastly exceed those brought to the WTO's interstate dispute settlement system.[76] At the end of 2007, there were some 290 known international investor-state dispute settlement claims pending, involving more than 70 countries, 44 of them in the developing world.[77] The bourgeoning judgments produced in the course of these disputes, many of which are readily available on the Internet, are producing a rich international investment jurisprudence.

Some might be tempted to draw comparisons between modern investment agreements and the nineteenth century capitulation agreements that Western powers once extracted from the colonial periphery.[78] Under those agreements, Western states gained extraterritorial jurisdiction in the territories of their non-Western colonies by exempting Western nationals (including Western merchants and investors) from local law. Capitulation agreements imposed the "standard of civilization" on the "uncivilized" by granting jurisdiction over Western nationals and their property in consular officials of the Western state in lieu of local courts.[79] Western colonial nations justified these imposed compacts on the basis that the host state was not sufficiently civilized, and Western nations could not allow their nationals to be subject to procedures or laws that fell below the standard of civilized nations.[80] Like the old capitulation agreements, present day BITs also grant foreign investors the benefit of an international minimum standard of treatment and enable investors, at their discretion, to exempt themselves from going to local court to resolve disputes between them-

---

76. *See* Sachs & Sauvant, *supra* note 63, at xxxviii–xxxix. This disparity is hardly a surprise given the fact that the WTO dispute settlement system has jurisdiction only over complaints brought by the member states of that organization. Whereas the thousands of private traders of goods who might have a legitimate complaint based on a violation of the WTO's covered agreements cannot bring a complaint at the international level, the same is not true of the thousands of entrepreneurs who can bring complaints based on violations of an investment agreement.

77. *Id.*

78. *See, e.g.*, David P. Fidler, *A Kinder, Gentler System of Capitulations? International Law, Structural Adjustment Policies, and the Standard of Liberal, Globalized Civilization*, 35 TEX. INT'L L. J. 387 (2000) [hereinafter Fidler, *Kinder System*] (emphasizing the comparison between modern investment regimes and capitulation agreements); David P. Fidler, *The Return of the Standard of Civilization*, 2 CHI. J. INT'L L. 137, 142–44 (2001) [hereinafter Fidler, *Standard of Civilization*] (describing nineteenth century capitulation agreements).

79. *See* Fidler, *Kinder System*, *supra* note 78, at 392; *see also* W. ROSS JOHNSTON, SOVEREIGNTY AND PROTECTION: A STUDY OF BRITISH JURISDICTIONAL IMPERIALISM IN THE LATE NINETEENTH CENTURY 32–53 (1973) (describing the rationale behind and history of these types of agreements).

80. Fidler, *Kinder System*, *supra* note 78, at 392–93.

selves and their host states. But under modern investment agreements, international arbitrators take the place of consular officials.

There is also a historical reason to draw analogies between capitulation agreements and BITs. Like capitulation agreements, BITs were the brainchild of Western capital exporters such as Germany.[81] The modern network of BITs began with Western nations negotiating such agreements with lesser developing countries in order to best protect Western investments in developing nations. There was a time when the flow of capital was distinctly in one direction and investor protections benefited only the metropole or Western capital exporters. But today, with 27% of the number of BITs between developing countries themselves and a considerable portion of capital flows *going to* the West as well as *coming from* the East,[82] investment agreements cannot be explained simply as one-sided capitulation agreements. Certainly, south-to-south bilateral agreements between lesser developing countries cannot be dismissed in this fashion. It is also difficult to see some of the leading signatories of BITs worldwide (countries such as China, Egypt, or Cuba)[83] in Mead's terms—as products of *Anglo-American* empire.

Today's global regime on foreign investment is not simply a product of treaties imposed through *bilateral* assertions of power by rich states on poorer ones. The foreign investment regime is both multilateral and bilateral. Multilateral financial institutions such as the IMF and the World Bank—purported agents of the international community—propound notions of "good governance" that are intrinsic to the global investment regime.[84] The IMF's structural adjustment conditions imposed on its loan recipients (such as Argentina) often include a multitude of conditions that complement the investor guarantees contained in investment agreements.[85] The IMF has frequently demanded investor-friendly changes to national laws, including the privatization of formerly state-run industries, along with assurances that foreigners will be free to bid on a competitive basis. The

81. *See, e.g.*, VANDEVELDE, *supra* note 70, at 19.

82. Sachs & Sauvant, *supra* note 63, at xxxv fig.7 (relying on numbers produced by UNCTAD in 2007).

83. *See id.* at xxxv fig.8 (table of ten countries with highest number of BITs). Although neither the United States nor Cuba are among the top ten BIT signatories identified on that table, Cuba (which has concluded 60 BITs as of 2008) has concluded nearly as many BITs as have Belgium and Luxembourg (with 84). *See* United Nations Conference on Trade and Development [UNCTAD], *Total Number of Bilateral Investment Treaties Concluded 1 June 2008 (Cuba)*, http://www.unctad.org/sections/dite_pcbb/docs/bits_cuba.pdf. Apart from free trade agreements with investment chapters such as NAFTA, the United States has entered into 41. *See* Trade Compliance Center, http://tcc.export.gov/Trade_Agreements/Bilateral_Investment_Treaties/index.asp (last visited Mar. 26, 2009) (listing BITs to which the U.S. is a party as of the end of 2008).

