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Standing Tall: BRICs Improve FDI Impacts and Reduce Risks

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Abstract

The situations for the international architecture of foreign trade and investment became quite different since the WWII. That for international trade was initially defined by the former GATT system and achieved a relatively high degree of consensus and legitimacy in the 1990s in the form of basic WTO agreements, especially because of the improved environment for the solution of trade disputes between countries. By contrast, the international architecture for foreign investment was much more complex and convoluted, and notably less credible. Attempts to establish a viable foreign investment framework via investor country-controlled institutions (IMF, World Bank, OECD), the WTO (with respect to services, trade-related investment measures and trade-related aspects of intellectual property rights) and bilateral and plurilateral international investment agreements (IIAs), all enjoyed at best partial success. Notably, not even the principal investor countries could come to a multilateral agreement, as demonstrated by the failure of the OECD's Multilateral Agreement on Investment in the late 1990s. Developing countries and transition economies did not possess clear policies with regards to the role of FDI in their national development strategy. Increasingly, controversy was generated when basic aspects of international commercial arbitration became the foundation for resolving disputes between host countries and individual foreign investors (rather than their home country governments) as manifest in the wave of IIAs between investor countries and capital-importing host countries.

The situation became quite complex for capital-importing countries – mostly developing countries or transition economies. This was especially evident with regards to IIAs, which carried new risks for host countries in the form of international arbitration stemming from Investor-State dispute settlement provisions of those agreements. Some of the principal risks were legitimacy concerns about the procedures themselves, expansive interpretations of basic concepts by arbitral tribunals and excessive costs in terms of fees and awards. Foreign firms were able to resolve investment disputes with host countries by way of international arbitration, an option not available to national companies. Only a few of the bigger capital-importing countries proved capable of taking advantage of their increasing negotiating strength vis-a-vis investor countries to redefine the role of FDI and to get better deals with regards to the treatment of foreign investment in IIAs and thereby significantly *limit or* reduce the associated risks, especially those related to *dispute settlement by way of* international arbitration.

Generally, the increased negotiating strength of four principal developing countries and transition economies known as BRICs (acronym for Brazil, Russia, India and the Peoples' Republic of China) was explicitly recognized by the international community in at least two important ways since the 2008 financial crisis deepened. First, the status quo of global crisis management was altered from exclusively the group of the principal investor countries, G-7, to include some of the main capital-importing countries in the new G-20. Secondly, the larger of the developing countries and economies in transition were more fully incorporated in the voting structure of multilateral financial institutions. The new influence of the BRICs was even evident at the Copenhagen Conference on Climate Change as most of them were active in preventing a G-7

type package being foisted upon developing countries and economies in transition. This paper analyses how the BRICs stood tall by utilizing their increasing bargaining power to structure improved development strategies, including better defining the role of the foreign investment in those strategies, and taking initiatives to limit or reduce their risk to foreign investment arbitration by way of IIAs. Their successes contrast with the increasingly complex situations of less influential developing countries and transition economies that face ever-higher risks in their IIAs that carry Investor-State dispute settlement provisions involving international arbitration.

Key words: BRICs. FDI policies. MNCs. FDI treatment. Economic Policy. Economic Development. Investment Dispute Settlement.

JEL Classification: F02 F23 F54 F55 K33 O16 O19

Introduction

At the beginning of the new millennium a group of researchers at Goldman Sachs (GS) coined the acronym BRICs in order to highlight the growing importance of Brazil, Russia, India and China in the global economy (GS, 2001, 2003, 2004 and 2007; Jain, 2006). These four countries can be considered emerging global players because of their new presence in the international economy. They are among the largest countries in the world – encompassing more than 25 per cent of world's land area. As a group, they contain more than 40% of world population, with the PRC and India each surpassing the 1 billion persons mark. In terms of GDP, in 2008 they accounted for 15% of world product; however, in less than 15 years they are projected to account for over half that of the G6 (Italy, France, UK, Germany, Japan, US; or G-7 less Canada) and surpass that core group of investor countries by 2040 (GS, 2007). The BRICs come in different sizes and demonstrate distinct degrees of integration into the international economy (World Bank, Development Indicators). Individually, Brazil has a relatively large economy - its GDP reached US$ 1,314.2 billion in 2007, which ranks it in 10th place globally. It also possesses a medium-sized population (191.6 million) with a medium average income (US$ 9,370 per capita). Its merchandise trade (exports plus imports) plays a limited but growing role in its integration into the international economy (22% of GDP). FDI inflows have become substantial (US$ 34.6 billion in 2007). The Russian Federation has a relatively large economy (its GDP reached US$ 1,291 billion in 2007) coupled with a medium-sized population (141.6 million persons) and medium-to-high average income (US$ 14,400 per capita). Merchandise trade plays a relatively significant role in its integration into the international economy (45% of GDP), and FDI inflows have become substantial (US$ 52.5 billion in 2007). India counts with a relatively large economy (its GDP reached US$ 1,171.0 billion in 2007) and it contains a very large population (1,123.3 million persons) with low average income (US$ 2,740 per capita). Merchandise trade plays a limited role in its integration into the international economy (31% of GDP) but FDI inflows have become substantial (US$ 23 billion in 2007). The Peoples Republic of China possesses a relatively large economy (its GDP reached US$ 3,280.1 billion in 2007) together with a very large population (1,320 million persons) with medium to low average income (US$ 5,370 per capita). Merchandise trade plays a central role in its integration into the international economy (66% of GDP), and FDI inflows have been among the world the largest (US$ 83.5 billion in 2007).

In the last decade or so, at different paces, the BRICs began important processes of economic and structural change, usually couched in more coherent national development strategies. Overall, and unlike the tendencies of many developing countries and transition economies since the fall of the Berlin Wall, the BRICs did not lamely follow the package of neoliberal economic policies and institutional building blueprints offered by the investor countries and the multilateral institutions that they controlled. These neoliberal packages often included regional trade agreements (RTAs) and bilateral investment treaties (BITs), which aimed to maximize foreign investment liberalization and/or protection sometimes over national developmental priorities. The BRICs stood tall by taking appropriate policy action so that such packages would not unduly limit the policy space that they required to pursue accelerated growth and development, including with regards to risks associated with international arbitration deriving from provisions in international investment agreements (IIAs). Even so, foreign investors rewarded the BRICs with unprecedented levels of FDI inflows because the local market, natural resources and other factors

found in BRIC economies were so attractive for them. This paper focuses on BRICs' evolving national development policies, particularly the treatment of foreign investment. It is divided into two main sections. The first looks at the nature of national development strategies and the new role defined for FDI in them by each one of the BRICs countries. In the second section, an examination is offered of how each BRICs attempted to use its increasing negotiating strength to limit or reduce the risk from international arbitration stemming from Investor-State Dispute Settlement provisions (IA-ISDS) in its IIAs. Major risks for host countries associated with IA-ISDS procedures include legitimacy concerns, expansive interpretations by arbitration tribunals and high financial costs (Mortimore, 2009) as well as discrimination against national companies. Legitimacy concerns were linked to the IA-ISDS roots in commercial arbitration between private companies and included evident conflicts of interests of private arbitrators and undemocratic practices that did not respect the basic principals of public law with regards to rendering accounts, transparency and judicial independence. One effect was to reduce the host state to a commercial entity. Expansive interpretations of concepts in IIAs such as indirect expropriation, fair and equitable treatment, national treatment (in "like circumstances"), the scope of application of most favored nation treatment, the definitions of investor and investment, umbrella clauses and stabilization clauses, among others, considerably increased host country risk associated with existing IIAs. The impact of expansive interpretations was seen in host country policy paralysis or regulatory chill that reduced its policy space. Financial costs were sometimes prohibitive, especially for smaller and poorer host countries, as final costs including awards, lawyers' fees and administrative costs sometimes ran into hundreds of millions of dollars. IA-ISDS provisions in IIAs give advantages to foreign companies not available to national ones, which can invert national developmental priorities. In different ways, the BRICs attempted to limit or reduce these risks.

The Role for FDI in BRICs' National Development Strategies

The four BRICs evolved in very distinct manners and that was reflected in the roles they came to define for FDI in their national developmental strategies and in the way that they treated FDI. What they shared as a group was an evolving view which recognized the positive role that can be played by FDI while realizing that that role need be complementary to the core growth model relying on national companies ("FDI-assisted economic development"), as Narula and Lall (2006) had indicated.

