Working Group on Development and Environment in the Americas

Discussion Paper Number 27

Justice Denied: Dispute Settlement in Latin America's Trade and Investment Agreements

Michael Mortimore
Leonardo Stanley

October 2009

The Working Group on Development and Environment in the Americas, founded in 2004, brings together economic researchers from several countries in the Americas who have carried out empirical studies of the social and environmental impacts of economic liberalization. The Working Group's goal is to contribute empirical research and policy analysis to the ongoing policy debates on national economic development strategies and international trade. The Working Group held its inaugural meeting in Brasilia, March 29-30, 2004. This paper is one of eight written for the Brasilia meetings. They are the basis for "**Globalization and the Environment: Lessons from the Americas,"** a policy report published by the Heinrich Böll Foundation in July 2004.

The Policy Report and Discussion Papers produced by the Working Group can be found on the Web at:
http://ase.tufts.edu/gdae/WorkingGroup.htm

Index

Executive Summary……………………………………………………………………..**1**
Introduction... **2**
Section 1- The Convoluted International Architecture Relating to Foreign Investment and Dispute Settlement **4**
1. Achievements in the International Architecture for Foreign Trade: a multilateral trading system based on trade liberalization and dispute settlement 4
2. Winding Roads toward Foreign Investment Protection and Liberalization................ 8
a) Initiatives by international institutions 9
b) Negotiations in the WTO (TRIMs, GATS and TRIPS) 13
c) Bilateral and plurilateral international investment agreements 16
3. Negotiating Strength and Investor-State Dispute Settlement 24
a) The exceptional situation of the principal developing countries and transition economies (BRICs)... 24
b) BRICs´ Tales 31
Preliminary conclusions.. 32
Section 2- The Risks of IA-ISDS Clauses and the Challenges Facing Host Countries…………………………………………………………………………..**33**
1. Do the benefits from IA-ISDS clauses justify the risks borne by host countries?.... 33
a) Do IA-ISDS guarantees in IIAs produce increased foreign investment inflows? 34
b) Are IA-ISDS guarantees in IIAs worth the problems they bring and the risks involved?.. 35
2. Can IA-ISDS mechanisms be fixed so that the benefits justify the risks?............ 51
Section 3. The Management of IA-ISDS Risk in Latin America and the Caribbean55
1. Two different worlds of IA-ISDS risks from IIAs in LAC 56
2. LAC experiences dealing with IA-ISDS risks.. 60
a) Financial costs of IA-ISDS jurisprudence 60
b) Expansive interpretations in IA-ISDS jurisprudence 61
c) Legitimacy issues.. 72
3. Preliminary Conclusions.. 81
Section 4 - Conclusions **82**
References.. **85**

Boxes

Box 1: Trade dispute settlement under GATT and WTO ... 6
Box 2: Investor-State Dispute Settlement under International Investment Treaties ... 10
Box 3: The Basic Elements of Traditional European BITs ... 17
Box 4: The US Bilateral Investment Treaty Program ... 20
Box 5: NAFTA Dispute Settlement- Chapter 11 ... 21
Box 6: TNCs are not completely satisfied with IA-ISDS procedures ... 34
Box 7: Expansive Interpretations under NAFTA Chapter 11 Investment Arbitration ... 37
Box 8: Protecting Foreign Investment Can Be Very Costly: a Canadian perspective ... 48
Box 9: CARIFORUM-EC EPA as a Precedent-Setting RTA ... 58
Box 10: Metalclad Corporation v. United Mexican States: expansive interpretations of fair and equitable treatment and indirect expropriation ... 61
Box 11: MTD Equity v. Republic of Chile: expansive interpretation of fair and equitable treatment ... 62
Box 12: Who Can Resort to International Investment Arbitration? The Definition of "Investor" in IA-ISDS Jurisprudence in LAC ... 64
Box 13: MFN in three Argentine cases: Gas Natural, Siemens, and Suez/ Aguas de Barcelona/ Interaguas ... 67
Box 14: Elevating State Contracts to Treaty Jurisdiction: cases from Argentina ... 68
Box 15: Indirect expropriation in the water and sewage sector in Argentina: a question of degree? ... 70
Box 16: Two cases involving Occidental Petroleum Corporation v. Republic of Ecuador ... 74
Box 17: The CMS and LG&E cases against Argentina and the necessity defense for the Argentine emergency measures ... 79
Box 18: The Case for an International Foreign Investment Court ... 84

Tables

Table 1: Characteristics of Groups of LAC Countries with ICSID Cases ... 57

Figures

Figure 1: Argentina: foreign investment cycles, 1975-2004 ... 76

Annex Table

Annex Table 1: Latin America and the Caribbean: investor-state arbitration proceedings instituted with ICSID (Concluded cases) ... 100
Annex Table 2: Latin America and the Caribbean: investor-state arbitration proceedings instituted with ICSID (Pending cases) ... 103

Justice Denied: Dispute Settlement in Latin America's Trade and Investment Agreements

Michael Mortimore
Leonardo Stanley

Executive Summary

This report analyses the arbitration schemes under investor-state dispute provisions in Latin America's numerous trade and investment agreements. It is found that such provisions are biased toward international investors. Such a bias can skew legal systems in the region and threaten the ability of foreign investment to spur much-needed economic development in the Americas.

The new international system established at the end of the World War Two (WWII) dramatically altered the global scenario from one characterized by wars and depressions during the first half of the 20th century to one of stability and prosperity which lasted until the global crisis of 2008. International security, market economics and democracy become the main objectives pursued by this new international system. Remarkably, the world economy experienced impressive advances in terms of trade liberalization. In terms of investment, things were quite different. Since the failure to reach an agreement in Havana in the late-1940s, the development of an architecture for foreign investment became an exercise in provisional initiatives and second-bests. In that context new bilateral schemes emerged in the 1950s and mushroomed in the 1990s in a favorable market-friendly context.

Overall foreign investors took advantage of the situation by passing many risks associated with foreign direct investment onto host countries. Moreover, this new scheme generalized the use of international arbitration tribunals based on investor-State investment dispute settlement (IA-ISDS) mechanisms, a procedure that has demonstrated excessive discretion in dispute-resolution. As a result, foreign investors' interests have taken priority over host countries´ development programs. This explains the rising concern about the legitimacy of IA-ISDS procedures in Latin America. The large number of disputes under international arbitration could provoke a clash between capital-importing and exporting countries of a magnitude not seen since the wave of expropriations and nationalizations in the early 1960s.

It is time to re-evaluate IA-ISDS practices from this perspective. The inconsistent, incoherent and unpredictable results stemming for the current system suggest that it might be better to revisit the original post-WWII goals to design a new system for foreign investment dispute settlement. To introduce balance, effectiveness and credibility into the relationship between foreign investors and host countries, it makes sense to re-examine the roots of the current crisis. Balance with regards to foreign investment does not come from treating different actors (sovereign states and commercial enterprises) the same way but from recognizing and respecting that they are different, with distinct rights and duties under international law.

Introduction

Over the past twenty years foreign direct investment (FDI) has been continuously rising, observing an increasing participation of developing countries and the transition economies of South-East Europe (SEE) and the Commonwealth of Independent States (CIS). Surprisingly, although the importance of market-supporting institutions for globalization it is widely recognized, virtually no multilateral rules for FDI exist. Henceforth, direct investments in developing countries become overwhelmingly governed by international investment agreements (IIAs) that flourished in the past forty-five years, and especially in the past two decades. Consequently, the emerging international legal framework rests on the twin foundations of customary international law and national laws and regulations and relies for its substance on a multitude of IIAs and other legal instruments (UNCTAD, 2004a).

Along the protection and liberalization of investments, the new IIAs scheme would generalize the investor-State investment dispute – settlement (IA-ISDS) mechanism. Accordingly, foreign investors become entitled to indict host countries at international arbitration tribunals. But, although FDI flows benefited a vast group of emerging economies and developing countries, most of the claims were initiated against a group of Latin American countries, a collective which accounts a disproportionate number (100) and share (34.5 percent) of the cumulative cases of international arbitration stemming from IA-ISDS clauses of its IIAs, according to the figures for 2007 of the United Nations Conference on Trade and Development-UNCTAD (2008, p.14). Beyond even the very notable financial dimension of these cases (awards, lawyers' fees, administrative costs, etc.) which sometimes run into hundreds of millions of dollars per case; most countries in the region face certain palpable development challenges from the risks associated with such international arbitration. With regards to foreign investment *protection*, there exist relatively imprecise and dispute-prone commitments and obligations due to the fact that most of the LAC's bilateral investment treaties (BITs)[1] are still the original, unmodified versions from 1990s. Plus state contracts in certain conditions (those with stabilization clauses and for host countries with BITs containing umbrella clauses) can be elevated to treaty status. In terms of foreign investment *liberalization*, there also exist more demanding commitments and obligations in many of the regional trade agreements (RTAs)[2] in LAC because they incorporate the much more intrusive paradigm of the North American Free Trade Agreement (NAFTA)[3] even though some have been modified to a certain extent subsequently. Thus, LAC carries higher risks than other regions with respect to international arbitration resulting from its international investment agreements that incorporate the IA-ISDS mechanism.

The aim of this paper is to better comprehend the international foreign investment architecture dealing with foreign investment dispute settlement, to identify the nature of the risks related to IA-ISDS clauses and to examine the situation in LAC countries for the purpose improving IA-ISDS risk management in the region.

Section 1 describes how the new international system established at the end of the World War Two (WWII) dramatically altered the global scenario from one characterized by wars and depressions during the first half of the 20th century to one of stability and prosperity which lasted until the global crisis of 2008. Along this period, and under the auspicious of GATT, the world economy experienced impressive advances in terms of trade liberalization. But, in terms of investment, things were just completely different. Since the failure to reach an agreement at La Havana, the articulation of the new international trade and foreign investment architecture became an exercise in provisional initiatives and second-bests. Consequently, investments disputes were left to the mercy of market forces, and tensions between capital importing and exporting countries become recurrent. In that context a new bilateral scheme emerged in the late fifties, pulled by European investors in order to protect their belongings at former territories. However, it was not until the 90s that this institutional framework makes its moment, at pace with a predominant "market friendly" approach. Foreign investors profited of that, bypassing risks towards host countries along from shielding them from local courts. However, some few developing countries and transition economies of interest to foreign investors possessed negotiating strength sufficient to avoid or limit the risk from IA-ISDS clauses in their IIAs. The great majority of other developing countries and transition economies did not. In the first group one could include the main emerging countries that generally avoided or severely 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. In the second group, it might include a significant number of developing countries and transition economies have bought into the IA-ISDS practices of IIAs in the belief that they will receive more foreign investment in return. Some do so out of commitment whereas others were cajoled into it as a consequence of their weak negotiating strength.

Section 2 will analyze two related questions associated with the challenges imposed by the IA-ISDS scheme. On the one hand, it compares host countries benefits and costs to participate in the bilateral scheme. On the other hand, it evaluates the problems associated with the presence of an increasingly unpredictable IA-ISDS scheme. In addition, 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. This *expansive interpretation* might introduce higher levels of uncertainty into public policy, but also lead to *legitimacy issues*, such as policy paralysis or regulatory chill. In either case, it represents a serious challenge to host governments along a turn public opinion against IA-ISDS guarantees.

Section 3 evaluates the effectiveness of a country's or a region's IA-ISDS risk performance, including the essential nature of foreign investment bases covered by the IIAs. Attention will be put on Latin America Countries (LAC), a region very active in both the IIAs scheme but also at the IA-ISDS tribunals. In particular, when looking at LAC experiences at dealing with IA-ISDS risks the paper will consider three main aspects: the financial cost, some of the expansive interpretations of IA-ISDS jurisprudence, and some of the legitimacy issues. After observing all cases against LAC at ICSID tribunals (concluded or pending), and considering the aspects highlighted above, it might be tempted to qualify countries in two main groups. A first one, include those well disposed to carry the risks associated with the IA-ISDS procedures in their IIAs ("RTA-centric" countries). A second group that for different reasons do not seem well - disposed to do so. It might be worth to remember that a cyclical pattern has accompanied LAC economies, impeding the construction of stable institutions. But, the institutional transformation undertaken during the neoliberal years and the crisis that followed came to challenge the former vision. Host countries began to sign a significant number of IIAs that contained IA-ISDS clauses. A principal legitimacy issue, which can be identified in these experiences, was the feeling that the constraints on national sovereignty in terms of implementing a natural resource-based development strategy exceeded the benefits from the IA-ISDS system.

Section 1- The Convoluted International Architecture Relating to Foreign Investment and Dispute Settlement

The new international system established by the victors of the World War Two (WWII), led by the United States of America (USA), dramatically altered the global trajectory from one characterized by wars and depressions during the first half of the 20th century to one of stability and prosperity until the global crisis of 2008. Three of the principal objectives of the new international system were international security, market economics and democracy (representative government) and all experienced remarkable success. The North Atlantic Treaty Organization[4] established a mutual security network for its North American and European members, which brought peace to that part of the world, and eventually allowed NATO to face down the Soviet-led Warsaw Pact.[5] The North American-European alliance similarly provided the basis for institutionalizing market economics, most prominently in the fields of foreign trade and international investment.[6] Finally, by the end of the 20th century, some form of representative democratic government[7] was evident in about half the 200 or so members of the United Nations Organization, including virtually all the countries of North America and Europe, as well as a significant number of developing countries, to which can be added the more recent democratic initiatives of a number of transition economies. In this context, the North American-European "transatlantic" alliance took it upon itself to rewrite the global rules for international trade and foreign investment during the post-WWII period.

1. Achievements in the International Architecture for Foreign Trade: a multilateral trading system based on trade liberalization and dispute settlement

Originally, an International Trade Organization responsible for employment, foreign investment, international commodity agreements, restrictive business practices and services, as well as international trade, was to have emerged from the negotiations undertaken in Havana, Cuba in 1948 at the invitation of the US Government. That aim was dashed when President Truman did not even present the negotiated draft to the US Congress aware that it would not be approved because of the international commitments that it entailed. Since then, the articulation of the new international trade and foreign investment architecture became an exercise in provisional initiatives and second-bests, which reflected more the evolving relative negotiating strengths of the major players (USA and Europe) rather than any well-conceived master plan.

After a slow start, impressive advances were registered with regards to the post- WWII international architecture for *international trade*. The General Agreement on Tariffs and Trade (GATT) was signed in 1947 by 23 contracting parties as an unofficial, de facto international organization, valid until the ITO was formally established. The GATT 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)[8] and most-favored nation treatment (MFN),[9] 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. That achievement was made possible in large part because the USA and Europe had resolved many of their principal outstanding differences and agreed to multilateral rules for dealing with future trade disputes.

The principal functions of the WTO[10] were to serve as a forum for trade negotiations, as administrator of the WTO trade agreements[11], as a means to resolve trade disputes, and as a mechanism to monitor country trade policy.[12] Compared to the GATT which was an informal organization which dealt solely with trade in goods, the WTO became a rules-based organization whose activities were extended into other areas, such as performance requirements, trade in services, and traded inventions, creation and designs (that is, intellectual property). The 51 original members were eventually joined by 99 others (including China in 2001) by 2007 and presently a further 30 observers (including the Russian Federation) are undertaking accession negotiations. 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 effectiveness of the trade dispute settlement process itself (Box 1). It was considered the *central pillar* of the multilateral trading system and its usefulness was evident in preventing global trade disputes from degenerating into global economic instability or military conflict as had taken place in the past.

One significant factor supporting the advance of multilateral trade negotiations was the ability of both European negotiators and US to sell to other WTO members the relevance of the theory of *comparative advantage.*[13] This ostensibly demonstrated how all countries had something to gain from trade liberalization within a functional multilateral trading system. In this fashion, first, Europe and the USA, then other industrial countries, followed by existing and emerging developing countries and eventually several transition economies came to appreciate the benefits to be had by way of their stakes in the multilateral trading system, in spite of the numerous specific conflicts that arose.

Box 1: Trade dispute settlement under GATT and WTO

Under GATT Article XXIII *state-to-state* diplomatic consultations including working parties of country representatives were initially the means of resolving such disputes; however, their ineffectiveness led to the use of *ad hoc* panels of experts after 1955. Even these panels faced procedural problems resulting in delays since no strict deadlines were imposed and, furthermore, the appeal process depended on the representatives of members reaching consensus. Thus the GATT dispute settlement process was characterized by the lack of fixed timetables, the ability of individual representatives of members to block rulings and, generally, inconclusiveness.

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 (DSB) according to the understanding on rules and procedures governing the settlement of disputes (DSU). Any party to a dispute (not third parties) could appeal a panel report to a seven-member standing Appellate Body (AB) established for this purpose. The AB had the power to uphold, modify or reverse the legal interpretations adopted by the panel. WTO panel and AB reports were binding on the parties to the dispute once the DSB adopted them. They were not binding interpretations of the WTO agreements, however, and had no legal effect on other WTO Members.

Formal deadlines were established for consultations and mediation (60 days), the appointment of a panel (45 days), the final report to the parties involved (180 days) the final report to WTO members (21 days), and the adoption of the report by the DSB (60 days). An appeal would take another 30 days. The WTO disputes were to take a maximum of one year, if no appeal was launched. Rulings were automatically adopted unless there was a consensus to reject the ruling, in other words, a country wanting to block a ruling has to persuade all other WTO members (including the adversary in the case) to share its view. Furthermore, the Dispute Settlement Body was authorized to allow the complaining side to impose limited trade sanctions if prompt compliance was not forthcoming. In this way, the WTO introduced enforcement into multilateral trade relationships.

Two of the most important cases that involved disputes between USA and Europe under WTO were the US-FSC and the EC-Trademarks and Geographical Indications cases. The 1998 case *US – FSC* (DS 108), concerned US tax exemptions for the Foreign Sales Corporation (FSC), in respect of their export-related foreign source trade income. The Appellate Body upheld the Panel's finding, as claimed by the European Communities (EC), that the FSC measure in fact represented government revenue foregone that was "otherwise due" and, thus a "financial contribution" within the meaning of Article 1.1. of the Agreement on Subsidies and Countervailing Measures. In other words it has been established that the FSC measures constituted prohibited export subsidies.

The US (and Australian) claim was upheld against the trade rules of the EC in the case of *EC- Trademarks and Geographical Indications* (DS 174, 290), in which the measure at issue was the EC Regulation related to the protection of geographical indications and designations of origin (GIs). The panel found that the equivalence and reciprocity conditions in respect of GI protection under the EC Regulation violated the national treatment obligation under TRIPS Article 3 by according less favorable treatment to non-EC nationals in comparison to EC nationals. By providing "formally identical", but in fact different procedures based on the location of a GI, the EC modified the "effective equality of opportunities" between different nationals to the detriment of non-EC nationals. These two cases demonstrated that the dispute settlement process worked and that the major players respected the results.

An important case involving a dispute between industrialized countries that directly impacted developing countries was the so-called "banana" dispute. The European Commission Regulation number 1637/98 defined imports of bananas into the European Communities and access to the EC market for different categories of bananas. Caribbean bananas were grown on small, family-run farms mostly from ex-European colonies. A September, 1997 WTO decision pushed by the USA, backed by large plantation companies like Chiquita, obliged these local producers to compete directly with giant transnational corporations with production in Latin America. According to the WTO ruling, there was not to be discrimination based on where the bananas were produced.

The “cotton” dispute also received considerable international attention since it represented a claim by a developing country (Brazil) against a prominent industrialized one (USA). The initial ruling was a mixed bag. The WTO dispute resolution panel ruled in favor of Brazil on most key points, and the Appellate Body report, released on March 3, 2005, mostly confirmed the initial panel's rulings. The measures at issue were the US agricultural "domestic support" measures, export credit guarantees and other measures alleged to be export and domestic content subsidies. To be successful, Brazil first had to establish that US subsidies exceeded agreed-upon limitations set in 1992. The United States attempted to limit the scope of the complaint strictly to cotton, but Brazil successfully argued that all other commodities could be considered export credit programs as well. Thus, some developing countries also had some success by bringing trade disputes to the WTO for resolution.

Inevitably, the major players, USA and Europe, encountered periodic trade disputes related to their dominance of global trade, and they often made recourse to the dispute settlement mechanism of the WTO. Although these events tended to grab headlines, such disputes currently impact only some 2% of USA-EU trade. In other words, an effective dispute settlement procedure facilitated the expansion of the multilateral trading system. According to the WTO statistics as of 2006, industrial countries (mainly Australia, Canada, European Communities/Union, US, and Japan) have faced disputes in 191 cases and developing countries (mainly Argentina, Brazil, Chile, Republic of Korea, Egypt, Guatemala, India, Indonesia, Mexico, Dominican Republic, Thailand, Turkey) have done so in 61 cases. The leader among the industrial countries was the USA with 98 cases, followed by the EU with 53. Developing country leaders were Republic of Korea with 10 registered cases, followed by Argentina, Brazil, Mexico and India.

Source- based on http://www.wto.org and http://ec.europa.eu/trade/issues/bilateral/countries/USAa/index_en.htm; WTO dispute settlement: One-page case summaries 1995-December 2007 (WTO series); http://www.choicesmagazine.org and Alvarez, J. (2008) in Sauvant (2008)

The relatively stable and functional multilateral trade system created by the WTO did, nevertheless, experience certain significant challenges. One of the most serious had to do with the increased use of regional trade agreements which eroded the MFN principle, increased discrimination and complexity in international trade relations and undermined transparency (Fiorentino et al., 2006). What had been considered “building blocks” for multilateral trade liberalization (such as the consolidation of European integration) were accompanied by “stumbling blocks” (such as the US policy to push for its own “WTO plus” RTA network). Another serious problem concerned the latest negotiations of the WTO -- the Doha Round -- ostensibly the “Development Round”, as developing countries insisted on increased concrete benefits. Negotiations eventually ground to a halt in 2008 when both industrialized and developing countries maintained their inflexible positions. Thus, while impressive advances in the international trade architecture were achieved in the post-WWII period, certain serious problems arose with regards to the diverging interests of the principal members (USA and Europe) and the limited nature of the benefits received by new members (developing countries and transitions economies). Nonetheless, in comparison, the international architecture for foreign investment was considerably more complex and convoluted and, notably, less credible.

2. Winding Roads toward Foreign Investment Protection and Liberalization

The conflict that existed with regard to *foreign investment* allowed for little immediate advance for that aspect of the new international architecture after WWII. It might be recalled that, historically, foreign investment disputes between investor countries and developing host countries often had been the subject of gunboat diplomacy, that is, the use of force on the part of the investor country (for example, French, British and Spanish navies blockaded the Mexican port of Veracruz in 1862 and British, German and Italian navies blockaded Venezuela in 1902). These kinds of practices produced harsh reactions from host countries. For example, in Latin America, the Calvo[14] and Drago[15] doctrines emerged from 19th and early 20th experiences and tainted the relationship between investor countries and Latin American governments for a century.

The early post-WWII reality was one of rising nationalizations, first by communist takeovers in China, Eastern Europe and Cuba, then during the 1960s and 1970s by numerous developing countries which expropriated foreign investments in their territories, especially in the natural resource sector (mostly petroleum and mining). Much of the petroleum industry in the Middle East and North Africa (Iran, Iraq, Saudi Arabia, Algeria, and Libya) was nationalized during this period as were several foreign companies in Latin America and the Caribbean in the petroleum (the Standard Oil Company subsidiaries in Venezuela and Peru, and the Gulf Oil subsidiaries in Ecuador and Bolivia) and mining sectors (the Kennecott and Anaconda subsidiaries in Chile, and the Alcoa, Kaiser and Reynolds subsidiaries in Jamaica). These events led to acrimonious disputes over compensation between home country governments (particularly the USA) and host country governments (especially in Latin America and the Caribbean).

Existing developing countries along with some of the newly independent ones, often backed by the Soviet bloc, became very active in the General Assembly of the United Nations in defending their sovereignty vis-a-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 appropriate compensation in the case of such expropriation would be less than full compensation (in contrast to the US position regarding the Hull formula16). 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 on the Economic Rights and Duties of States demanded recognition of the economic independence for States and their rights to exercise authority over, regulate and supervise foreign investment present in and transnational corporations operating in their national jurisdictions. Furthermore, the United Nations became the setting for the negotiations on a draft Code of Conduct on Transnational Corporations, that is, new rules of behaviour for foreign companies.17

Given the conflictive starting point for foreign investment, several separate means were employed by investor countries in their attempt to establish a new international architecture related to foreign investment. These ranged from initiatives by international institutions controlled by capital-exporting countries, such as the Bretton Woods financial institutions and the OECD, to negotiations on foreign investment-related matters in the WTO, to bilateral and plurilateral international investment agreements, such as bilateral investment treaties and investment chapters of RTAs.

a) Initiatives by international institutions

The first post-WWII moves of industrial countries in the foreign investment field, after the ITO initiative died, entailed simply pursuing economic revival and development as well as promoting private enterprise. In this, the Bretton Woods financial institutions[18] were fundamental. The International Monetary Fund initially focused on financial matters and foreign exchange regimes to facilitate foreign trade and investment; however, after the USA left the gold standard in 1971 the 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, today known as the World Bank, originally financed the reconstruction of economies devastated by WWII, however, its role was progressively expanded by way of a number of new institutions, such as the International Finance Corporation-IFC[19] (1956), the International Development Agency-IDA[20] (1960), the International Center for the Settlement of Investment Disputes-ICSID (1968) and the Multilateral Investment Guarantee Agency-MIGA[21] (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 or the Washington Convention) which began with 30 member States and now has over one hundred and forty 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 to international investment treaties, such as BITs and the investment chapters of RTAs (Box 2). ICSID eventually revolutionized the relationship between foreign investors and host countries with regards to dispute settlement.

The role of the principal multilateral financial institutions (IMF and World Bank group) was 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 to the adoption of more orthodox economic policies, which by their very nature were increasingly foreign investor-friendly ones.

Box 2: 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 between private companies to resolve foreign investment disputes. The purpose of those procedures was to provide an effective solution based on the decision of an arbitration panel, which decided the merits of the case in accordance with international arbitration law. The most common institutional arbitration forums were ICSID (including the Additional Facilities), the Court of Arbitration of the ICC, the Arbitration Institute of the Chamber of Commerce of Stockholm, the London Court of International Arbitration (LCIA) plus ad hoc alternatives. The proceedings were usually in accordance with the arbitration rules of ICSID and the United Nations Commission in International Trade Law (UNCITRAL).[a/]
Some of the limitations to providing a final and enforceable decision by way of international arbitration were eliminated by way of 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 need comply with the laws of the state in which it was enforced with one that it only had to comply 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 did not conciliate or arbitrate disputes; it provided the institutional and procedural framework for independent conciliation commissions and arbitral tribunals constituted in each case to resolve the dispute. They were based on a treaty establishing an autonomous and self-contained system for the institution, conduct and conclusion of such proceedings. Arbitration and conciliation under the convention were entirely voluntary, but once the parties have given their consent, neither could unilaterally withdraw it. The Secretariat maintained the ICSID Panels of Conciliators and of Arbitrators to which each Contracting State could designate four persons and the Chairman of the Administrative Council could designate ten persons. Awards were considered final; however, they could be annulled under five specific conditions, that is, 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 is based. A further distinctive feature is that an arbitral award rendered pursuant to the Convention could not be set aside by the courts of the Contracting State, and was only subject to the post-award remedies provided for by the Convention. All Contracting States, whether or not party to the dispute, recognized and enforce ICSID Convention arbitral awards. Today, ICSID is considered to be the leading international arbitration institution devoted to investor-State dispute.

Initially, the ICSID Convention did not itself constitute the system of foreign investor protection because ratification of that treaty did not amount to a 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 (i.e. the International Court of Arbitration of the ICC), under different arbitration rules (i.e. the UNCITRAL Rules, and subject to different authorities for the appointment of presiding arbitrators (i.e. the President of the International Court of Justice). While 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. Those cases involved mainly African (16 cases) host countries and primarily concerned services; however, it is notable that four of those cases involved Latin America and the Caribbean, namely the nationalization of three US bauxite companies operating in Jamaica (3 cases) and one case involving petroleum in Trinidad and Tobago.

The major changes brought about by the IA-ISDS procedures of IIAs was that they gave foreign investors new choices (initially, the ability to seek remedy through international arbitration once local remedies were exhausted), it provided treaty status to such procedure, eventually acquiring a general consent to international arbitration on the part of host states, and it made international arbitration decisions final and enforceable. This provided foreign investors with significant new options to deal with foreign investment problems, especially those associated with expropriation or nationalization.