84. *See, e.g.*, INTERNATIONAL MONETARY FUND, GOOD GOVERNANCE: THE IMF'S ROLE (1997), *available at* http://www.imf.org/external/pubs/ft/exrp/govern/govern.pdf.

85. *See* Daniel Kalderimis, *IMF Conditionality as Investment Regulation: A Theoretical Analysis*, 13 SOC. & LEGAL STUD. 103, 110–11 (2004).

IMF's demands have been accurately described as part and parcel of foreign investment regulation even though its actions take a different form than that of reciprocity-based investment agreements.[86] For its part, the World Bank's International Finance Corporation (IFC) encourages developing countries to make investor- and market-friendly changes to their laws that can also be seen as part and parcel of the global foreign investment regime. The IFC's notions of good governance are intended to smooth the functioning of a nation's laws to enable the market to function more efficiently; this includes measures intended to simplify bankruptcy proceedings, better protect intellectual and other forms of property, speedily establish companies or enforce contracts, and enable access to arbitration.[87] And what these institutions demand or recommend is in turn enforced by other global demandeurs, including non-state market actors who, for example, determine the creditworthiness of nations or issue political risk insurance.[88] These non-state actors are also de facto regulators of global investment flows, and their actions also complement the guarantees given to foreigners under investment agreements.

The foreign investment regime, consisting of the diverse actions of states (through investment agreements), international arbitrators deciding investor-state disputes, international organizations such as the IMF, or private market actors, is, on the whole, considerably more efficacious than rival regimes in international law. Unlike UN human rights regimes, subject only to non-binding views of experts at the international level, or even the WTO regime, which in the end relies only on relatively rare adjudicative decisions authorizing one state to engage in trade retaliation to induce another's future compliance, investment agreements ensure that private investors have a directly enforceable financial remedy for past injury.[89] As Argentina (which currently faces over forty investor-state claims against it) has learned, these damage awards can be quite costly.[90] Indeed, Argentina has now lost four cases brought by public utilities owned by U.S. investors under a single investment agreement, the U.S.–Argentina BIT.[91]

---

86. *See id.* at 104, 108–11.

87. *See, e.g.*, WORLD BANK, DOING BUSINESS 2008 (2008), *available at* http://www.doingbusiness.org/documents/DB-2008-overview.pdf. The *Doing Business* website offers a host of other useful reports. *See* DOING BUSINESS, http://www.doingbusiness.org/ (last visited Mar. 26, 2009).

88. Some of these are identified regularly by the World Bank's Multilateral Investment Guarantee Agency (MIGA). *See, e.g.*, Political Risk Insurance Center, http://www.pri-center.com/ (last visited Mar. 26, 2009).

89. *See* Gus Van Harten & Martin Loughlin, *Investment Treaty Arbitration as a Species of Global Administrative Law*, 17 EUR. J. INT'L L. 121, at 131–37 (2006).

90. For an account of a subset of these disputes, involving U.S. investors in Argentina's gas sector, see José E. Alvarez & Kathryn Khamsi, *The Argentine Crisis and Foreign Investors: A Glimpse into the Heart of the Investment Regime*, *in* YEARBOOK ON INTERNATIONAL INVESTMENT LAW & POLICY (2008–2009), at 379, 379 (Karl P. Sauvant ed., 2009).

91. *Id.* at 380.

While Argentina at this writing continues to resist paying out the sums due, it is not clear how much longer it will be able to hold off.[92] In three of these cases, the investor's damage award has in each case exceeded $100 million.[93] And the prospect of directly enforceable monetary penalties, itself extremely rare in international law, is not the only enforcement tool used by this regime. States that treat foreign investors poorly do so at their peril, whether or not the injured investor goes to the trouble of resorting to international arbitration. States face other powerful economic disincentives to abide by the investment regime, as their access to foreign capital is likely to be gravely affected if they deviate from the regulatory path laid down by the foreign investment regime; public sources of funding (such as the IMF or the World Bank) and credit agencies around the world are de facto enforcers of the regime. The credit market and political rankings of governments, formal and informal, help patrol the efficacy of the investment regime.

Perhaps most significantly, the national and international regime governing investment is sustained by the belief, now widely held among almost all states irrespective of political system or culture—from Mexico to Vietnam—that the basic guarantees contained in BITs are essential components to a modern functioning state and a thriving economy.[94] The investment regime is premised on widespread belief in David Ricardo's theory of comparative advantage and, as with the WTO, is grounded in historical lessons drawn from periods when the world ignored Ricardo, as when the U.S. turned to the Smoot–Hartley Tariff Act,[95] thereby ushering in the Great Depression.[96] More specifically, many of the guarantees accorded foreign investors under the FDI regime merely reaffirm "general principle[s] of law" that once were regarded (at least by Western "civilized" states at the end of the nineteenth century) as sacrosanct, including contract sanctity, the right to property, and the international minimum standard of treatment protecting both.[97] The investment regime is also grounded in the common belief, usually simply asserted rather than empirically demonstrated, that a liberal investment and trade regime is condu-

92. *See, e.g.*, Enron Corp. & Ponderosa Assets, L.P. v. Argentine Republic, Decision on the Argentine Republic's Request for a Continued Stay of Enforcement of the Award, ICSID Case No. ARB/01/3 (Oct. 7, 2008) (rejecting Argentina's argument that winning ICSID claimants need to seek enforcement of their awards in Argentine courts), *available at* http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=viewCase&reqFrom=Home&caseId=C3.

