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Multinational Enterprises and the Global Investment Regime: Toward Balancing Rights and Responsibilities

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Global Governance

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toward balancing rights and responsibilities

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Multinational enterprises and the global investment regime: Toward balancing rights and responsibilities

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1. Setting the scene: The growth of foreign direct investment and of the activities of multinational enterprises

The activities of multinational enterprises (MNEs) – more than 80,000 firms headquartered in one country and controlling assets in another country – have grown substantially over the past three decades.[1] While there are no systematic data on non-equity forms of such activities (such as management contracts, licensing and franchising agreements), data do exist on the flows of foreign direct investment (FDI), i.e. investments of 10 percent or more in an enterprise abroad: These flows have risen from an annual average of US$ 50 billion during 1981-1985 to US$ 2.1 trillion in 2007. Flows declined in 2008 and 2009 by some 50 percent, to approximately US$1.1 trillion (table 1), as a result of the financial crisis and recession (and stayed at the same level in 2010). But as long as FDI flows remain positive, the stock of such investment continues to grow, at least in principle. By the end of 2009, this stock had reached US$ 19 trillion, generating sales by foreign affiliates estimated to be worth some US$ 29 trillion (table 1); this sales value was about twice the value of world exports the same year (US$ 16 trillion). In other words, FDI has become more important than trade in terms of delivering goods and services to foreign markets. In addition, some one-third of world trade consists of intra-firm trade, i.e. trade among the various units (foreign affiliates, domestic plants, headquarters) that make up the increasingly integrated international production systems of individual MNEs. Moreover, it is within these corporate systems that the bulk of the world's commercial research and development is being undertaken and technology and skills are being transferred, and through which the world market can be accessed. Through all these activities, MNEs integrate not only markets but also national production systems on a regional or global scale.

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[1] The salient features of the activities of MNE are best documented in UNCTAD's annual *World Investment Report* (see www.unctad.org). The data used here are from this source, unless otherwise footnoted. The latest edition is UNCTAD, *World Investment Report 2010: Investing in a Low-Carbon Economy* (New York and Geneva: UNCTAD, 2010).

Table 1. Selected indicators of FDI and international production, 1990-2009

Item	Value at current prices (Billions of dollars)				Annual growth rate (Per cent)				
	1990	2005	2008	2009	1991-1995	1996-2000	2001-2005	2008	2009
[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
FDI outflows	241	893	1 929	1 101	16.8	36.1	9.2	-14.9	-42.9
[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
FDI outward stock	2 087	12 417	16 207	18 982	11.9	18.4	14.6	-16.1	17.1
[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
Income on outward FDI	120	902	1 182	1 008	20.2	10.3	31.3	-7.7	-14.8
[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
Sales of foreign affiliates	6 026	21 721	31 069[b]	29 298[c]	8.8	8.2	18.1	-4.5[b]	-5.7[c]
[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
Total assets of foreign affiliates	5 938	49 252	71 694[f]	77 057[f]	13.7	19.0	20.9	-4.9[f]	7.5[f]
[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
Employment by foreign affiliates (thousands)	24 476	57 799	78 957[h]	79 825[i]	5.5	9.8	6.7	-3.7[h]	1.1[i]
Memorandum									
[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
Gross fixed capital formation	5 099	9 833	13 822	12 404[j]	5.4	1.1	11.0	11.5	-10.3
[illegible]	[illegible]	[illegible]	[illegible]		[illegible]	[illegible]	[illegible]	[illegible]	
Exports of goods and services	4 414	12 954	19 986	15 716[j]	7.9	3.7	14.8	15.4	-21.4

Source: UNCTAD, *World Investment Report 2010: Investing in a Low-Carbon Economy* (New York and Geneva: UNCTAD, 2010), p. 16.

In the past, the world FDI market was dominated by MNEs from developed countries. While they remain the primary actors, a noticeable recent development is the growth of MNEs from emerging markets.[2] At the end of 2009, outward FDI flows undertaken by more than 20,000 MNEs headquartered in emerging markets were about US$ 280 billion (nearly six times annual average *world* FDI outflows during 1981-1985), accounting for about 25 percent of world FDI outflows; they also controlled nearly US$ 3 trillion of the world's outward FDI stock in 2009. As a result, a number of emerging markets are now not only primarily host countries, but are becoming important home countries as well. In 2009, Brazil, Russia, India, and China (the BRICs) together accounted for about one-third of total FDI outflows from emerging markets.

All this makes MNEs the most important private actors in the international economy. It also makes them important actors in individual economies, although, on average (2007-2009), FDI inflows accounted for only 13 percent of gross fixed capital formation worldwide. This percentage is similar in developed countries and developing countries, although the percentage varies widely among both developed and developing countries.

Not surprisingly, therefore, all countries seek to attract FDI, as the tangible and intangible assets associated with FDI -- capital, technology, employment, skills, access to markets, etc.—can make an important contribution to national development. They do so notwithstanding the governments' knowledge that FDI can also be associated with a range of negative effects, including the crowding out of domestic firms, restrictive

[2] "Emerging markets" are all economies of the world, minus those defined by UNCTAD as "developed countries"; see UNCTAD's World Investment Report, op. cit. For a discussion, see, Karl P. Sauvant and Geraldine McAllister, with Wolfgang A. Maschek, eds., *Foreign Direct Investment from Emerging Markets: The Challenges Ahead* (New York: Palgrave Macmillan, 2010).

business practices, transfer pricing, undesirable environmental effects, and the curtailment of competition.[3]

As discussed below, the evaluation of the costs and benefits of FDI and MNE activities can change over time, and has done so. With it, the nature of national policies and international agreements – and therefore the regime governing investment and multinational enterprises – change as well, depending on how governments perceive their interests and pursue their objectives.

2. Interests and objectives

In contrast to the trade area, no multilateral framework governs foreign direct investment and the activities of MNEs. This is not for wont of trying. As early as 1948, the aborted Havana Charter for an International Trade Organization had sought to address investment issues. This effort was resumed in a comprehensive manner only in the late 1970s, and it involved the negotiations of a United Nations Code of Conduct on Transnational Corporations (UN Code) in the context of that Organization's wider work on FDI and MNEs.[4] The effort to regulate FDI and the activities of MNEs was resumed on the basis of the shared recognition that the cross-border nature of the activities of these firms required an international approach to their regulation. The question was, however: What would be the purpose of such regulation?

The UN Code negotiations established the two dominant themes – and tensions – that have since characterized efforts to establish an international framework for FDI and the activities of MNEs, namely (1) the struggle to find the proper balance between the rights and responsibilities of host countries on one hand and those of MNEs on the other; and (2) the struggle over the legal nature (mandatory vs. voluntary) that any rights and responsibilities should take. Governments approach these two issues from the perspective of what is most in the interest of their countries, including their own enterprises -- in other words, in light of the costs and benefits they expect from FDI and the activities of MNEs. These struggles, based on the underlying interests, have determined the subsequent evolution of the international investment law and policy regime.

[3] For a full discussion of the impact of FDI on economic development, see, for example, UNCTAD, *World Investment Report 1999: Foreign Direct Investment and the Challange of Development* (New York and Geneva: UNCTAD, 1999); Theodore H. Moran, *Foreign Direct Investment and Development: Launching a Second Generation of Policy Research. Avoiding the Mistakes of the First, Re-evaluating Policies for Development and Developing Countries* (Washington: Peterson Institute for International Economics, forthcoming), Joseph E. Stiglitz, *Globalization and its Discontents* (New York: W.W. Norton & Company, 2003); Kevin P. Gallagher and Daniel Chudnovsky, *Rethinking Foreign Investment for Sustainable Development: Lessons from Latin America* (London: Anthem Press, 2009).

[4] For an in-depth review of the activities of the UN in the area of FDI, see Tagi Sagafi-nejad in collaboration with John H. Dunning, *The UN and Transnational Corporations: From Code of Conduct to Global Compact* (Bloomington: Indiana University Press, 2008). See also Theodore H. Moran, "The United Nations and transnational corporations: a review and a perspective", *Transnational Corporations*, vol. 18 (August 2009), pp. 91-112.

So what *are* the underlying interests that drive the evolution of the international investment regime?

Host countries, as already discussed, seek to attract FDI, especially of the kind that furthers their economic development the most (as witnessed by the efforts of countries to target specific types of investment), and to maximize the benefits that they can derive from such investments. At the same time, they seek to preserve the flexibility they need to minimize any negative impact of FDI or the activities of MNEs and to safeguard any important non-economic objectives they pursue in their own national interest (including essential security interests). As will be discussed below, the concept of "national interests" is typically not defined and can include a range of military, political, economic, and cultural considerations.

When considering their interests, therefore, host country governments seek (to different degrees) to limit their mandatory responsibilities *vis-à-vis* foreign investors, while maintaining a legal right to regulate the entry of MNEs and the behavior of these firms once they are established in their territories.

Home countries, for their part, typically seek to protect the foreign assets of their outward-investing MNEs and to facilitate the operations of their firms abroad. The former involves the establishment of strong and broad protection and dispute-settlement standards, anchored not only in national laws but also in international agreements, especially with countries whose judicial systems are considered to be fragile, biased and/or inefficient. The latter involves the liberalization of entry conditions for MNEs into host countries and the reduction of any restrictions on foreign affiliates operating in host countries. Home country governments typically do not want to assume direct obligations, except with regard to subrogation and the settlement of disputes between treaty partners.

When considering their interests as home countries, therefore, governments seek broad mandatory responsibilities for host country governments with respect to the treatment of MNEs and their foreign affiliates, while limiting any responsibilities of foreign investors or keeping any responsibilities voluntary.

This interest picture is of course not as clear-cut as just presented. For example, during the 1970s, when the FDI/MNE problematique reached the international agenda, a number of developed countries too were interested, at least to a certain degree, in regulating the activities of MNEs, supporting for example guidelines for these enterprises.[5] More importantly, all countries were (and are) host countries, and more and more are becoming home countries as well. In particular, emerging markets, traditionally primarily host

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[5] Thus, there were extensive hearings in the U.S. on outward FDI and especially concerning the activities of ITT in Chile. *See* US Senate Committee on Foreign Relations, Subcommittee on Multinational Corporations, 93rd Congress, 1st Session, *The International Telephone and Telegraph Company and Chile, 1970–1971* (Washington, DC: Government Printing Office, 1973). Also, for example, The Netherlands was a co-sponsor of the resolution initiating work by the United Nations on this subject; *see* ECOSOC Res. 1721, 53 U.N. ESCOR, Supp. (no. 1), U.N. Doc. E/5209 (1972) which called on the United Nations Secretary-General to establish a Group of Eminent Persons to study the effects of multinational enterprises on world development and international relations.

countries, are increasingly also becoming home countries (as pointed out earlier); hence they need to be more sensitive to the concerns of their firms investing abroad. Traditional home countries (principally developed countries), for their part, pay more attention to their position as host countries; this is helped by the fact that they increasingly have become respondents in international investment disputes and, moreover, face various types of new investors, especially from emerging markets (including sovereign investors). Traditional home countries are further sensitized to their position as host countries by various political and economic concerns associated with inward FDI.

As the underlying FDI situation of countries becomes similar, the host/home country interests need to be rebalanced. This, in turn, affects how the two dominant themes – and tensions – identified earlier are addressed in the international investment law and policy regime. How this has been done over time, and the challenges to which this has led, will be examined next.

3. The rise of international investment agreements and their orientation

a. The 1960s and 1970s: Focus on the responsibilities of MNEs and the rights of governments

The UN Code negotiations – within which these interests and objectives were dealt with in prolonged negotiations -- sought to address the rights and responsibilities of host countries and MNEs in a comprehensive and balanced manner.[6] Developing countries approached these negotiations from the perspective that the negative effects of FDI outweighed the positive ones; hence they imposed various controls on the activities of MNEs within their territories. Mirroring their domestic policy approach, developing countries (and the socialist countries) – all of them at that time overwhelmingly host countries -- focused therefore in the UN Code negotiations on defining the responsibilities of MNEs (and they wanted these responsibilities to be binding) and preserving their own rights as regards the treatment of these enterprises; to put it differently, host developing countries sought to keep their own responsibilities and the rights of MNEs as limited as possible. In line with these objectives, developing countries (and the socialist countries) also sought strong and mandatory language on intergovernmental cooperation and the implementation of the UN Code, with a view toward giving effect to this instrument.

Reflecting that they were the principal home countries of MNEs and that the negotiations took place in a North-South context, the developed countries focused especially on the responsibilities of host countries to treat foreign firms in line with certain principles; they wanted to keep the responsibility of MNEs as general as possible; and they sought weak language on international cooperation and implementation. On the question of mandatory vs. voluntary, the developed countries put forth a preference for a voluntary instrument,

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[6] The draft text, as well the other international investment instruments referred to, are contained in UNCTAD, *International Investment Instruments: A Compendium* (New York and Geneva: United Nations, 2005)**.** The draft text of the UN Code is available at http://www.unctad.org/sections/dite/iia/docs/Compendium//en/13%20volume%201.pdf.

primarily because they did not want to impose (even general) mandatory behavioral standards on (at that time mostly "their") MNEs, while (depending on what would eventually have been agreed upon) possibly weakening customary international law regarding the treatment of foreign investors.

The negotiations of the UN Code, which had begun in 1976, reached their most intensive phase in the early 1980s and then slowed down. The objectives of the developed and developing countries concerning the dominant themes of the negotiations could not be reconciled. While substantial agreement on (typically) fairly general responsibilities of MNEs could be reached, host countries resisted the language sought by developed countries on the treatment of foreign investors. This made the Code unbalanced in the eyes of developed countries. Accordingly, they opposed a mandatory instrument with strong international cooperation and implementation provisions.[7]

This stalemate was resolved when the environment within which the negotiations took place changed. In particular, as discussed below, attitudes in host countries toward FDI became more welcoming, while developed countries initiated the negotiation of bilateral investment treaties for the protection and promotion of foreign investment, i.e., binding instruments that focus almost entirely on the responsibility of host countries. The negotiations of the UN Code fizzled out in 1992.[8]

The quest for a comprehensive United Nations Code and other instruments dealing with FDI and MNEs itself was the result of heightened awareness about the importance of FDI and issues relating to it,[9] the post-decolonization political climate of developing countries seeking a voice in shaping the international economic system and the rules governing it (especially in light of their own overriding priority, development),[10] and the new assertiveness of developing countries in the wake of OPEC's success to raise the price of oil substantially and hence assert their bargaining power.[11] As far as the specific areas of FDI and MNE activities were concerned, the cost/benefit calculation of host developing countries suggested that the negative effects of FDI and MNE activities out-weighted the positive ones and that, therefore, the responsibilities of MNEs needed to be defined and

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[7] Even if developing countries (and the socialist countries) had been more flexible on the provisions regarding treatment, international cooperation and implementation, it is not at all clear whether key developed countries would have accepted an instrument with mandatory provisions governing the activities of (mostly "their") MNEs.

[8] UNCTAD, *World Investment Report 1993: Transnational Corporations and Integrated International Production* (New York: United Nations, 1993). According to this report, "After informal consultations held from 21 to 23 July 1992, delegations concluded that, at present, no consensus was possible on the draft Code." *Id.* at 33. This brought the negotiations on the United Nations Code of Conduct on Transnational Corporations to a formal end.

[9] United Nations, *Multinational Corporations in World Development* (New York: United Nations, 1973). *See also* Richard J. Barnet and Ronald E. Mueller, *Global Reach: The Power of the Multinational Corporations* (New York: Simon & Schuster, 1974). *See also* the reference to the Hearings in footnote 5.

[10] Which found its expression, among other things, in a spade of nationalizations, especially in natural resources.

[11] This mood was captured in the well-known article by C. Fred Bergsten, entitled "One, two, many OPEC's…? The threat is real," *Foreign Policy*, Spring 1974, pp. 84-90.

enforced.[12] Accordingly, negotiations were initiated on various aspects of the FDI/MNE problematique, in various multilateral and regional fora, with a number of them leading to the eventual adoption of instruments.

Many of these negotiations were driven by (host) developing countries, supported by the socialist countries, and pursued in the United Nations system, and they sought to affirm the rights of governments vis-à-vis foreign investors or their desire to impose responsibilities on MNEs. Most noteworthy among them were the United Nations resolutions on permanent sovereignty over natural resources[13] and especially the Charter of Economic Rights and Duties of States[14] and the resolutions related to the establishment of a New International Economic Order[15] as these instruments reflected most clearly the approach of host (developing) countries. Other instruments in this category negotiated in a multilateral framework included the ILO Tripartite Declaration;[16] codes of conduct on

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[12] At least in a multilateral context. At the national level, attitudes toward FDI in many countries remained much more welcoming than the positions of the governments of these countries in multilateral fora suggested.

[13] See e.g., especially *Permanent Sovereignty over Natural Resources,* G.A. res. 1803 (XVII), 17 U.N. GAOR Supp. (No.17) at 15, U.N. Doc. A/5217 (1962) and *Permanent Sovereignty over Natural Resources of Developing Countries,* G.A. res. 3016 (XXVII), 18 December 1972, 12 ILM 226.

[14] *Charter of Economic Rights and Duties of States*, UN Doc. A/RES/29/3281(1974). Article 2(2) of the *Charter* states:

> Each State has the right:
>
> a. To regulate and exercise authority over foreign investment within its national jurisdiction in accordance with its laws and regulations and in conformity with its national objectives and priorities. No State shall be compelled to grant preferential treatment to foreign investment;
>
> b. To regulate and supervise the activities of transnational corporations within its national jurisdiction and take measures to ensure that such activities comply with its laws, rules and regulations and conform with its economic and social policies. Transnational corporations shall not intervene in the internal affairs of a host State. Every State should, with full regard for its sovereign rights, cooperate with other States in the exercise of the right set forth in this subparagraph;
>
> c. To nationalize, expropriate or transfer ownership of foreign property, in which case appropriate compensation should be paid by the State adopting such measures, taking into account its relevant laws and regulations and all circumstances that the State considers pertinent. In any case where the question of compensation gives rise to a controversy, it shall be settled under the domestic law of the nationalizing State and by its tribunals, unless it is freely and mutually agreed by all States concerned that other peaceful means be sought on the basis of the sovereign equality of States and in accordance with the principle of free choice of means.

The *Charter of Economic Rights and Duties of States* was adopted against the votes of Belgium, Denmark, the Federal Republic of Germany, Luxembourg, the United Kingdom, and the United States; Australia, Canada, France, Ireland, Israel, Italy, Japan, the Netherlands, Norway, and Spain abstained. The roll call vote is registered at 14 ILM 265 (1975).

[15] *Declaration on the Establishment of a New International Economic Order*, UN Doc. A/RES/S-6/3201 (1974), reprinted 13 ILM 715. Article 4 of the Declaration states: "The new international economic order should be founded on full respect for the following principles…. Regulation and supervision of the activities of transnational corporations by taking measures in the interest of the national economies of the countries where such transnational corporations operate on the basis of the full sovereignty of those countries…" The Declaration was adopted by the General Assembly without a vote on May 1, 1974.

[16] *International Labour Organization Tripartitie Declaration of Principles Concerning Multinational Enterprises and Social Policy*, adopted by the Governing Body of the International Labour Office at its 204th Session (Geneva, November 1977) and amended at its 279th Session (Geneva, November 2000).

restrictive business practices,[17] breast-milk substitutes,[18] consumer protection,[19] and the transfer of technology;[20] and a model convention for double taxation treaties between developed and developing countries.[21] Decision 24 of the Andean Pact[22] reflected the same spirit at the sub-regional level.