Sources: ICSID; UNCITRAL; Van Harten, 2005.

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

The IMF did so primarily by way of its Stabilization Programs (usually graduating their influence in the local economy by way of standby arrangements through extended fund facilities to structural adjustment facilities) packages.The World Bank did so mostly through Structural Adjustment Programs. These institutions often utilized cross-conditionality in their programs and sometimes in coordination with regional development banks. Specific reforms often included the reduction of the size and activities of the public sector, and liberalization of international trade and foreign investment, among other things. In 1992, the World Bank offered 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.

The principal institution for industrialized countries, known as the Organization of Economic Cooperation and Development-OECD[22] had a core mission to enhance the contribution of foreign investment to growth and sustainable development worldwide, by advancing foreign investment policy reform and international co-operation.
OECD member governments established binding disciplines for themselves and recommendations concerning the appropriate behavior for transnational corporations by means of legal instruments to which adhering countries committed themselves, such as the Codes of Liberation[23] (1961), the Declaration and Decisions on International Investment and Multinational Enterprises[24] (1976). Countries that adhered to the OECD instruments were obliged to concede transparent and non-discriminatory treatment to foreign investors. Initially, the 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, 2007, 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 the European Communities, and to allow accession by non-OECD members countries. In gist, the investor countries of the OECD attempted to negotiate a multilateral investment treaty reflecting their own investor interests and priorities which they hoped to extend to all other countries, while not allowing those same countries to formally participate in the negotiations.[25]

In April 1998 the MAI negotiations were discontinued and, according to the OECD, will not be resumed. They suffered from several serious problems that explain this outcome (Geiger, 2008, pp. 23-4). There existed a lack of consensus with regards 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 modeled 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 USA and European member countries on issues ranging from cultural diversity and national security to the scope of dispute settlement. Other difficulties were apparent and concerned changing political circumstances 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 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.[26] Businessmen tended to lose interest in the MAI when it became apparent that taxation would not be dealt with. Finally, many OECD national policymakers came to the opinion that the MAI might actually end up lowering foreign investment protection standards below those available in current IIAs. Overall and in general, it became clear that negotiating a multilateral foreign investment liberalization treaty, *even among investor countries themselves*, was considerably more complicated than expected.

In May of 2006, the OECD did an about-face by adopting a new Policy Framework for Investment (PFI) designed to stimulate global and regional dialogues on foreign investment and providing national policy assessment and peer review. Compared to the failed MAI, the new approach was non-prescriptive, comprehensive but non-exhaustive and participatory. The PFI aimed at promoting policy transparence, coherence of policy approaches and a rules-based system backed by public/private dialogue and stakeholder participation (Geiger, 2008, pp. 24-5)

In sum, the attempt by investor countries to increase foreign investment protection by way of the international institutions that they controlled worked out reasonably well with regards to issues concerning compensation for expropriation and nationalization and the establishment of international arbitration as a means to deal with investor-state disputes. Efforts to push an even more demanding agenda with regards to foreign investment liberalization eventually broke down. Both the OECD and the Bretton Woods financial institutions eventually eased back on many of their more aggressive initiatives in the area of new international architecture for foreign investment.

b) Negotiations in the WTO (TRIMs, GATS and TRIPS)

Major investor countries piggybacked on the success of multilateral trade initiatives, symbolized by the creation of the WTO, to institute several innovations in multilateral foreign investment instruments by dressing them up in trade clothing. Another important initiative was the establishment in 1996 of a Working Group that was to conduct analytical work on the relationship between foreign trade and international investment.

The <u>Trade-Related Investment Measures Agreement</u>-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 basic provisions of GATT 1994. 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).[27] Examples of inconsistent measures in the 1996 Agreement were spelled out in the Annex's Illustrative List.[28]

In terms of significant decisions taken by WTO TRIMs panels, the decision in *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 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 the tax and customs duty benefits that such benefits were "advantages" within the meaning of the illustrative List.

The <u>General Agreement on Trade in Services</u>-GATS was inspired by essentially the same objectives as its counterpart in merchandise trade, the General Agreement on Tariffs and Trade (GATT): creating a credible and reliable system of international trade rules; ensuring fair and equitable treatment of all participants; stimulating economic activity through guaranteed policy bindings; and promoting international trade and development through progressive liberalization. In services, GATS was intended to be only a first step in a longer-term process of multilateral rule-making and international trade liberalization.

The GATS consisted of three elements including the main text, which indicated general obligations and disciplines, annexes that dealt with rules for specific sectors and individual country commitments to provide access to their markets (and their special temporary suspension of MFN). The commitments of individual countries to open markets in specific sectors and how far to open those markets were the outcome of negotiations. Commitments were listed in "schedules" that indicate 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.

Although the GATS did not deal explicitly with foreign investment, it was covered through the "commercial presence" mode of supply of services (in comparison to "cross-border supply", "consumption abroad" or "presence of natural persons" modes of supply which did not necessarily involve foreign investment). Commercial presence implied that a service supplier of one Member established a territorial presence, including through ownership or lease of premises, in another Member's territory to provide a service (e.g. domestic subsidiaries of foreign insurance companies or hotel chains).

Progressive liberalization was considered to be one of the basic tenets of the GATS, nonetheless, while the negotiations succeeded in setting up the principle structure of the Agreement, the liberalizing effects have been relatively modest. While progress was made in financial and telecommunication services, 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 the GATS Agreement might undermine their ability to pursue national policy objectives and constrain their regulatory powers.

The Agreement on Trade-Related Aspects of Intellectual Property Rights- established minimum levels of protection that each government had to give to the intellectual property (IP) of fellow WTO members. It was a highly innovative document that broke new ground to cover a field tangentially related to international trade that was not covered by the GATT 1994. Historically the link between IP and international trade has been forged under the leadership of the USA. After the close of the Tokyo Round in 1979, the USA became concerned and frustrated by the reluctance of developing countries to adopt high normative standards and strict enforcement measures for intellectual property rights and it placed IP on the negotiating agenda for the Uruguay Round. The TRIPS Agreement, which came into force in the 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.[29]

The TRIPS Agreement brought intellectual property into the fold of multilateral rules for the first time and covered five broad issues: 1) how basic principles of the trading system and other international intellectual property agreements should be applied; 2) how to give adequate protection to intellectual property rights; 3) how countries should enforce those rights adequately in their own territories; 4) how to settle disputes on intellectual property between members of the WTO; and 5) 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, designs, etc. and to use that right to negotiate payment in return for others using them by way of copyrights, patents, trademarks, etc. 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 to the intellectual property of other Members.

A significant dispute concerning pharmaceutical issues was the “Canada – Pharmaceutical Patents” 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. Those were i) 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, 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 as soon as the patent expired. The EU challenged both exceptions on the grounds that they illegitimately curtailed the patent right. The panel concluded that the regulatory review exception was permissible under the TRIPS 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[30] that could lead to more disputes between the owners of intellectual property and the needs of consumers of such.

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

The advance of the international architecture for foreign investment by way of the WTO came to a halt when a clear consensus in order to negotiate new foreign investment rules or commitments could not be reached in the WTO Working Group on Investment and Trade, which 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 the WTO in 2004, foreign investment was dropped from the Doha Round agenda. This produced considerable concern.[31] Thus, the Working Group on Investment and Trade did not live up to expectations and 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 motivations of the participants 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.[32] While all countries traded, both importing and exporting, foreign investment was undertaken almost exclusively by a small minority of industrial countries, especially during the immediate post-WWII period when the vast majority of other countries were solely foreign investment recipients (i.e. host countries).

c) Bilateral and plurilateral international investment agreements

Before bilateral investment treaties became generalized, foreign investors in the post-WWII setting, which experienced the expropriation or nationalization of their assets in developing countries, were faced with essentially three somewhat unappealing but practical 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 exclusively governments then resolved these disputes. Second, they could litigate in the host government's national courts; however defenses based on sovereign immunity were often readily available to defendants. Third, the foreign investor could simply absorb the cost of adverse host government action by making a claim under their political risk insurance (Franck, 2007, pp. 190-1). Evidently, foreign investors were not satisfied with these limited options.

BITs made their appearance on the international scene at the instigation of European investor countries seeking more protection for their foreign investments in emerging developing countries, including their ex-colonies, and a way 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 USA.

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 the 35 such BITs, 29 with African countries. While Germany and Switzerland continued their expansion in the 1970s (8 and 7, respectively), other European countries became more active, such as France (9 agreements), United Kingdom (5 agreements), and 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 1 in the 1960s (Ecuador), 1 in the 1970s (Haiti) and 14 in the 1980s (mainly former UK 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 regards to foreign investment protection.

The first European BITs, such as that signed between Germany and Pakistan in 1959, did not provide for compulsory investor-state arbitration; however, that facility began to appear more frequently in the BITs signed as of 1968 (i.e. Netherlands-Indonesia) and 1969 (i.e. Italy-Chad and Italy-Cote d'Ivoire) and thereafter, once the World Bank's International Center for the Settlement of Investment Disputes (ICSID) came into force. Coincidentally, many of the same African and Asian developing countries that were among the original signatories (those whose entry into force occurred before 1970)[33] of the ICSID Convention were the same ones that signed BITs with the principal European signatories.[34]

Originally, the two principal purposes of BITs were i) to consolidate the protection of foreign investment against the risk of unlawful expropriation and ii) to institutionalize dispute settlement by providing foreign investors with more options with regard to IA-ISDS clauses, gradually eliminating the need to exhaust local remedies and improving enforcement. The typical BIT by the 1990s contained certain "boilerplate" basic provisions of foreign investment protection (Box 3).

Box 3: The Basic Elements of Traditional European BITs

The fundamental provisions of the early BITs included the following:

- Scope of application (normally including a broad and open definition of investment applied to existing and new investment);
- Entry and establishment of investment (typically subject to national laws and regulations);
- Fair and equitable treatment (often qualified by more specific standards prohibiting arbitrary or discriminatory measures, etc.);
- National treatment (subject to qualifications and exceptions);
- Most-Favored Nation treatment (subject to some standardized exceptions);
- Expropriation and compensation (for public purpose in non-discriminatory manner in accordance with due process and accompanied by compensation);
- Transfer of funds (qualified by exceptions);
- Dispute settlement (state-state and investor-State).

The separate qualifications made to these provisions in each individual BIT through negotiation created significant diversity in the concrete obligations in keeping with the relative negotiating strength of the investor and the host governments.

Source: based on UNCTAD (1998)

US policymakers opted as of the 1980s for dedicated BITs targeting developing countries, building on the success enjoyed by European investor countries. In the process, US policymakers became emboldened and 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 behavior, 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 US Government (Vandevelde, 1993). The new BIT 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, 2008a, p. 2). The overwhelming majority of BITs concluded since 1990 were traditional ones 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, 2007a). 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 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*[35] (or improved market access with fewer foreign investment restrictions) in the US 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 that reason, this type of traditional BIT was 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 USA, took advantage of the unique historical events in the 1980s and 1990s to implement a strong push towards foreign investment liberalization, particularly in developing countries and economies in transition.[36] These changes resulted from the increasing negotiating strength of the principal investor countries and weakening negotiating strength (coupled with greater external vulnerability) of developing countries and economies in transition. The USA and a few other investor countries seized the moment to dramatically alter the existing relationship between investor countries and host countries.

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 as a means 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). US 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 US BITs and RTAs, especially in the North American Free Trade Agreement, 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 US-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 enhanced nature of IA-ISDS procedures. US RTAs and 1994 Model BITs (See Box 4), 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.[37]

US RTAs and BITs (based on the 1994 Model) applied the national treatment and most-favored nation treatment rules as a general obligation with regards to the scheduling of sectoral liberalization. This "negative list" approach established that unless a country specifically excepted the application of NT and MFN to particular activities, it was understood to apply to all activities (UNCTAD, 2004, pp. 120 and 125). This approach differed dramatically from the "positive list" one more common to WTO agreements in which an obligation applies in 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 any obligations once accepted were permanent, that is, there was no going back to the previous situation. Aspects of these concepts were found in US- and like-minded RTAs and BITs; however, this aspect 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 regards to derogations (Sikkel, 1997, pp. 21 and 25). Standstill prohibited any new or more restrictive exceptions to the minimum standard of treatment (i.e. national treatment or most-favored-nation treatment). Rollback 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 standstill, which provided its starting point. Combined with standstill, 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 principal effect was to first limit, then reduce, non-conforming measures in terms of host country exceptions to the minimum standard of treatment (NT and MFN).

Box 4: The US Bilateral Investment Treaty Program

The US bilateral investment treaty program protected private foreign investment, developed market-oriented policies in partner countries, and promoted US exports. The BIT program's basic aims were to protect investment abroad 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.

U.S. BITs provided foreign investments with six core benefits:

- First, US 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 full life-cycle of 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 provide 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: based on http://www.ustr.gov/Trade_Agreements/BIT/Summary_of_US_Bilateral_Investment_Treaty_(BIT)_Program.html

Specific clauses in US RTAs 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 the performance requirements (a longer list than the WTO TRIMs Agreement)[38], government procurement, transparency, liberalization of financial and other services, new areas of intellectual property protection, the facilitation of visas of top management personnel, the provision of greater transparency and a requirement for the provision of more information to foreign investors, among others. Moreover, recent US IIAs required a formal annex detailing the non-conforming measures of the host country. In other words, the specific clauses of the US foreign investment liberalizing RTAs and BITs aimed to further open developing country markets, reduce the host country interference with the local operations and assets of US investors and make host governments increasingly accountable to foreign investors.

One of the principal impacts of foreign investment liberalization in US-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 rights 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 more complex and detailed manners. The effect was to expand the number of possible triggers for IA-ISDS procedures by individual private foreign corporations (See Box 5).

Box 5: NAFTA Dispute Settlement- Chapter 11

Chapter 11 established a mechanism for the settlement of foreign investment disputes. A NAFTA investor who alleged that a host government had breached its foreign investment obligations under Chapter 11 could, at its option, have recourse to one of the following arbitral mechanisms: the World Bank's International Centre for the Settlement of Investment Disputes (ICSID); ICSID's Additional Facility Rules (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 for 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 is legally located.[a]

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 US jurisprudence, that is, government acts that provoked the loss of management, use or control, or a significant depreciation of the value of foreign assets (in contradistinction to direct expropriation, which was characterized by government acts that transfer title and physical possession of such).

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 opened a Pandora’s Box of IA-ISDS procedures since, effectively, it 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, but under which they had no obligation.

NAFTA’s Chapter 11 investor-state dispute settlement process was a path-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.

Sources: Based on http://www.nafta-sec-alena.org/; UNCTAD, 2004, pp.68-9; Gal-Or, p. 151; Trebilcock, M. and R. Howse, p. 355; Clark (1997).

[a] In the Metalclad case, Mexico appealed its dispute with a US firm in a court in the Canadian province of British Columbia.

The US-led foreign investment liberalization initiative was characterized by forceful attempts to dramatically alter the relationship between investor countries and host countries, to the benefit of the former. It transformed the map with regards to international trade and foreign investment agreements. Currently, the United States of America has regional trade agreements in effect with 16 countries[39], three are pending Congressional approval,[40] and four other RTA negotiations are ongoing.[41] The USA presently has 39 BITs in force with developing countries and economies in transition.[42] The USA also pursues less demanding Trade and Investment Framework Agreements (TIFA) with 36 other countries.[43] In other words, the USA was constructing its own world of international trade and foreign investment primarily by way of RTA and BIT rules emphasizing foreign investment liberalization that go far beyond the obligations and commitments of traditional BITs.

The NAFTA partners of the USA also pursued RTAs and BITs of a similar nature. Canada currently has RTAs with 7 countries[44], and is negotiating with 23 more[45] and has BITs in force with 22 countries.[46] Mexico established RTAs with 12 countries[47] is negotiating with another (Korea) and has BITs with 19 others.[48] The effect of this network of NAFTA member RTAs and BITs was the formation of an expanding group of countries that pursued IIAs, which for the most part 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 Asian Pacific Economic Cooperation (APEC), which now has 21 members[49], and is currently pursuing an agenda based on foreign trade and international investment liberalization[50] (UNCTAD, 2008; Sauvé, 2008; ECLAC, 2008).

In contrast to this NAFTA-centric network for international trade and foreign investment liberalization, the European Union possesses an IIA network encompassing 27 RTAs[51] and hundreds of BITs.[52] Although the EU-centric 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 EU has attempted to negotiate somewhat more demanding Economic Partnership Agreements (including some foreign investment liberalization aspects) with former European colonies; however, to date it has reached agreement solely with a group of Caribbean countries.[53]

It might be mentioned in passing, that other areas of the global economy are obliged to adapt to this new phenomenon of preferential trade and investment networks, which is challenging the existing concept of “open regionalism”. There has been a surge in such networks in both developing Asia and Latin America and the Caribbean. In developing Asia, the more demanding RTAs are being labeled “comprehensive economic partnerships” which are clearly WTO-plus commitments and are characteristic of the agreements among partners such as Singapore, ASEAN (Brunei, Malaysia, Philippines, Singapore, Thailand and Viet Nam), and Japan and, in some ways and recently, China (Sauvé, 2007). In LAC, Chile developed an extensive network of RTAs with the USA, Canada, Mexico, Panama, Costa Rica, Nicaragua, Honduras, El Salvador, Guatemala, and less demanding ones with EFTA, Korea, Japan and China[54] plus BITs in force with

39 countries.[55] In other words, the separate networks of international trade and foreign investment liberalization are expanding and interconnecting, especially among countries of the Pacific Rim (APEC).

In spite of these advances in the expansion of liberalizing networks by way of bilateral and plurilateral IIAs, a serious setback for the USA and several like-minded governments in the Americas at the forefront of the international trade and foreign investment liberalization initiative took place in the form of the suspension of negotiations on the Free Trade Area of the Americas (FTAA). This RTA was meant to represent the crowning glory of the US initiative to unite all the countries of the Americas -- except Cuba -- from Alaska, USA to Tierra del Fuego, Argentina in one huge NAFTA-style regional trade agreement reflecting the US priorities for the region, that is, a binding comprehensive agreement with disciplines all the way through. By 2003, the tensions reached breaking point, especially since the USA would not allow its policy on agricultural subsidies to be dealt with in the FTAA negotiations and Brazil would not accept mandatory liberalization in areas such as foreign investment, intellectual property, government procurement, services, and competition policy. The face-saving proposal of a "flexible" process where governments could decide to exclude some areas from FTAA negotiations for liberalization even as other governments negotiated liberalization in these areas, that is, a "FTAA lite" or "FTAA a la carte", did not hide from view the fact that the negotiations were stalemated and the FTAA was comatose. In response, the USA announced a shift away from the FTAA and toward more bilateral RTAs.[56] In other words, the crowning achievement of US international trade and foreign investment policy in Latin America and the Caribbean collapsed; however, the USA reacted by stringing together other bilateral RTAs (Peru, and Colombia, which is awaiting US Congress approval) and a subregional RTA (Dominican Republic-Central America) to continue its project to unite like-minded governments in the region in liberalizing international trade and foreign investment treaties.

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, which acted as a court of international trade using customary rules of interpretation of international public law (Box 1), 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 were primarily BITs (78%), NAFTA (13%) and the Energy Charter Treaty[57] (6%), and the arbitration forum was usually ICSID (62%) and/or UNCITRAL (18%) or less frequently under the Arbitration Institute of the Stockholm Chamber of Commerce, ICC and LCIA arbitration rules (UNCTAD, 2008).

In other words, in comparison to international architecture for international trade, the rules for foreign investment were partial, fragmented and consisted of a mixture of customary international law; bilateral, plurilateral, regional and multilateral agreements; acts of international institutions; authoritative texts (declarations of states, resolutions of international organizations, etc.); and judicial decisions (national case law and international arbitral decisions, etc.). Until 1990, international arbitration stemming from ISDS clauses of RTAs and BITs concerned primarily the relatively few cases of direct expropriation. Once the foreign investment boom took off in the 1990s, 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 was 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 that of expropriation and nationalization crisis in the early part of the post-WWII period.

3. Negotiating Strength and Investor-State Dispute Settlement

The clauses that go into an IIA, be it a BIT or a RTA, largely reflect the relative negotiating positions of the participants. Some few developing countries and transition economies of interest to foreign investors possessed negotiating strength sufficient to avoid or limit the risk from IA-ISDS clauses in their IIAs. The great majority of other developing countries and transition economies did not. What explains the success of the few?

a) The exceptional situation of the principal developing countries and transition economies (BRICs)

The BRICs (a group of four emerging economies encompassing Brazil, Russian Federation, India and China) 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.

i) Brazil

Brazil possesses a relatively large economy (its GDP reached US$ 1,314.2 billion in 2007) and a medium-sized population (191.6 million) with medium average income (US$ 9,370 per capita) according to the World Development Indicators of the World Bank. Merchandise trade (exports plus imports) plays a limited role in its integration into the international economy (22% of GDP), although FDI inflows have been substantial (US$ 34.6 billion in 2007). Similar to other countries in LAC, Brazil had a history of macroeconomic instability associated with balance of payments problems due to the fact that it exported relatively little and carried important levels of external debt. Brazil's development model for most of the post WWII period was framed in a nationalistic project based on import-substituting industrial policies; however, that project incorporated foreign investment. During the 1950s to the 1970s, symbiotic relationships developed between the State and state-owned enterprises, national firms and foreign firms, known as "tripé" (tripod) or triple alliance (Evans, 1979). Brazil was the principal developing country recipient of FDI in the 1970s; however, it could not break out of the balance of payments limitations imposed by its indebted-industrialization model.

As of 1995, Brazil adopted a more liberal approach to economic development and recovered macroeconomic stability. Many sectors were opened to FDI, including petroleum, telecommunications, mining, power generation, and local transportation, and huge privatization programs were implemented in infrastructure services (Da Motta, 2004). TNCs purchased over half of the privatized state companies' assets, investing US$ 100 billion in the process.

Although Brazil lost first place among developing country recipients of FDI inflows in the 1980s, it accumulated a stock of inward FDI of around US$ 328.5 billion by 2007, equivalent to 2.2% of the global inward FDI stock (UNCTAD 2008b). FDI inflows during the ISI model went mainly to manufactures, especially electrical and electronic machinery and equipment, automobiles and parts, base chemicals, metals and food products. With the reorientation of 1995, FDI inflows shifted dramatically toward services, especially, telecommunications, energy and financial services, although the automobile industry remained a focus of TNC investment in Brazil. The stock of FDI in Brazil came mainly from US and Europe (Spain, Netherlands, Portugal, Germany and United Kingdom) (ECLAC, various).

In spite of this favorable treatment for FDI and the magnitude of FDI inflows, Brazil stands out for its active resistance to various aspects of the foreign investment protection and liberalization initiatives. It never ratified the Washington Convention of 1965 (the ICSID Convention), nor did it ratify the fourteen BITs that it negotiated in the 1990s[58], neither the two foreign investment agreements of the Southern Market (Mercosur) integration scheme for Mercosur members (Colonia Protocol) and non-members (Buenos Aires Protocol). Finally, Brazil actively opposed several aspects of the Free Trade Area of the Americas, which it considered asymmetric and containing undesirable constraints on LAC countries, including the proposed IA-ISDS procedures. Brazil is not involved in any known foreign investment disputes mainly because it carries virtually no IIA risks.[59]

With regards to Brazil's outward FDI, three of the tops 100 non-financial TNCs by external assets are from Brazil (Companhia Vale do Rio Doce, Petrobras and Metalurgica Gerdau). The increasing internationalization of Brazilian firms is generating local demands for increased protection for foreign assets. For example, in 2007 Bolivia expropriated Petrobras' refinery and the lack of an IIA between Brazil and Bolivia limited Petrobras' options to resolve that problem. Accordingly, one consequence of failing to sign the ICSID Convention and not ratifying BITs was that Brazilian companies are unprotected.

In sum, Brazil is a country that has demonstrated a welcoming approach to FDI, has accumulated a significant stock of inward FDI, thereby increasing its integration into the global economy in that manner. At the same time, Brazil has used its increasing negotiating strength, which derives in part from its attractiveness to TNCs (its large market and growing economy), to implement cautious policies that carefully limit its IA-ISDS risks with respect to IIAs.

ii) Russian Federation

The Russian Federation has a relatively large economy (its GDP reached US$ 1,291 billion in 2007) and a medium-sized population (141.6 million) with medium-to-high average income (US$ 14,400 per capita) according to the World Development Indicators of the World Bank. Merchandise trade plays a relatively significant role in its integration into the international economy (45% of GDP), and FDI inflows have been substantial (US$ 52.5 billion in 2007). This Federation had very little experience with modern capitalism and virtually had to learn from scratch after the collapse of the Soviet Union around 1990.

During 1991-2000, the Russian Federation adopted radical changes in an attempt to introduce capitalist practices into the local economy. A new constitution, civil codes and foreign investment law were enacted and international trade liberalization and opening up to foreign investment were important elements of the transition policy reforms package undertaken in Russia; however, FDI did <u>not</u> play an important role in the immediate restructuring of the Russian economy. In fact, many foreign investors complained of discriminatory and unfair treatment (OECD, 2001, 2004). The rapid privatization of large segments of the ex-Soviet Union economy mainly to local oligarchs created considerable chaos as was demonstrated by the case of Yukos (*The New York Times*, 1999) and the Russian economy entered into crisis in 1998, when the State defaulted on its external debt and was forced to devalue the currency. Over 1992-2000, the GDP shrank by 40%. The economy recovered thereafter growing at an average annual rate of 7% based primarily of Russia's role as one of the principal global producers and exporters of petroleum and natural gas. Inward FDI in natural resources expanded rapidly reaching an all-time high in 2007.

In 2008, the new law on strategic industries, "On the Order of Foreign Investment in Companies with Strategic Impact on the National Security of the Russian Federation" was enacted and defined 42 sectors in which the control of local companies by foreign investors was to be subject to prior authorization from a special government commission. By including natural monopolies as "strategic" sectors, the State began to regulate foreign investments in strategic companies on a case-by-case basis, especially in energy (OECD, 2008). Russian companies, especially State companies such as Gazprom and Rosneft gained effective control over most of the energy sector. Some major petroleum TNCs such as Royal Dutch Shell in the Sakhalin II project and BP in the TNK-BP joint venture found themselves losing direct control over those assets (in the case of BP, the TNK-BP venture represented one-quarter of its global production, one-fifth of its global reserves and 10 percent of its earnings)(*The Economist*, 2008; *Yahoo!News*, 2008). The Russian Federation received mixed signals from the international community in the sense that while it did not meet requirements to accede to the WTO, the OECD invited it in 2007 to open discussions for membership (along with Chile, Estonia, Israel and Slovenia).

The stock of inward FDI in Russia started from virtually zero in 1993 to reach US$ 324 billion in 2007, which was equivalent to 2.1 percent of the global inward FDI stock (UNCTAD, 2008b). That is, in a few short years, 2004-2007, the inward FDI stock of the

Russian Federation reached the same level as those of Brazil or China; however, it was thought that round-tripping by Russian companies using tax havens such as Cyprus accounted for a significant part of that total. The inward FDI stock was concentrated by activity in natural resources, especially energy, some manufactures and trade. Half of the 2007 record FDI inflow alone went to natural resources.

The Russian Federation signed the ICSID Convention in 1992 but never ratified it. In terms of IIAs, the Russian Federation negotiated the Energy Charter Treaty but it did not ratify it either; however, it has 36 BITs in force.[60] According to UNCTAD (2008), the Russian Federation had five international investment arbitration cases pending.[61] At the same time, while not reaching the stage of arbitration, the cases of British Petroleum and Royal Dutch Shell in gigantic petroleum and gas projects in the Russian Federation produced considerable international tension (*The Economist*, 2008; *Yahoo!News*, 2008).

The outward FDI stock of the Russian Federation reached US$ 255 billion in 2007 (flows in that year alone reached US$ 45.6 billion) equivalent to 2 percent of the global outward FDI stock (UNCTAD, 2008). State companies, such as Gasprom (and its subsidiary, Gazpromneft), Rosneft, and privately owned Russian companies, such as Lukoil (20% ConocoPhilips), Norilsk Nickel and Evraz, among others, were among the leaders internationalizing their operations (Kalotay, 2008). At the same time, in 2008 the Russian Federation established a government investment company to manage a US$ 32 billion fund drawn from the Oil Stabilization Fund. The Russian Federation has a sovereign wealth fund for investment purposes. In other words, as well as its economic performance, the international presence of the Russian Federation is growing steadily.