93. Alvarez & Khamsi, *supra* note 90, at 380.

94. *See, e.g.*, Kenneth J. Vandevelde, *Investment Liberalization and Economic Development: The Role of Bilateral Investment Treaties*, 36 COLUM. J. TRANSNAT'L L. 501, 502–03 (1998).

95. *See* U.S. Dep't of State, Protectionism in the Interwar Period, http://www.state.gov/r/pa/ho/time/id/17606.htm (last visited Mar. 27, 2009).

96. *See generally* JOHN H. JACKSON, WILLIAM J. DAVEY & ALAN O. SYKES, JR., LEGAL PROBLEMS OF INTERNATIONAL ECONOMIC RELATIONS 4–18 (4th ed. 2002).

97. *See, e.g.*, LOWENFELD, *supra* note 29, at 391–92.

cive to respect for the national rule of law generally, the vibrancy of its political system, and even the society's respect for human rights.[98] The premise is that how a state treats a foreign investor is a reasonable proxy for how it treats everyone else.

Further, to the extent the investment regime relies on international dispute settlement, this too is embedded in widespread faith in neutral denationalized forums for resolving interstate disputes. It is widely assumed that such forums are far more likely to be impartial than national courts and judges, who historically have favored local interests. As all of this suggests, the investment regime has become an important element of a new de facto standard of civilization affirming essential minimum standards that most countries want to achieve.[99] Pundits such as Thomas Friedman have even suggested that a liberal investment regime contributes to international peace since it is rare for two states that both admit McDonald's franchises to make war on each other.[100] Whether or not one adheres to his contestable "McDonald's theory of conflict prevention," Thomas Friedman is not wrong to point out that most states of the world have turned to a liberal investment regime and that most government elites appear to have internalized its values.[101] Rightly or wrongly, most governments have donned what Friedman optimistically celebrates as a "Golden Straightjacket."[102]

It is important to see just how constraining that straightjacket may be. The investment regime now imposes considerable restraints on governments' policy options that go beyond the obvious ones, such as the impossibility of 1970s-style massive nationalizations without compensation. Consider the common BIT provision requiring states to accord foreign investors fair and equitable treatment. In a recent NAFTA case, the arbitrators explained what this requires of states:

> The Arbitral Tribunal considers that this provision . . . requires the Contracting Parties to provide to international investments treatment that does not affect the basic expectations that were taken into account by the foreign investor to make the investment.

---

98. *Cf.* Tom Ginsburg, *International Substitutes for Domestic Institutions: Bilateral Investment Treaties and Governance*, 25 INT'L REV. L. & ECON. 107 (2005) (challenging some of these common assumptions).

99. *See, e.g.*, Fidler, *Standard of Civilization*, *supra* note 78, at 139. But the conception of a new standard of civilization nonetheless might be used on occasion to help define a reputed "clash of civilizations" between civilized nations and "terrorists" at war with (among other things) the essential components of globalization. *See* HUNTINGTON, *supra* note 25, at 209–18.

100. THOMAS L. FRIEDMAN, THE LEXUS AND THE OLIVE TREE 195–217 (1999) (describing the "Golden Arches theory of conflict prevention").

101. *See id.* Note however that it is not clear where the causal arrows point in this sequence; that is, whether internalized market values preceded or followed adherence to investment-friendly laws.

102. *Id.* at 201–10.

> The foreign investor expects the host State to act in a consistent manner, free from ambiguity and totally transparently in its relations with the foreign investor, so that it may know beforehand any and all rules and regulations that will govern its investments, as well as the goals of the relevant policies and administrative practices or directives, to be able to plan its investment and comply with such regulations. Any and all State actions conforming to such criteria should relate not only to the guidelines, directives or regulations issued, or the resolutions approved thereunder, but also to the goals underlying such regulations. The foreign investor also expects the host State to act consistently, i.e. without arbitrarily revoking any preexisting decisions or permits issued by the State that were relied upon by the investor to assume its commitments as well as to plan and launch its commercial and business activities.[103]

As this intrusive inquiry suggests, satisfying the fair and equitable treatment standard may require states to adopt highly developed and particularized national institutions. Treating foreign investors equitably apparently demands a well-run administrative state highly protective of property rights and the expectations of those with capital. Just how intrusive this inquiry can be became apparent in another NAFTA case applying the same provision. In that case, *Metalclad v. Mexico*, a U.S. operator of a hazardous waste disposal plant that was denied a building permit by a municipality in Mexico was awarded over $16 million in damages because, among other things, Mexican law was insufficiently clear as to the need for a local permit above and beyond a federal permit.[104] Mexican officials were understandably livid that international arbitrators interpreting a treaty were bold enough to second-guess federal–state relations under Mexican law; they were not, however, angry enough to denounce NAFTA or to insist on drastic reforms to NAFTA investor-state dispute settlement.[105] As such cases suggest, the inherent vagueness of the "fair and equitable treatment" guarantee in investment treaties such as NAFTA can easily

103. Tecnicas Medioambientales TECMED S.A. v. United Mexican States, ICSID (W. Bank) Case No. ARB(AF)/00/2 (May 29, 2003), 43 I.L.M. 133, 173 ¶ 154 (2004).