Developed (home) countries, too, were active at the multilateral level. Even before the initiative had shifted to the developing and socialist countries at the beginning of the 1970s, they had succeeded in the adoption (1965) of a convention that established the International Centre for Settlement of Investment Disputes,[23] an institution that was largely dormant until the number of international investment disputes began to rise substantially in the late 1990s. But developed countries were largely defensive, trying to limit the initiative of the developing and socialist countries by seeking to keep responsibilities of MNEs voluntary. Their only major initiative concerned the proposal for an agreement on illicit payments, proposed by the United States; but since neither the developing countries nor other developed countries were strongly supportive, this effort fizzled out as well.[24]

Available at: http://www.ilo.org/public/english/employment/multi/download/english.pdf. The ILO Declaration contains also references to (already existing) binding instruments.

[17] UNCTAD, *The Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices*, UN doc. TD/RBP/CONF/10/Rev.1 (1981). The Set of Principles and Rules was adopted by the United Nations Conference on Restrictive Business Practices on April 22, 1980 and by the General Assembly in resolution 35/63 on December 5, 1980. Subsequently, UNCTAD convened United Nations Conferences to Review All Aspects of the Set. These documents are available at: http://www.unctad.org/en/docs/tdrbpconf10r2.en.pdf.

[18] World Health Organization, *International Code of Marketing of Breast-milk Substitutes* (1981). The Code was adopted by the Thirty-fourth World Health Assembly by resolution WHA34.22 on May 21, 1981. These documents are available at: http://www.who.int/nutrition/publications/code_english.pdf.

[19] *Guidelines for Consumer Protection*, adopted by the United Nations General Assembly Resolution 39/248 on April 9, 1985.

[20] The *Draft International Code of Conduct on the Transfer of Technology* was negotiated between 1976 and 1985. It has not been adopted by the United Nations General Assembly. The text of the draft is available at: http://stdev.unctad.org/compendium/documents/totcode%20.html.

[21] *United Nations Model Double Taxation Convention between Developed and Developing Countries*, adopted by the Committee of Experts on International Cooperation in Tax Matters in 1979. This model specifically addresses the experts' concerns that the 1963 OECD Model Convention on Income and on Capital, which involves drastic reductions in withholding taxes, would not be appropriate for capital importing countries (because these have to reduce their withholding taxes and do not benefit from the reciprocal reduction in the capital exporting country's withholding tax because their residents do not invest much overseas). It was last updated in 2000. The recent trend has been for the UN model to converge toward the OECD model. I thank Reuven Avi-Yonah for pointing this out.

[22] "*Decision 24: Common Regime of Treatment of Foreign Capital and of Trademarks, Patents, Licenses, and Royalties*," Nov. 30, 1976, 16 I.L.M. 138 (1977).

[23] *Convention on the Settlement of Investment Disputes between States and Nationals of Other States*, entered into force on October 14, 1966, available at: http://icsid.worldbank.org/ICSID/ICSID/RulesMain.jsp. Several years earlier, in 1958, the *Convention on the Recognition and Enforcement of Foreign Arbitral Awards* (the "New York Convention") was adopted by the United Nations Conference on International Commercial Arbitration. It entered into force on June 7, 1959.

[24] See brief history and text of the *Draft International Agreement on Illicit Payments* at http://www.unctad.org/sections/dite/iia/docs/Compendium//en/9%20volume%201.pdf. The draft was put before the General Assembly in 1979, but the General Assembly took no action.

At the regional level, however, the developed countries adopted (1976) the OECD Declaration on International Investment and Multinational Enterprises.[25] It consisted of four elements, each underpinned by a Decision by the OECD Council on follow-up procedures, related to guidelines for multinational enterprises, national treatment, conflicting requirements, and international investment incentives and disincentives. Although this instrument was adopted within a relatively like-minded group of countries ("relatively" because especially Australia and Canada also paid attention to their status as host countries), it reflected the tensions identified earlier in the North-South context, as well as a trade-off between the treatment of foreign investors and the desire to regulate the activities of MNEs, with the guidelines being strictly voluntary, although monitoring and review arrangements were made. Since the Declaration was adopted after the NIEO resolutions were passed and before the negotiations on a United Nations Code of Conduct began, it prepared the developed countries for those negotiations and signaled that, if they would agree to anything at all, it would have to be in the context of a package addressing the rights and responsibilities of host countries and MNEs, with the responsibilities of MNEs being voluntary.[26]

b. The mid-1980s until the early 2000s: Focus on the responsibilities of host countries and the rights of MNEs

If the objectives of the developing (host) countries drove the international investment-agreements making efforts during the 1970s, the initiative shifted to the developed countries around the middle of the 1980s. Negotiations on virtually every instrument that had not been concluded by then were eventually abandoned, most notably among them (as already mentioned) the United Nations Code of Conduct. The window of opportunity closed for those governments that sought a stronger regulation of the role of MNEs.

The second oil-price shock in 1979 had been absorbed, and the price of oil was actually falling, while the organization of producer cartels was not successful, weakening the actual and psychological bargaining power of developing countries. The debt crisis that began in the early 1980s[27] not only further undermined the bargaining power of the developing world, but actually led to a greater appreciation for the benefits of long-term capital as embodied in FDI. Later on, the disintegration of the socialist camp deprived developing countries of an important ally. Most importantly, the benefits of FDI came to be more appreciated, and countries had learned, at least to a certain extent, how to benefit

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[25] OECD, *Declaration on International Investment and Multinational Enterprises* (Paris: OECD, 1976).

[26] It should be noted in this context that the OECD countries had agreed much earlier among themselves on instruments liberalizing capital movements and invisible transactions (OECD, *Code of Liberalisation of Capital Movements,* and OECD, *Code of Liberalisation of Current Invisible Operations*, both adopted in 1961).

[27] In August 1982, Mexico's finance minister informed the chairperson of the Federal Reserve, the U.S. Treasury Secretary and the IMF Managing Director that Mexico would be unable to meet its obligation to service its debt that month. By October 1983, 27 countries had rescheduled their debts, and more followed. *See* Federal Deposit Insurance Corporation, *History of the Eighties—Lessons for the Future. Volume 1: An Examination of the Banking Crisis of the 1980s and Early 1990s*, at 191, available at: http://www.fdic.gov/bank/historical/history/191_210.pdf (last visited March 16, 2011)**.**

more from such investment. The general acceptance of market-based development, as promoted in the framework of the Washington Consensus,[28] provided the overall framework for a change in approach toward FDI and the activities of MNEs.

As the benefits of FDI came to be seen as out-weighing its costs (and the costs could be reduced through appropriate policies), the cost/benefit calculation of host developing countries changed. With it, the approach of developing countries (and eventually also that of the formerly socialist countries) to the regulatory framework for FDI changed, from controlling MNEs to attracting FDI. Red carpets replaced red tape, as well as the laws, regulations and mechanisms that had been put in place to control MNEs. This occurred both at the national and international levels.

At the national level, countries (and not only developing ones) moved strongly – some more, some less --in the direction of creating a more welcoming framework for FDI. While systematic data are not available for the 1980s, they do exist for regulatory changes beginning in 1992. In particular, out of 2,748 changes in national FDI laws in countries across the world between that year and the end of 2009, 89 percent made the investment climate more welcoming for foreign direct investors (table 2). A good part of the changes involved the reduction or elimination of entry conditions for MNEs, facilitating their operations and offering incentives for foreign investors.

Table 2. National regulatory changes, 1992-2009

Item	1992	1993	1994	1995	1996	1997	1998	1999	2000	2001	2002	2003	2004	2005	2006	2007	2008	2009
[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
Number of regulatory changes	77	100	110	112	114	150	145	139	150	207	246	242	270	203	177	98	106	102
[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
Regulations/restrictions	-	1	2	6	16	16	9	9	3	14	12	24	36	41	35	24	23	31

Source: UNCTAD, *World Investment Report 2010: Investing in a Low-Carbon Economy* (New York and Geneva: UNCTAD, 2010), p. 77.

Beginning in the 1990s, furthermore, countries not only sought to make the investment climate more welcoming, but they also made active and increasing efforts to attract FDI. The instrument of choice became investment promotion agencies (IPAs). Eventually, nearly all countries established such agencies, increasingly also at the sub-national level. In 1995, the World Association of Investment Promotion Agencies was set up, whose membership had grown to 249 by March 2011, from 157 countries.[29] Worldwide, an estimated 8,000 government agencies at the national and sub-national levels have the mandate to attract foreign investors.[30] Among the various instruments IPAs use for this

[28] John Williamson coined the phrase in 1990 "to refer to the lowest common denominator of policy advice being addressed by the Washington-based institutions to Latin American countries as of 1989." John Williamson, "What should the World Bank think about the Washington Consensus?" *World Bank Research Observer*, Vol. 15, No. 2 (August 2000), pp. 251-264.
[29] See http://www.waipa.org/why.htm (last accessed March 16, 2011).
[30] See, Millennium Cities Initiative and Vale Columbia Center on Sustainable International Investment, *Handbook for Promoting Foreign Direct Investment in Medium-size, Low-budget Cities in Emerging Markets* (New York: MCI and VCC, 2009), p. 1, available at www.vcc.columbia.edu. For a review of the

purpose are investment incentives, whose incidence and importance have risen substantially over the past two decades. As a result, the world market for FDI has become highly competitive.

It is against this background of a changing cost/benefit calculation and the nature of the regulatory changes at the national level that international investment rule-making continued, but now with developed countries in the driver's seat. In line with the objectives of developed (home) countries, efforts to define and enforce the responsibilities of MNEs were largely abandoned. Instead, the focus shifted toward countries assuming binding responsibilities for the treatment (and especially the protection) of foreign investors, further strengthened by procedural rights that provided for investor-State dispute settlement in case investors felt aggrieved by host country governments; moreover, host countries increasingly also assumed commitments (although hesitantly) regarding the improvement of conditions governing the entry and operations of MNEs. In other words, the pervasive liberalization trend at the national level became complemented by the rapid rise of international investment agreements (IIAs) (i.e., agreements that, in one way or another, address FDI matters in a substantial manner, with bilateral investment treaties most prominent among them), with these agreements focusing on the protection of investors and also the liberalization of the conditions for their operations. The international investment regime that is a result of this development has become an important parameter for national policy making.

There remains however an important difference between the extent to which developing countries were prepared to assume commitments at the multilateral level, compared to the regional and bilateral levels.

At the multilateral level, the most important successes of the developed countries included agreement on the Multilateral Investment Guarantee Agency (MIGA) (1985),[31] the General Agreement on Trade in Services (GATS)[32] and the Agreement on Trade-Related Investment Measures (TRIMs),[33] the latter two negotiated in the framework of the Uruguay Round of GATT (concluded in 1994). On the other hand, efforts to formulate Guidelines on the Treatment of Foreign Direct Investment (1992),[34] undertaken in the framework of the World Bank Group, yielded only a voluntary instrument. The effort, especially of the European Union and Japan, to include investment in the negotiations of the WTO Doha Round (launched in 2001) (as part of the "Singapore issues") yielded a mandate[35] to clarify key elements of an eventual multilateral

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performance of these agencies at the national level, see IFC, *Global Investment Promotion Benchmarking 2009: Summary Report* (Washington, DC: World Bank, 2009).

[31] *Convention Establishing the Multilateral Investment Guarantee Agency*, 24 ILM 1598 (1985).

[32] *General Agreement on Trade in Services* (GATS), 1869 UNTS 183; 33 ILM 1167 (1994). This agreement is particularly important, as FDI in services accounts for the bulk of FDI flows and stock.

[33] *Agreement on Trade-Related Investment Measures* (TRIMs), 1868 UNTS 186.

[34] World Bank Report to the Development Committee and Guidelines on the Treatment of Foreign Direct Investment 21 September 1992, published as *Legal Framework for the Treatment of Foreign Direct Investment* (Volume II, Guidelines) (World Bank, 1992), reproduced as 21 ILM 1363 (1992).

[35] Paragraph 20 of the Singapore Ministerial Declaration reads:

framework on investment and to move to formal negotiations after the Cancun Ministerial Conference of the WTO (2003); but failure to reach consensus at that Conference led to the discontinuation of further discussions of investment in the WTO – at least for the time being.

In all these instances, it was the opposition of developing countries that prevented more far-reaching agreements: they resisted, where they could, the assumption of greater binding responsibilities *vis-à-vis* foreign investors that would reduce their national policy space and limit their right to regulate – mirroring in this manner the efforts of developed countries during the 1970s to limit the imposition of responsibilities on MNEs. The agreement to establish the Multilateral Investment Guarantee Agency (MIGA) was adopted (at the time of the debt crisis) because it limits itself to offering FDI insurance to MNEs from developed and developing countries, i.e., it did not contain standards of treatment.[36] The GATS and TRIMs Agreement were opposed by developing countries, but became part of a broader trade-off in the framework of the Uruguay Round; besides, GATS most notably adopted a positive list approach to scheduling commitments (which allows countries to enter into commitments on a sector-by-sector basis when they see fit to do so), while the TRIMs Agreement was restricted to clarifying the application of existing GATT Articles (III and IV) to four performance requirements. The World Bank effort remained voluntary as it was judged, from the beginning, that a mandatory effort

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> Having regard to the existing WTO provisions on matters related to investment and competition policy and the built-in agenda in these areas, including under the TRIMs Agreement, and on the understanding that the work undertaken shall not prejudge whether negotiations will be initiated in the future, we also agree to:
>
> - Establish a working group to examine the relationship between trade and investment
> - …… These groups shall draw upon each other's work if necessary and also draw upon and be without prejudice to the work in UNCTAD and other appropriate intergovernmental fora. As regards UNCTAD, we welcome the work under way as provided for in the Midrand Declaration and the contribution it can make to the understanding of issues. In the conduct of the work of the working groups, we encourage cooperation with the above organizations to make the best use of available resources and to ensure that the development dimension is taken fully into account. The General Council will keep the work of each body under review, and will determine after two years how the work of each body should proceed. It is clearly understood that future negotiations, if any, regarding multilateral disciplines in these areas, will take place only after an explicit consensus decision is taken among WTO Members regarding such negotiations.

World Trade Organization, *Singapore Ministerial Declaration*, 13 December 1996.

[36] MIGA offers political insurance to enterprises from its 173 members (148 of which are developing countries) for investments in developing countries against risks, such as expropriation, war and civil unrest, transfer restrictions, and breach of contract. The investors must be nationals of members other than the country. *See*: http://www.miga.org/guarantees/index_sv.cfm?stid=1547. The MIGA Convention does however specify that members recognize subrogation (Art. 18 (b) and it refers to expropriation and similar measures under covered risks (Art. 11). In Art. 12 (d), in the context of "eligible investments", the Convention specifies: "In guaranteeing an investment, the Agency shall satisfy itself as to: (i) the economic soundness of the investment and its contribution to the development of the host country; (ii) compliance of the investment with the host country's laws and regulations; (iii) consistency of the investment with the declared development objectives and priorities of the host country; and (iv) the investment conditions in the host country, including the availability of fair and equitable treatment and legal protection for the investment."

would not be successful.[37] And the attempt to launch negotiations on a multilateral investment framework in the WTO had faced, from the beginning, the resistance of key developing countries (although it was supported by others), and eventually was abandoned in the context of stalled progress of the overall Doha Round, among other reasons, because the benefits of a multilateral approach had not been demonstrated, while the costs of a multilateral agreement (in terms of having to enter binding commitments regarding the treatment of foreign investors, possibly coupled with cross-retaliation in cases of infringements) were clear. The WTO exercise, moreover, followed the aborted attempt of developed countries to negotiate -- among themselves, in the framework of the OECD -- a Multilateral Agreement on Investment, an effort that was abandoned in 1998 for lack of consensus among the negotiating parties – not because the stumbling block was the trade off between rights and responsibilities of countries and firms, but because, at the bottom, key constituencies did not see the benefit of a compromise that left out developing countries while adding little to the already existing framework among developed countries.[38]

At the regional and bilateral levels, however, the regulatory framework for international investment developed rapidly, focusing almost entirely, in a mandatory manner, on the responsibilities of host countries *vis-à-vis* MNEs. Developing countries were willing to enter into commitments at these levels since they did that in the context of trade-offs in specific regional settings and since, in the context of bilateral agreements, they could protect themselves through exceptions. Moreover, in their efforts to attract FDI in competition with other countries, they were individually prepared to grant rights that they were not willing to grant multilaterally.[39]

As a result, bilateral treaties for the promotion and protection of investment (BITs) proliferated rapidly (figure 1).[40] They are complemented by bilateral and regional free trade agreements containing substantial investment commitments (figure 1); most modern free trade agreements are also free investment agreements. (Double taxation treaties (DTTs) are also of immediate relevance to foreign investors.) Collectively, these agreements, including regional and multilateral agreements covering investment, are referred to here as "international investment agreements" (IIAs).[41]

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[37] Communication by Antonio Parra.

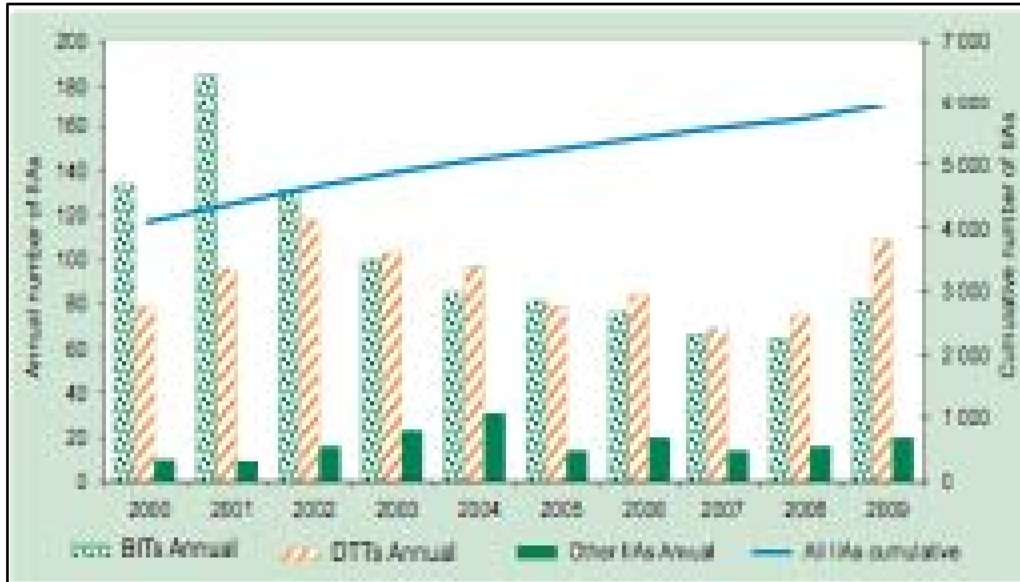
[38] The documentation of the MAI negotiation process is available on the OECD website. See http://www.oecd.org/daf/mai/ (last visited May 11, 2009). See also Edward Montgomery Graham, *Fighting the Wrong Enemy: Antiglobal Activists and Multinational Enterprises* (Washington DC: Peterson Institute for International Economics, 2000) and UNCTAD, "Lessons from the MAI," *UNCTAD Series on Issues in International Investment Agreements* (New York and Geneva: UNCTAD, 1999), available at: http://www.unctad.org/en/docs/psiteiitm22.en.pdf.