Brazil

Brazil has a long history of FDI involvement in its economy, which can be traced back more than a century when foreign investors were interested primarily in the opportunities available in the services sector (transportation, electricity, finance, and trading) (UNCTAD, 2005). Brazil's national development model for most of the post-WWII period was framed in a nationalistic project based on import-substituting industrial (ISI) policies; however, that project incorporated rather than prohibited 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 became 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" national development model.

Most transnational corporations (TNCs) invested in Brazil in view of the promise of the internal market rather than any legal protection available (i.e. Law 4131/62), and in spite of the existence of some sectoral restrictions consistent with the ISI model[1] (da Motta Veiga, 2004; Baumann, 1998). The local business environment provided incentives for mostly market-seeking TNCs to focus on working the local protected market rather than attempting to achieve internationally competitive production or quality standards in order to export from Brazil.

In the mid-1980s the external debt crisis aggravated the fiscal and financial gaps of the balance of payments of the Brazilian economy and the collapse of the demand of the internal market put a damper on foreign investors' expectations and FDI subsequently nose dived. New tensions became apparent in the Brazilian treatment of FDI. Decree-Law Nº 1986/82 introduced restrictions for foreigner companies in the local capital market. A 1988 constitutional amendment introduced other new restrictions on FDI. By virtue of this last modification, foreign investors began to feel discriminated against by nationality (article 171), and state ownership in some strategic sectors (oil and natural gas, telecommunications, postal services) was reintroduced. Foreign investors were prohibited from some specific sectors (natural resources, many minerals, coastal navigation, air transport, and media), and restricted in others (some mining, hydraulic energy, maritime transportation, and the purchase of rural properties). These measures could not hide the fact that the exhaustion of the Brazilian ISI model had become evident (Paiva Abreu, 2004) and that inward-looking policies had proved inadequate to meet the Brazilian development requirements (Rouquié, 2006).

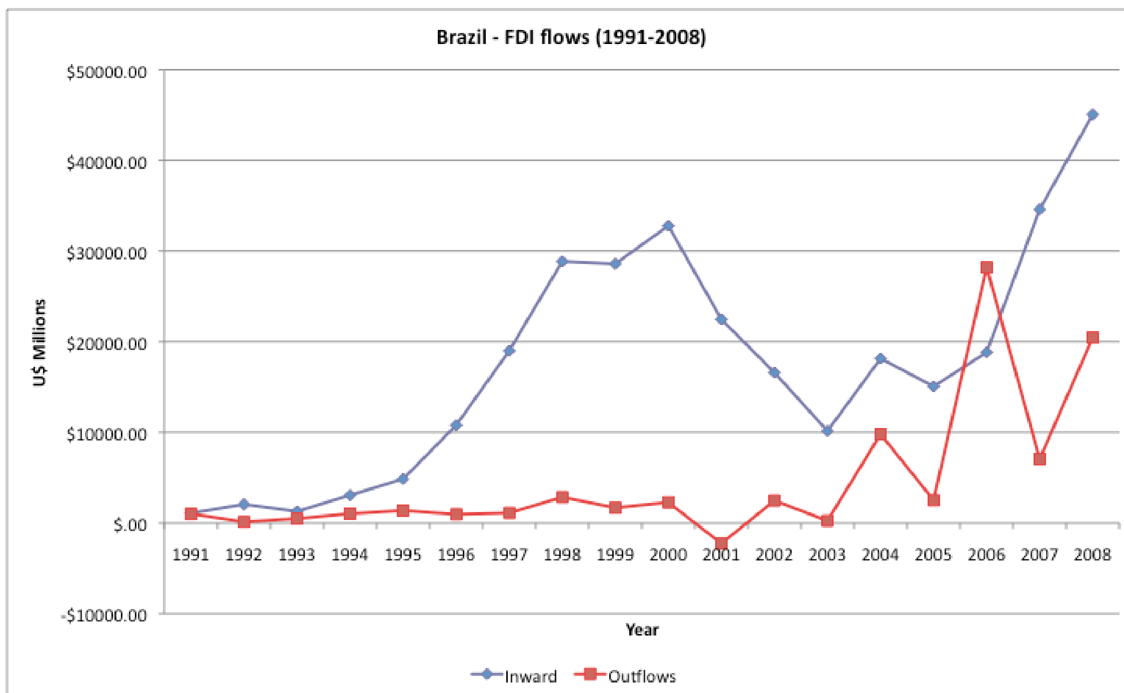
As of 1995, Brazil adopted a more liberal and market-friendly approach toward national development. Six changes stand out. First, the macroeconomic stabilization programme tamed the existing chaos in coordination with opening up the economy by way of significant import tariff reduction[2] and the repeal of many non-tariff barriers. Secondly, Brazil and its partners in the Southern Market integration scheme, MERCOSUR, agreed to set a common external tariff (CET), consolidating a subregional market that increased foreign investors' enthusiasm for the initiative. Thirdly, a new constitutional reform repealed the discriminatory treatment toward foreign investors[3] and lifted the state monopoly in several strategic sectors[4]. Fourthly, the government eased restrictions on currency convertibility, allowing foreign investors to freely remit profits – including dividends, capital and royalties[5]. Fifthly, the government simplified all bureaucratic processes affecting foreign investors[6], and at the same time launched a series of tax initiatives in order to attract more FDI, notably in the automobile industry[7], as well as another group of additional programmes[8]. Last but not least, the government launched an ambitious privatization programme[9]. In sum, many sectors were opened to FDI, including petroleum, telecommunications, mining, power generation, and local transportation, and huge privatization programs were implemented in infrastructure services. In this fashion, the FDI of transnational corporations was now considered by Brazilian policymakers to be an important instrument for the modernization and accelerated growth of the national economy.

Foreign investors responded energetically and 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). The presence of FDI shifted within the local economy. Whereas FDI inflows during the ISI model went mainly to manufactures, especially electrical and electronic machinery and equipment, automobiles and parts, 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. (ECLAC, various [add to Bibliography]). The sources of inward FDI became more diversified. The US continued as the principal source of foreign capital – as was the case - before the external crisis in the 1980s and several European investors increased their presence in Brazil (especially from Netherlands, Germany, France, Spain and Portugal). In this fashion, the inflow of FDI began to more clearly reflect the new developmental strategy of Brazil and the role for FDI in it.

More recently -- since 2000 -- Brazil became a source of outward FDI from local companies. Several factors have pushed Brazilian entrepreneurs to go global and, for the first time, FDI outflows surpassed FDI inflows in 2006. Three of the top 100 non-financial TNCs by external assets comes from Brazil: Companhia Vale do Rio Doce (Vale)[10], Petrobras[11] and Metalurgica Gerdau[12]. In the cement industry, Voltarim and Camargo Correa are also very active abroad, whereas Odebrecht is leading among construction and civil works firms[13]. These are just some of the examples of firms beginning to operate on a global basis in diversified sectors, such as: textile[14], banking[15], pharmaceutical, automotive and auto parts[16], foods and beverages[17], software and biofuels. By the end of the nineties, more than one thousand Brazilian firms were operating abroad (UNCTAD, 2004). The Brazilian government actively promoted the process, and the national bank, BNDES, helped finance the international expansion of local firms. Basically, the federal government had come to appreciate the importance of counting with its own Brazilian "Global Champions"[18]. In other words, both inward and outward FDI were considered to be important means of further integrating Brazil into the international market.

Graph 1 - Brazil, inward and outward FDI, in US millions (1991-2008)



Source: based on data from UNCTAD

In the case of Brazil, the role of inward FDI in Brazilian national development strategies evolved from one focussed mainly on supplying the internal market with manufactures to one based on the modernization of many services and coordinated with the process of internationalising the economy. Both inward FDI from TNCs and outward FDI from Brazilian companies played a role. In sum, the Brazilian treatment of FDI consisted of a number of sharp twists and turns that related to a number of different factors, primarily the changing national development strategy and the role of FDI in it, the macroeconomic situation in terms of external balances, and the ebb and flow of nationalistic forces in the local political system.

Russian Federation

Under the Soviet model dating from 1917, investment for national development was undertaken almost exclusively by the State. Marxist ideology was openly hostile to foreign investment and, as a result, foreign investors had little or no role to play in the national development strategy until after the collapse of the Soviet Union around 1990. The nascent Russian Federation had very little experience with modern capitalism and virtually had to learn from scratch. 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, among others, were enacted and international trade liberalization and opening up to foreign investment were important elements of the transition policy reform package undertaken in Russia; however, FDI did not 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 [add to Bibliography]), among others, and the Russian economy entered into severe crisis by 1998, when the State defaulted on its external debt and was forced to devalue the currency. Astonishingly, the GDP shrank by 40% over 1992-2000.