104. *See* Metalclad Corp. v. United Mexican States, ICSID (W. Bank) Case No. ARB(AF)/97/1 (August 30, 2000), 40 I.L.M. 36, 49 ¶ 88 (2001).

105. This balance is demonstrated by the comments by a top Mexican trade official. *Compare* Hugo Perezcano Díaz, *Trading Democracy* (PBS television documentary Feb. 1, 2002) (transcript available at http://www.pbs.org/now/transcript/transcript_tdfull.html) ("International tribunals were set up to interpret and decide on international law. And the NAFTA has not come in to replace our domestic judicial system for the benefit of foreigners."), *with* Hugo Perezcano Díaz, *Transparency in International Dispute Settlement Proceedings on Trade and Investment*, *in* APPEALS MECHANISM IN INTERNATIONAL INVESTMENT DISPUTES 193, 200 (Karl P. Sauvant ed., 2008) (arguing that it is understandable if reforms to make investor-state dispute settlement more transparent were to take some time).

lead to particularized demands for standards of good governance, requiring a level of transparency that even U.S. municipalities would find difficult to satisfy.

Consider also the investment guarantee that assures investors that they will be fairly compensated for any government action that is "'tantamount to . . . expropriation.'"[106] The same *Metalclad* case suggested that this means that

> expropriation under NAFTA includes not only open, deliberate and acknowledged takings of property, such as outright seizure or formal or obligatory transfer of title in favour of the host State, but also covert or incidental interference with the use of property which has the effect of depriving the owner, in whole or in significant part, of the use or reasonably-to-be-expected economic benefit of property even if not necessarily to the obvious benefit of the host State.[107]

Metalclad was awarded damages not only for violation of fair and equitable treatment but because Mexico's passage of an environmental decree deprived Metalclad of its foreseeable profits.[108] In other instances, investor-state arbitrations have suggested that acts by U.S. state courts, such as overly high punitive damage awards rendered by a Mississippi jury against a Canadian investor, may constitute judicial takings of property or violate the "international minimum standard" of treatment.[109] Investors in Canada and the United States have also challenged, with mixed success, environmental measures that have lessened the economic value of foreign investors' expected profits as illegal indirect takings.[110] As might be expected, such claims, which would appear to go far beyond existing property protections for U.S. nationals under the U.S. Constitution's Takings Clause, have alarmed state attorneys general in the United States, nongovernmental organizations, and environmental law scholars.[111] Some fear that NAFTA's investment guarantees will chill state and federal environmental regulation among the three NAFTA parties.[112]

---

106. Metalclad, *supra* note 104, at 50 ¶ 102 (quoting NAFTA art. 1110).
107. *Id.* ¶ 103.
108. *See id.* at 51 ¶¶ 109–111; *see also* United Mexican States v. Metalclad Corp., [2001] 89 B.C.L.R. (3d) 359 (Can.).
109. *See* Loewen Group, Inc. v. United States, ICSID (W. Bank) Case No. ARB(AF)/98/3 (June 26, 2003), 42 I.L.M. 811 (2003).
110. *See generally* PUBLIC CITIZEN, NAFTA CHAPTER 11 INVESTOR–TO–STATE CASES: BANKRUPTING DEMOCRACY (2001), *available at* http://www.publiccitizen.org/documents/ACF186.PDF.
111. *See, e.g.*, Vicki Been, *Does an International "Regulatory Takings" Doctrine Make Sense?*, 11 N.Y.U. ENVTL. L.J. 49 (2002).
112. *See, e.g.*, PUBLIC CITIZEN, *supra* note 110, at 38–39.

Consider also the "exceptions" clause in U.S. BITs, which permits BIT parties to take measures to protect their "essential security interests."[113] Notably, that permission does not extend to other government measures, such as government regulations designed to protect other social or environmental interests of the state that might injure the interests of foreign investors.[114] Worse still—at least from the prospective of a government regulator—investment treaties put the determination of what is justified pursuant to a state's essential security in the hands of international arbitrators and not the state itself. As Argentina has discovered in the course of recent investor claims against it, most international arbitrators hearing such claims have found that Argentina could not claim that the grave crisis that engulfed the nation from 2001 to 2002 constituted an event sufficient to trigger this exception.[115] Despite the fact that Argentina faced riots in the streets, a run on its banks that depleted substantial private savings, massive unemployment and political difficulties that led to a succession of five presidents over a matter of weeks, most investor-state arbitrators have determined, at least to date, that they had a right to second guess the Argentine government's decision to disavow guarantees made to U.S.-owned public utilities.[116] Even though Argentina apparently did not treat U.S. investors differently than others in the relevant sectors, arbitrators found the Argentine government's actions in the midst of a serious crisis to constitute violations of the U.S.–Argentina BIT because, according to the arbitrators, Argentina failed to prove that the actions that it took were the "only way" to handle the underlying crisis facing that country.[117]

As is evident from Table 1, the United States has evidently been sufficiently alarmed by these interpretations of its original Model BIT that it has since changed the relevant language, at least for its more recent BITs, such as its investment treaty with Uruguay in 2004. First, as seen on the right side of Table 1, the United States has refined the language defining the fair and equitable guarantee such that it now suggests that this right only embraces traditional protections under customary international law. While that guarantee still includes maltreatment by national courts, it limits its investor protections to egregious acts involving basic violations of due process. The newly hedged fair and equitable treatment guarantee appears

113. *See* U.S.–Uruguay BIT, *supra* note 70; *see also infra* tbl.1 (comparing 1984 U.S. Model BIT, Exceptions: Article X(1) with U.S.–Uruguay BIT, Exceptions: Article 18).