[39] *See* Andrew T. Guzman, "Why LDCs sign treaties that hurt them: explaining the popularity of bilateral investment treaties," *Virginia Journal of International Law,* vol. 38 (1998), pp. 639-688.

[40] For the most comprehensive database on BITs, see UNCTAD, http://www.unctad.org/iia.

[41] Important also are double taxation treaties, of which there were 2,894 in existence at the end of 2009. *See*, UNCTAD, *World Investment Report 2010: Investing in a Low-Carbon Economy* (New York and Geneva: UNCTAD, 2010), p. 81.

Figure 1. Trends of BITs, DTTs and other IIAs, 2000-2009 (Number)



Source: UNCTAD, *World Investment Report 2010: Investing in a Low-Carbon Economy* (New York and Geneva: UNCTAD, 2010), p. 82.

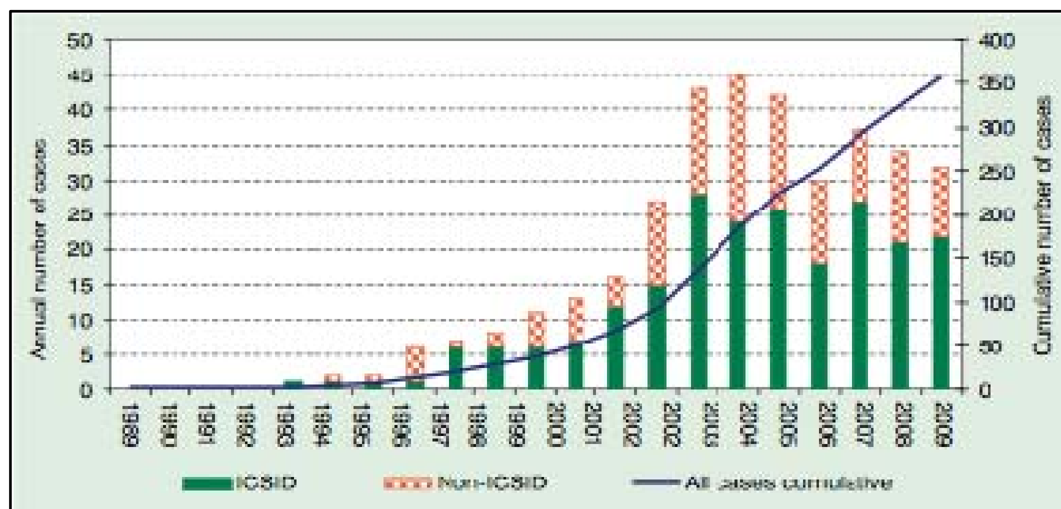
The first BIT was signed in 1959.[42] By the end of 1970, only 53 BITs had been signed (although many of them were still relatively weak -- compared to now -- in terms of protections and dispute settlement). Their number began to grow slowly during the 1970s (when 71 BITs were signed), blossomed during the 1980s (when 243 BITs were signed) and really took off in the 1990s (between 1991 and the end of 2000, 1,549 treaties were signed),[43] for a total of 2,750 BITs at the end of 2009, involving 179 countries.[44] At the beginning, and especially during the 1970s, BITs were partly meant to counteract the efforts of developing (and socialist) countries to weaken customary international investment law. Since then, they have become – by design -- the most important international instruments for the protection of international investment as they enshrine key protection standards in legally binding international agreements. The most significant of these are national and most-favored-nation treatment, fair and equitable treatment, protections against expropriation (and the payment of compensation in case they should occur under specified conditions), transfer of funds, and access to international arbitration when disputes occur. All of them impose binding obligations on countries in their capacity as host countries.

[42] Between the Federal Republic of Germany and Pakistan. Before that, investment issues were dealt with in the context of such treaties as the Friendship, Commerce and Navigation treaties of the U.S. BITs essentially took out the investment issue from these treaties and dealt with them in separate treaties, which, by now, have become substantial and detailed legal documents. The US Model BIT, for example, grew from 18 pages in 1984 to 40 pages in 2004.
[43] See UNCTAD, *Bilateral Investment Treaties 1959-1999* (New York and Geneva: United Nations, 2000), available at: http://www.unctad.org/en/docs/poiteiiad2.en.pdf.
[44] UNCTAD, [44] UNCTAD, www.unctad.org/iia

Free trade and investment agreements often contain various protection standards, but may also prescribe a liberalization of the investment framework. As of the end of 2009, 295 such agreements had been signed, and many more were under negotiation. Some relatively recent BITs, too, go beyond protection and contain liberalization provisions, especially regarding entry and operational conditions for MNEs. The United States, Canada and Japan lead in this respect.

The effectiveness of IIAs in terms of protecting foreign investors has risen with the active utilization of the investor-State dispute-settlement mechanism that most of them have. There were few international investor-State arbitrations during the 1980s and the first half of the 1990s (figure 2). By the end of 2009, however, at least 357 known[45]

Figure 2. Known investment treaty arbitrations, cumulative and newly instituted cases, 1989–2009



Source: UNCTAD, *World Investment Report 2010: Investing in a Low-Carbon Economy* (New York and Geneva: UNCTAD, 2010), p. 84.

international treaty-based arbitration cases had been initiated.[46] Some two-thirds arose before the International Centre for Settlement of Investment Disputes (ICSID), the rest in other institutions. At least 81 countries, led by Argentina (table 3), are (or had been) respondents by the end of 2009. Governments from all groups of countries were (or had been) respondents: 49 governments of developing countries, 17 of developed ones and 15

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[45] Only ICSID reports the number of cases; hence the actual number of disputes is likely to be higher. The following data are from UNCTAD, *World Investment Report 2010*, op. cit. (UNCTAD has the most comprehensive database on international investment disputes.) For a discussion of the reasons for this explosion of investment disputes, see Jeswald W. Salacuse, "Explaining the increased recourse to treaty-based investment dispute settlement," in Karl P. Sauvant with Michael Chiswick-Patterson, eds., *Appeals Mechanism in International Investment Disputes* (New York: Oxford University Press, 2008), pp. 105–126.

[46] According to UNCTAD, 78% of the known cases had been initiated (by the end of 2007) on the basis of an alleged violation of a BIT provision, followed by 14% under NAFTA and 6% under the Energy Charter Treaty. *See* UNCTAD, "The development dimension of international investment agreements," doc. TD/B/C.II/MEM.3/2, December 2, 2008, p.6.

of economies in transition. Although the great majority of disputes were initiated by MNEs from developed countries, firms from emerging markets are increasingly becoming active as well.[47] UNCTAD reports that, out of the 164 cases concluded by the end of 2009, 62 were decided in favor of the State and 47 in favor of the investor.[48] These disputes can be quite costly, both as far the awards are concerned[49] and the costs of litigation.[50] They cover a wide range of issues.[51]

Table 3. Leading respondents in international investment disputes, status December 2008

Country	Cases
Argentina	48
Mexico	18
Czech Republic	15
Ecuador	14
Canada	13
United States	12
Ukraine	11
Poland	10
Egypt	9
India	9
Venezuela	9
Russian Federation	8

Source: UNCTAD, "Latest developments in investor-State dispute settlement," *IIA Monitor No. 1 (2009)*, UNCTAD/WEB/DIAE/IIA/2009/6, available at: http://www.unctad.org/en/docs/webdiaeia20096_en.pdf

The number of disputes may not appear high. However, it needs to be considered that the majority of the cases were only initiated recently: over half during 2005–2009; in other

[47] For example, by investors from Chile, China, Egypt, India, Malaysia, Oman, Peru, Russia, and Singapore, accounting for about one-tenth of all disputes. Information from UNCTAD.
[48] UNCTAD, *World Investment Report 2010*, op. cit., p. 83. Fifty-five cases were settled.
[49] *See* Susan D. Franck, "Empirically evaluating claims about investment treaty arbitration," *North Carolina Law Review*, vol. 86 (2007), pp. 1-89, 58. The lowest damage award (aside from cases that resulted in no damages) was US$ 24,603, and the highest, US$ 269,814,000; *id*., pp. 58–59. The average figure given in the text includes awards of zero dollars. See, however, the critique by Gus van Harten of the methodology used by Franck in: "The use of quantitative methods to examine possible bias in investment arbitration", in Karl P. Sauvant, ed., *Yearbook on International Investment Law and Policy 2010-2011* (New York: Oxford University Press, 2011 forthcoming).
[50] The costs of litigation of individual cases can be several million dollars.
[51] *See* Ian A**.** Laird and Borzu Sabahi, "Trends in international investment disputes: 2007 in review," in Karl P. Sauvant, ed., *Yearbook on International Investment Law and Policy 2008-2009* (New York: Oxford University Press, 2009), pp. 79-116; Ian A. Laird, Borzu Sabahi, Frederic G. Sourgens, and Sobia Haque, "International investment law and arbitration: 2008/2009 in review", in Karl P. Sauvant, ed., *Yearbook on International Investment Law and Policy 2009-2010* (New York: Oxford University Press, 2010), pp. 87 - 176; and Ian A. Laird, Borzu Sabahi and Frederic G. Sourgens, "International investment law and arbitration: 2009/2010 in review", in *International Investment Yearbook 2010-2011, op cit. See also* UNCTAD, *Investor-State Disputes Arising from Investment Treaties: A Review* (New York and Geneva: UNCTAD, 2006).

words, the number of disputes has only recently taken off (even if Argentina were to be excluded), and they involve a great number of countries. This compares to 91 panel reports issued under Article XXIII of the GATT[52] between 1948 and the end of 1994, and 161 panels established by the Dispute Settlement Body under the WTO between the beginning of 1995 and November 24, 2008.[53] It must be noted, however, that only States can bring disputes in the GATT/WTO, whereas all of the investment disputes reported here were brought by investors.[54] In fact, there is considerable potential for a substantial further increase in the number of investment disputes, if one considers that there are over 3,000 IIAs[55] (and even more if one takes the relationships into account that are established by regional, inter-regional or multilateral investment agreements), most of which contain dispute-settlement provisions; and that there are a great number of MNEs and foreign affiliates worldwide, most of which, depending on the applicable treaty language, could in principle initiate an international arbitration case if they feel aggrieved.[56] As José Alvarez put it: "What this means is that, unlike the case with the WTO, which relies on member states to file claims against one another, the investment regime is enforced by the roughly 77,000 parent firms or MNCs that engage in FDI. These firms, not their home states, are the regime's private attorneys general."[57] The rise of investment disputes reflects the confidence of international investors to stand up for what they consider to be their rights under international investment agreements.

4. Toward rebalancing

The late 1990s and early 2000s marked the high-water mark of the creation of an investment environment favorable for MNEs and FDI. Led by the developed countries, virtually all countries had liberalized, albeit to various degrees, their national regulatory regimes for FDI and strengthened the protection of foreign investors by enshrining it in binding international treaties that define the responsibilities of host countries and the rights of foreign investors. This opened markets for foreign investors and made it safer for them than at any time in the recent past to establish themselves abroad.

As a result, the international investment law regime has never been stronger than today as far as investors are concerned. To quote Jeswald Salacuse and Nicholas Sullivan: "In most cases, a foreign investor benefiting from a BIT may now look to a comprehensive, specific, and largely uncontested set of international legal rules, with recourse to

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[52] Note that several panel reports were not adopted. There were also 24 panel reports issued under the Tokyo Round Codes; many of these were not adopted either. Information provided by the WTO.
[53] A total of 199 disputes were covered by the 161 panels established. Of these disputes, 87 were resolved with mutually agreed solutions or were withdrawn, and 118 panel reports were adopted. Information provided by the WTO.
[54] There are also a handful of disputes before ICSID brought by States that are based on contracts (as opposed to treaties).
[55] DTTs excluded.
[56] Depending on treaty language, individual shareholders may be entitled to initiate disputes as well.
[57] José E. Alvarez, "Contemporary foreign investment law: An empire of law or the law of empire -- Meador Lecture Series 2007-2008: Empire," *Alabama Law Review*, vol. 60 (2009), pp. 943-976.

international tribunals for enforcement."[58] This, they continued, compares with a situation, some 30 yeas ago, when "foreign investors who sought the protection of international investment law encountered an ephemeral structure consisting largely of scattered treaty provisions, a few questionable customs, and contested general principles of law."[59] In fact, Thomas W. Wälde asserted:

> Investment treaties…have built, indubitably, one of the most effective and truly legal regimes within the fragmented and mostly quite rudimentary institutional frameworks for the global economy. Comparable in terms of legal character and effectiveness to the WTO regime, the international investment regime is arguably more advanced, as it fully incorporates the most important and directly affected non-state actors. In a longer-term perspective, claimants (and their lawyers), who are essentially driven by private interests, help ensure greater compliance and effectiveness for the treaties and their underlying objectives than can or is achieved by exclusively inter-state implementation procedures. It also goes beyond the prospective-remedy-only sanction available under the WTO.[60]

And he added: "Investment arbitration is arguably the most astounding success in international law over the past decades…"[61]

At the same time, as argued in the following sections, countervailing forces were and are at work. An increasing number of commentators[62] see the international investment law and policy regime in need of rebalancing as far as its orientation is concerned and in need

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[58] Jeswald W. Salacuse and Nicholas P. Sullivan, "Do BITs really work: An evaluation of bilateral investment treaties and their grand bargain", *Harvard International Law Journal,* vol. 46 (2005), pp. 67-130, 70.
[59] Ibid, p. 71.
[60] Thomas W. Wälde, "Improving the mechanisms for treaty negotiation and investment disputes: competition and choice as the path to quality and legitimacy," in *International Investment Yearbook 2008-2009*, op. cit., pp. 505-584, 514.
[61] Ibid., p. 543.
[62] One of the first to suggest this was José E. Alvarez, *see* José E. Alvarez, "Remarks", *American Society of International Law, Proceedings of the 86th Annual Meeting*, Apr. 1-4, 1992, at 550-555 (1992). *See also*; Joseph E. Stiglitz, "Regulating multinational corporations: towards principles of cross-border legal frameworks in a globalized world balancing rights with responsibilities," *American University International Law Review*, vol. 23, issue 3 (2008), pp. 451-558; Gus van Harten, *Investment Treaty Arbitration and Public Law* (New York: Oxford University Press, 2007); José E. Alvarez, "The evolving foreign investment regime," http://www.asil.org/ilpost/president/pres080229.html; José E. Alvarez, "The once and future foreign investment regime," in Mahnoush H. Arsanjani, Jacob Katz Cogan, Robert D. Sloane, and Siegfried Wiessner, eds., *Looking to the Future: Essays on International Law in Honor of W. Michael Reisman* (Leiden and Boston: Brill Martinus Nijhoff, 2010); Peter Muchlinski, *Multinational Enterprises and the Law*, *second edition* (Oxford: Oxford University Press, 2007); M. Sornarajah, *The International Law of Foreign Investment, second edition* (Cambridge: Cambridge University Press, 2004); M. Sornarajah, "A coming crisis: expansionary trends in investment treaty arbitration," in Sauvant with Chiswick-Patterson, op. cit., pp. 39-80; and Brigitte Stern, "The future of international investment law: a balance between the protection of investors and the states' capacity to regulate," in José E. Alvarez and Karl P. Sauvant, with Kamil Gérard Ahmed and Gabriela del P. Vizcaino, eds., *The Evolving Investment Regime: Expectations, Realities, Options* (New York: Oxford University Press, 2011). Of course, there are differences between these various authors. For example, some call for radical changes, while others focus on specific aspects.

of improvement as far as its operation is concerned, and this issue is also on the political agenda.[63] In particular, the question of the proper balance between the rights and responsibilities of host countries and MNEs is back on the agenda, as is the question of what form this should take. This, in turn, is embedded in the broader issue of a certain re-evaluation of the costs and benefits of FDI and hence the interest situations of countries and the objectives they pursue, as well as changing policy approaches to FDI at the national level.

a. Changes at the national level

To be sure, individual countries continue to liberalize their FDI regulatory frameworks, actively seek to attract foreign investors and further conclude IIAs with strong protection standards and liberalizing provisions. And it may well be that governments, needing to increase investment to come out of the recession, will even double their efforts in this respect, at least during the next few years.

However, as mentioned earlier in this chapter, the attitudes of governments vis-à-vis FDI are the result of an explicit or implicit calculation of the costs and benefits of such investment, including those of a non-economic nature. For governments, FDI is first of all a tool that helps them to advance their countries' economic development. It is welcome as long as its benefits outweigh its negative effects. During the past 25 years or so, this calculation ended in favor of a positive contribution of FDI – hence the regulatory developments as described above.

This calculation is changing as a number of governments are re-evaluating the costs and benefits of FDI in general and those of cross-border M&As in particular.[64] This is all the more important, as M&As are the preferred[65] form of market entry for MNEs. Suspicion can be particularly high when M&As are undertaken by private equity funds, by emerging market MNEs (which, as shown earlier, are increasingly investing abroad) and,

[63] See the reference to the May 2009 Hearings in the Trade Subcommittee of the Ways and Means Committee of the House of Representatives of the US Congress, referred to below.

[64] One cannot, however, say that cross-border M&As are now typically resisted: the bulk of M&As are normal commercial transactions (with the only principal constraining consideration being M&As that have anti-competitive implication) that receive little attention. But it is indicative that a 2007 Economist Intelligence Unit survey of 258 senior executives across Asia found that the United States (24%), China (23%), and France (13%) are regarded as the countries most likely to block M&As because of strategic and political concerns (see Norton Rose, *Cross-border M&A: the Asian Perspective*, Economist Intelligence Unit and Norton Rose (2007) p. 4). In a survey conducted for another report, respondents expressed considerable concern about possible protectionism in a number of emerging-market regions. Among developed countries, France and the United States again were the two countries that stood out in terms of concern about attitudes of officials to FDI (see Laza Kekic and Karl P. Sauvant, eds., *World Investment Prospects to 2011: Foreign Direct Investment and the Challenge of Political Risk* (Economist Intelligence Unit and Columbia Program on International Investment, 2007)).

[65] It is difficult to calculate what share of FDI flows is accounted for by cross-border M&As. It is popular to calculate this share by dividing the value of cross-border M&As by the total value of FDI inflows. However, this is faulty as cross-border M&As can be financed from sources other than FDI, especially funds raised locally or on international capital markets. Dividing the value of cross-border M&As by FDI flows would yield the maximum share and would yield a correct result if, and only if, all M&As were financed by FDI – which, at least for developed markets with deep capital markets, is not the case.

especially, by sovereign investors from emerging markets (including sovereign wealth funds), which are also increasingly investing abroad.[66] Add to that the dissatisfaction of some governments with the distribution of benefits related to FDI, most notably in the natural resources sector.[67] Overarching all these concerns is the desire to control one's own economic development, at least to the extent that this is possible in a globalizing world economy.[68]

Economic and non-economic objectives are intertwined, typically captured by the general concept of "national interests" (or similar concepts, such as "national security" or "essential security interests"), a concept that is tightly linked to strategic sectors and national champions, and can trump all other considerations. Advanced especially by developed countries,[69] these are vague concepts, typically not defined precisely.[70] What is common to these concepts is that they give governments of host countries discretion to limit the applicability of national laws and regulations and international agreements relating to investment under certain circumstances. They can also lend themselves to misuse for protectionist purposes.