As a result of the fact that the privatization scheme originally favored the transfer of state-owned enterprises to local oligarchs[19], a rent-seeking culture emerged, with foreign investors playing only a relatively minor role up to that point in time. The political transition was severely damaged because of high levels of corruption detected and the shift toward closer integration into the international economy was discredited in the local economy (Stiglitz, 2007). Thus, the transition from communism to a market economy got off to a very bad start in the Russian Federation.

The economy did eventually recover, growing at an average annual rate of 7% thereafter mostly due to commodity booms, especially in hydrocarbons. The Russian economy even came to enjoy a combination of current account surplus, balanced budget, and increasing foreign investments, which allowed Russian authorities to accumulate significant foreign reserves (Sutela, 2008)[20]. The Russian economy was still based mainly on natural resources, in spite of the central importance given to the industrialization process during the communism era.[21] Russia became the main producer of hydrocarbons outside of OPEC (with 12.1% of total world production). In 2006, exports of crude oil, petroleum products and natural gas accounted for almost 80% of Russian total exports. The country was also an important actor in the global coal market (1st in reserves, 3rd in exports, and 6th in production). Thus, the hydrocarbons industry and other natural

resources grew more important as the principal bridge between the local economy and the international one.

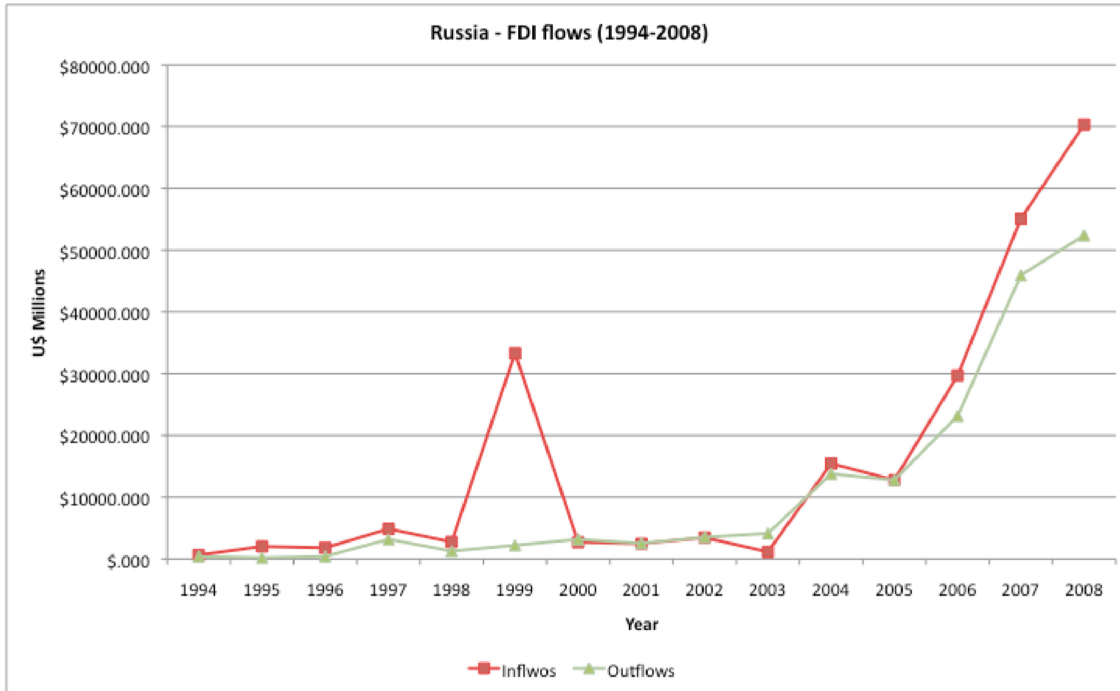
The hydrocarbons industry was restructured following the collapse of the communist regime, which allowed private Russian companies to dominate the sector. During this first stage, Russian companies controlled the industry through mainly interrelated financial groups[22] that benefited from the loan for shares exchange programme launched in 1995. Production and investments softened in those early years due to the short-term profit-taking focus of those local groups (Locatelli, 2006).[23] An important merger and acquisition (M&A) process took place as of 2002[24], which further increased concentration in the industry.

Faced with this chaotic situation, the central government toughened entry conditions in natural resource activities and increased its control over both production and exports. The arrest and trial of Mikhail Khodorkovsky, chief executive of Yukos, a major petroleum company, exemplified the Government's determination to re-establish its control in that sector (Kononczuk, 2006).

Foreign investors, always interested in energy resources, began to enter in greater numbers into the Russian Federation in order to take advantage of this new situation.[25]. During the 2005-2007 period FDI increased dramatically (Sutela, 2007; URBC, 2009), with natural resources maintaining a leading role[26], even though some investors were also attracted by the fast-growing consumer sector as well (Stewart, 2008). Cumulative FDI inflows during the first seventeen years of the Russian Federation amounted to about 10% of domestic fixed capital formation (URBC, 2009). 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. Thus, to a significant degree, the Russian central government viewed FDI as an instrument to both restructure the natural resource sector and strengthen the role of the State vis-à-vis powerful local private interests.

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. Now, the Russian central government began to improve its presence in the natural resource sector at the expense of some of the existing major foreign investors. 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 thereby 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).

Graph 2: Russia, Inward and Outward FDI, in U$ Millions (1994-2008)



Source: based on data from UNCTAD

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). Lukoil has several projects in Dubai, Iran, Kazakhstan, Saudi Arabia, Ukraine and Venezuela, and Gazprom set up operations in the PRC, Hungary, Macedonia, Poland, Uzbekistan and countries of the Commonwealth of Independent States (CIS) [27]. The iron and steel industry internationalized its operations, led by Norilsk Nickel[28], Evraz[29] and Severstal[30]. Telecommunications-related firms began to expand abroad, led by Sistema (CIS countries) and VilpemCom (Kazakhstan, Tajikistan and Ukraine). Following this trend, Russia became in 2006 the 15th most import source of FDI worldwide and 2nd largest among emerging economies (Kalotay, 2008). From a government policy perspective, it seems to be the case that Russian investors had little governmental support, except some Stated-owned enterprises (SOEs) in the energy sector, which held strategic importance for the Russian Federation[31]. 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, like its economic performance, the international presence of the Russian Federation was growing steadily.

In the case of the Russian Federation, the recent national development strategy defined a new role for FDI as a counterweight to local dominant financial groups, which allowed the central

government to reposition itself as a direct participant in the natural resource sector and become a part of the growing presence of the Russian Federation in the international economy.

India

Foreign investment in India dates from the days of the East India Co. when India was a colony of Britain; however, after a brief period of FDI promotion (Kumar, 1995)[32] upon independence, India established a relatively closed economy with considerable state intervention in industrial policy and multiple controls over private investment. These controls limited the sectors 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. The government implemented a national development strategy characterized as a highly interventionist industrialization model popularly known as the "Licence Raj", affecting both local and foreign investors. The legal scheme introduced by the Foreign Exchange and Regulation Act (FERA) imposed a 40% ceiling on foreign investors participation in industrial projects, sometimes even preventing TNCs using their own brands in India. Nevertheless, despite these restrictive rules and institutional arrangements, for those lucky few foreign investors that managed to enter - typically market-seeking TNCs - benefits were considerable (Kumar, 1995).

That situation changed in the early 1980s, when State control began to be phased out (De Long, 2003; Rodrik & Subramanian, 2004)[33]. The federal government introduced a new and increasingly more coherent industrial policy in the 1990s, including a price liberalization scheme coupled with an important reduction in tariffs and the partially progressive dismantling of the Licence Raj system. India 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-reform period had many positive features, such as an 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.

