

---

## desarrollo productivo



# I nternational arbitration based on investor-State dispute settlement clauses in international investment agreements: challenges for Latin America and the Caribbean

Michael Mortimore



NACIONES UNIDAS



900049354 - BIBLIOTECA CEPAL

Santiago, Chile, October 2010

This document was prepared by Michael Mortimore, Chief of the Unit of Investment and Corporate Strategies until February 28, 2009, Division of Production, Productivity and Management of the Economic Commission for Latin America and the Caribbean (ECLAC).

The author thanks the contribution and comments of Stanimir Alexandrov (Sidley), Américo Beviglia-Zampetti (EEC), Álvaro Calderón (ECLAC), Gus Van Harten (York University), Torbjorn Fredriksson (UNCTAD), Sebastián Sáez (Banco Mundial), Karl Sauvant (Columbia University), Miguel Solanes (ECLAC), Leonardo Stanley (CEDES) y Marcia Tavares (ECLAC).

The views expressed in this document, which has been reproduced without formal editing, are those of the authors and do not necessarily reflect the views of the Organization.

---

United Nations Publication

ISSN 1020-5179

ISBN: 978-92-1-121722-3

LC/L.3049-P

ORIGINAL: SPANISH

Sales Nº: E.09.II.G.51

Copyright © United Nations, October 2010. All rights reserved

Printed in United Nations, Santiago, Chile

---

Applications for the right to reproduce this work are welcomed and should be sent to the Secretary of the Publications Board, United Nations Headquarters, New York, N.Y. 10017, U.S.A. Member States and their governmental institutions may reproduce this work without prior authorization, but are requested to mention the source and inform the United Nations of such reproduction.

## Index

---

<b>Summary</b> .....	5
<b>A. The International architecture relating to foreign investment and dispute settlement</b> .....	7
1. Achievements in the International architecture for foreign trade: a multilateral Trading system based on trade liberalization and dispute settlement .....	7
2. Winding roads towards foreign investment protection and liberalization .....	8
(a) Initiatives by the Bretton Woods financial institutions and OECD .....	9
(b) Negotiations in WTO (TRIMs, GATS and TRIPS) .....	12
(c) Bilateral and plurilateral International investment agreements .....	14
3. Negotiating strength and investor-State dispute settlement: the exceptional situation of the principal developing countries and transition economies (BRICs) .....	20
<b>B. The risks of IA-ISDS clauses and the challenges facing host countries</b> .....	23
1. Do the benefits from IA-ISDS clauses justify the risk borne by host countries? .....	24
(a) Do IA-ISDS guarantees in IIAs produce increased foreign investment inflows .....	24
(b) Are IA-ISDS guarantees in IIAs worth the problems they bring and the risks evolved? .....	24
2. Can IA-ISDS mechanisms be fixed so that the benefits justify the risks? .....	33

<b>C. The Management of IA-ISDS risk in Latin America and the Caribbean</b> .....	39
1. Two different worlds of IA-ISDS risk in Latin America and the Caribbean .....	40
2. Experiences of dealing with IA-ISDS risks in the region .....	41
(a) Financial costs of IA-ISDS jurisprudence .....	42
(b) Expansive interpretations in IA-ISDS jurisprudence.....	42
(c) Legitimacy issues.....	51
3. Natural-resources-based development strategies .....	51
4. The Argentine crises and the necessity of defense.....	54
<b>D. Conclusions</b> .....	59
<b>Bibliography</b> .....	63

<b>Serie Desarrollo productivo: issues published</b> .....	71
--	----

### Table index

TABLE 1	CHARACTERISTICS OF GROUPS OF LATIN AMERICA AND THE CARIBBEAN COUNTRIES WITH ICSID CASES, 2008.....	41
---------	--	----

### Box index

BOX 1	INVESTOR STATE DISPUTE SETTLEMENT UNDER INTERNATIONAL INVESTMENT TREATIES .....	10
BOX 2	THE UNITED STATES BILATERAL INVESTMENT MODEL .....	17
BOX 3	DISPUTE SETTLEMENT IN THE NORTH AMERICAN FREE TRADE AGREEMENT-CHAPTER 11 .....	19
BOX 4	METALCLAD CORPORATION VERSUS UNITED MEXICAN STATES: EXPANSIVE INTERPRETATIONS OF FAIR AND EQUITABLE TREATMENT AND INDIRECT EXPROPRIATION .....	43
BOX 5	MTD EQUITY VERSUS REPUBLIC OF CHILE: EXPANSIVE INTERPRETATION OF FAIR AND EQUITABLE TREATMENT .....	44
BOX 6	WHO CAN RESORT TO INTERNATIONAL INVESTMENT ARBITRATION? THE DEFINITION OF “INVESTOR” IN INVESTOR-STATE DISPUTE SETTLEMENT (IA/ISDS) JURISPRUDENCE IN LATIN AMERICA AND THE CARIBBEAN.....	45
BOX 7	MOST-FAVOURLED-NATION TREATMENT IN THREE ARGENTINE CASES: GAS NATURAL, SIEMENS AND SUEZ/AGUAS DE BARCELONA /INTERAGUAS .....	47
BOX 8	ELEVATING STATE CONTRACTS TO TREATY JURISDICTION: CASES FROM ARGENTINA .....	48
BOX 9	INDIRECT EXPROPRIATION IN THE WATER AND SEWAGE SECTOR IN ARGENTINA: A QUESTION OF DEGREE? .....	50
BOX 10	THE CMS AND LG&E CASES AGAINST ARGENTINA AND THE NECESSITY DEFENSE FOR THE ARGENTINE EMERGENCY MEASURES .....	56

## Summary

---

The countries of Latin America and the Caribbean account for a large number (100) and share (35%) of international arbitration cases in the world (UNCTAD, 2008b, p. 14). The cases stem from the clauses on international arbitration in investor-State dispute settlement (IA-ISDS) included in international investment agreements (IIAs). Most countries in the region face certain development challenges from the risks associated with such international arbitration. With regard to foreign investment protection, commitments and obligations are relatively imprecise and dispute-prone. In terms of foreign investment liberalization, demanding commitments and obligations are found in many of the regional trade agreements in Latin America and the Caribbean. This has led to a high level of risk with respect to international arbitration resulting from the region's IIAs that incorporate the IA-ISDS mechanism.

During the 1990s, many countries in the region, as in the rest of the world, adopted market-oriented reforms. For more than a decade, questioning these reforms—including the stances adopted in regard to IIAs—was left off the political agenda. The current crisis and the reassessment of many aspects of the previous model, including the financial architecture, provide the opportunity to open a debate regarding the benefits and risks associated with IIAs. The aim of this chapter is to examine the situation in Latin American and Caribbean and the dynamics that led to it, to identify the related risks, and to contribute some ideas to the debate. Understanding the long-term costs and benefits of IIAs is crucial for ensuring a proper balance between guarantees to investors and policy space for countries in the pursuit of their development goals.

## **A. The international architecture relating to foreign investment and dispute settlement**

---

### **1. Achievements in the international architecture for foreign trade: a multilateral trading system based on trade liberalization and dispute settlement**

Impressive advances were registered with regard to the international architecture for international trade following the Second World War. The General Agreement on Tariffs and Trade (GATT) was signed in 1947 and was to provide an international forum to encourage trade liberalization among member states by regulating and reducing tariffs on traded goods based on two basic principles, national treatment (NT)<sup>1</sup> and most-favoured-nation treatment (MFN),<sup>2</sup> and by providing a permanent mechanism for resolving trade disputes. The GATT went on to hold seven consecutive rounds of tariff liberation negotiations (finishing with the Uruguay Round) before a permanent trade body—now called the World Trade Organization (WTO)—was formally constituted on 1 January 1995 with 51 original members. The principal functions of WTO were to serve as a forum for trade negotiations, as an administrator of WTO trade

---

<sup>1</sup> According to WTO, national treatment is the principle of giving others the same treatment as one's own nationals. Article III of the General Agreement on Tariffs and Trade (GATT) requires that imports be treated no less favourably than the same or similar domestically produced goods once they have passed customs. Article XVII of the General Agreement on Trade in Services (GATS) and article 3 of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs) also deal with national treatment for services and intellectual property protection.

<sup>2</sup> According to WTO, most-favoured-nation treatment (GATT article I, GATS article II and TRIPs article 4) is the principle of not discriminating between one's trading partners.

agreements,<sup>3</sup> as a means to resolve trade disputes and as a mechanism to monitor country trade policy.<sup>4</sup> The current 150 members have collectively agreed to conduct their trade according to multilaterally agreed rules.

The shift from GATT to WTO was perhaps the single most important event in the history of global trade. An important part of that success was due to the introduction of the trade dispute settlement process itself, the guaranteed enforcement of rules and an appeals mechanism. The WTO agreement introduced a formal dispute settlement system to act as a court of international trade using customary rules of interpretation of international public law. The process depended on decisions by experts (not representatives of members) that were reviewed by a single appellate body and supervised by the Dispute Settlement Body according to the understanding on rules and procedures governing the settlement of disputes.

One significant factor supporting the advance of multilateral trade negotiations was wide consensus among negotiators that all countries had something to gain from trade liberalization within a multilateral trading system. In this fashion, first Europe and the United States, then other industrial countries and developing countries, and eventually several transition economies came to appreciate the benefits of the multilateral trading system in spite of the numerous specific conflicts that arose. There was no equivalent consensus, however, about the mutual benefits of foreign investment. The international architecture for foreign investment was considerably more complex and convoluted.

## 2. Winding roads towards foreign investment protection and liberalization

The period following the Second World War was characterized by a rise in nationalization, first under communist takeovers in China, Eastern Europe and Cuba, then during the 1960s and 1970s, by numerous other developing countries. Expropriation of foreign investments took place especially in the natural-resource sector (mostly petroleum and mining). Much of the petroleum industry in the Middle East and North Africa (Algeria, Iran, Iraq, Libyan Arab Jamahiriya and Saudi Arabia) was nationalized during this period. In Latin America and the Caribbean nationalizations of the investments of several foreign companies took place in the petroleum sector (Standard Oil Company subsidiaries in the Bolivarian Republic of Venezuela and Peru and Gulf Oil subsidiaries in Ecuador and the Plurinational State of Bolivia) and the mining sector (the Kennecott and Anaconda subsidiaries in Chile, and the Alcoa, Kaiser and Reynolds subsidiaries in Jamaica). These events led to disputes over compensation between home country governments and host country governments.

Developing countries, often backed by the Soviet bloc, became very active in the General Assembly of the United Nations in defending their sovereignty vis-à-vis the rights of foreign investors. In 1962, resolution 1803 (XVII) recognized the rights of peoples and nations to permanent sovereignty over natural resources, including the nationalization of such with “appropriate” compensation. Resolution 3171 (XXVIII) of 1973 clarified that each State is entitled to determine the amount of possible compensation and the mode of payment (in contrast to the United States position regarding the Hull formula).<sup>5</sup> Resolution 3201 (XXIX) of 1974 declared that in the new international economic order any sanctions placed against countries expropriating the assets of foreign investors would be considered unacceptable. Also in 1974, resolution 3281 (XXIX) on the Charter of Economic Rights and Duties of States demanded recognition of the economic independence of States and their rights to exercise authority over, regulate and supervise foreign investment present in, as well as transnational corporations operating in, their national jurisdictions. Furthermore, the United Nations became the setting for the

<sup>3</sup> Legal texts deal with agriculture, textiles and clothing, banking, telecommunications, government procurement, industrial standards and product safety, food safety regulations, intellectual property and other areas.

<sup>4</sup> Additional functions were the provision of technical assistance and training for developing countries and maintaining cooperation with international institutions.

<sup>5</sup> The Hull formula for expropriations entails “prompt, adequate and effective compensation”. It arose from the demands of United States Secretary of State, Cordell Hull, on the Government of Mexico after it nationalized the petroleum industry in 1939.

negotiations on a draft code of conduct on transnational corporations, that is, new rules of behaviour for foreign companies.<sup>6</sup>

Given the conflictive starting point for foreign investment, several separate means were employed by investor countries in their attempts to establish a new international architecture for foreign investment. These ranged from initiatives by international institutions, such as the Bretton Woods financial institutions and the Organisation for Economic Co-operation and Development (OECD), to negotiations on foreign investment matters in WTO and bilateral and plurilateral international investment agreements, such as bilateral investment treaties and chapters on investment in regional trade agreements.

### **(a) Initiatives by the Bretton Woods financial institutions and OECD**

After the Second World War, the first moves taken by industrial countries in the foreign investment field, after the International Trade Organization initiative died, entailed simply pursuing economic revival and development and promoting private enterprise. In this, the Bretton Woods financial institutions were fundamental.<sup>7</sup> The International Monetary Fund (IMF) initially focused on financial matters and foreign exchange regimes to facilitate foreign trade and investment; however, after the United States abandoned the gold standard in 1971, IMF shifted towards general policy evaluation and guidance for member countries—especially, developing countries and later transition economies—when they experienced financial crises or balance-of-payments difficulties. The International Bank for Reconstruction and Development, the original institution of the World Bank Group, originally financed the reconstruction of economies devastated by the Second World War; however, its role was progressively expanded by way of a number of new institutions, such as the International Finance Corporation (IFC) (1956), the International Development Association (IDA) (1960), the International Centre for Settlement of Investment Disputes (ICSID) (1968) and the Multilateral Investment Guarantee Agency (MIGA)<sup>8</sup> (1988), which together became what is now known as the World Bank Group. Of these institutions, ICSID in particular became very relevant for foreign investors.

ICSID is an autonomous international institution established under the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the ICSID Convention) which began with 30 member States and now has over 140 members. The primary purpose of ICSID was to provide facilities for conciliation and arbitration of international investment disputes. The Convention sought to remove major impediments to the free international flows of private investment posed by non-commercial risks and the absence of specialized international methods for investment dispute settlement. Initially, its principal focus was to deal with investor-State investment disputes involving “concession” type contracts associated with foreign investment risks in the cold war climate (Gal-Or, 2005). However, it soon came to encompass disputes related

<sup>6</sup> United Nations Economic and Social Council resolution 1721 (LIII) in 1972 mandated the formation of a Group of Eminent Persons to Study the Impact of Multinational Corporations on Economic Development and International Relations. The study recommended the establishment of a Commission on International Investment and Transnational Corporations and a United Nations Centre on Transnational Corporations (UNCTC). The former was to propose a code of conduct for transnational corporations and the latter was a technical body to backstop the Commission by undertaking research on the nature of the operation and impact of transnational corporations on member countries. By 1992, it was apparent that no consensus was going to be reached with regard to the draft code of conduct, and work was suspended. With regard to the UNCTC, United States opposition eventually limited the feasibility of its operations in New York, and remnants of the institution were eventually transferred to the United Nations Conference on Trade and Development (UNCTAD) in Geneva, Switzerland. A complete history of the United Nations role in the field of transnational corporations is available in Sagafi-Nejad (2008).

<sup>7</sup> It should be remembered that both the International Monetary Fund (IMF) and the World Bank Group were directly controlled in terms of voting rights by the United States and Europe; the former normally selected the president of the World Bank and the latter the head of the International Monetary Fund.

<sup>8</sup> It was felt that concerns about investment environments and perceptions of political risk often inhibited foreign direct investment, with the majority of flows going to just a handful of countries and leaving the world's poorest economies largely ignored. The Multilateral Investment Guarantee Agency (MIGA) addressed these concerns by providing three key services: political risk insurance for foreign investments in developing countries; technical assistance to improve investment climates and promote investment opportunities in developing countries; and dispute mediation services to remove possible obstacles to future investment. MIGA operational strategy played to its foremost strength in the marketplace, namely, attracting investors and private insurers into difficult operating environments. The agency's strategy focused on specific areas where they could make the greatest difference: infrastructure development, frontier markets and South-South investments.

to international investment treaties, such as BITs and the investment chapters of regional trade agreements (see box 1). ICSID eventually revolutionized the relationship between foreign investors and host countries with regard to dispute settlement.

### BOX 1

#### INVESTOR-STATE DISPUTE SETTLEMENT UNDER INTERNATIONAL INVESTMENT TREATIES

Investors and their home countries were not satisfied with existing dispute settlement processes and pressed for more rapid, effective and final solutions. One alternative promoted by the International Chamber of Commerce (ICC) was the use of procedures similar to commercial arbitration available to private firms to resolve foreign investment disputes. In these procedures, an arbitration panel decides on the merits of a case in accordance with international arbitration law. The most common institutional arbitration forums were the International Centre for Settlement of Investment Disputes (ICSID), including the Additional Facility, the International Court of Arbitration of the ICC, the Arbitration Institute of the Chamber of Commerce of Stockholm, the London Court of International Arbitration plus ad hoc alternatives. The proceedings were usually in accordance with ICSID arbitration rules and the United Nations Commission on International Trade Law (UNCITRAL).

Some of the limitations to providing a final and enforceable decision by means of international arbitration were eliminated by multilateral action. The 1958 United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention) introduced greater scope for enforcing arbitral awards by replacing the requirement that an award had to comply with the laws of the State in which it was enforced with the requirement that it had to comply only with the laws of the State in which the arbitration was held. The 1965 International Convention on the Settlement of Investment Disputes (the ICSID Convention) was the first multilateral treaty to envision the expansion of the private arbitration model to encompass general disputes between foreign investors and host States.

ICSID does not conciliate or arbitrate disputes; it provides the institutional and procedural framework for independent conciliation commissions and arbitral tribunals constituted in each case to resolve the dispute on the basis of a treaty establishing an autonomous and self-contained system for the institution, conduct, and conclusion of such proceedings. Arbitration and conciliation under the Convention are entirely voluntary, but once the parties have given their consent, neither can unilaterally withdraw it. The ICSID Secretariat maintains the ICSID Panels of Conciliators and of Arbitrators to which each contracting State designates four persons and the Chair of the Administrative Council designates ten persons. Awards are considered final; however, they can be annulled under five specific conditions, namely: that the tribunal was not properly constituted; that it manifestly exceeded its powers; that there was corruption on the part of a member; that there was a serious departure from a fundamental rule of procedure; and that the award failed to state the reasons on which it was based. A further distinctive feature is that an arbitral award rendered pursuant to the ICSID Convention cannot be set aside by the courts of the contracting State and is only subject to the post-award remedies provided for by the ICSID Convention. All contracting States, whether or not party to the dispute, recognize and enforce ICSID Convention arbitral awards. Today, ICSID is considered to be the leading international arbitration institution devoted to investor-State disputes.

Initially, the ICSID Convention did not itself constitute the system of foreign investor protection because ratification of that treaty did not amount to general consent by a State to compulsory investor-State arbitration, according to the Preamble of the Convention. Investor-State arbitration could still take place in different forums (such as the International Court of Arbitration of the ICC), under different arbitration rules (such as the UNCITRAL Arbitration Rules and be subject to different authorities for the appointment of presiding arbitrators (such as the President of the International Court of Justice). While investor-State investment dispute settlement (IA-ISDS) eventually was to prove revolutionary, only 26 cases of international arbitration were concluded by ICSID before the foreign investment boom began in the 1990s. Of these, 16 cases involved African host countries and primarily concerned services; four cases involved Latin America and the Caribbean, namely the nationalization of three United States bauxite companies operating in Jamaica and one case involving petroleum in Trinidad and Tobago.

IA-ISDS procedures of international investment agreements gave foreign investors new choices (initially, the ability to seek remedy through international arbitration once local remedies were exhausted), provided treaty status to such procedures (eventually acquiring a general consent to international arbitration on the part of host States), and made international arbitration decisions final and enforceable.

**Source:** Economic Commission for Latin America and the Caribbean (ECLAC), on the basis of information from International Centre for Settlement of Investment Disputes (ICSID); United Nations Commission on International Trade Law (UNCITRAL); and G. Van Harten, "Judicial supervision of NAFTA chapter 11 arbitration: public or private law?", *The Journal of the London Court of International Arbitration*, vol. 21, N° 4, 2005.

<sup>a</sup> Adopted by UNCITRAL on 28 April 1976, the UNCITRAL Arbitration Rules provide a comprehensive set of procedural rules upon which parties can agree for the conduct of arbitral proceedings arising out of their commercial relationship and are widely used in ad hoc arbitrations as well as administered arbitrations. The Rules cover all aspects of the arbitral process, providing a model arbitration clause, setting out procedural rules regarding the appointment of arbitrators and the conduct of arbitral proceedings and establishing rules in relation to the form, effect and interpretation of the award.

The principal multilateral financial institutions (IMF and World Bank Group) were also important in promoting foreign-investment-friendly economic policies and business environments in countries experiencing financial crises or balance-of-payments problems. The Bretton Woods financial institutions did so by conditioning their lending to developing countries and transition economies on the adoption of orthodox economic policies, which were increasingly foreign-investor-friendly ones. These institutions often utilized cross-conditionality in their programmes and sometimes operated in coordination with regional development banks. Specific reforms often included the reduction of the size and activities of the public sector and the liberalization of international trade and foreign investment. In 1992, the World Bank issued its formal Guidelines on the Treatment of Foreign Direct Investment that it considered “not ultimate standards but an important step in the evolution of generally acceptable international standards”. In this fashion, the Bretton Woods institutions directly supported the expansion of foreign investment.

A core mission of the principal institution for industrialized countries, the Organisation for Economic Co-operation and Development (OECD), was to enhance the contribution of foreign investment to growth and development worldwide by advancing foreign investment policy reform and international cooperation. OECD member governments established binding disciplines and recommendations concerning the appropriate behaviour for transnational corporations by means of legal instruments to which adhering countries committed themselves, such as the Codes of Liberalization (1961) and the Declaration and Decisions on International Investment and Multinational Enterprises (1976). Countries that adhered to the OECD instruments were obliged to grant transparent and non-discriminatory treatment to foreign investors. Initially, OECD was at the forefront of efforts to develop international “rules of the game” relating to international capital movements and foreign investment, especially with regards to nationalization and expropriation. In that regard, members maintained that under customary international law, foreign investments could be expropriated only if four conditions were met: (1) it was for a public purpose; (2) on a non-discriminatory basis; (3) under due process of law; and (4) based on the payment of prompt, adequate and effective compensation. At that time, many developing countries denied that such conditions were part of customary international law (UNCTAD, 2007b, p. 47). The OECD members demonstrated convergent opinions and policies in this area.

In May 1995, the OECD member governments launched the Multilateral Agreement on Investment (MAI) at the Annual Meeting of the OECD Council at Ministerial Level. The MAI was a first attempt to combine in one multilateral agreement the disciplines in three key areas of foreign direct investment rule-making, specifically: foreign investment protection, foreign investment liberalization and dispute settlement. It was intended to be a free-standing international treaty open to all OECD members and to allow accession by non-OECD member countries. The latter did not participate formally in the negotiations. The draft agreement reflected mainly investor country interests and priorities.<sup>9 10</sup>

In April 1998, the MAI negotiations were discontinued and, according to OECD, they will not be resumed. Several serious problems explain this outcome (Geiger, 2008, pp. 23-4). There was a lack of consensus with regard to specific substantive issues, for example, whether the focus was on foreign direct investment or all types of foreign investment-related transactions and assets. There were conceptual ambiguities as to whether the agreement was to be modelled as an investment agreement with top-down obligations or follow a WTO bottom-up approach of negotiated offers and commitments for market access and national treatment. Unresolved difficulties included the lack of agreement between the United States and European member countries on issues ranging from cultural diversity and national security to the scope of dispute settlement. Other difficulties concerned changing political circumstances

<sup>9</sup> The Multilateral Agreement on Investment (MAI), taken together with other OECD instruments, provided for pre- and post-establishment national treatment, unimpeded repatriation of profits and capital, transparency of regulations, dispute settlement mechanisms, peer review to promote rollback of remaining restrictions, the prohibition of performance requirements for both goods and services, as well as voluntary guidelines for the behaviour of transnational corporations, environmental and consumer protection, competition and restrictive business practices, corporate governance, accounting and reporting, taxation, and labour conditions, among others.

<sup>10</sup> The standard argument was that host countries that offered better protection and wider access to foreign investment because of IAs would receive increased foreign investment inflows. OECD promoted the MAI among OECD members by way of statements such as the following: “[a]ccession to the MAI would send a signal to investors that the acceding country subscribes to high standards of investment liberalization and protection, thus giving it a competitive edge” (Dymond, 1997, p. 9).

and the backlash against globalization (UNCTAD, 1999). Non-governmental organizations in OECD countries organized a strong resistance to the MAI negotiations, criticizing especially the foreseen effects on developing countries in terms of limitations on their right to regulate in the context of dispute settlement, as well as the fact that the developing countries did not directly participate in the MAI negotiations.<sup>11</sup> The business sector tended to lose interest in the MAI when it became apparent that taxation would not be dealt with. Finally, many OECD national policymakers opined that the MAI might actually end up lowering foreign investment protection standards from those available in current IIAs. It became clear that negotiating a multilateral foreign investment liberalization treaty, even among investor countries themselves, was considerably more complicated than expected.

In May 2006, OECD reversed its position and adopted a new Policy Framework for Investment designed to stimulate global and regional dialogues on foreign investment and provide national policy assessment and peer review. Compared to the failed MAI, the new approach was non-prescriptive, comprehensive but non-exhaustive, and participatory. The Policy Framework for Investment aimed to promote transparent policies, coherence of policy approaches and a rules-based system backed by public-private dialogue and stakeholder participation (Geiger, 2008, pp. 24-5)

In sum, investor country attempts to increase foreign investment protection through the Bretton Woods institutions and OECD worked out reasonably well as regards compensation for expropriation and nationalization and the establishment of international arbitration as a means to deal with investor-State disputes. Efforts to push through an even more demanding agenda with regard to foreign investment liberalization eventually broke down, however, and both OECD and the Bretton Woods financial institutions eased away from their initial goals of establishing a new international architecture for foreign investment.

## **(b) Negotiations in WTO (TRIMs, GATS and TRIPS)**

As multilateral trade initiatives successfully progressed, as symbolized by the creation of WTO, several innovations were instituted in multilateral foreign investment instruments.

The Agreement on Trade-Related Investment Measures (TRIMs) was one of the multilateral agreements on trade in goods negotiated during the Uruguay Round, which prohibited trade-related investment measures, such as obligatory requirements of locally acquired inputs (“local content”) that were inconsistent with the basic provisions of GATT. It was felt that certain foreign investment measures could have trade-restrictive and distorting effects and that members should not apply any measure that was prohibited by the provisions of GATT article III (national treatment) or article XI (quantitative restrictions). Examples of inconsistent measures in the 1996 Agreement were spelled out in the Illustrative List of the annex to the Agreement.

In terms of significant decisions taken by WTO dispute settlement panels, the decision in the case referred to as “Indonesia – Automobiles” ruled on the legality of an Indonesian car programme linking tax benefits for cars manufactured in that country to domestic content requirements and of linking customs duty benefits for imported components of cars manufactured in Indonesia to similar domestic content requirements. The panel found that these local content requirements were “investment measures” because they had a significant impact on foreign investment in the automotive sector and that they were “trade-related” because they affected international trade. The panel also found that compliance with the requirements for the purchase and use of products of domestic origin was necessary to obtain tax and customs duty benefits and that such benefits were “advantages” within the meaning of the Illustrative List.

The General Agreement on Trade in Services (GATS) was inspired by essentially the same objectives as its counterpart in merchandise trade, GATT: to create a credible and reliable system of international trade rules; ensure fair and equitable treatment of all participants; stimulate economic

---

<sup>11</sup> A small group of developing countries (Argentina, Brazil, Chile, Estonia, Hong Kong Special Administrative Region of China, Latvia, Lithuania and the Slovak Republic) participated in the negotiations as observers.

activity through policy bindings; and promote international trade and development through progressive liberalization. In services, GATS was intended to be a first step in a longer-term process of multilateral rule-making and international trade liberalization.

GATS consisted of three elements: the main text, which indicated general obligations and disciplines; annexes, which dealt with rules for specific sectors; and individual country commitments to provide access to their markets (and their special temporary suspension of MFN). Commitments were listed in schedules that indicated the sector being opened, the extent of market access being given and any limitations on national treatment that might be incurred. This was the first and only set of multilateral rules governing international trade in services.

Progressive liberalization was considered to be one of the basic tenets of GATS. Nonetheless, while the negotiations succeeded in setting up the principle structure of the Agreement, only relatively modest liberalizing effects have been achieved. Progress was made in financial and telecommunications services, but most schedules in other services mainly confirmed the status quo market conditions. In part, this reflected the high degree of flexibility, both within the framework of rules and also in terms of market access commitments, demanded by countries worried that GATS might undermine their ability to pursue national policy objectives and constrain their regulatory powers.

The Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs) established minimum levels of protection that each government had to give to the intellectual property of fellow WTO members. It was a highly innovative document covering a field tangentially related to international trade that was not covered by the 1994 GATT. Historically the link between intellectual property and international trade has been forged under the leadership of the United States. After the close of the Tokyo Round in 1979, the United States became concerned and frustrated by the reluctance of developing countries to adopt high normative standards and strict enforcement measures for intellectual property rights and therefore placed the issue on the negotiating agenda for the Uruguay Round. The TRIPs Agreement, which came into force in 1995, was largely an affirmation of the prominent position of the industrialized world in the trade debate. The Agreement provided relatively high minimum standards for each of the main categories of intellectual property rights, established standards of protection and enforcement and provided for the application of the WTO dispute settlement mechanism to resolve disputes between WTO members.<sup>12</sup>

The TRIPs Agreement brought intellectual property into the fold of the multilateral rule system for the first time and covered five broad issues: (i) how basic principles of the trading system and other international intellectual property agreements should be applied; (ii) how to give adequate protection to intellectual property rights; (iii) how countries should enforce those rights adequately in their own territories; (iv) how to settle disputes on intellectual property between WTO members; and (v) special transitional arrangements during the period when the new system is being introduced. Creators of intellectual property were to be given the right to prevent others from using their inventions and designs and to exercise that right to negotiate payment in return for others using them by way of copyrights, patents or trademarks. The TRIPs Agreement attempted to narrow the gaps in the way these rights were protected in different countries and to bring them under common multilateral rules by establishing minimum levels of protection that each government had to provide for the intellectual property of other members.