The Russian Federation is another large market / fast growing economy that was 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. It was able to limit its IA-ISDS risk by not ratifying the ICSID Convention or the Energy Charter Treaty and avoiding the negotiation of any IIAs with foreign investment liberalization leaders, such as the USA. Nonetheless, the Russian Federation has a small number of international investment arbitration cases outstanding and its relationship with foreign investors was shaken by some of the drastic actions taken by the State (and State companies) in restructuring the national economy.

iii) India

India counts with a relatively large economy (its GDP reached US$ 1,171.0 billion in 2007) and a very large population (1,123.3 million) with low average income (US$ 2,740 per capita) according to the World Development Indicators of the World Bank. Merchandise trade plays a limited role in its integration into the international economy (31% of GDP), although FDI inflows have been substantial (US$ 23 billion in 2007). Foreign investment in the country dates from the days of the East India Co. when it was a colony of Britain; however, after independence India established a relatively closed economy with considerable state intervention in industrial policy and multiple controls over private investment. These controls limited the areas in which private investors were allowed to operate, and often also determined the scale of operations, the location of new investment, and even the technology to be used. As of the late 1980s, India has gradually opened up its markets through economic reforms and reduced government controls on foreign trade and investment (Panagariya, 2004; Ahluwalia, 2002). India's economic performance in the post-reforms period has many positive features. The average growth rate in the ten-year period from 1992-93 to 2001-02 was around 6 percent, which put India among the fastest growing developing countries at that time. A recent focus of Indian policy is to consolidate regional trade agreements in South Asia, ASEAN and, in the future, in Northeast Asia (Kumar, 2007).

Opening up to foreign direct investment became another important part of India's reforms. That new policy allowed 100 percent foreign ownership in a large number of industries and majority ownership in all sectors, except banks, insurance companies, telecommunications and airlines. Procedures for obtaining permission were greatly simplified by listing industries that are eligible for automatic approval up to specified levels of foreign equity (100 percent, 74 percent and 51 percent). For investments in other industries, or for a higher share of equity than is automatically permitted in listed industries, applications are considered by a Foreign Investment Promotion Board. As of 1993, foreign institutional investors were allowed to purchase shares of listed Indian companies in the stock market, opening a window for portfolio investment in existing companies (Government of India, 1999).

India is not among the principal recipients of inward FDI, although its stock reached over US$ 76.2 billion in 2007, equivalent to 0,5% of global inward FDI stock (UNCTAD, 2008b). The experience with foreign investors has gone through rough patches.[62] India's policy with regards to IIAs has been variable. India is not a signatory of the ICSID Convention; however, it currently has 48 BITs in force with 14 industrialized countries and 34 others.[63] Indian BITS do not provide foreign investors any rights to establish investment 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 RTA has diluted the typical guarantees of the kind that the RTAs associated with the foreign investment liberalization process in which Singapore plays an increasing role, in that there are only positive list 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.[64] One of these cases, involved US TNCs Enron, GE and Bechtel in the Dabhol power plant that was supposed to supply energy-hungry India with more than 2,000 megawatts of electricity, about one-fifth the additional energy needed by India. In early September of 2004, an arbitration tribunal conducted under the auspices of the American Arbitration Association's International Centre for Dispute Resolution issued its final arbitration award requiring the US Overseas Private Investment Corporation (OPIC) to pay $57,140,000 under political risk insurance to subsidiaries of General Electric Company (GE) and Bechtel Enterprises Holdings, Inc. (Bechtel) for expropriation of the $3 billion Dabhol power project in India. The panel held that the Government of India

(GOI), the Maharashtra State Electricity Board (MESB) and the Indian State Government of Maharashtra (GOM) had violated the power purchase agreement, their guarantees and the state support agreements for the Dabhol project "for political reasons and without any legal justification."

The outward FDI stock of India is relatively small and reached only US$ 29 billion in 2007 equivalent to less than 0.5 percent of the global outward FDI stock (UNCTAD, 2008b). This reflects the fact that relatively few of the major Indian goods-producing companies are internationalized (only Ranbaxy Laboratories Ltd. is found on the top 100 non-financial TNCs from developing countries, measured by external assets), and those more internationalized Indian companies which provide services (such as Wipro, Infosys, etc.) do not possess a large amount of external assets.

India has had a hot and cold relationship with foreign investors. Recently, this large market developing country has attempted to use it increasing negotiating strength to reorder that relationship. India has been cautious in terms of its IA-ISDS risks with regards to the ICSID Convention and its IIAs; however, it currently faces nine cases of international arbitration stemming from those IIAs. The recent RTA with Singapore seems to demonstrate a clearer policy with regards to its management of IA-ISDS risk.

iv) China

The Peoples Republic of China possesses a relatively large economy (its GDP reached US$ 3,280.1 billion in 2007) and a very large population (1,320 million) with medium to low average income (US$ 5,370 per capita) according to the World Development Indicators of the World Bank. Merchandise trade plays a central role in its integration into the international economy (66% of GDP), and FDI inflows have been among the world’s largest (US$ 83.5 billion in 2007). The Communist government established in 1949 made several dramatic attempts to find its footing in terms of development models passing through chaotic experiences with inward-looking phases, such as the Hundred Flowers campaign in the 1950s and the Cultural Revolution in the 1960s, until it found a more balanced and successful model which entailed breaking with some traditional communist practices, including a closer association with the international economy in the form of international trade and foreign investment beginning as of 1978. Its accession to the WTO in 2001 consolidated that tendency.

China evolved from an assembly base of global supply chains to a principal hub of Asian supply chains. China’s cautious opening up to international trade and foreign investment brought impressive results in terms of GDP and export growth, inward FDI inflows, employment creation in the Special Economic Zones on the coast and, subsequently, massive foreign exchange earnings. Two decades of exceptionally high growth in the order of 10% a year transformed the economy, converted China into the world’s principal exporter, pulled more than 80 million Chinese out of poverty and consolidated a huge domestic market. Domestic companies were strengthened in the process. Private property rights were strengthened in 2007. China’s dependence on FDI was subsequently reduced (FDI/GFKF fell from a high of 4.1% to 2.3% and FDI/GDP fell from 14.3% to 5.8%). China eventually became a very significant foreign investor in its own right as its companies internationalized and the government established a sovereign wealth fund to invest its huge foreign exchange reserves (OECD, 2008b).

China's cautious FDI policy originally focused on restricting FDI to the cheap labor export assembly activities in the Special Economic Zones, for the most part reserving the domestic market to domestic companies or limited to joint ventures of foreign companies with local partners. For foreign investors, activities in China were defined as prohibited, restricted, permitted and encouraged. After entry into the WTO, China's FDI rules became more liberal in the sense that they encouraged more activities and fewer restricted activities were maintained and eventually 75% of all foreign companies were wholly-owned foreign companies. The new FDI policy of the 21st century became more selective by focusing on quality FDI for prioritized activities, such as high-tech manufactures, and away from cheap-labor export assembly operations. The tax regime was revamped to not distinguish between foreign and domestic firms (effectively raising taxes for foreign firms and lowering them for domestic firms). In 2006, new national security screening rules were established to monitor foreign takeovers of Chinese companies (OECD, 2008b). In other words, Chinese FDI policy focused on using FDI to attain national development objectives, evolving with the advance of the transformation of the economy.

China has been one of the principal developing country recipients of FDI accumulating a 2007 stock of inward FDI of around US$ 327 billion, equivalent to 2,1% of the global inward FDI stock (UNCTAD, 2008b). China attracts Asian, US and European FDI although the use of round-tripping by Chinese firms via Hong Kong and tax havens makes the interpretation of Chinese official FDI statistics a difficult task. The FDI is centered on manufactures (apparel, home appliances, electronics, automobiles, etc.) and natural resources (mining).

Beginning in the 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 impact in terms of 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 (Rooney, 2007; Heymann, 2008). China currently has 89 BITs in force, 14 with industrialized countries and 75 others.[65]

China recently began to negotiate new, higher risk BITs (with Netherlands, Bosnia-Herzogovina, Germany and Finland) and RTAs (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 with respect to the need for a previous local administrative review and other limitations (Moulis and Jun, 2007). The post establishment national treatment clause was explicit and contained a standstill obligation; however, rollback promises came on a "best-efforts" commitment. Since its accession to the ICSID Convention, no cases have been brought against China (Jun, 2007). It has become confident enough with its modern FDI policy to begin negotiating access to the Energy Charter Treaty and a RTA with ASEAN, which entails certain FDI liberalization measures. In other words, the Chinese approach to foreign investment has been very cautious but is becoming increasingly liberal.

With regards to China's outward FDI, thirty-four of the top 100 non-financial TNCs by external assets are from China (26 from Hong Kong, China)(UNCTAD, 2008). The largest by external assets are diversified companies,[66] petroleum companies,[67] services providers[68] and manufacturers[69] (Fudan, 2008). Although China was been reluctant to accept the jurisdiction of the ICSID Convention, the only case pending refers to the arbitration demand by a Chinese investor against Peru (Tza Yap Shum v. Peru) (*Dispute Resolution Journal*, 2006). The shift to riskier FDI policy in China with regards to IA-ISDS clauses reflects its new status as a major outward investor with significant external assets to protect.

China represents the clearest case of a larger market / fast growing economy, which carefully calibrated its foreign investment policies to take advance of its growing negotiating strength. It defined the economic goals that it wanted to achieve taking advantage of foreign investment without being coerced into exaggerated or unwarranted risks with regards to IA-ISDS clauses.

b) BRICs´ Tales

These examples from the BRICs demonstrate that a handful of 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 the foreign investment in their development strategies and to manage the IA-ISDS risks that they assumed in IIAs. They generally avoided or severely 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 an RTA with the USA. In the WTO negotiations, they (except the Russian Federation) were able to act in a more collective fashion on the basis of increasingly consolidated positions such as to prefer the more limited WTO illustrative list with regard to performance requirements, to recommend a "bottom up, positive list, list in" option for services rather than the "top down, negative list, list out" approach preferred by investor countries, to attempt to stress technology transfer over technology protection with regards to intellectual property, and to prefer state-state dispute settlement instruments. In other words, some developing countries and transition economies, as exemplified by the BRICs, developed more well thought out foreign investment policies, which they employed with certain effectiveness in both individual and multilateral negotiations.

The rising negotiating strength of the principal developing countries and transition economies was explicitly recognized by the international community as the 2008 global financial crisis set in, in the sense that new more urgent calls were heard to alter the status quo of global crisis management (from G-7[70] to G-20[71]) as well as in the operations of multilateral financial institutions for the purpose of more fully incorporating at least the largest of the developing countries and economies in transition. In that vein, even Robert Zoellick, the former US Trade Representative, who had negotiated many of the more demanding US RTAs and BITs, and current President of the World Bank, called for a “new multilateralism” in which at a minimum Brazil, China, India, Mexico, Russia, Saudi Arabia and South Africa should be fully included, and that the voting shares of the IMF and World Bank should reflect that reality. (*Bridges*, 2008a). In its position paper prepared for the G-20 meeting in London in April, 2009, China called for changed voting rights in the Bretton Woods financial institutions in favour of developing countries, suggested changes in industrialized countries’ accounting standards and credit ratings to end their pro-cyclical bias that leads to excessive risks, issued a warning against foreign investment protection, and recommended strengthening the oversight over the macroeconomic policies of the major reserve currency economies (*Yahoo!News*, 2009).

This initiative by OECD countries was limited to a handful of developing countries and transition economies, which had built up an improved negotiating strength and demonstrated in many cases that they knew how to use it. It did not include the great majority of developing countries and transition economies, especially those characterized by weak negotiating strength, which as a consequence often carryied very acute IA-ISDS risks. These host countries signed harsh IIAs with high IA-ISDS risks in the belief that they would receive much higher FDI inflows as a result.

Preliminary conclusions

Section 1 has examined the international architecture for international trade and foreign investment after WWII and found them to be quite different. That 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 new challenges are arising (RTAs challenge the MFN principle, and developing countries and transition economies have stalled the Doha Round because of the lack of progress in solving their problems).

The international architecture for foreign investment is much more complex and convoluted, and notably less credible. Attempts to establish a viable framework via investor country-controlled institutions, the WTO and bilateral and plurilateral IIAs all enjoyed at best partial success such that the international architecture for foreign investment was built on a hodge-podge of limited, distorted and/or lifeless 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 was used to sneak foreign investment issues into WTO negotiations, and unprecedented investor-state dispute settlement clauses in IIAs surreptitiously replaced the existing state-state mechanism. Many of the principal “liberalizing” initiatives failed, such as the OECD MAI, “investment” was dropped from the Doha Round of the WTO and the FTAA was suspended. In other words, the international architecture for foreign investment 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 US-centric RTAs (liberalizing or “WTO plus”) in comparison to the European-centric BITs (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 in the belief that they will receive more foreign investment in return. Some do so out of commitment whereas others were cajoled into it as a consequence of their weak negotiating strength. Section 2 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.

Section 2- 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 "no country can be sure that its IIAs will remain unchallenged before international tribunals" (UNCTAD, 2008a, p. 7). The increasingly unpredictable nature of IA-ISDS decisions has 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 the strictly legal aspects of their clauses. The next section will examine the situation in LAC.

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. In general, it would be appear to be the case that foreign investors are satisfied with the functioning of the IA-ISDS procedures, although they have manifested some serious complaints about the slowness of the processes and the expenses involved (Box 6). Home country governments appear to be content with the outcome as they continue to press for new IIAs containing those procedures, although at a slower pace and with significant modifications in some cases (USA, Canada, Norway, etc.). Strangely enough, the premise that IIAs, in general, and the IA-ISDS procedures, in particular, help attract more foreign investment to host countries is anything but certain. This lack of clarity with regards 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.

Box 6: TNCs are not completely satisfied with IA-ISDS procedures

Business organizations have generally made manifest their strong support for IA-ISDS procedures. A good example was the launch of the publication *Clearing the Smoke: the Success of NAFTA's Investment Chapter* by the Business Roundtable (US), the Canadian Council of Chief Executives (Canada) and the Consejo Mexicano de Hombres de Negocios (Mexico) in May, 2003 in Ottawa, Canada. The objective of the publication was "to clear away the smoke about Chapter Eleven, and clarify the many reasons why Chapter Eleven is an outstanding success". During this launch, the basic justification of Chapter Eleven was presented in the following manner:

"Investor-state mechanisms contribute greatly to raising and sustaining the confidence of foreign investors that they will get a fair shake in host countries whatever the adequacy of those domestic legal systems. In planning a major investment, companies have to think many years into the future and cannot rely on the investment climate as it exists at the beginning of a new project. Nor can investors assume that foreign regulators and foreign courts will always act independently of political currents. That is why investor-state mechanisms play such a useful role in establishing a procedural right to an independent tribunal. Such a right reduces the political risk to the investor, and hence will lead to more investment than would occur in the absence of the investor-state tribunals."

These business organizations went on to recommend that the Free Trade Area of the Americas initiative include recourse to an investor-state mechanism since among the reasons for NAFTA's success they emphasized were the strong protections for investment and the right to enforce those guarantees through investor-state dispute settlement.

At the same time, while businessmen appreciate the final nature of IA-ISDS tribunal decisions, many complaints have been registered that the procedures have resulted much longer (averaging about three years per case) and much more expensive (arbitrator fees and expenses approaching US$ 1 million per case) than foreseen. Overall and in general, TNCs seem to be content with the results; however, they see room for improvement.

Sources: Canadian Council of Chief Executives (2003); Government of Canada, Foreign Affairs and International Trade Canada (2003); Clark, P. and G. LaFortune (2004); UNCTAD (2008).

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. The statistical evidence would appear self-evident as both rose notably during the 1990s; nonetheless, confirming a significant causal relationship between these variables has not proved feasible for a host of analyses on this matter.[72]

Franck (2007a), undertook a detailed analysis of the existing literature and was of the opinion that "it is difficult to draw decisive substantive conclusions" (p. 353) and that "there is an absence of empirical evidence considering the relationship between investment arbitration and FDI, and it appears that this evidence is not immediately forthcoming" (p. 355). The World Bank cited a study which analyzed 20 years of data on BITs and found that "[c]ountries that had concluded a BIT were no more likely to receive additional FDI than were countries without such a pact" (cited in Peterson, 2004, p. 10). A similar conclusion was reached by Bhattacharya, (2007), Pate (2006, p. 14, citing

Stiglitz (2005, p. 150) and Faya-Rodriguez (ITN, 2008). Moreover, the high FDI inflows received by the BRICs that have generally been very cautious with regards to their IA-ISDS exposure (Section 1) contradicted any hypothesis on a direct causal link between signing IIAs with IA-ISDS procedures and foreign investment inflows. Franck's conclusion was probably the most realistic in stating, "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" (2007a, p. 340). In other words, while foreign investors obviously seek increased protection for their investments, it cannot be confirmed empirically or otherwise that signing IIAs with IA-ISDS guarantees will necessarily result in higher foreign investment inflows to host countries, especially developing countries or transition economies.

A number of authors even suggested that some host countries that sign IIAs not only do not receive increased foreign investment inflows but they might in fact eventually be hurt by those agreements (for example, Chung, 2007; Kalb, 2006; Hallward-Driemeier; 2003; Guzman, 1998). The reasons they could do so are very diverse. For example, some do so out of conviction, others do so under duress[73], others get caught up in the herd mentality surrounding the intensified competition for foreign investment (Guzman, 1998, pp. 671-2; Van Harten, 2007, p. 179); and some do so out of ignorance[74], among other reasons. Thus, the relationship between signing IIAs with IA-ISDS procedures and the benefits received by the host countries doing so is anything but clear.

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 analyze 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; Pacquing, 2003, p. 25), this subsection identifies several of the principal criticisms of IA-ISDS mechanisms in IIAs. Public opinion seems to have turned against IA-ISDS guarantees since they are not working as intended (Clark and LaFortune, 2004, p. 3) and they appear to favor disproportionately the protection of foreign investors' rights to the detriment of the national policy concerns of the host country, or, at a minimum, there is much room for improvement (Franck, 2007, p. 83), and that balance in this matter is sorely needed (Pate, 2006, p. 11; van Aaken, 2008, p. 19). While some suggest the use of a wrecking ball, others view the solution more in terms of a scalpel (Paulsson, 2008, p. 265).

The following examination of the principal shortcomings of IA-ISDS guarantees is grouped 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. Following that, some of the principal risks for host countries will be further defined.

i) Expansive IA-ISDS jurisprudence 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, "like treatment" with regards to national treatment, the scope of most-favored-nation treatment, the definitions of investor and investment, 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 US-style RTAs and BITs, many of these features are also found in more traditional BITs and State contracts. The following examples are a partial list and are for illustrative purposes only.

Indirect expropriation (NAFTA)

Direct expropriation and nationalization were matters at the center 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[75], including creeping expropriation and regulatory takings. 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, 2005, 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 severely 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, 2003, p.111), or worse.

Box 7: Expansive Interpretations under NAFTA Chapter 11 Investment Arbitration

According to Hufbauer and Schott, at the time of the signing of NAFTA, Chapter 11 seemed uncontroversial and many saw NAFTA arbitration as an improvement over national courts; nevertheless, the rules regarding "indirect expropriation" under Article 1110 and the requirements for minimum legal standards under Article 1105 fostered a broader range of litigation than was originally envisioned (2007, p. 4).

With regards to whether bona fide regulatory measures such as those to protect the environment, human health or safety could be considered as indirect expropriations and thus require compensation, three tendencies in arbitral decisions in NAFTA became evident. One paid no heed to host states' needs for national policy space and defined indirect expropriation solely in terms of the economic impact on the foreign investor (as demonstrated by the Metalclad v. United Mexican States decision, ICSID Case No. ARB(AF)/97/1). A second recognized the public policy aim of the challenged measure but required that there be a reasonable relationship of proportionality between the burden the measure placed on the foreign investor and the public interest aim of the measure, as shown by the Técnicas Medioambientales Tecmed S.A. v. United Mexican States decision (ICSID Case No. ARB(AF)/00/2). The third did not recognize the public policy aim of the challenged measure as a criterion to be weighed against the burden of the foreign investor, but rather a determining factor, which prevented the measure being considered expropriatory, as indicated by the Methanex Corp. v. United States of America decision (Yu and Marshall, 2008, p. 19; Malik, 2008, p. 2).

These cases demonstrate that the vague and ambiguous definitions in NAFTA led to inconsistent arbitral decisions with regards to host country regulatory practices and indirect expropriation. It was not clear what qualified as bone fide government measure for the environment, health and other welfare. Protected property rights seemed to be extended under Chapter 11 while the exercise of a Government's "police powers" [a/] was curtailed. Some opined that the NAFTA Chapter 11 track record of cases was not one of reversing illegal expropriations or clear-cut instances of discrimination, rather it was a track record of a broad array of attacks on government actions and regulatory policies that included nondiscriminatory environmental and public health measures, a variety of land-use actions, domestic court decisions, legal settlements, municipal contracts, public services, tax policy, anti-gambling policy, drug policy and the application of anti-dumping and countervailing duties; thus, NAFTA-style foreign investor protections had moved from a defensive tool against uncompensated expropriation to an offensive weapon used to attack basic regulatory policy (Public Citizen, 2005, pp. 76 and 79). At a minimum, Chapter 11 did not develop a clear analytical framework for Governments to use in order to determine whether an envisaged measure constituted an acceptable regulation or amounted to a regulatory taking requiring compensation (UNCTAD, 2007, pp. 59-60) which had the effect of significantly increasing the risk borne by national policy makers, especially in regulatory matters.

Sources: Hufbauer and Schott (2007); OECD, 2005; Public Citizen, 2005; Yu and Marshall (2008); Malik, (2008); UNCTAD, 2007; UNCTAD, 2003.

[a/] The power of the state to place restraints on the personal freedom and property rights of persons for the protection of the public safety, health and morals, or the promotion of public convenience and general prosperity … The police power is the exercise of the sovereign right of a government to promote order, safety, security health morals and general welfare within constitutional limits and is an essential attribute of government. Black's Law Dictionary, 6th Edition, 1990.

The "policy space" debate initially focused mainly on US RTAs, especially NAFTA, since in comparison to European IIAs the US RTAs were seen to constrain to a greater degree host country national policy (Gallagher, 2008). One reason had to do with differing views on the nature of private property. According to Sornarajah, the US view tended to be an absolutist vision of property rights in which any infringements on the enjoyment of the foreign investor's interests in his property involved the creation of liability in the host state (2002, pp. 10-1), whereas the European view recognized more the social function of property which was considered more important than the individual's claim to property (2008, p. 49). In practice, however, the European BIT jurisprudence regarding indirect expropriation was quite similar in nature to that of the US 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, 2005, p. 53); and it was left to the arbitral tribunals to do so. The initial arbitral tribunals' decisions on indirect expropriation in NAFTA threw a scare into those wary of the expansive interpretations of arbitral tribunals because of the way that they facilitated increased use of IA-ISDS procedures by foreign investors and the regulatory chill that host governments demonstrated as a result (See Box 7).

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 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, 2005, pp. 74-5). It is sometimes considered a gap-filling or catchall 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, 2007, p. 87) and they have been reluctant to reduce FET to a single legal standard or formula (Shenkman, 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, 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-favored 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 (2005, 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 investors 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. v. The Argentine Republic (ICSID Case No. ARB/01/08) and Tecnicas Medioambientales Tecmed S.A. v. The United Mexican States (ICSID Case No. ARB(AF)/00/2). The level of protection provided by FET has been variable (in some cases low, such as in Waste Management, Inc. v. The United Mexican States (ICSID Case No. ARB(AF)/00/3) but usually high, as was the case in MTD Equity Sdn. Bhd.v. Republic of Chile (ICSID Case No. ARB/01/7) (see Section 3). 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).

National treatment (NT) and "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 favorable than that provided to domestic investors "in like circumstances" (UNCTAD, 2005, 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 <u>different</u> circumstances and be wary that any *incidental* discrimination not trigger IA-ISDS procedures.

The interpretation of NT 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: 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, 2007, 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 favorable to the latter are examined, but also measures that are on their face non-discriminatory but have the effect of according less favorable treatment to foreign as compared with domestic investors in like circumstances (UNCTAD, 2005, p. 34). Narrow interpretations have been given to "in like circumstances" by some NAFTA tribunals, such as the Methanex v. United States decision and United Parcel Service of America (UPS) v. 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. v 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 v. Ecuador (LCSI Case No. IN3467) interpreting the Ecuador-US BIT in 2007 gave the term "in like circumstances" a notoriously broad definition (see Section 3). In other words, the "in like circumstances" requirement of the NT standard has been interpreted in a notably expansive manner in NAFTA and beyond.

Most-favored-nation treatment (MFN) and scope of application (BITs)

Most-favored-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 favorable 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, 2005, 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 undertaken (OECD, 2005, 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, 2005, p. 35). Some foreign investors have used the MFN clause to pick and choose the most favorable provisions from various IIAs signed by the same host country (UNCTAD, 2007, p. 52). Traditionally, the *ejusdem generis* principle 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, p. 159); however, jurisprudence has not been uniform (UNCTAD, 2007, 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 Rodriguez, 2008, pp. 92 and 101). With regards to the application of MFN status to dispute settlement, tribunals in Emilio Augusto Maffezini v. The Kingdom of Spain (ICSID Case No ARB/97/7), Siemens v. The Republic of Argentina (ICSID Case No ARB/02/8), Gas Natural SDG, S.A. v. The Republic of Argentina (ICSID Case No ARB/03/10), and Suez, Sociedad General de Aguas de Barcelona S.A. and Interagua Servicios Integrales de Agua S.A v. The Republic of Argentina (ICSID Case No ARB/03/17) (on the latter three, see Section 3, Box 13), have decided in favor of the expansion of the scope of MFN to include the more favorable procedural treatment from a third party BIT (Faya Rodriguez, 2008, p. 95). The award of jurisdiction of RosInvestCo UK Ltd v. The Russian Federation (SCC Case No. ARB. V079/2005) seems to share that viewpoint. Other cases, such as Salini Construttori S.p.A and Italstrade S.p.A. v. The Hashemite Kingdom of Jordan (ICSID Case No. ARB/02/03), Plama Consortium Ltd. v. Bulgaria (ICSID Case No. ARB/03/24) and Telenor Mobile Communications A.S. v. Republic of Hungary (ICSID Case No ARB/04/15), at least in principle took a narrower view focusing on the original intention of the parties as the decisive factor (UNCTAD, 2005, p. 35; Faya Rodriguez, 2008, p. 95). These arbitral decisions suggest that the application of the MFN principle is not simple or consistent (OECD, 2005, p. 127) and 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 investment determines the scope of application of the rights and obligations 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 law of the state claimed nationality (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, 2008, p. 8). Some IIAs include "denial of benefits" clauses allowing exclusion of foreign investors in certain categories (shell companies, nationals of the host state, etc.).

While there is no single definition of foreign investment, most IIAs adopt an open-ended approach, which favors a broad definition. 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, 2003, p. 101). Typically, a non-exclusive, illustrative list of examples is included in the IIA.

Jurisprudence with regards to these definitions has proved contentious. On the one hand, a notable case concerned the subsidiary of the US Bechtel Corporation in Bolivia (Aguas del Tunari v. Republic of Bolivia, ICSID Case No. ARB/02/3) in which the foreign investors migrated the holding company from Cayman Islands to Luxembourg, whose shares were in turn held by a newly established firm in the Netherlands, thereby using Netherlands-Bolivia BIT in order to go to ICSID (van Aaken, 2008, p. 20) (see Section 3, Box 12). 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[76], have usually upheld standing of certain categories of foreign investors (indirect investors, minority investors and bondholders and other non-equity investors), which extends the use of IA-ISDS guarantees to these categories of foreign 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)[77]

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, which had the effect of bringing a host of 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 was not uniform under bilateral investment treaties as some BITs covered only disputes relating to an "obligation under this agreement", i.e. only for claims of BIT violations, whereas others extended the jurisdiction to "any dispute relating to investments" and some others even created 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, in respect to investments. These provisions were 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 had been added to provide additional protection to foreign investors and were directed at covering foreign investment agreements that host countries frequently conclude with foreign investors.