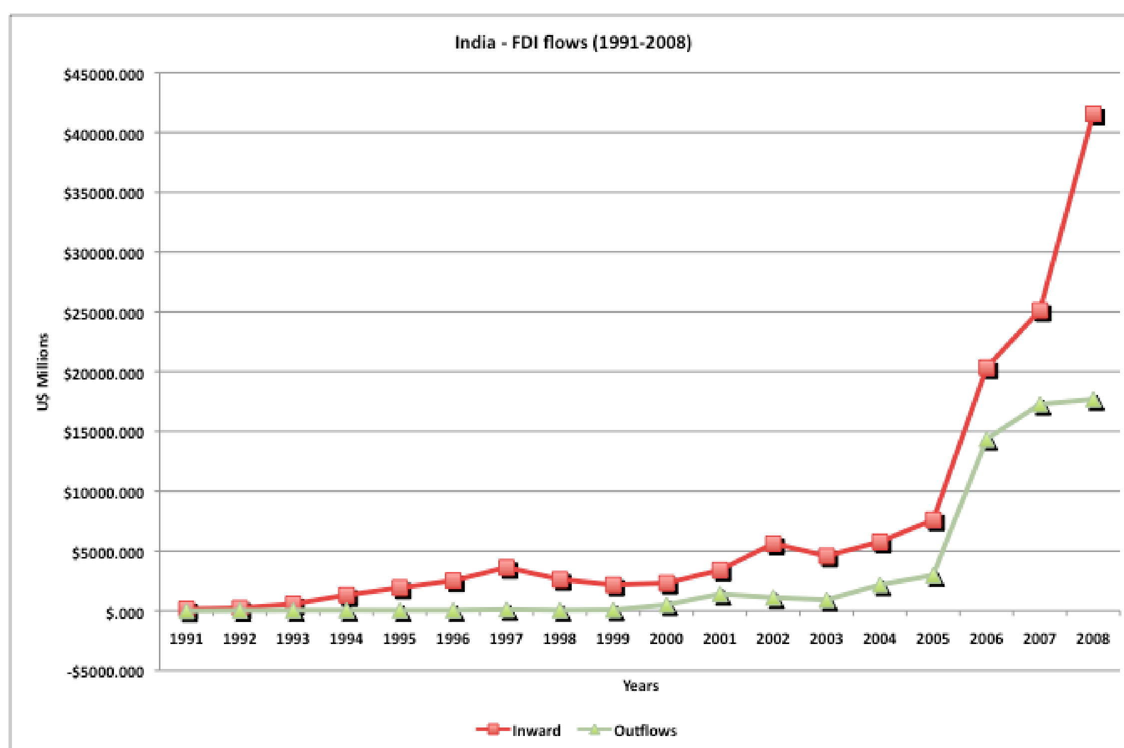
Opening up to foreign direct investment became an important part of India's reforms. Several entry barriers were fully or partially dismantled in important sectors, such as telecommunications, banking, insurance, and air transport, among others. That new policy allowed 100 percent foreign ownership in 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 were 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 was automatically permitted in listed industries, applications were considered by a Foreign Investment Promotion Board. As of 1993, foreign institutional investors were allowed to purchase shares of Indian companies listed on the stock market, opening a window for portfolio investment in existing companies (Government of India, 1999).

In parallel, the federal government introduced a more receptive FDI attraction policy,[34] including a series of incentives packages (Government of India, 2006), the end of discrimination between local and foreign investors, and the transformation of the former regulatory body (FERA) into an investment promotion agency (FEMA – Foreign Exchange Management Agency). Nonetheless, the new trend did not imply a total break with past practices, since foreign investors continued to

need government approval to enter – although that approval seems to have been granted increasingly in an automatic manner (IBEF, 2008).

FDI flows shifted towards newly open industries (Kumar, 2003). Since 2000, most FDI flows went to services[35]. The telecommunications sector emerged as the leading "new star", receiving more than 60% of the FDI inflows. Foreign investors were also attracted by the energy power sector, although the results did not meet expectations (Virmani, 2004)[36]. FDI flows originated mainly from Mauritius[37], followed by more traditional sources (US, Japan, Netherlands, Great Britain, France and Switzerland) plus some new Asian ones (South Korea and Singapore) (Government of India, 2006)[38]. India is not among the principal recipients of inward FDI, although its stock reached over US$ 76.2 billion by 2007, equivalent to 0.5% of global inward FDI stock (UNCTAD, 2008b).

Graph 3: India, inward and outward FDI flows (1991-2008)



Source: based on data from UNCTAD

As was the case for Brazil, national firms only became interested in the global market after the economic liberalization process began. Previously, Hindu firms basically followed a South-South pattern focusing on raw materials and manufactures. More recently, they are becoming global, targeting firms in both developed and developing countries (Kumar, 2009)[39]. Most of the FDI outflows are manufacturing-related investment, including higher-tech manufactures (Kumar, 2009). Acquisitions account for most of the internationalization process, as exemplified by the acquisition of the French RPG Aventis by Ranbaxy Technologies[40], or the acquisition of Betapharm Arzneimittell GmbH of Germany by Dr. Reddy, a pharmaceutical and healthcare firm. One should also mention the new foreign acquisitions of the TATA Group[41], comprising the

English TETLEY Tea Company[42], Korean DAEWOO Commercial Vehicle Company, FORD´s luxury Jaguar/Land Rover British brand[43] and the Euro steel maker CORUS[44]. Nonetheless, 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.

The Indian government has supported the internationalization process of Indian firms by phasing out early restrictions that obliged local entrepreneurs to obtain permission before investing abroad. Beyond promoting South-South cooperation, India is now seeking markets all over the world, a policy that was incentivated by the creation of the Export-Import Bank of India (Exim Bank).

Clearly, India's latest national development strategy cautiously contemplated a new role for both inward and outward FDI to accelerate growth and development by way of a closer integration into the international economy. Inward FDI was to promote modernization of the productive sectors while outward FDI consolidated India's competitiveness in several services, such as software.

Peoples Republic of China (PRC)

The Communist government established in 1949 made several dramatic attempts to find its footing in terms of national 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. Under the communist regime of Mao Zedong the PRC was isolated from the world in lieu of the Chinese Communist Party's (CCP) "deep distrust for capitalism endeavours and correspondingly of Western trade and investors". After Mao´s death in 1976 a new national development strategy evolved whose centerpiece was an industrialization programme more based on market forces and aimed at unleashing the traditional entrepreneurial spirit present in the Chinese culture[45],

The PRC adopted an open policy towards FDI following a gradualist approach. Wei (2003) distinguished four phases. In a first stage, foreign investors were only allowed to enter in two "special coastal zones", located in the coastal provinces of Guadong and Fujian, and they were obliged to export all of their production. Following the success of this policy, the government added four more zones in 1980, in a second stage[46]. In a third stage, another fourteen coastal cities were included, although some differences were introduced among those zones[47]. A fourth and final stage was initiated after Deng Xiaoping's 1992 southern tour, when he asserted that the march towards the market economy was inexorable[48], which translated into a new burst of FDI. In the same year, the central government modified its treatment of FDI, relaxing several of the existing restrictions, including those preventing foreign firms from selling in the internal market

and opening several services to more competition (including telecommunications, transport and insurance). In 1994 the central government somewhat liberalized the foreign exchange regime, introducing the convertibility of the national currency, the renminbi[49], although only on a partial basis (Quian, 1999)[50]. Even so, and despite achieving WTO membership, the PRC still uses a variety of measures that strongly influence the behavior of foreign companies operating in the country (BOFIT Weekly, 29 – 17.7.2009).

The central government also altered company legislation in order to allow foreigners to conduct business in the PRC without intermediaries[51]. Originally, most of the FDI inflows were conducted under contractual joint-ventures (CJVs) and jointly developed projects[52]. Since the late 1980s other legal entities were introduced, such as equity joint-ventures (EJVs), which become the dominant mode of foreign direct investment. Finally, in the mid-1990s wholly foreign-owned enterprises (WFOEs) were finally authorized. From an economic perspective, Zhang (2002) considered that these changes in the legal framework for FDI were introduced in order to enhance the technological catching-up process. Pingyao (2002) emphasized their role in spurring productivity gains among SOEs. In any case, the focus of government policy was to attract more FDI and directly regulate it less for the purpose of increasing the contribution of foreign investment to national development.