A significant dispute concerning pharmaceutical issues was the “Canada – Patent Protection of Pharmaceutical Products” case. Canada’s patent law presented two exceptions to patent rights, both aimed at accelerating the entry of generic copies of patented pharmaceuticals onto the internal market. The exceptions were: (i) the possibility for generic competitors to take necessary steps during the life of a patent to obtain regulatory approval of drugs covered by the patent so that regulatory approval would not delay their entry onto market after the patent expired; and (ii) a stockpiling exception that permitted competitors to make commercial quantities of the patented pharmaceutical late in the life of the patent so that the product could enter the market

<sup>12</sup> The Agreement did not resolve many issues of compatibility. For example, the United States employed a first-to-invent criterion for priority in patent applications, while the rest of the world used a first-to-file system.

as soon as the patent expired. The European Union challenged both exceptions on the grounds that they illegitimately curtailed patent rights. The panel concluded that the regulatory review exception was permissible under the TRIPs Agreement but that the stockpiling exception was not: it found that the patent holder had no legitimate interest in gaining commercial benefit from any de facto term extension arising when regulatory approval of generic products commences only after the patent lapsed. This suggests that the TRIPs Agreement contains a number of serious unresolved issues that could lead to more disputes between intellectual property owners and the needs of consumers.<sup>13</sup>

Thus, the WTO Agreements extended the frontier of foreign investment liberalization to include some performance requirements, some services and some intellectual property protection; however, they turned out to be less demanding on host countries than the more aggressive initiatives, such as the OECD MAI or the United States and European IIAs described below. Moreover, dispute settlement under these Agreements was founded on the WTO Dispute Settlement Understanding, which utilized State-State procedures rather than the investor-State procedures common in BITs and the investment chapters of regional trade agreements (which incorporated IA-ISDS clauses). The direct participation of developing countries and some transition economies —sometimes as a bloc— in the global negotiations in WTO provided them with a certain collective negotiating strength, which helps explain why the multilateral initiatives in WTO tend to be less demanding on host countries.

Improvements to the international foreign investment architecture by way of WTO came to a halt when a clear consensus to negotiate new foreign investment rules or commitments could not be reached in the WTO Working Group on the Relationship between Trade and Investment. This was one of the three working groups set up by ministers at the Singapore Ministerial Conference in 1996. Lacking such consensus in the Cancun Ministerial Conference of WTO in 2003, foreign investment was dropped from the Doha Round agenda. This produced considerable concern. The Working Group on Investment and Trade did not live up to expectations, which confirmed the fact that multilateral undertakings linked to foreign investment were much more difficult to negotiate and agree upon than those linked to international trade, undoubtedly because the participants' motivations were distinct and the justifications less self-evident.

For the consolidation of international rules for foreign investment there was no obvious selling point similar to that of comparative advantage for international trade to which most countries could relate. While all countries traded, both importing and exporting, foreign investment was undertaken almost exclusively by a small minority of industrial countries, especially during the period immediately after the Second World War when the vast majority of other countries were solely foreign investment recipients (in other words, host countries).

### **(c) Bilateral and plurilateral international investment agreements**

Before BITs became generalized, foreign investors in the post-Second World War setting that experienced the expropriation or nationalization of their assets in developing countries were faced with three dispute resolution options. First, when deciding whether a claim should be brought to address their complaints they were left to the political mercies of their home government, the host government or both, as these disputes were then resolved exclusively by governments. Second, they could litigate in the host government's national courts; however, defences based on sovereign immunity were often readily available to defendants. Third, the foreign investors could simply absorb the cost of adverse host

---

<sup>13</sup> With regard to developing countries, the TRIPs Agreement contained balancing provisions that were supposed to be sufficient to allow them full access to food and seed resources. Article 8.1 allowed members "to protect public health and nutrition, and to promote the public interest in sectors of vital importance to their socio-economic and technological development". Furthermore, members could exclude inventions "necessary to protect human, animal or plant life or health" from patentability (article 27.2). However, since 2005, developing countries that were members of WTO (such as Brazil, India and Thailand) have been required by TRIPs to issue patents. Obliging developing countries to comply with patent legislation has complicated the provision of generic medicines, especially those related to HIV treatment. Although patents have expired on a number of first-line AIDS drugs (making them available cheaply from generic makers), patents still exist on most new and second-line medicines. For example, in Brazil, the Ministry of Health currently spends 80% of its budget on imported patented drugs, even though they represent only a small proportion of drugs used.

government action, then possibly make a claim under their political risk insurance (Franck, 2007b, pp. 190-1). Evidently, foreign investors were not satisfied with these limited options.

A major factor in the appearance of BITs on the international scene was the interest of European countries seeking to protect their investments more in developing countries, including their ex-colonies, and to depoliticize foreign investment disputes in those countries. Individual European governments possessed considerably less influence with governments expropriating or nationalizing the assets of their investors than was the case for the United States.

Measured in terms of the number of BITs in force up to the 1990s, when the foreign investment boom began, Germany and Switzerland were the most active in the 1960s signing 33 of 35 BITs, 29 with African countries. While Germany and Switzerland continued their expansion in the 1970s (8 and 7 new BITs, respectively), other European countries became more active, such as France (9 agreements), the United Kingdom (5 agreements), and the Netherlands (5 agreements), this time with several Asian as well as African developing countries. By the 1980s, the number of European BITs rocketed and the agreements in force negotiated in that decade surpassed 73, mostly with Asian and African developing countries. Over this whole period, agreements negotiated between these European countries and Latin American and Caribbean countries amounted to only one in the 1960s (Ecuador), one in the 1970s (Haiti) and 14 in the 1980s (mainly former United Kingdom possessions in the Caribbean plus Panama). In other words, the European countries managed to induce most African and several Asian developing countries to break, at least at the bilateral level, with the more confrontational position of the Latin American-led Group of 77 with regard to foreign investment protection.

Originally, the two principal purposes of BITs were: to consolidate the protection of foreign investment against the risk of unlawful expropriation; and to institutionalize dispute settlement by providing foreign investors with more options with regard to IA-ISDS clauses, thereby gradually eliminating the need to exhaust local remedies and improving enforcement. The typical BIT by the 1990s contained certain basic provisions for foreign investment protection, but the separate qualifications made to these provisions in each individual BIT through negotiation created significant diversity in the concrete obligations of the signatories, in keeping with the relative negotiating strength of the investor and the host governments.

United States policymakers opted, as of the 1980s, for dedicated BITs targeting developing countries, building on the success enjoyed by European investor countries. In the process, United States policymakers included new goals for their BITs, such as: to bolster the claim that the Hull rule remained customary international law by establishing a network of treaties that included this principle; to protect current and future foreign investment from host government intervention; and to take advantage of the new ICSID general consent for resolving foreign investment disputes that did not rely on either local courts or require direct involvement by the Government of the United States (Vandevelde, 1993). The new BITs incorporated more aggressive obligations in respect of foreign investor protection although few such BITs came into force before the 1990s.

The growth of BITs after the foreign investment boom began was astonishing, rising from 386 agreements in 1990 to 2,619 in June 2008, and involved a total of 179 countries. Other IIAs, mostly regional trade agreements, grew from less than 10 to 259 over the same period (UNCTAD, 2009, p. 2). The overwhelming majority of BITs concluded since 1990 were traditional in the sense that they admitted foreign investments of the other contracting party only if such investments conformed to the host country's legislation, according to UNCTAD (1998, 2007c). This represents the so-called "admission model" which was common in European BITs with developing countries. This model allowed the host country to apply any admission and screening mechanism for foreign investment that it may have had in place and therefore to determine the conditions on which foreign investment would be allowed to enter the country. There was no obligation on the part of the host country to eliminate discriminatory legislation affecting the establishment of foreign investment in the country unless the BIT explicitly stated otherwise. Traditional BITs emphasized investment protection in comparison to what would become known as foreign investment liberalization (or improved market access with fewer foreign investment restrictions) in the BITs entered into by the United States and similar BITs and were then viewed by developing countries and economies in

transition as being less intrusive and possessing somewhat more predictable impacts for contracting parties. For this reason, traditional BITs were the most numerous not only between developed and developing countries, but also among the developing countries and the economies in transition themselves.

A relatively small group of investor countries, led by the United States, took advantage of the unique historical events in the 1980s and 1990s to move towards foreign investment liberalization, particularly in developing countries and economies in transition. The foreign investment liberalization process went far beyond the mere protection of existing foreign investments. It included the decrease or elimination of measures and restrictions on the entry and operation of foreign firms (ownership and control, authorization and reporting), the reduction of qualifications and exceptions for the application of positive standards of treatment (national treatment, fair and equitable treatment, transfer of funds, transparency) and fuller recourse to international arbitration (for the settlement of investment disputes) with a view to the elimination of perceived discrimination against foreign enterprises and the implementation of measures and policies seeking to reorient the operation of host country markets (including competition policy, regulation of monopolies, prudential supervision and disclosure of information in host countries, among others) (UNCTAD, 1999, p. 3; Gugler and Tomsik, 2006). BITs entered into by the United States and similar BITs (such as those of Canada) were based on “models” to which the investor countries allowed relatively few significant deviations.

The foreign investment liberalization push was evident in the more demanding United States BITs and regional trade agreements, especially in the North American Free Trade Agreement (NAFTA) and a host of subsequent NAFTA-like regional trade agreements (Gagne and Morin, 2006). Foreign investment liberalization advanced at variable speeds and with distinct levels of success according to the instruments utilized.

The core elements of the United States-led foreign investment liberalization process concerned the establishment of foreign investors, the permanent and progressive nature of foreign investment liberalization obligations, broadened sectoral coverage, specific clauses to reduce government interference in the operations of foreign investors and the improvement of IA-ISDS procedures. United States regional trade agreements and BITs based on the 1994 Model (see box 2), followed a “right of establishment model” (as compared to the European “admission model”) which provided stronger disciplines in terms of national treatment and most-favoured-nation treatment in the pre-establishment (admission) phase as well as the post-establishment phase of foreign investment.<sup>14</sup>

---

<sup>14</sup> This is referred to as a combined national treatment and most-favored-nation treatment model with regard to the admission and establishment of foreign investment. Under such treaties each party is required to accord foreign investors of the other party the better of most-favored-nation treatment and national treatment in respect of both establishment of investment and the treatment of investment in the post-establishment phase, subject to the ability of the parties to make or maintain exceptions in sectors or matters specified in an annex to the treaty. (UNCTAD, 2004b, p. 5)

## BOX 2 THE UNITED STATES BILATERAL INVESTMENT TREATY MODEL

The United States bilateral investment treaty model protected private foreign investment, developed market-oriented policies in partner countries and promoted United States exports. The programme aimed to protect investment in countries where foreign investor rights were not already protected through existing agreements (such as modern treaties of friendship, commerce and navigation or free trade agreements); to encourage the adoption of market-oriented domestic policies that treated private foreign investment in an open, transparent and non-discriminatory way; and to support the development of international law standards consistent with these objectives.

United States BITs provided foreign investments with six core benefits:

- First, United States BITs required that investors and their “covered investments” (that is, foreign investments of a national or company of one BIT party in the territory of the other party) be treated as favorably as the host party treated its own investors and their investments or foreign investors and foreign investments from any third country. The BIT generally afforded the better of national treatment or most-favored-nation treatment for the life of the foreign investment—from establishment or acquisition, through management, operation, and expansion, to disposition.
- Second, BITs established clear limits on the expropriation of foreign investments and provided for payment of prompt, adequate and effective compensation when expropriation takes place.
- Third, BITs provided for the transferability of foreign investment-related funds into and out of a host country without delay and using a market rate of exchange.
- Fourth, BITs restricted the imposition of performance requirements, such as local content targets or export quotas, as a condition for the establishment, acquisition, expansion, management, conduct or operation of a foreign investment.
- Fifth, BITs gave covered foreign investments the right to engage the top managerial personnel of their choice, regardless of nationality.
- Sixth, BITs gave foreign investors from each party the right to submit a foreign investment dispute with the government of the other party to international arbitration. There was no requirement to use that country’s domestic courts.

The United States negotiated BITs on the basis of a model text. The 1994 Model Text was replaced by a modified version in 2004.

**Source:** Economic Commission for Latin America and the Caribbean (ECLAC), on the basis of United States Trade Representative (USTR), “Summary of U.S. Bilateral Investment Treaty (BIT) Program” [online] [http://www.ustr.gov/Trade Agreements/BIT/Summary of US Bilateral Investment Treaty \(BIT\) Program.html](http://www.ustr.gov/Trade%20Agreements/BIT/Summary%20of%20US%20Bilateral%20Investment%20Treaty%20(BIT)%20Program.html).

United States regional trade agreements and BITs (based on the 1994 Model) applied the national treatment and most-favoured-nation treatment rules as a general obligation with regard to the scheduling of sectoral liberalization. This “negative list” approach established that unless a country specifically excepted the application of national treatment and most-favoured-nation treatment to particular activities, it was understood to apply to all activities (UNCTAD, 2004b, pp. 120 and 125). This approach differed dramatically from the “positive list” that is more common to WTO agreements in which an obligation applies to a particular sector only if the State has specifically included that sector in its list of commitments (Houde and Kolse-Patil, 2008).

The permanent and progressive nature of foreign investment liberalization implied that once obligations were accepted they became permanent, that is, there was no going back to the previous situation. These concepts were found in United States and like-minded regional trade agreements and BITs; however, this was best captured by the OECD attempt to negotiate a Multilateral Agreement for Investment, especially concepts such as stand-still agreements and the roll-back principle with regard to derogations (Sikkel, 1997, pp. 21 and 25). A stand-still agreement prohibited any new or more restrictive exceptions to the minimum standard of treatment (in other words, national treatment or most-favoured-nation treatment). The roll-back principle was that aspect of the foreign investment liberalization process by which the reduction and eventual elimination of non-conforming measures took place. It was linked with stand-still, which provided its starting point. Combined with stand-still, it produced a “ratchet-effect”, in which any new foreign investment liberalization measures would be “locked in” so that they could not be rescinded or nullified over time. The main effect was to first limit, then reduce, non-

conforming measures in terms of host country exceptions to the minimum standard of treatment (national treatment and most-favoured-nation treatment).

Specific clauses in United States regional trade agreements and many BITs (1994 Model) affected the way that host States could impact the operations of the foreign investment established in their territory. They included clauses on performance requirements (a longer list than the WTO TRIMs Agreement),<sup>15</sup> government procurement, transparency, liberalization of financial and other services, new areas of intellectual property protection, the facilitation of visas for top management personnel and a requirement for the provision of more information to foreign investors, among others. Moreover, recent United States IIAs required a formal annex detailing the non-conforming measures of the host country. In other words, the specific clauses of the United States foreign investment liberalizing regional trade agreements and BITs aimed to further open developing country markets, reduce host country interference with the local operations and assets of United States investors and make host governments increasingly accountable to foreign investors.

One of the principal effects of foreign investment liberalization in United States-style IIAs was to provide foreign investors with widened international arbitration remedies in the case of disputes with host countries. NAFTA represented the institutionalization of the new stature of private foreign investors as equals with sovereign States in international public law and provided NAFTA private foreign investors with the unprecedented right to question the public policy of member governments. This involved a wider variety of disciplines and it affected more areas of host country policy in complex and detailed ways. The effect was to expand the number of possible triggers for IA-ISDS procedures by individual private foreign corporations (see box 3).

The United States-led foreign investment liberalization initiative was characterized by attempts to alter the relationship between investor countries and host countries, to the benefit of the former. It transformed the basis of international trade and foreign investment agreements. Currently, the United States has regional trade agreements in effect with 16 countries, three are pending Congressional approval, and four other regional trade agreement negotiations are ongoing. The United States presently has 39 BITs in force with developing countries and economies in transition. The United States also pursues less demanding Trade and Investment Framework Agreements (TIFA) with 36 other countries. In other words, the United States was constructing a global scheme of international trade and foreign investment primarily by way of regional trade agreements and BIT rules emphasizing foreign investment liberalization that go far beyond the obligations and commitments of traditional BITs.

The NAFTA partners of the United States also pursued regional trade agreements and BITs of a similar nature. Canada currently has regional trade agreements with 7 countries and is negotiating with 23 more and has BITs in force with 22 countries. Mexico established regional trade agreements with 12 countries, is negotiating with the Republic of Korea and has BITs with 19 others. The effect of this network of NAFTA member regional trade agreements and BITs was the formation of an expanding group of countries that pursued IIAs that incorporated more demanding processes of foreign investment liberalization. This network extended the frontier of foreign investment liberalization (or WTO-plus obligations) to large areas of Latin America and, increasingly, parts of Asia. An example of the potential of the latter is reflected in Asia-Pacific Economic Cooperation (APEC), which now has 21 members, and is currently pursuing an agenda based on foreign trade and international investment liberalization (UNCTAD, 2008b; Sauv , 2008; ECLAC, 2008e).

---

<sup>15</sup> WTO-plus items or those that went beyond the illustrative list of the TRIMs agreement included requirements (i) to transfer technology, a production process or other proprietary knowledge to a person in the host country and (ii) to act as the exclusive supplier of the goods it produces or services it provides to a specific region or world market.

## BOX 3

**DISPUTE SETTLEMENT IN THE NORTH AMERICAN FREE TRADE AGREEMENT - CHAPTER 11**

Chapter 11 of the North American Free Trade Agreement (NAFTA) established a mechanism for the settlement of foreign investment disputes. An investor in one of the parties to NAFTA that alleged that a host government had breached its foreign investment obligations under chapter 11 could, at its discretion, have recourse to one of the following arbitral mechanisms: the World Bank's International Centre for Settlement of Investment Disputes (ICSID); the Additional Facility Rules of ICSID (involving non-members of ICSID, as was the case for Canada and Mexico at the start of NAFTA); and the rules of the United Nations Commission on International Trade Law (UNCITRAL Rules). Alternatively, the investor could choose the remedies available in the host country's domestic courts. An important feature of the chapter 11 arbitral provisions was the enforceability in domestic courts of final awards by arbitration tribunals. The only appeals process available was by way of the domestic court system in which the tribunal was legally located.

The most radical change represented by NAFTA was that it was "the first comprehensive international trade treaty to provide private parties direct access to dispute settlement as a right" (Trebilcock and Howse, 1999). As a consequence, many of the early NAFTA chapter 11 cases involved the concept of "indirect expropriation" present in United States jurisprudence, that is, government acts that provoked the loss of management, use or control, or a significant depreciation of the value of foreign assets (as opposed to direct expropriation, which was characterized by government acts that transfer title and physical possession of such assets).

The principal significance of the chapter 11 investor-State dispute settlement process, especially insofar as it involved indirect expropriation, was that in the context of foreign investment liberalization, it enormously expanded the rights of foreign investors and their influence in the national policy decisions of the host government. This put the arbitration machinery of international commercial regimes at the direct service of foreign investors who could now enforce rights they enjoyed thanks to an international treaty to which they were not party and under which they had no obligation.

The NAFTA Chapter 11 investor-State dispute settlement process was a ground-breaking development with revolutionary implications. Its principal innovation was to do away with the more than a century old international legal principle that the government of a State was the only subject that had (full) standing in international public law and was representing its citizens in its governmental capacity. Whereas traditional BITs typically dealt with narrow commercial disputes, chapter 11 could involve central aspects of broad public policy.

**Source:** Economic Commission for Latin America and the Caribbean (ECLAC), on the basis of North American Free Trade Agreement (NAFTA) Secretariat [online] <http://www.nafta-sec-alena.org/>; United Nations Conference on Trade and Development (UNCTAD), "Key terms and concepts in IIAs: a glossary", *UNCTAD Series on Issues in International Investment Agreements* (UNCTAD/ITE/IIT/2004/2), Geneva, 2004. United Nations publication, Sales N° E. 04.II.D.31; N. Gal-Or, "NAFTA Chapter Eleven and the implications for the FTAA: the institutionalization of investor status in public international law", *Transnational Corporations*, vol. 14, N° 2, August 2005; M. Trebilcock and R. Howse, *The Regulation of International Trade*, London, Routledge, 1999; and T. Clark, *Silent Coup: Confronting the Big Business Coup of Canada*, Toronto, Lorimer, 1997.

In contrast to this NAFTA-centric network for international trade and foreign investment liberalization, the European Union possesses an IIA network encompassing 27 regional trade agreements and hundreds of BITs. Although the European Union network is more numerous, it is considerably less demanding than the NAFTA-centric network which focuses on WTO-plus international trade and foreign investment liberalization. The European Union has attempted to negotiate somewhat more demanding Economic Partnership Agreements (which include some foreign investment liberalization elements) with former European colonies; however, to date it has reached agreement solely with a group of Caribbean countries.<sup>16</sup>

In spite of these advances in the expansion of liberalizing networks by way of bilateral and plurilateral IIAs, the United States and several like-minded governments in the Americas at the forefront of the international trade and foreign investment liberalization initiative experienced a serious setback in the form of the suspension of negotiations on the Free Trade Area of the Americas (FTAA). The United States reacted by stringing together other bilateral regional trade agreements and a subregional trade agreement

<sup>16</sup> The 2000 Cotonou Agreement established a new trade agenda framework between the 79 African, Caribbean and Pacific countries and the European Union known as Economic Partnership Agreements (EPA), which were reciprocal, but not preferential, trade agreements. Since the European Commission has no direct competence over foreign investment issues within common commercial policy, it is obliged to deal with foreign investment matters in a "trade-related" or "commercial presence" manner. Thus, with regard to these issues, its EPAs deal with market access and liberalization but not protection (which is carried out by European Union Members individually via BITs). The end-2007 negotiation deadline was missed by all but the 15 CARIFORUM countries (except Haiti), and the final agreement was signed on 15 October 2008.

(the Dominican Republic – Central America – United States Free Trade Agreement (CAFTA-DR)) to continue its project towards liberalizing international trade and foreign investment treaties in the region.

An even bigger threat to the foreign investment surge came in the form of the sharp rise in investment disputes. Unlike international trade disputes that could count on the WTO dispute settlement system, disagreements between foreign investors and host countries were settled according to the individual international investment treaties, which usually meant some form of IA-ISDS procedures. Most investment arbitrations nowadays involve as defendants developing countries (60%) and economies in transition (19%), the instruments for initiating such claims are primarily BITs (78%), NAFTA (13%) and the Energy Charter Treaty<sup>17</sup> (6%). The arbitration forum is usually ICSID (62%) and/or UNCITRAL (18%) or, less frequently, the Arbitration Institute of the Stockholm Chamber of Commerce, the International Chamber of Commerce and the London Court of International Arbitration (UNCTAD, 2008b).

In other words, compared to the international architecture for international trade, the rules for foreign investment are partial and fragmented and consist of a mixture of customary international law; bilateral, plurilateral, regional and multilateral agreements; acts of international institutions; authoritative texts (such as declarations of States and resolutions of international organizations); and judicial decisions (national case law and international arbitral decisions, for example). Until 1990, international arbitration stemming from ISDS clauses in regional trade agreements and BITs concerned a few cases of direct expropriation. Once the foreign investment boom took off in the 1990s, however, the cumulative number of IA-ISDS cases rapidly expanded from 10 in 1998 to over 300 by 2007. The expansive IA-ISDS jurisprudence suggested to some that virtually any aspect of host country public policy which might affect the value of foreign assets in the host country could be questioned by foreign investors. It is feared that investor-State dispute settlement arbitration could provoke a fissure between investor countries and developing country and transition economy hosts of a magnitude not seen since during the expropriation and nationalization crisis in the years immediately after the Second World War.

### **3. Negotiating strength and investor-State dispute settlement: the exceptional situation of the principal developing countries and transition economies (BRICs)**

The clauses that go into an IIA, be it a BIT or a regional trade agreement, largely reflect the relative negotiating positions of the participants. Some developing countries and transition economies of interest to foreign investors possess negotiating strength sufficient to avoid or limit the risk from IA-ISDS clauses in their IIAs. The great majority of developing countries and transition economies do not. What explains the success of the few? Brazil, the Russian Federation, India and China (known collectively as BRICs) represent the biggest markets outside of the OECD countries and, as such, are of significant interest to foreign investors. An examination of each of these four cases provides relevant information on the nature and use of their negotiating strength to avoid or limit the risk from IA-ISDS clauses in their IIAs.

Brazil is a country that has welcomed FDI and has accumulated a significant stock of inward FDI, thereby increasing its integration into the global economy. At the same time, Brazil has used its increasing negotiating strength, which derives in part from its attractiveness to TNCs (given its large market and growing economy), to implement cautious policies that carefully limit its IA-ISDS risks with respect to IIAs. Brazil never ratified the Washington Convention of 1965 (the ICSID Convention), nor the fourteen BITs that it negotiated in the 1990s, nor the two foreign investment agreements of the MERCOSUR integration scheme for MERCOSUR members (the Colonia Protocol) and non-members (the Buenos Aires Protocol). It actively opposed several aspects of the FTAA, which it considered to be asymmetric and contain undesirable constraints on Latin American and Caribbean countries, including

<sup>17</sup> The fundamental aim of the Energy Charter Treaty was to strengthen the rule of law on energy issues in ex-Soviet Union member countries, by creating a level playing field of rules to be observed by all participating governments, thereby mitigating risks associated with energy-related investment and trade (see Energy Charter [online] <http://www.encharter.org/index.php?id=7>).

the proposed IA-ISDS procedures. Brazil is not involved in any known foreign investment disputes mainly because it carries virtually no IIA risks.

The Russian Federation is another large-market, fast-growing economy that has been able to use its increasing negotiating strength to reorder its relationship with foreign investors for the purpose of reestablishing control over its national economy and better defining the role of TNCs in the national economy. The Russian Federation signed the ICSID Convention in 1992 but never ratified it. In terms of IIAs, the Russian Federation negotiated but did not ratify the Energy Charter Treaty; however, it has 36 BITs in force. The Russian Federation has a small number of international investment arbitration cases outstanding (UNCTAD, 2008b), and its relationship with foreign investors was shaken by some of the actions taken by the State (and State companies) in restructuring the national economy.

India has been cautious in terms of its IA-ISDS risks with regard to the ICSID Convention and its IIAs. India is not a signatory of the ICSID Convention; however, it currently has 48 BITs in force with 14 industrialized economies and 34 others. Indian BITs do not provide foreign investors with any rights to invest in its territory (D'Agnostino and Nair, 2008). More recently, India has become active in negotiating regional trade agreements (with Canada), even signing one containing an investment chapter with Singapore. However, the India-Singapore agreement has diluted the typical guarantees included in the regional trade agreements associated with the foreign investment liberalization process in which Singapore plays an increasing role (agreements in which there are only positive lists of obligations, no pre-establishment rights, and no MFN or fair and equitable treatment or full protection and security (except for public interest measures) and no IA-ISDS clauses). India currently faces nine cases of international investment arbitration under UNCITRAL facilities.

China represents the clearest case of a large-market, fast-growing economy, which carefully calibrated its foreign investment policies to take advantage of its growing negotiating strength. The country defined the economic goals that it wanted to achieve to take advantage of foreign investment without taking unwarranted risks with regard to IA-ISDS clauses. China's cautious FDI policy originally focused on restricting FDI to the export assembly activities in the special economic zones, for the most part reserving the domestic market for domestic companies or joint ventures undertaken by foreign companies with local partners. The current FDI policy is more selective by focusing on quality FDI for prioritized activities, such as high-tech manufactures, and shifting away from cheap-labour export assembly operations (OECD, 2008h). Beginning in 1982, China became a signatory of the ICSID Convention and assembled the world's second most important web of BITs after Germany; however, these initiatives carried very significant restrictions, which limited their FDI protection and contemplated virtually no foreign investment liberalization. Before 2003, China's BITs did not allow for IA-ISDS clauses in its IIAs except to determine the amount of compensation in the case that an expropriation took place and did not carry explicit national treatment clauses (Heymann, 2008). China currently has 89 BITs in force, of which 14 are with industrialized countries.

China recently began to negotiate new, higher risk BITs (with Bosnia and Herzegovina, Finland, Germany and the Netherlands) and regional trade agreements (with Pakistan), which extended FDI protection and included some aspects of FDI liberalization. The new IIAs incorporated IA-ISDS procedures but limited them by way of preconditions such as the need for a previous local administrative review, among others (Moulis and Jun, 2007). The post-establishment national treatment clause was explicit and contained a stand-still obligation; however, roll-back promises came on a "best-efforts" commitment. Since its accession to the ICSID Convention, no cases have been brought against China (Jun, 2007). China has become confident enough with its modern FDI policy to begin negotiating access to the Energy Charter Treaty and a regional trade agreement with ASEAN, which entails certain FDI liberalization measures.

These examples from the BRICs demonstrate that some large developing countries and transition economies were able—in different ways and at variable speeds—to utilize their negotiating strength to better define the role of foreign investment in their development strategies and to manage the IA-ISDS risks that they assumed in IIAs. They generally avoided or limited recourse to IA-ISDS procedures by not ratifying the ICSID Convention or other IIAs, or by limiting their IIAs to the more traditional BITs. Notably, none of these countries has a BIT or a regional trade agreement with the United States.

Section A has examined the international architecture for international trade and foreign investment after the Second World War and found them to be quite different. The architecture for international trade was for the most part defined by WTO (based on NT, MFN, and a State-State dispute settlement mechanism). The multilateral trading system worked very well in terms of dispute settlement, especially among the major players, although challenges persist as reflected in the stalling of the Doha Round.

The international architecture for foreign investment is much more complex. Attempts to establish a viable framework via the Bretton Woods institutions and OECD, WTO and bilateral and plurilateral IIAs all had limited success, and the international architecture for foreign investment was consequently built on a conglomeration of distorted inputs. For example, the NT and MFN principles did not have the same “fit” as in international trade, a “trade-related” fiction for performance requirements, services and intellectual property themes were used to partially introduce foreign investment issues into WTO trade negotiations, and most unprecedented of all, without debate investor-State dispute settlement clauses in IIAs replaced the existing State-State mechanism. Even so, many of the principal “liberalizing” initiatives failed, such as the OECD Multilateral Agreement on Investment, “investment” was dropped from the Doha Round of WTO, and the FTAA negotiations were suspended. In other words, the international architecture for foreign investment has had nowhere near the same acceptance or effectiveness as that for international trade.

As a result, a splintering process is apparent in the different IIA networks being assembled, such as the United States-centric regional trade agreements (liberalizing or “WTO-plus”) in comparison to the European-centric BITs (which are more traditional). Furthermore, there is significant variation with respect to the participation of developing countries and transition economies in those networks. Whereas the BRICs were wary of those networks, a significant number of developing countries and transition economies have bought into the IA-ISDS practices of IIAs either in the belief that they will receive more foreign investment in return or as a consequence of their weak negotiating strength (or both). Section B examines in more detail the risks of IA-ISDS clauses in IIAs in an attempt to evaluate whether those clauses are worth the risks that they carry.