European BITs in particular (mainly those of Switzerland, Netherlands, United Kingdom and Germany) created international law obligations by way of broad umbrella clauses, which, by design or through the recent expansive decisions of international arbitration tribunals, increasingly permitted foreign investors to claim damages against breached contracts with host countries by way of IA-ISDS procedures rather than in local courts and administrative tribunals. For example, in terms of design, the government of Switzerland held in the case of SGS Societe General de Surveillance S.A. v. Islamic Republic of Pakistan (ICSID No.ARB/01/13) that its intention at the time of the inclusion of the umbrella clause in the BIT in question was to subject contractual commitments to treaty disciplines. Umbrella clauses have also become expansionary by way of the recent arbitration interpretation. According to Yannaca-Small, “Arbitral tribunals, in their majority, when faced with a ‘proper’ umbrella clause, i.e. one drafted in broad and inclusive terms, seem to be adopting a fairly consistent interpretation which covers all state obligations, including contractual ones.”

Thus, while European BITs were usually considered less intrusive than than US-style IIAs for contracting parties; 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.[78]

Box 14 of Section 3 discusses the application of umbrella clauses and other mechanisms to bring contract disputes to treaty status in Latin America.

Stabilization clause (State contracts)

Another of the principal unforeseen consequences associated with the more traditional IIAs had to do with the expansionary interpretations given to stabilization clauses by arbitral decisions which also had the effect of bringing a host of 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, 2007, p. 26). Originally, contract breaches were usually dealt with by way of the national court system of the host country. Stabilization clauses, that is, contractual clauses in those same private contracts between foreign investors and host states whose objective was to reduce or eliminate the impact on foreign investors of changes in the legal system or business conditions in the host state during the life of the project changed that. These were used in widespread fashion by foreign investors as risk mitigation tools to protect foreign investments from a number of sovereign risks such as nationalization or expropriation (in the 1960s and 1970s) and, more recently, 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 others (Shemberg, 2008, p. 4).

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

-*freezing* clauses “freeze” the law of the host state with respect to the foreign investment project over the life of the project. Although domestic law in many countries today does not allow the sovereign to promise not to legislate in the future; nevertheless, this kind of clause may still be meaningful to international arbitration pursuant to IIAs;

-*economic equilibrium* clauses require that the foreign investor comply with new laws but also require that he be compensated for the cost of complying with them (compensations taking such forms as adjusted tariffs, extension of the concession, tax reductions, monetary compensation, or other), 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) 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, by exemptions from new laws.

In practice, these stabilization clauses in contracts with OECD countries usually required 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 did not, and, moreover, sometimes even labor, environmental and other social laws were stabilized (Mann, 2008).

These stabilization clauses in State contracts have been used to support international arbitration decisions based on the expropriation, FET and umbrella clauses of IIAs. Tienhaara (2006, p. 84) has noted that international arbitral tribunals have consistently upheld stabilization clauses and the need for compensation; nevertheless, inconsistencies exist. For example, the Salini Costruttori S.p.A. and Italstrade S.p.A. v. Kingdom of Morocco (ICSID Case No. ARB/00/4), Suez, Sociedad General de Aguas de Barcelona S.A. and Vivendi Universal S.A. v. Argentine Republic (ICSID Case No. ARB/03/19) and SGS Societe General de Surveillance S.A. v. Republic of the Philippines (ICSID Case No. ARB/02/6) cases found that the broad wording of the ISDS provision in the IIA was sufficient to establish jurisdiction with regards to purely contractual claims; however, the SGS Societe General de Surveillance S.A. v. Islamic Republic of Pakistan (ICSID Case No. ARB/01/13) tribunal did not allow a similar claim (OECD, 2007, p. 27).

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

Similar to stabilization cluases are Legal Stabilization Agreements (LSAs), which with a stronger legal standing, share much the same objectives and generate much the same risks (Vielleville and Vasani, 2008) (see Section 3).

In sum, the expansive interpretations of arbitral tribunal decisions with regards to concepts found in IIAs, such as the examples referred to above (indirect expropriation, fair and equitable treatment, "like treatment" with regards to national treatment, the scope

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

of most-favored-nation treatment, the definitions of investor and investment, umbrella clauses and stabilization clauses) allowed arbitrators to scrutinize virtually any sovereign act of the host government 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 represented a serious challenge to host governments since the nature of arbitral tribunal jurisprudence was in many cases inconsistent, incoherent and ambiguous and produced increased uncertainty which at times led democratically-elected host governments to unilaterally abandon or limit their own 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 was that the power to determine the legality of sovereign acts was being delegated to privately contracted arbitrators which raised the question whether such practices satisfied basic standards of judicial decision-making in democratic societies or if they were tainted and failed to meet the basic requirements of the rule of law (Van Harten, 2007, pp. 5, 102 and 153). At the same time, clever foreign investors and their lawyers used IA-ISDS procedures to test the boundaries of their IIA treaty and contract guarantees in settings in which no mature jurisprudence existed 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 (Alvarez and Park, 2003). This subsection focuses on two of the principal critiques associated with the legitimacy of IA-ISDS procedures, that is, problems linked to their commercial arbitration roots, on one hand, and difficulties associated with their undemocratic nature, on the other.

Citing Blackaby, an OECD publication (2005, p. 11) suggested that the notion that arbitrators deciding a purely commercial dispute behind closed doors "does 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 and the precise reasons for them. Apparently it was short step to extend that mind set, first, 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, 2007, 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, and it intentionally shielded hearings from the public eye (IPS, 2007, p. 9). The private model of adjudication that originated in the rules and enforcement structure of international commercial arbitration presented major challenges to public law principles of judicial accountability, openness and independence (Van Harten, 2007, p. 6). Franck (2005, pp. 1538-9) considered that major innovations in international investment arbitration created a private cause of action against states, which permitted investors to act like "private attorney-generals," and placed the enforcement of public international law rights in the hands of private individuals and corporations. The revolutionary aspect of the shift from contract 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, 2005, p. 608) in which private arbitrators were given the power to resolve regulatory disputes (Van Harten, 2007, p. 120). According to Van Harten (2006, p. 149):

Simply put, no other system of international adjudication does what investment treaties do to restrain state action through individualized claims, international review mechanisms, and effective remedial arrangements. In no other case can (i) an individual bring an international claim absent the customary duty to exhaust local remedies, (ii) in relation to disputes arising from sovereign acts of the state, and (iii) obtain a precise and potent public law remedy (in this case a damages award) that is (iv) internationally enforceable across the globe against assets of the respondent state.

In gist, 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 was flawed, above all else because it 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, 2007, 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 favor of allowing claims and awarding damages against sovereign governments (Van Harten, 2007, pp. 152-3).[79] 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, 2007, 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, 2005, p. 616). Mann (2008) felt that the conflict of interest includes both actual bias and the avoidance of the appearance of bias:

Lawyers or their partners cannot sit as judge one day and as an advocate on a similar issue another day. Judges cannot create decisions that might in some way aid their partners in another case or a firm client in a future potential situation. Yet, this is precisely what happens today in the international arbitration bar. This is not, and can never be, the hallmark of a mature legal system. Indeed it is the antithesis of one. …[P]racticing lawyers who either themselves act as a counsel in cases or have partners who do by definition have a conflict of interest (actual or perceived) that is inimical to their participation as arbitrators. Nor is the selection process of continued appropriateness: it is well understood today that parties of arbitrations chose arbitrators because of their understood leanings (pp. 368-9).

In effect, IA-ISDS procedures could be viewed as a one-sided system of state liability, in which only foreign investors could bring the 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. Previously, while the domestic courts of either the host or the home state were sometimes seen to be biased in the resolution of an international investment dispute via the existing state-state mechanism, it was a step backward to replace it with adjudicators who were perceptively dependent on private interests (Van Harten, 2007, 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 its undemocratic nature

International arbitration under the IA-ISDS procedures of IIAs challenged the rule of law in democratic societies for a number of reasons. As Van Harten has pointed out (2007, p. 130), it lowered the status of the host state *vis-a-vis* foreign investors. Conceptually, the key problem with the characterization of the investor-state relationship as a reciprocal relationship was that it fundamentally altered the nature of the rights and duties of states. When an adjudicator approached the regulatory position of a foreign investor as if it were reciprocal, this did one of two things. Either it reduced the state to the status of a private party or it elevated the foreign investor to a quasi-sovereign status of formal equality with the state 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, was negated. Second, it favored foreign investors so heavily as to undermine core principles of public law, such as accountability, openness and independence (Van Harten, 2007, p 179). In this sense, international investment arbitration of this nature placed limits on the functioning of the democratic process in host countries.

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

Box 8: Protecting Foreign Investment Can Be Very Costly: a Canadian perspective

Canada for decades has sent 80 percent or more of its exports to its neighbor, the United States, and the AD-CVD trade rules of the USA represented a chronic limit on Canada's export potential in that market. In a dramatic shift, the MacDonald Royal Commission on the Economic Union and Development Prospects for Canada in the mid-1980s broke with tradition and recommended a new free trade focus to economic policy. The Mulroney government, which then represented a relatively infrequent return to power at the federal level by the Progressive Conservative party, took that viewpoint to the limit in the context of the Canadian-US Free Trade Agreement (1989) and the North American Free Trade Area (1994). The aim was to attract more US FDI, achieve economies of scale based on access to the continental market and exploit the comparative advantage of Canada. Chapter 11 of NAFTA should be interpreted in that context.

One should not forget that NAFTA was negotiated by three national governments of conservative leanings (the Reagan administration in the USA, the Mulroney one in Canada and the Salinas de Gortari one in Mexico). In that context, the use of IA-ISDS guarantees can become the angle stone of a strategy to limit by way of IIA commitments the degree of intervention permitted to the host government. Conservative parties can be intrinsically interested in constraining all forms of government intervention in the national market and that it can therefore be convenient to promote formal obligations in international investment treaties that do just that. Clarkson has maintained that NAFTA's Chapter 11 introduced an extraordinary foreign element into the sphere of Canadian public law by challenging some fundamental components of Canada's legal and political value system. Since US investment and commercial law tended to prevail in international private arbitration, conflicts between US corporations and the Canadian state inexorably caused US legal definitions to infiltrate Canadian legal standards, for example, by forcing Canadian governments to operate as if US law on "regulatory takings" applied to them. Moreover, in Canada, the right to property was not an absolute right but one conditioned by broader societal objectives. In fact, in 1980, property rights had been excluded by Parliament from the proposed Charter of Rights and Freedoms on the grounds that they were adequately protected under common law. With Chapter 11 cases the specter that the norms of international commercial law would be privileged over domestic values presented itself.

Another claim was that Chapter 11 limited government activism in dealing with development problems. With regards to industrial policy, it was felt that by being required to offer State incentives (mostly subsidies) to all firms (not just Canadian ones) and not applying selective performance requirements on foreign companies, Canada was obliged to abandon the kinds of industrial strategies aimed at promoting local enterprise, employment, and innovation that had constituted traditional federal and provincial economic policy. Moreover, regulatory chill was demonstrated by such initiatives as stillborn public car insurance plans in the provinces of Ontario and New Brunswick, withdrawn proposals for plain packaging cigarettes and the cancellation of contracts to transfer public property into private hands in the case of Toronto's Pearson Airport, among others, all of which had triggered threats of litigation under NAFTA. The range of government measures that might have been subjected to foreign investor claims extended beyond that for which legal sanctions were available under the common law. As a result, the impact was to constrain the authority of Canadian governments at all levels more through the threat of arbitration than did the norms and limitations imposed by Canada's constitution and common law.

Perhaps the most costly effect of all was the truncating of the political spectrum. The constitutional significance of NAFTA was locking in of conservative values and making them immune from partisan politics. More activist politicians in the future would find their hands tied by internationally negotiated but domestically implemented political limits to which their predecessors committed them. Clarkson put it as follows: "In agreeing to accept limits to government powers derived from the principles of free trade, the Progressive Conservative government led by Brian Mulroney lost what for ideological reasons it did not want to keep, namely a capacity to intervene in the economy to promote Canadian-owned corporations in the hope of creating competitive edge for its economic champions." From this perspective, then, the truncating of the political spectrum preemptively disenfranchised future generations from pursuing different legislative goals through the democratic process.

Sources: Clarkson (2006), (2004), (2003), (2002), (2001), Clark (1997), Blackwood and McBride (2006), Schneiderman (1996)

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

In respect of *independence*, the most troubling issue that arose from the use of private arbitration to resolve regulatory disputes was the threat to judicial independence since arbitrators lacked the security of tenure and bars on outside remuneration that were characteristic of judges in mature legal systems. The system made arbitrators dependent on prospective claimants (private investors or executive governments) in ways that tenured judges were not (Van Harten, 2007, p. 167). Arbitrator bias offered 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 was that this explanation was enough to conclude that the system does not satisfy the requirement of judicial independence in public law (Van Harten, 2007, pp. 174-5).

Finally, the political implications of the IA-ISDS guarantees can be quite profound as they might warp or *truncate the political spectrum* in the host country. An example taken from the experience not of a developing country or transition economy but of a G-7 country, such as Canada, demonstrates that IA-ISDS procedures can have far reaching effects that go well beyond the economic and judicial sphere to influence the political process itself by placing limits on the exercise of democracy (Box 8).

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 undemocratic nature of such procedures do 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

Without a doubt the most evident and 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. As was mentioned, the damages, legal fees and administrative costs of some of the more notorious decisions have involved hundreds of millions of dollars. That represents a severe financial restriction on any government and especially of a small- or medium-sized developing country or transition economy with active developmental aspirations manifest in "catch-up" strategies. Public sector financial resources that go to pay the costs of adverse IA-ISDS decisions are public sector financial resources that do not go toward developmental tasks.

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" that can be cashed for an unknown amount at a future but as yet unknown date (Redfern and Hunter, 2004, pp. 60-2). Such commitments represent a kind of 'sword of Damocles' that hangs over the heads of host countries. In either case, these treaty obligations represent open-ended promises or commitments that can severely inhibit government action to face up to developmental challenges. The more serious the host government in dealing with such risks the more 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 only that 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, labor and employment, cultural heritage and the environment, among others. Or, alternatively, host governments in extreme circumstances may be forced to choose between honoring the international 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, that is, "Do the benefits from IA-ISDS clauses justify the risks?"; two things can be said. First, it depends to a very large extent to the specific situations of the host countries. What holds for Brazil may not be the case for Bolivia, or that of Russia 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 they 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 are the more likely is 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 inconsistent, incoherent and ambiguous jurisprudence manifest in classic cases, such as, Lauder v. Czech Republic and Czech Republic v. CME Czech Republic B.V., which resulted in contradictory arbitral decisions.[80] Rather, it came from the US government, the same country that had aggressively promoted the most demanding aspects of foreign investment liberalization in general and IA-ISDS guarantees in particular. When NAFTA's Chapter 11 was turned against the *US Government itself*[81] a strong backlash occurred within that country. Even though the USA subsequently has won all its IA-ISDS cases, a surge in opposition to the application of Chapter 11 arbitration procedures to that country occurred. For example, a host of state and local governments went on record opposing such 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 RTAs. 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 USA, the United States Trade Representative (USTR) itself waivered 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 favor of the economic essence of such (i.e. 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 standard of treatment and indirect expropriation were linked to customary international law in annexes in the new US RTAs following the practice set out by the NAFTA Free Trade Commission in July of 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 US case law.[82]

The principal US initiative was to propose the creation of appellate mechanisms for IA-ISDS procedures. The US Congress in its Bipartisan Trade Promotion Authority Act of 2002 established a negotiating objective of US RTAs to "providing an appellate body or similar mechanism to provide coherence to the interpretations of investment provisions in trade agreements" (Legum, 2008, 232). As a result, subsequent RTAs (i.e. 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 DR-CAFTA agreement 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 (i.e. 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. 202-3).

The new view of the US government played out in a number of other areas. The search for increased transparency and consistency led to clarifications of NAFTA and a new 2004 US Model BIT, among others (for example, for the first time a US RTA --with Australia-- was signed that did not include IA-ISDS provisions. See Newcombe, 2005 and Dodge, 2006). Some of the main aspects were to propose:

- The interim review of draft decisions or awards. If one of the disputing parties requested, 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;

- Fuller transparency. Written submissions were to be made available to the public in a timely fashion, hearings were to be open to the general public, etc.;

- The consolidation of claims. It provided 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 were to be added to the annexes to the 2004 US Model BIT (Tracton, 2008, pp.203-6).

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

The US initiatives provoked reactions. For example, the OECD eventually organized a "Symposium on Making the Most of International Investment Agreements: a common agenda" which took place in Paris in December of 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 in April of 2006. The principal advantages and disadvantages of any appellate mechanism were considered (Yannaca-Small, 2008, pp. 224-5). Advantages included avoiding inconsistency, rectifying legal errors and possibly serious errors of facts, adding review by a neutral mechanism (not a national court), and improving effective enforcement, and 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 US Government 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.[83]

This is a curious outcome considering that an OECD publication (2006a) 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 of 2006 the OECD achieved a landmark result by adopting a tool for global and regional dialogue on foreign investment, national policy assessment and peer review, and known as Policy Framework for Investment. As mentioned, this represented a substantial softening of the previous OECD hardline stance on foreign investment, exemplified by the MAI. Presumably, the inherent differences between the US-style IIAs, which stressed foreign investment liberalization, and the European-style IIAs, 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 (Brunner, 2008, p. 284; Legum, 2008, 238; Alvarez, 2008, pp. 31-2; Pualsson, 2008, p. 242; 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 et al., 2008 and 2008a), 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.[84] Other, even more minor changes,[85] were being considered for the UNCITRAL Rules by a Working Group set up in 2006.[86]

The major concrete modifications relate to IA-ISDS guarantees and mechanisms were found primarily in initiatives of individual countries. It is probably for this reason more than others that there is a feeling that <u>new</u> 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 end of 2007). The modifications to NAFTA and the new 2004 US Model BIT have been referred to previously.[87] *Canada* also participated in the modifications to NAFTA and developed a new 2004 Model BIT (called Foreign Investment Protection Agreement in Canada).[88] While the shift from BITs based on the OECD model[89] to those based on the 1994 Model (NAFTA ‘light’)[90] moved in a liberalizing direction by focusing on establishing 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[91] 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 FIPA signed with Colombia (*IAReporter*, 2009).

Norway had 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 what was deemed expropriation pursuant to the provisions of international law, safeguarded the general regulatory freedom of the state on 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 regards to regional practices in negotiating individual IIAs, in general, *Asian countries* have become more active recently in negotiating IIAs but at the same time they do so in much more prudent and cautious ways than others 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, 2007). Even with regards to the trend towards signing RTAs with some of the more active home countries in Asia, such as Japan and Singapore, some Asian developing countries such as *Philippines* and *India* have demonstrated their ability to negotiate RTAs with significant limits on IA-ISDS risks. In the case of Philippines' RTA with Japan,[92] 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 (*ITN*, 2006). In the case of India's RTA with Singapore[93], 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 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 US and Canadian agreements were adopted with respect to indirect expropriation (ITN, 2005). Thus, a number of

Asian developing countries demonstrated that IIAs, including liberalizing RTAs, could be negotiated in ways that limited the IA-ISDS risks.

In answer to the question 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 toward 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 problems and deficiencies linked to the impacts on democratic processes, limits on national policy space and other questions concerning its 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 for developing countries and transition economies, at least, they must learn from the IA-ISDS jurisprudence and focus on improving their risk management in terms of their own IA-ISDS exposure by renegotiating existing commitments where possible and better negotiating new commitments in prospective IIAs.

Section 3. The Management of IA-ISDS Risk in Latin America and the Caribbean

A large number of 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 toward explaining the superior performance of developing Asia, especially East Asia, in comparison to LAC (Sauve, 2007; Duran et al., 2008)

For example, the essential nature of the foreign investment base covered by IIAs in developing Asia and LAC 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 which are predominant. Given that natural resources have been the center 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 regards to trade in goods (especially manufactures), one would expect more IA-ISDS cases in LAC in comparison to developing Asia.

With regards to the basic orientations of the principal IIAs partners, the recent surge in IIAs among Asian partners has diluted the profile of North American and European investors in Asia. The TNCs from Asian partners have been less propense to utilize IA-ISDS procedures than the European, and especially the North American TNCs (Stanley, 2007). Intra-LAC FDI is still relatively limited in the region and the principal IIA partners continue to be North American and European ones who have proved quite propense 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 environment (especially, democratic, macroeconomic and legal), and implement cohesive policies, are those most likely 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 LAC 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, 2006).

In relation to effective use of negotiating strength in the provisions of the IIA treaty, it is difficult to draw conclusions at the regional level, however, the scarcity of RTAs with the USA on the part of developing Asian countries (except Singapore and perhaps Korea) contrasts sharply with the proliferation of RTAs between the USA and LAC countries (Mexico, Chile, Dominican Republic, Costa Rica, Nicaragua, Honduras, El Salvador, Guatemala, Panama, Peru and perhaps Colombia). Furthermore, the effective use of negotiating strength shown by China and India in their IIAs, even the most recent ones, shows 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 LAC.

1. Two different worlds of IA-ISDS risks from IIAs in LAC

By 2008, LAC countries were parties to well over 300 IIAs. They were also subject to over 200 known IA-ISDS cases.[94] The analysis that follows concentrates solely on the 117 ICSID cases and, with one exception, not those of the Court of Arbitration of the ICC, the Arbitration Institute of the Chamber of Commerce of Stockholm, or the London Court of International Arbitration or ad hoc alternatives. The ICSID cases are the only ones for which a minimum of coherent information is available and the cases corresponding to LAC are organized into concluded and pending cases, by country, in Annex Table IV.1.

Table IV.1 contains information on the 20 LAC countries that have been directly involved in ICSID cases of international arbitration (concluded or pending). They represent more than half of the countries of the region. As is evident, a fissure is increasingly apparent within LAC separating countries that are well-disposed to carry the risks associated with the IA-ISDS procedures in their IIAs ("RTA-centric" countries), ostensibly in order to attract more FDI, such as Mexico, Chile, Peru, Colombia, Panama, Dominican Republic and Central American countries, and the others ("disenchanted" countries) that, for different reasons, do not seem well-disposed to do so (Bolivia, Ecuador, Paraguay, Venezuela, and, the single country with over 50 percent of the pending ICSID cases in LAC, Argentina).[95] RTA-centric countries generally appear to feel that the IA-ISDS risks are justified while the disenchanted do not concur. RTA-centric countries currently carry a significantly lighter load in terms of pending cases than do the disenchanted countries but they may be more susceptible to regulatory chill or policy paralysis.

Table 1: Characteristics of Groups of LAC Countries with ICSID Cases

(Number of IIAs and number of cases)

Country	RTAs[1] (US-style)	BITs[1]	Concluded Cases	Pending Cases	Total Cases
RTA-centric (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
Disenchanted (5)	-	*141*	*27*	*50*	*77*
Argentina	-	54	15	33	48
Venezuela	-	24	5	5	10
Ecuador	-	23	5	8	13
Paraguay	-	21	1	2	3
Bolivia	-	19	1	2	3

Caribbean (5)	*	*22*	*8*	*1*	*9*
Jamaica	*	10	3	-	3
Trinidad & Tobago	*	7	2	-	2
Grenada	*	2	1	1	2
Guyana	*	3	1	-	1
Saint Kitts & Nevis	*	n/a	1	-	1
Total (19)	*35*	*346*	*52*	*65*	*117*

Source: based on http//www.icsid.org [1] In force * Recently signed EPA with European Commission (no IA-ISDS procedures incorporated).

Recently, an additional fissure became perceptible in LAC (Table IV.1) in the form of an Economic Partnership Agreement (EPA) signed by 15 Caribbean countries (CARIFORUM)[96] of the 79 member Africa, Caribbean and Pacific group of countries and the European Commission, which might suggest that these countries have now become more well-disposed to carry increased risks associated with the IA-ISDS procedures in their IIAs.[97] The situation of these Caribbean countries is quite special in that i) they possess relative few IIAs (a total of only 22 BITs for the 5 countries); ii) the RTA they recently signed was with the European Commission not the USA; iii) that IIA incorporates no IA-ISDS procedures (Box 9); and iv) 8 of the 9 ICSID cases involving these Caribbean countries have been concluded (3 before 1990). The Caribbean countries (except Dominican Republic) carry quite low IA-ISDS risks, which is distinct from both the RTA-centric and the disenchanted 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.

Box 9: CARIFORUM-EC EPA as a Precedent-Setting RTA

The context for the CARIFORUM-EC EPA includes the expiration of the WTO waiver rules on EU preferential trade scheme with ACP countries contained in the 2000 Cotonou Agreement, the apparent loss of interest of EU investors in the Caribbean and the rise in US RTAs in the region, including the entry of a Caribbean country (Dominican Republic) in the US-Central America RTA. The EPA covered trade in goods and services, as well as commitments in intellectual property protection, foreign investment, government procurement, competition, cultural cooperation and protection of labor rights and the environment. One of the principal benefits for the EC was to set the bar high for all subsequent EPA negotiations with ACP countries. On the part of CARIFORUM countries, they succeeded in making the EPA into a development-friendly mechanism with asymmetrical commitments and obligations in their favor that offered tangible benefits in terms of access to the EU's lucrative services market.

With regards to trade in goods commitments, the EU removed all tariffs and quotas on all CARIFORUM exports already on 1 January 2008 in anticipation of the conclusion of the Agreement (with the exception of sugar which will be liberalized in October, 2009 and rice in December, 2009). The

CARIFORUM countries will offer duty-free access to 61.1 percent of EU goods within 10 years, 82.7 percent after 15 years and 87 percent by 2033.

In terms of foreign investment, the EPA covered services (professional, communications, construction and engineering, distribution, education, environmental, financial, health-related, social, tourism and travel-related, transport, and new services not included elsewhere) and non-services (agriculture, hunting, forestry, fishing, mining, manufacturing, production of gas, electricity, steam and hot water) and commitments were made not to limit market access or national treatment in specific ways (by the number of investors, the total value of transactions or assets, the total number of operations or on the total quantity of output, the participation of foreign capital in terms of maximum percentage limit on foreign share holding, and measures that restrict or require specific types of commercial presence or joint ventures through which an investor may perform an economic activity), except as indicated in the corresponding schedules. Sensitive sectors were excluded and reservations (29 individual CARIFORUM countries and 13 collective ones) made for possible future regulation in sub-sectors to preserve policy space. The MFN commitment was for no less favorable treatment than CARIFORUM countries afford like commercial presences of any major trading economy (i.e. with more than a 1 percent share of world merchandise exports). The EC MFN commitment is full. Provisions related to the behavior of foreign investors to prevent abuses and to guarantee that investment liberalization will not result in social and environmental costs. At the same time, there were important cooperation commitments in competition, transparency commitments in government procurement and an innovative Protocol on cultural cooperation.

Most notably, foreign investment was limited to foreign direct investment and no investment protection provisions on expropriation, fair and equitable treatment or IA-ISDS procedures were included in this Agreement, in good part due to the EC's limited competence in this area. Nonetheless, given the relatively limited coverage of European BITs in CARIFORUM countries, this did represent an effort by those countries to rebalance the thrust of BITs by enhancing host county rights.

This EPA seems to have left the EU with the idea that EPAs represent the best available option for structuring its trade, regulatory and development cooperation with ACP partners, especially for internationalization of the regulation of key industries on a sector-by-sector basis. CARIFORUM countries appear to have succeeded in negotiating a balanced services and investment chapter with acceptable commitments and obligations in exchange for concrete development finance and technical assistance through the EU's 165 million euro commitment from the European Development Fund.

In summary, the CARIFORUM-EC EPA is precedent-setting in terms of RTAs in the sense that highly unequal partners negotiated an agreement that offered tangible benefits to the side with weaker negotiating strength. This EPA can be considered WTO-plus because it goes beyond the commitments and rules of government services trade in WTO and created a detailed (if far from comprehensive) framework for rules on foreign investment. It can be considered GATS-plus in the sense that liberalization commitments cover a wider range of service and foreign investment activities, particularly in key infrastructural sectors (although the depth of the CARIFORUM countries' commitments scheduled in areas where the parties already had GATS commitments is limited). Generally, these Caribbean countries seem to have adopted a cautious yet effective approach to negotiating international commitments and obligations by way of IIAs.

Sources: Avril, (2008); Sauve and Ward (2009); South Center (2008); European Commission (2008); Wandrag (2008); Westcott (2008); *Bridges* (2008).

2. LAC experiences dealing with IA-ISDS risks

Three aspects of the LAC experiences 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 but not definitive of the situation in LAC 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 LAC country has been the defendant is relatively weak and incomplete in spite of the ongoing efforts to improve upon it. The mantel of secrecy still pervades international investment arbitration and the efforts to infuse more transparency in this subject matter have been only partially successful.