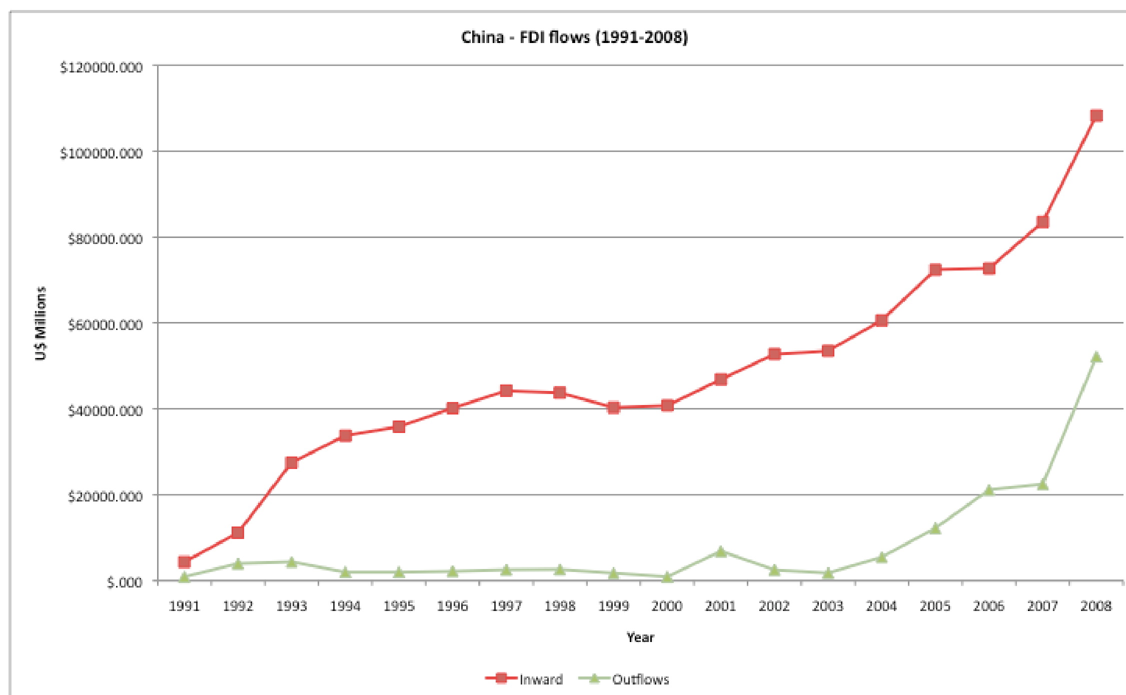
The PRC succeeded in becoming an assembly base for global supply chains then began to evolve itself into a principal hub of Asian supply chains. China's cautious opening up to international trade and foreign investment brought impressive results in terms of GDP and export growth, inward FDI inflows, 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 the PRC into the world's principal exporter, pulled more than 500 million Chinese out of poverty and consolidated a huge domestic market (World Bank, Database). 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%). The PRC 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 the PRC were defined as prohibited, restricted, permitted and encouraged. After entry into the WTO in 2001, 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.

The PRC 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). Annual inflows increased from US$ 4 billions in 1991 to US$ 28 billions in 1993[53], to reach US$ 40 billions three years later. By 2005, the PRC was receiving annual FDI inflows of US$ 70 billions. It is critical to point out that among the first to be tempted to enter into the Chinese market were the overseas Chinese[54] - along with other Asian investors, who would continue as the main sources of FDI inflows. FDI flows were initially channelled towards the manufacturing sector, attracted by the PRC's cheap labour costs, since internal markets were at first closed to them, so their production went solely to increase exports. Consequently, FDI-based exports rocketed as a percent of total Chinese exports, from a mere 17% in 1991 to 50% of total exports in 2001 (MOFTEC, 2001)[55]. Once cost advantages began to erode, some efficiency-seeking TNCs sought out other countries in the region for their export platforms[56]; however, at the same time more technological advanced FDI began to replace it, indicating the intra-trade and intra-investment boom at regional level. In this sense, FDI in the PRC became more integrated as more TNCs moved along global value chains, which incorporated production and R&D sites in the PRC, (Economist, 2007). The PRC attracts Asian, European FDI, and US 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).

Graph 4: PRC, inward and outward FDI, in U$ millions (1991-2008)



Source: based on data from UNCTAD

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,[57] petroleum companies,[58] services providers[59] and manufacturers[60] (Fudan, 2008). Today, more than 2000 Chinese firms are present in more than 130 countries – although, almost one-fifth of them are found in Hong Kong. Most of the initial Chinese FDI was natural resource-seeking in developing countries focused on locating and accessing raw materials for its industrial machine[61]. One of the latest of these moves was the Chinalco deal for a 9% stake in the Anglo-Australian mineral giant Rio Tinto Company[62]. Increasingly industrially- and technologically-advanced Chinese firms are establishing abroad, especially in neighbouring countries. A few "global champions" have emerged in technology-related industries, as Lenovo exemplifies[63]. In terms of modality, mergers and acquisitions are the principal form adopted by resource-oriented firms, whereas greenfield investment is more common for those competing in the manufacture sector.

Hong Kong remains as one of the principal sites for Chinese FDI – although most of the outflows come back to the PRC as FDI inflows ("roundtrip" investments). Tax havens are among the main destinations for Chinese outward FDI: Cayman Islands; Virgin Islands; Macao (PRC), among others. A second group of countries (Australia, Russia, Sudan, and Kazakhstan) attract natural resource-seeking investments from the PRC. A final group comprising the U.S, Korea Republic, Germany, Vietnam, and Thailand, which attract market-seeking and efficiency-seeking Chinese FDI, mainly in manufacturing. The PRC government began to induce investments abroad when it announced its "Go Global" strategy at the beginning of the millennium. Noticeably, it had previously fiercely controlled outward investment (Hagiwara, 2006). Henceforth, some former rules and controls began to be more flexibly now, although governmental authorization both by the Ministry of Commerce (project) and the State Administration of Foreign Exchange (SAFE) agency (foreign currency administration) are still required if investing abroad. The support system for outward FDI has been expanded, with special assistance from the Ministry of Commerce[64] and other governmental agencies[65]. In 2003, the central government launched a special body (the Commission to Control and Administrate Chinese Assets Abroad, Supervision and Administration), aimed at promoting the development of several Chinese TNCs by 2010. This interest is not only from the central government but also some provincial administrations, which have encouraged Chinese firms to invest abroad through a series of complementary policy measures.

In conclusion, the PRC government radically redesigned the role for FDI in its national development strategy but in a gradual and considered manner. First, inward FDI was used to expand Chinese exports, especially manufactures. As labour cost advantages waned new roles for inward FDI in the industrialization process, including industrial restructuring and technological upgrading were defined. Finally, outward FDI was a means of consolidating the place of the Chinese industrialization process in the international economy.

The next section deals with complementary changes that the BRICs introduced into their treatment of inward FDI in the context of the new role defined for FDI in their respective development strategies. In general, more liberal and market-friendly FDI policies were coupled with increased concern for ensuring positive impacts of FDI on their economies and limiting or reducing some of the risks associated with IIAs.

Complementary Changes in the Treatment of Inward FDI in BRICs

Each and every one of the BRICs designed a new role for inward FDI in their development strategies and in each and every case it encompassed more liberal and market-friendly policies. While details differed, the most important insight into BRICs' practices with regard to the treatment of inward FDI is that each and every one of them came to utilize their growing negotiating power to limit or curtail their risks in terms IA-ISDS stemming from their IIAs, unlike most of the other developing countries and transition economies with more reduced bargaining strength in this area.