## **B. The risks of IA-ISDS clauses and the challenges facing host countries**

---

The sharp rise in the number of known treaty-based cases of international arbitration, from 10 in 1998 to over 300 in 2007, was the first indicator that the IA-ISDS procedures represented an important new risk for host states. After analyzing the evolution of IA-ISDS decisions and some of their principal problems, UNCTAD concluded that “no country can be sure that its IIAs will remain unchallenged before international tribunals” (UNCTAD, 2009b, p. 7). The increasingly unpredictable nature of IA-ISDS decisions created mounting uncertainty and unpredictability for host countries. This raised at least two fundamental questions.

- Do the benefits from IA-ISDS clauses justify the risks borne by host countries?
- If not, can IA-ISDS mechanisms be fixed so that the benefits justify the risks?

The aim of this section is to analyze these two questions in terms of the challenges that they represent for host countries. This analysis focuses primarily on the IA-ISDS risks and challenges and their causes rather than on the strictly legal aspects of their clauses. The next section will examine the situation in Latin America and the Caribbean.

## 1. Do the benefits from IA-ISDS clauses justify the risks borne by host countries?

The predominant motives for adopting the IA-ISDS procedures were to provide foreign investors with rapid, inexpensive and final solutions to foreign investment disputes, to lift the burden off home country governments to intervene in foreign investment disputes on behalf of their own investors and to stimulate increased flows of foreign investment to host countries. The cost-benefit relation of IA-ISDS guarantees in IIAs cannot be assessed statically. Rather, it must be considered dynamically, as short-term losses could produce long-term gains, or short-term gains could produce long-term losses. Thus, there is no clear-cut answer. In general, it would appear to be the case that foreign investors are satisfied with IA-ISDS procedures, although they have manifested some serious complaints about the slowness of the processes and the expenses involved. Home country governments appear to be content with the outcome as they continue to press for new IIAs containing those procedures, albeit at a slower pace and with significant modifications in some cases (Canada, Norway, United States, for example). However, the premise that IIAs in general and IA-ISDS procedures in particular help attract more foreign investment to host countries is anything but certain. This lack of clarity with regard to the benefits for host countries will be dealt with in this subsection together with a related question, that is, whether IA-ISDS clauses are worthwhile in view of certain significant problems that have arisen and the new risks that have emerged.

### (a) Do IA-ISDS guarantees in IIAs produce increased foreign investment inflows?

At first sight, the confirmation of the premise that IIAs with IA-ISDS clauses promote greater inflows of foreign investment to host countries would appear to be a relatively trivial empirical task of linking the notable increase of the signing of IIAs incorporating such clauses with the sharp rise of foreign investment inflows to host developing countries and transition economies. Both rose notably during the 1990s; nonetheless, confirming a significant causal relationship between these variables has not proved feasible for a large number of analyses on this matter (Franck, 2007a; Peterson, 2004, p. 10; Bhattacharya, 2007; Pate, 2006, p. 14).<sup>18</sup> Moreover, the high FDI inflows received by BRICs that have generally been very cautious with regards to their IA-ISDS exposure (see section A) contradict any hypothesis on a direct causal link between signing IIAs with IA-ISDS procedures and foreign investment inflows. The most realistic conclusion is probably that “while investment treaty arbitration may not directly trigger foreign investment, the availability of this dispute resolution mechanism is a factor in an overall decisional matrix” (Franck, 2007a, p. 340).

In order to evaluate if IIAs with IA-ISDS procedures are worth the effort, given that the principal perceived benefit (increased foreign investment inflows) is not certain or in any way automatic, it is necessary to analyse the problems and risks associated with them.

### (b) Are IA-ISDS guarantees in IIAs worth the problems they bring and the risks involved?

Working from the premise that asymmetrical bargaining strength and power relations produce asymmetrical (one-sided) results, which even the most avid supporters of FDI liberalization seem to support (for example, Sauvé, 2008, p. 32; and Pacquing, 2003, p. 25), this subsection identifies several of the principal criticisms of IA-ISDS mechanisms in IIAs. IA-ISDS guarantees seem not to be working as intended (Clark and LaFortune, 2004, p. 3) and they appear to favour disproportionately the protection of foreign investors' rights to the detriment of the national policy concerns of the host

<sup>18</sup> Consult, also, for example, Egger and Pfaffermayr (2004); Elkins, Guzman and Simmons (2006); Gallagher and Birch (2005); Hallward-Driemeier (2003); Hewko (2002); Neumayer and Spess (2005); Tobin and Rose-Ackerman (2005); Salasuse and Sullivan (2005); and Tumman and Emmert (2004); and UNCTAD (1998).

country, or, at a minimum, there is much room for improvement (Franck, 2007c, p. 83), and balance in this matter is sorely needed (Pate, 2006, p. 11; van Aaken, 2008, p. 19).

The following examination groups the principal shortcomings of IA-ISDS guarantees into two categories to facilitate the analysis: expansive IA-ISDS jurisprudence that shifts risks to host countries and reduces their national policy space, and the legitimacy issues surrounding IA-ISDS practices.

**(i) Expansive IA-ISDS jurisprudence that shifts risks to host countries and reduces their national policy space**

One of the principal criticisms of IA-ISDS guarantees is that the vague terms and other ambiguities found in the IIAs provide the arbitral tribunals with excessive discretion in their decision-making, which results in expansive interpretations that both facilitate the increased use of IA-ISDS procedures by foreign investors and constrain the policy space of host governments. Such expansive interpretations are evident in a broad array of IIA concepts, such as indirect expropriation, fair and equitable treatment, national treatment in “like circumstances”, the scope of most-favoured-nation treatment, the definitions of investor and investment, and umbrella clauses and stabilization clauses, among others. While facilitation of the use of IA-ISDS guarantees by foreign investors and the shifting of risks to host governments are more explicit in the original United States-style regional trade agreements and BITs, many of these features are also found in more traditional BITs and State contracts. The following examples are a partial list.

*Indirect expropriation (NAFTA)*

Direct expropriation and nationalization were matters at the centre of foreign investment debates during the 1960s and 1970s, which focused on foreign investment protection. After considerable controversy and conflict, this issue was largely resolved through general agreement that certain conditions be met to legitimize direct expropriations and nationalizations, that is, such actions were to be for a public purpose, as provided by law, in a non-discriminatory manner and with adequate compensation. Thereafter, debate shifted to the concept of indirect expropriation, including creeping expropriation and regulatory takings.<sup>19</sup> Creeping expropriation involved the use of a series of government measures leading to a deprivation of the economic value of the investment even though no individual measure in itself would amount to expropriation. Regulatory takings occurred where a government measure was implemented for regulatory purposes but had an impact on the economic value of the asset owned by the foreign investor sufficient to be deemed an expropriation (UNCTAD, 2005b, p. 42). Regulatory takings were particularly sensitive because many government regulations could have an impact on the value of private property and any expansive interpretation of regulatory takings could limit the national policy space by hindering a government’s right to regulate, creating the risk of regulatory chill, that is, when governments become unwilling to undertake legitimate regulation for fear of lawsuits from foreign investors (UNCTAD, 2003b, p. 111), or worse.

The “policy space” debate initially focused mainly on United States regional trade agreements, especially NAFTA, since in comparison with European IIAs the United States regional trade agreements were seen to constrain host country national policy to a greater degree (Gallagher, 2008). One reason had to do with differing views on the nature of private property. The United States view tended to be an absolutist vision of property rights in which any infringements on the enjoyment of the foreign investors’ interests in their property involved the creation of liability in the host State, whereas the European view recognized more the social function of property which was considered more important than the individual’s claim to property (Somarajah, 2008, p. 49). In practice, however, European BIT jurisprudence regarding indirect expropriation was quite similar in nature to that of United States BITs. Few legal texts attempted to address directly how to distinguish legitimate non-compensable regulations having an effect on the economic value of foreign investments and indirect expropriation requiring compensation (OECD, 2005b, p. 53); and it was left to the arbitral tribunals to do so. The initial arbitral

<sup>19</sup> A “direct” expropriation or nationalization is characterized by acts that transfer title and physical possession, whereas “indirect” expropriation or nationalization involves acts that effectuate the loss of management, use or control, or a significant depreciation in the value of assets (UNCTAD, 2004b, pp. 68-9).

tribunals' decisions on indirect expropriation in NAFTA concerned those wary of the expansive interpretations of arbitral tribunals because of the way that they facilitated the increased use of IA-ISDS procedures by foreign investors and the regulatory chill that host governments demonstrated as a result.

In sum, the NAFTA practice suggested that vague and ambiguous terms in the agreement, such as indirect expropriation, could lead to excessive discretion for arbitral tribunals. In turn, these tribunals showed themselves prone to interpretations that facilitated increased use of IA-ISDS procedures and constrained the policy space of host governments.

#### *Fair and equitable treatment (all IIAs)*

Fair and equitable treatment (FET) is one of the most important substantive obligations in IIAs. It is an absolute, non-contingent standard of treatment, which means that its exact meaning is determined by reference to specific circumstances of application. Some feel that the vagueness of the term was intentional in order to give arbitrators the possibility to articulate the range of principles necessary to achieve the treaty's purpose in particular disputes (OECD, 2005b, pp. 74-75). It is sometimes considered a gap-filling or catch-all provision that was designed to guarantee foreign investors an internationally required level of protection, even when other more specific standards were not implicated. Recent years have witnessed a string of major awards for foreign investors premised in whole or in part on a breach of this standard. Arbitral tribunals have used this standard more than any other to award damages against a host government (Van Harten, 2007b, p. 87) and they have been reluctant to reduce FET to a single legal standard or formula (Shenkman, 2006, p. 4).

The FET standard provides extreme flexibility in ensuring protection for foreign investors in a wide variety of circumstances. For example, in a challenge to a judicial measure, the central question may be due process. In an administrative proceeding, the key factor may be transparency. In other situations, it may be whether government officials acted in a fundamentally arbitrary fashion. The FET obligation may provide a remedy even where no expropriation has occurred. For that reason, nearly every investor-State arbitration proceeding these days includes a FET claim (Shenkman, 2006, p. 4).

Very different FET standards are encountered in IIAs, especially BITs. Joubin-Bret (2008, p. 138) noted these differences in the following fashion:

- some BITs do not provide for FET to investors;
- some provide FET, full stop;
- some refer to FET in accordance with principles of international law, while others refer to international customary law;
- some treaties refer to FET as a part of the international minimum standard of the treatment of aliens;
- others (quite a large number, actually) combine FET with national treatment and most-favoured-nation treatment, mixing an absolute standard with two relative standards and referring to the relative standards as the comparators to assess whether an investor has been treated in a fair and equitable manner.

This flexibility coupled with ambiguous FET standards naturally provided arbitrators with a great degree of discretion in the interpretation of FET obligations of IIAs in their arbitral decisions.

UNCTAD (2005b, p. 39) concluded that the overall result of the jurisprudence to date is that FET provisions may be construed as no longer applicable solely to what would be considered egregious abuses of government power or disguised uses of government powers for untoward purposes, but to any open and deliberate use of government powers that fails to meet the malleable demands of good governance, such as transparency, protection of the investor's legitimate expectations, freedom from coercion and harassment, due process and procedural propriety and good faith. Shenkman (2006, p. 4) pointed out that one of the most significant principles emerging from recent jurisprudence is the sharpened focus on investor's

“legitimate and reasonable expectations” at the time of the investment, and whether those expectations have been frustrated unreasonably by actions attributable to the State, as was demonstrated by CMS Gas Transmission Co. versus The Argentine Republic (ICSID Case N° ARB/01/08) and Técnicas Medioambientales Tecmed S.A. versus The United Mexican States (ICSID Case N° ARB(AF)/00/2). The level of protection provided by FET has been variable (in some cases low, such as in Waste Management, Inc. versus The United Mexican States (ICSID Case N° ARB(AF)/00/3) but usually high, as was the case in MTD Equity Sdn. Bhd. versus Republic of Chile (ICSID Case N° ARB/01/7) (see section C). The expansive interpretation of FET obligations in IIAs by arbitral tribunals has produced sharp criticism, especially of the fact that the highly discretionary decisions rarely take national policy space requirements into consideration (Yu and Marshall, 2008, p. 18; Porterfield, 2006).<sup>20</sup>

#### *National treatment (NT) “in like circumstances” (NAFTA and BITs)*

The principle of non-discrimination is a relative standard usually formulated in a provision that requires treatment no less favourable than that provided to domestic investors “in like circumstances” (UNCTAD, 2005b, p. 32). Foreign companies that feel that they have received a treatment less favorable than local companies can claim discrimination by way of the NT standard of the IIA. For this reason, national governments desiring to provide special support to national companies must ensure that these companies are in different circumstances and be wary that any incidental discrimination not trigger IA-ISDS procedures or lodge an exception or a reservation in the relevant IIA.

The interpretation of national treatment provisions, such as article 1102 of NAFTA, requires that there be a determination of which entities or activities serve as a reference point for ascertaining the type of treatment to be granted. Most arbitral tribunals dealing with article 1102 have followed a three-step analysis in order to determine whether in a particular case a host country has breached its obligation to provide NT to covered foreign investors and their investments. Those three steps are as follows: first, identification of the relevant subjects for comparison; second, consideration of the relative treatment each comparator receives; and third, if a different treatment is found, examination of whether the subjects compared are “in like circumstances”, or in other words, whether there are any factors that may justify differential treatment (UNCTAD, 2007b, p. 48).

The NAFTA cases have accepted a standard of both de jure and de facto discrimination based on a case-by-case analysis of the impact a measure has on a foreign investor. In this fashion, not only measures that clearly show difference of treatment between foreign and domestic investors that is favourable to the latter are examined, but also measures that are on their face non-discriminatory but have the effect of according less favourable treatment to foreign as opposed to domestic investors in like circumstances (UNCTAD, 2005b, p. 34). Narrow interpretations have been given to “in like circumstances” by some NAFTA tribunals, such as the Methanex versus United States decision and United Parcel Service of America (UPS) versus Canada (UNCITRAL (NAFTA) Award on the Merits, 24 May 2007); whereas others have utilized a broad approach, such as was the case for S.D. Myers Inc. versus Canada (UNCITRAL). Thus, there has been no uniform interpretation of the “in like circumstances” requirement of the NT standard in NAFTA.

Beyond NAFTA, an arbitral decision in the case of Occidental Exploration and Production Company versus Ecuador (LCSI Case N° IN3467) interpreting the Ecuador-United States BIT in 2007 gave the term “in like circumstances” a notoriously broad definition (see section C). In other words, the “in like circumstances” requirement of the NT standard has been interpreted in a notably expansive manner in NAFTA and beyond.

<sup>20</sup> In reference to the MTD case (see box .6), Solanes and Jouravlev (2007) warn about the implications in terms of moral hazard and potential for corruption and abuse of the finding by the tribunal that a single government official may commit. The authors add that the “combination of moral hazard problems, that can encourage investors to avoid renegotiation even at the expense of project failure, and corruption, may explain the rescission of some recent international public utilities contracts. In some of these cases, sectoral lobbies have convinced governments to denounce contracts, in circumstances that raise serious doubts regarding the legal and economic wisdom of doing so.”

### *Most-favoured-nation treatment (MFN) and scope of application (BITs)*

Most-favoured-nation treatment is a second component of the relative non-discrimination standard requiring host countries to accord to foreign investors and their investments treatment that is no less favourable than that accorded to foreign investors of any third State and their investments. It is the multilateralization instrument par excellence of the benefits accorded to foreign investors and their investments (OECD, 2005b, p. 129). The formulation and application of MFN clauses varies widely among IIAs. In some cases the scope of application of the clauses extends to the entire content of the treaty; in others, the clause is limited to only some of the matters addressed by the treaty. The proper application and interpretation of a particular MFN clause in a particular case requires a careful examination of the text of that provision (OECD, 2005b, p. 158).

This standard has been the subject of controversy as to whether it can be used to broaden the scope of an investor's procedural and substantive rights beyond those in the agreement under which it claims protection and which contains an MFN clause (UNCTAD, 2005b, p. 35). Some foreign investors have used the MFN clause to pick and choose the most favourable provisions from various IIAs signed by the same host country (UNCTAD, 2007b, p. 52). Traditionally, the *ejusdem generis* principle has limited the application of the MFN treatment available in other treaties to the same "subject matter" the same "category of matter", or the same "class of matter" (OECD, 2005, b p. 159); however, jurisprudence has not been uniform (UNCTAD, 2007b, p. 52).

Although MFN clauses were originally thought to apply only to substantive issues, they have been extended to procedural issues through jurisprudence (van Aaken, 2008, p. 21). Most of the arbitration cases have been about whether or not provisions from third treaties may be imported, thereby demonstrating a certain tendency toward "treaty shopping" (Faya Rodríguez, 2008, pp. 92 and 101). Arbitral decisions suggest that the application of the MFN principle is not simple or consistent (OECD, 2005b, p. 127) and that it has facilitated the increased use of IA-ISDS procedures by foreign investors and created considerable uncertainty for host governments.

### *Definition of foreign "investor" and "investment" (BITs)*

The definition of foreign investor and foreign investment determines the scope of IIAs and the establishment of jurisdiction of arbitral tribunals. Foreign investors can be natural or legal persons. For natural persons, IIAs usually determine nationality exclusively on the basis of the law of the State of which nationality is claimed (at times introducing alternative criteria such as a requirement for residency or domicile). For legal persons, the situation is more complex because of the way that companies organize in a globalized world. Tribunals have usually adopted the test of incorporation or seat rather than control when determining the nationality of a juridical person, unless the test of control is provided for in the IIA (OECD, 2008f, p. 8). Some IIAs include "denial of benefits" clauses allowing exclusion of foreign investors in certain categories (such as shell companies and nationals of the host state).

While there is no single definition of foreign investment, most IIAs take an open-ended approach. Asset-based definitions are the most common in IIAs and tend to include assets and capital flows, movable and immovable property, interests in companies, claims to money, intellectual property rights and concessions (UNCTAD, 2003b, p. 101). Typically, a non-exclusive, illustrative list of examples is included in the IIAs.

Jurisprudence with regard to these definitions has proved contentious. On the one hand, a notable case concerned the subsidiary of the United States Bechtel Corporation in the Plurinational State of Bolivia (Aguas del Tunari versus Republic of Bolivia, ICSID Case N° ARB/02/3) in which the foreign investors migrated the holding company from the Cayman Islands to Luxembourg. The shares of the holding company were in turn held by a newly established firm in the Netherlands, and it was thus possible to use the Netherlands-Bolivia BIT to go to ICSID (van Aaken, 2008, p. 20) (see section C, box 6). On the other hand, in a recent case, jurisdiction was denied to TSA against Argentina under the Netherlands-Argentina BIT because it was determined that the ultimate owner was an Argentine citizen and therefore there was no "foreign control" as required under the ICSID Convention (*IA Reporter*, 5 January 2008, pp. 2-3). In general, expansive interpretations, particularly from jurisprudence involving

Argentina,<sup>21</sup> have usually upheld the standing of certain categories of foreign investors (indirect investors, minority investors and bondholders and other non-equity investors), extending the use of IA-ISDS guarantees to these investors. As a result, virtually any kind of business activity and presence in a foreign State can at least potentially fall within the ambit of a typical IIA (Shenkman, 2006, p. 1).

### *Umbrella clauses (BITs)*<sup>22</sup>

One of the principal unforeseen consequences associated with the more traditional IIAs has to do with the expansionary interpretations given to umbrella clauses by arbitral decisions. These had the effect of bringing a host of state contracts with foreign investors under treaty protection. This expansive aspect of traditional BITs is a relatively recent phenomenon.

The scope of subject matter (*rationae materiae*) jurisdiction is not uniform under BITs as some cover only disputes relating to an “obligation under this agreement”, that is, only for claims of BIT violations, whereas others extend the jurisdiction to “any dispute relating to investments” and some others even create an international law obligation that a host State shall, for example, “observe any obligation it may have entered to”; “constantly guarantee the observance of the commitments it has entered into”; “observe any obligation it has assumed” and other formulations, with respect to investments. These provisions are commonly called “umbrella clauses,” although other terms have also been used: “mirror effect,” “elevator,” “parallel effect,” “sanctity of contract,” “respect clause” and “*pacta sunt servanda*.” Clauses of this kind are added to provide additional protection to foreign investors and are directed at covering foreign investment agreements that host countries frequently conclude with foreign investors.<sup>23</sup>

European BITs have usually been considered less intrusive than United States-style IIAs for contracting parties, but the expansion of foreign investor rights by way of arbitral decisions relating to the umbrella clauses surprised many developing countries and economies in transition because it often took the dispute decision-making associated with contracts between the host government and foreign investors out of the ambit of the local legal or administrative system and provided foreign investors with IA-ISDS protection.<sup>24</sup>

### *(State contracts)*

Another of the principal unforeseen consequences associated with the more traditional IIAs has to do with the expansionary interpretations given to stabilization clauses by arbitral decisions which also has the effect of bringing a host of state contracts with foreign investors under IIA treaty protection.

By way of expansive interpretations of arbitral tribunals, violations of an individual contract with a host government now also entail a breach of a substantive obligation of an IIA above and beyond umbrella clauses (OECD, 2006c, p. 26). Originally, contract breaches were dealt with in the national court system of the host country. Stabilization clauses, that is, contractual clauses that aim to reduce or eliminate the impact of changes in the legal system or business conditions in the host State during the life of the project, changed that. Such clauses became common as risk mitigation tools to protect foreign investments from nationalization or expropriation (in the 1960s and 1970s) and, more recently, from creeping expropriation, nullification of the contract pursuant to national law and a host of specific fiscal issues (such as accelerated depreciation and amortization of assets, long loss-carry-forward periods, royalty rates or guarantees that foreign exchange can be repatriated or kept in a protected offshore account, and general or specific guarantees with regard to environmental and social legislation, among other risks (Shemberg, 2008, p. 4).

<sup>21</sup> For example, *Enron Corp. and Ponderosa Assets versus The Argentine Republic* (ICSID Case No. ARB/01/3); *Siemens A.G. versus The Argentine Republic* (ICSID Case No. ARB/02/8); *Azurix Corp. versus The Argentine Republic* (ICSID Case No. ARB/01/12); *CMS Gas Transmission versus The Argentine Republic* (ICSID Case No. ARB/01/8); *Lanco International Inc. versus The Argentine Republic* (ICSID Case No. ARB/97/6); and the bondholders’ claims by *Giovanna A. Beccara, Giovanni Alemanni and others*.

<sup>22</sup> This section is based principally on *Yannaca-Small* (2006b).

<sup>23</sup> Box 8 of section C discusses the application of umbrella clauses and other mechanisms to bring contract disputes to treaty status in Latin America.

<sup>24</sup> It might be mentioned in passing that the United States stopped using umbrella clauses with the 2004 modification of its BIT model; nevertheless, it still possesses 38 previously signed BITs with such clauses in them.

These clauses usually came in three principal forms (Shemberg, 2008, p. vii):

- freezing clauses, which “freeze” the law of the host State with respect to the foreign investment project over the life of the project. Although domestic laws in many countries do not allow the sovereign to promise not to legislate in the future, this kind of clause may still be meaningful to international arbitration pursuant to IIAs;
- economic equilibrium clauses, which require that the foreign investor comply with new laws but also require that the investor be compensated for the cost of complying with them (compensations taking such forms as adjusted tariffs, extension of the concession, tax reductions or monetary compensation, for example), even if exemptions are not specifically mentioned in the contract;
- hybrid clauses (so named because they share some aspects of both of the other categories), which require the State to restore the investor to the same position it had prior to changes in the law, including, as stated in the contract, exemptions from new laws.

In practice, these stabilization clauses in contracts with OECD countries usually require the foreign investors to absorb the risk of changes to generally applicable laws, and sometimes specified laws and also those geared to public policy (safety, security); whereas those of non-OECD countries often do not, and, moreover, sometimes even labour, environmental and other social laws are stabilized (Mann, 2008b).

The main criticisms levelled at stabilization clauses, notwithstanding the legitimate expectation of foreign investment protection from arbitrary State action, are that they elevate violations of State contracts to IIA protection and they limit host-country policy in areas such as non-discrimination, health and safety, labour and employment, cultural heritage, human rights and the environment, among others (Shemberg, 2008, pp. viii and 39).

Similar to stabilization clauses are Legal Stabilization Agreements (LSAs), which, with a stronger legal standing, share similar objectives and generate the same risks (Vielleville and Vasani, 2008) (see section C).

In sum, the expansive interpretations of arbitral tribunal decisions with regard to concepts found in IIAs, such as the examples referred to above (indirect expropriation, fair and equitable treatment, “like treatment” with regard to national treatment, the scope of most-favoured-nation treatment, the definitions of investor and investment, umbrella clauses and stabilization clauses) have allowed arbitrators to scrutinize virtually any sovereign act that might affect the assets of a foreign investor. As a consequence, a marked tendency became apparent to facilitate increased use of IA-ISDS procedures by foreign investors and, as a consequence, to constrain the policy space of host governments by shifting additional risks to them. This has represented a serious challenge to host governments since the nature of arbitral tribunal jurisprudence has in many cases been ambiguous and produced increased uncertainty, which at times has limited governments’ space to pursue legitimate public policy goals for fear of triggering international investment arbitration.

## **(ii) Legitimacy issues affecting IA-ISDS practices**

One of the principal consequences of the increased use of IA-ISDS procedures associated with IIAs is that the power to determine the legality of sovereign acts has been delegated to privately contracted arbitrators. This has raised the question of whether such practices satisfy the basic standards of judicial decision-making in democratic societies or if they are tainted and fail to meet the basic requirements of the rule of law (Van Harten, 2007b, pp. 5, 102 and 153). At the same time, foreign investors and their lawyers have used IA-ISDS procedures to test the boundaries of their IIA treaty and contract guarantees in settings in which no mature jurisprudence exists to guide international investment arbitrators (Franck, 2005, pp. 1586 and 1613). The stakes in the increased use of IA-ISDS mechanisms of IIAs were seen to be simply too great to sit by idly while issues of public international law were being decided inconsistently, in private (Franck, 2005, p. 1613). A backlash was apparent (Álvarez and Park, 2003).

This subsection focuses on two of the principal critiques associated with the legitimacy of IA-ISDS procedures: problems linked to their commercial arbitration roots, on the one hand, and difficulties associated with their undemocratic nature, on the other.

#### *Problems linked to the commercial arbitration roots of IA-ISDS procedures*

Citing Nigel Blackaby, an OECD publication put forward the notion that arbitrators deciding a purely commercial dispute behind closed doors did “not offend fundamental principles of justice” even if there was no mechanism ensuring that the public would ever know about the claim brought, the positions taken by the parties, the decisions issued by the tribunals or the precise reasons for them (OECD, 2005b, p. 11). Apparently it was a short step to extend that mindset to purely commercial contracts between foreign investors and host governments and, thereafter, to broader areas of public policy. In the case of contracts, at least initially, international arbitration was confined to a specific dispute, foreign investor or project, and the contracting parties were the same, so the State had a clearer sense of what it had agreed to arbitrate (Van Harten, 2007b, p. 63). Things changed dramatically when broader areas of public policy became vulnerable to such international arbitration since the system of commercial arbitration evidently was not designed to provide public accountability, transparency or citizen participation (Anderson and Grusky, 2007, p. 9). The private model of adjudication that originated in the rules and enforcement structure of international commercial arbitration presents major challenges to the principles of judicial accountability, openness and independence (Van Harten, 2007b, p. 6). Franck (2005, pp. 1538-1539) considered that major innovations in international investment arbitration placed the enforcement of public international law in the hands of private individuals. The revolutionary aspect of the shift from contract arbitration to IIA arbitration was the transformation of a modified form of commercial arbitration into a system to control the State’s exercise of regulatory authority with respect to foreign investors as a group (Van Harten, 2005b, p. 608) in which private arbitrators were given the power to resolve regulatory disputes (Van Harten, 2007b, p. 120).

The shift from commercial arbitration between private parties to international investment arbitration between private parties and the host sovereign government was unique and entailed a number of serious problems.

An important problem had to do with the innate conflicts of interest created because the system submitted the sovereign authority and budgets of States to formal control by private adjudicators who could be suspected of interpreting investment treaties broadly in order to expand the system’s appeal to potential claimants and, in turn, their own prospects for future appointment (Van Harten, 2007b, p. vii). As merchants of adjudicative services, private arbitrators had a financial stake in furthering the system’s appeal to claimants and, as a result, the system was tainted by an apprehension of bias in favour of allowing claims and awarding damages against sovereign governments (Van Harten, 2007b, pp. 152-153).<sup>25</sup> In this manner, a rich environment for creative lawyering was established in relation to the opportunities generated by the vagueness and flexibility of treaty provisions, especially MFN-based “provision-shopping” (Van Harten, 2007b, p. 110). Evidently, the need to insulate investment treaty arbitration from a perception of dependence on corporate interests was not properly accounted for when the system was designed and that helped explain the tendency of arbitrators to interpret their own jurisdiction expansively (Van Harten, 2005b, p. 616).

In effect, IA-ISDS procedures could be viewed as a one-sided system of State liability, in which only foreign investors file claims and only States paid damages for breach of the treaties, and in which an adjudicator was made dependent on prospective claimants and thus biased, in the objective sense, against respondent governments, even though governments traditionally appointed at least one of the arbitrators of the panel. While the domestic courts of either the host or the home State had sometimes been seen to be biased in the resolution of an international investment dispute, these adjudicators were

---

<sup>25</sup> García (2004, p. 66) went so far as to suggest “arbitrators’ allegiances were to their law firms. Their billing requirements made it impossible for them to approach a case in the same way a judge or other decision-makers would do when they had no financial stake either in the existence of the claim itself, nor in its prolonged duration.”

perceptively dependent on private interests (Van Harten, 2007b, pp. 5-6). Thus, innate conflicts of interest represent one of the principal problems stemming from the commercial arbitration roots of international investment arbitration and lead to a questioning of the legitimacy of IA-ISDS clauses.

#### *Doubts associated with the undemocratic nature of IA-ISDS procedures*

International arbitration under the IA-ISDS procedures of IIAs has challenged the rule of law in democratic societies for a number of reasons. As Van Harten has pointed out (2007b, p. 130), it has lowered the status of the host State vis-à-vis foreign investors. Conceptually, the key problem with the characterization of the investor-State relationship as a reciprocal relationship is that it fundamentally altered the nature of the rights and duties of States. When an adjudicator approaches the regulatory position of a foreign investor as if it were reciprocal, this does one of two things: either it reduces the State to the status of a private party; or it elevates the foreign investor to a quasi-sovereign status but without any sovereign responsibilities. In both cases, the concept of the State as a unique entity, endowed with authority that no private party can possess, is negated. Second, such a stance favours foreign investors so much that it undermines the core principles of public law, such as accountability, openness and independence (Van Harten, 2007b, p. 179). In this sense, international investment arbitration of this nature has placed limits on the functioning of the democratic process in host countries.