114. *Cf.* General Agreement on Tariffs and Trade art. XX, Oct. 30, 1947, T.I.A.S. No. 1700, 55 U.N.T.S. 194 [hereinafter GATT].

115. *See* Alvarez & Khamsi, *supra* note 90, at 398–402.

116. *Id. But see* Cont'l Cas. Co. v. Argentina, ICSID (W. Bank) Case No. ARB/03/9 (Sept. 5, 2008), *available at* http://ita.law.uvic.ca/documents/ContinentalCasualtyAward.pdf (finding Argentina's alleged breaches of the U.S.–Argentina BIT partly justified under that treaty's "essential security" clause).

117. Alvarez & Khamsi, *supra* note 90, at 398–402.

intended to overrule decisions such as those in the *Metalclad* case.[118] Second, the new U.S. language on expropriation shown on Table 1 attempts to restrict the scope of compensable indirect takings to compensable takings that would be recognized under the U.S. Constitution, as under the U.S. Supreme Court's interpretation in *Penn Central Transportation Co. v. City of New York*.[119] Indeed, takings jurisprudes should recognize the factors at 4(a)(i)–(iii) in the U.S.–Uruguay BIT as taken directly from *Penn Central*'s interpretation of U.S. law.[120] This change in the U.S. BIT language presumably responds to the views expressed by some members of Congress when that body last authorized the executive to continue to negotiate trade and investment agreements; in that legislation, Congress stated that future trade agreements should not grant foreign investors "greater" rights than those given to U.S. investors.[121] Lastly the new U.S. BIT language, with respect to the measures that "it considers necessary" for the protection of its essential security, suggests an attempt to make that clause essentially self-judging so that international arbitrators cannot second-guess a state's determination that a measure that harms a foreign investor is needed to protect a state's own determination of its "essential security," as has occurred repeatedly in connection with cases against Argentina.[122]

---

118. *Cf.* Metalclad Corp. v. United Mexican States, ICSID (W. Bank) Case No. ARB(AF)/97/1 (August 30, 2000), 40 I.L.M. 36, 49 ¶ 88 (2001).

119. 438 US 104 (1978).

120. *Compare* U.S.–Uruguay BIT, *infra* tbl.1, at Annex B, 4(a)(i)–(iii), *with Penn Central*, 438 U.S. at 124 ("In engaging in these essentially ad hoc, factual inquiries, the Court's decisions have identified several factors that have particular significance. The economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations are, of course, relevant considerations. So, too, is the character of the governmental action." (citation omitted)).

121. *See* Bipartisan Trade Promotion Authority Act of 2002, Pub. L. No. 107-210, div. B, tit. 21, 116 Stat. 933; *see also* DAVID SCHNEIDERMAN, CONSTITUTIONALIZING ECONOMIC GLOBALIZATION: INVESTMENT RULES AND DEMOCRACY'S PROMISE 74 (2008) (discussing section 2102(3) of the Act and comparing these factors to the Calvo Doctrine).

122. *See* Peru–U.S. Trade Promotion Agreement, art. 22.2(b), Apr. 12, 2006, *available at* http://www.ustr.gov/Trade_Agreements/Bilateral/Peru_TPA/Final_Texts/Section_Index.html; *see also id.* art. 22.2 n.2 ("[I]f a Party invokes [the measures not precluded clause] in an arbitral proceeding . . . , the tribunal or panel hearing the matter shall find that the exception applies."); Alvarez & Khamsi, *supra* note 90.