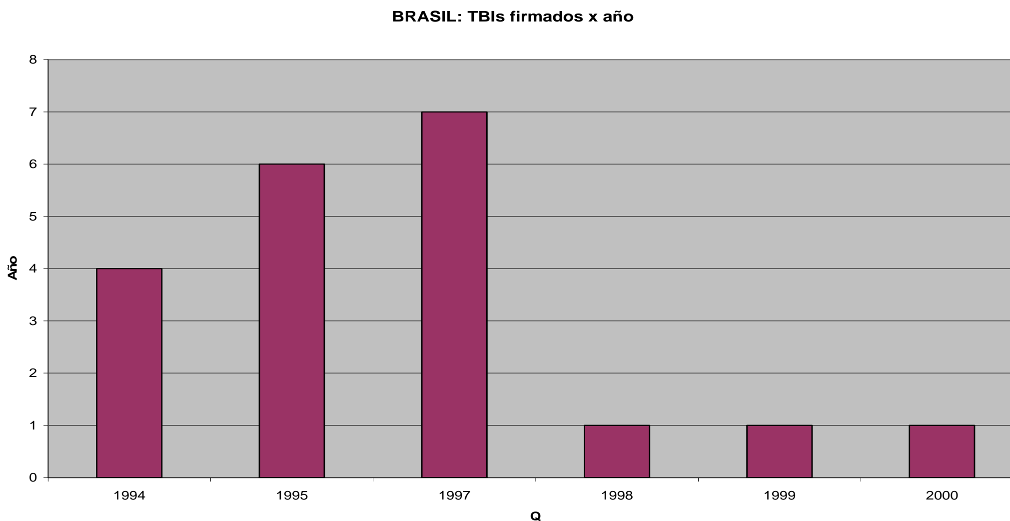
Brazil

In spite of the magnitude of FDI inflows and a clearer definition of what Brazilian authorities expected from FDI in terms of its impact on national development, Brazil stands out for its active resistance to various aspects of post-WWII foreign investment protection and liberalization initiatives. First, it never ratified the Washington Convention of 1965 (the ICSID Convention), which laid the basis for an international framework for the resolution of investment disputes by way of international arbitration between individual foreign investors and host country governments. Secondly, Brazilian national FDI legislation maintained several important exceptions to national treatment[66] of foreign investment and legal provisions for compensation in case of expropriation did not wholly meet the commonly accepted international practice of "prompt, adequate and effective" compensation. Thirdly, Brazil negotiated fourteen BITs during the pro-FDI époque following the fall of the Berlin Wall in the 1990s[67], but never ratified them mainly because of the risks associated with the IA-ISDS clauses[68]. Fourthly, Brazil negotiated the two fundamental foreign investment agreements of the Southern Market (Mercosur) integration scheme, one covering investments by Mercosur members (Colonia Protocol) and the other those of non-members (Buenos Aires Protocol), but never ratified them either. Finally, Brazil actively opposed several aspects of the US RTA-like Free Trade Area of the Americas before its suspension in 2004 because it considered the initiative to be asymmetric and containing undesirable constraints on Latin American and Caribbean countries, including the proposed IA-ISDS procedures. As a result of these actions, Brazil is not involved in any known ISDS investment disputes and carries virtually no IIA risks.[69] While Brazil formally maintained a foreign investor-friendly outlook, the policy stance with regard to risks linked to ISDS had two indirect consequences.

The first consequence was that interested parties attempted to obtain international arbitration rights in the domestic economy. Many foreign investors criticized the the Brazilian judicial system as inefficient, over-expensive and lacking independence (da Motta Veiga, 2004), and offering only low legal standards for protecting foreign investors (UNCTAD, 2005) since it lacked the investment protection and liberalization measures found in other developing countries and transition economies. In partial response to this situation, the National Congress enacted new legislation on arbitration in 1996 (Law 9307), attempting to move closer to international practice.[70] The main objective of the new legislation was to allow foreign investors to bypass the "bureaucratic" judicial system, bringing full and equal access to the domestic disputes resolution mechanism to both local and foreign investors. Nevertheless, the arbitration clauses included in private contracts usually prevented them from being automatically enforced if consent implied

international arbitration. In this sense, the Brazilian Supreme Court of Justice (SCJ) continued to demand that it confirm international arbitrational awards. Only thereafter the claimant had the right to go to local courts in order to demand local enforcement. Thus, the new institutional process proved to a certain extent circular forcing foreign investors to return to the local courts after all.

Graph 5: Brazil – BITs signed (but not ratified)



In order to improve upon this deficiency in the eyes of foreign investors, the federal government facilitated arbitration against State companies and entities. This feature figured in concession contracts in both telecommunications and the oil industry[71]. In this limited fashion, the federal government of Brazil attempted to provide some additional protection to foreign investors but in the end it was not close to existing international standards because even that limited tendency was blunted by a posterior prohibition of bypassing of new judiciary for arbitration involving the State or any public entity. The SCJ become less flexible towards the recognition of any awards resulting from international arbitration, but recognized those settled from local courts – including those cases involving SOEs or mixed firms[72] as well as administrative contracts[73]. In this sense, the SCJ continued to not recognize arbitration awards if considered hostile towards national policies, national sovereignty[74] or conspiring against national defense[75]. Thus, this backdoor approach did not produce the ISDS results sought by foreign investors.

The other consequence had to do with the ISDS rights of Brazilian companies investing outside of Brazil. Undoubtedly, Brazilian investors were increasingly eager to count with "modern" judiciary tools for dispute settlement abroad. Up to now they were compelled to rely on federal governmental intervention by way of the Ministry of Foreign Affairs as disputes ended up being dealt with at the political-diplomatic level. This was demonstrated by the recent experiences with Bolivia and Ecuador. In 2007 Bolivia expropriated Petrobras' refinery and the lack of an IIA between Brazil and Bolivia limited Petrobras' options to resolve that problem. In other words, a consequence of failing to sign the ICSID Convention and not ratifying BITs was that the foreign investments of Brazilian companies were unprotected.

Objectively speaking, this situation might lead Brazil to rethink its strategy regarding the future IA-ISDS clauses in any IIAs; however, for a diplomatic cadre educated under José Maria Silva Paranhos – Baron of Rio Branco, the founder of modern Brazilian diplomacy[76], any sign of losing sovereignty could prove difficult[77].

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. 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 or reduce to a minimum its IA-ISDS risks with respect to IIAs.

Russian Federation

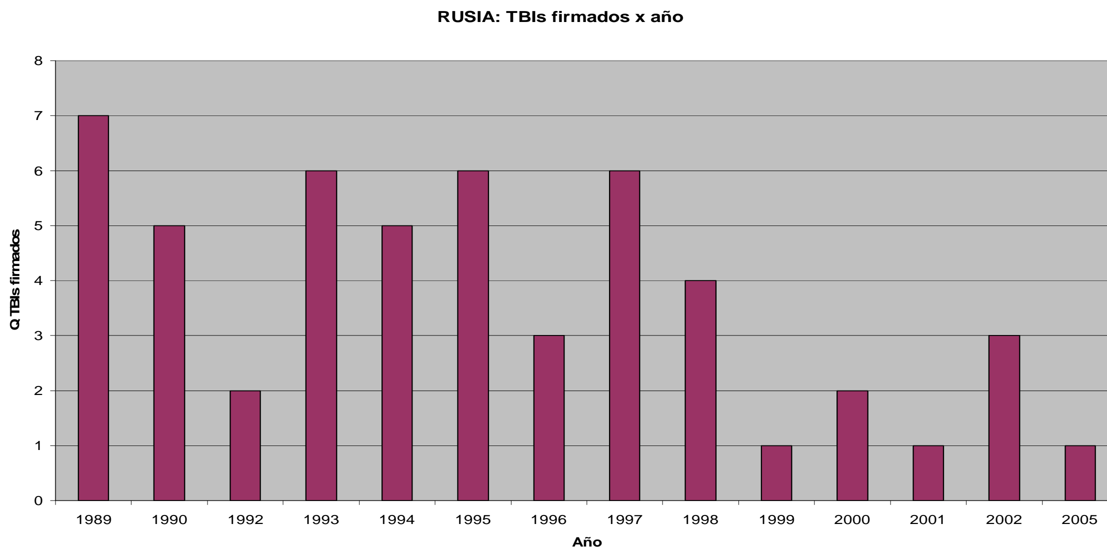
The Russia Federation, founded following the dissolution of the Soviet Union around 1991, became the continuing legal personality of the ex – USSR with regards to international treaties. That made it responsible for a total of fourteen special investment treaties negotiated and ratified by the USSR[78] (US State – 2006 Investment Climate Statement). Most of these treaties limited foreign investors' use of international arbitration solely to defining the amount of compensation of any expropriation[79]. In the context of the initial euphoria of the opening up process, the new Russian Federation negotiated thirty-four new IIAs, joined the ICSID Convention and negotiated the Energy Charter Treaty. Furthermore, in 1992 the Russia Federation signed a preliminary trade agreement with the United States of America, including a chapter dealing with foreign investment issues. Later, those same governments came to sign a new agreement, which contained more foreign investment issues[80]. The Russian government in 2002 also considered renegotiating all the old USSR BITs in order to avoid any potential conflict with existing WTO and OECD measures. Currently, the Russian Federation has 36 BITs in force[81]; however, it never ratified the ICSID Convention, the Energy Charter Treaty, the US Agreement, a number of BITs nor harmonized the old USSR BITs with WTO and OECD practices. In other words, when the Russian Federation received mixed signals from the international community, for example, it still is not considered to have met requirements to accede to the WTO, although the OECD invited it in 2007 to open discussions for membership (along with Chile, Estonia, Israel and Slovenia), it got cold feet with regards to its foreign investment commitments.

The Energy Charter proved a key point of conflict. This treaty was originally designed to integrate energy-endowed countries emerging from communism (including the ex-USSR and former allies)[82]. It included both a formal investment chapter and another related to dispute settlement, both of which were very demanding on host countries. Among the reasons given by the Russian Duma (Parliament) for not ratifying it[83] was the demand that third parties be granted access to its gas distribution network[84], which the central government considered too much. Following this rebuff, the European Parliament responded aggressively by introducing a series of conditions to obstruct Russian entrance to the WTO.