In terms of accountability, IIAs have given arbitrators comprehensive jurisdiction over a very broad class of potential disputes with foreign investors, which have thus been removed from the domestic courts (Van Harten, 2007b, p. 72). Usually, there has been no competent mechanism for a formal appeal against an arbitral decision on issues of law (except for jurisdiction and gross procedural error) as is the case for domestic courts.

With regard to openness, although foreign investment disputes involving States implicates public interest issues, they are decided in processes designed to address private and commercial issues, without regard for the transparency and participation values of democratic governance (Bernasconi-Osterwalder, 2006, p. 2). This secrecy (to its opponents) or confidentiality (to its supporters) has become the norm for investor-State arbitration. However, there is widespread recognition that investor-State cases raise issues that are very different from commercial arbitration, and that these issues require the weighing of public interests as well as private ones. No other democratically based judicial process involving public issues and the public welfare has been so devoid of the basic guarantees of public access and accountability as the investor-State process itself (Mann, 2008b, p. 30). In short, IIA arbitration is alone among all international bodies that adjudicate regulatory disputes in its blanket suppression of essential information about the process (Van Harten, 2007b, p. 164).

With regard to independence, the most troubling issue arising from the use of private arbitration to resolve regulatory disputes is the threat to judicial independence since arbitrators lack the security of tenure and bars on outside remuneration that are characteristic of judges in mature legal systems. The system has made arbitrators dependent on prospective claimants (private investors or executive governments) in ways that tenured judges are not (Van Harten, 2007b, p. 167). Arbitrator bias offers a credible explanation for the tendency of tribunals to adopt a broad reading of their jurisdiction and of their standards of review, thus expanding the system's compensatory promise for foreign investors. And the simple fact of the matter is that this explanation is enough to conclude that the system does not satisfy the requirement of judicial independence in public law (Van Harten, 2007b, pp. 174-175).

In sum, serious questions about the legitimacy of the IA-ISDS system have arisen. Its commercial roots necessitate secrecy for such procedures and generate conflicts of interest for arbitrators. The nature of such procedures does not allow for a minimum of accountability, openness or independence. Moreover, lowering a sovereign entity with a representative government to the level of a foreign investor or raising a foreign investor to the status of a sovereign raises serious doubts about the sovereign's ability to represent and defend the legitimate interests of its citizens.

### **(iii) The principal risks of IA-ISDS clauses and the challenges faced**

The most concrete risk facing developing countries and transition economies with IA-ISDS commitments in their IIAs is the financial cost of any adverse decision by an arbitral tribunal. The damages, legal fees and administrative costs of some of the more notorious decisions have involved hundreds of millions of dollars. That may represent a financial restriction, especially for a small developing country.

However, a greater long-term risk is the expansive interpretations given to central concepts in IIAs that can have the effect of enormously increasing the dimension and nature of the exposure of host countries in existing IIAs. In this fashion, without entering into new IIAs, expansive interpretations of these concepts transform an existing level of risk into a greatly increased level of risk, thereby introducing higher levels of uncertainty into public policy.

In other cases, this can lead to legitimacy issues, such as policy paralysis or regulatory chill, which can translate into the host country's partial or total loss of control over its own national developmental process. Effectively, the general and prospective consent that host countries agree to by way of IIAs has been compared to a "blank cheque" (Redfern and Hunter, 2004, pp. 60-62). In either case, these treaty obligations represent open-ended promises or commitments that can inhibit government action. In dealing with such risks, policy paralysis can set in and constrain the national policy space supporting developmental strategy. Regulatory chill at different levels of government represents a similar effect as policy paralysis but it applies strictly to regulatory matters. Governments become unwilling to undertake legitimate national regulation for fear of lawsuits from foreign investors. Thus, the caution required to manage carefully these IA-ISDS risks can significantly curtail national regulatory policy and in the process reduce the host government's action in fields, such as health and safety, labour and employment, cultural heritage and the environment, among others. Alternatively, host governments in extreme circumstances may be forced to choose between honouring the obligations in their international investment treaties and contracts or meeting the legitimate needs of their citizens during crisis situations.

In answer to the initial question raised, namely, "Do the benefits from IA-ISDS clauses justify the risks?", two things can be said. First, it depends to a very large extent on the specific situations of the host countries. What holds for Brazil may not be the case for the Plurinational State of Bolivia, or that of the Russian Federation for Rwanda, or that of India for Indonesia, or that of China for the Czech Republic. Large-market developing countries and transition economies, such as the BRICs, have for the most part been quite cautious with taking on IA-ISDS commitments and have received considerable inflows of foreign investment, while smaller developing countries and transition economies with more reduced bargaining strength have felt the need to accept relatively high levels of IA-ISDS commitments to attract foreign investment, thereby elevating their level of risks in relation to the latter. It is clear that assuming such risks will not necessarily guarantee higher foreign investment inflows and that the higher the risks, the more likely international investment arbitration. In this context, it is now relevant to reevaluate the appropriateness of IA-ISDS practices.

## **2. Can IA-ISDS mechanisms be fixed so that the benefits justify the risks?**

It may come as a surprise that the first significant initiative to modify IA-ISDS guarantees in IIAs came not as a reaction to the unclear jurisprudence manifest in classic cases, such as *Lauder versus Czech Republic* and *Czech Republic versus CME Czech Republic B.V.*, which resulted in contradictory arbitral decisions. Rather, it came from the United States, which had promoted the most demanding aspects of foreign investment liberalization in general and IA-ISDS guarantees in particular. When chapter 11 of NAFTA (see box 3) was turned against the United States itself, however, a strong backlash occurred within the United States. Even though the country subsequently won all its IA-ISDS cases, opposition to the application of chapter 11 arbitration procedures in the United States surged. For example, a host of state and local governments went on record opposing such procedures and in 2002, Senator John Kerry—the Democratic Party presidential candidate of 2004— even proposed an amendment that aimed to

exclude chapter 11-type provisions from future regional trade agreements. Some felt that those who negotiated NAFTA in the early 1990s “did not anticipate that lawyers would be able to use the provisions of chapter 11 to launch the kind of legal actions that generated such opposition” (Capling and Nossal, 2004, p. 27). When IIA arbitration risks stemming from IA-ISDS guarantees became difficult to defend within the United States, the United States Trade Representative (USTR) waived and took measures to modify the same IA-ISDS procedures that previously had been considered fundamental and unquestionable elements of its foreign investment liberalization policy. Guidance was given to international investment arbitrators so that they looked beyond the “form” of the foreign investment in favour of the economic essence of such (in other words, that there be a commitment of capital, the expectation of profit or the assumption of risk and, in the case of debt instruments, a long-term perspective). The concepts of fair and equitable treatment and indirect expropriation were linked to customary international law in annexes in the new United States regional trade agreements following the practice set out by the NAFTA Free Trade Commission in July 2001, which issued a binding interpretation clarifying, among other things, NAFTA article 1105(1), that is, fair and equitable treatment and full protection and security, and article 1110, on indirect expropriation (Gagne and Morin, 2006, pp. 367-372). In other words, they constituted obligations only to the extent that they are recognized by customary international law and squared with United States case law.<sup>26</sup>

The principal United States initiative was to propose the creation of appellate mechanisms for IA-ISDS procedures. The United States Congress in its Bipartisan Trade Promotion Authority Act of 2002 established a negotiating objective for United States regional trade agreements to “provid[e] an appellate body or similar mechanism to provide coherence to the interpretations of investment provisions in trade agreements” (Legum, 2008, p. 232). As a result, subsequent regional trade agreements (with Chile, Peru, Morocco, Oman and Singapore) included commitments to consider whether to establish a bilateral appellate body or similar mechanism within three years after the agreement entered into force and to strive to reach an agreement to permit a multilateral appellate body to review awards under the agreement if the mechanism for such an appellate body was established under a separate multilateral agreement. The Dominican Republic —Central America— United States Free Trade Agreement (CAFTA-DR) additionally called for the establishment of a working group to study the appellate issue and to provide a draft appellate amendment and included an illustrative list of issues to consider (the applicable standard of review, the composition of the appellate panel, its relation to underlying arbitration agreements and laws on the recognition and enforcement of arbitral awards, and the effect of decisions by the appellate body or similar mechanisms) (Tracton, 2008, pp. 202-203).

The new view adopted by the Government of the United States played out in a number of other areas. The search for increased transparency and consistency led to clarifications of NAFTA and a new 2004 United States Model BIT, among others. For example, for the first time a United States regional trade agreement (the agreement with Australia), was signed that did not include IA-ISDS provisions (Newcombe, 2005; Dodge, 2006). The main proposals included:

- the interim review of draft decisions or awards. At the request of one of the disputing parties, the tribunal was to circulate a draft decision or award to the disputing parties and to the non-disputing government party so that the disputing parties had the opportunity to provide written comments (if an appeal mechanism was not available);
- that government parties have the opportunity jointly to make binding interpretations of the agreement. Any posterior decision or award was to be consistent with the joint declaration;
- that the non-disputing party have the right to make submissions to the tribunal regarding the interpretation of the agreement;

<sup>26</sup> In this sense, a breach of article 1105(1) was not a breach of another provision of NAFTA unlike the jurisprudence shown in *Metalclad Corp versus United Mexican States* (ICSID Case No. ARB(AF)/97/1), *S.D.Myers, Inc. versus Canada*, and *Pope & Talbot, Inc. versus Canada*, Award on Merits, Phase 2 (Tracton, 2008, pp. 204).

- that written submissions were to be made available to the public in a timely fashion, hearings were to be open to the general public, for example;
- that a mechanism for a tribunal to decide whether consolidation for all or part of the claim was warranted;
- guidance to tribunals on factors to consider in deciding whether an indirect expropriation had occurred and clarifying how international customary law was formed in the annexes to the 2004 United States Model BIT (Tracton, 2008, pp.203-206).

While all these modifications and clarifications were implemented to some degree, the central proposal to create appellate mechanisms did not prosper.

The United States initiatives provoked reactions. For example, OECD eventually organized a symposium entitled, "Making the most of international investment agreements: a common agenda" which took place in Paris in December 2005, and Columbia University held a symposium on "Transparency and consistency in international law: is there a need for a review mechanism?" in New York, United States, in April 2006. The principal advantages and disadvantages of any appellate mechanism were considered (Yannaca-Small, 2008, pp. 224-225). Advantages included avoiding inconsistency, rectifying legal errors and possibly serious errors of fact, adding review by a neutral mechanism (not a national court) and improving effective enforcement. Disadvantages encompassed limiting the principle of finality, creating additional delays, costs and caseloads and politicizing the system. In spite of the strong push by the Government of the United States and its NAFTA partners, the majority of OECD members did not consider this issue urgent enough to merit what they considered to be radical change.<sup>27</sup>

This is a curious outcome considering that an OECD publication (2006c) fully recognized that IA-ISDS procedures needed improvement in areas such as: the quality of decisions, multiple and parallel proceedings requiring consolidation, and jurisdictional questions surrounding contracts, among others. Moreover, in related developments, in May 2006, OECD achieved a landmark result by adopting a tool for global and regional dialogue on foreign investment, national policy assessment and peer review, known as the Policy Framework for Investment. As mentioned, this represented a substantial softening of the previous OECD hard-line stance on foreign investment, exemplified by the MAI. Presumably, the inherent differences between the United States-style BITs, which stressed foreign investment liberalization, and the European-style ones, which emphasized foreign investment protection (Gugler and Tomsik, 2006), played a role in this result, that is, the inability to institute the proposal for an appellate mechanism. By all means the prospects for an appellate system appeared to be grim (Brummer, 2008, p. 284; Legum, 2008, p. 238; Álvarez, 2008, pp. 31-32; Paulsson, 2008, p. 242; and Qureshi and Khan, 2008, p. 268).

At the same time, a considerable number of reform initiatives were launched, and several significant changes were introduced into national practices with regard to IIAs. Certain relatively minor modifications were introduced into the ICSID Regulations in 2006; however, they did not include any of the more important matters (Parra and others, 2008a and 2008b), such as the Additional Annulment Facility, now considered "dormant" (Juillard, 2008, p. 101) or the Appellate Mechanism, now thought to be "off the table" (Legum, 2008, p. 233). The relatively minor changes took into account the lack of transparency or the limited possibility for the public to be heard in cases that affected them. Other, even more minor changes, were being considered for the UNCITRAL Rules by a Working Group set up in 2006.

The major concrete modifications related to IA-ISDS guarantees and mechanisms were introduced primarily through the initiatives of individual countries. It is for this reason that new IIAs are becoming somewhat more balanced (Malik, 2008a, pp. 10 and 8). Countries are learning from the problems that have arisen and, moreover, a rising number of IIAs have been renegotiated (121 by the

<sup>27</sup> The consideration of other options, such as transposing investment arbitration to the International Chamber of Commerce mechanism for scrutiny of awards by adding an extra layer of control before awards were sent to the parties and the establishment of an Additional Annulment Facility to mirror the Additional Facility Rules of ICSID so that non-ICSID members would also have access to the self-contained ICSID system of annulment did not produce any consensus either. Some minor advances in transparency and consolidation of cases (de facto) were registered (Yannaca-Small, 2008, p. 226).

end of 2007). The modifications to NAFTA and the new 2004 United States Model BIT have been referred to previously. Canada also participated in the modifications to NAFTA and developed a new 2004 Model BIT (called Foreign Investment Protection Agreement). While the shift from BITs based on the OECD model to those based on the 1994 Model (NAFTA 'light') moved in a liberalizing direction by focusing on setting up pre-establishment rights, strengthening NT and MFN, restricting performance requirements and facilitating entry of personnel, the shift to BITs anchored in Canada's 2004 Model implied implementing several clarifications of substantive investment obligations and augmenting transparency and efficiency in the IA-ISDS process to avoid further international investment arbitration; these were lessons from the NAFTA arbitration experience. Some of the latest Canadian modifications were to exclude government bonds from the definition of investment; to explicitly equate fair and equitable treatment with the customary international minimum standard; to limit the application of the MFN guarantee to future IA-ISDS procedures; to introduce general exceptions to strengthen the right to regulate; and to guide the interpretation of indirect expropriation in the same sense as NAFTA did (Newcombe, 2004, pp. 3-7). These criteria recently became manifest in the new, Foreign Investment Protection Agreement signed with Colombia (*IAReporter*, 2009).

Norway suspended negotiating BITs in the mid-1990s due to its concern for the limits that they might impose on the Government's ability to regulate and expropriate in the public interest, which was guaranteed in the national constitution. Norway eventually opted for a new model that strictly defined expropriation pursuant to the provisions of international law, safeguarded the general regulatory freedom of the State in its own territory and introduced a compensation formula distinct from the "prompt, adequate and effective" variant. In this way, Norway designed a standard of expropriation that met the level of protection it wished to provide foreign investors while expressly retaining the ability to regulate in the public interest without fear of compensation claims (Malik, 2008a).

With regard to regional practices in negotiating individual IIAs, in general, Asian countries have become more active recently but have also been much more prudent and cautious in terms of their IA-ISDS guarantees (Stanley, 2007). Overall, the Asian countries were more prone to employ escape clauses and conserve their national policy space (Sonarajah, 2008, pp. 40, 47 and 74; Kumar and Gallagher, 2007). Specific advantages of Asian IIAs in this regard have to do with covering fewer investment matters, incorporating relatively little foreign investment liberalization, narrowly defining foreign "investment", limiting TRIMs prohibitions to WTO practices, demonstrating extreme caution with "expropriation" and "indirect expropriation", and requiring a more limited scope for IA-ISDS procedures (Kumar, 2007b). Even with regard to the trend towards signing regional trade agreements with some of the more active home countries in Asia, such as Japan and Singapore, some Asian developing countries, such as the Philippines and India, have demonstrated their ability to negotiate regional trade agreements with significant limits on IA-ISDS risks. In the case of the Philippines' regional trade agreement with Japan, no open consent was given for IA-ISDS procedures, and a general exception to override investment provisions (and avoid expansive interpretations which could reduce the national policy space to regulate) was inserted to permit the host governments to take measures necessary to protect human, animal or plant life, or health, as well as measures necessary to protect public morals or to maintain public order (*Investment Treaty News*, 2006). In the case of India's regional trade agreement with Singapore, which was its first broad-based agreement covering trade, foreign investment and services, important innovations were achieved by that host country. Limited foreign investment liberalization commitments were on a positive list basis and IA-ISDS procedures were not open to foreign investors for disputes relating to the establishment, acquisition or expansion of foreign investments. Furthermore, in order to limit possible expansive interpretations, no MFN, FET or full protection and security guarantees were included, and clauses similar to the United States and Canadian agreements were adopted with respect to indirect expropriation (*Investment Treaty News*, 2005). Thus, a number of Asian developing countries demonstrated that IIAs, including liberalizing regional trade agreements, could be negotiated in ways that limited the IA-ISDS risks.

In answer to the question of whether IA-ISDS clauses can be fixed so that the benefits justify the risks, it can be concluded that a general solution is not likely in the near term. While there seems to be

agreement that IA-ISDS mechanisms are flawed, the malaise and turmoil associated with that fact do not converge towards a single solution. OECD countries seem to focus on their own perspectives in this regard (with differences between Europe and North America) and not on the overall situation. “Tinkering” will not resolve the negative impacts of IA-ISDS clauses on democratic processes, the limits they place on national policy space and other questions concerning their legitimacy. Moreover, the confusion surrounding how to fix IA-ISDS clauses compounds the uncertainty and unpredictability associated with those procedures themselves. For now, it would seem to be the case that developing countries and transition economies must learn from the IA-ISDS jurisprudence and focus on improving their risk management in terms of their own IA-ISDS exposure.



## **C. The management of IA-ISDS risk in Latin America and the Caribbean**

---

Many factors are involved in determining the effectiveness of a country's or a region's IA-ISDS risk performance. Among the most important are the essential nature of foreign investment bases covered by the IIAs, the basic orientations of the principal IIA partners, the quality of host country foreign investment policies and the effective use of negotiating strength in the provisions of the IIA treaty. These factors go a long way towards explaining the superior performance of developing Asia, especially East Asia, in comparison to Latin America and the Caribbean (Sauve, 2007; Duran, Mulder and Onudera, 2008).

The foreign investment base covered by IIAs in developing Asia and in Latin America and the Caribbean are quite dissimilar. In the former, it is the efficiency-seeking investments of global value chains for manufactures that stand out, while in the latter, it is market-seeking investments in privatized services (mostly energy, telecom, sanitation, and transportation infrastructure) or investments in natural resources that are predominant. Given that natural resources have been at the centre of expropriation and nationalization disputes, that services require regulation and many are socially sensitive, and that most of the advances in multilateral trade negotiations have been achieved with regard to trade in goods (especially manufactures), one would expect more IA-ISDS cases in Latin America and the Caribbean than in developing Asia.

With regard to the basic orientations of the principal IIA partners, the recent surge in IIAs among Asian partners has diluted the profile of North American and European investors in the region. The TNCs from Asian partners

have had less propensity to use IA-ISDS procedures than European and North American TNCs (Stanley, 2007). Intraregional FDI in Latin America and the Caribbean is still relatively limited, and the principal IIA partners continue to be North American and European ones, which have proved quite willing to employ IA-ISDS procedures.

In terms of the quality of IIA policies, many elements come into play. Naturally enough, countries or regions that demonstrate greater clarity in their long-term development strategy, count on a stable and efficient institutional (especially, democratic, macroeconomic and legal) environment and implement cohesive policies are those most likely to have IA-ISDS policies that reflect those same priorities (Mortimore, 2009). Historically, Asian “flying geese” have significantly outperformed Latin American “sitting ducks” with regard to coherent development strategies (Mortimore, 1993). At the same time, developing Asian countries learned more from the Asian crisis of the late 1990s than did Latin American and Caribbean countries from the debt crisis of the 1980s (the “lost decade”). Active and targeted FDI policies (coupled with effective IA-ISDS risk management) in developing Asia have produced better results than passive and horizontal policies in Latin America and the Caribbean (Mortimore, 2008).

In relation to the effective use of negotiating strength in IIAs, it is difficult to draw conclusions at the regional level. The scarcity of regional trade agreements with the United States on the part of developing Asian countries (except Singapore and perhaps the Republic of Korea), however, contrasts sharply with the proliferation of regional trade agreements between the United States and Latin American and Caribbean countries (Chile, Costa Rica, Dominican Republic, El Salvador, Guatemala, Honduras, Mexico, Nicaragua, Panama, Peru and, in the future, Colombia). Furthermore, the effective use of negotiating strength shown by China and India in their IIAs reflects an ability to achieve concrete results which contrasts sharply with Brazil’s policy of simply not participating in IIAs.

In sum, there are many factors that go into determining the effectiveness of a country’s or a region’s IA-ISDS performance. In this section we focus on the situation and experiences of Latin America and the Caribbean.

## 1. Two different worlds of IA-ISDS risks from IIAs in Latin America and the Caribbean

By 2008, Latin American and Caribbean countries were parties to well over 300 IIAs. They were also subject to over 200 known IA-ISDS cases.<sup>28</sup> The analysis that follows concentrates solely on the 117 ICSID cases and, with one exception, not those of the International Court of Arbitration of the International Chamber of Commerce, the Arbitration Institute of the Chamber of Commerce of Stockholm, the London Court of International Arbitration or ad hoc alternatives. The ICSID cases are the only ones for which a minimum of coherent and comparable information is available.

Table IV.1 below contains information on the 20 Latin American and Caribbean countries that have been directly involved in ICSID cases (concluded or pending). They represent more than half of the countries in the region. Two groups of countries can be identified with respect to their approaches to the IA-ISDS procedures in their IIAs. On one hand, Chile, Colombia, Dominican Republic, Mexico, Panama, Peru and Central American countries (hereafter referred to as “Type I” countries) seem to have considered that the benefits of these agreements outweigh the risks they imply. Conversely, Argentina, the Bolivarian Republic of Venezuela, Ecuador, Paraguay and the Plurinational State of Bolivia (hereafter referred to as “Type II” countries) appear to have considered that the risks outweigh the benefits.<sup>29</sup>

<sup>28</sup> Furthermore, J. C. Hamilton, international arbitration and litigation partner of White and Case has suggested that in 2006 there were 151 International Chamber of Commerce cases of commercial arbitration involving Latin American parties, up from 83 cases in 2000 (*IDQ*, 2007).

<sup>29</sup> In keeping with the analysis of section A, Brazil is not included in this classification because the Brazilian Congress never ratified any of the IIAs negotiated (14 BITs and the Buenos Aires and Colonia Protocols of MERCOSUR). From that perspective, Brazil carries few IA-ISDS risks.

Recently, an additional fissure became perceptible in Latin America and the Caribbean (see table IV.1) in the form of an Economic Partnership Agreement (EPA) signed by 15 Caribbean countries (CARIFORUM) of the 79-member Africa, Caribbean and Pacific group of countries and the European Commission, which might suggest that these countries are now more disposed to carrying increased risks associated with the IA-ISDS procedures in their IIAs. The situation of these Caribbean countries is quite special in that (i) they possess relatively few IIAs (a total of only 22 BITs for the five countries); (ii) the regional trade agreement they recently signed was with the European Commission and not the United States; (iii) the EPA incorporates no IA-ISDS procedures; and (iv) eight of the nine ICSID cases involving these Caribbean countries have been concluded (three before 1990). The Caribbean countries (except Dominican Republic) carry quite low IA-ISDS risks, which is distinct from both the Type I and the Type II countries dealt with in the following analysis. For these reasons, they must be considered separately from the rest of Latin America and are not dealt with further in this chapter.

**TABLE 1**  
**CHARACTERISTICS OF GROUPS OF LATIN AMERICAN AND CARIBBEAN COUNTRIES**  
**WITH ICSID CASES, 2008**

(Number of IIAs and number of cases)

Country	Regional Trade Agreements <sup>a</sup> (United States style)	BITs <sup>a</sup>	Concluded Cases	Pending Cases	Total Cases
Type I (9)	35	171	17	14	31
Chile	8	39	1	2	3
Mexico	8	19	9	4	13
Costa Rica	4	13	1	3	4
El Salvador	4	20	1	-	1
Panama	3	17	-	1	1
Peru	2	28	3	2	5
Guatemala	2	14	-	1	1
Honduras	2	9	1	1	2
Nicaragua	2	12	1	-	1
Type II (5)	-	141	27	50	77
Argentina	-	54	15	33	48
Venezuela (Bolivarian Republic of)	-	24	5	5	10
Ecuador	-	23	5	8	13
Paraguay	-	21	1	2	3
Bolivia (Plurinational State of)	-	19	1	2	3
Caribbean (5)	<sup>b</sup>	22	8	1	9
Jamaica	<sup>b</sup>	10	3	-	3
Trinidad and Tobago	<sup>b</sup>	7	2	-	2
Grenada	<sup>b</sup>	2	1	1	2
Guyana	<sup>b</sup>	3	1	-	1
Saint Kitts and Nevis	<sup>b</sup>	-	1	-	1
Total (19)	35	346	52	65	117

Source: Economic Commission for Latin America and the Caribbean (ECLAC), on the basis of information from the International Centre for Settlement of Investment Disputes (ICSID).

<sup>a</sup> In force.

<sup>b</sup> Recently signed an Economic Partnership Agreement with the European Commission (no IA-ISDS procedures incorporated).

## 2. Experiences of dealing with IA-ISDS risks in the region

Three aspects of the Latin American and Caribbean experience are of relevance: the financial cost, some of the expansive interpretations of IA-ISDS jurisprudence and some of the legitimacy issues. This

analysis is meant to be illustrative and not definitive of the situation in the region due to the complexity of the issues dealt with.

### (a) Financial costs of IA-ISDS jurisprudence

The information on the financial costs (awards, lawyers' fees and administrative costs) of ICSID international arbitration tribunals in which a Latin American or Caribbean country has been the defendant is relatively weak and incomplete in spite of the ongoing efforts to improve upon it. The mantle of secrecy still pervades international investment arbitration, and the efforts to infuse more transparency in this subject matter have been only partially successful.

Franck (2007c, pp. 58-59) found in her analysis of 102 awards (of which 52 were final) up to June 2006 that the average damages assigned were US 10.4 million. Using that as a reference point, the known costs in Latin America and the Caribbean can be considered very high, in general; however, they are extremely concentrated in only one country: Argentina. If one takes into consideration only the principal damages assessed without including accumulated interest or other non-evident costs, the known awards assigned by ICSID tribunals in the case of Latin American and Caribbean countries surpass US\$ 1 billion, and Argentina alone accounts for over US\$ 900 million. Six individual ICSID cases against Argentina have awarded the plaintiffs more than US\$ 100 million each.<sup>30</sup> The damages of another case surpassed US\$ 50 million.<sup>31</sup> Moreover, as was mentioned, Argentina accounts for about half (33 cases) of all pending cases (65) in the region. Although even when awards are granted, the amounts awarded are often smaller than those claimed by the investors, it is significant that the cases that originated in the Argentina 2001-2002 crisis alone led to claims estimated at US\$ 20 billion (Perrone, 2001).<sup>32</sup> One single claim is for US\$ 4.4 billion (see box 6). Not considered in the US\$ 20 billion calculation are numerous cases for which the amount of the claim is unknown.

Only one of the other Type II countries, Ecuador, has had to pay damages (US\$ 69 million).<sup>33</sup> More notable, however, is the fact that these countries (excluding Argentina) are involved in about one quarter of the pending claims. In other words, damages from ICSID cases will probably play a more important role in the future for these countries.

With regards to the other countries, the situation has been much less dramatic. The Type I countries have faced considerable damages but nothing similar to Argentina. Peru lost one case worth about US\$ 18 million, Mexico was ordered to pay damages in the order of US\$ 17 million for two cases,<sup>34</sup> and Chile lost one case with damages of about US\$ 5 million.<sup>35</sup> The Type I countries were involved in about one third of the concluded ICSID cases and are responsible for only around one fifth of the pending cases.

In sum, the available information does not permit a definitive analysis of financial costs associated with ICSID cases in Latin America and the Caribbean. More needs to be done in this regard to make the IA-ISDS procedures more transparent. The case that stands out by far in Latin America and the Caribbean is that of Argentina, and the number of pending cases linked to that country suggests that such damages will be even more important in the future. In any case, it is evident that the financial dimension of IA-ISDS tribunal decisions can be in the tens, and sometimes, hundreds of millions of dollars.

<sup>30</sup> Siemens (ICSID Case No. ARB/02/8), Azurix (ICSID Case No. ARB/01/12), CMS Gas Transmission Co. (ICSID Case No. ARB/01/08), Sempra (ICSID Case No. ARB/02/16), Enron (ICSID Case No. ARB/01/3), Suez, Sociedad General de Aguas de Barcelona S.A. and Interagua Servicios Integrales de Agua S.A (ICSID Case No. ARB/03/17).

<sup>31</sup> The LG&E case (ICSID Case No. ARB/02/1).

<sup>32</sup> Estimates calculated from Perrone (2001) The figure of US\$ 20 billion does not include numerous cases for the which the amount of compensation is unknown.

<sup>33</sup> City Oriente (ICSID Case No. ARB/06/21).

<sup>34</sup> Metalclad (ICSID Case No. ARB(AF)/97/1) and Feldman (ICSID Case No. ARB(AF)/99/1).

<sup>35</sup> MTD Equity Sdn. Bhd. case (ICSID Case No. ARB/01/7).

## (b) Expansive interpretations in IA-ISDS jurisprudence

As was mentioned in section B, IA-ISDS guarantees in IIAs often contain vague terms and other ambiguities that provide arbitral tribunals with excessive discretion in their decision-making, which can result in expansive interpretations that facilitate the increased use of IA-ISDS procedures by foreign investors, shift additional risks to the host government and otherwise constrain the host's national policy space. In this regard, the Type I countries seem to have been able to better adapt to the situation by reforming the worst aspects of their regional trade agreements or taking precautions to avoid such risk in BITs, whereas the Type II countries face increasing tensions in line with the limitations on their right to regulate stemming from their older and unmodified BITs.

Two examples from the Type I countries stand out: the NAFTA countries' reaction to the challenge posed by the expansive interpretation of fair and equitable treatment and indirect expropriation in the *Metalclad* case (see box 4); and the Government of Chile's reaction to the adverse decision in the case of *MTD Equity* (see box 5). In the first case, the NAFTA members acted rapidly to ensure that such expansive interpretations would not unduly limit their right to regulate in the context of chapter 11 of NAFTA. In the second, the Government of Chile decided not to pursue further BITs as a result of the *MTD Equity* case and other cases, although it continued negotiating regional trade agreements with investment chapters. In other words, there is some evidence that Type I countries have attempted to improve the management of their IA-ISDS risks. What is exceptionally difficult to measure is the regulatory chill or policy paralysis that may have taken place before that happened.