U.S. Model BIT (1984)	U.S./ Uruguay BIT (2004)
Fair & Equitable Treatment/ CIL: Article II(2)	Fair & Equitable Treatment/ CIL: Article 5(1), (2), (3) & Annex A
Investments shall at all times be accorded fair and equitable treatment, shall enjoy full protection and security and shall in no case be accorded treatment less than that required by international law. Neither Party shall in any way impair by arbitrary and discriminatory measures the management, operation, maintenance, use, enjoyment, acquisition, expansion, or disposal of investments. Each Party shall observe any obligation it may have entered into with regard to investments.	1. Each Party shall accord to covered investments treatment in accordance with customary international law, including fair and equitable treatment and full protection and security. 2. For greater certainty, paragraph 1 prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to covered investments. The concepts of "fair and equitable treatment" and "full protection and security" do not require treatment in addition to or beyond that which is required by that standard, and do not create additional substantive rights. The obligation in paragraph 1 to provide: (a) "fair and equitable treatment" includes the obligation not to deny justice in criminal, civil, or administrative adjudicatory proceedings in accordance with the principle of due process embodied in the principal legal systems of the world; and (b) "full protection and security" requires each Party to provide the level of police protection required under customary international law. 3. A determination that there has been a breach of another provision of this Treaty, or of a separate international agreement, does not establish that there has been a breach of this Article. ANNEX A – Customary International Law The Parties confirm their shared understanding that "customary international law" generally and as specifically referenced in Article 5 and Annex B results form a general and consistent practice of States that they follow from a sense of legal obligation. With regard to Article 5, the customary international law minimum standard of treatment of aliens refers to all customary international law principles that protect the economic rights and interests of aliens.
Expropriations: Article III(1)	Expropriations: *[comparable to old, but adds Annex B]*
Investments shall not be expropriated or nationalized either directly or indirectly through measures tantamount to expropriation or nationalization ("expropriation") except for a public purpose; in a non-discriminatory manner; upon payment of prompt, adequate and effective compensation; and in accordance with due process of law and the general principles of treatment provided for in Article II (2). Compensation shall be equivalent to fair market value of the expropriated investment immediately before the expropriatory action was taken or became known; include interest at a commercially reasonable rate from the date of expropriation; be paid without delay; be fully realizable; and be freely transferable at the prevailing market rate of exchange on the date of expropriation.	ANNEX B – Expropriation The Parties confirm their shared understanding that: 1. Article 6(1) is intended to reflect customary international law concerning the obligation of States with respect to expropriation. 2. An action or a series of actions by a Party cannot constitute an expropriation unless it interferes with a tangible or intangible property right or property interest in an investment. 3. Article 6(1) addresses two situations. The first is known as direct expropriation, where an investment is nationalized or otherwise directly expropriated through formal transfer of title or outright seizure. 4. The second situation addressed by Article 6(1) is known as indirect expropriation, where an action or series of actions by a Party has an effect equivalent to direct expropriation without formal transfer of title or outright seizure. (a) The determination of whether an action or series of actions by a Party, in a specific fact situation, constitutes an indirect expropriation, requires a case-by-case, fact-based inquiry that considers, among other factors: (i) the economic impact of the government action, although the fact that an action or series of actions by a Party has an adverse effect on the economic value of an investment, standing alone, does not establish that an indirect expropriation has occurred; (ii) the extent to which the government action interferes with distinct, reasonable investment-backed expectations; and

Table 1: U.S. BIT comparison

	(iii) the character of the government action. (b) Except in rare circumstances, non-discriminatory regulatory actions by a Party that are designed and applied to protect legitimate public welfare objectives, such as a public health, safety, and the environment, do not constitute indirect expropriations.
Exceptions: Article X(1)	Exceptions: Article 18
This Treaty shall not preclude the application by either Party of measures necessary for the maintenance of public order, the fulfillment of its obligations with respect to the maintenance or restoration of international peace or security, or the protection of its own essential security interests.	Nothing in this Treaty shall be construed: 1. to require a Party to furnish or allow access to any information the disclosure of which it determines to be contrary to its essential security interests; or 2. to preclude a Party from applying measures that it considers necessary for the fulfillment of its obligations with respect to the maintenance or restoration of international peace or security, or the protection of its own essential security interests. *New Exceptions:* Financial Services: Article 20(1) Notwithstanding any other provision of this Treaty, a Party shall not be prevented from adopting or maintaining measures relating to financial services for prudential reasons, including for protection of investors, depositors, policy holders, or persons to whom a fiduciary duty is owed by a financial services supplier, or to ensure the integrity and stability of the financial system.... Interpretations by the Parties: Article 30(3) A joint decision of the Parties, each acting through its representative designated for purposes of this Article, declaring their interpretation of a provision of this Treaty shall be binding on a tribunal, and any decision or award issued by a tribunal must be consistent with that joint decision.

Table 1 (cont.)

There are other signs of the United States' and other developed countries' disquiet with respect to the investment regime that they helped to construct. Thus, the most recent U.S. BITs include a new exception according greater government latitude with respect to financial services and enabling the state parties to such treaties to issue binding joint interpretations of those treaties' terms.[123] National security concerns, such as those emerging in the wake of 9/11 and the aborted Dubai Ports deal, are also driving U.S. and other policymakers to entertain second thoughts about whether they ought to continue to discourage investment screening of any kind, as even the U.S.–Uruguay BIT continues to do.[124] The United States has recently revamped its laws permitting the President to block proposed foreign acquisitions of U.S. companies if these pose a threat to U.S. national security.[125] More proposed foreign transactions are now exposed to government screening and to potential government intervention as a result.[126] Other countries now appear to be following the United States' lead and are also changing their laws to permit greater screening of incoming foreign investment, at least for purposes of protecting their own national security.[127] Moreover, efforts to recalibrate existing or prospective investment agreements in order to enhance the regulatory power of governments may well continue and result in even greater narrowing of foreign investors' treaty rights. As was suggested by the rhetoric on "fair trade" heard during the Presidential primaries in the United States, particularly by the successful Obama campaign,[128] there may yet be additional reconsideration of agreements such as NAFTA, at least to the extent such agreements are perceived to elevate the rights of foreign investors above those whom investors affect, such as consumers and workers.

As this brief summary of recent developments in the United States suggests, investment agreements are not like capitulation treaties of the colonial era in another respect: BITs bite more than the state that "capitulates." As the changes to the U.S. model investment agreement suggest, BITs do not just affect the periphery. The once all-powerful metropole is

123. *See, e.g.*, U.S.–Uruguay BIT, *supra* note 70, art. 20(1) (permitting certain "prudential" government actions on financial services); *id.* art. 30(3) (permitting joint interpretation by the treaty parties).

124. *See generally* José E. Alvarez, *The Evolving Foreign Investment Regime* (Feb. 2008), http://www.asil.org/ilpost/president/pres080229.html; Sauvant, *supra* note 62, at 71.