This conflict should be placed in the context of the 1990s when the Russian Federation experienced the mentioned huge transformation process aimed at introducing market reform into the local economy. That makeover included both a new constitution and the implementation of a new civil code. The new FDI laws, guaranteeing foreign investors' rights to protect them against government interference did not become operative and FDI entry continued to require

government authorization, particularly for FDI linked to natural resources exploitation[85]. The mixed signals from the international community made the Duma even less enthusiastic towards inward FDI, restricting foreign investors guarantees and limiting their participation in strategic sectors.

Graph 6: Russia – BITs signed (not all were ratified)



Because of their overriding interest in the petroleum industry, foreign investors focused on much greater legal security there. Nevertheless, as indicated earlier, for the most part local financial groups gained control over the privatization process to their own benefit in the early 1990s. For example, in the context of the bankruptcy law, Russian groups profited from legal loopholes in order to increase their own petroleum reserves. Another example concerned how the principal Russian groups gained control over petroleum exports even beyond the original ceiling (25% of production imposed by the government (Locatelli, 2006). Modifications limiting the control of these groups did not appear until 2003 when a series of amendments to the 1995 petroleum contract law were introduced by the Putin administration, forcing companies to accept new access conditions in the context of a novel production scheme. The new arrangement implied an increase in central government intervention and a weakening of Russian private operators' rights, along with a reversal of the decentralization scheme introduced in the 1990s to give the regional governments greater participation in the industry. By doing so, the Kremlin expected to better incorporate the hydrocarbon industry into the new development strategy (Boussena and Locatelli, 2006).

Somewhat surprisingly, most foreign investors came to accept this new scheme even though it involved a reduction in their control over certain projects[86], and in effect the Russian State reasserted control over the industry, both locally- and foreign-controlled projects. Finally, in 2008 the mentioned 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 forty-two sectors in which foreign participation in local companies began to be subjected to prior authorization from a special government commission[87]. 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)[88]. In other words, the attempt to force the hand of the nascent Russian Federation with regards to international treaties related to FDI and, especially, FDI in natural resources, backfired for foreign investors and their home country governments. The Russian State took it upon itself the management of its natural resources. Even so, the Russian Federation faces a number of Investor-State investment disputes deriving from existing IIAs.

According to UNCTAD (2008), the Russian Federation had at least five international investment arbitration cases pending.[89] 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 IA-ISDS disputes carry the risk of negating central aspects of the Russia Federation's proposed new role for foreign investment in national development, especially in natural resources.

The Yukos affair[90] is a central challenge to Russian in this regard to IIAs. Some claims use UNCITRAL procedures while others are linked to the Stockholm Court of Arbitration. Yuko´s main shareholder (Menatep), sited in Gibraltar, launched the first and most important case[91]. A decision, which was rendered at the end of November 2009, appears to hold that Russia is bound to extend the protections of the Energy Charter Treaty on a "provisional" basis due to the Federation's initial signature of the agreement even though Russia earlier in 2009 announced that it never intends to ratify it. This jurisdictional decision paves the way for a massive multi-billion dollar claim alleging expropriation of the majority shareholding in the Yukos oil company. The ruling is the third to be rendered in favour of shareholder groups seeking to sue the Russian Federation for breach of various international investment protection treaties[92]. Meanwhile, another claim – this one mounted by the Yukos company itself – is to be heard on its merits by the European Court of Human Rights starting on January 14, 2010[93]. A UK investor (RosInvestCo) is also challenging Russia despite what was stated in article 7 (providing for disputes only to discuss the amount of expropriation), the tribunal accepted the investor's claim asserting infringement of the most favored nation clause[94].

Two other recent awards, both granted by the Stockholm Court of Arbitration demonstrate conflicting outcomes related to Russia's IIA network. In Berschader v. Russia, the former Belgium construction company, Berschader International,) sued Russia following a contractual dispute involving the reconstruction of the Russian Supreme Court building in Moscow. Arbitrators declared lack of jurisdiction because of the narrowness of the expropriation clause found in the original treaty, allowing for international arbitration only for the definition of the amount of compensation (article 10 at Belgium & Luxembourg BIT with Russia) in the case of expropriation[95]. A completely contrasting award was made in the case initiated by the German investor, Franz Sedelmayer[96], in this case the arbitrators found jurisdiction on the claim although expropriation had yet to be proven.

A curious situation has developed in which some Russian investors seem to be benefiting from the existing Russian IIA network. A claim was launched by Russian investor, Iurrii Bogdanov, against the Moldova Republic relating to Mr. Bogdanov's acquisition of former SOEs that were negatively affected by a legislative amendment introduced by the host government, which

reduced the company's value. The case was initially settled in local courts, but Mr. Bogdanov took the case to the Stockholm Court of Arbitration by way of the IIA[97]. A second case involves a Russian mining company with interests in Mongolia, which faced a special windfall tax in 2006, raising taxes to 68%, whenever the price of an ounce of gold surpassed the US$ 500 barrier. In this opportunity, the case was initiated following UNCITRAL procedures. These cases might suggest the existence of a double standard: whereas foreign investors are prevented from taking Russia to international arbitration, Russian investors are doing so in their IIA partner countries.

In sum, the Russian Federation is another large market, fast growing economy that has attempted to use its increasing negotiating strength with investor countries 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 sought to limit or reduce its IA-ISDS risk by not ratifying many of the IIAs that it had signed (i.e. the ICSID Convention, the Energy Charter Treaty, numerous BITs and avoiding the negotiation of any IIAs with foreign investment liberalization leaders, such as the USA). Nonetheless, the Russian Federation carries an indeterminate risk associated with the small number of international investment arbitration cases outstanding largely due to the expansive interpretations reached by international arbitral tribunals. The Yukos case, in particular, which encapsulates the central government's relationship with both local and foreign investors in the hydrocarbons industry, is a case in point that demonstrates that considerable IA-ISDS risks exist even though most of the IIAs have never been ratified. Furthermore, these IA experiences have shaken the relationship with foreign investors, which in turn, could complicate the role that is designed for them by the national development strategy.

India

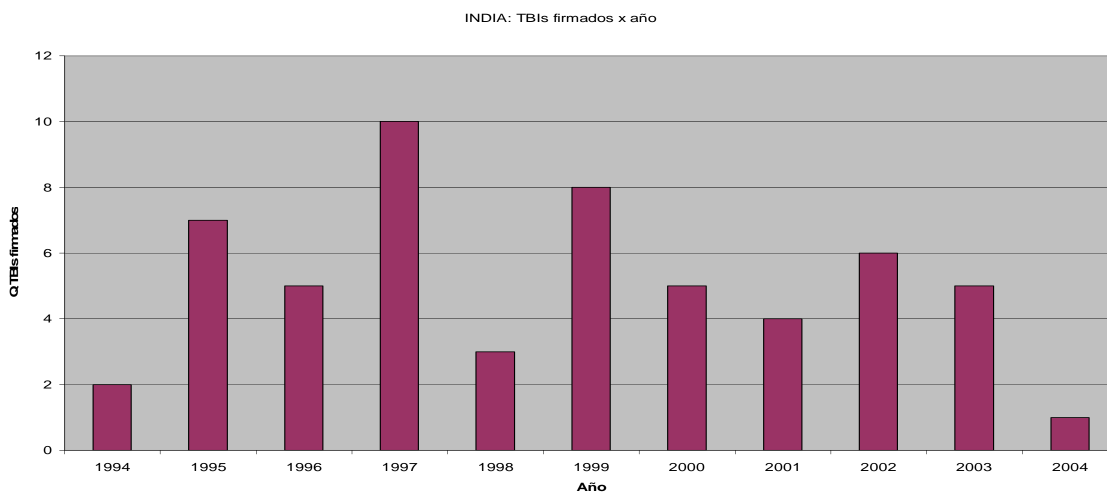
India has been characterized by a hot and cold relationship with foreign investors. In spite of the traumatizing experience with the Bhopal disaster at US Union Carbide's plant in the mid-eighties[98], India avidly emerged from its Licence Raj model to embrace market liberalization in the 1990s. This new fervour was reflected in its IIA network, which included close to 50 BITs, on top of a special agreement with the United States in 1987[99]. Recently, the country has remained active on the IIA front, adhering to several new RTAs and FTAs, several of which contain special chapters dealing with investment issues, reflecting the new focus of Indian policy to consolidate regional trade agreements in South Asia, ASEAN and, in the future, in Northeast Asia (Kumar, 2007)

Even so, India's policy with regards to IIAs has become quite cautious. It still is not a signatory of the ICSID Convention. Its 48 BITs in force with 14 industrialized countries and 34 others[100] do not provide foreign investors any rights to establish investment in its territory (D'Agnostino and Nair, 2008) and India's more recent RTAs and FTAs with countries like Canada and Singapore carry important qualifications that limit future IA-ISDS risks.