### BOX 4

#### METALCLAD CORPORATION VERSUS UNITED MEXICAN STATES: EXPANSIVE INTERPRETATIONS OF FAIR AND EQUITABLE TREATMENT AND INDIRECT EXPROPRIATION

This case (ICSID Case N° ARB (AF)/97/1) involved a dispute over the construction of a hazardous waste disposal facility by a company owned and controlled by United States-based Metalclad. The landfill was located in Guadalupe in the Mexican State of San Luis Potosí. State and federal approvals had been obtained, but there was local resistance to the project, and after construction had been completed the municipal authorities denied a construction permit for the plant. Public demonstrations against the company claiming hazardous environmental effects to surrounding areas blocked the inauguration of activity. In September 1997, while solutions were being sought at the federal, state and municipal levels, and after the notice on intent of arbitration had been filed, the Governor of the State of San Luis Potosí declared the area a natural area for the protection of a rare cactus, through an ecological decree. This effectively impeded the operation of the facility.

The International Centre for Settlement of Investment Disputes (ICSID) came to two major findings. On the one hand, it ruled that Mexico had failed to ensure fair and equitable treatment (article 1105 of the North American Free Trade Agreement (NAFTA)) in the form of a "transparent and predictable framework" for the investor's business planning and investment. On the other, it interpreted the definition of indirect expropriation, which proved more controversial because it highlighted the tension between foreign investor protection and national policy space. In this case, the tribunal ruled in regard to the adoption of the ecological decree that it did not need to consider the motivation for the indirect expropriation, but only the fact that there was interference and that it negatively impacted the value of the foreign investment (Zarsky, 2005). The controversy stemmed from the fact that the effect of this expansive interpretation, if widely applied, would imply that governments might have to compensate foreign investors for any measures taken in pursuit of environmental protection, health, public welfare or community interests if they interfered with the ability of foreign investors to make a profit from their investment (Mann and von Moltke, 2002).

Posterior investor-State investment dispute settlement cases under NAFTA considered that there were limits to the assimilation of regulatory action to indirect expropriation (for example, *SD Myers versus Canada* and *Pope & Talbot versus Canada*). Nevertheless, mainly at the instigation of the Government of the United States, clarifications were made to the concepts of fair and equitable treatment and indirect expropriation in order to guide arbitration tribunals in their interpretations. Those clarifications and guidelines were introduced into subsequent regional trade agreements involving the NAFTA member countries, as well as into the revised model for bilateral investment treaties of the United States and Canada. In other words, when it became apparent that arbitral tribunals were using the excessive discretion at their command to reach expansive interpretations of concepts, such as fair and equitable treatment and indirect expropriation, which might then be applied to the other NAFTA host countries, the member countries acted rapidly to curtail such activity.

Source: Economic Commission for Latin America and the Caribbean (ECLAC), on the basis of information from International Centre for Settlement of Investment Disputes (ICSID), ICSID Case, N° ARB(AF)/97/1; Lyuba Zarsky, *International Investment for Sustainable Development: Balancing Rights and Rewards*, Earthscan, 2005; Howard Mann and Konrad von Moltke, "Protecting investor rights and the public good: assessing NAFTA's chapter 11", document presented at IISD Tri-national policy workshops [online] <http://www.iisd.org/trade/ILSDWorkshop>, Mexico City, 13 March, Ottawa, 18 March, Washington, D.C., 11 April 2002; and Rachel D. Edsall, "Notes - indirect expropriation under NAFTA and DR-CAFTA: potential inconsistencies in the treatment of state public welfare regulations", *Boston University Law Review*, vol. 86, N° 4, 2006; Andreas F. Lowenfeld, *International Economic Law*, Oxford University Press, 2008.

## BOX 5

**MTD EQUITY VERSUS REPUBLIC OF CHILE: EXPANSIVE INTERPRETATION OF FAIR AND EQUITABLE TREATMENT**

This case (ICSID Case N° ARB/01/7) highlighted the relationships between, and co-ordination of, different spheres of government that involved apparently contradictory decisions at the national level. MTD Equity (MTD), a Malaysian company, acquired land in the Pirque area, south of Santiago, Chile, with the intention of investing in a planned mixed-use community (including housing, schools, universities and shopping areas). Project appraisal and negotiations started in April 1996. When the project was being considered, both the owner of the land on which the project would be developed by the Malaysian investors and the bank that conducted the appraisal of the land stated their opinion that the land could be developed as a planned community if the zoning for agricultural use established at the time was changed, which they considered feasible. Also during the project appraisal period, company executives met with the Chilean Foreign Investment Committee (FIC) and other government officials. An application for the first part of the investment was filed with FIC in January 1997, specifying the location of the investment as "Pirque, Metropolitan Region" and mentioning the farmland on which it would be situated. FIC is responsible for approving the flow of funds into the country under the terms of the Foreign Investment Statute (Decree-Law 600). The authorization was granted two months later.

MTD hired local construction firms to assist it in, among other tasks, obtaining zoning changes. These needed to be initiated by the Municipality of Pirque and endorsed by the Ministry of Housing and Urban Affairs (MINVU). Through further contacts with the Government, the company learned that because Pirque lay within the "greater Santiago" area, its zoning status relied on the zoning programme for that metropolitan region. MTD made the initial applications to MINVU with regard to the zoning of the area in 1997, with the support of the Municipality of Pirque. Simultaneously, another FIC approval was granted for the second phase of the project. However, by the end of 1997 the company started meeting resistance from the urban development authorities with regard to changing the zoning status of that area of Pirque. In 1998, the company was informed that no zoning changes would be undertaken. Developments towards the area of Pirque (south of Santiago) were considered incompatible with plans to develop the city towards the north. The project was then formally rejected by MINVU. A request for arbitration was filed invoking the Malaysia-Chile bilateral investment treaty (BIT), and during the mandatory three-month negotiation period that preceded the arbitration proceedings, FIC issued yet another authorization, for a third stage in the process.

The key disagreement over which arbitration was sought was the significance of the approvals granted by FIC. The claimants argued that the Government of Chile could not have approved a foreign investment and then later denied permission to develop it. Chile argued that FIC had a well-defined and limited function, which was to approve the capital transfers that are undertaken under the regime defined by the Foreign Investment Statute. It was not responsible for obtaining or ensuring the receipt of other permits and authorizations. Chile further claimed that MTD had acted "irresponsibly and contrary to the prudent and diligent standard of behavior expected from an experienced investor" by investing before obtaining the necessary permits and by incorrectly interpreting the significance (and the limits) of the foreign investment authorization conceded by FIC.

In its appreciation of the case, the tribunal referred to the preamble of the BIT, in which State obligations are worded proactively, "to promote," "to create," and "to stimulate," as opposed to passive obligations such as avoiding acts that would harm foreign investors and foreign investments (non-interference). Under this interpretation, even if it is true that MTD acted irresponsibly and without the precautions and measures that were to be expected from an experienced international investor, the responsibility was oddly shifted onto Chile to make sure that MTD obtained all necessary approvals for its investment and correctly interpreting the meaning of each approval. The tribunal considered that there was an "inconsistency of action" between two arms of government, that the central Government of Chile could not be considered a passive party and that "the coherent action of the various officials through which Chile acts is the responsibility of Chile, not of the investor". It ruled that "approval of an investment by FIC for a project that is against the urban policy of the Government is a breach of the obligation to treat an investor fairly and equitably". This arguably amounted to the determination, by a privately appointed tribunal, of the attributions and responsibilities of a government body. Annulment of the Tribunal's decision was requested by Chile but denied. As a consequence of this decision, based on a very high standard of fair and equitable treatment, Chile was made to pay damages of more than US\$ 5 million. As a result of this and another arbitral tribunal decision, Chile came to the conclusion that the old, unmodified BITs were too risky to continue pursuing, preferring the investment chapters of regional trade agreements, which had been modified based on the experience of NAFTA.

Source: Economic Commission for Latin America and the Caribbean (ECLAC), on the basis of information from International Centre for Settlement of Investment Disputes (ICSID), "MTD Equity Sdn. Bhd. and MTD Chile S.A. (Claimants) v. Republic of Chile (Respondent)", ICSID Case, No ARB/01/7.

The Type II countries had many harrowing experiences with expansive ICSID arbitral tribunal decisions relating to older unreformed BITs that sent inconsistent messages to host governments with regard to their policy space for regulation and the treaty protection to be given contracts in the infrastructure sector. At least three groups of issues related to these arbitration cases came up: (i) Who

can resort to IA-ISDS procedures or, how does the definition of foreign investor affect *ius standi*? (see box 6); (ii) What is the scope of applicability of the MFN clause? (see box 7); and (iii) What is the situation of State contracts? That is, can they be elevated to treaty jurisdiction? (see box 8). In terms of merit, the discussion on the standards for asserting indirect expropriation (see box 9) illustrated the danger of imprecise definitions in that regard. Several of the examples mentioned in boxes IV.6-IV.9 refer to Argentina due to the fact that Argentina is the country in the region with the most IA-ISDS jurisprudence (15 concluded cases and 33 pending cases).

#### BOX 6

### WHO CAN RESORT TO INTERNATIONAL INVESTMENT ARBITRATION? THE DEFINITION OF "INVESTOR" IN INVESTOR-STATE INVESTMENT DISPUTE SETTLEMENT (IA-ISDS) JURISPRUDENCE IN LATIN AMERICA AND THE CARIBBEAN

*Ius standi* refers to the capacity of an agent (in this case a foreign investor) to bring a case before a court. A principal criterion to determine if a company has *ius standi* before the International Centre for Settlement of Investment Disputes (ICSID) under the different international investment agreements (IIAs) is to determine if the company is a foreign investor according to the definition in the respective IIA. Investor-State investment dispute settlement (IA-ISDS) jurisprudence in Latin America and the Caribbean has produced significant doubts. For example, three issues have arisen in this regard: the consideration of indirect shareholders as having *ius standi* and its implications in terms of the possibility of acceding to arbitration where no agreement exists between home and host country; the consideration of minority shareholders; and the definition of "investors" that derives from the interpretations of the meaning of "investment" in the IIAs.

#### A. Indirect shareholders: reference to the cases of *Noble versus Republic of Ecuador* (ICSID Case N° ARB/05/12), *Enron Corporation and Ponderosa Assets, L.P. versus The Argentine Republic*

(ICSID Case N° ARB/01/3), and *Aguas del Tunari SA versus The Republic of Bolivia*

(ICSID Case N° ARB/03/2)

In *Noble versus Republic of Ecuador* (ICSID Case N° ARB/05/12), the tribunal affirmed that nothing in international law barred an indirect shareholder from acceding to international arbitration. One question addressed in this case was "how indirect can a shareholder be and still qualify as an investor for treaty purposes? Is there a limit and, if so, is it reached here? In other words, how many layers or corporations can there be between the direct shareholders and the indirect investor?" The tribunal referred to the *Enron versus The Republic of Argentina* case (below) in which it was stated that there should be a cut-off point in the string of companies to be considered. In this case, the tribunal found that the cut-off point was not reached because Argentina had specially invited the shareholders to make the investment and the investors had decision-making power in the management of the local company, and because "the relationship between the investment and the direct shareholder, on the one hand, and the indirect shareholder, on the other, is not too remote".

The decision on jurisdiction in the case of *Enron Corporation and Ponderosa Assets, L.P. versus The Argentine Republic* (ICSID Case N° ARB/01/3) was a key aspect of this debate and discussed the limits to the *ius standi* of indirect and minority shareholders. Claimants in this case made investments in a "string of locally incorporated companies that in turn made the investment in TGS" (the gas transportation company over which the dispute arose). The tribunal acknowledged that "there is indeed a need to establish a cut-off point beyond which claims would not be permissible as they would have only a remote connection to the affected company". This cut-off point would be defined based on "the extent of the consent to arbitration of the host State. If consent has been given in respect of an investor and an investment, it can be reasonably concluded that the claims brought by such investor are admissible under the treaty." On the other hand, if "consent cannot be considered as extending to another investor or investment, these other claims should then be considered inadmissible as being only remotely connected with the affected company and the scope of the legal system protecting that investment". As an indication of the consent of Argentina to arbitration, the tribunal considered whether the claimants had been invited by the Government of Argentina to participate in the investment connected to the privatization of TGS. Argentina actively promoted investment in its privatization programme for the gas industry, conducted road shows and specifically invited foreign investors to participate. These were used as an indication of its consent to arbitration.

The consideration of indirect shareholders as legitimate parties in arbitration proceedings is not in itself a problem for host countries. The potential problem stems from the lack of a precise definition of claimant (through criteria such as ultimate or effective control over the enterprise), which opens the possibility of forum shopping as was illustrated in the *Aguas del Tunari* case in the Plurinational State of Bolivia. In *Aguas del Tunari SA versus The Republic of Bolivia* (ICSID Case N° ARB/03/2), the United States company Bechtel owned stakes in *Aguas del Tunari* (AdT), the company that held the Cochabamba water and waste water concession from 1 November 1999 to April 2000, when the concession was terminated. The decision on jurisdiction of the case, issued in 2005, illustrated several issues of broader interest. The Plurinational State of Bolivia did not, at the time of the termination, have an IIA with the United States. A bilateral investment treaty (BIT) had been signed between the two countries in 1998 but only came into force in June 2001. Recourse to ICSID in the AdT case was justified by the company invoking provisions of the Agreement on Encouragement and Reciprocal Protection of Investments Between the Kingdom of the Netherlands and the Republic of Bolivia (Bolivia-Netherlands BIT). What relationship was there between AdT and its controllers and the Kingdom of the Netherlands? In 1999, when the concession was granted, Bechtel's 55% stake in AdT was through a holding company, *International Water* (*Aguas del Tunari*) which was established in the Cayman Islands. Between the granting of the concession in September 1999 and the beginning, in January and February 2000, of the events that led to its termination, there was a change in the ownership of the holding company. The result was that Italian company Edison acquired half of Bechtel's stakes in AdT.

(Continues)

## Box 6 (continued)

However, the change that was more significant for the arbitration proceedings that followed was that the holding company previously incorporated in the Cayman Islands migrated to Luxembourg, and its controllers were incorporated under the law of the Netherlands, with whom the Plurinational State of Bolivia did have a BIT, in force since 1994. In the proceedings leading up to the decision on jurisdiction in this case, among other arguments, two points were brought up that illustrate the importance of precision in terms and definitions.

First, the Plurinational State of Bolivia argued that AdT was not a "national" of the Netherlands as defined by the BIT, that the term "control" in the agreement referred to ultimate and effective control, and that the Dutch entities in this case were "corporate shells". The claimant, on the other hand, interpreted the phrase "controlled directly or indirectly" as requiring only the legal potential to control the claimant. This would imply that any of the subsidiaries of the parent company could benefit from the BIT. The broad definitions in the BIT allowed for the broader interpretation, enabling Bechtel, the United States company, to use the Bolivia-Netherlands BIT. Second, the Plurinational State of Bolivia suggested that the transfer in ownership may have been done in anticipation of the need for arbitration (and therefore that the company would have been "treaty shopping"). No evidence of such was found in the proceedings in this particular case. However, it is relevant that the decision states that it is not uncommon and, with the exception of cases with specific limitations, not illegal for a company to locate its operations where it draws benefits from favourable tax and regulatory conditions, including access to BITs. In this particular case, the limitation would have been in the restrictions to changes in ownership contained in the concession agreement. However, again, an imprecise definition of control made it legal for changes in ownership and in place of incorporation of the holding company, as long as the holding company itself was the same.

This case demonstrates that vague or ambiguous definitions in BITs allow arbitral tribunals to make expansive interpretations of concepts, which can lead to surprises for the host country.

#### **B. Minority shareholders: the Argentine cases involving Lanco, Enron and CMS**

A related but different issue was whether minority shareholders could initiate IA-ISDS procedures under IIAs. The issue has been discussed in several Latin American cases and particularly in Argentine ones. In different cases, Argentina expressed concern that if minority shareholders could bring claims to arbitration independently from controlling shareholders or the company directly involved in the dispute (in which they hold minority ownership), contradictory claims and awards would be issued in regard to the same facts, and an endless chain of claims would be generated "as any shareholder making an investment in a company that makes an investment in another company, and so on, could invoke a direct right of action for measures affecting a corporation at the end of the chain" (Enron versus Argentina). Tribunal opinions, nevertheless, maintain that minority shareholders do have *ius standi*.

In Lanco International Inc. versus The Argentine Republic (ICSID Case N° ARB/97/6), the tribunal accepted the *ius standi* of Lanco, that held an equity share of only 18.3%, stating that in defining investment, the Argentina-United States BIT does not require control or a majority share of the company directly affected by the contested measures.

The decision on jurisdiction in the case of Enron Corporation and Ponderosa Assets, L.P. versus The Argentine Republic (ICSID Case N° ARB/01/3), mentioned above, continued from the discussion of the *ius standi* of indirect shareholders to that of minority shareholders. Despite having minority ownership in TGS, the claimants in this case had decision-making power in the management of TGS, among other types of involvement in the management of the company. This was considered an indicator that the connection of the claimants with TGS was more than "remote", and thus that they were entitled to resort to arbitration.

Finally, in CMS versus The Argentine Republic (ICSID Case N° ARB/01/8) the tribunal concluded that there was "no bar in current international law to the concept of allowing claims by shareholders independently from those of the corporation concerned" (...) "even if those shareholders are minority or non-controlling shareholders." In this case, CMS was a minority shareholder in TGN, the gas transportation company over which the dispute arose.

What all these cases demonstrate is that if indeed the arbitrators raised interesting doubts and questioned the scope of the definition of foreign investor, they also consistently amplified the categories of foreign investors covered by the agreements. The result is the proliferation of IA-ISDS cases that the host country did not foresee as feasible under existing treaties. In this manner, the vague and imprecise definition of foreign investor has facilitated the expansion of international arbitration.

#### **C. Definition of investor and investment: holders of Argentine public external debt**

The definitions of foreign investment differ somewhat according to the IIAs although they are generally open-ended, and thereby subject to interpretation by IA tribunals. Considering external public debt bondholders as foreign investors for the purposes of acceding to arbitration under a BIT would appear to be an expansive interpretation of the definition of foreign investor. Many treaties do not include public bonds specifically as foreign investment and some countries (for example, Canada) have begun to exclude such from the definition of foreign investment in new IIAs. Nonetheless, the definition of foreign investment in most older and unmodified BITs is open-ended, and an arbitral tribunal inclined to an expansionary interpretation may consider assets or claims that were not anticipated or intended by the country to be covered by the BIT. The United States-Argentina treaty, for instance, does not include bonds in the definition of investment, but expressly includes "a claim to money or a claim to performance having economic value and directly related to an investment", terms that give the arbitrator a very wide scope for interpretation. In the example under question, three groups of Italian holders of Argentine sovereign bonds entered arbitration proceedings against Argentina under the Argentina-Italy BIT, over their losses due to Argentina's 2001 default on its external public debt. Claims amount to US\$ 4.4 billion for the first group of 190,000 investors; 14.3 million euros and US\$ 1.2 million for the second group; and 6.5 million euros plus US\$ 560,000 for the third group.

(Continues)

## Box 6 (concluded)

The claims are, among others, for violation of the "just and equitable standard of treatment" clause and of the prohibition against expropriation without compensation. The cases, which are still pending, were admitted to ICSID apparently because the definition of foreign investment in the Argentina-Italy BIT expressly includes public bonds, in contrast to many other IIAs. This could lead to a curious situation in which certain bondholders from countries with BITs with Argentina with broad definitions of investment who rejected the unilateral offer from the Government of Argentina and were left out might actually fare better than those that accepted it.

Source: Economic Commission for Latin America and the Caribbean (ECLAC), on the basis of *Investment Treaty News*, 27 April 2007; *IA Reporter*, vol. 1, N° 7, 7 August 2008; Tony Phillips, "Argentina versus the World Bank: fair play or fixed fight?", *Americas Program Special Report* [online] <http://americas.irc-online.org/am/5189>, 29 April 2008; United Nations Conference on Trade and Development (UNCTAD), "Treaty between the United States of America and the Argentine Republic Concerning the Reciprocal Encouragement and Protection of Investment" [online] [http://www.unctad.org/sections/dite/ia/docs/bits/argentina\\_us.pdf](http://www.unctad.org/sections/dite/ia/docs/bits/argentina_us.pdf); Foreign Trade Information Service (SICE), "Trattato fra la Repubblica Italiana e la Repubblica Argentina sulla promozione e protezione degli investimenti" [online] [http://www.sice.oas.org/Investment/BITSbyCountry/BITS/ARG\\_Italy.pdf](http://www.sice.oas.org/Investment/BITSbyCountry/BITS/ARG_Italy.pdf); International Centre for Settlement of Investment Disputes (ICSID), "Aguas del Tunari SA v. The Republic of Bolivia", ICSID Case, N° ARB/03/2, "Decision on jurisdiction", ICSID Case, N° ARB/05/12; Arif Hyder Ali and Alexandre de Gramont, "ICSID arbitration in the Americas", *Global Arbitration Review Special Report*, 2008; *IA Reporter*, vol. 2, N° 1, 5 January 2009; *IA Reporter*, vol. 1, N° 2, 3 June 2008.

These examples illustrate how loose definitions can facilitate expansive interpretations regarding who qualifies to initiate IA-ISDS proceedings. They also illustrate the danger of treaty shopping when an unpredictable number of shareholders (direct, indirect or minority shareholders) qualify to initiate such arbitration. Unforeseen risks can be generated for the host country by way of expansive interpretations of the concepts in existing IIAs. Box 7 indicates how MFN clauses can lead to provision shopping by claimants.

## BOX 7

### MOST-FAVOURABLE-NATION TREATMENT IN THREE ARGENTINE CASES: GAS NATURAL, SIEMENS AND SUEZ/AGUAS DE BARCELONA/INTERAGUAS

Three cases involving Argentina illustrate variations in the interpretation of the scope of application of most-favoured-nation (MFN) treatment.

In *Gas Natural SDG S.A. versus the Argentine Republic* (ICSID Case N° ARB/03/10), the foreign investor (Gas Natural), a Spanish company, invoked the Agreement on the Promotion and Reciprocal Protection of Investments between the Kingdom of Spain and the Argentine Republic (the Argentina-Spain bilateral investment treaty, BIT). The company also invoked the most-favoured-nation (MFN) clause in that agreement to claim the application of the more favourable conditions contained in the Argentina-United States BIT which, contrary to the Argentina-Spain BIT, did not require resorting to national courts and an 18-month waiting period before a company could resort to international investment arbitration. Argentina, on the other hand, held that the MFN clause applied to foreign investment only and not to the dispute settlement process. While admitting that "the issue of applying a general most-favoured-nation clause to the dispute resolution provisions of bilateral investment treaties is not free from doubt, and that different tribunals faced with different facts and negotiating background may reach different results", the tribunal found in favour of the claimant company.

In *Siemens A.G. versus The Argentine Republic* (ICSID Case N° ARB/02/8), Siemens claimed breach of the Bilateral Investment Treaty between Germany and Argentina of April 9, 1991 (Argentina-Germany BIT). Like the Argentina-Spain BIT referred to in the previous paragraph, the Argentina-Germany BIT contains a requirement for prior resort to the national courts of Argentina and an 18-month waiting period. Siemens invoked the MFN clause to apply what it considered to be the more favourable conditions of the Argentina-Chile BIT, which does not contain any provision for first resort to the local courts or an 18-month waiting period. Like the *Gas Natural* case, after discussion over the scope of the MFN provisions, where Argentina claimed they were only applicable to "substantive" matters, the tribunal again found in favour of the company, stating that the term "treatment" in the MFN clauses in the Argentina-Germany BIT, and its reference to "activities related to the investments" are "sufficiently wide to include settlement of disputes".

In the case involving *Suez, Sociedad General de Aguas de Barcelona, S.A. and Interagua Servicios Integrales de Agua S.A. versus Argentine Republic* (ICSID Case N° ARB/03/17) the claimants, both from Spain, invoked the Argentina-Spain BIT but resorted to the MFN clause to request the application of the conditions set out in the Argentina-France BIT in respect of resort to arbitration. Whereas the Argentina-France BIT allowed investors recourse to international arbitration after a period of six months of negotiation from the time they assert their claim, the Argentina-Spain BIT required that at the end of the same six-month period the investors start a judicial proceeding in the local courts and stated that investors were entitled to seek international arbitration only after a further 18 months. Again, the tribunal found in favour of the claimants, pointing out that "in negotiating the Argentina-Spain BIT, the Contracting States considered and decided that certain matters should be excluded. The fact that dispute settlement was not covered among the excluded matters must be interpreted to mean that dispute settlement is included within the term all matters" (contained in paragraph 2 of the agreement).

Thus, arbitral tribunals in three Argentine cases have consistently interpreted the scope of application of the MFN clause in Argentina's BITs in a very broad manner apparently well beyond what the Argentine treaty negotiators had in mind in the early 1990s.

Source: Economic Commission for Latin America and the Caribbean (ECLAC), on the basis of information from International Centre for Settlement of Investment Disputes (ICSID), "Gas Natural SDG S.A. v. the Argentine Republic", ICSID Case, N° ARB/03/10, "Siemens A.G. v. The Argentine Republic", ICSID Case, N° ARB/02/8, "Suez, Sociedad General de Aguas de Barcelona, S.A. and Interagua Servicios Integrales de Agua S.A. v. Argentine Republic", ICSID Case, N° ARB/03/17.

In practice, the scope of application of the MFN clause in Argentine IA-ISDS jurisprudence, as discussed in box 7, facilitated foreign investor claims in a manner not foreseen by the Government of Argentina and considerably widened its existing IA-ISDS risks.

Another example of expansive interpretations of IIA clauses concerns State contracts (some of which explicitly detail dispute settlement clauses) that can be elevated to treaty protection due to the existence of a BIT (see box 8). Again, Argentine IA-ISDS jurisprudence is referred to.

#### BOX 8

#### ELEVATING STATE CONTRACTS TO TREATY JURISDICTION: CASES FROM ARGENTINA

Two of the ways that investor-State investment dispute settlement (IA-ISDS) tribunals have jurisdiction over contract claims is through umbrella clauses and by interpreting the same facts such that they are considered to simultaneously violate a contract and a treaty provision other than the umbrella clause.

##### A. Umbrella clauses

These clauses, contained in around 40% of the bilateral investment treaties (BITs) currently in force, mostly with European countries, usually state that each party agrees to "observe any obligation it has assumed". This type of statement has the practical effect of making certain acts subject to the protection of the international investment agreement (IIA) even when they do not specifically violate the contract.

Arbitral tribunals have taken two general approaches—a narrow and a broad view—with regard to umbrella clauses. According to the narrow view, the existence of an umbrella clause does not automatically elevate contract claims to treaty claims as "this would negate the effect of the dispute resolution choice of forum clause in investor-state contracts." The broader view sustains that an umbrella clause does have the effect of providing jurisdiction over purely contractual breaches. Two cases involving *Société Générale de Surveillance*—one against Pakistan and the other against the Philippines—contained extensive discussions on the application of the umbrella clause, the first with a narrower view, the second with a broader view, provoking considerable confusion. In Argentina, both the narrow and the broad interpretations are found in the IA-ISDS jurisprudence of International Centre for Settlement of Investment Disputes (ICSID) cases.

In *El Paso Energy International Company versus The Argentine Republic* (ICSID Case N° ARB/03/15), the tribunal concluded in 2006 that "an umbrella clause cannot transform any contract claim into a treaty claim as this would necessarily imply that any commitments of the State in respect to investments, even the most minor ones, would be transformed into treaty claims". It also sustained that if States intend to violate any obligation of the treaty, they must say so "clearly and unambiguously".

In *LG&E versus The Argentine Republic* (ICSID Case N° ARB/02/1), the tribunal understood that due to the umbrella clause in the United States-Argentina BIT, obligations toward foreign investors, including those deriving from a contract, receive extra protection. It also understood that certain provisions of the Gas Law gave rise to liability under the umbrella clause in the treaty. This understanding implied that the investment treaty tribunal had jurisdiction over governmental compliance with local laws.

Furthermore, there has been controversy over the application of the umbrella clause at distinct moments in the same case. In *CMS versus The Argentine Republic* (ICSID Case N° ARB/01/08), an ICSID ad hoc Committee partially annulled the first ICSID award on the merits dealing with the 2000-2002 Argentine crisis for failure to state reasons regarding the conditions of application of an umbrella clause. The key finding of the Committee in 2005 was that an umbrella clause did not change the content, proper law of, or parties to, the obligations of the State, the breach of which may trigger the umbrella clause. The decision of the ad hoc Committee sparked debate as to whether the Committee was entitled, within the limited framework of its annulment powers, to suggest such an interpretation of the conditions of application of umbrella clauses (Honlet and Borg, 2008). In the annulment proceedings in 2007, the Tribunal's findings relating to the umbrella clause were annulled. Other findings were upheld, even though errors of law were detected in relation to the Tribunal's findings on necessity. The award of damages was not affected. The ICSID annulment committee in *CMS versus Republic of Argentina* discredited that decision by indicating that if it were "acting as a court of appeal, it would have to reconsider the Award" (Paulsson, 2008, p. 262).

These contradictory or contrasting cases involving the same host country suggest that there exists an immature state of jurisprudence regarding the elevation of contracts to treaty protection by way of umbrella clauses. The expansive interpretations of umbrella clauses facilitated by the flexibility permitted IA-ISDS tribunal members can produce significant inconsistency.

(Continues)

Box 8 (concluded)

**B. Interpreting the same facts such that they are considered to simultaneously violate a contract and a treaty provision other than the umbrella clause**

Some contracts have exclusive jurisdiction clauses that provide that disputes over breaches of contract may be dealt with exclusively by a particular court or jurisdiction (such as the courts of the Argentine province of Tucumán in the Vivendi concession contract, a key case in this debate). It is often in the interest of the foreign investor to bypass the choice-of-forum clauses and proceed directly to international investment arbitration. Due to vagueness in the terms of BITs, foreign investors are often able to plead a breach of a State contract as a violation of a BIT.

The case of *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. versus The Argentine Republic* (ICSID Case N° ARB/97/3) was associated with a 1995 water and sewage concession contract between a French company, *Compagnie Générale des Eaux*, and its Argentine affiliate, *Compañía de Aguas del Aconquija, S.A.* (collectively CGE, later renamed Vivendi), and the province of Tucumán in Argentina. Disputes arose between Tucumán and CGE early on. According to the claimants, regulatory actions, lack of support and even active opposition on the part of local political authorities (including acts and statements that discouraged clients from paying their bills) led to a breach of contract. The company, on the other hand, was accused by the Province of deficiencies in service delivery. Eventually, CGE withdrew from the concession.