Franck (2007, pp. 58-9) found in her analysis of 102 awards (52 final awards) up to June of 2006 that the average damages assigned were US$ 10.4 million. Using that as a reference point, the known costs in LAC 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 LAC 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.[98] The damages of another case surpassed 50 million.[99] 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 20 billion dollars[100]. One single claim is in the order of US$ 4.4 billion (See Box 12). 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 disenchanted countries had been assigned damages (US$ 69 million), which was the case of Ecuador.[101] More notable, however, was the fact that these disenchanted countries (excluding Argentina) are involved in about one-quarter of the pending ones. 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 was much less dramatic. The RTA-centric countries faced damages of consideration but nothing similar to Argentina. Peru lost one case worth about US$ 18 million[102], Mexico was assigned damages in the order of US$ 17 million for two cases[103], and Chile lost one case with damages of about US$ 5 million.[104] The RTA-centric countries were involved in about one-third of the concluded cases of ICSID, and are responsible for only around one-fifth of the pending ones.

In sum, the available information does not permit a definitive analysis of financial costs associated with ICSID cases in LAC. More needs to be done in this regard to make the IA-ISDS procedures more transparent. The case that stands out by far in LAC 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, sometimes, hundreds of millions of dollars, which would be debilitating for any LAC economy.

Box 10: Metalclad Corporation v. United Mexican States: expansive interpretations of fair and equitable treatment and indirect expropriation

This case (ICSID Case No. 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 company, Metalclad of a landfill in Guadalcazar 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 manifestations 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 rare cactus, through an ecological decree. This effectively impeded the operation of the facility.

The ICSID tribunal 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 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 as it highlighted the tension between foreign investor protection and national policy space. In this case, the tribunal considered 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 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 in pursuit of environmental protection, health, public welfare or community interests if they interfered with the ability of the foreign investor to make a profit from its investment. (Mann and von Moltke, 2002).

Posterior IA-ISDS cases under NAFTA considered that there were limits to the assimilation of regulatory action to indirect expropriation (i.e. SD Myers v. Canada, Pope & Talbot v. Canada). Nevertheless, mainly at the instigation of the US Government, 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 also were introduced into subsequent RTAs involving the NAFTA member countries as well as the revised Model BITs 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 possibility.

Sources: Introductory Note and Award of the Tribunal on Case ICSID Case No. ARB(AF)/97/1; Zarsky, Lyuba (2005), *International Investment for Sustainable Development: Balancing Rights and Rewards*, Earthscan; Mann, Howard, and Konrad von Moltke, "Protecting Investor Rights and the Public Good: Assessing NAFTA's Chapter 11", Background Paper to the IISD Tri-National Policy Workshops, Mexico City: March 13; Ottawa March 18; Washington: April 11, http://www.iisd.org/trade/ILSDWorkshop; 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 nb. 4; Lowenfeld, Andreas F. (2008), *International Economic Law*, Oxford University Press, Second Edition.

b) Expansive interpretations in IA-ISDS jurisprudence

As was mentioned in Section 2, 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, and shift additional risks to the host government, and otherwise constrain the host's national policy space. In this regard, the RTA-centric countries seem to have been able to better adapt to the situation by reforming the worst aspects of their RTAs or taking precautions to avoid such risk in BITs, whereas the disenchanted countries of the region face increasing tensions in line with the limitations on their right to regulate stemming from their older unmodified BITs.

Two examples from the RTA-centric 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 (Box 10); and the reaction of the Chilean government to the adverse decision in the case of MTD Equity (Box 11). 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. In the second, the Chilean government decided not to pursue further BITs as a result of the MTD Equity and other cases, although it continued negotiating RTAs with investment chapters. In other words, there is some evidence that RTA-centric 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 11: MTD Equity v. Republic of Chile: expansive interpretation of fair and equitable treatment

This case (ICSID Case No. ARB/01/7) put into evidence the relationships between, and coordination of, different spheres of government that involved apparently contradictory decisions at the level of the national government. 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, shopping areas and others). 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 were 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 the FIC in January 1997, specifying the location of the investment as "Pirque, Metropolitan Region", and mentioning the farmland in which it would be situated. The 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 them, among other tasks, in obtaining zoning changes. These needed to be initiated by the Municipality of Pirque, and endorsed by the Ministry of Housing and Urban Development ("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 program 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 on the part of 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 the plans of developing the city towards the north. The project was then formally rejected by MINVU. A request for arbitration was filed invoking the Malaysia-Chile BIT and during the mandatory 3-month negotiation period that preceded the arbitration proceedings, the 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 the 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 the 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 the 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", "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 the 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 fiar 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 RTAs, which had been modified based on the experience of NAFTA.

Sources: Case No. ARB/01/7- MTD Equity Sdn. Bhd. and MTD Chile S.A. (Claimants) v. Republic of Chile (Respondent) Award of the Tribunal. ICSID webpage.

The disenchanted countries had a number of harrowing experiences with expansive decisions of ICSID arbitral tribunals relating to older unreformed BITs that sent inconsistent messages to host governments with regards 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*? (Box 12); (ii) What is the scope of applicability of the MFN clause? (Box 13); and (iii) What is the situation of state contracts? That is, can they be elevated to treaty jurisdiction? (Box 14). In terms of merit, the discussion on the standards for asserting indirect expropriation (Box 15) illustrated the danger of imprecise definitions in that regard. Several of the examples mentioned in Boxes12-15 refer to Argentina due to the fact that it is the LAC country which has generated most IA-ISDS jurisprudence (15 concluded and 33 pending cases).

Box 12: Who Can Resort to International Investment Arbitration? The Definition of "Investor" in IA-ISDS Jurisprudence in LAC

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 ICSID under the different IIAs is to determine if the company is a foreign investor according to the definition in the respective IIA. IA-ISDS jurisprudence in LAC 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 Enron Corporation and Ponderosa Assets, L.P. v. Argentine Republic case (ICSID Case No. ARB/01/3), Noble vs. Republic of Ecuador (ICSID Case No. ARB/05/12) and Aguas del Tunari SA v. The Republic of Bolivian (ICSID Case No. ARB/03/2)
In Noble v. Republic of Ecuador (ICSID Case No. ARB/05/12), the decision on jurisdiction 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 v. 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. v. The Argentine Republic (ICSID Case No. ARB/01/3) was a key aspect of this debate and discussed the limits to the *ius standi* of indirect and minority shareholders (discussed under title b.). 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 had actively promoted investment in its privatization program for the gas industry, conducted road-shows, and specifically invited foreign investors to participate were use 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 precise definitions on whom the claimants may be (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 Bolivia. In Aguas del Tunari SA v. The Republic of Bolivian (ICSID Case No. ARB/03/2), US company Bechtel owned stakes in Aguas del Tunari (AdT), the company that held the Cochabamba water and waste water concession from November 1, 1999, to April 2000, when the concession was terminated.[105] The decision on jurisdiction of the case, issued in 2005, illustrated several issues of broader interest. Bolivia did not, at the time of the termination, have an IIA with the United States. A 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) established in the Cayman Islands. Between the granting of the concession in September of 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. 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 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, 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 US company, to use the Bolivia-Netherlands BIT. Second, 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 favorable 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, such as the scope of application of MFN treatment, which can lead to surprises for the host country.

b. <u>Minority shareholders</u>: the Argentine cases involving Lanco, CMS, and Enron

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 v. Argentina). Tribunal opinions, nevertheless, maintain that minority shareholders do have *ius standi*.

In Lanco International Inc. v. The Argentine Republic (ICSID Case No. 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-US 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. v. The Argentine Republic (ICSID Case No. ARB/01/3), mentioned above, continued from the discussion of the *ius standi* of indirect shareholders to that of minority shareholders.[106] 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 v. The Argentine Rupublic (ICSID Case No. 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 question the scope of the definition of foreign investor, they also consistently amplify the categories of foreign investors are covered by such. 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 (i.e. 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 US-Argentina treaty, for instance, doesn’t 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 4.4 billion dollars for the first group of 190,000 investors; 14.3 million Euros and 1.2 million dollars for the second group; and 6.5 million Euros plus 560 thousand dollars for the third group. The claims are, among others, of 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 includes, expressly, public bonds, in contrast to many other IIAs. This could lead to a curious situation in which certain bondholders from particular countries with BITs with Argentina with broad definitions of investment who rejected the unilateral offer from the Argentine government and were left out might actually fare better than those that accepted it.

Sources: Investment treaty news April 27, 2007, IA Reporter - Volume 1, No. 7, August 7, 2008, Americas Program Special Report, “Argentina Versus the World Bank: Fair Play or Fixed Fight?” Tony Phillips, April 29, 2008, http://americas.irc-online.org/am/5189; Treaty between the United States of America and the Argentine Republic Concerning the Reciprocal Encouragement and Protection of Investment; Trattato fra la Repubblica Italiana e la Repubblica Argentina sulla Promozione e Protezione degli Investimenti. Aguas del Tunari SA v. The Republic of Bolivia (ICSID Case No. ARB/03/2), Introductory Note and Decision on Respondent’s Objection to Jurisdiction, ICSID Review, Foreign Investment Law Journal, available at http://icsid.worldbank.org; Arif Hyder Ali and Alexandre de Gramont, “ICSID Arbitration in the Americas”, The Arbitration Review of the Americas 2008, Global Arbitration Review Special Report; ICSID Case No. ARB/05/12, Decision on Jurisdiction; IA Reporter Volume 2, nb. 1 January 5, 2009, volume 1, no. 2, June 3, 2008; Aguas del Tunari SA v. The Republic of Bolivian (ICSID Case No. ARB/03/2), Introductory Note and Decision on Respondent’s Objection to Jurisdiction, ICSID Review, Foreign Investment Law Journal, available at http://icsid.worldbank.org; Arif Hyder Ali and Alexandre de Gramont, “ICSID Arbitration in the Americas”, The Arbitration Review of the Americas 2008, Global Arbitration Review Special Report.

Box 13: MFN 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 MFN treatment.

In Gas Natural SDG S.A. v. the Argentine Republic (ICSID Case No. 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 BIT). The company also invoked the MFN clause in that agreement to claim the application of the more favorable conditions contained in the Argentina-United States BIT that, contrary to the Argentina-Spain BIT, did not require resort to national courts and an eighteen-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-favored-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 favor of the claimant company.

In Siemens A.G. v. The Argentine Republic (ICSID Case No. 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 favorable 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 favor of the company, stating that 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. v. Argentine Republic (ICSID Case No. 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 it asserts its 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 were entitled to seek international arbitration only after a further eighteen months. Again, the tribunal found in favor 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 Argentina 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.

Sources: Gas Natural SDG S.A. v. the Argentine Republic, ICSID Case No. ARB/03/10, Decision of the Tribunal on Preliminary Questions on Jurisdiction, June 17, 2005; Siemens A.G. v. The Argentine Republic, ICSID Case No. ARB/02/8, Decision on Jurisdiction of August 3, 2004; Suez, Sociedad General de Aguas de Barcelona, S.A. and Interagua Servicios Integrales de Agua S.A. v. Argentine Republic (ICSID Case No. ARB/03/17) Decision on Jurisdiction.

Box 14: Elevating State Contracts to Treaty Jurisdiction: cases from Argentina

Two of the ways that 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 BITs currently in force, mostly with European home countries, usually state that each Party agrees to "observe any obligation it has assumed" (See section 2). This type of statement has the practical effect of making certain acts subject to the protection of the IIA even when they do not specifically violate the contract.

Two general approaches - a narrow and a broad view - have been taken by arbitral tribunals 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. As was mentioned in Section 2, two cases involving SGS (Société Généräle 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 interpretation are found in the IA-ISDS jurisprudence of ICSID cases.

In El Paso Energy International Company v. The Argentine Republic (ICSID Case No. 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 make violations of any obligation a violation of the treaty, they must say so "clearly and unambiguously".

In LG&E v. The Argentine Republic (ICSID Case No. ARB/**xx/xx**), the tribunal understood that due to the umbrella clause in the United States-Argentina BIT, obligations towards foreign investors, including those deriving from a contract, receive extra protection. It also understood that certain provisions of the Gas Law also 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 v. The Argentine Republic (ICSID Case No. ARB/**xx/xx**), 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, and parties to, the obligations of the State, the breach of which may trigger the umbrella clause. The decision of the CMS *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 detected in relation to the Tribunal's findings on necessity. The award of damages was not affected. The ICSID annulment committee in CMS v. 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 suggests that 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 and incoherence.

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. v. The Argentine Republic (ICSID Case No. ARB/97/3), was associated with a 1995 water and sewage concession contract between 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 the delivery of services. 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: ECLAC based on Malik, 2007, Honlet and Borg, 2008, Paulsson, 2008, p. 262.

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, minority shareholders) qualify to initiate such arbitration. These examples demonstrate how unforeseen risks can be generated for the host country by way of expansive interpretations of the concepts in existing IIAs. Box 13 indicates how MFN clauses can lead to provision shopping by claimants.

In practice, the scope of application of the MFN clause in Argentine IA-ISDS jurisprudence, as discussed in Box 13 facilitated foreign investors claims in a manner not foreseen by the Argentine government and considerably widened its existing IA-ISDS risks.

Box 15: 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 No. ARB/03/19) (described in the previous box), in assessing the claim of indirect expropriation, the tribunal analyzed 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 *Tecmed* (ICSID Case No. ARB/**xx/xx**)];
2. Whether the challenged measures "effectively neutralise the benefit of Claimants' property [referring to a case involving *CME* (ICSID Case No. ARB/**xx/xx**)] ;
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 No. ARB/**xx/xx**)]; and
4. Whether they render Claimants' property rights useless or have a similar dispossessory effect [referring to a case involving *Starrett Housing* (ICSID Case No. ARB/**xx/xx**)].

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 their conclusions to those arrived at in two other Argentine cases: CMS v. The Argentine Republic (ICSID Case No. ARB/**xx/xx**), and Azurix v. The Argentine Republic (ICSID Case No. 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 effects of indirect expropriation, as 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 does not manage the day –to-day operations of the company, and the investor has full ownership and control of the investment. The case involving Azurix Corp.[107] (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. v. 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 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",[1] 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".[2] "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 concessionary 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 concessionary's non-fulfillment of service expansion and quality goals (and other issues, among which 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."

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 provinces' 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.

Sources: Azurix Corp. v. The Argentine Republic (ICSID Case No. ARB/01/12), Award of 14 July 2006.; Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. (ICSID case No. ARB/03/19)

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 (Box 14). Again, Argentine IA-ISDS jurisprudence is referred to.

Clearly, imprecise and ambiguous definitions and expansive interpretations have facilitated greater use of the IA-ISDS procedures in LAC and in Argentina in particular. This has led to considerable unpredictability in respect of actually risks deriving from existing IIAs. This has been demonstrated by way of the cases involving the definition of investor and investment, the scope of application of MFN treatment and elevating 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 15 discusses the interpretation of indirect expropriation in two Argentine cases.

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 all risks associated with such. As has been made evident, many developing countries in LAC 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 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 (net) 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 regards to the IA-ISDS system on the part of foreign investors.

1. Natural resources-based development strategies

In this subsection, the special circumstances of LAC countries employing natural resource-based development strategies (Bolivia, Ecuador and Venezuela) and the particular situation of the Argentine crises are considered. In both cases, evidence of host state withdrawal is presented.

The export of natural resources traditionally has been the life blood of most of the countries of LAC. 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 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. Several of the disenchanted countries (Venezuela, Ecuador and 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.[108]

The petroleum and gas sector represented the central focus of these countries' developmental strategies (Stanley, 2008, p. 2). In terms of the share of total exports, these natural resources accounted for 46% for Bolivia, 57% for Ecuador and 87% for Venezuela in 2005. With regards to tax revenues, petroleum and gas corresponded to 25%, 30% and 55%, respectively. Finally, the petroleum and gas sector received the biggest share of inward FDI, 71%, 90% and 34%, respectively in 2005.

In different manners, these countries opted to establish increased state presence in the petroleum and gas sectors in their economies to promote a higher return from those natural resources. Several foreign investors responded by initiating IA-ISDS procedures. Venezuela passed a new Hydrocarbons Law in 2002 which reserved petroleum exploration, production and distribution to 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 (US), Total (France), and Statoil (Norway) renegotiated their contracts as a consequence; others, such as two US companies (Exxon-Mobil and Conoco-Philips) and one Italian one (ENI) did not. They initiated IA-ISDS proceedings.[109]

Ecuador also reformed its Hydrocarbons Law, reclaimed the principal concession then in operation (that of US company Occidental Petroleum – see Box 16) 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- see Box 16, Murphy, Burlington Resources and Perenco) were made on the host country, as well as one that dealt with an oil exploration contract (Repsol).

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 Venezuela and Ecuador, Bolivia's principal exports are gas and they go to Argentina and Brazil. Bolivia assumed control over pipelines and refineries and renegotiated existing contracts without provoking any IA-ISDS procedures. One element that worked in its favor 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. Venezuela denounced its BIT with Holland, 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 (Ecuador, Ministerio de Relaciones Exteriores, Comercio e Integración, 2007; *Investment Treaty News*, 2008), began a process to denounce nine of its twenty five BITs and initiated the preparation of a new Model investment agreement (Guerra, 2008). Bolivia formally withdrew from ICSID (ICSID, 2007; *Puentes*, 2008), and in February of 2009 enacted a new Constitution in which Article 366 reserved the petroleum and gas sector to the State.

Box 16: Two cases involving Occidental Petroleum Corporation v. Republic of Ecuador

Two cases have brought Occidental Petroleum Company (Oxy) and the Republic of Ecuador to international arbitration.

The first case (LCIA Case No. UN3467) referred to Ecuador's suspension of value-added tax (VAT) refunds. Until 2001, the company had received refunds of the value-added tax (VAT) paid on goods purchased in fulfillment of the exploration and exploitation activities undertaken by the company; however, new resolutions were issued by the government whereby no such refund would be made to petroleum companies, based on the notion that these reimbursements were already accounted for in the participation formula (that defines the allocation of costs and revenues) under the exploration and exploitation contracts with the state petroleum company, Petroecuador. Oxy initiated an international arbitration case in the London Court of International Arbitration (LCIA Case No. UN3467), which was considered under UNCITRAL rules. The case was concluded in 2004 in favor of the company, with an award of US$ 75 million dollars. The tribunal ruled that Ecuador had failed to provide national treatment which, in the Ecuador-United States BIT was defined as an obligation of treating investments and associated activities "on a basis no less favorable than that accorded **in like situation** to investment or associated activities of its own nationals or companies, or of national or companies of any third country, whichever is most favorable". What stands out in this case is that the tribunal interpreted the terms "in like situation" as including all exporting firms, rather than all **petroleum** companies, and thus concluded that Oxy was entitled to VAT refund (although these were denied to the state petroleum company, Petroecuador).

In May of 2006, the government of Ecuador accused Oxy of illegally transferring part of an oilfield to EnCana, a Canadian company, and cancelled its operating contract. The company presented the case before ICSID, estimating that damages would exceed US$ one billion. In fact, the claim presented mentions "the fair market value of the Participation Contract" (under which it operated", of 2.7 billion dollars, and consequential damages of 201.2 million dollars. Two decisions have been issued so far in this case: a decision on provisional measures requested by the company (denied) and a decision on jurisdiction. The decision on merit is pending.

What stands out in this second case, or rather in the circumstances surrounding it, is the use of external pressure on the host country. For example, the negotiations of the Ecuador-United States free trade agreement were suspended, and before any statements were made on the merit of the case, the IMF suggested Ecuador set aside reserves to pay for compensation. This is a curious affair since one of the principal benefits of the IA-ISDS procedures is supposedly to avoid the external pressures more common to the State-State resolution of foreign investment disputes.

Sources: Final Award, London Court of International Arbitration Administered Case No. UN 3467, between Occidental Exploration and Production Company and the Republic of Ecuador, ICSID Case No. ARB/06/11, Decision on Provisional Measures and Decision on Jurisdiction; "Ecuador rejects IMF recommendations in Occidental Petroleum suit", The Associated Press, October 7, 2006; "Occidental Petroleum Corporation v. Ecuador, Using ICSID Claims as Legalized Blackmail", "Challenging Corporate Investor Rule", Food & Water Watch and Institute for Policy Studies (IPS), 2007.

A principal legitimacy issue which can be identified in these experiences was the feeling that the constraints on national sovereignty in terms of implementing a natural resource-based development strategy exceeded the benefits from the IA-ISDS system. In each of these three countries, populist governments that currently enjoy strong 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 market-friendly governments and, notably, never subjected to a national vote. 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.[110]

In comparison to these disenchanted Andean countries, the RTA-centric 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).

However, on the down side, Peru was the first country in LAC to employ Legal Stability Agreements (LSAs) which were special agreements by which the State guaranteed legal stability to a particular investor. Peru extended broad guarantees, including the tax regime, the right to non-discrimination, the right to use the most favorable 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 Venezuela (tax regime, exports and specific sectors) (Vielleville and Vasani, 2008, pp. 16-7). The LSAs[111] were central to the ICSID tribunal decision in which Peru was found liable for damages in the order of US$ 18.4 million for breach of the guarantee of tax stabilization with a subsidiary of Duke Energy (ICSID Case No. ARB/03/28).[112]

2. The Argentine crisis and the necessity defense

This suggests that there are different ways of dealing with 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 of the system. 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 since that 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.

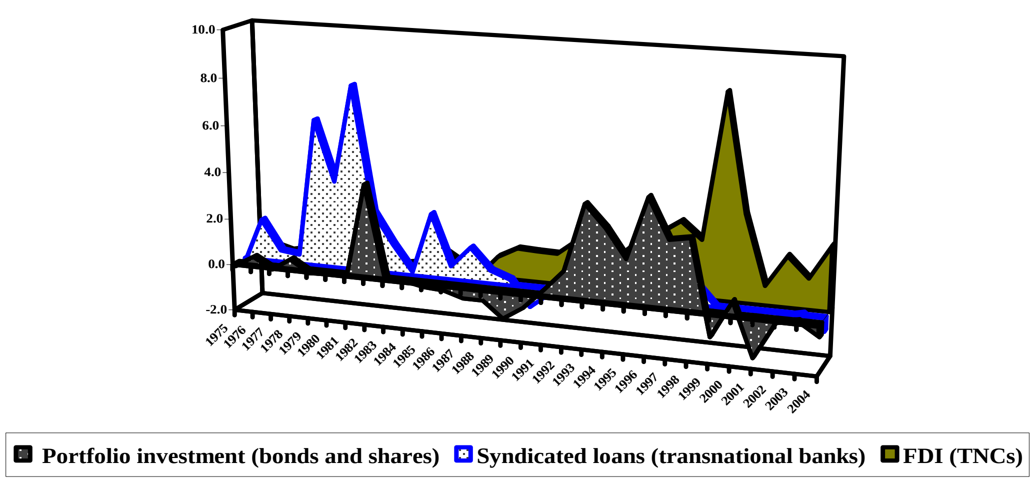
Foreign investment has played a very important but volatile role in the Argentine economy in the last 30 years, strong during the 1970s and the 1990s, when inflows reached highs of 8% of GDP (see figure IV.1) and virtually absent during the 1980s debt crisis. These highs were associated with three different types of investor: first, in the 1970s, transnational banks that extended large syndicated loans; then, in the 1990s, with 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 good part on improved market prospects in the context of the neo-liberal reform program introduced by the Menem government in the early 1990s. The Convertibility Law in 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 fiscal and 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.[113] More or less simultaneously, Argentina moved ahead with an ambitious program 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 program. 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.

Figure 1: Argentina: foreign investment cycles, 1975-2004

(Percentages of GDP)



Argentina’s macroeconomic performance improved notably and the country entered a solid upward spiral of growth, with the economy expanding by around 9% per year in 1994, and productivity increased. Argentina soon became a show case of successful reform in LAC and President Menem was hailed as an example to follow in the 1998 annual meeting of the IMF and World Bank in Washington.

On 23 December 2001 Argentina shook the international financial community by announcing 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) provoking a large number of IA-ISDS cases. The Argentine economy went into a tailspin in good part due to twin foreign investment crises: external public debt and foreign direct investment.

A little over three years later and with no help whatsoever from the IMF, 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, the 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 G-7 governments.

With regards 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 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 only to the guarantees offered under BITs but also the advantages related to national regulations (for example, rates set in dollars and indexed to the United States wholesale price index). National legislative provisions, regulatory terms and the BIT network bound the contractual framework. Thus, seeking to attract foreign investors and guarantee the success of the reforms, the neo-liberal Menem government ended up accepting a system of “complete” contracts, and thereby accepting risks that normally would be shouldered by the foreign investor.

This mechanism helped the Argentine government to demonstrate its commitment to the new international standards promoted by investor countries and the Washington financial institutions, but it also became the main base for foreign investors’ legal proceedings. The spirit of the restrictions the government had imposed upon itself (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 after successive Administrations demonstrated that the Menem government had painted Argentina into a corner and the current government it was both unable and unwilling to abide by the terms of the existing contracts. This produced a sharp reaction from foreign investors, which was manifest in a torrent (more than 40) of ICSID lawsuits[114] that raised the country’s contingent liabilities to around US$ 20 billion.

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 was 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. Foreign investors maintained that the Government of Argentina had agreed to assume the exchange-rate risk 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 exists 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 Argentine Government, the foreign investors (mainly those with interests in the service sectors) and the Washington financial institutions (World Bank and IMF).

The Argentine response began by challenging the arbitral tribunal, questioning its transparency, the process by which the arbitration panel was selected and the fact that the foreign investors were allowed to engage in forum shopping, i.e. select the tribunal most likely to provide a favorable judgment. By the same token, Argentina threatened not to recognize ICSID’s jurisdiction, claiming that cases should be heard in the local courts first. Lastly, in mounting a defense —that 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 (i.e., pesification and rate freezes) amounted to indirect expropriation.

Box 17: The CMS and LG&E cases against Argentina and the necessity defense for the Argentine emergency measures

The 1991 BIT between the United States of America and the Argentine Republic, which entered into force on October 20, 1994 ("US-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 Argentine government over the period of 1999 to 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 ICSID rules.

CMS was the first of several cases filed at ICSID that referred to measures taken by the Argentine Republic to manage the simultaneous crises. CMS owned 29.42% of Transportadora de Gas del Norte (TGN), a company that held the license for transportation of gas over a certain area within Argentina. TGN's rates were set in dollars and adjusted according to the 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 US dollar and the US 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 December 1, 2001 and Law 25.561 of January 6, 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 US 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 US-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 US-Argentina BIT on the grounds that a state of necessity (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 US-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 State Responsibility (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. 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 motivation of the Tribunal's 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 December 21, 2001 to April 26, 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. In essence, the tribunals suggested that foreign investors' rights took precedence over economic and social needs of the local population in times of crises.

Sources: CMS Gas Transmission Company v. Argentine Republic (Case No. ARB/01/8), Award of the Tribunal and Decision of the Ad Hoc Committee on the Application for Annulment of the Argentine Republic; LG&E Energy Corp., LG&E Capital Corp. and LG&E International Inc.1 v. Argentine Republic (ICSID Case No. ARB/02/1), Introductory Note by Claudia Frutos-Peterson and Award of the Tribunal, Investment Treaty News, IISD, October 15, 2007,

Since all the lawsuits cited a single cause, the logic of the 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 17 comparing the CMS and LG&E cases).

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 them to intercede with their investors. Another, in view of the arbitration tribunal's award in the CMS case, was the Government's suggestion 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.[115] 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.

When the Argentine crisis broke out the international system failed 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 shocked to find that the World Bank was unable to oblige the Argentine authorities to abide by the original terms of utility contracts. The bondholders found that the IMF was unable to force the Argentine Government 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 Argentine Government, in its dual capacity as host country and debtor, was appalled by the functioning of the international system, because of the way it explicitly favored foreign investors, the lack of objectivity of the international financial institutions (basically IMF) 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 is between 1999 and 2003 the proportion of Argentines living below the poverty line doubled, from 27.1 to 54.7% of the population, the Government found itself forced to choose between using scarce resources to alleviate the economic and social suffering of the Argentine population caused by the crises and allocating them to meet their international obligations to foreign investors. Ultimately, the international finance and investment community, which had celebrated Argentina's adoption of a risky neoliberal 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 provoked in large part by the policies of the former. Finally, the BITs network later became a conduit for IA-ISDS demands by the bondholders that had not accept 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.