For the United States, which has been preoccupied with terrorism in a post-9/11 world, "national interest" has primarily military and strategic political connotations—as with the Dubai Ports World and CNOOC cases.[71] However, the US is also suspicious of sovereign FDI in general, particularly when it originates in a country considered to be potentially unfriendly or a strategic competitor.[72] For the European Union, Japan, and a number of

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[66] For example, outward FDI from China doubled from 2007 to 2008, to US$ 52 bn. Some 80-90% of China's outward FDI is undertaken by State-owned enterprises (Leonard K. Cheng and Zihui Ma, "China's outward FDI: Past and future" (July 2007), at http://www.nber.org/books_in_progress/china07/cwt07/cheng.pdf). For a discussion of the concerns regarding sovereign FDI, see Karl P. Sauvant, Lisa E. Sachs and Wouter P.F. Schmit Jongbloed, eds., *Sovereign Investment: Concerns and Policy Reactions* (New York: Oxford University Press, forthcoming).

[67] To a certain extent, this is a cyclical phenomenon: when demand for raw materials is high, producer host countries seek a larger share of the rent; when demand is low, their bargaining power declines.

[68] For an elaboration of these various concerns, see Karl P. Sauvant, "Driving and countervailing forces: A rebalancing of national FDI policies," in *International Investment Yearbook 2008-2009*, op. cit., pp. 215-272.

[69] In their Declaration at the 2007 Heiligendamm summit, the G8 noted in para. 11: " […] we remain committed to minimize any national restrictions on foreign investment. Such restrictions should apply to very limited cases which primarily concern national security." *See* Group of 8, "Growth and Responsibility in the World Economy: Summit Declaration", June 7, 2007, available at www.g-8.de/Content/EN/Artikel/__g8-summit/anlagen/2007-06-07-gipfeldokument-wirtschaft-eng,property=publicationFile.pdf.

[70] *Id*. For example, the G8 provided only general principles that need to be observed in relation to national security, namely: "nondiscrimination, transparency and predictability".

[71] But even this approach can be quite broad, as "critical infrastructure" is part of the review process by CFIUS of incoming M&As; it includes "systems and assets, whether physical or virtual, so vital to the United States that the incapacity or destruction of such systems or assets would have a debilitating impact on national security.." Exon-Florio Statute (50 USC App. § 2170) as amended by Pub. L. 110-49 (2007) (the Foreign Investment and National Security Act of 2007, or "FINSA") at §(1)(a)(6).

[72] Thus, the US Foreign Investment and National Security Act foresees that an M&A in the US by a state-controlled entity notified to the Committee on Foreign Investment in the United States is subject to an investigation, unless specifically exempted from such a review. See *The Foreign Investment and National Security Act of 2007* (FINSA), Pub. L. 110-49 (2007), amended the *Omnibus Trade and Competitiveness*

developing countries, "national interest" has a strong economic dimension and easily blends with considerations of strategic industries and national champions;[73] but the European Union also keeps an eye on political/military interests, especially when it comes to incoming FDI undertaken by state-owned enterprises and sovereign wealth funds, i.e. sovereign FDI. In developing countries, the concept of "economic security" is gaining currency. As with its military and strategic-political counterparts, this concept is vague and its boundary lines are unclear. It focuses on promoting economic development, including encouraging key industries, maximizing the positive contributions of FDI and the activities of MNEs and minimizing any negative impacts, and protecting viable (or potentially viable) domestic firms. But the concept has also been evoked in China in the context of the dispute between Groupe Danone and Wahaha, a local soft-drink producer, as Wahaha is one of the country's best-known brand names.[74]

It is a reflection of the changing attitudes toward FDI, the associated cost/benefit calculations and the changing interest-situations of various countries, that national FDI regulations have become less welcoming in a number of countries. More specifically, although the liberalization and promotion trend remains dominant, there has been a marked rise in the number of regulatory changes *unfavorable* to foreign investors since the beginning of the 2000s: compared with 6 percent of all regulatory changes over the 11-year period between 1992 and 2002 that were unfavorable, that percentage rose to 12 percent of all changes in 2003-2004, 20 percent during 2004-2006, 23 percent during 2007-2008, and reached 30 percent in 2009 (table 2). This change has been particularly marked in Latin America: 60 percent of the regulatory changes occurring in that region in 2007 disfavored FDI (figure 3). During 2006–2007, the countries worldwide that introduced at least one change making the investment climate less welcoming for MNEs accounted for 40 percent of all FDI inflows – a substantial figure, indeed.[75]

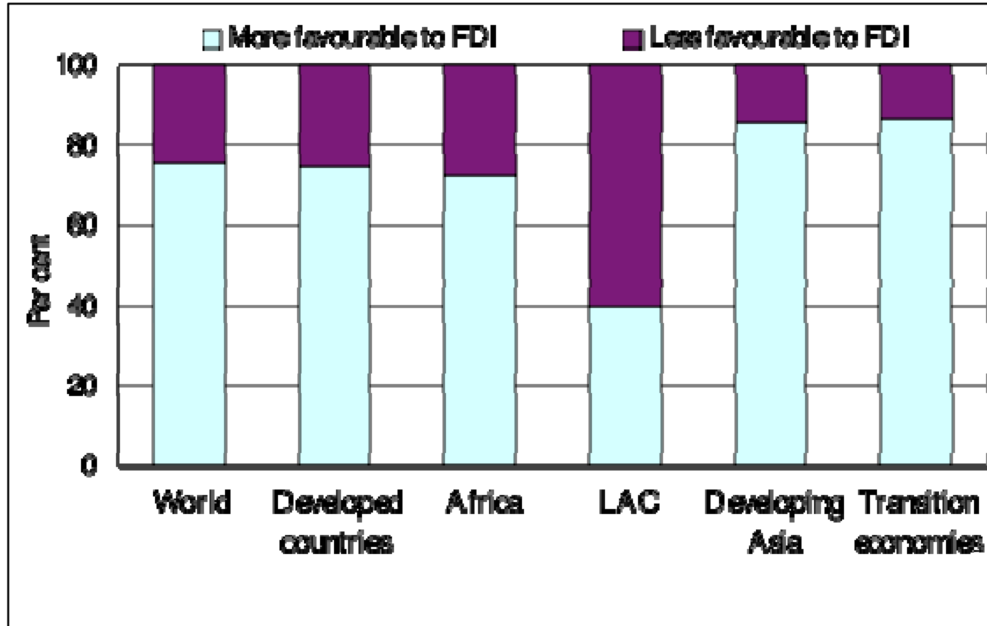
Act of 1988, § 5021, Pub. L. 100-418 (1988), codified at 50 U.S.C. App. § 2170. FINSA was followed by the President's Executive Order of January 2008 (Executive Order 13456, Further Amendment of Executive Order 11858 Concerning Foreign Investment in the United States, January 23, 2008) and the final regulations issued by the Treasury Department (31 CFR Part 800: Regulations Pertaining to Mergers, Acquisitions, and Takeovers by Foreign Persons; Final Rule, November 21, 2008). See also the discussion below.

[73] French policymakers, for example, speak about "economic patriotism" ("De Villepin stands by calls for 'economic patriotism," *Financial Times*, September 22, 2005, *at* http://us.ft.com/ftgateway/superpage.ft?news_id=fto092220051434330491) and include casinos among the country's strategic industries. The issue of national champions came into play when there was a rumor that Pepsi (U.S.) might want to acquire France's Danone, one of the world's leading yogurt producers.

[74] As noted in an article in the *China Daily* (June 20, 2007, quoting the spokesperson of H&J Vanguard, a Beijing-based consultancy firm): "Danone's bid on Wahaha jeopardizes a national brand and threatens the nation's economic security."

[75] Author's calculation, based on data supplied by UNCTAD. David Marchick and Matthew Slaughter came to a similar result for 2006, based on data for eleven countries that had adopted or were considering laws and regulations restricting certain types of FDI or expanding government oversight over it. David Marchick and Matthew Slaughter, "Global FDI policy: correcting a protectionist drift," *Council on Foreign Relations Special Report* (New York: Council on Foreign Relations, June 2008).

Figure 3. National FDI policy changes, by region, 2007



Source: James X. Zhan, "Recent global rends: FDI flows, TNCs and policies" (Geneva: UNCTAD, 2008), mimeo.

What this suggests is that *national* attitudes in a number of countries toward FDI are changing. Some of the policy measures that have been introduced in this context may well be protectionist in nature – as recognized at the highest government levels, namely the G8 and G20.[76]

[76] In their declaration issued by the G8 leaders at their 2007 Heiligendamm summit, they took note of increasing FDI regulatory risk when they observed that there were tendencies toward FDI protectionism. More specifically, paragraph 10 of the declaration noted: "We will work together to strengthen open and transparent investment regimes and to fight against tendencies to restrict them. Erecting barriers and supporting protectionism would result in a loss of prosperity. We therefore agree on the central role of free and open markets for the world economy, respecting sustainability concerns, and the need to maintain open markets to facilitate global capital movements. We reaffirm that freedom of investment is a crucial pillar of economic growth, prosperity and employment. We call on all developed countries, major emerging economies and others to critically assess their investment policies, the potential costs incurred from unnecessarily restrictive or arbitrary policies and the economic benefits of open investment regimes." *See* Group of 8, "Growth and Responsibility in the World Economy: Summit Declaration", June 7, 2007, available at www.g-8.de/Content/EN/Artikel/__g8-summit/anlagen/2007-06-07-gipfeldokument-wirtschaft-eng,property=publicationFile.pdf.
Subsequently, the Group of 20, "Declaration: Summit on Financial Markets and the World Economy"**,** November 15, 2008 (available at http://www.whitehouse.gov/news/releases/2008/11/20081115-1.html) said in the first paragraph of para. 13:
"13. We underscore the critical importance of rejecting protectionism and not turning inward in times of financial uncertainty. In this regard, within the next 12 months, we will refrain from raising new barriers to investment or to trade in goods and services, imposing new export restrictions, or implementing World Trade Organization (WTO) inconsistent measures to stimulate exports." This call for a moratorium was repeated in the Group of 20, "The global plan for recovery and reform," April 2, 2009 (available at http://www.g20.org/Documents/final-communique.pdf). In paragraph 22, the G20 leaders said "We will not repeat the historic mistakes of protectionism in previous eras. To this end, we reaffirm the commitment

There is no established definition of "FDI protectionism". The issue is more complex than it appears because not every measure taken in the interest of legitimate public policy objectives – e.g., seeking to increase the contribution of FDI to the host or home economy – is necessarily an instance of FDI protectionism, even if it ends up making the investment climate less hospitable for foreign investors. Furthermore, the concept of FDI protectionism should cover both inward FDI, on which most attention has focused, and outward FDI. In the context of inward FDI, one would expect that "FDI protectionism" involves new measures by public authorities that (1) focus solely on foreign investors (i.e., domestic investors are not similarly treated in like situations) that (2) are taken to prevent or discourage foreign direct investors with respect to the establishment, acquisition or expansion of their operations in a host country or to limit foreign direct investors' management, conduct and sale or other disposition of existing investments. In the context of outward FDI, "FDI protectionism" may also involve measures directed at domestic companies that require them to repatriate assets or operations to the home

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made in Washington: to refrain from raising new barriers to investment or to trade in goods and services, imposing new export restrictions, or implementing World Trade Organization (WTO) inconsistent measures to stimulate exports. In addition we will rectify promptly any such measures. We extend this pledge to the end of 2010 […]." This pledge was again extended following the G20 Toronto Summit (Toronto, June 26 – 27, 2010); paragraph 36 of the declaration affirms that: "As such, we renew for a further three years, until the end of 2013, our commitment to refrain from raising barriers or imposing new barriers to investment or trade in goods and services, imposing new export restrictions or implementing World Trade Organization (WTO)-inconsistent measures to stimulate exports, and commit to rectify such measures as they arise. We will minimize any negative impact on trade and investment of our domestic policy actions, including fiscal policy and action to support the financial sector. We ask the WTO, OECD and UNCTAD to continue to monitor the situation within their respective mandates, reporting publicly on these commitments on a quarterly basis." Similarly the communique following the G20 Seoul Summit (November 11-12, 2010), paragraph 42: "Recognizing the importance of free trade and investment for global recovery, we are committed to keeping markets open and liberalizing trade and investment as a means to promote economic progress for all and narrow the development gap. […] We therefore reaffirm the extension of our standstill commitments until the end of 2013 as agreed in Toronto, commit to rollback any new protectionist measures that may have risen, including export restrictions and WTO-inconsistent measures to stimulate exports, and ask the WTO, OECD, and UNCTAD to continue monitoring the situation and to report publicly on a semi-annual basis." See also, the Communiqué following the Meeting of Finance Ministers and Central Bank Governors (Paris, February 18-19, 2011) where in paragraph 9 it is noted that: "We reaffirm our commitment to free trade and investment recognizing its central importance for the global recovery. We will refrain from introducing, and oppose protectionist trade actions in all forms and recognize the importance of a prompt conclusion of the Doha negotiations." UNCTAD, OECD and WTO were mandated to monitor developments in this respect. *See*, OECD, UNCTAD and WTO, "Report on G20 Trade and Investment Measures" (September 2009); OECD, UNCTAD and WTO, "Report on G20 Trade and Investment Measures (March 2010)"; OECD and UNCTAD, "Third Report on G20 Investment Measures" (June 2010); and OECD and UNCTAD, "Fourth Report on G20 Investment Measures (November 2010)", all available at:
http://www.unctad.org/templates/Page.asp?intItemID=5716&lang=1.
See also Deputy Secretary Robert M. Kimmitt: "One of the current vulnerabilities that we have seen in parts of the world is the rise of protectionist sentiment, epitomized in rhetoric questioning the benefits of cross-border investment. . . . The Treasury Department has worked hard to combat investment protectionism on multiple fronts . . .," Remarks of Deputy Secretary Robert M. Kimmitt at the Dubai International Financial Centre, document HP-1241 of October 28, 2008, p. 4.

country or discourage certain types of new investments abroad.[77] Any definition of "FDI protectionism" would need to be supplemented by an illustrative list of measures and would need to be contextualized, e.g. in terms of the extent to which a particular new measure departs from existing policies within a given country.[78]

What is significant is that developed countries have led much of the rise of FDI protectionism.[79] Indicative of this trend is the re-appearance of investment screening agencies (which had been replaced beginning in the 1980s by investment promotion agencies), exemplified by the Committee on Foreign Investment in the United States (CFIUS) whose standing and role was strengthened considerably by the Foreign Investment and National Security Act of 2007.[80] Among the features of this screening process is that there is a presumption that M&As by state-controlled entities are subject to additional scrutiny in the form of an "investigation", which follows an initial 30-days review, unless certain statutory triggers for terminating the review at 30 days are met. It is a reflection of the changed investment climate in the U.S. that notifications to CFIUS were up considerably since 2006, although they declined in 2009 due to the impact of the Western financial crisis and recession on FDI in the US (which declined significantly, along with M&As into that country) (figure 4).[81]

If developed countries change their attitudes and policies toward FDI, it is likely to have a demonstration effect for emerging markets, leading the latter to reevaluate the costs and benefits of such investment as well.[82] It would be ironic, though, if developed countries would now lead a backlash against FDI and trigger a roll-back of investor protection and liberalization, as they had been the ones that, for more than two decades after the restrictive 1960s and 1970s during which anti-FDI feelings ran high, had led the efforts to create an open investment regime and strengthen protection standards.

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[77] An example of outward FDI protectionism is when the President of a country encourages one of the firms headquartered in that country to repatriate certain production facilities from abroad (*See* "Europe vows quick review of auto bailout plans," *New York Times*, February 25, 2009.) or when the off-shoring, via FDI, of the production of certain services is being discouraged or not allowed. *See* UNCTAD, *World Investment Report 2004: The Shift Towards Services* (Geneva, UNCTAD, 2004), ch. V.B.

[78] I am grateful to José E. Alvarez, Andrea Bjorklund, David Fagan, Vishwas Govitrikar, Peter Muchlinski, and Kenneth Vandevelde for their suggestions on this text.

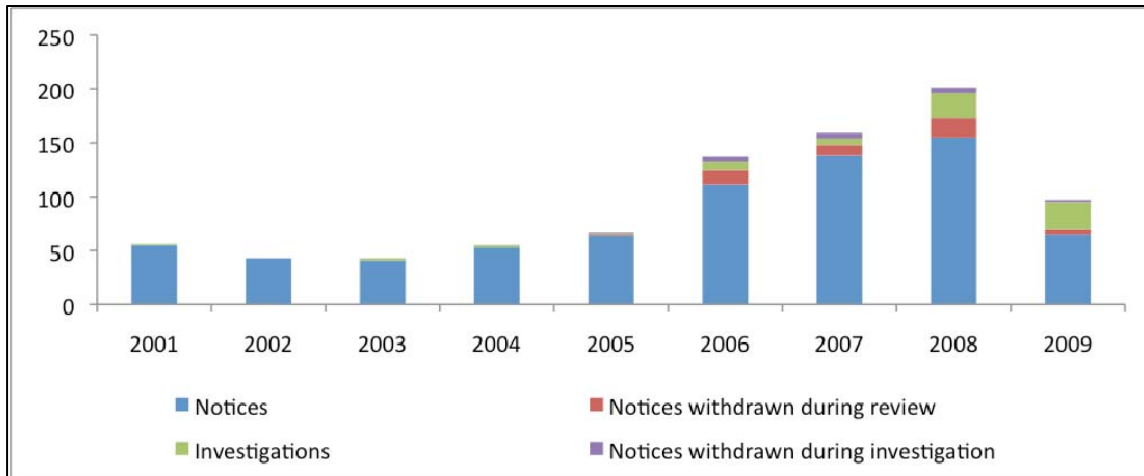
[79] Documented in Sauvant, "Driving and countervailing forces," op. cit.

[80] See FINSA, op. cit.

[81] The U.S. maintains one of the most open investment frameworks in the world, reaffirmed in May 2007 in a statement on "Open Economies" by President George W. Bush and the establishment of "Invest in America" within the Department of Commerce. Moreover, virtually all states in the United States fiercely compete for FDI. Yet, as the US Secretary of the Treasury, Henry M. Paulson, noted, "Economic nationalism . . . has been a growing concern in the United States in recent years. . . . Foreign investment into the United States, especially by sovereign wealth funds and state-owned enterprises, is also increasingly viewed with suspicion by some US companies, various members of the national security community, and the American public at large. . . ." (See, Henry M. Paulson, Jr., "A strategic economic engagement: Strengthening U.S.-Chinese ties," *Foreign Affairs*, vol. 87 (September/October 2008), pp. 50-77, 72.

[82] As already alluded to before, it is however quite conceivable that the 2008-2009 economic crisis and its aftermath will override, at least for the time being, all other considerations as countries may be eager to attract whatever investment they can obtain. Should this occur, the question is whether this would be a temporary override or not.