The initial ruling remitted the case to provincial courts because of the strong link between the concession contract (that had a forum selection clause) and the alleged violation of the treaty. The tribunal held that the claims had to be submitted to the Argentine provincial courts before an arbitral tribunal could adjudicate BIT claims. The claimants submitted an application of annulment of the decision. The annulment tribunal, while stressing the distinction between contract and treaty claims, overturned the first decision and decided that the choice-of-forum clause in the concession contract did not affect the jurisdiction of the tribunal over claims based on the Argentina-France BIT. The guiding interpretations established in this case were: (i) where the fundamental basis of the claim was breach of contract, the dispute resolution mechanism in the contract should apply, and (ii) if it was a breach of treaty, then the existence of an exclusive jurisdiction clause in the contract should not stand in the way of arbitration under the terms of the treaty. However, as this same case illustrated, it was often difficult to separate breach of contract from breach of treaty.

Again, as was the situation with the interpretation of the definition of foreign investor, the arbitrators raised interesting doubts and questioned elevating State contracts to treaty jurisdiction; however, they also continuously amplified such practices. The proliferation of IA-ISDS cases that the host country did not foresee as feasible under the existing treaties was the unpredictable result. In the process, the host State lost jurisdiction over many contracts with foreign investors.

Source: Economic Commission for Latin America and the Caribbean (ECLAC), on the basis of M. Malik, "The expanding jurisdiction of investment-state tribunals: lessons for treaty negotiators", document presented at the Annual Forum of Developing Country Investment Negotiators, International Institute for Sustainable Development (IIDD)/Centre on Asia and Globalisation, Singapore, 1-2 October 2007; J.C. Honlet y G. Borg, "The decision of the ICSID Ad Hoc Committee in *CMS v. Argentina* regarding the conditions of application of an umbrella clause: *SGS v. Philippines* revisited", *The Law and Practice of International Courts and Tribunals*, vol. 7, 2008; and J. Paulsson, "Avoiding unintended consequences", *Appeals Mechanism in International Investment Disputes*, K. Sauvart (ed.), Oxford University Press, 2008.

Clearly, imprecise and ambiguous definitions and expansive interpretations have facilitated greater use of the IA-ISDS procedures in Latin America and the Caribbean and in Argentina in particular. This has made the risks that actually derive from existing IIAs highly unpredictable. This has been demonstrated by the cases involving the definition of investor and investment, the scope of application of MFN treatment and the elevation of State contracts to treaty jurisdiction.

Something similar takes place with regards to the expansive interpretations on the merits of cases, as compared to the foregoing issues of jurisdiction, which can also generate major IA-ISDS risks for host governments. Box 9 discusses the interpretation of indirect expropriation in two Argentine cases.

**BOX 9**  
**INDIRECT EXPROPRIATION IN THE WATER AND SEWAGE SECTOR IN ARGENTINA:**  
**A QUESTION OF DEGREE?**

In *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A.* (ICSID case N° ARB/97/3) (described in the previous box), in assessing the claim of indirect expropriation, the tribunal analysed whether the acts that gave rise to the claims "had an effect similar to the dispossession of Claimants' rights and expectations". The criteria used in this appreciation were based on previous decisions:

1. Whether the challenged measures "radically deprive[d] Claimants of the economic use and enjoyment of its investment" (referring to the decision in a case involving *Teched* (ICSID Case N° AF/00/2));
2. Whether the challenged measures "effectively neutralise the benefit of Claimants' property (referring to a case involving *CME Czech Republic B.V. (The Netherlands) versus The Czech Republic* (UNCITRAL Case));
3. Whether they "deprive the owner of the benefit and economic use of its contractual rights (referring to a case involving *Santa Helena* (ICSID Case N° ARB/96/1)); and
4. Whether they render Claimants' property rights useless or have a similar dispossessory effect (referring to a case involving *Starrett Housing Corporation, Starrett Systems, Inc., Starret Housing International, Inc., versus The Government of Islamic Republic of Iran, Bank Markazi Iran, Bank Omraran, Bank Mellat* (Interlocutory Award, N° ILT 32-24-1)).

The tribunal found that "the actions taken by the provincial authorities against the concession and its "foreign" investors had a devastating effect on the economic viability of the concession", hitting the investment at its "economic heart" and rendering the concession valueless. The tribunal conceded that it would not have been "reasonable for Claimants to expect they would achieve the recovery rates or internal rates of return upon which they had modeled their investment" but that it was reasonable for them to expect that the Province "would not mount a wrongful and damaging campaign to force them, on threat of rescission, to abandon their contractual rights and renegotiate the concession based on lower tariffs" (among the contested acts were alleged instructions by the provincial authorities that customers not pay their bills).

The tribunal compared its conclusions to those arrived at in two other Argentine cases: *CMS versus The Argentine Republic* (ICSID Case N° ARB/01/08) and *Azurix versus The Argentine Republic* (ICSID Case N° ARB/01/12). In *CMS*, where the same standards (of substantial deprivation) had been applied, the tribunal concluded that the contested acts had not had the effect of indirect expropriation because *CMS* continued to export. Other factors considered in the *CMS* ruling that led to denying the claim of indirect expropriation were that the investor remained in control of the investment, the government did not manage the day-to-day operations of the company, and the investor had full ownership and control of the investment. The case involving *Azurix Corp.a* (part of the Enron group) may have more in common with *Vivendi* as it also involves a concession for water and sewage services, in this case for Buenos Aires Province.

In *Azurix Corp. versus The Argentine Republic*, the claimant had won the bid to act as concessionaire and made a "canon payment" of 438 million Argentine pesos ("the canon") to the Province in exchange for the execution of a 30-year concession agreement, which was handed over in 1999. According to *Azurix*, trouble started during the handover, when, among other problems, critical information on the concession area was not provided to the company. The company also claimed "actions or omissions of the Province or its instrumentalities that resulted in the non-application of the tariff regime of the concession for political reasons; that the Province did not complete certain works that were to remedy historical problems and were to be transferred to the concessionaire upon completion; that the lack of support for the concession regime prevented *Azurix Buenos Aires* (ABA) from obtaining financing for its Five

Year Plan; that in 2001, the Province denied that the canon was recoverable through tariffs"; and that "political concerns were always privileged over the financial integrity of the concession", and "[w]ith no hope of recovering its investments in the politicized regulatory scheme, ABA gave notice of termination of the concession and was forced to file for bankruptcy". "After some crossfire with the Province, the company informed the Province that it had terminated the concession agreement in 2001. The Province rejected the termination and issued an Executive order demanding that the company "refrain from engaging in conduct that would disturb the provision of the service". The concessionaire filed for bankruptcy reorganization proceedings in February 2002, and in March the Province deemed that it had abandoned the service and terminated the agreement claiming the concessionaire's non-fulfillment of service expansion and quality goals (and other issues, among which were Enron's bankruptcy). Among other claims, *Azurix* sustains that its investment, the concession agreement, has been expropriated as a result of "measures tantamount to expropriation".

The Tribunal found "that the impact on the investment attributable to the Province's actions was not to the extent required to find that, in the aggregate, these actions amounted to an expropriation; *Azurix* did not lose the attributes of ownership, at all times continued to control ABA (the concessionaire) and its ownership of 90% of the shares was unaffected. No doubt the management of ABA was affected by the Province's actions, but not sufficiently for the Tribunal to find that *Azurix's* investment was expropriated".

(Continues)

Box 9 (concluded)

In interpreting this result, the Vivendi tribunal stated: "the tribunal disagreed with the claimant as to whether Argentina had behaved wrongfully concerning Azurix's attempt to recover its Canon payment or had interfered inappropriately in its requested revision to the Retail Price Index." The tribunal made it clear that if it had found in favour of Azurix's contentions on these points, it "would agree that the breaches of the concession agreement would have had a devastating effect on the financial viability of the concession". It also considered that the management of the concession company had been affected, but not sufficiently for a finding of expropriation. In the result, it found that the Province's actions did not impact Azurix's investment to *the extent required*."

There are justifications to the different outcomes in these two cases in the Argentine water and sewage industries. Arguably, however, the facts are at least similar, and the definition of indirect expropriation without precise qualifications as to what qualifies as expropriation is largely a matter of degree and thus subject to interpretation by arbitral tribunals.

Source: Economic Commission for Latin America and the Caribbean (ECLAC), on the basis of information from the International Centre for Settlement of Investment Disputes (ICSID), "Azurix Corp. v. The Argentine Republic", ICSID Case, N° ARB/01/12 and "Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A.", ICSID Case, N° ARB/03/19.

<sup>a</sup> There are two Azurix cases: ARB/01/12: registered in October 2001, award rendered in July 2006, annulment proceeding pending; ARB/03/30: registered in December 2003, pending.

Evidently, expansive interpretations of concepts contained in IIAs can greatly increase the use of IA-ISDS procedures and IA-ISDS decisions on merits. As well as creating the increased probability of inconsistency and incoherence in IA-ISDS jurisprudence, these practices lead to heightened uncertainty and unpredictability on the part of the host countries that hold these international treaty and contract obligations and widen the risks associated with such. As has been made evident, many countries in Latin America and the Caribbean have been surprised by the explosion of IA-ISDS claims from their existing IIAs.

### (c) Legitimacy issues

Issues relating to legitimacy go beyond mere disagreements with the outcomes of IA-ISDS tribunal decisions; they raise questions about the legitimacy of the IA-ISDS system itself on the part of host governments. Van Aaken (2008, p. 3) correctly postulated that if substantive rules or review mechanisms place too much of a constraint on sovereignty, this might precipitate a backlash by host governments. She pointed out in her analysis of contract theory applied to IIAs that the expansive interpretations of international arbitration tribunals provided sovereign States little flexibility while at the same time, heightening uncertainty and lowering predictability. Believing that States will only participate in the IA-ISDS system if the expected costs of constraining (regulatory) sovereignty through IIAs and State contracts are lower than the expected benefits, she came to the opinion that international investment law has now passed a threshold of protection for foreign investors that endangers the system as a whole and may eventually lead to the ultimately undesired result of less protection for foreign investment in the long run due to the backlash from host governments. Such an outcome would inevitably create legitimacy (as well as efficacy) issues with regard to the IA-ISDS system on the part of foreign investors.

In this subsection, the special circumstances of Latin American and Caribbean countries employing natural-resource-based development strategies (Bolivarian Republic of Venezuela, Ecuador and the Plurinational State of Bolivia) and the particular situation of the Argentine crises are considered. In both instances, evidence of host State withdrawal from the dispute-settlement system is presented.

## 3. Natural-resources-based development strategies<sup>36</sup>

The export of natural resources traditionally has been the life blood of most of the countries of Latin America and the Caribbean. The history of petroleum and gas, in particular, has witnessed a series of long cycles oscillating between nationalization and liberalization phases, often in keeping with

<sup>36</sup> Based in large part on Stanley (2007).

international prices and the level of national reserves, that is, growing State participation during periods of high prices and strong reserves, followed by opening up to foreign investors during epochs of low prices and falling reserves. The Bolivarian Republic of Venezuela, Ecuador and the Plurinational State of Bolivia have followed this cycle. During the late 1960s and early 1970s there was a strong increase in State participation in petroleum and gas activities in these Andean countries, including a wave of nationalizations. The 1990s brought a cycle of opening up to foreign investors which was followed in the 2000s by another sharp increase in State participation in petroleum and gas activities in those countries. The difference, this time, was that the host countries had signed a significant number of BITs that contained IA-ISDS clauses with investor countries.<sup>37</sup>

The central focus of these countries' development strategies is the petroleum and gas sector (Stanley, 2008, p. 2), which accounted for a large share of their exports and inward FDI as well as of tax revenues.

In different ways, these countries opted to increase the State presence in their petroleum and gas sectors to promote a higher return from those natural resources. Several foreign investors responded by initiating IA-ISDS procedures. The Bolivarian Republic of Venezuela passed a new Hydrocarbons Law in 2002, which reserved petroleum exploration, production and distribution for the State petroleum company, PDVSA, except for joint ventures with foreign companies for extra-heavy crude in the Orinoco region, and subsequently raised taxes from 34% to 50% and royalties from 1% to 30%. In 2007, the Orinoco region was included in the majority share for PDVSA rule (Vielleville and Vasani, 2008). Some foreign companies operating there, such as Chevron (United States), Total (France) and Statoil (Norway) renegotiated their contracts as a consequence; others, such as two United States companies (Exxon-Mobil and Conoco-Philips) and one Italian one (ENI) did not. They initiated IA-ISDS proceedings.<sup>38</sup>

Ecuador also reformed its Hydrocarbons Law, reclaimed the principal concession then in operation (that of United States company Occidental Petroleum) for the State petroleum company, Petroecuador, and established a windfall tax on exports when the international price exceeded certain parameters. Ecuador had been subjected to ICSID tribunal decisions relating to the petroleum sector by Repsol in 2001 and City Oriente in 2006; the latter resulting in a settlement which cost the host country US\$ 70 million. Thereafter, four more ICSID demands related to hydrocarbon concessions (Occidental, Murphy, Burlington Resources and Perenco) were made on the host country, as well as one that dealt with an oil exploration contract (Repsol).

The Plurinational State of Bolivia nationalized the petroleum and gas industry in 2006, establishing new contracts with the State petroleum company, YPFB, substantially raising taxes and royalties. In contrast to the Bolivarian Republic of Venezuela and Ecuador, the Plurinational State of Bolivia's principal exports are gas and they go to Argentina and Brazil. It assumed control over pipelines and refineries and renegotiated existing contracts without provoking any IA-ISDS procedures. One element that worked in its favour was the lack of a BIT with Brazil which Petrobras might have used to initiate that kind of claim.

These Andean countries have reacted harshly to the decisions of the IA-ISDS system. The Bolivarian Republic of Venezuela denounced its BIT with the Netherlands, which it said transnational petroleum companies had abused (Bilaterals.org, 2008; *FDI*, 2008), and stated that no ICSID consent would be forthcoming for petroleum and mining contracts. Ecuador stated that there would only be limited ICSID coverage and specifically not for petroleum and mining contracts (Ministry of Foreign Affairs, Trade and Integration of Ecuador, 2007; *Investment Treaty News*, 2008b), began a process to denounce 9 of its 25 BITs and initiated the preparation of a new model investment agreement (Guerra,

<sup>37</sup> In relation to the top investor countries in petroleum and gas in Latin America and the Caribbean, the Plurinational State of Bolivia had BITs with the United States, France, Italy, the Netherlands and Spain; Ecuador had BITs with Canada, France, Italy, the Netherlands, Spain and the United States; and the Bolivarian Republic of Venezuela had them with Canada, France, Italy, the Netherlands and Spain.

<sup>38</sup> In the only tribunal decision so far relating to ENI's ICSID demand on the Bolivarian Republic of Venezuela dealing with the Dación field in Anzoátegui and its exploration activities in the West Gulf of Paria, the negotiated settlement reached left ENI as a 26% shareholder in Petrosucre operating in Costa Afuera coupled with an indemnization paid to it by PDVSA of US\$ 700 million over seven years. See [online] <http://www.guia.com.ve>.

2008). The Plurinational State of Bolivia formally withdrew from ICSID (*ICSID News Release*, 2007; *Puentes*, 2008), and in February 2009 enacted a new Constitution in which article 366 reserved the petroleum and gas sector to the State.

A principal legitimacy issue that can be identified in these experiences is the feeling that the constraints on national sovereignty in terms of implementing a natural-resource-based development strategy exceed the benefits from the IA-ISDS system. In each of these three countries, governments that currently enjoy considerable democratic support found that their developmental strategies based on increased State participation in natural resources, specifically petroleum and gas, ran into significant difficulties and limitations due to the existence of international treaties which were agreed to by previous more market-friendly governments. These countries asked —is it reasonable that national governments which are ideologically opposed to greater State participation in the national economy effectively truncate the national policy spectrum by way of international treaties that offer guarantees to foreign investors that national investors do not enjoy in an industry that historically has undergone clear nationalization/liberalization phases? These three countries clearly did not accept the risks involved in IA-ISDS clauses and considered the system to be illegitimate.<sup>39</sup>

In comparison to these Type II Andean countries, the Type I countries for the most part have managed their reduced policy spaces in natural resources without getting involved in multiple IA-ISDS cases. Mexico, for example, gained NAFTA policy space for its energy sector by negotiating exceptions and reservations in the original NAFTA agreement. This gave Mexico the right to place limits on foreign investment in petroleum, gas and electricity and innovate with its foreign investment policy in those sectors. Moreover, Chile and Peru were able to acquire increased returns from the copper sector by way of temporary or permanent measures to gain a greater share in the huge rises in the international price of copper (before 2009).

On the other hand, Peru was the first country in Latin America and the Caribbean to employ Legal Stability Agreements (LSAs), which are special agreements by which the State guarantees legal stability to a particular investor for a term of 10 years.<sup>40</sup> Peru extended broad guarantees, including the tax regime, the right to non-discrimination, the right to use the most favourable exchange rate, the right to free availability of foreign exchange and the right to free remittances, all of which went far beyond the practices adopted by countries such as Ecuador (only the tax regime) and the Bolivarian Republic of Venezuela (tax regime, exports and specific sectors) (Vielleville and Vasani, 2008, pp. 16-17). The LSAs<sup>41</sup> were central to the ICSID tribunal decision in which Peru was found liable for damages on the order of US\$ 18.4 million for breach of the guarantee of tax stabilization with a subsidiary of Duke Energy (ICSID Case N° ARB/03/28).<sup>42</sup>

This suggests that there are different ways of dealing with the limitations and constraints of IIAs and State contracts in natural resource sectors, ranging from negotiating better agreements, renegotiating contracts in manners that foreign investors accept, or directly challenging the legitimacy of the IA-ISDS system by partially or completely bailing out. With regard to petroleum and gas, one thing seems clear: it is difficult to change the historical evolution of a conflictive industry by way of international treaties

<sup>39</sup> These experiences may have pushed these same governments into more radical stances outside of the natural resource sector. For example, the Bolivarian Republic of Venezuela expropriated or initiated expropriation proceedings with companies in the electricity (Electricidad de Caracas, Seneca), telecom (CANTV), agroindustrial (Lácteos Los Andes), steel (Ternium Sidor) and cement (Cemex Venezuela, Fábrica Nacional de Cementos) sectors. In the Plurinational State of Bolivia, the main telecom company was expropriated, which led to the initiation of an IA-ISDS procedure.

<sup>40</sup> In the case of concessions, the period of validity of the agreement is defined by the duration of the concession.

<sup>41</sup> The effect of Legal Stability Agreements (LSAs) is to give the State's commitments to stability the status of contractual commitments. As mentioned, Peru pioneered the use of LSAs in Latin America and is the country in which their use is the most widespread. An estimated 600 LSAs were entered into between 1992 and 2003. In addition to the examples above, Panama's LSAs provide stability of tax, customs and labour regimes, but exclude measures taken for a public purpose; Colombia's "Legal Stability Act" (No. 963, of 2005) defines the possibility of establishing agreements with the State to ensure stability for 20 years of factors that are considered determinant to the investment, including, but not limited to, taxes (Vielleville and Vasani, 2008).

<sup>42</sup> In the decision, the tribunal stated "the fundamental rights granted by Peru pursuant to an LSA are private contractual rights that are enforceable against the State as if it were a private party."

since this may be viewed as illegitimate by the side of the national political spectrum which feels that it has been deprived of important instruments to promote national development based on natural resources.

#### 4. The Argentine crises and the necessity defense<sup>43</sup>

Foreign investment has played a very important but volatile role in the Argentine economy in the last 30 years. Foreign investment was strong during the 1970s and the 1990s, when inflows reached highs of 8% of GDP, and virtually absent during the 1980s debt crisis. These highs were associated with three different types of investor: first, in the 1970s, transnational banks that extended large syndicated loans; then, in the 1990s, financial intermediaries who lent voluminous sums in bonds and TNCs that made very significant direct investments. In other words, Argentina was attractive to a multitude of different foreign investors but in an on-again off-again manner.

Argentina's new ability to attract foreign capital was based in large part on improved market prospects in the context of the reform programme introduced under President Menem in the early 1990s. The Convertibility Law of March 1991 was fundamental to stabilizing the economy, based on the introduction of a fixed one-to-one dollar-peso exchange rate, after the inflationary chaos that followed the debt crisis of the 1980s. This extreme measure was costly in economic policy terms as it effectively tied the hands of national policymakers in monetary matters; however, it greatly enhanced Argentina's credibility with the international investor community and the Washington-based international financial institutions (IMF, World Bank and IDB).

Argentina signed over 50 BITs in the 1990s to provide increased protection to foreign investors in the hope of attracting much greater quantities of foreign investment. More or less simultaneously, Argentina moved ahead with an ambitious programme of privatizations and launched a process of financial and trade deregulation and liberalization. The privatizations soon became one of the pillars of the new economic programme. From an aggregate point of view, the sale of public assets and the use of the debt-capitalization scheme enabled Argentina to attract fresh foreign investment, reduce its external debt and remove the financial liabilities generated by public utilities from the public sphere. From a microeconomic perspective, the process was soon to draw criticism for focusing on a quest for credibility (Gerchunoff and Canovas, 1995), which would ultimately tie the fate of the privatized firms inextricably to the success of the convertibility plan.

Argentina's macroeconomic performance improved notably, the country entered an upward spiral of growth, and productivity increased. Argentina soon became a showcase of successful reform in Latin America and the Caribbean, and President Menem was hailed as an example to follow in the 1998 annual meeting of IMF and World Bank in Washington, D.C.

On 23 December 2001, Argentina announced a default on its external public debt of over US\$ 100 billion. At the time, Argentina's debt represented a quarter of all debt traded in the emerging bonds market. In January 2002, the Argentine peso declined to one third of its value and the government "pesified" public utility rates (converting dollar-denominated contract provisions to pesos) triggering a large number of IA-ISDS cases. The Argentine economy went into a tailspin.

A little over three years later, Argentina shed its default status when its unilateral offer was widely accepted (by over 75%) by external public debt bondholders. Argentina achieved what no country had achieved before, that is, most bondholders not only accepted a large cut in principal, but agreed to a lengthening of maturity and a reduction in the interest rates to be paid. The outcome of the swap far exceeded Argentina's expectations, especially given that it had worked out its default unilaterally without the intervention of the international financial institutions or the assistance of G7 governments.

With regard to the FDI crisis, the abrupt end of exchange rate parity opened a new front in the dispute with foreign investors, in this case with those who had invested in the real sector, especially public utilities. Under the agreements signed in the 1990s, foreign investors felt that they were entitled to

---

<sup>43</sup> Based primarily on Mortimore and Stanley (2006a and 2006b) and Stanley (2004).

full compensation from the government. Although most foreign investors in Argentina were affected by the change in the exchange rate model, the bulk of the complaints came from those with some kind of interest in public utilities, mainly those associated with the energy industry (gas and electric power).

The predominance of this type of foreign investment was due not to the guarantees offered under BITs but rather to the advantages related to national regulations (for example, utility rates set in dollars and indexed to the United States wholesale price index). The contractual framework was bound by national legislative provisions, regulatory terms and the BIT network. Thus, seeking to attract foreign investors and guarantee the success of the reforms, the administration of President Menem ended up accepting risks that normally would be shouldered by the foreign investor.

This mechanism helped the Government of Argentina to demonstrate its commitment to the new international standards promoted by investor countries and international financial institutions, but it also became the main base for foreign investors' legal proceedings. The spirit of the Government's self-imposed restrictions (the convertibility scheme combined with the BITs) was to minimize the possibility of contract renegotiation with privatized firms, since the magnitude of the commitments made any alteration, however necessary, too costly. Ultimately, the crisis was to demonstrate the intrinsic "incompleteness" of the contract scheme implicit in the regulation of the privatized firms (Guash, Laffont and Straub, 2002; Navajas, 2004). The collapse of economic policy and the sharp deterioration of the business environment demonstrated that the administration had painted Argentina into a corner and the Government was both unable and unwilling to abide by the terms of the existing contracts. This produced a sharp reaction from foreign investors that was manifest in a torrent (more than 40) of ICSID lawsuits, which raised the country's contingent liabilities to around US\$ 20 billion.<sup>44</sup>

The emergency measures adopted by the Government affected the economic and financial equation of foreign investors. In the case of the regulated sectors (with pesified rates), the higher the level of indebtedness in dollars, the larger the impact of these measures. Hence, regardless of the sector, most of the disputes brought after 2002 cited the effects of the devaluation on contracts in general and on the rate-setting system in particular. Both foreign and investors maintained that the Government of Argentina had agreed to assume the exchange-rate risk and then broke its promise in January 2002.

Some of the most vehement attacks came from regulated firms belonging to the energy sector (gas and electric power), which initiated 22 lawsuits (19 before ICSID and 3 before UNCITRAL). Given the strong vertical and horizontal links that exist in those industries, the firms' complaints referred not only to the effects of the economic emergency law on rates, through pesification and rate freezes, but also to the effects on prices in the unregulated sector (in the case of gas, the price of inputs; in the case of electricity, the price of generation).

Although most of the cases cited more than one cause, pesification was the primary motivation for the lawsuits brought against Argentina (Stanley, 2004). Whatever the reasons given, however, the filing of cases was generally a strategic move in the positioning for renegotiation. Hence, after the economic emergency legislation was passed and the lawsuits filed, there ensued a wrangle between the Government of Argentina, the foreign investors (mainly those with interests in the service sectors) and the international financial institutions (World Bank and IMF).

The Argentine authorities began by challenging the arbitral tribunal, questioning its transparency, the process by which the arbitration panel had been selected and the fact that the foreign investors were allowed to engage in forum shopping, that is, selecting the tribunal most likely to provide a favourable judgment. By the same token, Argentina threatened not to recognize the jurisdiction of ICSID, claiming that cases should be heard in the local courts first. Lastly, in mounting a defense—that was actually formulated in the case of CMS Gas Transmission Company and the denial of jurisdiction in others—the Government's strategy was to deny that the steps it had taken after declaring the economic emergency (in other words, pesification and rate freezes) amounted to indirect expropriation. Since all the lawsuits cited a single cause, the logic of the

---

<sup>44</sup> It should be mentioned that five of these were filed while the convertibility regime was still in place.

economic emergency legislation was central to the Government's strategy. It argued that the measures it had taken represented the only avenue open to it, and the foreign investors had to bear part of the adjustment burden; however, those arguments were accepted partially at best and generated considerable confusion at the same time (see box 10 comparing the CMS and LG&E cases).

#### BOX 10

### THE CMS AND LG&E CASES AGAINST ARGENTINA AND THE NECESSITY DEFENSE FOR THE ARGENTINE EMERGENCY MEASURES

#### Treaty between the United States of America and the Argentine Republic concerning the reciprocal encouragement and protection of investment

The 1991 bilateral investment treaty (BIT) between the United States and the Argentine Republic, which entered into force on 20 October 1994 ("United States-Argentina BIT", or the "Treaty"), contained a specific reference to the possibility of the State avoiding liability for breach of the Treaty in cases of "force majeure", that have been referred to as situations of necessity or emergency. Article XI states that the Treaty "shall not preclude the application by either Party of measures necessary for the maintenance of public order, the fulfillment of its obligations with respect to the maintenance or restoration of international peace or security, or the protection of its own essential security interests". The CMS and LG&E cases, both involving United States investors in the Argentine natural gas distribution market, and both concerning emergency measures taken by the Government of the Argentina over the period of 1999-2002, resulted in conflicting conclusions regarding the "necessity defense". The discussion on the necessity defense brings to the surface the tension between national policy space and foreign investment protection, and the contradictory awards in the two cases reveal the problem of incoherence in arbitral decisions under the International Centre for Settlement of Investment Disputes (ICSID) rules.

CMS was the first of several cases filed at ICSID that referred to measures taken by the Argentine Republic to manage the crises. CMS owned 29.42% of Transportadora de Gas del Norte (TGN), a company that held the license for gas transportation in a certain area within Argentina. The rates of TGN rates were set in dollars and adjusted according to the producer price index (PPI). Beginning in August 2000, a series of measures were taken that affected rate levels. Adjustments were deferred, then frozen, and the rate adjustment method based on the dollar and the United States PPI was overhauled. CMS filed a request for arbitration at the beginning of this train of events, in July 2001, but the request was amended to reflect events that took place during the course of the proceedings that were related to the conflict: Decree 1570/01 dated 1 December 2001 and Law 25.561 of 6 January 2002 brought to an end the regime of convertibility and parity of the Argentine peso with the United States dollar. The company claimed that it had undertaken investments in the gas transportation sector based on expectations of real return in dollar terms and the adjustment of rates based on the United States PPI. According to CMS, the measures taken between 1999 and 2001 led to loss of income and hurt its ability to pay its own debt. CMS invoked the United States-Argentina BIT to seek compensation.

In its decision issued in 2005, an ICSID arbitration rejected CMS claims of expropriation and of discriminatory and arbitrary treatment but ruled that Argentina had "breached its obligations to accord the investor the fair and equitable treatment guaranteed in article II(2)(a) of the Treaty and to observe the obligations entered into with regard to the investment guaranteed in article II(2)(c) of the Treaty". Argentina argued that it should be exempt from any liability for breaching the United States-Argentina BIT on the grounds that a state of necessity had arisen (the financial, economic, social and political crises in the context of which the emergency measures were taken). The tribunal did not accept Argentina's necessity defense, and awarded CMS US\$ 133 million in compensation. The ruling was later partially annulled, but the decision on the state of necessity was upheld.

Argentina had invoked its argument based on customary international law and article XI of the United States-Argentina BIT. The tribunal approached the issue first through customary international law, and found that the case did not meet the conditions set out in the articles of the International Law Commission (ILC) on Responsibility of States for Internationally Wrongful Acts (that the parties considered as adequately reflecting "the state of customary international law on the question of necessity"). According to that source, a number of conditions have to be cumulatively met for the necessity defense to be invoked, including that the act be the "only way for the State to safeguard an essential interest against a grave and imminent peril"; that the act "does not seriously impair an essential interest of the State or States towards which the obligation exists, or of the international community as a whole"; and that the State "has not contributed to the situation of necessity." Although the tribunal understood that neither the essential interests of the United States nor of the international community had been seriously impaired by the measures taken by Argentina, it questioned whether "an essential interest" of the State (of Argentina) was at stake, whether there was a "grave and imminent peril"; and whether the measures taken by Argentina were "the only steps available" to safeguard its interest. It also affirmed that Argentina's "government policies and their shortcomings significantly contributed to the crisis". Since the conditions for acceptance of a necessity defense must be cumulatively satisfied, the Tribunal ruled that the necessity defense was not applicable under customary international law. In its analysis of the applicability of customary international law, it also looked at the same BIT, since according to the articles of the ILC the necessity argument cannot be invoked if the international obligation in question (in this case the BIT) excludes the possibility of invoking necessity. In appreciating the applicability of this article to the crisis in Argentina, the tribunal considered that the situation under appreciation was not one of "economic and social collapse" (amounting to military action or war) and therefore that the necessity defense was not warranted under article XI of the BIT, thus supporting its rejection of the application of the necessity argument based on customary international law.