3. Preliminary Conclusions

Section 3 has demonstrated that IA-ISDS risk management in LAC has been rather poor in comparison to other parts of the world, especially developing Asia. Even so, within LAC 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 carried no IA-ISDS guarantees. The RTA-centric countries carry additional risks in terms of the liberalizing aspects of their IIAs, which constrain the national policy space[116]; however, the NAFTA-based corrections (clarifications for fair and equitable treatment, indirect expropriations, etc.) 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 disenchanted countries, as their name suggests, have shown themselves unwilling to carry their IA-ISDS risks associated with older, unmodified BITs because their experiences with IA-ISDS tribunals have been traumatic. For the most part, and beyond the enormous financial costs and expansive interpretations of IA concepts, they raise serious legitimacy issues with regards to way that the IA-ISDS system constrains natural resource-based development strategies (Venezuela, Ecuador, Bolivia) and the ability to deal with multiple crises encompassing both foreign investment contracts in services and external public debt (Argentina). 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 screams from the past (LAC's historically difficult relationship with foreign investment) or represent the voice of the future (the first of many countries to abandon the IA-ISDS system).

Section 4 - 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. That option is generations away as, among other issues, the very existence of IA-ISDS procedures usually means that national judicial systems are purposefully avoided at a cost of curtailing any learning they might achieve through practical experience. A second-best answer would be a new, concerted and comprehensive multilateral agreement on foreign investment agreed among investor and host countries that would become the single legal foundation for interpreting 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 if developing countries and transition economies have a full participation in the negotiations. A third-best response would probably be a WTO-style dispute settlement system with an overseeing Appellate Body[117] based on a rule of law model rather than an *ad hoc* process (Mann, 2008, p. 214). Given the stultification of the Doha Round of the WTO, this does not appear to be a feasible option at present to deal with the problems (financial costs and expansive interpretations) and legitimacy issues associated with IA-ISDS practices. That leaves only fourth-best proposals.

While no simple solution is evident, a starting point might be to reconsider how this problem arose. At least four very significant *wrong turns* led to the current IA-ISDS system. First, industrialized countries strayed from post-WWII values (security, market economics, democracy), especially after the Soviet bloc collapsed. As a result market economics was warped into an extreme version with characteristics of market fundamentalism and democratic values were cheapened. Any practical solution for the IA-ISDS problems and legitimacy crises requires that the interaction between market economic and democratic values be restored. Balance must replace one-sidedness.

A second wrong turn involved investor countries establishing the rules for IA-ISDS procedures in isolation from the concerns of host developing countries and transition economies. Investor countries wanted out from their obligations to represent their own investors under the existing state-state regime because it complicated their handling of external relations; however, they shifted huge risks to host developing countries and transition economies with weak negotiating strength with sometimes devastating results. Only the largest of them, especially the BRICs were capable of escaping from or managing IA-ISDS risks. The rest were essentially abandoned to their luck in spite of their inexperience.

A third wrong turn had to do with the granting of direct legal personality to foreign investors under international law, which allowed them to directly challenge the policies of sovereign states. This allowed arbitration lawyers to construct a system of international investment arbitration with roots in international commercial arbitration. The product was an IA-ISDS system which shared with communist totalitarianism and religious fundamentalism certain characteristics, such as secrecy, intolerance and an essentially undemocratic nature, which became inherent in the principal problems (exorbitant financial costs and expansive interpretations) and legitimacy issues indentified with that system.

Finally, a fourth major wrong turn was to adapt a “trade-related” fiction to bring aspects of foreign investment into the WTO (TRIMs, GATS, TRIPS, etc.). That debased one of the few international organizations in which most developing countries were fully represented, and moreover, the subsequent increase in the use of RTAs challenged the WTO’s existence; both of which disabled any serious consideration for adapting the WTO dispute settlement understanding to foreign investment disputes and thereby introducing transparency, balance and enforcement into a proven state-state regime.

The inconsistent, incoherent and unpredictable results stemming from the IA-ISDS system suggest that it might be better to refocus on the post-WWII goals (security, market economics and democracy) to design a new system for foreign investment dispute settlement but this time looking for balance in order to incorporate the interests of 200 rather than only 50 countries. It is clear that even the powerful investor countries cannot stop wheel of history at one particular point in time favoring foreign investors in a one-sided way with a system stacked against sovereign states.

The crisis which began in 2008 is an appropriate setting to refocus efforts in this regard. The new status of the G-20, which includes several of the most influential developing countries and transition economies as well as the dominant economic powers, is a much improved vehicle for doing so. One of the guiding principles for that endeavor 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 taught us that extreme caution is required with regards to the risks associated with foreign investment disputes. Since “tinkering” is no longer a valid option, it might be the moment to consider a more radical option, such as an international foreign investment court. (See Box 18).

Box 18: The Case for an International Foreign Investment Court

Regulatory disputes, in distinction to strictly commercial or other private disputes, are those between a state and a private party in relation to the state's exercise of its uniquely sovereign powers or its assumption of uniquely sovereign obligations. In this context, Van Harten maintains that international treaty arbitration goes beyond other forms of international adjudication in that it is a form of public law adjudication, constituted at the international level.

Accepting that investment treaty arbitration is a form of public law adjudication, it therefore must satisfy objective guarantees of judging in public law. Van Harten argues that international arbitration is inappropriate for the final interpretation of public law and resolution of public law disputes because arbitrators lack objective guarantees of independence and impartiality due to the fact that they are named by unrepresentative appointing authorities on a case-by-case basis, they lack security of tenure and they are not barred from outside remunerative activity. He insists that regulatory disputes should be subject to the overarching authority of public courts, defined among other things by their presumptive openness and by objective guarantees of their independence and impartiality, in order to guard against the suspicion that adjudicators can be swayed in their judgments by the power that others might hold over their income and career.

According to Van Harten, an international investment court could take many forms: multilateral, regional or bilateral. It could be a full court or an appellate body court that would hear appeals from decisions made in the first instance by arbitrators. It could be an autonomous entity or housed within existing institutions. It could be by dedicated judges or via a roster of jurists who sit on domestic courts. All alternatives should be measured against the mentioned criteria of judging in public law. Without those standards being met, one cannot count on a system that depoliticizes disputes and subjects them to rule of law, or that deserves the respect of all interested parties

Sources: Van Harten (2007, 2008).

To introduce balance, effectiveness and credibility into the relationship between foreign investors and host countries, it makes sense to reexamine the roots of the current crisis. Balance with regards to foreign investment does not come from treating different actors (sovereign states and commercial enterprises) the same way but from recognizing and respecting that they are different, with distinct rights and duties under international law.

References

Ahluwalia M. (2002), "Economic Reforms in India since 1991: Has gradualism worked?, *Journal of Economic Perspectives*, August 2002;

Alvarez, J. (2008), "Implications for the Future of International Investment Law", in Sauvant, K. (ed.), *Appeals Mechanism in International Investment Disputes*, Oxford University Press, 2008;

Alvarez, G. and W. Park (2003), "The New Face of Investment Arbitration: NAFTA Chapter 11, 28, *Yale Journal of International Law*;

Anderson, S. (2008), "Will Dems Follow Through on Promises to Fix NAFTA?", *Unconventional Wisdom*, Institute for Policy Studies, 16 December;

___________ and S. Grusky (2007), *Challenging Corporate Investor Rule*, Institute for Policy Studies and Food and Water Watch, Washington, D.C., April;

Avril, H. (2008), "Some Interim EPAs May Not Be Concluded", *Bilaterals.org*, 17 June;

Bernasconi-Osterwalder, N. (2006), "Democratizing International Dispute Settlement: The case of trade and investment disputes", presented to the 6th International Conference of New or Restored Democracies (ICNRD-6), 29 October – 1 November, 2006, Doha, Qatar, organized by the Center for International Environmental Law-CIEL;

Bhattacharya, D. (2007), Centre for Policy Dialogue (CPD), "The Impact of Investment Agreements on FDI: Do IIAs Attract FDI?", PPT presented to the First Annual Forum of Developing Country Investment Negotiators" held in Singapore, 1 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*, Num. 221, January-February;

Bridges Weekly Trade News Digest (2008), "EU, Former Colonies Sign First Generation Trade Pact", No. 5, October-November;

______________________________, (2008a), "World Bank Chief calls for 'New Multilateralism'", Vol. 12, Number 33, 8 October;

Brummer, C. (2008), “Examining the Institutional Design of International Investment Law”, in Sauvant, K. (ed.), *Appeals Mechanism in International Investment Disputes*, Oxford University Press, 2008;

Canadian Council of Chief Executives (2003), “North American Business Leaders Declare NAFTA and its Investment Provisions an Outstanding Success”, 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”, paper prepared for the Oceanic Conference on International Studies, Australian National University, Canberra, 14-16 July;

Chung, O. (2007), “The Lopsided Law Regime and Its Effect on the Future of Investor-State Arbitration”, *Virginia Journal of International Law*;

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, Issue 2, May;

Clarkson, S. (2006), “Hijacking the Constitution: NAFTA's Investor-State Dispute Arbitration," in Alan S. Alexandroff, ed., *Investor Protection in the NAFTA and Beyond: Private Interest and Public Purpose* (Toronto: CD Howe Institute, Policy Study 44, The Border Papers);

__________ (2004), “Global Governance and the Semi-Peripheral State: The WTO and NAFTA as Canada's External Constitution,” in Stephen Clarkson and Marjorie Griffin Cohen, eds., *Governing under Stress: Middle Powers and the Challenge of Globalization* (London: Zed Books);

__________ (2003), “Locked In? Canada’s External Constitution under Global Trade Governance,” *American Review of Canadian Studies* 33:2 (Summer 2003);

__________ (2002), “Systemic or Surgical? Possible Cures for NAFTA’s Investor-State Dispute Process,” *Canadian Business Law Journal* 36;

__________ (2001), “The Globalization of Governance: Canada’s De-stabilizing Experience with NAFTA and the WTO.” Paper presented at a panel on “Trade, Prosperity, and Stability: Revisiting the Debate on the Dynamics of Globalization,” at the conference on The Challenges and Opportunities of Globalization at the Dawn of the Millennium, Howard University, Washington, DC, 11 April ;

Clift, J., (2003), “Beyond the Washington Consensus”, *Finance and Development*, September;

Cote, C. (2005), “Canada’s Investment Trade Policy Strategy- Foreign Investment Promotion and Protection Agreements”, PPT mimeo presented at “Canadian Mining Investment in Russia and Central Asia”, Toronto, International Trade Canada, 9 March

D’Agostino, J. and Promod Nair (2008), “Treaty Protection in India”, *Global Arbitration* Review, Vol. 3, Issue 1, February;

Da Motta Vega, P. (2004), “Foreign Direct Investment in Brazil: regulation, flows and contribution to development”, mimeo, May;

Dattu, R. (2007), “Legal Issues in Bilateral Investment Treaties”, PPT mimeo, Centre for Trade Policy and Law, Osler, Hoskin & Harcourt LLP, 18 May;

Dispute Resolution Journal (2006), “Investment Disputes with China”, May;

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;

Duran, J., N. Mulder and O. Onudera (2008), “Trade Liberalization and Economic Performance- Latin America versus East Asia, 1970-2006”, *Trade Policy Working Papers*, No. 70, OECD, Paris, February;

Dymond, W., (1997), “State of Play of the MAI Negotiations”, in OECD, “The Multilateral Agreement on Investment- state of play as of February 1997”, OCDE/GD(97)38, Paris;

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*, 32, 788;

El cronista comercial (2005), Buenos Aires, 13 May;

Elkins**,** Z., A. Guzman and B. Simmons (2006) “Competing for Capital: The Diffusion of Bilateral Investment Treaties, 1960-2000” at (http:// papers.ssrn.com/sol3/papers.cfm?abstract_id=578961;

European Commission (2008), “Cariforim-EC EPA: Investment”, Trade Fact Sheet, Brussels, October;

Evans, P (1979), *Dependent Development: The Alliance of Multinational, State, and Local Capital in Brazil*, Princeton University Press, New Jersey;

Faya Rodriguez, A. (2009), “A quince años del Capítulo XI de TLCAN”, *A quince años del TLCAN*, Ed. Porrúa and the Iberoamericana University, Mexico;

_____________ A. (2008), “The Most-Favored-Nation Clause in International Investment Agreements: a Tool for Treaty Shopping?”, *Journal of International Arbitration*, Vol. 25, No. 1;

FDI, (2008), “In Dispute: Are Dutch Investment treaties on their Way Out?”, 9 June;

Fiorentino, R., Verdeja, L. and C. Tuqueboeuf (2006), “The Changing Landscape of Regional Trade Agreements: 2006 Update”, *WTO Discussion Paper*, No. 12, Geneva;

Franck, S. (2008), “Challenges Facing Investment Disputes: Reconsidering Dispute Resolution in International Investment Treaties”, in Sauvant, K. (ed.), *Appeals Mechanism in International Investment Disputes*, Oxford University Press, 2008;

_________ (2007), “Empirically Evaluating Claims About Investment Treaty Arbitration”, *North Carolina Law Review*, Vol. 86, January;

_________ (2007a), “Foreign Direct Investment, Investment Treaty Arbitration, and the Rule of Law”, *Global Business & Development Law Journal*, Vol. 19;

_________ (2007b), “Integrating Investment Treaty Conflict and Dispute Systems Design”, *Minnesota Law Review*, Vol. 92;

_________ (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 (2008), “Chinese Multinationals Make Steady Progress”, Press Release of Fudan University-Vale Columbia Center, 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, No. 2, May;

Gallagher, K. (2008), “The Death of the Washington Consensus?”, *The Guardian*, 14 October;

___________ and M. Birch, (2005), “Do Investment Agreements Attract Investment? Evidence from Latin America”, forthcoming (Submitted to European Journal of Development Research) (2006);

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, No. 2, August;

Garcia, C. (2004), "All the Other Dirty Little Secrets: Investment Treaties, Latin America and the Necessary Evil of Investor-State Arbitration", *Florida Journal of International Law*, Vol. 16;

Geiger, R. (2008), "The Multifaceted Nature of International Investment Law", in Sauvant, K. (ed.), *Appeals Mechanism in International Investment Disputes*, Oxford University Press, 2008;

Gerchunoff, P. and G. Cánovas (1995), "Privatizaciones en un contexto de emergencia económica", *Desarrollo económico*, vol. 34, No. 136, Buenos Aires, Institute of Economic and Social Development (IDES), January-March;

Government of Canada, Foreign Affairs and International Trade Canada (2003), "Report on NAFTA Chapter 11 Multi-stakeholder Consultations", http//:www.international.gc.ca/trade-agreements-accords-commerciaux/invest/multistake-nafta.aspx, 28 May;

Government of India, Ministry of Commerce and Industry, (1999), "International Trade-India and the World Trade Organization", Communication from India, WT/WGTI/W/71, 13 April;

Great Transformations, (2008), "What is Market Fundamentalism?", http://www.greattransformations.org;

Guash, J.L., J.J.Laffont and S. Straub (2002): *Renegotiation of Concession Contracts in Latin America*, available in SSRN electronic journal, http://papers.ssrn.com/abstract_id=340580;

Guerra, G. (2008), "Ecuadorian IIA Policy: a complex and dynamic process", mimeo, South Center;

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, No. 392;

Guzman, A. (1998), "Why LDCs Sign Treaties That Hurt Them: Explaining the Popularity of Bilateral Investment Treaties", *Virginia Journal of International Law*, 38;

Hallward-Driemeier, M., (2003), "Do Bilateral Investment Treaties Attract Foreign Investment? Only a Bit…and They Could Bite", *World Bank Policy Research Working Paper* No. 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, *Rule of Law Series,* Report No. 26, April;

Heymann, M. (2008), "International Law and the Settlement of Investment Disputes Relating to China", *Journal of International Economic Law*, Vol. 11, No. 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*, 7;

Houde, M. (2006), "Chapter 6- Novel Features in Recent OECD Bilateral Investment Treaties", in OECD (2006), Paris;

_________ 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*, OECD, Paris;

Hufbauer, G. and J. Schott (2007), "NAFTA Revisited", *Policy Options*, October;

IAReporter (2009), "Canada and Colombia conclude Free Trade Agreement with carefully-circumscribed investment protections", Vol. 2, No. 2, 22 January;

ICSID News Release (2007), "Bolivia Submits a Notice under Article 71 of the ICSID Convention"Washington, D.c., 2 May;

International Disputes Quarterly-IDQ (2007), "The Evolution of Dispute Resolution in Latin America- interview with Jonathon C. Hamilton", 5 November;

Investment Treaty News (2008), "An Interview with Alejandro Faya-Rodriguez, special legal advisor, Ministry of Economy", 17 July;

_____________________ (2008a), "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", in Sauvant, K. (ed.), *Appeals Mechanism in International Investment Disputes*, Oxford University Press, 2008;

Jun Wang (2007), "China and the ICSID Arbitration", *Moulislegal: China Messenger*, 2 August;;

Kalb, J. (2006), "The Institutional Consequences of Bilateral Investment Treaties", *International Affairs Journal*, UC Davis, Winter;

Kalotay, K. (2008), “How to explain the foreign expansion of Russian firms”, *Journal of Financial Transformation*, Capco Institute;

Kumar, N. (2007), “I. Investment Provisions in Regional Trading Arrangements in Asia: Relevance, Emerging Trends and Policy Implications”, Artnet Working Paper No 46, UN-ESCAP, Bangkok;

_________ (2007a), “Regional Integration, Foreign Direct Investment and Efficiency-Seeking Industrial Restructuring in Asia: the case of India”, *RIS Discussion* Papers, RIS-DP #123; New Delhi; June;

_________ and K. Gallagher (2007), “Relevance of “Policy Space” for Development: Implications for Multilateral Trade Negotiations”, *RIS Discussion Papers*, RIS-DP 120, New Delhi, March;

Legum, B. (2008), “Options to Establish an Appellate Mechanism for Investment Disputes”, in Sauvant, K. (ed.), *Appeals Mechanism in International Investment Disputes*, Oxford University Press, 2008;

Malik, M. (2008), “Recent developments in International Investment Agreements and the Rights of States to regulate: 2007-2008”, presented to the 2nd Annual Forum of Developing Countries Investment negotiators, 3-4 November, Marrakesh, Morocco, organized by the International Institute for Sustainable Development-IISD and the South Center;

________ (2008a), “Recent developments in the Definition of Investment in International Investment Agreements”, presented to the 2nd Annual Forum of Developing Countries Investment negotiators, 3-4 November, Marrakesh, Morocco, organized by the International Institute for Sustainable Development-IISD and the South Center;

________ (2007), “The Expanding Jurisdiction of Investment-State Tribunals: lessons for treaty negotiators”, Background Paper for the Developing Country Investment Negotiators’ Forum, Centre on Asia and Globalisation/IISD, Singapore, 1-2 October;

Mann, H. (2009), “International Investment Agreements, Foreign Investment Sustainability in Infrastructure and Contractual and Regulatory Measures”, PPT presentation to seminar on “Acuerdos Internacionales de Inversión, Sustenibilidad de Inversiones de Infrastructura y Medidas Regulatorias y Contractuales”, organized by SUNASS, IISD and UN-ECLAC and held in Lima, 14-16 January;

_________ (2008), “Transparency and Consistency in International Investment Law: Can the Problems be Fixed by Tinkering?”, in Sauvant, K. (ed.), *Appeals Mechanism in International Investment Disputes*, Oxford University Press, 2008;

_________ (2008a), “International Investment Agreements, Business and Human Right: Key Issues and Opportunities”, presented to the 2nd Annual Forum of Developing

Countries Investment negotiators, 3-4 November, Marrakesh, Morocco, organized by the International Institute for Sustainable Development-IISD and the South Center;

_________ Cosbey, A. and K. von Moltke, (2008), “comments on ICSID Discussion Paper, ‘Possible Improvements of the Framework for ICSID Arbitration’”, in Sauvant, K. (ed.), *Appeals Mechanism in International Investment Disputes*, Oxford University Press, 2008;

_________ 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;

Marshall, F., (2008), “Advances in Investor-State Arbitration”, presented to the 2nd Annual Forum of Developing Countries Investment negotiators, 3-4 November, Marrakesh, Morocco, organized by the International Institute for Sustainable Development-IISD and the South Center;

Ministerio de Relaciones Exteriores, Comercio e Integración, Gobierno de Ecuador (2007), “Notificación conforme artículo 25(4) del convenio”, carta a CIADI, Quito, 23 noviembre;

Mortimore, M. (2009), “Can Latin America Learn From Developing Asia’s Focused FDI Policies”, *International Journal of Institutions and Economies*, Special Issue on Institutions, Industrial Policy and Technological Capacities: Essays in Honour of Sanjaya Lall, Vol. 1, Issue 1, (forthcoming);

__________ (1993), “Flying Geese or Sitting Ducks? Transnationals and Industry in developing countries”. *CEPAL Review*, No. 51, Santiago, December;

__________ and L. Stanley (2006), “Has Investor Protection Been Rendered Obsolete by the Argentine Crisis?, *CEPAL Review*, No. 88, Santiago, April;

________________________ (2006a), “La Argentina y los Tratados Bilaterales de Inversión: el costo de los compromisos internacionales”, *Desarrollo Económico-Revista de Ciencias Sociales*, Vol. 46, No. 182, Buenos Aires, julio-setiembre;

__________ and S. Vergara (2006), “Targeting Winners: Can FDI policy help developing countries industrialise?”, in Narula, R. y S. Lall (eds.), *Understanding FDI-Assisted Economic Development*, Routledge, London and New York. This article was also published in the *European Journal of Development Research*, Vol. 16, No. 3, Autumn (2004);

Moulis, D and Jun Wang (2007), “Dispute Settlement under a China-Australia FTA. Possibilities, problems and prospects”, PPT given to Free Trade Agreement Conference on “Free Trade Agreements: Where is the World Heading?”, Gold Coast, Queensland, Australia, 9 March;

Navajas, F. (2004), “Reformas en el sector de infraestructura en la Argentina - Algunos comentarios”, presentation on project “Balance del proceso de transformación de los servicios de infraestructura en la República argentina”, Buenos Aires, Federación Interamericana de Empresas de Seguros (FIDES);

Neumayer, E. and L. Spess, (2005), “Do Bilateral Investment Treaties Increase Foreign Direct Investment to Developing Countries”, at (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, No. 1, Spring;

____________ (2004), “Canada’s New Model Foreign Investment Protection Agreement”, mimeo, University of Victoria, August;

Organization for Economic Co-operation and Development-OECD, (2008), “Novel Features in OECD Countries’ Recent Investment Agreements: An Overview”, in Sauvant, K. (ed.), *Appeals Mechanism in International Investment Disputes*, Oxford University Press, 2008;

________ (2008), *International Investment law- understanding concepts and tracking innovations*, Paris;

________ (2008a), *OECD Investment Policy Review: Russian Federation*, Paris;

________ (2008b), *OECD Investment Policy Reviews: China 2008*, Paris;

________ (2006) *International Investment Perspectives*, Paris;

________ (2006a) “Improving the System of Investor-State Dispute Settlement: an Overview”, *Working Paper on International Investment*, No. 2006/1, Paris, February;

________ (2005), *International Investment Law- A Changing Landscape*, Paris;

________ (2005a), “Transparency and Third Party Participation in Investor-State Dispute Settlement Procedures- Statement by the OECD Investment Committee”, Paris, June;

________ (2004), “Indirect Expropriation and the Right to Regulate in International Investment Law”, *Working Paper on International Investment*, No. 2004/4, Paris;

________ (2004a), *Russian Federation: Progress and Reform Challenges*, Paris;

________ (2003), *International Investment Perspectives*, Paris;

________ (2001), “The Investment Environment on the Russian Federation: laws, policies and institutions”, Paris, May;

Pacquing, R. (2003), “Investor-state arbitration: Canada’s Experience in NAFTA and the Case for its inclusion in the Australia-US FTA”, The Australian APEC Study Centre, Issues Paper No. 25, Monash University, October;

Panagariya A., (2004), “India in the 1980s and 1990s: A Triumph of Reforms”, *Transnational Dispute Management* (2004), Volume I, Issue 2, May;

Parra, A. et.al. (2008), “Possible Improvements of the Framework for ICSID Arbitration”, October 22, 2004, in Sauvant, K. (ed.), *Appeals Mechanism in International Investment Disputes*, Oxford University Press, 2008;

____________ (2008a), “Suggested Changes to the ICSID Rules and Regulations”, May 12, 2005, in Sauvant, K. (ed.), *Appeals Mechanism in International Investment Disputes*, Oxford University Press, 2008;

Pate, T. (2006), “The Past, Present and Future of Arbitral Clause in Foreign Investment Legislation: in pursuit of “the balance””, at http://www.desolapate.com/publicaciones/pdf, May;

Paulsson, J. (2008), “Avoiding Unintended Consequences”, in Sauvant, K. (ed.), *Appeals Mechanism in International Investment Disputes*, Oxford University Press, 2008;

Peterson, L. (2006), “Pakistan Attorney General advises states to scrutinize investment treaties carefully”, *Investment Treaty News*, International Institute for Sustainable Development, 1 December;

_________ (2005), “The Global Governance of Foreign Direct Investment: Madly Off in all Directions”, Dialogue on Globalization Occasional Papers, No. 19, Freidrich Ebert Stiftung, Geneva, May;

_________ (2004), “Bilateral Investment Treaties and Development Policy-Making”, International Institute for Sustainable Development, Winnipeg, November;

Public Citizen, (2005), *NAFTA Chapter 11 Investor-State Cases: Lessons for the Central American Free Trade Agreement*, Publication Number E9014, Washington, D.C., February;

Puentes, (2008), “Bolivia se margina del CIADI”, Vol. 9, Número 1, ICSTD, marzo;

Redfern, A. and M. Hunter (2004), *Law and Practice of International Commercial Arbitration*, 4th Edition. London;

Rooney, K. (2007). ICSID and BIT Arbitration and China. Journal of International Arbitration 24 (6): 689-712.