Figure 4. CFIUS filings and investigations, 2001-2009



Source: Persephone Economou and Karl P. Sauvant, "Recent trends and issues in foreign direct investment, 2010," in *International Investment Yearbook 2010-2011*, op. cit.

b. Implications for the international investment law and policy regime: The need for rebalancing and improvement

The reevaluation of the costs and benefits of FDI and the tempering of the overwhelming liberalization trend at the national level are bound to be reflected at the international level: while the mid-1980s to early 2000s were characterized, *grosso modo*, by expanding binding responsibilities of host countries without obtaining further rights, as well as greater binding rights for MNEs without an increase in their responsibilities, it appears that we are now entering a period during which the rights of host countries are expanding while their responsibilities may actually be narrowed, while MNEs may well see an increase in their responsibilities and a curtailment of their rights. More specifically, the key changes are toward narrowing key protection provisions for foreign investors while recognizing more than before the right of host countries to regulate in the public interest matters related to international investment. This process has already begun, and could lead to a rebalancing of the substantive and procedural rights of host countries and investors and hence the orientation and objectives of the international investment law and policy regime.

i. The rights of host countries and MNEs

The substantive rights are the key to a rebalancing of the investment regime. As discussed, during the past 20 years or so, that regime was dominated by the objective to strengthen the protection of foreign investors (especially through BITs between developed countries and emerging markets) and, increasingly, to facilitate their operations (especially through free trade agreements but also, more recently, through the

BITs of some countries). The trade-off was supposed to be an increase in FDI flows -- this was the "grand bargain."[83] While, intuitively, it is plausible that greater protection should encourage greater FDI flows, the empirical evidence in this regard is mixed: a number of studies have tested the relationship between the conclusion of BITs and FDI flows, and the results have not been clear-cut, i.e. some found such a relationship, others did not. The principal reason may be methodological, as it is difficult to isolate the effect of a part of the regulatory framework from the much more important effect of economic factors, the principal determinants of FDI flows (such as economic growth; market size; the quality of infrastructure, skills and innovatory capacity). These economic factors – combined with the liberalization of investment regimes, whether unilateral or through IIAs -- have driven the rapid growth of FDI flows during the past 20 years, and this growth was accompanied by the rapid growth in the number of BITs seeking to protect such investment. The bottom line is that the relationship between BITs and FDI flows has so far not convincingly been established.[84] And that means that the "grand bargain" does not appear to deliver[85] higher FDI flows as a result of the treaties host countries conclude.[86] What is clear, however, is that BITs have sovereignty costs in terms of the responsibilities that countries assume concerning the treatment of foreign investors.

With the rapid rise of international investment disputes, these costs can also become costs in terms of dollars and cents, as documented earlier. Such disputes not only involve emerging markets as respondents, but also, as noted above, a growing number of developed countries. One of the latter is the U.S., which had been involved in 19 NAFTA Chapter 11 investment disputes as of November 2010,[87] but has lost, so far, none. Still,

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[83] See the title of the article by Salacuse and Sullivan, op. cit.

[84] The principal studies undertaken during the past ten years, as well as a summarizing overview, are contained in Karl P. Sauvant and Lisa E. Sachs, eds., *The Effect of Treaties on Foreign Direct Investment: Bilateral Investment Treaties, Double Taxation Treaties, and Investment Flows* (New York: Oxford University Press, 2009). One of the reasons that there appears to be a relationship between US BITs and FDI flows from the US to countries that concluded such agreements with the U.S. may well be that US BITs tend to contain liberalization provisions, especially national treatment at the pre-establishment phase; in those cases, it is difficult to separate the protection effect from the liberalization effect. In addition, the U.S. has BITs with a number of countries that also have free trade agreements with the U.S. (e.g. Bahrain, Jordan, Morocco); hence there is the additional difficulty of distinguishing between the effects of BITs and those of free trade agreements. (For example, a World Bank study found that regional agreements that create larger markets positively affect FDI inflows when other institutional variables affecting the investment climate are satisfactory (though agreements that do not result in larger markets do not positively affect FDI flows); see Richard Newfarmer, "Beyond merchandise trade: Services, investment, intellectual property, and labor mobility," in *Global Economic Prospects 97*, at 109 (2005), available at http://siteresources.worldbank.org/INTGEP2005/Resources/gep2005.pdf). Finally, US BITs are precondition to access OPIC investment insurance – another effect that, properly speaking, would need to be controlled for.

[85] Negotiators were (and presumably are) not unaware of this: Kenneth J. Vandevelde reported that US BIT negotiators alerted their negotiations partners that BITs would not necessarily lead to higher investment flows; see his *United States Investment Treaties: Policy and Practice* (Boston: Kluwer, 1992), p. 32.

[86] There are of course other reasons for which IIAs are concluded. Roberto Echandi, for example, argues that these agreements help especially developing countries to undertake – and protect– reforms of their domestic regulatory frameworks for the treatment of enterprises in general. *See* Roberto Echandi, "What do developing countries expect from the international investment regime," in Alvarez et al., op. cit.

[87] *See* Canadian Centre for Policy Alternatives (update October 2010), available at: http://www.policyalternatives.ca/publications/reports/nafta-chapter-11-investor-state-disputes-1

the possibility that BITs (and IIAs in general) can bite, and not only emerging markets, is leading a number of developed countries to become more sensitive about the breadth of certain rights that these agreements confer upon investors, with a view toward defining them more clearly and making them less expansive, while at the same time giving more rights to governments.

The U.S. has led this process, along with Canada.[88] Nowhere might the direction be clearer into which the international investment regime may be moving than when comparing the US Model BIT from 1984 (around the time that marked the beginning of the protection and liberalization phase, when strengthening investor rights was the priority) with the US Model BIT of 2004 (around the time when the pendulum had begun to swing back toward safeguarding more the rights of host countries). Without doing justice to the complexity of many of these revisions, the changes between the two model treaties that clearly seem to narrow investors' rights in the 2004 model are as follows (see the annex for a greater elaboration)**:**[89]

* Includes the explicit right of host countries to regulate investments to protect health, safety and the environment.
* Narrows the definition of "investment" to limit coverage of a treaty.
* Narrows the scope of national and MFN treatment obligations by increasing allowances for exemptions and eliminating a separate clause on "arbitrary and discriminatory" action.
* Eliminates the "umbrella clause", allowing investors to bring claims involving rights in investment contracts to investor-state arbitration only if such claims also involve an alleged host country violation of a treaty guarantee as well.
* Reduces the scope of the "minimum standard of treatment" to the standard under customary international law.
* Limits transparency requirements of host countries' investment-related laws and administrative practices to only those acts having "general application."
* Limits the scope of "fair and equitable treatment" and "full protection and security" guarantees.
* Omits a previous provision assuring investors' rights to pursue claims in national courts.
* Exempts the revocation, limitation or creation of intellectual property rights from the expropriation clause when they are in accord with the TRIPS Agreement.
* Requires expropriation claims based on taxation measures to be submitted to both state parties' tax authorities before arbitration.

[88] See the Canadian 2004 Model BIT at http://www.international.gc.ca/trade-agreements-accords-commerciaux/assets/pdfs/2004-FIPA-model-en.pdf.
[89] For a full analysis, see José E. Alvarez, "The once and future foreign investment regime", op. cit., and (for a comparison of the 1994 Model and the 2004 one) Kenneth J. Vandevelde, "A comparison of the 2004 and 1994 U.S. Model BITs: Rebalancing investor and host country interests," in *International Investment Yearbook 2008-2009,* op. cit., pp. 283-316.

* Eliminates the "tantamount to expropriation" language, limits the expropriation treaty right to that in customary international law, and subjects claims of "indirect expropriation" to a case-by-case review procedure.
* States that non-discriminatory regulatory actions taken to protect legitimate public welfare objectives are not "indirect" takings except in rare circumstances.
* Imposes a 90-days notice indicating the basis of each of an investor's claims and a three-year statute of limitations.
* Includes a more expansive and self-judging "essential security" clause and a new exception for measures "relating to financial services for prudential reasons" or "in pursuit of monetary and related credit policies or exchange rate policies."
* Authorizes state parties to issue interpretations of a treaty that are binding on arbitrators.

The differences between these two models – each reflecting, for its time, the ideal BIT the U.S. sought to negotiate -- is stark indeed. According to José E. Alvarez: "The United States … is no longer as sanguine about proposing open-ended relative or absolute guarantees to foreign investors or about its ability to comply with these…. While the new U.S. Model does not protect host states as much as did the NIEO, it is not farfetched to suggest that its new text evinces a new found respect for many of the 'sovereign rights' that the United States ridiculed at the General Assembly during the 1970s."[90]

Some of the revisions in the US Model reflect changes that had already occurred in US treaty practice before the new model was released in 2004 or, for that matter, was underway. For example, in the framework of the North American Free Trade Commission, the U.S., Canada and Mexico limited (2001) the meaning of the scope of the fair and equitable treatment standard to the customary international law minimum standard of treatment of aliens.[91] Similarly, the U.S. Government negotiated the Singapore (2003)[92] and Chile (2004)[93] free trade agreements while it was preparing the 2004 BITs model; hence those two agreements influenced the 2004 Model as well.

Thus, the 2004 US Model BIT captured and reconciled changes that were already contained or underway in US IIAs and consolidated them in a new instrument that reflected the orientation and objectives of the government at that time. Subsequent BITs

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[90] Alvarez, "The once and future foreign investment regime", op. cit., pp. 31, 36.
[91] See *Notes of Interpretation of Certain Chapter 11 Provisions* (NAFTA Free Trade Commission, July 31, 2001) (available at: http://www.international.gc.ca/trade-agreements-accords-commerciaux/disp-diff/NAFTA-Interpr.aspx?lang=en, last visited May 11, 2009.) Article 2 on "Minimum Standard of Treatment in Accordance with International Law" states, "1. Article 1105(1) prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to investments of investors of another Party. 2. 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 the customary international law minimum standard of treatment of aliens."
[92] United States-Singapore Free Trade Agreement, available at: http://www.ustr.gov/Trade_Agreements/Bilateral/Singapore_FTA/Final_Texts/Section_Index.html
[93] United States-Chile Free Trade Agreement, available at: http://www.ustr.gov/Trade_Agreements/Bilateral/Chile_FTA/Final_Texts/Section_Index.html

(with Uruguay (2005) and Rwanda (2008)[94] were based on the 2004 model, as were the free trade agreements with investment chapters that were concluded.[95] They reflect therefore the approach taken in the 2004 Model BIT, not only as regards substantive provisions (especially limiting the interpretation of fair and equitable treatment[96] and indirect expropriation[97] -- two key protection standards) but also concerning procedural rights (especially transparency in the dispute-settlement process),[98] submission of

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[94] United States-Uruguay BIT, available at: http://www.ustr.gov/assets/Trade_Agreements/BIT/Uruguay/asset_upload_file748_9005.pdf; United States-Rwanda BIT, available at: http://www.ustr.gov/assets/Trade_Agreements/BIT/Rwa/asset_upload_file743_14523.pdf**.**The US is in negotiations with other countries, based on the model BIT.

[95] Since the beginning of 2004, the U.S. has concluded bilateral free trade agreements with: Australia (2005), available at: http://www.ustr.gov/Trade_Agreements/Bilateral/Australia_FTA/Final_Text/Section_Index.html (however, this agreement does not foresee investor-State dispute settlement), Chile (2004), available at: http://www.ustr.gov/Trade_Agreements/Bilateral/Chile_FTA/Final_Texts/Section_Index.html, Morocco (2006), available at: http://www.ustr.gov/Trade_Agreements/Bilateral/Morocco_FTA/FInal_Text/Section_Index.html, Oman (2006), available at: http://www.ustr.gov/Trade_Agreements/Bilateral/Oman_FTA/Final_Text/Section_Index.html, Peru (2009), available at: http://www.ustr.gov/Trade_Agreements/Bilateral/Peru_TPA/Final_Texts/Section_Index.html, and is also part of the Dominican Republic- Central American FTA (2006), available at: http://www.ustr.gov/Trade_Agreements/Regional/CAFTA/CAFTA-DR_Final_Texts/Section_Index.html.. The U.S.-Colombia FTA, the U.S.-Republic of Korea FTA, and the U.S.-Panama FTA have investment chapters, but are still awaiting approval by Congress (http://www.ustr.gov/Trade_Agreements/Bilateral/Colombia_FTA/Final_Text/Section_Index.html, http://www.ustr.gov/Trade_Agreements/Bilateral/Republic_of_Korea_FTA/Final_Text/Section_Index.html and http://www.ustr.gov/Trade_Agreements/Bilateral/Panama_FTA/Section_Index.html). There are of course variations among these various agreements, especially in terms of refinements of language.

[96] See, for example, article 5(1)(2) of the U.S.-Uruguay BIT: "Article 5: Minimum Standard of Treatment.
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." (Footnote omitted.)
(http://www.ustr.gov/assets/Trade_Agreements/BIT/Uruguay/asset_upload_file748_9005.pdf).

[97] According to the United-States Singapore free trade agreement, the concept of "indirect expropriation" has to be interpreted on the basis of a number of criteria, and "Except in rare circumstances, nondiscriminatory regulatory actions by a Party that are designed and applied to protect legitimate public welfare objectives, such as public health, safety, and the environment, do not constitute indirect expropriations". See the letter exchange on expropriation at http://www.ustr.gov/assets/Trade_Agreements/Bilateral/Singapore_FTA/Final_Texts/asset_upload_file708_4036.pdf.

[98]Article 10.21(1) of the United States-Peru Trade Promotion Act provides that the respondent in an investment dispute will make available to the public: "(a) the notice of intent; (b) the notice of arbitration; (c) pleadings, memorials and briefs submitted to the tribunal by a disputing party… ;(d) minutes or

"amicus briefs",[99] and the possibility to issue interpretations of treaties that are binding on arbitrators[100]). Potentially important for the further development of the dispute-settlement system is the inclusion, in a number of US treaties, of provisions concerning an appellate body for purposes of reviewing awards rendered by investment tribunals.[101]

One of the changes deserves special attention, namely the nature of the "essential security" clause, as it potentially has far-reaching effects on the international law and policy regime; it permits governments to take measures ordinarily in violation of treaty provisions, but necessary to protect vital interests. It is common that international agreements contain "essential security" (or similar) clauses.[102] This is also the case in BITs and free trade agreements with investment chapters. Often, the question of whether or not an essential security (or similar) clause has been evoked in good faith rests (in the case of conflicts) with arbitrators. For example, in most international investment arbitration cases involving Argentina the question arises of whether or not the country faced an essential (economic) security situation during its most recent (2001) crisis or not, and hence could disregard certain BIT commitments. The government argued that it did, investors argued that it did not – and the tribunals and annulment committees dealing with this issue came to differing conclusions.[103]

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transcripts of hearings of the tribunal, where available; and (e) orders, awards, and decisions of the tribunal." Article 10.21(2) states that "The tribunal shall conduct hearings open to the public and shall determine, in consultation with the disputing parties, the appropriate logistical arrangements…." The Article includes provisions to protect "information designated as protection information" from disclosure. (http://www.ustr.gov/Trade_Agreements/Bilateral/Peru_TPA/Final_Texts/Section_Index.html)

[99] Article 21.10(d) of the United States-Peru TPA states that "The Parties shall establish by the date of entry into force of this Agreement Model Rules of Procedure, which shall ensure…that the panel will consider requests from non-governmental entities in the disputing Parties' territories to provide written views regarding the dispute that may assist the panel in evaluating the submissions and arguments of the disputing Parties…" *Id.*

[100] Article 30(3) of the United States - Uruguay BIT states that "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."
(http://www.ustr.gov/assets/Trade_Agreements/BIT/Uruguay/asset_upload_file748_9005.pdf)

[101] Included in the DR-CAFTA, US-Chile FTA, US-Morocco FTA, US-Singapore FTA, US-Oman FTA, US-Columbia TPA, US-Panama TPA, US-Peru TPA, US- Uruguay BIT, US-Republic of Korea FTA, and US-Rwanda BIT. For example, Annex E of the US-Uruguay BIT states, "Within three years after the date of entry into force of this Treaty, the Parties shall consider whether to establish a bilateral appellate body or similar mechanism to review awards rendered under Article 34 in arbitrations commenced after they establish the appellate body or similar mechanism." Article 28(10) of the same treaty also states "If a separate multilateral agreement enters into force between the Parties that establishes an appellate body for purposes of reviewing awards rendered by tribunals constituted pursuant to international trade or investment arrangements to hear investment disputes, the Parties shall strive to reach an agreement that would have such appellate body review awards rendered under Article 34 in arbitrations commenced after the multilateral agreement enters into force between the Parties."
(http://www.ustr.gov/assets/Trade_Agreements/BIT/Uruguay/asset_upload_file748_9005.pdf)

[102] Article 21(1) of the GATT, for examples, states that "Nothing in this agreement shall be construed: (a) to require any contracting party to furnish any information the disclosure of which it considers contrary to its essential security interests; or (b) to prevent any contracting party from taking any action which it considers necessary for the protection of its essential security interests…"(
http://www.wto.org/english/docs_e/legal_e/gatt47_02_e.htm#articleXXI)

[103] CMS Transmission Co. v. Argentine Republic, ICSID Case No. ARB/01/8, Award (May 12, 2005),

An important development is that the 2004 US Model BIT amends the 1984 Model BIT essential security clause to specify that either state party can take measures "that *it considers necessary*" (italics added) to protect its essential security interests (article 18).[104] Subsequently, this formulation was included, for example, in the US-Uruguay BIT[105] and the Peru-US Trade Promotion Agreement (which contains an investment chapter);[106] the latter agreement also contains a footnote to the relevant article that says: "[f]or greater certainty, if a Party invokes [the essential security clause] in an arbitral proceeding…the tribunal or panel hearing the matter shall find that the exception applies."[107]

What are the implications of these developments? To begin with, at least in US treaty practice, substantive rights of investors are being circumscribed as regards key protection standards. At the same time, the rights of host countries are strengthened. Most importantly, the evolution of the US essential security clause strongly suggests that (1) each party to an investment agreement that contains language along the lines of the 2004 US Model BIT can judge for itself whether or not an essential security situation exists, creating the highly unusual situation of making a potential respondent government the judge in its own case; and (2) if the government decides that such a situation exists, it appears to be free to put aside its investment-treaty obligations in order to protect its

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LG&E Energy Corp. v. Argentine Republic, ICSID Case No. Arb/02/1, Decision on Liability (Oct. 3, 2006), Enron Corp., Ponderosa Assets, L.P. v. Argentine Republic, ICSID Case No. Arb/01/3, Award (May 22, 2007), Sempra Energy Int'l v. Argentine Republic, ICSID Case No. Arb/02/16, Award, P 391, Sept. 28, 2007, and Continental Casualty v. Argentine Republic, ICSID Case No. ARB/03/9, Award (Sept. 5, 2008). See also the annulment decisions in *Sempra*, *annulled by* Sempra Energy International v. Argentine Republic, *decision on the Argentine Republic's application for annulment of the award* (June 29, 2010); *Enron*, *annulled by* Enron Creditors Recovery Corp. Ponderosa Assets, L.P. v. Argentine Republic, *decision on the application for annulment of the Argentine Republic* (July 30, 2010); and *CMS Transmission*, *annulment declined by* CMS Gas Transmission Co. v. Argentine Republic, ICSID Case No. ARB/01/8, *decision of the Ad Hoc Committee on the application for annulment of the Argentine Republic* (Sept. 25, 2007). For a discussion, see José E. Alvarez and Tegan Brink, "Revisiting the necessity defense: Continental Casualty v. Argentina," in *International Investment Yearbook 2010-2011*, op. cit., and Alberto Alvarez-Jimenez, "The interpretation of necessity clauses in bilateral investment treaties after the recent ICSID annulment decisions," in ibid.