(Continues)

Box 10 (concluded)

Then, in a circular reference, the tribunal considered article XI of the BIT in and of itself and reiterated that it was not applicable. The commission assessing the annulment plea considered that the tribunal's motivation for the conclusion regarding the necessity defense was inadequately supported, but upheld it nonetheless.

In the case of LG&E, similarly to CMS, the claimant stated that the emergency laws had changed the regulatory environment under which it had invested in three natural gas distribution companies (Distribuidora de Gas del Centro S.A., Gas Natural BAN S.A., and Distribuidora de Gas Cuyana S.A.). As in the CMS case, the tribunal agreed with the claimant that such a defense can only be applied to a situation of "collapse" or "profoundly serious conditions". However, it understood that there are conditions (such as those conforming the crises) that "without being catastrophic in and of themselves nevertheless invite catastrophic conditions in terms of disruption and disintegration of society, or are likely to lead to a total breakdown of the economy", in which case "emergency and necessity might acquire a different meaning". In other words, rather than limiting the necessity defense to situations of collapse, equated to military action or war, the tribunal in the LG&E case recognized the potential severity of economic crises. Thus in contrast to the CMS case, the tribunal accepted the necessity defense for a specific period, from 21 December 2001 to 26 April 2003 "during which it was necessary to enact measures to maintain public order and protect its essential security interest". The tribunal determined that Argentina was liable for damages to LG&E for breaches of the treaty, *except during the period of the state of necessity*.

As a result of these two cases, it became clear that Argentina's necessity defense would be at best partially accepted by the arbitration tribunals. The tribunals suggested that foreign investors' rights took precedence over the economic and social needs of the local population in times of crises.

Source: Economic Commission for Latin America and the Caribbean (ECLAC), on the basis of International Centre for Settlement of Investment Disputes (ICSID), "CMS Gas Transmission Company v. Argentine Republic", ICSID Case, N° ARB/01/8, "LG&E Energy Corp., LG&E Capital Corp. and LG&E International Inc.1 v. Argentine Republic", Case CIADI N° ARB/02/1; Claudia Frutos-Peterson, "Introductory note by and award of the tribunal", *Investment Treaty News*, 15 October 2007.

With its proposals rejected and its arguments disallowed, the Government shifted its stance. One of its lines of approach was to seek to have the privatized firms withdraw their suits as a goodwill gesture in the context of contract renegotiation. With this in mind, the Argentine administration lobbied the Governments of Spain and France, requesting they intercede with the companies from those countries that had investments in Argentina. In addition, in view of the arbitration tribunal's award in the CMS case, the Government of Argentina suggested that it might not acknowledge any possible awards.

The responses from foreign investors varied, depending on the strategic interest that each had at the point of filing the original claim. One group, consisting mainly of foreign investors who still had strategic interests in the country, began to evaluate the benefits of withdrawing their suits.<sup>45</sup> Those firms that had withdrawn from the country (mostly foreign investors in public utilities) and those who had sued for breach of contract were more likely to continue with their IA-ISDS proceedings.

The Argentine crisis highlighted the international system's failure to provide a solution to either the losses of foreign investors caused by the country's inability to apply the rates stipulated in the original contracts or the sovereign default. Foreign direct investors were confronted with the fact that the World Bank was unable to oblige the Argentine authorities to abide by the original terms of utility contracts. The bondholders found that IMF was unable to force the Government of Argentina to renegotiate its debt under any kind of preexisting scheme or provide assistance to bondholders who opted not to accept the swap offer —"holdouts"— in the hope of a better deal from the Government of Argentina. For its part, the Government of Argentina, in its dual capacity as host country and debtor, was appalled by the functioning of the international system because of the way it explicitly favoured foreign investors, the lack of objectivity of the international financial institutions and attempts to condition the country's economic policy to fulfillment of (by then impossible) international commitments. As a result, and in view of the social dimension of the crisis that between 1999 and 2003 doubled the proportion of Argentines living below the poverty line, from 27.1% to 54.7% of the population, the Government found

<sup>45</sup> The suits dropped include, reportedly, those filed by: Empresa Distribuidora y Comercializadora Sur S.A. (EDESUR), AES Corporation, Pioneer National Resources Co., Camuzzi, Gas Natural BAN, Empresa Distribuidora y Comercializadora Norte S.A. (EDENOR) and Unysis, which would lower the total amount claimed by over US\$ 4 billion (*El cronista comercial*, 2005).

itself forced to choose between using scarce resources to alleviate the economic and social suffering caused by the crises and allocating them to meet international obligations to foreign investors. Ultimately, the international finance community, which had celebrated Argentina's adoption of a risky policy framework failed to provide the country with specific solutions to resolve the multiple crises it was facing. It proved to be another example of one government limiting the policy options of succeeding governments to deal with the crises caused in large part by the policies of the former. Finally, the BIT network later became a conduit for IA-ISDS demands by the bondholders that had not accepted the unilateral swap offered years earlier. This left the impression that the IA-ISDS system was warped to serve foreign investor interests at any cost.

Section C has shown that within Latin America and the Caribbean there are several distinct situations. Brazil avoided IA-ISDS risk by not ratifying any IIAs. The Caribbean countries signed up for relatively few BITs, and the recent EPA with the European Commission carries no IA-ISDS guarantees. The Type I countries carry risks in terms of the liberalizing aspects of their IIAs which constrain their national policy space:<sup>46</sup> however, the NAFTA-based corrections (such as clarifications for fair and equitable treatment and indirect expropriations) have been incorporated which should reduce IA-ISDS cases in that regard. These countries have proved willing to carry significant IA-ISDS risks even after their IA-ISDS jurisprudence entailed substantial financial costs and increased unpredictability stemming from expansive interpretations of IIA concepts. The Type II countries have shown themselves unwilling to carry their IA-ISDS risks associated with older, unmodified BITs because of their experiences with IA-ISDS tribunals. For the most part, and beyond the financial costs and expansive interpretations of IA concepts, they raise serious legitimacy issues with regard to the way that the IA-ISDS system constrains natural-resource-based development strategies (Bolivarian Republic of Venezuela, Ecuador, Plurinational State of Bolivia) and the ability to deal with multiple crises encompassing both foreign investment contracts in services and external public debt (Argentina). Although no other country has been exposed to the costs of IA-ISDS commitments to the extent that Argentina has, the Argentine experience illustrates the risks that other countries run should they be faced with the need to institute policy measures to avert or resolve critical situations that may have an impact on investor interests. Legitimacy issues stem from privileging foreign investors' rights over those of the citizens of sovereign States to an extent that becomes unacceptable to the host country. The unanswered question is whether these legitimacy issues reflect echoes from the past (Latin America and the Caribbean's historically difficult relationship with foreign investment) or represent the voice of the future (the first of several countries to abandon the IA-ISDS system).

---

<sup>46</sup> It might be mentioned that the United States-centric regional trade agreement model continues to evolve and in certain cases expressly expands the scope of dispute resolution clauses to include breaches related to investment agreements and authorizations, in addition to treaty violations. In the United States-Peru FTA, for example, a broad but vague dispute resolution clause expands the right of the foreign investor to bring claims for such matters (Malik, 2007).

## D. Conclusions

---

Considering the nature of the problems and risks discussed above, evidently a first-best solution to deal with the risks of IA-ISDS guarantees would be to upgrade host country judicial systems to international standards so that foreign investors would feel comfortable without such formal guarantees. Given, among other reasons, the complexity of judicial reform processes in the region, that option is not feasible in the short and medium run. A second-best answer would be a new, concerted and comprehensive international agreement on foreign investment among investor and host countries that would supersede the myriad of BITs and other IIAs. Since even the capital-exporting countries alone could not agree to the OECD MAI in the 1990s, this option can be dismissed as unlikely, especially with a larger number of negotiating parties. A third-best response would probably be a WTO-style dispute settlement system with an overseeing Appellate Body<sup>47</sup> based on a rule of law model rather than an ad hoc process (Mann, 2008b, p. 214). Given how difficult it has been to make progress in the Doha Round of WTO negotiations, this does not appear to be a feasible option at present for dealing with the problems (financial costs and expansive interpretations) and legitimacy issues associated with IA-ISDS practices.

While definitive global solutions are unlikely in the short and medium run as many of the factors that have impeded them up to this point in time persist, a case can be made for a more piecemeal approach in the management of existing risks through capacity building at the local level. Regional collaboration in this respect plays a key role.

---

<sup>47</sup> Álvarez (2008, p. 29) suggests that the single Appellate Body can correct panelists' error of law (if not of fact) and can direct remedial compliance once the Body has spoken on merits. The Dispute Settlement Understanding of WTO acknowledged that the central role of trade dispute adjudicators was to provide security and predictability and urged them to clarify the single set of obligations that all WTO members are subject to, but not to add or diminish the rights and obligations provided in those agreements.

The growing number of IIAs and of disputes arising from them, together with the limited capacity of local authorities to handle those disputes and the high litigation costs involved, has led some Latin American and Caribbean countries to take collective action to mitigate the problem. As of May 2009, there were three subregional initiatives to set up an institution that could provide legal advice to countries on investor-State dispute settlement.

- Investment dispute settlement mechanism for the South American Community of Nations (UNASUR). In March 2009, UNASUR, by mandate of the presidents of its 12 member countries, decided to set up a working group to examine the creation of a legal advisory centre, a dispute settlement centre and a regional cooperation mechanism to handle investor-State disputes, focusing on the training of government officials, the exchange of experiences and information and cooperation among member States.
- Legal advice centre for investment disputes in Central America, the Dominican Republic and Colombia. The countries promoting this initiative (except Colombia) have investment agreements with the United States and are aiming to lower the costs of free trade agreement negotiations. An advisory committee, comprising the Inter-American Development Bank (IDB), the United Nations Conference on Trade and Development (UNCTAD), the Organization of American States (OAS), the University of Columbia and the Central American Academy, is helping the group, and the IDB is providing financial support within the framework of its regional public goods project. The goal of this initiative is to provide legal advice and legal defense services to the States involved, as well as training in dispute management and prevention and in the negotiation of investment agreements to national teams.
- Legal advice centre for investor-State disputes within the framework of the Latin American Pacific Basin Initiative.<sup>48</sup> In October 2008, at a meeting held in Santiago, the ministers of foreign affairs and of foreign trade of the member countries of this group agreed on the importance of examining different alternatives for setting up a legal advice centre for investor-State dispute settlement that could provide technical support for the prevention and management of these kinds of disputes. Although this step does not constitute a new initiative as such, it does point to the wide acceptance of the need to seek a regional solution for handling this complex issue.

Today the debate revolves around the services that a legal advice centre should provide, the institutional structure and budget that such a centre should have and how it should be financed. Several countries in the region feel that setting up a centre of this kind is now essential, that a convergent, regional solution needs to be sought, and that efforts, initially at least, should focus on defence-related activities with regard to the lawsuits already under way and on making the centre's operations cost-efficient and sustainable over time. Given the differences that exist within Latin America and the Caribbean (between Type I and Type II countries), the negotiations have been fraught with difficulty. For such an initiative to get off the ground, therefore, it will probably have to start with just a small group of member countries, but leave room for other countries to join later on. For it to expand in stages in this way, the centre's institutional arrangements will need to be both simple and flexible.

This chapter shows that it would also be convenient for the discretionary powers of the arbiters to be limited as regards the interpretation of the terms stipulated in IIAs that are already in force, as they have been within NAFTA.

Countries should not lose sight of the more long-term objective of designing a new system for foreign investment dispute settlement. The crisis that began in 2008 is an appropriate setting to refocus efforts in this regard. The new status of the G20, which includes several of the most influential developing countries and transition economies as well as the dominant economic powers, is a much-

<sup>48</sup> The members of this group are: Chile, Colombia, Costa Rica, Ecuador, El Salvador, Guatemala, Honduras, Mexico, Nicaragua, Panama and Peru.

improved vehicle for doing so. One of the guiding principles for that endeavour should be that developing countries and transition economies will need increasingly active national policies to deal with the crisis, as has been the case for the industrialized countries. Foreign investment can be an important factor in overcoming the crisis; however, the IA-ISDS experiences have shown that caution is required with regard to the risks associated with foreign investment disputes. It might be the moment to consider other options, such as an international foreign investment court, which could hear appeals against the decisions of ad hoc tribunals. Like the transition from GATT to WTO, the establishment of such a court could take decades. Nonetheless, the corresponding debate needs to begin now.



## Bibliography

---

- Ahluwalia, M. (2002), "Economic reforms in India since 1991: has gradualism worked?", *Journal of Economic Perspectives*, vol. 16, N° 3, August.
- Álvarez, G. and W. Park (2003), "The new face of investment arbitration: NAFTA", *Yale Journal of International Law*, N° 28.
- Álvarez, J. (2008), "Implications for the future of international investment law", *Appeals Mechanism in International Investment Disputes*, K. Sauvart (ed.), Oxford University Press.
- Anderson, S. (2008), "Will Dems follow through on promises to fix NAFTA?", *Unconventional Wisdom*, Institute for Policy Studies, 16 December.
- Anderson, S. and S. Grusky (2007), *Challenging Corporate Investor Rule*, Washington, D.C., Institute for Policy Studies/Food and Water Watch, April.
- Avril, H. (2008), "Some interim EPAs may not be concluded" [online] [http://www.bilaterals.org/article.php3?id\\_article=12460](http://www.bilaterals.org/article.php3?id_article=12460), 17 June.
- Bernasconi-Osterwalder, N. (2006), "Democratizing international dispute settlement: the case of trade and investment disputes", document presented at the sixth International Conference of New or Restored Democracies, Doha, 29 October to 1 November.
- Bhattacharya, D. (2007), "The impact of investment agreements on FDI: do IIAs attract FDI?", document presented at the First Annual Forum of Developing Country Investment Negotiators, International Institute for Sustainable Development (IISD)/Centre for Policy Dialogue (CPD), Singapore, 1-2 October.
- Bilaterals.org (2008), "Venezuela to renegotiate Dutch investment treaty", 30 April.
- Blackwood, E. and S. McBride (2006), "Investment as the Achilles heel of globalization? The ongoing conflict between the rights of capital and the rights of states", *Policy and Society*.
- Breslow, M. (1999), "George Soros: beware market fundamentalism", *Dollars & Sense*, N° 221, January-February.
- Bridges Weekly Trade News Digest* (2008), "EU, former colonies sign first generation trade pact", vol. 12, N° 5, October-November.

- Brummer, C. (2008), "Examining the institutional design of international investment law", *Appeals Mechanism in International Investment Disputes*, K. Sauvant (ed.), Oxford University Press.
- Campbell Black, Henry (1990), *Black's Law Dictionary*, sixth edition.
- Canadian Council of Chief Executives (2003), "North American business leaders declare NAFTA and its investment provisions an outstanding success" [online] [http://www.ceocouncil.ca/en/view/?document\\_id=1](http://www.ceocouncil.ca/en/view/?document_id=1), 28 May.
- Capling, A. and K. Nossal (2004), "The rise and fall of chapter 11: investor-state dispute mechanisms in the North American Free Trade Agreement and the Australian-United States Free Trade Agreement", document presented at the Oceanic Conference on International Studies, Australian National University, Canberra, 14-16 July.
- Clark, T. (1997), *Silent Coup: Confronting the Big Business Coup of Canada*, Toronto, Lorimer.
- Clark, P. and G. LaFortune (2004), "Why can't NAFTA chapter 11 be more like the WTO?", *Transnational Dispute Management*, vol. 1, N° 2, May.
- Clarkson, S. (2006), "Hijacking the Constitution: NAFTA's investor-state dispute arbitration", *Investor Protection in the NAFTA and Beyond: Private Interest and Public Purpose*, Policy Study, N° 44, Alan S. Alexandroff (ed.), Toronto, CD Howe Institute.
- \_\_\_\_\_ (2004), "Global governance and the semi-peripheral state: The WTO and NAFTA as Canada's external constitution", *Governing under Stress: Middle Powers and the Challenge of Globalization*, Stephen Clarkson and Marjorie Griffin Cohen (eds.), London, Zed Books.
- \_\_\_\_\_ (2003), "Locked in? Canada's external constitution under global trade governance", *American Review of Canadian Studies*, vol. 33, N° 2.
- \_\_\_\_\_ (2002), "Systemic or surgical? Possible cures for NAFTA's investor-state dispute process", *Canadian Business Law Journal*, vol. 36.
- \_\_\_\_\_ (2001), "The globalization of governance: Canada's de-stabilizing experience with NAFTA and the WTO", document presented at the conference The challenges and opportunities of globalization at the dawn of the Millennium", Howard University, Washington, D.C., 11 April.
- Clift, J. (2003), "Beyond the Washington Consensus", *Finance and Development*, vol. 40, N° 3, Washington, D.C., International Monetary Fund (IMF), September.
- Cote, C. (2005), "Canada's investment trade policy strategy- foreign investment promotion and protection agreements", document presented at the Canada Eurasia Russia Business Association Conference: Canadian Mining Investment in Russia and Central Asia, Toronto, 9 March.
- D'Agostino, J. and Promod Nair (2008), "Treaty protection in India", *Global Arbitration Review*, vol. 3, N° 1, February.
- Dattu, R. (2007), "Legal issues in bilateral investment treaties", unpublished.
- Dodge, W. (2006), "Investor-State dispute settlement between developed countries: reflections on the Australia-United States Free Trade Agreement", *Vanderbilt Journal of Transnational Law*, vol. 39.
- Dolzer, R. and M. Stevens (1995), *Bilateral Investment Treaties*, Brill/International Centre for Settlement of Investment Disputes (ICSID).
- Durán, J., N. Mulder and O. Onudera (2008), "Trade liberalization and economic performance- Latin America versus East Asia, 1970-2006", *Trade Policy Working Papers*, N° 70, Paris, Organisation for Economic Co-operation and Development (OECD), February.
- Dymond, W. (1997), "State of play of the MAI negotiations", *The Multilateral Agreement on Investment State of Play as of February 1997* (OCDE/GD(97)38), Paris.
- ECLAC (Economic Commission for Latin America and the Caribbean)(2008), *Opportunities for Trade and Investment between Latin America and Asia-Pacific: the Link with APEC* (LC/L.2971), Santiago, Chile, November.
- Edsall, R. (2006), "Indirect expropriation under CAFTA and DR-CAFTA: potential inconsistencies in the treatment of state public welfare regulations", *Boston University Law Review*, vol. 86.
- Egger, P. and M. Pfaffermayr (2004), "The impact of bilateral investment treaties on foreign investment", *Journal of Comparative Economics*, vol. 32, N° 788.
- El cronista comercial* (2005), Buenos Aires, 13 May.
- Elkins, Z., A. Guzmán and B. Simmons (2006), "Competing for capital: the diffusion of bilateral investment treaties, 1960-2000" [online] [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=578961](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=578961).
- European Commission (2008a), "Bilateral trade relations. USA" [online] [http://ec.europa.eu/trade/issues/bilateral/countries/usa/index\\_en.htm](http://ec.europa.eu/trade/issues/bilateral/countries/usa/index_en.htm).
- \_\_\_\_\_ (2008b), "Cariforum-EC EPA: investment", *Trade Fact Sheet*, Brussels, October.

- Faya Rodríguez, A. (2009), "A quince años del capítulo XI de TLCAN", *A quince años del TLCAN*, Mexico City, Ed. Porrúa/Universidad Iberoamericana.
- \_\_\_\_\_ (2008), "The most-favored-nation clause in international investment agreements: a tool for treaty shopping?", *Journal of International Arbitration*, vol. 25, N° 1.
- FDI (2008), "In dispute: are Dutch investment treaties on their way out?", 9 June.
- Franck, S. (2008), "Challenges facing investment disputes: reconsidering dispute resolution in international investment treaties", *Appeals Mechanism in International Investment Disputes*, K. Sauvant (ed.), Oxford University Press.
- \_\_\_\_\_ (2007a), "Foreign direct investment, investment treaty arbitration, and the rule of law", *Global Business and Development Law Journal*, vol. 19.
- \_\_\_\_\_ (2007b), "Integrating investment treaty conflict and dispute systems design", *Minnesota Law Review*, vol. 92.
- \_\_\_\_\_ (2007c), "Empirically evaluating claims about investment treaty arbitration", *North Carolina Law Review*, vol. 86, January.
- \_\_\_\_\_ (2005), "The legitimacy crisis in investment treaty arbitration: privatizing public international law through inconsistent decisions", *Fordham Law Review*, vol. 73.
- Fudan University/Vale Columbia Center on Sustainable International Investment (2008), "Chinese multinationals make steady progress", *Press Release*, New York, 22 October.
- Gagne, G. and J.F. Morin (2006), "The evolving American policy on investment protection: evidence from the recent FTAs and the 2004 model BIT", *Journal of International Economic Law*, vol. 9, N° 2, May.
- Gallagher, K. (2008), "The death of the Washington Consensus?", *The Guardian*, 14 de October.
- Gallagher, K. and M. Birch (2005), "Do investment agreements attract investment? Evidence from Latin America", unpublished.
- Gal-Or, N. (2005), "NAFTA Chapter Eleven and the implications for the FTAA: the institutionalization of investor status in public international law", *Transnational Corporations*, vol. 14, N° 2, August.
- Geiger, R. (2008), "The multifaceted nature of international investment law", *Appeals Mechanism in International Investment Disputes*, K. Sauvant (ed.), Oxford University Press.
- Gerchunoff, P. y G. Cánovas (1995), "Privatizaciones en un contexto de emergencia económica", *Desarrollo económico*, vol. 34, N° 136, Buenos Aires, Institute of Economic and Social Development (IDES), January-March.
- Government of Canada (2003), "Report on NAFTA chapter 11 multi-stakeholder consultations" [online] <http://www.international.gc.ca/trade-agreements-accords-commerciaux/invest/multistake-nafta.aspx>, 28 May.
- Great Transformations (2008), "What is market fundamentalism?" [online] <http://www.greattransformations.org>.
- Guash, J.L., J.J. Laffont and S. Straub (2002), "Renegotiation of concession contracts in Latin America", *SSRN Electronic Journal* [online] [http://papers.ssrn.com/abstract\\_id=340580](http://papers.ssrn.com/abstract_id=340580).
- Guerra, G. (2008), "Ecuadorian IIA policy: a complex and dynamic process", unpublished.
- Gugler, P. and V. Tomsik, (2006), "International agreements on foreign investment: North American vs. European approach", *Working Paper of the Faculty of Economics of the University of Fribourg*, N° 392.
- Hallward-Driemeier, M. (2003), "Do bilateral investment treaties attract foreign investment? only a Bit...and they could bite", *World Bank Policy Research Working Paper*, N° 3121, Washington, D.C., June.
- Hewko, J. (2002), "Foreign direct investment- does the rule of law matter?", *Report to the Carnegie Foundation for International Peace*, N° 26, April.
- Heymann, M. (2008), "International law and the settlement of investment disputes relating to China", *Journal of International Economic Law*, vol. 11, N° 3, August.
- Honlet, J.C. and G. Borg (2008), "The decision of the ICSID Ad Hoc Committee in CMS v. Argentina regarding the conditions of application of an umbrella clause: SGS v. Philippines revisited", *The Law and Practice of International Courts and Tribunals*, vol. 7.
- Houde, M. (2006), *Novel Features in Recent OECD Bilateral Investment Treaties*, chap. 6, Paris, Organisation for Economic Co-operation and Development (OECD).
- Houde, M. and A. Kolse-Patil (2008), "The interaction between investment and services chapters in selected regional trade agreements", *International Investment Law: Understanding Concepts and Tracking Innovations*, Paris, Organisation for Economic Co-operation and Development (OECD).
- Howard, Mann and Konrad von Moltke (2002) "Protecting investor rights and the public good: assessing NAFTA's chapter 11", document presented at the trilateral policy workshops of the International Institute for Sustainable

- Development (IISD) [online] <http://www.iisd.org/trade/ILSDWorkshop>, Mexico City, 13 March, Ottawa, 18 March, Washington, D.C., 11 April.
- Hufbauer, G. and J. Schott (2007), "NAFTA revisited", *Policy Options*, October.
- ICSID News Release (2007), "Bolivia submits a notice under article 71 of the ICSID Convention", Washington, D.C., 2 May.
- IDQ (*International Disputes Quarterly*) (2007), "The evolution of dispute resolution in Latin America- interview with Jonathan C. Hamilton", 5 November.
- Investment Treaty News* (2008), "Ecuador threatens cancellation of oil contracts unless ICSID nixes forum", 29 August.
- \_\_\_\_\_ (2006), "Japan-Philippines leave investor-state arbitration mechanism unresolved in EPA", 20 September.
- \_\_\_\_\_ (2005), "India-Singapore FTA inked, investment provisions include important innovations", 3 August.
- Joubin-Bret, A. (2008), "The growing diversity and inconsistency in the IIA system", *Appeals Mechanism in International Investment Disputes*, K. Sauvant (ed.), Oxford University Press.
- Juillard, P. (2008), "Variation in the substantive provisions and interpretation of international investment agreements", *Appeals Mechanism in International Investment Disputes*, K. Sauvant (ed.), Oxford University Press.
- Jun, Wang (2007), "China and the ICSID Arbitration", *Moulislegal: China Messenger*, 2 August.
- Kalotay, K. (2008), "How to explain the foreign expansion of Russian firms", *Journal of Financial Transformation*, Capco Institute.
- Kumar, N. (2007a), "Regional integration, foreign direct investment and efficiency-seeking industrial restructuring in Asia: the case of India", *RIS Discussion Papers*, N° 123, New Delhi, June.
- \_\_\_\_\_ (2007b), "Investment provisions in regional trading arrangements in Asia: relevance, emerging trends and policy implications", *Artnet Working Paper*, N° 46.
- Kumar, N. and K. Gallagher (2007), "Relevance of "policy space" for development: implications for multilateral trade negotiations", *RIS Discussion Papers*, N° 120, New Delhi, March.
- Legum, B. (2008), "Options to establish an appellate mechanism for investment disputes", *Appeals Mechanism in International Investment Disputes*, K. Sauvant (ed.), Oxford University Press.
- Malik, M. (2008a), "Recent developments in the definition of investment in international investment agreements", document presented at the second Annual Forum of Developing Country Investment Negotiators, International Institute for Sustainable Development (IISD)/South Center, Marrakesh, 3-4 November.
- \_\_\_\_\_ (2008b), "Recent developments in international investment Agreements and the rights of states to regulate: 2007-2008", document presented at the second Annual Forum of Developing Country Investment Negotiators, International Institute for Sustainable Development (IISD)/South Center, Marrakesh, 3-4 November.
- \_\_\_\_\_ (2007), "The expanding jurisdiction of investment-state tribunals: lessons for treaty negotiators", document presented at the second Annual Forum of Developing Country Investment Negotiators, International Institute for Sustainable Development (IISD)/Centre on Asia and Globalisation, Singapore, 1-2 October.
- Mann, H. (2009), "International investment agreements, foreign investment sustainability in infrastructure and contractual and regulatory measures", document presented at the seminar on International agreements on investment, sustainability of infrastructure investments and regulatory and contractual measures, National Superintendency of Sanitation Services (SUNASS), International Institute for Sustainable Development (IISD)/Economic Commission for Latin America and the Caribbean (ECLAC), Lima, 14-16 January.
- \_\_\_\_\_ (2008a), "International investment agreements, business and human right: key issues and opportunities", document presented at the second Annual Forum of Developing Country Investment Negotiators, International Institute for Sustainable Development (IISD)/South Center, Marrakesh, 3-4 November.
- \_\_\_\_\_ (2008b), "Transparency and consistency in international investment law: can the problems be fixed by tinkering?", *Appeals Mechanism in International Investment Disputes*, K. Sauvant (ed.), Oxford University Press.
- Mann, H. and J. Soloway (2002), "Untangling the expropriation and regulation relationship: is there a way forward?", *Report to the Ad Hoc Expert Group on Investment Rules and the Department of Foreign Affairs and International Trade*, Ottawa, Department of Foreign Affairs and International Trade.
- Mann, Howard and Konrad von Moltke (2002), "Protecting investor rights and the public good: assessing NAFTA's chapter 11", document presented at the trinational policy workshops of the International Institute for Sustainable Development (IISD) [online] <http://www.iisd.org/trade/ILSDWorkshop>, Mexico City, 13 March, Ottawa, 18 March, Washington, D.C., 11 April.