125. *See, e.g.*, Mark E. Plotkin & David N. Fagan, *The Revised National Security Review Process for FDI in the US*, COLUM. FDI PERSP., Jan. 7, 2009, at 1, *available at* http://www.vcc.columbia.edu/pubs/documents/Perspective2-PlotkinandFagan.pdf.

126. *Id.* at 2–3.

127. *See, e.g.*, Sauvant, *supra* note 62, at 73–74.

128. *See* Barack Obama and Joe Biden—Plan to Strengthen the Economy: Trade, http://www.barackobama.com/issues/economy/ (last visited Mar. 30, 2009) (suggesting a policy that would amend NAFTA and enforce free trade arrangements).

also subject to—and occasionally chafes under—their reciprocal constraints.[129]

At the same time, to the extent both rich states like the United States and poor LDCs continue to only tinker around the edges of the foreign investment regime and continue to uphold the bulk of the investment protections given to foreign investors, their reticence demonstrates the extent to which the fundamental premises of the regime remain unchallenged. For the present, most hosts of foreign investment, as well as capital exporters, appear to believe that the free flow of capital needs to be encouraged, including through international legal guarantees. Most states do not regard their investment agreements as enabling a zero-sum game that benefits only capital exporters in the West—as was the case with capitulation agreements. Most continue to believe that the mutual flow of capital raises all boats.

The investment regime shares a number of characteristics with the ancient Athenian Empire. To the extent the investment regime reflects imperial control, its methods are, like many of those deployed by Athens, based on informal persuasion rather than explicit military coercion. And, as the cases involving fair and equitable treatment, expropriation, and essential security discussed above suggest, its effects, like those of Athens, are pervasive, impacting on the foreign and domestic polities of all states. The allies of the investment regime, like those of Athens, are the rich entrepreneurs who most benefit from its protections; those whom the Athenians would have called the tribute-paying class. At the same time, the historical trajectory of the foreign investment regime, relative to the rise and fall of the Delian League, is also instructive. While earlier incarnations of today's investment regime relied, as did Athens, on periodic military interventions—as did the United States and other states that once engaged in "gunboat diplomacy" to protect their investors in the periphery—the modern investment regime relies, perhaps more than Athens, on voluntary acquiescence, particularly through the cooperation of elites within all states who acquire tangible economic benefits from the regime.[130] Its methods of enforcement, however, are no less efficacious than those deployed by Athens.

As with respect to Athens, there are (alleged) connections between this regime and the spread of democracy and interstate security (the alleged "democratic peace"). As was the case for the Delian League, the invest-

129. Of course, as historians of colonialism have suggested, even during the colonial era, the metropole did not remain unaffected by developments, including legal developments, resulting from their engagements with the periphery. *See generally* ANGHIE, *supra* note 35, at 32–114.

130. Nonetheless, as is suggested by U.S. military interventions during the Cold War and U.S. saber-rattling since, as with respect to Chavez's Venezuela, the modern investment regime remains subject to the potential threat to use force if it is threatened in the extreme. To this extent it is perhaps not altogether different from the Delian League's reliance on Athenian military intervention.

ment regime is motivated by an appeal to the material self-interest of all concerned. Like the League, the investment regime highlights the importance (and the protection of) private entrepreneurs. Like the ancient League, it relies on and reproduces an international division of labor. It also encourages and relies upon foreign trade and the enhancement of national resources allegedly produced by it. Like the League, BITs emerge, BIT by BIT, as states react to the threat that exclusion from the regime would deprive them of access to the world market and its benefits. In some cases, as was true for some who became aligned with Athens, BITs are also concluded with certain powerful states for political reasons, including a desire to receive other benefits (e.g., aid or security) from the BIT partner. Investment agreements, like the arrangements surrounding the Athenian Empire, are portrayed by their promoters as producing a virtuous circle between free markets, enhanced economic security, democracy, and human rights—as was suggested by former President Ronald Reagan, who argued that BITs produce benefits for all.[131]

But the global investment regime may also resemble ancient empires like those of Athens and Rome in a more fundamental way: it too aspires to universality. The investment regime relies on ostensibly sacrosanct truths that in our secular age approach the divine revelation that justified the Roman Empire. Its Jupiter is now David Ricardo and his unchallenged theory of comparative advantage, along with other "truths" rarely challenged (at least among their adherents), such as the idea that interstate disputes are best settled by neutral arbitrators applying denationalized rules of law. The investment regime is perceived, particularly after the end of the Cold War, as the only option for operating a sustainable economy. Like ancient empire, the investment regime does not have a clear rival. Those few states outside its domain, like those outside the Roman or Athenian Empires, may as well be barbarians or the uncivilized. In today's global market, not participating in the free trade and investment regimes is tantamount to fiscal (and possibly political) suicide. As with respect to Athens and Rome, to be allowed to participate in the investment regime is to be allowed to enjoy the newly defined form of "sovereignty" that is left to nation states—as Abe and Antonia Chayes have suggested is true with respect to other universal regimes.[132] To be allowed entry into the regime—to permit the inward flow of external capital and to permit one's entrepreneurs to be protected elsewhere—is perceived by most states, East and West, North and South, as a positive good. For the world's capitalists (which now include most of us), the investment regime is no longer an

131. President's Statement on International Investment Policy, 2 PUB. PAPERS 1243, 1243 (Sept. 9, 1983) ("[T]here are only winners, no losers, and all participants gain from it.").