[104] Article 18 of the US Model BIT reads: "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."

[105] 2004 United States-Uruguay BIT, available at: http://www.ustr.gov/assets/World_Regions/Americas/South_America/Uruguay_BIT/asset_upload_file582_6728.pdf. Article 18(2) says, "Nothing in this Treaty shall be construed…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."

[106] United States-Peru Trade Promotion Agreement, available at: http://www.ustr.gov/Trade_Agreements/Bilateral/Peru_TPA/Final_Texts/Section_Index.html. Article 22.2(b) says, "Nothing in this Treaty shall be construed…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."

[107] Ibid. For similar language, see also the US- Republic of Korea free trade agreement, op. cit.

security (however defined). Alvarez put the implications of this approach as follows: "If this is what the new essential security clause in US BITs does, it would appear that the principal benefit of such treaties – to provide foreign investors with a forum capable of enforcing their claims and thereby secure a binding judgment against a host state – has been eviscerated."[108] In other words, an essential security (or similar) clause that is self-judging, with "essential security" not defined, dramatically re-establishes the rights of host countries over investors (at least, presumably, in circumstances that are not ordinary; but this is for the host country to judge) in the case of parties to IIAs that follow this approach. If indeed other countries adopt this approach as well (and there is some indication that this is the case[109]), then a central pillar of the edifice of the international investment law and policy regime is in jeopardy.

ii. The responsibilities of host countries and MNEs

While the struggle of balancing the rights of host countries and MNEs is beginning to shift the balance toward the former, the situation has changed little in the area of responsibilities, at least as far as investors are concerned. To be sure, to the extent that the rights of MNEs are circumscribed and host country governments recover certain rights in

[108] José E. Alvarez, "The rise of emerging market multinationals: legal challenges ahead," in *Foreign Direct Investments from Emerging Markets*, op. cit. Elsewhere, however, Alvarez observed: "The relevant case law does not suggest … that the invocation of 'national security' functions like a 'get out of jail free' card enabling host governments to take whatever actions they wish vis-à-vis foreign investors, including investors that are state owned. Since many, if not most, of the gravest conflicts in history between foreign investors and their host countries have emerged in the midst of serious economic or political turmoil, it would be a serious departure from the existing legal regime governing investments if this were otherwise." See his "Sovereign concerns", in Sauvant, Sachs and Schmit Jongbloed, op. cit. There are of course a number of questions that arise. For example, there is the question of whether, in the case of a dispute involving a country that has a BIT with a self-judging essential security clause with one country and another BIT with an other country that does not contain such a clause (or contains such a clause, but without it being self-judging), the latter BIT (which is more favorable to investors) would trump the former (assuming that MFN applies). Another question is whether, even in the case that an essential security clause applies, compensation needs to be paid. To deal with such issues, it is not inconceivable that future BITs may contain a clarification to the effect, for example, that, for greater clarity, the invocation of the essential security clause does not give rise to any claims of compensation.

[109] The 2008 Japan-Laos BIT, for example, specifies that "…each Contracting Party may: (a) take any measure which it considers necessary for the protection of its essential security interests; (i) taken in time of war, or armed conflict, or other emergency in that Contracting Party or in international relations; or (ii) relating to the implementation of national policies or international agreements respecting the non-proliferation of weapons;…". (http://www.mofa.go.jp/policy/treaty/submit/session169/agree-5.html) Similar provisions are contained in the Japan-Peru BIT, signed November 2008 (http://www.mofa.go.jp/region/latin/peru/agree0811.pdf) and Japan-Uzbekistan BIT, signed August 2008 (http://www.mofa.go.jp/policy/treaty/submit/session170/agree-1.html)**.** The 2005 India-Singapore Comprehensive Economic Cooperation Agreement provides in Art. 6.12 (4): "This Article shall be interpreted in accordance with the understanding of the Parties on non-justiciability of security exceptions as set out in their exchange of letters, which shall form an integral part of this Agreement". The exchange of letters specifies that "any decision of the disputing Party taken on such security considerations shall be non-justiciable in that it shall not be open to any arbitral assessment of any claim for damages and/or compensation, or an adjudication of any other issue referred to the tribunal." See also Article 24(3) of the Energy Charter Treaty and Art. 18 of the "ASEAN Comprehensive Investment Agreement," signed February 26, 2009. The ASEAN Comprehensive Investment Agreement will enter into force after ratification by all Member States.

terms of the flexibility they have to pursue legitimate public policies, the responsibilities of host country governments are tempered. Overall, however, the responsibility of host countries remains to provide a secure, predictable and stable regulatory framework, and to protect investors, subject to the rule of law.

There are also some signs that, after the lull of the mid-1980s to early-2000s, when the protection and the facilitation of entry and operation of investors reigned supreme, efforts to define the responsibilities of MNEs are receiving more attention, even if this is done mostly in the framework of voluntary instruments and in a fragmented manner. At the firm level, the concepts of "corporate social responsibility" (CSR) and "sustainable development" have received widespread attention, and firms seek to incorporate them into their business activities on a voluntary basis. These efforts also have their international counterparts, with most of them focusing on social, human rights, environmental, and corruption issues; economic growth and development issues per se (of great interest to many countries), however, typically receive little attention. A few of these (and other) efforts have resulted in binding instruments, such as the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions[110] and the United Nations Convention Against Corruption,[111] or in commitments in various international agreements[112] on specific subjects.[113]

Most of the instruments dealing with the responsibilities of investors are voluntary. This is exemplified by the Global Compact (announced in 1999 by the Secretary-General of the United Nations, Kofi Annan, and launched in July 2000)[114] and the Extractive Industry Transparency Initiative (2002).[115] In the area of human rights and MNEs, the UN Secretary-General appointed a "Special Representative of the Secretary-General on the

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[110] OECD, *OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions*, signed on December 17, 1997, entered into force on February 15, 1999.
[111] *United Nations Convention Against Corruption*, adopted by G.A. res. 58/4 on October 31, 2003, entered into force on December 14, 2005.
[112] For example, the TRIPS Agreement (*Agreement on Trade-Related Aspects of Intellectual Property Rights*, Dec. 15, 1993, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 33 I.L.M. 81 (1994)) contains rules on certain restrictive business practices related to licensing contracts; see Pedro Roffe, "Control of anti-competitive practices in contractual licenses under the TRIPS Agreement", in C. Correa and A.A. Usuf, eds., *Intellectual Property and International Trade: The TRIPS Agreement* (London: Kluwer, 1998), pp. 261-296. The TRIPS Agreement also stipulates (art. 66.2) that "developed country Members shall provide incentives to enterprises and institutions in their territories for the purpose of promoting and encouraging technology transfer to least developed country Members in order to enable them to create a sound and viable technological base."
[113] There is also the possibility to link voluntary instruments to legally binding ones. At one point during the negotiations of the OECD Multilateral Agreement on Investment, it was proposed to annex the OECD Guidelines for Multinational Enterprises to the Agreement, without however changing their voluntary character.
[114] United Nations Global Compact, http://www.unglobalcompact.org/. As of June 30, 2009, the Global Compact has 8,000 participants, including over 5,300 businesses in 130 countries.
[115] The Extractive Industry Transparency Initiative is a "coalition of governments, companies, civil society groups, investors and international organizations." *See* http://www.eiti.org/ According to EITI's website, 50 of the world's largest oil, gas and mining companies "support and actively participate in the EITI process." A list is available at: http://eiti.org/supporters/companies. Three industry associations also support the process.

issue of human rights and transnational corporations and other business enterprises," John Ruggie, to, among other things, "elaborate further on the scope and content of the corporate responsibility to respect all human rights and to provide concrete guidance to business and other stakeholders," and to "identify, exchange and promote best practices and lessons learned on the issue of transnational corporations and other business enterprises, in coordination with the efforts of the human rights working group of the Global Compact."[116] Of special significance are the "Generally Accepted Principles and Practices" (the "Santiago Principles"), presented by the IMF's International Working Group of Sovereign Wealth Funds (IWG) to the IMF's International Monetary and Financial Committee on October 11, 2008[117] to govern the behavior of a special class of foreign investors, namely sovereign wealth funds. The Santiago Principles too are voluntary, but the speed with which they were formulated indicates what can be done if major countries decide that action needs to be taken.

Voluntary instruments like the ones mentioned can play a useful role in terms of learning, outlining and establishing standards, defining expectations, and influencing behavior. As such, they raise the responsibilities of MNEs, especially when such soft-law instruments are considered in judicial proceedings and non-governmental organizations (NGOs) and others monitor the resulting instruments.[118] Monitoring is particularly important to lend credibility to voluntary instruments. It continues to be undertaken in regard to long-established instruments such as, most notably, the ILO Tripartite Declaration[119] and the OECD Guidelines.[120] The OECD Guidelines were strengthened in 2000;[121] it is expected

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[116] "Mandate of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises," Human Rights Council Res. 8/7, June 18, 2008, available at: http://ap.ohchr.org/documents/E/HRC/resolutions/A_HRC_RES_8_7.pdf. For the full terms of reference and a complete list of documents prepared by and submitted to the Special Representative as of August 10, 2010 (including links to the documents), *see* http://www.business-humanrights.org/SpecialRepPortal/Home (last visited March 16, 2011).

[117] International Working Group of Sovereign Wealth Funds (IWG), *Sovereign Wealth Funds: Generally Accepted Principles and Practices,'Santiago Principles'* (October 2008). The IWG agreed to explore the creation of a standing group of SWFs to keep the principles and practices under review and facilitate their dissemination, proper understanding and implementation. A "Formation Committee," comprised of 10 IWG members has been established, on a voluntary basis, to discuss and draw up the charter and work program of the proposed standing group. The work is in progress, and the IMF continues to facilitate it until the new group is established and becomes functional.To facilitate and to follow up on the work undertaken in the context of the Santiago Principles, the IWG established (by the "Kuwait Declaration" of April 6, 2009) the International Forum of Sovereign Wealth Funds. The Forum is a voluntary group of SWFs for the purpose of meeting and exchanging views on issues of common interest, and to facilitate an understanding of the Santiago Principles and SWF activities. It was emphasized that the Forum is not to be a formal supranational authority and its work shall not carry any legal force. The Forum has a professional Secretariat to facilitate its activities and direct communications. The Forum has requested the IMF staff to initially undertake this role. *See* http://www.iwg-swf.org/mis/kuwaitdec.htm#P39_6108 and http://www.ifswf.org/.

[118] NGOs monitor in particular various industry codes.

[119] International Labour Office, *Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy, fourth edition* (2006), available at: http://www.ilo.org/public/english/employment/multi/download/declaration2006.pdf.

[120] The decision of the Council underlying the guidelines states, for example, that "The Committee on International Investment and Multinational Enterprises …shall periodically or at the request of an adhering country hold exchanges of views on matters covered by the Guidelines and the experience gained in their

that an update of the Guidelines (launched in 2010) will be completed in mid-2011,[122] reflecting presumably the changing approach toward FDI, at least to a certain extent.

Overall, the most one can say is that the definition of the responsibilities of MNEs is inching toward more binding commitments, even if in a fragmented manner. The issue remains, therefore, whether the responsibilities of MNEs as currently defined and contained in overwhelmingly voluntary instruments are commensurate with the rights these enterprises enjoy and the role they play in the world economy and individual countries. In the new climate of re-evaluating the costs and benefits of certain forms of FDI and the new assertiveness of host countries, it may well be that this issue will receive more attention in the future.

5. The way forward

The establishment of an international regulatory framework for MNEs was described, at the beginning of this chapter, as involving a struggle to find the proper balance between the rights and responsibilities of MNEs on the one hand and those of host countries on the other, and a struggle over the legal nature (mandatory vs. voluntary) that any rights and responsibilities should take, based on the overall recognition that the global nature of the activities of MNEs requires an international approach. The preceding discussion has shown that the answer to this challenge has varied over time, depending on how governments perceived the cost and benefits associated with FDI and hence what attitudes they adopted and what objectives they pursued.

The struggle to reach the proper balance continues and needs to continue. Four areas, in particular, deserve attention:

1. *Further clarification of the substantive rights and responsibilities of host country governments*. As discussed, the present international investment law and policy regime has been established primarily and purposefully to protect foreign direct investors and facilitate their operations. The regime needs to evolve further in a manner that it also recognizes clearly the right of host countries to regulate in the public interest in order to protect and further their own legitimate public policy objectives, particularly as regards their own security and development. At the same time, the responsibilities of host countries need to be clear as well, i.e., the right to regulate in the public interest needs to

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application;" "The Committee shall be responsible for clarification of the Guidelines;" and "The Committee shall hold exchanges of views on the activities of National Contact Points with a view to enhancing the effectiveness of the Guidelines." *See* OECD, *The OECD Guidelines for Multinational Enterprises: Decision of the Council* (June 2000), available at:

[121] For documents related to this revision, see http://www.oecd.org/document/29/0,3343,en_2649_34889_2439005_1_1_1_1,00.html. The revised Guidelines included recommendations on the elimination of child labor, forced labor and human rights, new chapters on corruption and consumer protection, revised sections on the environment and on transparency and disclosure, and improved implementation procedures.

[122] See OECD, "Building trust and confidence in international investment" (Paris: OECD, March 26, 2009), mimeo. See also "Adhering countries will discuss the draft updated text at meetings in February and March 2011 with a view to finalising the update by May 2011." http://www.oecd.org/document/33/0,3746,en_2649_34889_44086753_1_1_1_1,00.html

be circumscribed in a manner that it does not provide the pretext for governments—whether of developed countries or emerging markets – to disregard their international commitments. Efforts need to be made, in particular, to clarify and, if need be, circumscribe, the self-judging essential security clause – it is a basic tenet of law that one cannot be a judge in one's own case.[123] This is even more important at a time when FDI protectionism appears to be on the rise, accompanied by the re-appearance of screening mechanisms along the lines of the Committee on Foreign Investment in the US. A good part of it appears to be directed against MNEs from emerging markets, or at least certain emerging markets and certain types of investments, namely sovereign FDI in the form of M&As. This development deserves special attention as MNEs from emerging markets, like their counterparts from developed countries, need a regulatory framework that is secure, predictable and stable, protects investors and assures the rule of law. An FDI Protectionism Observatory may be needed to monitor this development and focus international attention on it.

Progress in balancing the regulatory framework for investment has been made, in that the substantive rights of investors have been more clearly defined and at times even circumscribed, and in that at least some IIAs show more respect for the substantive rights of host countries. The evolution of the US approach is particularly important here, as the changes made between the country's 1984 and 2004 Model BIT and the country's IIAs that are based on the latter indicate how the balancing can be done. Among the many ways in which the U.S. has become more cautious about granting protections to foreign investors, particularly important is the limitation of the (absolute) "fair and equitable treatment" standard, which shifts the focus back to the (relative) "national treatment" standard, combined with more freedom to take exceptions from that standard; this puts non-discrimination back into the heart of the treatment approach.[124] Important is also the limitation of an expansive interpretation of investors' rights in the area of indirect expropriation, especially by apparently making non-discriminatory regulatory actions non-compensable.[125] The *Zeitgeist* may even move the US approach further on a number of other key issues in IIAs. Thus, the May 2009 Hearings of the Ways and Means Trade Subcommittee of the House of Representatives of the US Congress focused on investment protections included in US BITs and free trade agreements, asking "whether our FTAs and BITs give foreign investors in the United States greater rights than U.S. investors have under US law; whether the FTAs and BITs give governments the 'regulatory and policy space' needed to protect the environment and the public welfare; and whether an investor should have the right to submit to arbitration a claim that a host

[123] For a strong case against self-judging clauses, see for example Peter Muchlinski, "Trends in international investment agreements: balancing investor rights and the right to regulate. The issue of national security", in *International Investment Yearbook 2008-2009*, op. cit., pp. 35-78. See also Andrea K. Bjorklund, "Economic security defenses in international investment law", *ibid*., pp. 479-504.
[124] On national treatment as one of the core guarantees, see e.g. Rudolf Dolzer and Margrete Stevens, *Bilateral Investment Treaties* (Leiden and Boston: Brill Martinus Nijhoff, 1995).
[125] Related to this is the calculation of compensation in case of expropriation and the question of what approach to take in this respect. While the formula "prompt, adequate and effective" seems to be widely accepted, there does not seem to be a generally accepted approach to the calculation of damages, e.g., to what extent lost potential earnings should be taken into account. See, e.g. Stiglitz, op. cit., arguing that compensation should be limited to the value of actual investments.

government has breached its investment obligations under an FTA or a BIT."[126] What these questions imply is whether the U.S. should consider subscribing to the Calvo doctrine (once advocated by Latin American countries);[127] whether host country rights should be strengthened further (the concept of "policy space" is a concept that has traditionally been used by developing countries in the WTO either to avoid taking on certain international obligations or to obtain more flexibility in applying existing rules); and whether investor-state dispute settlement should perhaps be phased out in favor of State-State dispute settlement (as in the WTO). It may well be that the review of the US model BIT that has been initiated will further strengthen the rights of host countries.[128]

Recent US and Canadian IIAs reflect the evolving balance as regards host country rights and responsibilities. The inclusion of clauses that allow the parties to issue binding interpretations of the treaties they have entered into provide the basis on which further changes can be made if and when parties to IIAs containing such clauses decide to make use of them. Other countries are likely to adopt the US and Canadian approach, or at least elements of it,[129] contributing in this manner potentially to an overall rebalancing of the regime.

One provision that also changed in the 2004 US Model BIT compared to the 1984 version is that it expanded pre-establishment national treatment rights. This is one of the most sensitive issues and difficult rights, especially for developing countries, as it involves the right of establishment. (The difficulty of this right is reflected in the fact that, even among developed countries, it was granted only in 1984.[130]) It is particularly difficult for developing countries because economic development, and with it the

[126] *Hearing on Investment Protections in U.S. Trade and Investment Agreements*, United States House of Representatives Committee on Ways and Means, Subcommittee on Trade, May 14, 2009, http://waysandmeans.house.gov/hearings.asp?formmode=detail&hearing=678. For a strong reaction against the answers perhaps implied in these questions, see Daniel M. Price, "Keep international protections," *Washington Times*, May 14, 2009. As to the first of these questions, it should be noted that President Obama had stated during the Presidential campaign that he is opposed to "granting foreign investors any rights in the U.S. greater than those of Americans." See Barack Obama for President, *A Blueprint for* Change, Strengthening the economy: Trade, 13, available at http://www.barackobama.com/issues/ (viewed August 24, 2008). The final report on the hearings is available at is: http://www.state.gov/e/eeb/adcom/aciep/rls/index.htm.

[127] According to this doctrine, aliens have no more rights than the citizens of a sovereign state. Accordingly, investor-State disputes need to be settled under domestic law by the courts of the countries involved. Interestingly, in at least one country, Ghana, an opposite development seems to be taking place. According to Section 29 of the Ghana Investment Promotion Center Act, 1994, Act 478 (contained in the Revised Statute Laws of Ghana, 2007) (which applies to enterprises other than petroleum and mining enterprises), it appears that a *domestic* investor may be able to refer a dispute with the Government to international arbitration under the rules of UNCITRAL or any other national or international machinery for the settlement of investment dispute agreed to by the parties. In fact, where there is disagreement between an investor and the Government as to the method of dispute settlement to be adopted, the choice of the investor shall prevail (http://www.gipc.org.gh/UploadFiles/Publications/Investment_Law070627114453.pdf) I am grateful to S.K.B. Asante for this information.