- Mann, H., A. Cosbey and K. von Moltke (2008), "Comments on ICSID discussion paper, 'possible improvements of the framework for ICSID arbitration'", *Appeals Mechanism in International Investment Disputes*, K. Sauvart (ed.), Oxford University Press.
- Marshall, F. (2008), "Advances in investor-state arbitration", document presented at the second Annual Forum of Developing Country Investment Negotiators, International Institute for Sustainable Development (IISD)/South Center, Marrakesh, 3-4 November.
- Ministry of Foreign Affairs, Trade and Integration of Ecuador (2007), "Notificación conforme artículo 25(4) del convenio", *Carta a Centro Internacional de Arreglo de Diferencias Relativas a Inversiones (CIADI)*, Quito, 23 November.
- Mortimore, M. (2009), "Can Latin America learn from developing Asia's focused FDI policies", *International Journal of Institutions and Economies*, vol. 1, N° 1, in press.
- \_\_\_\_\_ (2008), "The transnationalization of developing America: trends, challenges and (missed) opportunities", *The Political Economy of Hemispheric Integration: Responding to Globalization in the Americas*, Diego Sánchez-Ancochea and Kenneth C. Shadlen (eds.) London, Palgrave Macmillan, June.
- \_\_\_\_\_ (1993), "Flying geese or sitting ducks? Transnationals and industry in developing countries", *CEPAL Review*, N° 51 (LC/G.1792-P), Santiago, Chile, Economic Commission for Latin America and the Caribbean (ECLAC), December.
- Mortimore, M. and L. Stanley (2006a), "La Argentina y los tratados bilaterales de inversión: el costo de los compromisos internacionales", *Desarrollo económico-revista de ciencias sociales*, vol. 46, N° 182, Buenos Aires, July-September.
- \_\_\_\_\_ (2006b), "Has investor protection been rendered obsolete by the Argentine crisis?", *CEPAL Review*, N° 88 (LC/G.2289), Santiago, Chile, Economic Commission for Latin America and the Caribbean (ECLAC), April.
- Mortimore, M. and S. Vergara (2006), "Targeting winners: can FDI policy help developing countries industrialise?", *Understanding FDI-Assisted Economic Development*, R. Narula and S. Lall (eds.), London, Routledge.
- Moulis, D. and Wang Jun (2007), "Dispute settlement under a China-Australia FTA. Possibilities, problems and prospects", document presented at the Conference Free Trade Agreements: Where is the World Heading?, Gold Coast, Queensland, 9 March.
- Navajas, F. (2004), "Reformas en el sector de infraestructura en la Argentina. Algunos comentarios", document presented at the seminar Assessing the transformation process of infrastructure services in the Argentine Republic, Buenos Aires, Interamerican Federation of Insurance Companies (FIDES), 12 August.
- Neumayer, E. and L. Spess (2005), "Do bilateral investment treaties increase foreign direct investment to developing countries" [online] <http://ecowpa.wustl.edu:8089/eps/if/papers/0411/0411004/pdf>.
- Newcombe, A. (2005) "The boundaries of regulatory expropriation in international law", *ICSID Review- Foreign Investment Law Journal*, vol. 20, N° 1.
- \_\_\_\_\_ (2004), "Canada's new model foreign investment protection agreement", University of Victoria, August, unpublished.
- OECD (Organisation for Economic Co-operation and Development) (2008a), "Novel features in OECD countries' recent investment agreements: an overview", *Appeals Mechanism in International Investment Disputes*, K. Sauvart (ed.), Oxford University Press.
- \_\_\_\_\_ (2008b), *International Investment Law: Understanding Concepts and Tracking Innovations*, Paris.
- \_\_\_\_\_ (2008c), *OECD Investment Policy Reviews: Russian Federation*, Paris.
- \_\_\_\_\_ (2008d), *OECD Investment Policy Reviews: China 2008*, Paris.
- \_\_\_\_\_ (2006a) *International Investment Perspectives*, Paris.
- \_\_\_\_\_ (2006b) "Improving the system of investor-state dispute settlement: an overview", *Working Paper on International Investment*, N° 2006/1, Paris, February.
- \_\_\_\_\_ (2005a), *Transparency and Third Party Participation in Investor-State Dispute Settlement Procedures. Statement by the OECD Investment Committee*, Paris, June.
- \_\_\_\_\_ (2005b), *International Investment Law. A Changing Landscape*, Paris.
- \_\_\_\_\_ (2004), *Russian Federation: Progress and Reform Challenges*, Paris.
- \_\_\_\_\_ (2003), *International Investment Perspectives*, Paris.
- Pacquing, R. (2003), "Investor-state arbitration: Canada's experience in NAFTA and the case for its inclusion in the Australia-US FTA", *Issues Paper*, N° 25, The Australian APEC Study Centre, Monash University, October.
- Panagariya, A. (2004), "India in the 1980s and 1990s: a triumph of reforms", *Transnational Dispute Management*, vol. 1, N° 2, May.

- Parra, A. and others (2008a), "Suggested changes to the ICSID rules and regulations", *Appeals Mechanism in International Investment Disputes*, K. Sauvant (ed.), Oxford University Press.
- \_\_\_\_\_ (2008b), "Possible improvements of the framework for ICSID arbitration", *Appeals Mechanism in International Investment Disputes*, K. Sauvant (ed.), Oxford University Press.
- Pate, T. (2006), "The past, present and future of arbitral clause in foreign investment legislation: in pursuit of "the balance" [online] <http://www.desolapate.com/publicaciones/pdf>, May.
- Paulsson, J. (2008), "Avoiding unintended consequences", *Appeals Mechanism in International Investment Disputes*, K. Sauvant (ed.), Oxford University Press.
- Perrone, Nicolás (2001), *Inversiones extranjeras. Demandas contra la Argentina por controversias vinculadas con la crisis del año 2001*, Buenos Aires, Faculty of Law, University of Buenos Aires.
- Peterson, L. (2006), "Pakistan attorney general advises states to scrutinize investment treaties carefully", *Investment Treaty News*, International Institute for Sustainable Development (IISD), 1 December.
- \_\_\_\_\_ (2005), "The global governance of foreign direct investment: madly off in all directions", *Dialogue on Globalization Occasional Papers*, N° 19, Geneva, Freidrich Ebert Foundation, May.
- \_\_\_\_\_ (2004), *Bilateral Investment Treaties and Development Policy-Making*, Winnipeg, International Institute for Sustainable Development (IISD), November.
- Porterfield, Matthew (2006), "An international common law of investor rights?", *University of Pennsylvania Journal of International Economic Law*, vol. 27, N° 1.
- Public Citizen (2005), *NAFTA Chapter 11 Investor-State Cases: Lessons for the Central American Free Trade Agreement*, Washington, D.C., February.
- Puentes (2008), "Bolivia se margina del CIADI", vol. 9, N° 1, March.
- Qureshi, A. and S. Khan (2008), "Implications of an appellate body for investment disputes from a developing country point of view", *Appeals Mechanism in International Investment Disputes*, K. Sauvant (ed.), Oxford University Press.
- Redfern, A. and M. Hunter (2004), *Law and Practice of International Commercial Arbitration*, London.
- Sagafi-Nejad, Tagi (2008), "The UN and transnational corporations-from code of conduct to global compact", *United Nations Intellectual History Project Series*, Indiana University Press.
- Salasuse, J. and N. Sullivan (2005), "Do BITs really work: an evaluation of bilateral investment treaties and their Grand Bargain", *Harvard International Law Journal*, vol. 46.
- Sauvé, P. (2008), "Trade and investment rules: Latin American perspectives", *CEPAL Review*, N° 94 (LC/G.2357-P), Santiago, Chile, Economic Commission for Latin America and the Caribbean (ECLAC), April.
- \_\_\_\_\_ (2007), "Investment regulation through trade agreements: lessons from Asia", *Towards Coherent Policy Frameworks: Understanding Trade and Investment Linkages*, ARTNet Working Paper Series, N° 49.
- Sauvé, P. and N. Ward (2009), *The EC-CARIFORUM Economic Partnership Agreement: Assessing the Outcome on Services and Investment*, Brussels, European Centre for International Political Economy (ECIPE), January.
- Schneiderman, D. (1996), "NAFTA's taking rule: American constitutionalism comes to Canada", *University of Toronto Law Journal*, vol. 46.
- Schreuer, C. (2008), "Preliminary rulings in investment arbitration", *Appeals Mechanism in International Investment Disputes*, K. Sauvant, (ed.), Oxford University Press.
- Shemberg, A. (2008), "Stabilization clauses and human rights", document presented at the second Annual Forum of Developing Countries Investment Negotiators, International Institute for Sustainable Development (IISD)/South Center, Marrakesh, 3-4 November.
- Shenkman, E. (2006), "Investor-state arbitration: an increasingly powerful tool for resolving disputes with sovereigns", *The International Comparative Legal Guide to: International Arbitration 2006*, London.
- Sikkel, M. (1997), "Exceptions, derogations and national reservations", *The Multilateral Agreement on Investment-State of Play as of February* (OECD/GD(97)38), Paris, Organisation for Economic Co-operation and Development (OECD).
- Solanes, Miguel and Andrei Jouravlev (2007), "Revisiting privatization, foreign investment, international arbitration, and water", *Recursos naturales e infraestructura series*, N° 129 (LC/L.2827-P), Santiago, Chile, Economic Commission for Latin America and the Caribbean (ECLAC), November. United Nations publication, Sales N° E.07.II.G.151.
- Soros, G. (1998), *The Crisis of Global Capitalism: Open Society Endangered*, New York, Public Affairs.
- Somarajah, M. (2008), "A coming crisis: expansionary trends in investment treaty arbitration", *Appeals Mechanism in International Investment Disputes*, K. Sauvant (ed.), Oxford University Press.

- \_\_\_\_\_ (2002), "The clash of globalizations and the international law of foreign investment", *The Simon Reisman Lecture in International Trade Policy*, Ottawa, The Norman Paterson School of International Affairs, 12 September.
- South Centre (2008), "The EU-CARIFORUM EPA on Services Investments and E-Commerce- implications for other ACP countries", *Analytical Note* (SC/AN/TDP/EPA/18), Geneva, May.
- Stanley, L. (2008), "Natural resources and foreign investors: a tale of three Andean countries", *Working Group on Development and Environment in the Americas Discussion Paper*, N° 16, Global Development and Environment Institute, Tufts University, April.
- \_\_\_\_\_ (2007), *The Diffusion of BITs and Policy Degrees of Freedom: a Comparison between Latin America and Asian Countries*, Buenos Aires, Center for the Study of State and Society (CEDES).
- \_\_\_\_\_ (2004), "Acuerdos bilaterales de inversión y demandas ante tribunales internacionales: la experiencia argentina reciente", *Desarrollo productivo series*, N° 58 (LC/L.2181-P), Santiago, Chile, Economic Commission for Latin America and the Caribbean (ECLAC). United Nations publication, Sales N° S.04.II.G.108.
- Stiglitz, J. and A. Charlton (2002), *Globalization and its Discontents*, New York, W.W. Norton & Co., May.
- \_\_\_\_\_ (1998), "Redefining the role of the State- What should it do? How should it do it? And how should these decisions be made?," document presented at the Tenth Anniversary of MITI Research Institute, Tokyo, March.
- Tams, C. (2006), "An appealing option? The debate about an ICSID appellate structure", *Essays in Transnational Economic Law*, N° 57, Wittenberg, Institut für Wirtschaftsrecht, June.
- Tienhaara, K. (2006), "What you don't know can hurt you: investor-state disputes and the protection of the environment in developing countries", *Global Environmental Politics*, vol. 6, N° 4, November.
- Tracton, M. (2008), "Provisions in the new generation of U.S. investment agreements to achieve transparency and coherence in investor-state dispute settlement", *Appeals Mechanism in International Investment Disputes*, K. Sauvart (ed.), Oxford University Press.
- Trebilcock, M. and R. Howse (1999), *The Regulation of International Trade*, London, Routledge.
- Tobin, J. and S. Rose-Ackerman (2005), "Foreign direct investment and the business environment in developing countries: the impact of bilateral investment treaties" [online] [http://www.law.yale.edu/outside/html/faculty/sroseack/FDI\\_BITs\\_may02.pdf](http://www.law.yale.edu/outside/html/faculty/sroseack/FDI_BITs_may02.pdf), 2 May.
- Tumman, J. and C. Emmert (2004) "The political economy of U.S. foreign direct investment in Latin America: a reappraisal", *Latin American Research Review*, vol. 39, N° 3.
- UNCTAD (United Nations Conference on Trade and Development)(2009), *The Development Dimension of International Investment Agreements* (TD/B/C.II/MEM.3/2), Geneva, February.
- \_\_\_\_\_ (2008a), "Latest developments in investor-state dispute settlement", *IIA Monitor*, N° 1 (UNCTAD/WEB/ITE/IIA/2008/3), Geneva.
- \_\_\_\_\_ (2008b), "Identifying core elements in investment agreements in the APEC region", *UNCTAD Series on International Investment Policies for Development* (UNCTAD/DIAE/IA/2008/3), Geneva. United Nations publication, Sales N° E.08.II.D.27.
- \_\_\_\_\_ (2007a), "Investor-state dispute settlement and impact on investment rulemaking", *UNCTAD Series on International Investment Policies for Development* (UNCTAD/ITE/IIA/2007/3), Geneva. United Nations publication, Sales N° E.07.II.D.10.
- \_\_\_\_\_ (2007b), *Bilateral Investment Treaties, 1995-2006: Trends in Investment Rulemaking* (UNCTAD/ITE/IIT/2006/5), Geneva. United Nations publication, Sales N° E.06.II.D.16.
- \_\_\_\_\_ (2005a), *Investment Policy Review of Brazil* (UNCTAD/ITE/IPC/MISC/2005/1), Geneva.
- \_\_\_\_\_ (2005b), "Investor-State disputes arising from investment treaties: a review", *UNCTAD Series on International Investment Policies for Development* (UNCTAD/ITE/IIT/2005/4), Geneva. United Nations publication, Sales N° E.06.II.D.1.
- \_\_\_\_\_ (2004), "Key terms and concepts in IIAs: a glossary", *UNCTAD Series on Issues in International Investment Agreements* (UNCTAD/ITE/IIT/2004/2), Geneva. United Nations publication, Sales N° E.04.II.D.31.
- \_\_\_\_\_ (2003a), "Dispute settlement: investor-State", *UNCTAD Series on Issues in International Investment Agreements* (UNCTAD/ITE/IIT/30), Geneva. United Nations publication, Sales N° E.03.II.D.5.
- \_\_\_\_\_ (2003b), *World Investment Report 2003- FDI Policies for Development: National and International Perspectives* (UNCTAD/WIR/2003), Geneva. United Nations publication, Sales N° E.03.II.D.8.
- \_\_\_\_\_ (1999), "Trends in international investment agreements: an overview", *UNCTAD Series on Issues in International Investment Agreements* (UNCTAD/ITE/IIT/13), Geneva. United Nations publication, Sales N° E.99.II.D.23.
- \_\_\_\_\_ (1998), *Bilateral Investment Treaties in the Mid-1990s*, Geneva.

- Van Aaken, A. (2008), "Perils of success? The case of international investment protection", *European Business Organization Law Review*, vol. 9.
- Van Harten, G. (2008a), "A case for an international investment court", document presented at the Inaugural Conference of the Society for International Economic Law: New Horizons of International Economic Law, Geneva, 16 July.
- \_\_\_\_\_ (2008b), "Chapter 4- investment treaty arbitration and its policy implications for capital-importing States", *The Political Economy of Hemispheric Integration*, D. Sánchez-Ancochea and K. Shadlen (eds.), New York, Palgrave-Macmillan.
- \_\_\_\_\_ (2007a), "The public-private distinction in the international arbitration of individual claims against the state", *International and Comparative Law Journal*, vol. 56, April.
- \_\_\_\_\_ (2007b), *Investment Treaty Arbitration and Public Law*, Oxford, Oxford University Press.
- \_\_\_\_\_ (2005a), "Private authority and transnational governance: the contours of the international system of investor protection", *Review of International Political Economy*, vol. 12, N° 4, October.
- \_\_\_\_\_ (2005b), "Judicial supervision of NAFTA chapter 11 arbitration: public or private law?", *The Journal of the London Court of International Arbitration*, vol. 21, N° 4.
- Van Harten, G. and M. Loughlin (2006), "Investment treaty arbitration as a species of global administrative law", *European Journal of International Law*, vol. 17, N° 1, February.
- Vandevelde, K. (1993), "U.S. bilateral investment treaties: the second wave", *Michigan Journal of International Law*, vol. 14.
- Vielleville, D. and B. Vasani (2008), "Sovereignty over natural resources versus rights under contracts: which one prevails?", *Transnational Dispute Management*, vol. 5, N° 2, April.
- Wandrag, R. (2008), "Towards a comprehensive EPA? Investment chapter", document presented at the Conference on Regional Economic Integration in Southern Africa: beyond EPAs; Surviving Internal Fragmentation, South African Institute for International Affairs/Overseas Development Institute/European Center for Development Policy Management, 24-25 November.
- Westcott, T. (2009), "Investment provisions and commitments in CARIFORUM-EU EPA", *Trade Negotiation Insights*, vol. 7, N° 9.
- Whitsitt, E. and D. Vis-Dunbar (2008), "In focus: investment arbitration in Brazil: yes or no?", *Investment Treaty News*, December.
- Williamson, J. (2004), "The Washington Consensus as policy prescription for development", *Practitioner's of Development Lecture Series*, Washington, D.C., World Bank, 13 January.
- \_\_\_\_\_ (2002), "Did the Washington Consensus fail?", speech given at the Peterson Institute for International Economics, Washington, D.C., 6 November.
- \_\_\_\_\_ (1989), "What Washington means by policy reform", *Latin American Readjustment: How Much Has Happened?*, J. Williamson (ed.), Washington, D.C., Institute for International Economics (IIE).
- World Bank (2003), *Global Economic Prospects and the Developing Countries, 2003*, Washington, D.C.
- Yannaca-Small, K. (2008), "Improving the system of investor-state dispute settlement: the OECD governments' perspective", *Appeals Mechanism in International Investment Disputes*, K. Sauvant (ed.), Oxford University Press.
- \_\_\_\_\_ (2006a), "Chapter 8: Consolidation of claims: a promising avenue for investment arbitration?", *International Investment Perspectives*, Paris, Organisation for Economic Co-operation and Development (OECD).
- \_\_\_\_\_ (2006b), "Interpretation of the umbrella clause in investment agreements", *Working Papers on International Investment*, N° 2006/3, Paris, Organisation for Economic Co-operation and Development (OECD), October.
- Yu, V. and F. Marshall (2008), "Investors' obligations and host country policy space", document presented at the second Annual Forum of Developing Countries Investment Negotiators, International Institute for Sustainable Development (IISD)/South Center, Marrakesh, 3-4 November.
- Zampetti, A. and T. Fredriksson (2003), "The development dimension of investment negotiations in the WTO: challenges and opportunities", *The Journal of World Investment*, vol. 4, N° 3.
- Zarsky, Lyuba (2005), *International Investment for Sustainable Development: Balancing Rights and Rewards*, Earthscan.



NACIONES UNIDAS

Serie

CEPAL

desarrollo productivo

## Issues published

A complete list as well as pdf files are available at

[www.eclac.org/publicaciones](http://www.eclac.org/publicaciones)

- 188 International arbitration based on investor-State dispute settlement clauses in international investment agreements: challenges for Latin America and the Caribbean, Michael Mortimore (LC/L.3049-P) No de venta S.09. II. G.51 (US\$10.00), 2009.
- 187 Theory and Practice of Industrial Policy. Evidence from the Latin American Experience, Wilson Peres, Annalisa Primi (LC/L.3013-P) N° de venta E.09.II.G.34 (US\$10.00), 2009.
- 186 Aglomeraciones productivas locales en Brasil, formación de recursos humanos y resultados de la experiencia CEPAL – SEBRAE, Francisco Teixeira, Carlo Ferraro (LC/L.3005-P) N° de venta S.09.II.G.13 (US\$10.00), 2009.
- 185 Del monopolio de Estado a la convergencia tecnológica: evolución y retos de la regulación de telecomunicaciones en América Latina, Carlos Razo, Fernando Rojas (LC/L.2849-P) N° de venta S.07.II.G.172 (US\$10.00), 2007
- 184 Evaluación de un programa de innovación y sistemas de producción en América Latina: estudio sobre la dinámica de redes, Mario Cimoli (LC/L.2842-P) N° de venta S.07.II.G.165 (US\$10.00), 2007.
- 183 Pobreza rural y políticas de desarrollo: avances hacia los Objetivos de Desarrollo del Milenio y retrocesos de la agricultura de pequeña escala, Martine Dirven. (LC/L.2841-P) N° de venta S.07.II.G.164 (US\$10.00), 2007.
- 182 Korean OFDI. Investment strategies and corporate motivation for investment abroad, Jae Sung Kwak (LC/L.2804-P) N° de venta S.07.II.G.137 (US\$10.00), 2007.
- 181 Producción de Biomasa para combustibles líquidos: el potencial de América Latina y el Caribe, Carlos Razo, Carlos Ludeña, Alberto Saucedo, Sofía Astete-Miller, Josefina Hepp y Alejandra Vildósola. (LC/L. 2803-P) N° de venta S.07.II.G.136 (US\$10.00), 2007.
- 180 Pymes y articulación productiva. Resultados y lecciones a partir de experiencias en América Latina, Marco Dini, Carlo Ferraro y Carolina Gasaly. (LC/L.2788-P) N° de venta S.07.II.G.138 (US\$10.00), 2007.
- 179 El monitoreo de los resultados de políticas agrícolas rurales: deficiencias de las estadísticas tradicionales, nuevas herramientas y su aplicación en el Municipio de Carapeguá, Paraguay, retirada
- 178 Biocombustibles y su impacto potencial en la estructura agraria, precios y empleo en América Latina, Carlos Razo, Sofía Astete-Miller, Alberto Saucedo, Carlos Ludeña. (LC/L.2768-P) N° de venta S.07.II.G.104 (US\$10.00), 2007.
- 177 Capital de riesgo y mecanismos financieros de apoyo a la innovación en Brasil y Chile, Luis Felipe Jiménez, (LC/L.2763-P) N° de venta S.07.II.G.99 (US\$10.00), 2007.
- 176 Cinco piezas de política de desarrollo productivo, Mario Cimoli, Martine Dirven, Carlo Ferraro, João Carlos Ferraz, Nicolo Gligo, Martin Hilbert, Wilson Peres, Annalisa Primi y Giovanni Stumpo. (LC/L.2704) N° de venta S.07.II.G.53 (US\$10.00), 2007.
- 175 Políticas activas para atraer inversión extranjera directa en América Latina y el Caribe, Nicolo Gligo S.(LC/L2667-P) N° de venta S.07.II.G (US\$10.00), 2007.
- 174 Características del empleo rural no agrícola en América Latina con énfasis en los servicios, Claus Köbrich y Martin Sirven, (LC/L. 2659-P), N° de venta: S.07.II.G.10 (US\$ 10), 2007
- 173 Capital de riesgo para la innovación: lecciones de países desarrollados, Luis Felipe Jiménez, (LC/L.2617-P), N° de venta S.06.II.G.159 (US\$10.00), 2006.
- 172 Investimento brasileiro no exterior: Panorama e considerações. Marcia Tavares, (LC/L.2624-P), N° de venta P.06.II.G. 148. (US\$10.00), 2006.
- 171 Los efectos potenciales del tratado de libre comercio entre Ecuador y Estados Unidos en las mujeres rurales ecuatorianas, César Morales y Soledad Parada, Red de desarrollo agropecuario, (LC/L.2496-P), N° de venta S.06.II.G.28 (US\$10.00), 2006.
- 170 Disposiciones agroalimentarias en los Tratados de Libre Comercio con Estados Unidos: avances y limitaciones para futuras negociaciones con socios latinoamericanos, Mónica Rodrigues, Red de desarrollo agropecuario (LC/L.2483-P), N° de venta S.06.II.G.11 (US\$10.00), 2006.

- 169 Organización industrial y competencia en las telecomunicaciones en América Latina: estrategias empresariales, Judith Mariscal, Eugenio Rivera, Red de reestructuración y competitividad (LC/L.2423-P), N° de venta S.05.II.G.170 (US\$10.00), 2005.
- 168 Crédito bancario no Brasil: Participação das pequenas empresas e condições de acesso, José Mauro de Morais, Red de Reestructuración y Competitividad (LC/L.2422-P), N° de venta P.05.II.G.169 (US\$10.00), 2005.
- 167 Impactos diferenciados de la liberalización comercial sobre la estructura agrícola en América Latina, Mónica Rodrigues, Red de desarrollo agropecuario (LC/L.2421-P), N° de venta S.05.II.G.168 (US\$10.00), 2005.
- 166 El (lento) retorno de las políticas industriales en América Latina y el Caribe, Wilson Peres, Red de reestructuración y competitividad (LC/L.2419-P), N° de venta S.05.II.G.166 (US\$10.00), 2005.
- 165 Science and Technology Policies in Open Economies: The Case of Latin America and the Caribbean, Mario Cimoli, João Carlos Ferraz y Annalisa Primi, (LC/L.2404-P), sales N° E.05.II.G.151 (US\$10.00), 2005.
- 164 La importancia de la tecnología de la información y la comunicación para las industrias de recursos naturales, Graciela Moguillansky, Red de inversiones y estrategias empresariales (LC/L.2401-P), N° de venta S.05.II.G.148 (US\$10.00), 2005.
- 163 El precio de mercado de la tierra desde la perspectiva económica, Raimundo Soto, Red de desarrollo agropecuario (LC/L.2355-P), N° de venta S.05.II.G.97 (US\$10.00), 2005.
- 162 Informe sobre la industria automotriz mexicana, Michael Mortimore, Faustino Barron, Red de inversiones y estrategias empresariales (LC/L.2304-P), N° de venta S.05.II.G.52 (US\$10.00), 2005.
- 161 Macroeconomic policies, sector performance and firm response: the case of Chile's textile goods market, Beverly Carlson, Restructuring and Competitiveness Network (LC/L.2255-P), Sales N° E.05.II.G.12 (US\$10.00), 2005.
- 160 Liberalización comercial agrícola con costos de transporte y transacción elevados: evidencia para América Latina, Mónica Kjöllerstrom, Red de Desarrollo Agropecuario (LC/L.2232-P), N° de venta S.04.II.G.152 (US\$10.00), 2004.
- 159 Innovación participativa: experiencias con pequeños productores agrícolas en seis países de América Latina, Marcela Córdoba, María Verónica Gottreet, Tito López y Asociados, Álvaro Montes, Liudmila Ortega, y Santiago Perry, Red de Desarrollo Agropecuario (LC/L. 2203-P), N° de venta S.04.II.G.128 (US\$ 10.00), 2004.
- 158 Acuerdos bilaterales de inversión y demandas ante Tribunales Internacionales: la experiencia argentina reciente, Leonardo E. Stanley, Red Inversiones y Estrategias Empresariales (LC/L.2181-P), N° de venta S.04.II.G.108 (US\$10.00), 2004.
- 157 Áreas económicas locales y mercado de trabajo en Argentina: estudio de tres casos, Ximena Mazorra, Agustín Filippo y Diego Schleser, Red de reestructuración y competitividad (LC/L. 2151-P), N° de venta S.04.II.G.79 (US\$ 10.00), 2004.
- 156 A Chilean wine cluster? Governance and upgrading in the phase of internationalization Evert-Jan Visser, Red de reestructuración y competitividad (LC/L.2138-P), sales N° E.04.II.G.67 (US\$10.00), 2004.
- 155 Competitividad del sector agrícola y pobreza rural: el papel del gasto público en América Latina, Mónica Kjöllerström, Red de desarrollo agropecuario, (LC/L.2137-P), N° de venta S.04.II.G.66 (US\$10.00), 2004.
- 154 Créditos a PYME en Argentina: racionamiento crediticio en un contexto de oferta ilimitada de dinero, Agustín Filippo, Daniel Kostzer y Diego Schleser, (LC/L.2136 -P), N° de venta S.04.II.G.65 (US\$10.00), 2004.
- 153 Salud y seguridad en el trabajo y el papel de la formación en México (con referencia a la industria azucarera), Leonard Mertens y Mónica Falcón, (LC/L.2130-P), N° de venta S.04.II.G.58 (US\$10.00), 2004.
- 152 Políticas públicas y la agricultura latinoamericana en la década del 2000, Pedro Tejo, (LC/L.2121-P) N° de venta S.04.II.G.50 (US\$10.00), 2004.

- Readers wishing to obtain the listed issues can do so by writing to: Distribution Unit, ECLAC, Casilla 179-D, Santiago, Chile, Fax (562) 210 2069, E-mail: [publications@cepal.org](mailto:publications@cepal.org).

Name: .....
Activity: .....
Address: .....
Postal code, city, country: .....
Tel.: ..... Fax: ..... E.mail: .....

---

## كيفية الحصول على منشورات الأمم المتحدة

يمكن الحصول على منشورات الأمم المتحدة من المكتبات ودور التوزيع في جميع أنحاء العالم. استعلم عنها من المكتبة التي تتعامل معها أو اكتب إلى : الأمم المتحدة ، قسم البيع في نيويورك أو في جنيف .

### 如何 购取 联合国 出版物

联合国出版物在全世界各地的书店和经售处均有发售。请向书店询问或写信到纽约或日内瓦的联合国销售组。

### HOW TO OBTAIN UNITED NATIONS PUBLICATIONS

United Nations publications may be obtained from bookstores and distributors throughout the world. Consult your bookstore or write to: United Nations, Sales Section, New York or Geneva.

### COMMENT SE PROCURER LES PUBLICATIONS DES NATIONS UNIES

Les publications des Nations Unies sont en vente dans les librairies et les agences dépositaires du monde entier. Informez-vous auprès de votre libraire ou adressez-vous à : Nations Unies, Section des ventes, New York ou Genève.

### КАК ПОЛУЧИТЬ ИЗДАНИЯ ОРГАНИЗАЦИИ ОБЪЕДИНЕННЫХ НАЦИЙ

Издания Организации Объединенных Наций можно купить в книжных магазинах и агентствах во всех районах мира. Наводите справки об изданиях в вашем книжном магазине или пишите по адресу: Организация Объединенных Наций, Секция по продаже изданий, Нью-Йорк или Женева.

### COMO CONSEGUIR PUBLICACIONES DE LAS NACIONES UNIDAS

Las publicaciones de las Naciones Unidas están en venta en librerías y casas distribuidoras en todas partes del mundo. Consulte a su librero o diríjase a: Naciones Unidas, Sección de Ventas, Nueva York o Ginebra.

---

Las publicaciones de la Comisión Económica para América Latina y el Caribe (CEPAL) y las del Instituto Latinoamericano y del Caribe de Planificación Económica y Social (ILPES) se pueden adquirir a los distribuidores locales o directamente a través de:

Publicaciones de las Naciones Unidas  
Sección de Ventas – DC-2-0853  
Fax (212)963-3489  
E-mail: publications@un.org  
Nueva York, NY, 10017  
Estados Unidos de América

Publicaciones de las Naciones Unidas  
Sección de Ventas, Fax (22)917-0027  
Palais des Nations  
1211 Ginebra 10, Suiza

Unidad de Distribución  
CEPAL – Casilla 179-D  
Fax (562)208-1946  
E-mail: publications@eclac.cl  
Santiago de Chile

Publications of the Economic Commission for Latin America and the Caribbean (ECLAC) and those of the Latin American and the Caribbean Institute for Economic and Social Planning (ILPES) can be ordered from your local distributor or directly through:

United Nations Publications  
Sales Sections, DC-2-0853  
Fax (212)963-3489  
E-mail: publications@un.org  
New York, NY, 10017  
USA

United Nations Publications  
Sales Sections, Fax (22)917-0027  
Palais des Nations  
1211 Geneve 10, Switzerland

Distribution Unit  
CEPAL – Casilla 179-D  
Fax (562)208-1946  
E-mail: publications@eclac.cl  
Santiago, Chile

ISBN 978-92-1-121722-3



9 789211 217223

S0900333 • October 2010  
ISBN 978-92-1-121722-3 • E.09.II.G.51  
Copyright © United Nations 2010  
Printed in Santiago, Chile - United Nations