Sagafi-Nejad, Tagi, 2008, *The UN and Transnational Corporations-from Code of Conduct to Global Compact*, United Nations Intellectual History Project, Indiana University press, Bloomington and Indianapolis;

Salasuse, J. and N. Sullivan, (2005), “Do BITs Really Work: An Evaluation of Bilateral Investment Treaties and their Grand Bargain,” 46, *Harvard International Law Journal*;

Sauvé, P. (2008), “Trade and Investment Rules: Latin American Perspectives”, *CEPAL Review*, 94, Santiago, Chile, April;

________ (2007), “Investment Regulation through Trade Agreements: Lessons from Asia” in UN-ESCAP, *Towards Coherent Policy Frameworks: understanding trade and investment linkages*, ARTNet Working Paper Series, No. 49, Bangkok, November;

________ and N. Ward (2009), The EC-CARIFORUM Economic Partnership Agreement: assessing the outcome on services and investment”, European Centre for International Political Economy, Brussels, January;

Schneiderman, D. (1996), “NAFTA’s Taking Rule: American Constitutionalism Comes to Canada”, *University of Toronto Law Journal*, 46;

Shemberg, A. “Stabilization Clauses and Human Rights”, presented to the 2nd Annual Forum of Developing Countries Investment negotiators, 3-4 November, Marrakesh, Morocco, organized by the International Institute for Sustainable Development-IISD and the South Center;

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”, in OECD, “The Multilateral Agreement on Investment- state of play as of February, 1997, OCDE/GD(97)38, Paris;

Schreuer, C. (2008), “Preliminary Rulings in Investment Arbitration”, in Sauvant, K. (ed.), *Appeals Mechanism in International Investment Disputes*, Oxford University Press, 2008;

Soros, G, 1998, *The Crisis of Global Capitalism: Open Society Endangered*, Public Affairs, New York;

Sornarajah, M. (2008), “A Coming Crisis: Expansionary Trends in Investment Treaty Arbitration”, in Sauvant, K. (ed.), *Appeals Mechanism in International Investment Disputes*, Oxford University Press, 2008;

____________ (2002), “The Clash of Globalizations and the International Law of Foreign Investment”, The Simon Reisman Lecture in International Trade Policy, The Norman Paterson School of International Affairs, Ottawa, Canada, 12 September;

South Centre (2008), "The EU-CARIFORUM EPA on Services Investments and E-Commerce- implications for other ACP countries", South Centre 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 No. 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", CEDES, Buenos Aires;

Stiglitz, J., and A. Charlton (2005), *Fair Trade for All: How Trade Can Promote Development*, Oxford University Press;

_________ 2002, *Globalization and its Discontents*, W.W. Norton & Co, New York, May;

_________ 1998, "Redefining the Role of the State- What should it do? How should it do it? And how should these decisions be made? Paper 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*, No. 57, Institut fur Wirtshaftsrecht, Wittenberg, 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, No. 4, November;

The Economist, (2008), "BP in Russia- Back to Business, 4 September;

The New York Times, (1999), "International Business- Russian Court Ruling is New Blow to Foreign Investment", 12 October;

Tracton, M. (2008), "Provisions in the New Generation of U.S. Investment Agreements to Achieve Transparency and Coherence in Investor-State Dispute Settlement", in Sauvant, K. (ed.), *Appeals Mechanism in International Investment Disputes*, Oxford University Press, 2008;

Trebelcock, M. and R. Howse (1999), *The Regulation of International Trade*, 2nd. Edition, Routledge, London;

Tobin, J. and S. Rose-Ackerman, (2005), "Foreign Direct Investment and the Business Environment in Developing Countries: The Impact of Bilateral Investment Treaties", at (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*, 39 (3);

UNCTAD (2008), “Latest Developments in Investor-State Dispute Settlement”, *IIA Monitor*, No. 1, UNCTAD/WEB/ITE/IIA/2008/3, Geneva

_________ (2008a), “The Development Dimension of International Investment Agreements”, TD/B/C.II/MEM.3/2, Geneva, December;

_________ (2008b), *World Investment Report 2008- Transnational Corporations and the Infrastructure Challenge*, Geneva;

_________ (2008c), *Identifying Core Elements in Investment Agreements in the APEC Region*, UNCTAD/DIAE/IA/2008/3;

_________ (2007), *Investor-State Dispute Settlement and Impact on Investment Rulemaking*, UNCTAD/ITE/IIA/2007/3, Geneva;

__________ (2007a), *Bilateral Investment Treaties, 1995-2006: trends in investment rulemaking*, UNCTAD/ITE/IIT/2006/5, Geneva;

__________ (2005), “Investor-State Disputes Arising from Investment treaties: A Review”, *UNCTAD Series on International Investment Policies for Development*, UNCTAD/ ITE/IIT/2005/4, Geneva;

__________ (2005a), *Investment Policy Review of Brazil* (draft), Geneva;

___________ (2004a), *International Investment Agreements: Key issues*, UNCTAD/ITE/IIT/2004/10 (Vol. I), Geneva;

_________ (2004b), *Key Terms and Concepts in IIAs: a glossary*, UNCTAD/ITE/IIT/2004/2, Geneva;

__________ (2003), *World Investment Report 2003- FDI Policies for Development: National and International Perspectives*, Geneva;

__________ (2003a), “Dispute Settlement: Investor-State”, *UNCTAD Series in International Investment Agreements*, UNCTAD/ ITE/IIT/30, Geneva;

__________ (1999), “Trends in International Investment Agreements: An Overview”, *UNCTAD Series in International Investment Agreements*, UNCTAD/ ITE/IIT/13, Geneva;

_________ (1998), *Bilateral Investment Treaties in the Mid-1990s*, Geneva;

UN-ECLAC, (2008), *Opportunities for Trade and Investment between Latin America and Asia-Pacific: the link with APEC*, LC/L.2971, Santiago, November;

van Aaken, A. (2008), “Perils of Success? The Case of International Investment Protection”, *European Business Organization Law Review*, 9;

Van Harten, G., (2008), “Chapter 4- Investment Treaty Arbitration and Its Policy Implications for Capital-Importing States”, in D. Sánchez-Ancochea and K. Shadlen, eds., *The Political Economy of Hemispheric Integration*, Palgrave-Macmillan, New York;

____________ (2008a), “A Case for an International Investment Court”, Inaugural Conference of the Society for International Economic Law: New Horizons of International Economic Law, Geneva, 16 July;

____________ (2007), *Investment Treaty Arbitration and Public Law*, Oxford University Press, Oxford;

____________ (2007a), “The Public-Private Distinction in the International Arbitration of Individual Claims Against the State”, *International and Comparative Law Journal*, Vol. 56, April;

____________ (2005), “Judicial Supervision of NAFTA Chapter 11 Arbitration: Public or Private Law?”, *Arbitration International*, The Journal of the London Court of International Arbitration, Vol. 21, No. 4;

____________ (2005a), “Private Authority and Transnational Governance: the contours of the international system of investor protection”, *Review of International Political Economy*, Vol. 12, No. 4, October;

____________ and M. Loughlin (2006), “Investment Treaty Arbitration as a Species of Global Administrative Law”, *European Journal of International Law*, Vol. 17, No. 1, February;

Vielleville, D. and B. Vasani (2008), “Sovereignty Over Natural Resources Versus Rights Under Contracts: Which One Prevails?”, *Transnational Dispute Management*, Vol. 5, Issue 2, April;

Wandrag, R. (2008), “Towards a Comprehensive EPA? Investment Chapter”, PPT presented at the Conference on “Regional Economic Integration in Southern Africa:
Beyond EPAs; Surviving Internal Fragmentation” organized by South African Institute for International Affairs, Overseas Development Institute and European Center for Development Policy Management, November;

Westcott, T. (2009), “Investment Provisions and Commitments in CARIFORUM-EU EPA”, *Trade Negotiation Insights*, Vol. 7, Number 9, ICTSD, November;

Willamson, J., 2004, “The Washington Consensus as Policy Prescription for Development”, *Practitioner’s of Development Lecture Series*, World Bank, Washington, D.C., 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", in Williamson, J. (ed.), *Latin American Readjustment: How Much Has Happened?*, Institute for International Economic, Washington, D.C.;

Wikipedia, 2008, "Washington Consensus", http://www.wikipedia.org;

Whitsitt, E. and D. Vis-Dunbar (2008), "In Focus: Investment Arbitration in Brazil: Yes or No?", *Investment Treaty News*, December;

World Bank, 2003, *Global Economic Prospects and the Developing Countries, 2003*, Washington, D.C.;

Yahoo News, (2009), "China wants IMF to be tougher with rich states", Reuters, 2 February;

__________ (2008), "Deal ends feud over BP's Russia venture, Reuters, 4 September;

Yannaca-Small, K. (2008), "Improving the System of Investor-State Dispute Settlement: The OECD Governments' Perspective", in Sauvant, K. (ed.), *Appeals Mechanism in International Investment Disputes*, Oxford University Press, 2008;

________________ (2006), "Chapter 8- Consolidation of Claims: A promising Avenue for Investment Arbitration?", in OECD (2006), Paris;

Yu, V. and F. Marshal (2008), "Investors' Obligations and Host Country Policy Space", presented to the 2nd Annual Forum of Developing Countries Investment negotiators, 3-4 November, Marrakesh, Morocco, organized by the International Institute for Sustainable Development-IISD and the South Center;

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, No. 3;

Annex Table 1: Latin America and the Caribbean: investor-state arbitration proceedings instituted with ICSID (Concluded cases)

Defendant	Year	Requesting firm	Subject	Status	Treaty
Argentina	1997	Lanco Internacional, Inc.	Port terminal concession agreement		
	1998	Houston Industries Energy, Inc. and others	Electricity distribution and sale concession		
	1999	Mobil Argentina S.A.	Petroleum exploration and production venture		
	1999	Empresa Nacional de Electricidad S.A.	Hydroelectric power concession		
	2001	CMS Gas Transmisión Company	Gas transmission enterprise	A	
	2003	Metalpar S.A. and Buen Aire S.A.	Motor vehicle enterprise		1991 Argentina-United States BIT
	2003	Camuzzi Internacional S.A.	Electricity distribution and transportation enterprise		1991 Argentina-Chile BIT
	2003	Pioneer Natural Resources Company, Pioneer Natural Resources (Argentina) S.A. and Pioneer Natural Resources (Tierra de Fuego) S.A.	Hydrocarbon and electricity concessions		1990 Argentina-Belgo-Luxembourg Economic Unit BIT
	2003	Pan American Energy LLC and BP Argentina Exploration Company	Hydrocarbon and electricity concessions		1991 Argentina-United States BIT
	2003	Aguas Cordobesas, S.A., Suez and Sociedad General de Aguas de Barcelona S.A.	Water services concession		1991 Argentina-United States BIT
	2004	BP America Production Company and others	Hydrocarbon concession and electricity generation project		1991 Argentina-Spain and Argentina-France BIT
	2004	Wintershall Aktiengesellshaft	Gas and oil production		1991 Argentina-United States BIT
	2004	France Telecom S.A.	Telecommunications concession		1991 Argentina-Germany BIT
	2004	RGA Reinsurance Company	Financial reinsurance services		1991 Argentina-France BIT
	2005	TSA Spectrum de Argentina	Telecommunications concession		1991 Argentina-United States BIT
Bolivia	2002	Aguas del Tunari S.A	Water and sewer services concession		1992 Argentina-Netherlands BIT

Chile	2001	MTD Equity Sdn. Bhd. and MTD Chile S.A.	Construction of residential housing complex	A	Netherlands-Bolivia BIT
Costa Rica	1996	Compañía del Desarrollo de Santa Elena S.A.	Valuation and land holding	C	
Ecuador	2001	Repsol YPF Ecuador S.A.	Oil exploration contract	A	
	2002	IBM World Trade Corp.	Informatic services contract		
	2004	Duke Energy Electroquil Partners and Electroquil S.A.	Power generation facilities		
	2006	Técnicas Reunidas S.A and Eurocontrol S.A.	Oil refinery expansion		Ecuador-United States BIT
	2006	City Oriente Limited	Hydrocarbon concession		
El Salvador	2003	Inceysa Vallisoletana S.L.	Motor vehicle inspection facility	C	
Grenada	1997	WRB Enterprises and Grenada Private Power Limited	Electricity enterprise		
Guyana	2001	Booker plc	Debt instruments		
Honduras	1999	Astaldi S.p.A.& Columbus Latinoamericana de Construcciones S.A.	Highway rehabilitation contract		
Jamaica	1974	Alcoa Minerals of Jamaica, Inc	Bauxite mining		
	1974	Kaiser Bauxite Company	Bauxite mining		
	1974	Reynolds Jamaica Mines Limited and Reynolds Metals Company	Bauxite mining		
Mexico	1997	Metalclad Corporation	Waste disposal enterprise		NAFTA
	1997	Robert Azinian and others	Waste disposal enterprises		NAFTA
	1998	Waste Management, Inc.	Waste disposal enterprises		NAFTA
	1999	Marvin Roy Feldman Karpa	Foreign trade enterprise	G	NAFTA
	2000	Técnicas Medioambientales Tecmed, S.A.	Waste disposal enterprise		NAFTA
	2000	Waste Management, Inc.	Waste disposal enterprise		NAFTA

	2002	Fireman’s Fund Insurance Company	Debt instruments		NAFTA
	2004	Archer Daniel Midlys Company and Tate &Lyle Ingredients Americas, Inc.	Soft drinks sweetener production enterprise	H,G	NAFTA
	2005	Bayview Irrigation District and others	Agricultural enterprises		NAFTA
Nicaragua	2006	Shell Brands Internacional AG and Shell Nicaragua S.A.	Trademarks		
Paraguay	1998	Eudoro A. Olguín	Foods products enterprise		Peru-Paraguay BIT
Peru	1998	Compagnie Miniere Internationale	Gold mining project		
	2003	Lucchetti S. A. and Lucchetti Peru, S.A.	Pasta factory	AC	Peru-Chile BIT
	2006	Aguaytia Energy LLC	Electricity generation and transmission		Peru-AEL BIT
Saint Kitts and Nevis	1995	Cable Televisión of Nevis, Ltd. and Cable Television of Nevis Holdings, Ltda..	Cable television franchise		
Trinidad and Tobago	1983	Tesoro Petroleum Corporation	Oil exploitation and exploration		
	2001	F-W Oil Interests, Inc.	Oil and gas development contract		
Venezuela (Bolivarian Republic of)	1996	Fedax N.V.	Debt instruments		
	2000	GRAD Associates, P.A.	Contract for the construction and modernization of penitentiaries		
	2000	Autopista Concesionada de Venezuela, C.A.	Contract for the construction of a highway system		
	2005	I&I Beheer B.V.	Debt instruments		
	2006	Eni Dación B.V.	Hydrocarbon rights		

Annex Table 2: Latin America and the Caribbean: investor-state arbitration proceedings instituted with ICSID (Pending cases)

Defendant	Year	Requesting firm	Subject matter	Status	Treaty
Argentina	1997	Compañía de Aguas del Aconquija S.A. and Vivendi Universal	Water and sewer services concession agreement	ABCDE	1991 Argentina-France BIT
	2001	Enron Corporation and Ponderosa Assets	Natural gas transportation company	BCA	1991 Argentina-United States BIT
	2001	Azurix Corp.	Water and sewer services concession agreement	A	1991 Argentina-United States BIT
	2002	LG&Energy Corp., LG&E Capital Corp. and LG&E Internacional Inc.	Gas distribution enterprise	BA	1991 Argentina-United States BIT
	2002	Siemens A.G.	Informatic services contract	AF	1991 Argentina-Federal Republic of Germany BIT
	2002	Sempra Energy International	Gas supply and distribution enterprise	A	1991 Argentina-United States BIT
	2002	AES Corporation	Electricity generation and distribution operations		1991 Argentina-United States BIT
	2003	Camuzzi Internacional S.A.	Gas supply and distribution enterprise		1990 Argentina-Belgo-Luxembourg Economic Unit BIT
	2003	Continental Casualty Company	Insurance company	CB	1991 Argentina-United States BIT
	2003	Gas Natural SDG, S.A.	Gas supply and distribution enterprise		1991 Argentina-Spain BIT
	2003	El Paso Energy Internacional Company	Hydrocarbon and electricity concessions		1991 Argentina-United States BIT
	2003	Aguas Provinciales de Santa Fe, S.A., Suez, Sociedad General de Aguas de Barcelona S.A. and Interaqua Servicios Integrales de Agua S.A.	Water services concession		1991 Argentina-Spain and Argentina-France BITs
	2003	Aguas Argentinas S.A., Suez, Sociedad General de Aguas de Barcelona, S.A and Vivendi Universal S.A.	Water services concession		1991 Argentina-Spain and Argentina-France BITs
	2003	Telefonica S.A.	Telecommunications enterprise		1991Argentina-Spain BIT
	2003	Enersis S.A and others	Electricity distribution enterprise		1991Argentina-Spain BIT
	2003	Electricidad Argentina S.A. and EDF International S.A.	Electricity distribution enterprise		1991 Argentina-France BIT

	2003	EDF International S.A., SAUR International S.A and León Participaciones Argentinas S.A.	Electricity distribution enterprise	1991 Argentina-France BIT
	2003	Unisys Corporation	Information storage and management project	1991 Argentina-United States BIT
	2003	Azurix Corp.	Water and sewer services concession agreement	1991 Argentina-United States BIT
	2004	Total S.A.	Gas production and distribution/power generation project	1991 Argentina-France BIT
	2004	SAUR International	Water and sewer services concession agreement	1991 Argentina-France BIT
	2004	CIT Group Inc.	Leasing enterprise	1991 Argentina-United States BIT
	2004	Mobil Exploration and Development Inc. Suc. Argentina and Mobil Argentina S.A.	Gas production concessions	1991 Argentina-United States BIT
	2005	Daimler Chrysler Services AG	Leasing and financial services	1991Argentina-Germany BIT
	2005	Compañía General de Electricidad S.A. and CGE Argentina S.A.	Electricity distribution concessions	1991 Argentina-Chile BIT
	2005	Asset Recovery Trust S.A.	Collection contract	1991Argentina-Germany and Argentina-United States BITs
	2006	Giovanna a Beccara and others	Debt instruments	
	2007	Giovanni Alemanni and others	Debt instruments	
	2007	Impregilo S.p.A.	Water service concessions	
	2007	Urbaser S.A. and Consorcio de Aguas Bilbao Biskaia, Bilbao Biskaia Ur Partzuergoa	Water services concession	
	2007	HOCHTIEF Aktiengesellschaft	Highway system construction contract	
	2008	Giordano Alpi and others	Debt instruments	
	2008	Impregilo S.p.A.	Highway construction concession	
Bolivia	2006	Química e Industrial del Bórax Ltda.. and others	Mining concession	

	2007	E.T.I. Euro Telecom International N.V.	Telecommunications enterprise		
Chile	1998	Víctor Pey Casado and Fundación Presidente Allende	Publishing enterprise	E	1991 Chile-Spain BIT
	2004	Sociedad Anónima Eduardo Vieira	Fisheries company	A	1991 Chile-Spain BIT
Costa Rica	2007	Alasdair Ross Anderson and others	Capital contributions in an enterprise		
	2008	Marion Unglaube	Tourism project		
	2008	Quadrant Pacific Growth Fund L.P. and Canasco Holdings Inc.	Agricultural enterprises		
Ecuador	2003	M.C.I. Power Group L.C. and New Turbine Inc.	Electric power generation project	A	
	2005	Empresa Eléctrica de Ecuador Inc. (EMELEC)	Electricity enterprise		
	2005	Noble Energy Inc. and Machala Power Cia. Ltd.	Electricity enterprise		
	2006	Occidental Petroleum Corporation and Occidental Exploration and Production Company	Hydrocarbon concession		
	2008	Murphy Exploration and Production Company International	Hydrocarbon concession		
	2008	Burlington Resources, Inc. and others	Hydrocarbon concession		
	2008	Perenco Ecuador Limited	Hydrocarbon concession		
	2008	Repsol YPF Ecuador, S.A. and others	Oil exploration contract		
Grenada	2005	RSM Production Corporation	Oil exploration contract		
Guatemala	2007	Railroad Development Corporation	Railroad concession contract		DR-CAFTA
Honduras	2007	Astaldi S.p.A.	Highway rehabilitation contract		
Mexico	2004	Corn Products Internacional, Inc	Soft drinks sweetener production enterprise	G	NAFTA
	2004	Gemplus, S.A. and Gemplus Industrial, S.A. de C.V.	Concession agreement to operate the National Registry of Motor Vehicles		

	2004	Talsud S.A.	Concession agreement to operate the National Registry of Motor Vehicles	
	2005	Cargill, Incorporated	Soft drinks sweetener production enterprise	
Panama	2006	Nations Energy, Inc. And others	Electricity power generation project	
Paraguay	2007	Bureau Veritas, Inspection, Valuation, Assessment and Control, BIVAC B.V.	Service agreement	
	2007	Société Générale de Surveillance S.A.	Service agreement	
Peru	2006	Tza Yap Shum	Fish flour production enterprise	
	2003	Duke Energy International Peru Investment Ltda.	Power generation project	A
Venezuela (Bolivarian Republic of)	2004	Vannessa Ventures Ltda.	Gold and copper mining project	
	2006	Vestey Group Ltda.	Farming enterprise	
	2007	Mobil Corporation and others	Oil and gas enterprise	
	2007	Conoco Phillips Company and others	Oil and gas enterprise	
	2008	Brandes Investment Partners, LP	Telecommunications enterprise	
	2008	CEMEX Caracas Investment B.V.	Cement production enterprise	

Source: Economic Commission for Latin America and the Caribbean (ECLAC), on the basis of the International Centre for Settlement of Investment Disputes (ICSID), (online), http://www.worldbanc.org/icsid/.

Status (as at 31 December 2008): A: annulment proceeding, B: supplementary decision, C: rectification proceeding, D: resubmission proceeding, E: Second annulment proceeding, F: Revision proceeding, G: Interpretation and supplementary decision and correction proceeding, H: original arbitration proceeding.

NOTES

[1] Bilateral investment treaties (BITs) are agreements between two countries for the reciprocal encouragement, promotion and protection of investments in each other's territories by companies based in either country. See http://www.UNCTAD.org. By end-June, 2008, 19% of all BITs incorporated a LAC country (UNCTAD, 2008, p.2).

[2] A regional trade agreement (RTA) creates an area in which trade among the members is duty free but members set their own tariffs on imports from third parties (unlike a custom union). (http://www.wto.org)

[3] NAFTA established a regional trade area among the USA, Canada and Mexico in 1994.

[4] The North Atlantic Treaty Organization (NATO) is today an alliance of 26 countries from North America and Europe committed to fulfilling the goals of the North Atlantic Treaty signed on 4 April 1949. In accordance with the Treaty, the fundamental role of NATO is to safeguard the freedom and security of its member countries by political and military means. After the collapse of the Berlin Wall in 1989, symbolizing the dissolution of the Soviet Union, NATO played an increasingly important role in crisis management and peacekeeping. (based on http://www.nato.int) In more recent years, it has taken on direct military operations outside of the North Atlantic theatre, namely in the Balkans and Afghanistan.

[5] The Warsaw Pact was mutual defense agreement among communist states in Central and Eastern Europe which was signed in Warsaw on May 14, 1955 at the instigation of the Soviet Union. It collapsed with the dissolution of the Soviet Union.

[6] According to the European Commission, by 2006 the combined economies of Europe (the European Union-EU) and the USA accounted for nearly 60% of global GDP, 33% of world trade in goods and 42% of world trade in services. The EU and the USA became each other's main trading partners. The two economies were interdependent to a high degree. Close to a quarter of all EU-USA trade consisted of transactions within firms based on their investments on either side of the Atlantic. The transatlantic relationship also defined the shape of the global economy as a whole as either the EU or the USA is also the largest trade and investment partner for almost all other countries in the global economy. The EU and the USA dominated global inward FDI stocks (59% in 2007) and global outward FDI stocks (70% in 2007).[6] In terms of *inward* FDI stocks, the share of the EU rose from 32 to 45 percent and that of the USA from 12 to 14 percent between 1980 and 2007. In terms of *outward* FDI stocks, the share of the EU rose from 39 to 52 percent, while that of the USA fell from 39 to 18 percent between 1980 and 2007 (UNCTAD FDI online). The overall "transatlantic workforce" was estimated at 12 to 14 million people, of which roughly half were Americans who owed their jobs directly or indirectly to EU companies (http://ec.europa.eu/world/where/united_states_america/index_en.htm).

[7] Democracy is a notably difficult concept to measure. *The Economist Intelligence Unit* in its Index of Democracy (29 October 2008) considers that half of the world's population lives in democracies (30 countries are full democracies and 50 countries are flawed democracies) and half does not (36 countries are hybrid regimes and 51 are authoritarian regimes). While a strong democratization trend was evident immediately after WWII and another as of 1974, the global spread of democracy is not linear and reversals have been registered from time to time.

[8] According to the WTO, national treatment is the principle of giving others the same treatment as one's own nationals. GATT Article 3 requires that imports be treated no less favourably than the same or similar domestically-produced goods once they have passed customs. GATS Article 17 and TRIPS Article 3 also deal with national treatment for services and intellectual property protection. (http:/www.wto.org)

[9] According to the WTO, the 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. (http:/www.wto.org)

[10] The WTO was different from the Bretton Woods financial institutions (IMF and World Bank) in that it did not have power delegated to a board of directors or the head of the organization, rather all major decisions were taken by consensus.

[11] Legal texts deal with agriculture, textiles and clothing, banking, telecommunications, government procurement, industrial standards and product safety, food sanitation regulations, intellectual property and other areas. (Based on http://www.wto.org)

[12] Additional functions were the provision of technical assistance and training for developing countries and maintaining cooperation with international institutions.

[13] In international trade, the theory of comparative advantage refers to the fact that although one country may have an absolute advantage over another, trade benefits can be created for both countries by each specializing in their most competitive areas. This theory is usually attributed to the classical economist David Ricardo.

[14] The Calvo doctrine is a legal principle, applicable in international disputes, that aliens have no more rights than the citizens of a sovereign state. Therefore, such disputes lie within the purview of the domestic laws and only the courts in the host country have the jurisdiction to hear the case. This doctrine is an integral part of many national constitutions and treaties (especially in Latin America) and was named after the Argentine diplomat and historian Carlos Calvo (1824-1906).

[15] The Argentine international jurist and diplomat Luis María Drago (1859-1921) is known for the "Drago Doctrine", which held that international law did not authorize European powers to use armed intervention to force American republics to pay public debts. Drago held that international law did not sanction intervention to compel sovereign republics to repay public indebtedness.

[16] The Hull formula for expropriations entails “prompt, adequate and effective compensation”. It arose from the demands of US Secretary of State, Cordell Hull, on the Mexican government after it nationalized the petroleum industry in 1939.

[17] United Nations’ ECOSOC resolution 1721 (LIII) in 1972 mandated the formation of a Group of Eminent Persons (GEP) to study the impact of multinational corporations on economic development and international relations. The GEP report culminated in the recommendation for the establishment of a UN Commission on Transnational Corporations and a UN Center on Transnational Corporations (UNCTC). The former was to propose a Code of Conduct for Transnational Corporations and the second was a technical body to backstop the Commission by undertaking research on the nature of the operation and impact of TNCs on member countries. By 1992, it was apparent that no consensus was going to be reached with regards to the draft Code of Conduct and work was suspended. With regards to the UNCTC, US government opposition eventually limited the feasibility of its operations in New York and remnants of the institution were eventually transferred to the UN Conference on Trade and Development in Geneva, Switzerland. A complete history of the United Nations role in the field of transnational corporations is available in Sagafi-Nejad (2008).

[18] It should be remembered that both the International Monetary Fund and the World Bank group were directly controlled in terms of voting rights by the USA and Europe; the former normally selected by the President of the World Bank and the latter the head of the International Monetary Fund.

[19] The IFC was the first inter-governmental organization to have as its main objective the promotion of private enterprise. It was considered a new private sector investment arm affiliated with the Bank, rather than having it lend directly from its own resources to the private sector. The IFC’s Articles of Agreement enshrined three critical principles. The founders insisted that IFC adopt a *business principle*, taking on the full commercial risks of its investments, accepting no government guarantees and earning a profit from its operations; be an *honest broker*, using its unique abilities as a corporation owned by governments to "bring together investment opportunities,

domestic and private capital, and experienced management," and; play a *catalytic role*, investing only in projects for which "sufficient private capital is not available on reasonable terms." (Based on http://www.ifc.org)

[20] The International Development Association is the part of the World Bank that helps the world's poorest countries. IDA aims to reduce poverty by providing interest-free credits and grants for programs that boost economic growth, reduce inequalities and improve people's living conditions. Since its inception, IDA credits and grants have totalled US$193 billion, averaging US$10 billion a year in recent years and directing the largest share, about 50 percent, to Africa. (Based on http://web.worldbank.org/WBSITE/EXTERNAL/EXTABOUTUSA/IDA.html)

[21] Since 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, therefore 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's operational strategy played to its foremost strength in the marketplace—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. (based on http://www.miga.org/)

[22] The OECD has 30 members and has progressively broadened its focus to include a growing number of other countries such that it now shares its expertise and accumulated experience with more than 70 developing and emerging market economies. (Based on http://www.oecd.org)

[23] The Code of Liberalisation of Capital Movements and the Code of Liberalisation of Current Invisible Operations constitute legally binding rules, stipulating progressive, non-discriminatory liberalisation of capital movements, the right of establishment and financial services and other current invisible transactions.

[24] The Declaration is a political agreement among adhering countries for co-operation on a wide range of foreign investment issues. It contains four related elements: the National Treatment instrument, the Guidelines for Multinational Enterprises, an instrument on incentives and disincentives to foreign investment, and an instrument on conflicting requirements.

[25] The 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, and voluntary guidelines for the behaviour of transnational corporations, environmental and consumer protection, competition and restrictive business practices, corporate governance, accounting and reporting, taxation, conditions of labour, and science and technology, among others.

[26] A small group of developing countries (Argentina, Brazil, Chile, Estonia, Hong Kong China, Latvia, Lithuania and the Slovak Republic) participated in the negotiations as observers.

[27] A precursor to this Agreement was the decision of a GATT dispute settlement panel on Canada — Administration of the Foreign Investment Review Act ("FIRA") (BISD 30S/140, 1984) which considered a complaint by the USA regarding certain types of undertakings which were required from foreign investors by the Canadian authorities as conditions for the approval of investment projects. The panel decision in the FIRA case was significant in that it confirmed that existing obligations under the GATT were applicable to performance requirements imposed by governments in a foreign investment context in so far as such requirements involve trade-distorting measures. At the same time, the panel's conclusion that export performance requirements were not covered by the GATT also underscored the limited scope of existing GATT disciplines with respect to such trade-related performance requirements and was a motive for reaching a more complete Agreement.