[128] As of March 2011, the new US Model BIT had not been released.

[129] Reference was already made earlier to the inclusion of a self-judging essential security clause in the case of recent Japan BITs and other treaties.

[130] See Peter T. Muchlinski, *Multinational Enterprises and the Law*, op. cit., p. 250.

establishment or strengthening of domestic industries and firms, is of paramount importance for these countries; infant-industry, national champion (also not unknown to developed countries) and industrial policy considerations (as well as considerations related to strategic sectors) require that governments retain the right to admit foreign investors on the basis of their domestic law and regulations. Not too many countries include a provision on national treatment at the pre-establishment phase in their IIAs, so that, given the current overall attitude toward FDI, this approach may not become the norm in such agreements.[131]

2. *Further clarification of the responsibilities of MNEs*. While there has been a movement toward the greater recognition of the rights of host countries, little has changed regarding the responsibilities of MNEs. The responsibilities of these firms, be it from developed countries or emerging markets,[132] need to be defined in a clearer and more coherent manner, as this is an important aspect of the overall balance of the international investment law and policy regime. This is in tune with the recognition that enterprises have a responsibility to their stakeholders in the communities in which they are established and play an important role. Attitudes in this respect are also changing, as reflected in the wide-spread acceptance of the concept of corporate social responsibility, further encouraged by the recent financial and economic crises and the attendant possible changing balance between the role of the state vs. the role of the market in the management of economic matters.

Further work can build on the various efforts already undertaken, although there is a question as to which issues should be addressed. For NGOs and governments in developed countries, the priority is often to address issues related to human rights, the environment, the social sphere, and corruption (as, for example, reflected in the Global Compact). For developing countries, the priority is often to address issues that are more directly related to economic development, such as transfer of technology and taxation. Be that as it may, the broader question of voluntary vs. mandatory still remains. But even if standards for MNEs are voluntary, there can be mandatory *procedural* obligations for governments to encourage MNEs to comply with such standards, as is the case with the OECD Guidelines for Multinational Enterprises, an approach that could conceivably find its way into IIAs. In fact, the proposed Norwegian Model BIT (2007) took this approach. Article 32 stated: "The Parties agree to encourage investors to conduct their investment activities in compliance with the OECD Guidelines for Multinational Enterprises and to participate in the United Nations Global Compact."[133] Conceivably, such an approach (in

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[131] Arguably, with the review, by certain countries, of incoming M&As under national security considerations, national treatment at the pre-establishment phase for one class of investments (M&As) is weakened (although, as noted earlier, the great majority of such M&As is not being reviewed).
[132] Or, for that matter, of domestic firms as well, to avoid discrimination.
[133] Norway's draft Model BIT (2007) is available at:
http://www.regjeringen.no/upload/NHD/Vedlegg/hoeringer/Utkast%20til%20modellavtale2.doc.
According to *Investment Treaty News*, June 2009, p. 7, however, Norway shelved the model BIT as public feedback indicated that, for some, the model did not provide investors with sufficient protection, while, for others, it did not give the government sufficient policy space to regulate in the public interest. For a discussion, see Peter Muchlinski, "Trends in international investment agreements, 2008/2009: Review of

similar or stronger language) can be extended to other voluntary instruments. The EU-ACP Cotonou Agreement, for example, contains references to sustainable development and human rights.[134] Finally, MNEs are subject to the laws and regulations of the countries in which they operate. To the extent to which these countries have laws and regulations that prescribe particular corporate behavior, foreign investors are bound by them; moreover, to the extent that IIAs prescribe that treaty benefits are granted only to investments made in accordance with host country laws and regulations,[135] MNEs wishing to benefit from a treaty's coverage need to observe national corporate standards as well, for that reason alone. Finally, in the case of large projects, most notably in natural resources and infrastructure, contracts are often concluded between governments (or government entities) and foreign investors, and these contracts can contain obligations addressed to the investors. In case of an alleged material breach of such an obligation, domestic courts -- or, depending on a contract's provision, international arbitration – can resolve such claims.[136] In other words, there are a number of avenues through which the responsibilities of MNEs can be clarified.

3. *Further clarification of the responsibilities of home countries*. To a large extent, home country governments in their capacity as home country governments see their responsibilities regarding outward investment restricted to protecting such investment and facilitating the international operations of their firms in host countries, as reflected in the conclusion of IIAs. But beyond that, most IIAs contain only very limited responsibilities for home countries, even though the investment relationship involves at least three parties: MNEs, host countries and home countries.

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the model bilateral investment treaties of Norway, South Africa and the United States", in *International Investment Yearbook 2009-2010, op cit*, pp. 41-86.

[134] "*Partnership Agreement Between the Members of the African, Caribbean and Pacific Group of States and the European Community and Its Member States*" ("The Cotonou Agreement"), June 23, 2000, revised June 2005, available at: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:22000A1215(01):EN:NOT. For a discussion, see Marie-Claire Cordonier Segger, Markus W. Gehring and Andrew Newcombe, *Sustainable Development in World Investment Law* (Alphen: Kluwer, 2011); see also Ilze Dubava, " Reconciling international investment law and sustainable development: Necessity or luxury?" (Florence: European University Institute, 2011), mimeo.

[135] Which could include obligations arising out of other international instruments (e.g., on human rights, social and environmental issues), to the extent that they have acquired effect in national law.

[136] If governments could evoke an appropriately drafted umbrella clause in reference to obligations of foreign investors in state contracts (and perhaps even other contracts), the umbrella clause could have the effect of bringing such contracts under treaty protection. (IIAs themselves typically do not impose obligations on foreign investors, although, as discussed earlier, some are beginning to do so.) For that, however, IIAs would have to contain provisions that allow governments not only to file counter-claims but also to initiate arbitration – a right they typically do not have. Access to international arbitration for governments is, therefore, an option that needs to be explored (even though, in the absence of such a right, it is possible that arbitrators will take into account a possible violation of a contract by an investor when calculating damages). One possible approach to this issue has been suggested by Ucheora Onwuamaegbu: As part of the conditions for entry, host countries could require that investors, to qualify for the protection of the treaty, need to give their consent that they accept international arbitration in case of a dispute brought by the government (in a similar manner as governments do in BITs).

Arguably, especially BITs – whose full title is often a variation of “treaties for the promotion and protection of investment” – could provide for more active steps to promote outward FDI, especially into developing and especially the 50 least developed countries. In fact, virtually all developed countries do take a number of active steps in this respect, ranging from providing insurance to their outward investors, to making financing available (e.g. for feasibility studies), to granting fiscal incentives,[137] to providing information on investment opportunities.[138] All these measures are useful, and they reflect the conviction of home countries that they benefit from helping their firms to develop an international portfolio of locational assets as an important source of their firms’ competitiveness.[139] But such measures are taken only at the discretion of the individual home country and to serve primarily only its own interests, i.e., they are not the results of negotiations and taken because they are prescribed by IIAs (in the same manner in which the responsibilities of host countries are).[140]

A more balanced international investment law and policy regime could include responsibilities for home countries (at least for developed countries and advanced developing countries) to encourage and facilitate FDI flows to the least developed countries, focusing especially on investments that have the most favorable development impact. Such commitments could enshrine a number of the measures taken so far unilaterally. They could also extend to providing support to strengthening the institutional capacity of developing countries to attract FDI and benefit from it, and they could extend to supporting the negotiation and implementation of IIAs and dealing with investment disputes.[141] Conceivably, commitments of this type could also include efforts by home country governments to require from “their” MNEs the observance of certain standards of behavior, as was done, for example, during the apartheid era when U.S. and European

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[137] See, for example, the debate in the US regarding the favorable tax-treatment of non-repatriated earnings by MNEs.

[138] For a full discussion of measures that could be taken by home countries, see “Home country measures”, in Karl P. Sauvant and Joerg Weber, eds., *International Investment Agreements: Key Issues* (Geneva: UNCTAD, 2005), vol III., pp. 1-28.

[139] The underlying assumption is, *grosso modo*, that, what is good for a country’s MNEs is also good for the (home) country. To the extent, however, that MNEs become truly multinational in terms of the location of their assets and activities, this assumption may hold less and less. See in this context the debate between Robert Reich and Laura Tyson which, although held 20 years ago is, if anything, even more relevant today. See Robert Reich, "Who is us?", *Harvard Business Review,* 1990, pp. 53-64; Laura D'Andrea Tyson, "They are not us: Why American ownership still matters", *The American Prospect,* 1991, pp. 37-48; and Robert Reich, "Who do we think they are?", *The American Prospect,* 1991, pp. 49-53.

[140] While all developed countries have a policy to protect and promote outward FDI by “their” companies, and have various programs in place to this effect, few developing countries have such policies and programs. Notable exceptions include China (which is supporting its firms to “go global”) and Singapore, which seeks to develop an external wing of its economy through outward FDI. See UNCTAD, *World Investment Report 1995: Transnational Corporations and Competitiveness* (Geneva: UNCTAD, 1995), ch. VII; UNCTAD, *World Investment Report 2006: FDI from Developing and Transition Economies: Implications for Development* (Geneva: UNCTAD, 2006); Peter J. Buckley, Jeremy L. Clegg, Adam R. Cross and Hinrich Voss**, “**What can emerging countries learn from the outward direct investment policies of advanced countries?” in, *Foreign Direct Investments from Emerging Markets*, op. cit; and Filip De Beule and Daniel Van Den Bulcke, “Changing policy regimes in outward foreign direct investment: from control to promotion,” in ibid.

[141] See also the discussion below on procedural improvements.

Union MNEs were obliged to observe certain guidelines when operating in South Africa.[142] All or any of such commitments could be accompanied by monitoring and follow-up mechanisms.

4. *Further clarification of the dispute-settlement process*. International investor-State dispute settlement is an integral part of the international investment law and policy regime, a part that gives the regime the "teeth" that many other international regimes do not have. It is also special because it gives foreign investors – be they from developed or developing countries -- access to an *international* dispute-settlement mechanism, a privilege that domestic firms do not have as a rule. It is therefore particularly important that the judicial process associated with the dispute-settlement mechanism works properly and is seen as fair and legitimate by the regime's principal stakeholders. Several aspects deserve special attention.[143]

Given the absence of an authoritative and clearly defined instrument governing investment matters, the rapid development of the investment regime and the evolving nature of its substantive provisions, arbitral tribunals have acquired substantial leeway to interpret treaty language. Equally, it is not surprising that, eventually, efforts were made to reduce the discretion of such tribunals. According to Kenneth J. Vandevelde, in fact, it was precisely one of the objectives of the 2004 US Model BIT to do that "by clarifying the substantive provisions of the BIT, so as to provide clearer guidance to the tribunals, and by allowing the two BIT parties to determine certain issues for the tribunals".[144] Reference has already been made to the clarification of some substantive provisions. As to the question of guidance, the 2004 US Model allows the BIT parties, most importantly, to issue joint interpretations of BIT provisions that are binding on a tribunal. To the extent that BITs do not contain a provision for interpretation, it could be included if the parties so desire, either during renegotiations of expiring BITs (and a number of these treaties are being renegotiated or are coming up for renegotiation[145] since a great number of them were negotiated during the 1990s and have a ten-year duration) or through the

[142] See *The Global Sullivan Principles*, available at: http://www.thesullivanfoundation.org/gsp/principles/gsp/default.asp and *Code of Conduct for European Community Companies with Subsidiaries, Branches or Representation in South Africa*, 19 Nov. 1985, reprinted in 24 ILM 1477 (1985).

[143] Other issues that deserve attention, but are not further elaborated here, include access to international arbitration at the initiative of host countries; access by host countries to the courts of home countries in case of disputes even if such access is not provided for in contracts (in principle, home country governments could grant access to their courts in IIAs to which they are party); possible abuses through treaty shopping; the selection of arbitrators and conflicts of interest; improvements of transparency, and admission of *amicus* briefs from non-disputing parties. For a review, see, e.g., van Harten, op. cit., and Stiglitz, op. cit. Wälde summarizes the criticisms against investment arbitration as follows in his "Improving the mechanisms for treaty negotiation and investment disputes", op. cit., pp. 511-512: "fragmentation of adjudication, lack of central unifying judicial authority, inconsistency of judicial law-making, integrity of process and players, transparency, access to third parties, operating in treaty systems with stunted compliance mechanisms".

[144] Vandevelde, "A comparison of the 2004 and 1994 U.S. Model BITs", op. cit., pp. 283-316.

[145] See, Edward Kehoe and Paul Maslo, "Trends in international investment agreements 2009-2010: Renegotiation of bilateral investment treaties", in *International Investment Yearbook 2010-2011*, op. cit.

changing of existing treaties; in this manner, treaty partners can see to it that the application of a treaty corresponds to their objectives.

This possibility, however, does not alleviate the need to deal with the possibility of inconsistent decisions rendered by autonomous ad hoc tribunals responding to similar or even the same facts.[146] In the case of the U.S., the 2002 Bipartisan Trade Promotion Authority Act of the US Congress[147] prescribed therefore for the country's free trade agreements a negotiating objective of "providing for an appellate body or similar mechanism to provide coherence to the interpretations of investment provisions in trade agreements".[148] As mentioned earlier, the call for an appellate body or similar mechanism to review awards rendered by tribunals was subsequently included in the 2004 US Model BIT and incorporated in US IIAs.[149] What this means is that the issue is on the agenda, although increasing coherence and consistency in international investment adjudication might eventually require a multilateral appeals mechanism, if not a World Investment Court with full-time independent judges.[150]

Another important aspect of the dispute-settlement process concerns the capacity of all States to participate in this process equally and competently. This challenge is well known from the trade area. There it led, in 2001, to the establishment of the (intergovernmental) Advisory Center on WTO Law to assist its members (primarily smaller developing countries) in dealing with the rapidly increasing number of disputes arising in the WTO, with a view toward ensuring that they can benefit fairly from the international trade system and, in this manner, strengthen the legitimacy of the system itself.[151] The situation in the investment area today is similar, given the rapid rise in the number of international investment disputes and the complexity and rapidly evolving

[146] *See e.g.*, *CME Czech Republic B.V. v. Czech Republic*, Partial Award (13 September 2001), (http://ita.law.uvic.ca/documents/CME-2001PartialAward.pdf) and *Lauder v. Czech Republic*, Final Award (3 September 2001) (http://ita.law.uvic.ca/documents/LauderAward.pdf). For a discussion of the pros and cons of such a mechanism, *see* Sauvant with Chiswick-Patterson, op. cit.,
[147] *See* Barton Legum, "Options to establish an appellate mechanism for investment disputes," in ibid., p. 232.
[148] 19 U.S.C. para. 3802(b) (3) (G) (iv).
[149] An initiative by ICSID, starting in October 2004, to create an "Appeals Facility" did not gain traction. After consultations, an ICSID document reported in May 2005 that most members of the Administrative Council had concluded that "it would be premature to attempt to establish such an ICSID mechanism at this stage, particularly in view of the difficult technical and policy issues" involved; see ICSID, "Suggested changes to the ICSID rules and regulations 3", May 12, 2005, at http://www.worldbank.org/icsid/highlights/052405-sgmanual.pdf.
[150] As advocated, for example, by van Harten and Stiglitz. See, respectively, van Harten, op. cit., and Stiglitz, op. cit. For a critical review arriving at the conclusion that the prospects of a unitary appellate mechanism are dim, at least in the near-term, see Legum, op. cit, pp. 231-240. Similarly Wälde, op. cit. as regards a World Investment Court.
[151] The Centre's website (http://www.acwl.ch/e/index_e.aspx) says: "The Advisory Centre on WTO Law (ACWL) is a Geneva-based intergovernmental organisation that was established in 2001 to provide legal advice on WTO law, support in WTO dispute settlement proceedings and training in WTO law to developing countries and least developed countries ('LDCs'). The terms 'country' and 'developing country' include customs territories and countries with economies in transition. The ACWL's basic mission is to ensure that these Members of the WTO have a full understanding of their rights and obligations under WTO law and an equal opportunity to defend their interests in WTO dispute settlement proceedings."

international investment law and policy regime. Many countries, especially developing ones, simply do not have the resources[152] to keep up with these developments, be it to negotiate state-of-the-art IIAs or defend themselves adequately in international investment disputes. For this reason, it would be appropriate to establish an independent intergovernmental International Investment Law Advisory Center to help its members in matters related to international investment law; the idea is actively being pursued in Latin America (a region particularly exposed to international investment disputes).[153] The terms of reference of such a facility could conceivably range from making available information and arranging for the sharing of experiences; to providing training and technical assistance in matters related to the negotiation of IIAs and their implementation; to the promotion of alternative means of dispute settlement; to assistance in the technical preparation of governments in the event of disputes; to rendering legal opinions; to litigating on behalf of a government. A competent Advisory Center would help ensure that there is a level playing field allowing for a fair dispute-settlement process; it would therefore enhance the acceptability -- and with that the legitimacy -- of the international investment law and policy regime.

Conclusions

Many of these (and other) shortcomings of the international law and policy regime are the result of its expansion during a period when the focus was almost exclusively on the responsibility of host countries, as well as the speed with which the regime developed over the past 20 years or so. The rebalancing that is underway and the various improvements that are being discussed or have been proposed will help to rectify this situation, and hence need to be pursued vigorously. It is in fact noteworthy that few, if any,[154] question the need for an international regime as such, to deal with issues arising

[152] There is also the question of whether governments that face no or few disputes should (and can) allocate scarce resources to building up a first class capacity for the event that they face a dispute, instead of using these resources for other purposes.

[153] The idea of establishing such a facility emerged in UNCTAD in 2005 and was later that year suggested to the OECD Committee on International Investment and Multinational Enterprises (CIME) where a number of members expressed interest in it. Subsequently, the Inter-American Development Bank, at the request of several Latin American governments, launched a project together with UNCTAD, the Organization of American States, the Academia de Centroamerica (Costa Rica), and the Vale Columbia Center on Sustainable International Investment (Columbia University) to explore the feasibility of an advisory facility for developing countries from the Latin American region. See UNCTAD, "Consultation report on the feasibility of an advisory facility on international investment law and investor-State disputes for Latin American countries" (Geneva: UNCTAD, February 2, 2009), mimeo. Negotiations among interested Latin American and Caribbean countries commenced in May 2009. On the question of such a facility in general, see Eric Gottwald, "Leveling the playing field: is it time for a legal assistance center for developing nations in investment treaty arbitration?", *American University International Law Review,* vol. 22 (2007), pp. 237-275, and Wälde, "Improving the mechanisms for treaty negotiation and investment disputes", op. cit. 563, for whom the "lack of a legal aid facility … is … a serious deficiency of the overall investment arbitration regime." In Latin America, UNASUR has also been pursuing the idea of an advisory facility.

[154] Even an eminent and ardent critic of the present international investment law and policy regime like Sornarajah does not per se question the need of such a regime to deal with the trans-border investments of firms, but rather focuses on how that regime can be improved fundamentally. See e.g. his "Toward

from the trans-border investments of firms. Rather, what scholars advocate is either that the regime requires fundamental changes,[155] major adjustments[156] or merely has to go through a "*crise de croissance* -- a teenager's crisis",[157] with most others seeing only a limited need for improvements.