132. ABRAM CHAYES & ANTONIA HANDLER CHAYES, THE NEW SOVEREIGNTY: COMPLIANCE WITH INTERNATIONAL REGULATORY AGREEMENTS 27–28 (1995).

imposition by the West but a requirement of contemporary civilization, morally and politically justified.[133]

How to describe the essence of this regime—or other international law regimes such as human rights—remains a challenge. One could call this the empire of capital.[134] One could call it, as B.S. Chimni has, an "emerging Global State."[135] Both of these have the virtue of recognizing what is different about this regime as compared to prior empires, Athens included. Unlike ancient or colonial empires, this "empire" is no longer territorially based since capital—if not yet labor—is no longer a prisoner of territory.[136] The foreign investment regime exists in a realm beyond statehood, particularly since the categories of imperialized periphery and exploitative metropole are blurring. As David Kennedy has noted, multinational corporations, along with other entrepreneurs, have now "deracinated themselves, floating freely about the globe."[137] But if capital has been freed to a considerable extent of the legal and political restraints of any one state, it nonetheless remains subject to global rules determined by interstate pact, as well as by the rules imposed by international organizations and nongovernmental actors such as those of the market itself, and remains subject to enforcement by thousands of global entrepreneurs. While it is not the law of any one national empire, it might be described as the empire of law.

The underlying idea of universal empire based on globalization of economic and cultural exchanges is one that features prominently in Michael Hardt and Antonio Negri's book titled simply *Empire*.[138] Their's is a conception of empire premised on a "global market and global circuits of production;" a new "global order, a new logic and structure of rule—in short, a new form of sovereignty."[139] "Empire," they write, "is the political subject that effectively regulates these global exchanges, the sovereign power that governs the world."[140] Hardt and Negri write of a post-sovereign world that "encompasses the spatial totality" and knows no ter-

133. Notably, the most prominent debates today among development economists are among those who contend that the free flow of capital believed to be necessary to sustain economic development requires nearly identical national institutions (including courts and administrative agencies) and those who contend that such flows are compatible with a much larger and diverse set of national institutions and policies. *See, e.g.*, David Kennedy, *The "Rule of Law," Political Choices, and Development Common Sense*, *in* THE NEW LAW AND ECONOMIC DEVELOPMENT 95 (David M. Trubek & Alvaro Santos eds., 2006) (describing the elements of mainstream development thinking, which he characterizes as "chastened" neoliberalism, for 1995–2005).

134. As was suggested to the author by Catherine Kessedjian.

135. *See* B. S. Chimni, *A Just World Under Law: A View from the South*, 22 AM. U. INT'L L. REV. 199, 201 (2007).

136. David Kennedy, *The Mystery of Global Governance*, 34 OHIO N.U. L. REV. 827, 834–35 (2008).

137. *Id.* at 834.

138. MICHAEL HARDT & ANTONIO NEGRI, EMPIRE (2000); *see also* Marks, *supra* note 39, at 451–53.

139. HARDT & NEGRI, *supra* note 138, at xi.

140. *Id.*

ritorial boundaries.[141] Their version of empire joins societies across spatial political boundaries, making these less relevant, and is premised on its all-embracive nature and its lacking any outside, or at least rendering the outside less relevant.

Hardt and Negri's conception of empire echoes those of other students of globalization who argue, with considerable force, that institutions like the WTO, the World Bank, and the IMF have now made the exercise of sovereign power considerably more difficult as governments increasingly discover that their most significant economic decisions are out of their control; that their sovereign power has, at least to this extent, shifted "upward"—to be exercised by faceless international bureaucrats on behalf of the collective—and "downward"—to be enforced by MNCs among others. It finds an echo in the work of others, such as Anne-Marie Slaughter, who stress the impact of other actors, such as the Basel Committee of Central Bankers or other groups of transnational government regulators[142]—a world of bureaucratic rule that some have described as a kind of "new medievalism."[143]

Tying all of these conceptions together, there is a recognition that traditional notions of sovereignty are no longer adequate to describe economic globalization or how it is governed.[144] But we should not forget that there was once a world without state sovereigns—and that other pre-Westphalian examples, such as the Athenian Empire, make for suitable (if never perfect) analogies. At the same time, the investment regime is not only deracinated ideology. It is also *an empire of law*, even though it appears to have outgrown its origins as the product of territorially demarcated empire.

Calling this phenomenon an empire of law is not intended to suggest that it is the *only* rule of law. The empire of law that I describe here is not immune from conflict between other conceptions of the rule of law, including traditional international law or the national rule of law. Indeed, given the effectiveness of the global investment regime—and especially its reliance on private, non-state entrepreneurs for enforcement—the potential for conflict between that regime and traditional interstate pacts (such as ordinary treaties subject only to interstate remedies or enforcement by national courts) or national rules (promulgated by national legislative institutions and also enforced by national courts) is not only likely but inevitable.

---

141. *Id.* at xi, xiv.

142. *See* ANNE-MARIE SLAUGHTER, A NEW WORLD ORDER 16-17 (2004).

143. *See, e.g.*, H. Patrick Glenn, *North America as a Medieval Legal Construction*, 2 GLOBAL JURIST ADVANCES 1, 1 (2002), *available at* http://www.bepress.com/gj/advances/vol2/iss1/art1.

144. *See* Marks, *supra* note 39, at 463.