[28] 1. TRIMs that were inconsistent with the obligation of *national treatment* provided for in paragraph 4 of Article III of GATT 1994 include those which were mandatory or enforceable under domestic law or under administrative rulings, or compliance with which is necessary to obtain an advantage, and which required:

(a) the purchase or use by an enterprise of products of domestic origin or from any domestic source, whether specified in terms of particular products, in terms of volume or value of products, or in terms of a proportion of volume or value of its local production; or

(b) that an enterprise's purchase or use of imported products be limited to an amount related to the volume or value of local products that it exports.

2. TRIMs that were inconsistent with the obligation of general elimination of *quantitative restrictions* provided for in paragraph 1 of Article XI of GATT 1994 included those which were mandatory or enforceable under domestic law or under administrative rulings, or compliance with which was necessary to obtain an advantage, and which restrict:

(a) the importation by an enterprise of products used in or related to its local production, generally or to an amount related to the volume or value of local production that it exported;

(b) the importation by an enterprise of products used in or related to its local production by restricting its access to foreign exchange to an amount related to the foreign exchange inflows attributable to the enterprise; or

(c) the exportation or sale for export by an enterprise of products, whether specified in terms of particular products, in terms of volume or value of products, or in terms of a proportion of volume or value of its local production.

[29] The Agreement did not resolve many issues of compatibility. For example, the USA employed a first-to-invent criterion for priority in patent applications, while the rest of the world used a first-to-file system. This discrepancy was not harmonized under the TRIPS Agreement.

[30] With regards 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 from patentability inventions "necessary to protect human, animal or plant life or health". However, since 2005, developing countries that were members of the WTO (such as India, Thailand and Brazil) 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, for example, 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.

[31] For example, a group of 22 bipartisan US trade policy experts wrote a memo on 25 November, 2008 to US President-elect Barack Obama and the members of the next session of the US Congress stating that "failure in the Doha Round could cause irreparable harm to the WTO's credibility, which would undermine its valuable dispute settlement mechanism and jeopardize our traditional interest in strong global economic institutions" and that "Any appearance of US rejection of Doha would undercut your goal of enhancing the global role and image of the United States". (http://ICTSD.net/i/news/bridegesweekly/36482).

[32] The standard argument was that host countries that offered better protection and wider access to foreign investment by way of international investment agreements would receive increased foreign investment inflows. The OECD promoted the Multilateral Agreement on Investment among OECD members by way of statements such as the following: "Accession 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 in OECD, 1997, p. 9).

[33] There were 23 from Africa (Benin, Burkina Faso, Burundi, Cameroon, Central African Republic, Chad, Congo, Democratic Republic of Congo, Cote d'Ivoire, Gabon, Guinea, Kenya, Lesotho, Liberia, Madagascar, Mauritania, Mauritius, Niger, Senegal, Sierra Leone, Togo, Tunisia and Uganda); 6 from Asia (Indonesia, South Korea, Malaysia, Pakistan, Singapore and Sri Lanka); and 1 from Latin America and the Caribbean (Jamaica).

[34] The principal European ones were Belgium/Luxemburg, France, Germany, Italy, Switzerland and United Kingdom.

[35] Foreign investment liberalization covered the provisions which essentially aimed to promote and secure non-discriminatory treatment and limited departures from this treatment. Foreign investment protection covered the obligations typically found in bilateral investment and protection and promotion agreement that provided absolute levels of protection. The dividing line between these two concepts is not always clear since the provisions aimed at protecting the foreign investor may reinforce liberalization commitments and liberalization commitments can also be viewed as providing legal security against future changes in the foreign investment regime of host countries. (See Houde and Kolse-Patil, 2008, p. 256)

[36] The unique historical events consisted of two essential elements: i) certain investor country governments, such as the Reagan administration in the USA or the Thatcher one in the UK, took advantage of the effective victory of global capitalism over international communism to triumph *their* vision of "market economics" which was employed to promote more market-friendly policies in developing countries and transition economies, some of which were left without an ideological game plan; and ii) economic distress for many developing countries and transitions economies as a result of the international debt crisis, which produced the "lost decade" for growth and development of LAC, and the effect of low international commodity prices, which provoked severe balance of payments problems in developing countries and transition economies in general.

[37] 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, 2004, p. 5)

[38] WTO plus items, or those that went beyond the illustrative list of the TRIMs agreement, included 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.

[39] Israel (1986), Canada (1989), Canada and Mexico (1994), Jordan (2000), Chile (2003), Singapore (2003), Australia (2004), Morocco (2004), Bahrain (2006), Central America (Guatemala, El Salvador, Honduras, Nicaragua and Costa Rica) and Dominican Republic (2008), and Peru (2008).

[40] Colombia, Panama and Korea.

[41] Malaysia, Oman, the members of the ASEAN Initiative and the South African Custom Union.

[42] Albania, Argentina, Armenia, Azerbaijan, Bahrain, Bangladesh, Bolivia, Bulgaria, Cameroon, Congo, D.R., Congo, Croatia, Czech Republic, Ecuador, Egypt, Estonia, Georgia, Grenada, Honduras, Jamaica, Jordan, Kazakhstan, Kyrgyzstan, Latvia, Lithuania, Moldova, Mongolia, Morocco, Mozambique, Panama, Poland, Romania, Senegal, Slovakia, Sri Lanka, Trinidad and Tobago, Tunisia, Turkey, and Ukraine.

[43] Central Asian countries (Kazakhstan, the Kyrgyz Republic, Tajikistan, Turkmenistan, and Uzbekistan), Thailand, Brunei, Saudi Arabia, Algeria, Bahrain, Malaysia, Qatar, United Arab Emirates, Kuwait, Yemen, Pakistan, Afghanistan, Mongolia, Indonesia, Philippines, Sri Lanka, Tunisia, Turkey, Nigeria, Ghana, South Africa, West African Economic and Monetary Union, Common Market for Eastern and Southern Africa (COMESA), and Oman. TIFAs are non-binding; however, they can yield direct benefits by addressing specific trade problems and by helping trading partners develop the experience, institutions and rules that advance integration into the global economy, creating momentum for liberalization that in some cases can lead to a Free Trade Agreement (FTA). (Based on http://www.state.gov/e/eeb/tpp/c10333.htm)

[44] USA, Mexico, Chile, Costa Rica, Peru, Israel, and Colombia. Canada also has a less demanding agreement with EFTA.

[45] Korea, Singapore, Jordan, the rest of Central America (El Salvador, Guatemala, Honduras and Nicaragua), Dominican Republic and Caricom (Antigua and Barbuda, Bahamas, Barbados, Belize, Dominica, Grenada, Guyana, Haiti, Jamaica, Montserrat, Saint Lucia, St. Kitts and Nevis, St. Vincent and the Grenadines, Suriname and Trinidad and Tobago).

[46] Argentina, Armenia, Barbados, Costa Rica, Croatia, Czech Republic, Ecuador, Egypt, Hungary, Latvia, Lebanon, Panama, Philippines, Poland, Romania, Russian Federation, Slovakia, Thailand, Trinidad and Tobago, Ukraine, Uruguay and Venezuela.

[47] USA, Canada, Guatemala, El Salvador, Honduras, Costa Rica, Nicaragua, Colombia, Bolivia, Chile, Uruguay and Israel. Mexico also has less demanding agreements with EFTA, the European Union and Japan.

[48] Argentina, Austria, Belgium and Luxembourg, Cuba, Czech republic, Denmark, Finland, France, Germany, Greece, Iceland, Italy, Korea, Netherlands, Panama, Portugal, Sweden, Switzerland, and Uruguay.

[49] APEC's 21 member economies are: Australia; Brunei Darussalam; Canada; Chile; People's Republic of China; Hong Kong, China; Indonesia; Japan; Republic of Korea; Malaysia; Mexico; New Zealand; Papua New Guinea; Peru; The Republic of the Philippines; The Russian Federation; Singapore; Chinese Taipei; Thailand; United States of America; Viet Nam. See http://www.apec.org/apec/tools/faqs.html.

[50] APEC's vision is based on the "Bogor Goals" of free and open trade and investment in the Asia-Pacific by 2010 for developed economies and 2020 for developing economies. The "Three Pillars" of APEC are trade and investment liberalisation, business facilitation, and economic and technical cooperation. See http://www.apec.org/apec/tools/faqs.html.

[51] The EU RTAs center on non-EU European countries (Albania, Andorra, Bosnia and Herzegovina, Croatia, Faroe Islands, Former Yugoslav Republic of Macedonia, Iceland, Montenegro, Norway, Switzerland and Liechtenstein, Tunisia and the European Economic Area), neighboring countries (Algeria, Egypt, Israel, Jordan, Lebanon, Morocco, Palestinian Authority, Syria and Turkey) and a few others (Cariforum States EPA, Chile, Cote d'Ivoire, Mexico, Overseas Countries and Territories, and South Africa). The EU is currently negotiating with India and Korea.

[52] The BITs of EU countries are negotiated bilaterally by individual EU members.

[53] The 2000 Cotonou Agreement established a new trade agenda framework between the 79 Africa, Caribbean and Pacific countries and the European Union known as Economic Partnership Agreements (EPA), which were reciprocal not preferential trade agreements. Since the European Commission has no direct competence over foreign investment issues within the common commercial policy, it is obliged to deal with foreign investment natters in a "trade-related" or "commercial presence" manner. Thus, with regards to those issues, its EPAs deal with market

access and liberalization not protection (which is carried out by EU members individually via BITs). The end-2007 negotiation deadline was missed by all less the 15 Cariforum countries (except Haiti) and the final agreement was signed on 15 October, 2008.

[54] Chile also has Association Agreements with the European Union, Singapore, Brunei Darussalam and New Zealand, Complementation Agreements with Argentina, Bolivia, Colombia, Cuba, Ecuador, Peru, Venezuela and the Southern Common Market (MERCOSUR, which consists of Brazil, Argentina, Uruguay and Paraguay), and a Partial Reach Agreement with India.

[55] Argentina, Australia, Austria, Belgium and Luxembourg, China, Costa Rica, Croatia, Cuba, Czech Republic, Denmark, Dominican Republic, Ecuador, El Salvador, Finland, France, Germany, Greece, Guatemala, Honduras, Iceland, Italy, Korea, Malaysia, Nicaragua, Norway, Panama, Paraguay, Peru, Philippines, Poland, Portugal, Romania, Sweden, Switzerland, Ukraine, United Kingdom, Uruguay, and Venezuela.

[56] Then US Trade Representative, Robert Zoellick, notified the US Congress that he intended at the time to begin bilateral RTA talks with Colombia, Panama and Peru (and later with Bolivia and Ecuador) and to negotiate a BIT with Uruguay.

[57] 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. Based on http://www.encharter.org/index.php?id=7.

[58] With industrialized countries, such as Belgium/Luxemburg, Denmark, France, Finland, Germany, Italy, Netherlands, Portugal, Switzerland, and the United Kingdom, and others, like Chile, Cuba, Republic of Korea, and Venezuela.

[59] It might be mentioned in this context, that while Brazil faced a balance of payments crisis somewhat similar to that of Argentina in 2001-2, it was able to weather the crisis in the energy sector better than Argentina not only because it was not carrying IA-ISDS risk but also because it had national institutions (the national development bank-BNDES and the national petroleum company-Petrobras) capable of contributing to a practical solution to the problem by way of direct negotiations with the companies involved. Argentina in contrast did not have similar institutions and carried very high IA-ISDS risk which, when negotiations broke down, led many TNCs operating there to take advantage of the IA-ISDS procedures in Argentina’s 50 plus BITs to initiate more than 40 cases of international arbitration (ECLAC, 2006).

[60] With industrialized countries, such as Austria, Belgium/Luxemburg, Canada, Denmark, Finland, France, Germany, Greece, Italy, Japan, Netherlands, Norway, Spain, Switzerland, and United Kingdom; and others, like Albania, Argentina, Cuba, Czech Rep, Egypt, Ethiopia, Hungary, India, Kazakhstan, Republic of Korea, Kuwait, Lebanon, Lithuania, Macedonia, Moldova, Romania, Serbia, Slovenia, South Africa, Turkey, and Vietnam).

[61] Two are at Swedish Chamber of Commerce (RosInvestCo UK Ltd. vs. Russian Federation – a claim arising out of alleged expropriation of investor's shares in Yukos; and Renta 4 et al vs. Russian Federation - also a claim arising out of the Russian Government's legal and taxation action against the Yukos Corporation) and the rest are under UNCITRAL rules (Yukos Universal Ltd. vs. Russian Federation, Hulley Enterprises Ltd. vs. Russian Federation, Veteran Petroleum Ltd. vs. Russian Federation).

[62] For example, India was traumatized in December, 1984 when a leak of methyl isocyanate from a more than 50%-owned pesticide plant of the US TNC Union Carbide killed 3,800 people in Bhopal, Madhya Pradesh and left several thousand more with permanent or partial disabilities. Although Union Carbide quickly paid the final settlement of US$ 470 million ordered by the Indian Supreme Court in February, 1989, and maintained that the incident was a result of deliberate sabotage, this experience made Bhopal infamous and identified with TNC abuses.

[63] Australia, Austria, Belgium/Luxemburg, Denmark, Finland, France, Germany, Italy, Netherlands, Portugal, Spain, Sweden, Switzerland, and United Kingdom; and others, like Argentina, Belarus, Bulgaria, China, Croatia, Cyprus, Czech Republic, Egypt, Hungary, Indonesia, Israel, Kazakhstan, Korea Rep., Kuwait, Kyrgyzstan, Lao PDR, Malaysia, Mauritius, Mongolia, Morocco, Oman, Philippines, Poland, Qatar, Romania, Russian Federation, Serbia, Sri Lanka, Taiwan, Tajikistan, Thailand, Ukraine, Uzbekistan, Vietnam.

[64] Capital India Power Mauritius I and Energy Enterprises – Mauritius - Company vs. Government of India; Offshore Power Production C.V., Travamark Two B.V., EFS India-Energy B.V., Enron B.V., and Indian Power Investments B.V. – Netherlands - vs. India; ABN Amro N.V. vs. India; ANZEF Ltd. V. India; BNP Paribas vs. India; Credit Lyonnais SA, - now Calyon SA- vs. India; Erste Bank Der Oesterreichischen Sparkassen AG vs. India; Standard Chartered Bank vs. India; Credit Suisse First Boston vs. India.

[65] With industrialized countries, such as Australia, Austria, Denmark, Finland, Germany, Greece, Iceland, Italy, Japan, Netherlands, New Zealand, Norway, Switzerland, United Kingdom, and others, like Albania, Argentina, Armenia, Azerbaijan, Bahrain, Bangladesh, Barbados, Belarus, Bolivia, Bosnia, Bulgaria, Cambodia, Cape Verde, Chile, Croatia, Cyprus, Czech Republic, Ecuador, Egypt, Estonia, Ethiopia, Georgia, Ghana, Guyana, Hungary, India, Indonesia, Iran, Jamaica, Kazakhstan, Republic of Korea, Kuwait, Kyrgyzstan, Lao PDR, Latvia, Lebanon, Lithuania, Macedonia, Madagascar, Malaysia, Mauritius, Moldova, Mongolia, Morocco, Mozambique, Myanmar, Oman, Pakistan, Papua New Guinea, Peru, Philippines, Poland, Qatar, Romania, Saudi Arabia, Serbia, Singapore, Slovakia, Slovenia, South Africa, Sri Lanka, Sudan, Syrian Arab Republic, Tajikistan, Thailand, Trinidad and Tobago, Turkey, Turkmenistan, Ukraine, United Arab Emirates, Uruguay, Uzbekistan, Vietnam, Yemen, and Zimbabwe.

[66] Such as Hutchison Whampoa Ltd., CITIC Group, Jardine Mathison Holdings, New World Development Co. Ltd., and China Merchants Holdings International.

[67] Including China National Petroleum Corp., Sinochem Corp., China Resources Enterprises and China National Offshore Oil Corp.

[68] Such as China Ocean Shipping Group Company, China State Construction Engineering Corp., CLP Holdings, Star Cruises, Orient Overseas International Ltd., and Shangra-La Asia Ltd.

[69] Including Lenova Group, First Pacific Co. Ltd., Techtronic Industries Co. Ltd., Esprit Holdings Ltd., and TCL Multimedia Technology Holdings Ltd.

[70] The G-7 countries include Britain, Canada, France, Germany, Italy, Japan and the USA.

[71] The G-20 is an informal forum that promotes open and constructive discussion between industrial and emerging-market countries on key issues related to global economic stability. By contributing to the strengthening of the international financial architecture and providing opportunities for dialogue on national policies, international co-operation, and international financial institutions, the G-20 helps to support growth and development across the globe. The members of the G-20 are the finance ministers and central bank governors of 19 countries: Argentina, Australia, Brazil, Canada, China, France, Germany, India, Indonesia, Italy, Japan, Mexico, Russia, Saudi Arabia, South Africa, South Korea, Turkey, the United Kingdom and the United States of America. The European Union is also a member, represented by the rotating Council presidency and the European Central Bank. To ensure global economic fora and institutions work together, the Managing Director of the International Monetary Fund and the President of the World Bank, plus the chairs of the International Monetary and Financial Committee and Development Committee of the IMF and World Bank, also participate in G-20 meetings on an ex-officio basis. See http://www.g20.org/G20/.

[72] Consult, for example, Egger and Pfaffermayr, 2004; Elkins et al. (2006); Gallager and Birch (forthcoming); Hallward-Driemeier, 2003; Hewko (2002); Neumayer and Spess (2004); Tobin and Rose-Ackerman (2005); Salasuse and Sullivan (2005); Tumman and Emmert (2004); and UNCTAD (1998).

[73] Alvarez, for example, stated that "…the truth is to date the U.S. model BIT has been regarded as, generally speaking, a "take-it-or-leave-it" proposition, with the United States calling the shots and the BIT partner as supplicant…." (comments to the American Society of International Law Proceedings cited in Garcia (2004**,** p. 17). Dolzer and Stevens (1995, p. 13) noted that some investor countries, such as France and Germany, required BITs as a prerequisite for political risk insurance by national institutions. Finally, the Bretton Woods institutions typically request liberal foreign investment policies in their stabilization and structural adjustment loans with developing countries and transition economies.

[74] An oft-quoted example comes from the Attorney-General of Pakistan, Makhdoom Ali Khan, who stated that Pakistan "long treated such treaties as "photo-op" agreements, which could be signed hastily, with little consideration of their concrete legal consequences" (Peterson, 2006). He went on to say that "These are signed without any knowledge of their implications. And when you are hit by the first investor-state arbitration you realize what these words mean".

[75] A "direct" expropriation/nationalization is characterized by acts that transfer title and physical possession, whereas "indirect" expropriation/nationalization involves acts that effectuate the loss of management, use or control, or a significant depreciation in the value, of assets. (UNCTAD, 2004, pp. 68-9)

[76] For example, Enron Corp. and Ponderosa Assets v. The Argentine Republic (ICSID Case No. ARB/01/3); Siemens A.G. v. The Argentine Republic (ICSID Case No. ARB/02/8); Azurix Corp. v. The Argentine Republic (ICSID Case No. ARB/01/12); CMS Gas Transmission v. The Argentine Republic (ICSID Case No. ARB/01/8); Lanco International Inc. v. The Argentine Republic (ICSID Case No. ARB/97/6); and the bondholders' claims by Giovanna A. Beccara, Giovanni Alemanni and others.

[77] This section is based principally on K. Yannaca-Small, "Interpretation of the Umbrella Clause in Investment Agreements", *Working Papers On International Investment*, Number 2006/3, OECD, Paris, October 2006.

[78] It might be mentioned in passing that the USA 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.

[79] Garcia (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."

[80] The Lauder cases involved multiple proceedings on the same facts that led to contradictory results. In one case (The Czech Republic v. CME Czech Republic B.V., Court of Appeal, Stockholm, Sweden, Case T-8735-01), the investor lost, in the other (Ronald S. Lauder v. Czech Republic, UNCITRAL, Final Award, 3 September 2001), the investor was awarded over 300 million dollars.

[81] For example, in Loewen Group Inc. and Raymond L. Loewen v. United States of America (ICSIC Case No. ARB(AF)/98/3); Mondev International Ltd. V. United States of America (ICSIC Case No. ARB(AF)/99/2); and ADF Group Inc. v. United States of America (ICSIC Case No. ARB(AF)/00/1)

[82] 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 v. United Mexican States (ICSID case No. ARB(AF)/97/1), S.D.Myers, Inc. v. Canada, and Pope & Talbot, Inc. v. Canada, Award on Merits, Phase 2 (Tracton, 2008, pp. 204).

[83] The consideration of other options, such as transposing to investment arbitration 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 ICSID's Additional Facility Rules 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).

[84] In that vein, the changes can be summarized as the possibility for non-parties to be present at hearings; a new procedure for non-parties to make written submission; improved disclosure of awards; expanded obligations for arbitrator independence; limits on arbitrators' fees; a fast track procedure for interim relief; and a more streamlined procedure to dispose of unmerited claims (Marshall, 2008, p. 2).

[85] Such as a refinement to the procedure for challenging arbitrators; a requirement to respond within 30 days to a claimants notice of arbitration; greater scope for potential counter-claims and set-offs; extended disclosure obligations; the promotion of reasonable costs; etc. (Marshall, 2008, pp. 8-12).

[86] At the same time, one should mention that certain other more questionable modifications being considered by the Working Group include the requirement that parties waive their right to any form of appeal, and increase liability protection of those associated with the arbitral tribunals (arbitrators, appointing authority, Secretary-General of the Permanent Court of Arbitration, experts, etc.) (Marshall, 2008, pp. 8-12; Tams, 2006). In this sense, the UNCITRAL discussions seemed to be more concerned with the welfare of arbitrators than the effective functioning of the international arbitration rules.

[87] While the policy in this area of the new US administration has not been made explicit, a clue may be derived from then-Senator Obama's response to an Iowa Fair Trade Coalition survey in which he did not agree to the activist's demand to eliminate private foreign investors' right to sue governments, he did ensure that this right was "strictly limited" and to "fully exempt" any law or regulation written to protect public safety or promote the public interest (Anderson, 2008, p. 3)

[88] In a related development, Canada took the first steps to become a formal member of ICSID in 2006. According the ICSID website, the ratification has not yet been received.

[89] Under the OECD Model, Canada negotiated BITs with 5 countries: Argentina and 4 transition economies (Dattu, 2007).

[90] Under the 1994 Model, Canada negotiated BITs with 16 countries: Armenia, Barbados, Costa Rica, Croatia, Ecuador, Egypt, Latvia, Lebanon, Panama, Philippines, Romania, Thailand, Trinidad and Tobago, Ukraine, Uruguay and Venezuela (Dattu, 2007).

[91] Under the 2004 Model, Canada negotiated FIPAs with 2 countries: Peru and Colombia, and is currently negotiating with China, India and Jordan (Dattu, 2007).

[92] Japan has 7 RTAs covering 13 trade partners: ASEAN (Brunei, Indonesia, Philippines, Malaysia, Singapore, Thailand, Viet Nam), Australia, Chile, India, Mexico, Republic of Korea and Switzerland.

[93] Singapore has 13 RTAs covering 23 trade partners; ASEAN, Australia, China, EFTA (Switzerland, Norway, Iceland and Liechtenstein), Gulf Cooperation Council (Bahrain, Kuwait, Oman, Qatar, Saudi Arabia and the United Arab Emirates), India, Japan, Jordan, New Zealand, Panama, Peru, Republic of Korea, and USA.

[94] 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).

[95] In keeping with the analysis of Section 1, Brazil is not included in the group of disenchanted 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 and has not had a traumatic experience with ICSID IA-ISDS procedures as has been the case for the group of disenchanted.

[96] CARIFORUM includes the 14 members of the Caribbean Community plus the Dominican Republic.

[97] The Cariforum countries, with the exception of Dominican Republic (which is tied into the US RTA network), have quite limited BITs in force: Barbados (9) Grenada (2), Guyana (3), Haiti (3), Jamaica (10), Saint Lucia (2) Saint Vincent and the Grenadines (1), and Trinidad and Tobago (7). Most involve the United Kingdom, other European countries (mainly Germany, Switzerland and France) and Canada. Only three countries have BITs with the USA (Grenada, Jamaica, and Trinidad and Tobago).

[98] 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).

[99] The LG&E case (ICSID Case No ARB/02/1).

[100] Estimates calculated from Nicolas Marcelo Perrone, “Inversiones Extranjeras. Demandas contra la Argentina por controversias vinculadas con la crisis del año 2001”, Facultad de Derecho de la Universidad de Buenos Aires (www.derecho.uba.ar).

[101] City Oriente (ICSID Case No ARB/06/21).

[102] Duke Energy (ICSID Case No ARB/03/28)

[103] Metalclad (ICSID Case No ARB(AF)/97/1) and Feldman (ICSID Case No ARB(AF)/99/1)

[104] MTD Equity Sdn. Bhd. case (ICSID Case No ARB/01/7)

[105] Bolivia, like other Latin American countries, had turned to the private sector for the provision of utilities, among which water and waste water systems. Until then, such services had been undertaken by the public sector, but deficiencies in management resulted in underinvestment, poor service and high levels of indebtedness. The process whereby previously subsidized public services were turned over to the private sector through concessions often involved bringing the price of the service (water and sewage services in this case) closer to its cost. In Cochabamba, when the new system was implemented in January 2000, rates were increased to finance maintenance and investments in expansion of the water system, as well as the public utilities large accumulated debt. Strong public manifestations led the government to roll back rates in February, and in April the contract with AdT was rescinded. AdT pursued arbitration through ICSID to seek compensation for what the company considered as the Bolivian government's having illegally terminated its contract and expropriating the concession. The case was eventually – six years later – settled between the parties: Bolivia agreed to declare that the concession was terminated because of civil unrest and the state of emergency in Cochabamba and not because of any act or omission by the claimant, but no compensation was paid.

[106] A second decision on jurisdiction was made in this case after an ancillary claim was presented. It confirmed the understandings of the first in this matter.

[107] 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

[108] In relation to the top investor countries in petroleum and gas in LAC, Bolivia had BITs with US, France, Italy, Netherlands and Spain; Ecuador had BITs with US, Canada, France, Italy, Netherlands and Spain; and Venezuela had them with Canada, France, Italy, Netherlands and Spain.

[109] In the only tribunal decision so far relating to ENI's ICSID demand on 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 http://www.guia.com.ve.

[110] These experiences may have pushed these same governments into more radical stances outside of the natural resource sector. For example, 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 Bolivia, the main telecom company was expropriated, which led to the initiation of an IA-ISDS procedure.

[111] The effect of Legal Stability Agreements 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 there use is the most widespread. An estimated 600 Legal Stability Agreements were entered into between 1992 and 2003. In addition to the examples above, Panama's LSAs provide stability of tax, custom 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 (see Vielleville, D.E. and B.S. Vasani, "Sovereignty Over Natural Resources versus Rights Under Investment Contracts: Which One Prevails?". Transnational Dispute Management, transnationa-dispute-management.com, Vol. 5, issue 2, April 2008).

[112] In the decision, the tribunal stated that "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." (para. 31).

[113] Argentina has more BITs in force (54) than any other LAC country. It has 16 with industrialized countries, such as Australia, Austria, Belgium and Luxembourg, Canada, Denmark, Finland, France, Germany, Italy, Netherlands, Portugal, Spain, Sweden, Switzerland, United Kingdom, and United States, as well as 38 with other countries, namely, Algeria, Armenia, Bolivia, Bulgaria, Chile, China, Costa Rica, Croatia, Cuba, Czech Republic, Ecuador, Egypt, El Salvador, Guatemala, Hungary, India, Indonesia, Israel, Jamaica, Korea, Lithuania, Malaysia, Mexico, Morocco, Nicaragua, Panama, Peru, Philippines, Poland, Romania, Russian Federation, South Africa, Thailand, Tunisia, Turkey, Ukraine, Venezuela, and Viet Nam,

[114] It should be mentioned that five of these were filed while the convertibility regime was still in place.

[115] 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*, 2006)

[116] It might be mentioned that the US-centric RTA model continues to evolve and in certain cases expressly expands the scope of dispute resolution clauses to include breaches related to investment agreement and authorizations, in addition to treaty violations. In the US-Peru FTA, for example, a broad but vague dispute resolution clause expands the right of the foreign investor to bring claim for such matters. (Malik, 2007)

[117] Alvarez (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 DSU of the 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.