On this basis, it would be desirable to take stock of where we stand in the evolution of the investment regime. At least two approaches offer themselves to do that. The first one would be to prepare a "Restatement of International Investment Law" to determine what is "black letter" law, where there is no consensus, and what the legal implications are of various provisions. Such a Restatement would, at a minimum, establish what is the lowest common denominator in the area of international investment law. The second approach would be the preparation of a model BIT – which, like any model treaty, would be an ideal type -- to identify (perhaps with options and legal implications) what could be the desirable content of any treaty (or the investment chapters in free trade agreements) of this kind, built on best practice; a model BIT could be of particular interest to developing countries.[158] In either case, the credibility of the resulting text would depend entirely on the reputation and representativeness of the scholars preparing the texts. An authoritative Restatement and model BIT, in turn, could serve as guides for arbitrators and negotiators of investment agreements.

In the meantime, the developments that deserve most attention concern the U.S. and emerging markets as they are likely to influence most the direction in which the international investment regime may evolve. (With the Lisbon Treaty[159] giving competence to the Commission of the European Communities in the investment area, the Commission could also become an important player once it has been settled how it should proceed.[160]) As to the US, what needs to be watched is the country's further treaty-

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normlessness: the ravages and retreat of neo-liberalism in international investment law", in *International Investment Yearbook 2009-2010*, op cit, pp. 595-642.

[155] See, e.g. ibid.; M. Sornarajah, *The International Law of Foreign Investment, second edition* (Cambridge: Cambridge University Press, 2004); and M. Sornarajah, "A coming crisis: expansionary trends in investment treaty arbitration," in Sauvant with Chiswick-Patterson, op. cit., pp. 39-80.

[156] *See* Howard Mann, "Civil society perspectives: what do key stakeholders expect from the international investment regime," in Alvarez et al., op. cit., and Stiglitz, "Regulating multinational corporations," op. cit.

[157] Brigitte Stern, "The future of international investment law: a balance between the protection of investors and the states' capacity to regulate," in Alvarez et al., op. cit., ch. 2.7.

[158] Many countries have their own model BITs, a number of them reprinted in UNCTAD, *International Investment Instruments: A Compendium*, op. cit. At the international level, the OECD had prepared (1967) a "Draft Convention on the Protection of Foreign Property"; see OECD, *Draft Convention on the Protection of Foreign Property,* C(67)102 (1967), available at: http://www.oecd.org/dataoecd/35/4/39286571.pdf. Although this draft was not opened for signature, it became the model for many BITs initiated by developed countries. There are also the OECD and UN model tax treaties, op. cit., and there is the "IISD Model International Agreement on Investment for Sustainable Development," of the International Institute for Sustainable Development, a non-governmental organization. (Available at: http://www.iisd.org/pdf/2005/investment_model_int_agreement.pdf).

[159] Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community (signed at Lisbon, December 13 2007, entered into force December 1, 2009), 2007/C 306/01, available at: http://europa.eu/lisbon_treaty/full_text/index_en.htm

[160] *See*, European Commission, "Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions – Towards a

making practice in light of the 2004 Model BIT and the review of that model in a climate much more respectful of host country interests.

In the case of emerging markets, the growth of MNEs from those countries, and hence the increasing role of emerging markets as home countries, is bound to influence the further evolution of the investment regime, especially at a time of a changing investment climate and rising FDI protectionism.[161] At the same time that developed countries, the traditional home countries, seek to reflect more their interests as host countries in IIAs, important emerging markets, whose outward FDI is rising fast and is becoming significant, seek to reflect more their new interests as home countries in such agreements; in particular, they seem to come to the conviction that their investors would benefit from the advantages of international investment law. Indicative of this is not only the inclusion of investor-State dispute settlement provisions in IIAs between and among emerging markets, but also the fact that emerging market MNEs are making more use of international arbitration, even if not as much as their developed country counterparts: Of the total of 357 known international arbitration cases at the end of 2009, about 10 percent were initiated by firms from emerging markets.[162] While that percentage is not high, it is lower than the share of emerging markets in world FDI outflows.

The two developments may well come together in the negotiations of a China-US BIT (or, in the future, a China-EU free trade agreement or BIT). The two countries agreed in July 2008 to negotiate such a treaty and, by the beginning of 2011, had held a number of meetings in this regard. The US is coming to these negotiations from a position in which it was a strong advocate of expansive investor protections but is moving toward circumscribing such protections while strengthening host country rights. China is coming to these negotiations from a position in which it was careful about protecting host country rights but is moving toward strengthening investor protections.[163] To quote Stephan W. Schill, the new generation of China BITs (starting with the BIT with The Netherlands (2001) and Germany (2003)) "conform, despite some remaining limitations, in all major aspects to what can be considered standard treaty practice in approximately 2,500 BITs world-wide", turning the country's BITs "into effective and powerful tools of investment protection."[164] In the opinion of one observer, China's approach to its BITs today is

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comprehensive European international investment policy" (July 7, 2010), COM(2010) 343 def; and European Commission, "Proposal for a regulation of the European Parliament and the Council – establishing a transitional arrangements for bilateral investment agreements between Member States and third countries" (July 7, 2010) COM(2010) 344 def; these two documents are reprinted in the *International Investment Yearbook 2010-2011*, op. cit. See the same source for a discussion of a number of issues relating to the EU competency issue in the area of FDI.

[161] China was one of the countries that supported the inclusion of a reference to FDI protectionism in the G20 statements reported above.

[162] Data supplied by UNCTAD.

[163] China is the emerging market with the largest number of BITs (125), surpassed, worldwide, only by Germany (135), by the end of 2009. It should be noted that China's outward FDI during 2008 almost doubled to US$ 52 billion (while world FDI flows declined) and remained at that level in 2009, when world FDI flows declined by over 40 percent. China's outflows during those two years were equivalent to the average of *world* FDI flows during the first half of the 1980s.

[164] Stephan W. Schill, "Tearing down the Great Wall: the new generation investment treaties of the People's Republic of China", *Cardozo Journal of International & Comparative Law*, vol 15 (2007), pp.

similar to the approach of the US during the 1980s, implying that it is more investor friendly (and less host-country friendly) than the US today.[165]

It is far from certain, however, that a China-US BIT will be concluded, even though both countries have an interest in such a treaty: the US because the country's firms have sizable investments in China, and the business community is supportive of such a treaty (including in the light of a perceived deterioration of the country's investment climate);[166] China, because the country's firms seek to expand into the US, but are faced (especially when they are State-controlled) with a more difficult environment.[167] Still, substantial difficulties have to be overcome, most importantly the political climate in Washington, D.C., regarding IIAs in general and China in particular, and the inherent difficulties, in the best of circumstances, to reach agreement on a very difficult subject in a process in which neither country has an inherent negotiating advantage or even can dictate terms.[168]

However, should agreement be reached and a treaty be ratified, it might well represent a "grand compromise" as it would involve a compromise between the single largest home and host country among developed countries on the one hand, and the single largest home and host country among developing countries, on the other. Such a compromise could well foreshadow the direction that the evolving international investment law and policy regime might take in terms of resolving, at least temporarily, the struggle to find the proper balance between the rights and responsibilities of MNEs on the one hand and those of countries on the other, and the struggle over the legal nature that any rights and responsibilities should take. In fact, even if and agreement can be reached, but ratification should not take place, the resulting text might still capture a new balance of rights and

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76,77. See also Norah Gallagher and Wenhua Shan, *Chinese Investment Treaties: Policies and Practice* (New York: Oxford University Press, 2009).

[165] Alvarez, "The once and future foreign investment regime", op. cit.

[166] The heads of 30 US business organizations wrote, on July 21, 2008, to the President of the United States to express their "support for the negotiation of a high-standard and commercially meaningful Bilateral Investment Treaty (BIT) with the People's Republic of China and to welcome the announcement of the launch of formal U.S.-China BIT negotiations," available at: http://www.uschina.org/public/documents/2008/07/bit_negotiations_business_community_letter.pdf

[167] See Karl P. Sauvant, ed., *Investing in the United States: Is the US Ready for FDI from China?* (Cheltenham: Edward Elgar, 2009).

[168] National treatment at the pre-establishment phase could turn out to be one of the most difficult issues to be resolved, as China has resisted, in its IIAs, an unqualified obligation for such treatment, retaining its right to an individual approval process for investments made in the country. The US has an equally strong and established position requiring national treatment at the pre-establishment phase. There may be several ways to find a compromise, though. For example, perhaps a compromise could be formulated around accepting national treatment at the pre-establishment phase in principle, while making its application subject to a positive list approach. Or negotiators could return to the formulation of the 1984 Model US BIT (Art. II), which provides for entry and establishment, but makes it subject to the host country's laws relating to the entry and sojourn of aliens, similar to what China has agreed to, for example, in the China-Mexico BIT (Art. 2 – "Each Contracting Party shall admit the entry of investments made by investors of the other Contracting Party pursuant to its applicable laws and regulations" – see Gallagher and Shan, op. cit., p. 514). Or negotiators could agree to grandfather all existing restrictions and processes (which would include screening done by both China and the US), similar to what was done in NAFTA *vis-à-vis* Canada's screening mechanism. Any compromise along these lines would also bring a China-US BIT closer to the approach of a number of European countries on this question, thus enhancing the potential of such a treaty to become a global model.

responsibilities of investors and host countries and become a model for other countries to follow.

“Temporarily”, because finding the proper balance regarding the rights and responsibilities of all stakeholders in the international investment law and policy regime is an ongoing struggle. In fact, particularly now, at the beginning of the 2010s, the international investment law and policy regime is very much in flux, given the various changes in the international economy (including the increasing importance of emerging markets as outward investors), and given the various developments that are taking place, including the negotiations between China on the one hand and Canada, Japan and the US on the other regarding their respective BITs; the possible reconsideration by Brazil concerning the desirability of the country concluding BITs;[169] and the European Commission sorting out the precise content of its new competence in the investment area. In other words, we are in the middle of a dynamic process in which key actors are reassessing their interest situations and objectives, including in the light of changing attitudes vis-à-vis foreign direct investment and in the light of changing bargaining power.

In the end, we might well have to transcend the combination of international investment agreements, customary international law, judicial decisions, authoritative statements, and voluntary rules that make up the international investment law and policy regime today and move toward a binding Multilateral Framework for Investment that comprehensively accommodates the rights and responsibilities of the various stakeholders in a manner that provides legitimacy to the entire regime.

ANNEX

Comparing the 1984 and 2004 US Model BITs

U.S. Model BIT (1984)	U.S. Model BIT (2004)
Preamble Agreeing that fair and equitable treatment of investment is desirable in order to maintain a stable framework for investment and maximum effective utilization of economic resources, and…	Preamble Agreeing that a stable framework for investment will maximize effective utilization of economic resources and improve living standards… Desiring to achieve these objectives in a manner consistent with the protection of health, safety, and the environment, and the promotion of internationally recognized labor rights;

[169] Brazil has negotiated 14 BITs, but not ratified any of them, including because of difficulties of reconciling investor-State disputed-settlement provisions with its constitution. However, the business community seems to be increasingly interested in the conclusion of such agreements.

Definition of Investment	Definition of Investment
Article I (b) "Investment" means every kind of investment in the territory of one Party owned or controlled, directly or indirectly by nationals or companies of the other Party, such as equity, debt, and service and investment contracts; and includes: (i) tangible and intangible property, including rights, such as mortgages, liens and pledges; (ii) a company or shares of stock or other interests in a company or interests in the assets thereof; (iii) a claim to money or a claim to performance having economic value, and associated with an investment (iv) intellectual and industrial property rights, including rights with respect to copyrights, patents, trademarks, trade names, industrial designs, trade secrets and know-how, and goodwill; and (v) any right conferred by law or contract, and any licenses and permits persuant to law… (e) "associated activities" include the organization, control, operation, maintenance and disposition of companies, branches, agencies, offices, factories or other facilities for the conduct of business; the making, performance and enforcement of contracts; the acquisition, use, protection and disposition of property of all kinds including intellectual and industrial property rights; and the borrowing of funds, the purchase and issuance of equity shares, and the purchase of foreign exchange for imports.	**Article 1** **"investment"** means every asset that an investor owns or controls, directly or indirectly, that has the characteristics of an investment, including such characteristics as the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk. Forms that an investment may take include: (a) an enterprise; (b) shares, stock, and other forms of equity participation in an enterprise; (c) bonds, debentures, other debt instruments, and loans;[1] (d) futures, options, and other derivatives; (e) turnkey, construction, management, production, concession, revenue-sharing, and other similar contracts; (f) intellectual property rights; (g) licenses, authorizations, permits, and similar rights conferred pursuant to domestic law[2, 3]; (h) other tangible or intangible, movable or immovable property, and related property rights, such as leases, mortgages, liens, and pledges. [1] Some forms of debt, such as bonds, debentures and long-term notes, are more likely to have the characteristics of an investment, while other forms of debt, such as claims to payment that are immediately due and result from the sale of goods or services, are less likely to have such characteristics. [2] Whether a particular type of license, authorization, permit, or similar instrument (including a concession, to the extent that it has the nature of such an instrument) has the characteristics of an investment depends on such factors as the nature and extent of the rights that the holder has under the law of the Party. Among the licenses, authorizations, permits, and similar instruments that do not have the characteristics of an investment are those that do not create any rights protected under domestic law. For greater certainty, the foregoing is without prejudice to whether any asset associated with the license, authorization, permit, or similar instrument has the characteristic of an investments. [3] The term "investment" does not include an order or judgment entered in a judicial or administrative action.

National and MFN Treatment **Article II** 1. Each party shall permit and treat investment, and activities associated therewith, on a basis no less favorable than that accorded in like situations to investment or associated activities of its own nationals or companies, or of nationals or companies of any third country, whichever is the most favorable, subject to the right of each Party to make or maintain exceptions falling within one of the sectors or matters listed in the Annex to this Treaty. Each Party agrees to notify the other Party before or on the date of entry into force of this Treaty of all such laws and regulations of which it is aware concerning the sectors or matters listed in the Annex. Moreover, each Party agrees to notify the other of any future exception with respect to the sectors or matters listed in the Annex, and to limit such exceptions to a minimum. Any future exception by either Party shall not apply to investment existing in that sector or matter at the time the exception becomes effective. The treatment accorded pursuant to any exceptions shall not be less favorable than that accorded in like situations to investments and associated activities of nationals or companies of any third country, except with respect to ownership of real property. Rights to engage in mining on the public domain shall be dependent on reciprocity.	**National and MFN Treatment** **Article 3** 1. Each Party shall accord to investors of the other Party treatment no less favorable than that it accords, in like circumstances, to its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments in its territory. **Article 4** 1. Each Party shall accord to investors of the other party treatment no less favorable than that it accords, in like circumstances, to investors of any non-Party with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments in its territory. **New Exceptions** **Article 14** 1. Articles 3 [National Treatment], 4 [Most-Favored-Nation Treatment], 8 [Performance Requirements], and 9 [Senior Management and Boards of Directors] do not apply to… iii. a local level of government 4. Articles 3 [National Treatment] and 4 [Most-Favored-Nation Treatment] do not apply to any measure covered by an exception to, or derogation from, the obligations under Article 3 or 4 of the TRIPS Agreement, as specifically provided in those Articles and in Article 5 of the TRIPS Agreement. 5. Articles 3 [National Treatment], 4 [Most-Favored-Nation Treatment], and 9 [Senior Management and Boards of Directors] do not apply to: (a) government procurement; or (b) subsidies or grants provided by a Party, including government-supported loans, guarantees, and insurance.
'Umbrella' Clause **Article II** 2. Each Party shall observe any obligation it may have entered into with regard to investments.	**'Umbrella' Clause** *No 'umbrella' clause is included, but breaches of investment authorizations and arguments are still subject to investor-state dispute Settlement under Art 24 (l) (see below).* *But note that under definitions (Article I), "investment contracts" are limited to some types of written contracts between investors and the host state.*

Minimum Standard of Treatment	Minimum Standard of Treatment
Article II 2. 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. 6. Each Party shall provide effective means of asserting claims and enforcing rights with respect to investment agreements, investment authorizations and properties.	**Article 5** Minimum Standard of Treatment[8] 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. [8] Article 5 [Minimum Standard of Treatment] shall be interpreted in accordance with Annex A. **Annex A** **Customary International Law** The Parties confirm their shared understanding that "customary international law" generally and as specifically referenced in Article 5 [Minimum Standard of Treatment] and Annex B [Expropriation] results from a general and consistent practice of States that they follow from a sense of legal obligation. With regard to Article 5 [Minimum Standard of Treatment], 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.

Expropriation	Expropriation
Article III 1. 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 the 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. **Article XI** 1. With respect to its tax policies, each Party should strive to accord fairness and equity in the treatment of investment of nationals and companies of the other Party. 2. Nevertheless, the provisions of this Treaty, and in particular Articles VI and VII, shall apply to matters of taxation only with respect to the following : (a) expropriation, pursuant to Article III…	**Article 6** 1. Neither Party may expropriate or nationalize a covered investment either directly or indirectly through measures equivalent to expropriation or nationalization ("expropriation"), except: (a) for a public purpose; (b) in a non-discriminatory manner; (c) on payment of prompt, adequate, and effective compensation; and (d) in accordance with due process of law and Article 5 [Minimum Standard of Treatment](1) through (3). 2. The compensation referred to in paragraph 1(c) shall: (a) be paid without delay; (b) be equivalent to the fair market value of the expropriated investment immediately before the expropriation took place ("the date of expropriation"); (c) not reflect any change in value occurring because the intended expropriation had become known earlier; and (d) be fully realizable and freely transferable. 3. If the fair market value is denominated in a freely usable currency, the compensation referred to in paragraph 1(c) shall be no less than the fair market value on the date of expropriation, plus interest at a commercially reasonable rate for that currency, accrued from the date of expropriation until the date of payment. 4. If the fair market value is denominated in a currency that is not freely usable, the compensation referred to in paragraph 1(c) – converted into the currency of payment at the market rate of exchange prevailing on the date of payment – shall be no less than: (a) the fair market value on the date of expropriation, converted into a freely usable currency at the market rate of exchange prevailing on that date, plus (b) interest, at a commercially reasonable rate for that freely usable currency, accrued from the date of expropriation until the date of payment. 5. This Article does not apply to the issuance of compulsory licenses granted in relation to intellectual property rights in accordance with the TRIPS Agreement, or to the revocation, limitation, or creation of intellectual property rights, to the extent that such issuance, revocation, limitation, or creation is consistent with the TRIPS Agreement. **Article 21** 2. Article 6 [Expropriation] shall apply to all taxation measures, except that a claimant that asserts that a taxation measure involves an expropriation may submit a claim to arbitration under Section B only if: (a) the claimant has first referred to the competent tax authorities (footnote omitted) of both Parties in writing the issue of whether that taxation measure involves an expropriation; and (b) within 180 days after the date of such referral, the

Source: José E. Alvarez, "The once and future foreign investment regime," in Mahnoush H. Arsanjani, Jacob Katz Cogan, Robert D. Sloane, and Siegfried Wiessner, eds., *Looking to the Future: Essays on International Law in Honor of W. Michael Reisman* (Leiden and Boston: Brill Martinus Nijhoff, 2010).