The treaty with Singapore, entitled "Comprehensive Economic Cooperation Agreement", for example, introduced novelties, which seem consistent with the need for enhanced host country's policy space[101]. Firstly, there are some important exceptions at the expropriation clause, mainly related to the inclusion of environmental or national security issues, designed to shelter legitimate

public welfare measures in those areas.[102] Secondly, the treaty also introduces a special treatment for some specific topics, including legitimate measures necessary to protect public morals, "human, animal or plant life or health" safety, "national treasures of artistic, public order, historic or archaeological value" or for the "conservation of exhaustible natural resources". Thirdly, in terms of protections for foreign investments at the post-establishment phase, the agreement includes national treatment guarantees, but does not include any provision for fair and equitable treatment or full protection and security[103]. Last, but not least, it completely eliminates the IA-ISDS clauses, perhaps the most innovative aspect introduced by the agreement[104]. In particular, dispute settlement by international arbitration is not available at any stage of investment (establishment, acquisition or expansion). India's preoccupation with such issues stems from its own experience with international arbitration from previous IIAs.

Graph 7: India – BITs signed



In spite of its more cautious approach to IIA risks, India currently faces nine cases of international investment arbitration under UNCITRAL facilities[105]. Most of them are associated with the construction of an energy power station (Dabhol power project) 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.[106] A series of contractual problems, originated at the energy price policy introduced by the government (fixing upsteam electricity prices), led to a group of US investors (including project lenders as well as project lenders) to launch international arbitration claims against India.[107] While the original claim was being dealt with in Mauritius, where local affiliates of US GE and Bechtel companies were legally domiciled[108], a new arbitration claim was made by Enron via a Dutch affiliate to take advantage of the India – Netherlands BIT. Additionally, in 2004 the American government initiated a State-to-State case against India, in order to recover U$ 110 million originally granted by the Overseas Private Investment Corporation (OPIC) to the firms participating in the project[109]. Later, another case reached the International Chamber of Commerce arbitration facilities in Paris, whose tribunal condemned the Maharashtra State to pay US$ 125 millions[110].

As a consequence of the Dabhol project, the Department of Economic Affairs of India decided to reopen all previous international investment treaties in order to bring them into line with the

provisions included in the Singapore-India agreement. The government's main objective was to prevent foreign investors rushing to international arbitration tribunals while claims were still pending in local courts. Thus, India recalibrated its IIA network in accordance with many of the lessons from its own IA-ISDS experiences.

In relation to Indian investors seeking international arbitration for their own investment disputes, there have been very few cases. The only active case is the one launched by Ashok Sancheti against the United Kingdom using UNCITRAL rules[111]. Sancheti, a London-based lawyer of Indian nationality, initiated the dispute following a disagreement with the Corporation of London over rent to be paid for a premise leased from the city. Afterwards, the investor went further, alleging governmental discrimination against him[112]. In parallel, the city of London initiated its own case against the investor, seeking £20.000 in unpaid rents. Up to this moment, the local courts have rejected Sanchetti´s request after determining that IA-ISDS facilities affected the UK government, but not the Corporation of London[113].

In sum, this large market developing country has attempted to use its increasing negotiating strength to reduce or limit risks associated with IA-ISDS clauses in IIAs. India has recently demonstrated extreme caution here; however, it currently faces nine cases of international arbitration stemming from earlier IIAs. The recent RTA with Singapore demonstrates a much more coherent and clearer policy with regards to the management of such risks.

The Peoples' Republic of China

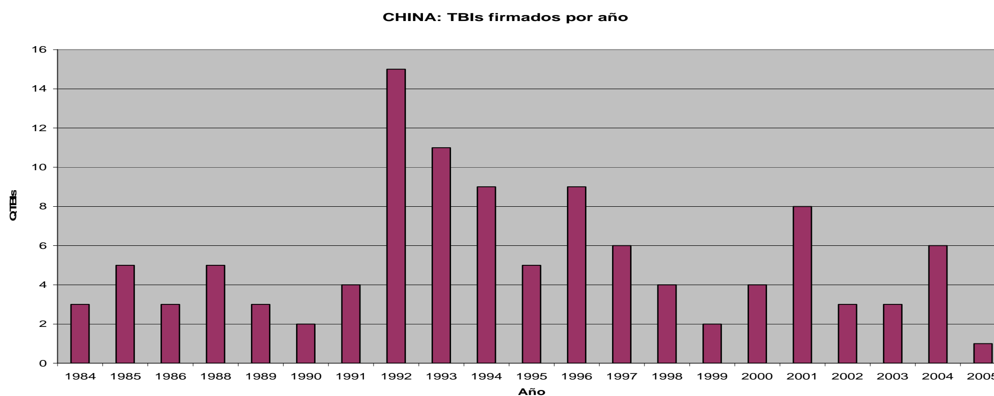
In the case of the PRC, it makes sense to recall that, to an important degree, the closing of the economy during the Mao tse Tung era had as much to do with China's reaction to colonial practices as Marxist ideology[114]. For this reason, the PRC's opening to foreign investment as of 1978 can be considered so dramatic and also suggests why the FDI policy was so cautious, evolving slowly based on the PRC's own experience of linking FDI directly to national goals defined in the national development strategy. In the past 30 years, the PRC has progressively opened up to foreign investment and as a consequence been host to exceedingly voluminous FDI inflows; nonetheless, foreign investors constantly complained that the local business environment and legal structure was "uncertain, risky and mired in red tape" (Arjunan, 2005). This suggests that the PRC authorities took advantage of their improving negotiating strength to obtain a much-improved deal with foreign investors and their home countries.

International investment treaties became a progressively more important aspect of the PRC's FDI policy. In 1982, China became a signatory of the ICSID Convention (ratified much later) and subsequently assembled the second most important global web of BITs, after Germany, encompassing more than one hundred agreements[115]. Recently, the PRC signed with Pakistan its first FTA containing a formal investment chapter[116]. Thus, the PRC has been among the more active countries pursuing IIA; however, in this regard as well, it did it in its own manner taking advantage of its growing bargaining power with foreign investors and their governments.

The first BITs were signed in the early 1980s in the context of a very restrictive FDI policy and were extremely restrictive limited in terms of FDI protection and guarantees. Originally, foreign investors were allowed to enter only throughout a joint venture contract or associated to local a local partner (basically a SOEs), the national currency did not become convertible at the mid

1990s, and the full protection of private property in the PRC was full consolidated in a Constitutional amendment of 2005. The BITs signed by the PRC are quite special and vary considerably according to the their date of signature (Rooney, 2007). The first generation included BITs signed up to the end of the 1990 when the PRC become very active in this field but was extremely cautious with regards to FDI protection and guarantees. A second era thereafter demonstrated a more enthusiastic attitude towards the recognition of foreign investors' rights on the part of the PRC. The PRC did not formally join ICSID (Washington Convention) until February 1993.

Graph 8: The PRC – BITs signed



Among first generation BITs, the older treaties signed generally excluded any sort of IA-ISDS provisions by which individual foreign investors could take the PRC to international arbitration, although this was possible exclusively for the definition of the amount of compensation payable following an expropriation (Heyman, 2008 and Rooney, 2008). The PRC- Denmark signed in 1986 is an example[117]. PRC government policy also delayed implementing the New York and Washington treaties, which naturally affected the enforcement of any awards (Rooney, 2007).

The second generation of BITs transformed the existing situation and marked the beginning of a new era for investment protection in the PRC. Since then, the PRC negotiated higher risk BITs (for example, with Netherlands, Bosnia-Herzogovina, Germany and Finland)[118] and even some RTAs (for example with Pakistan), which increased FDI protection and included some aspects of FDI liberalization. This new generation of IIAs incorporated IA-ISDS procedures but limited them by way of preconditions with respect to the need for a previous review by the local administrative as well as other limitations (Moulis and Jun, 2007)[119]. The post establishment national treatment clause was explicit and contained a standstill obligation; however, rollback promises came on a "best-efforts" commitment. The PRC 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. The new agreements signed by the PRC enhanced foreign investors´ protection both in their broad and effective IS-DS provisions, and in their comprehensive and unqualified substantive protections (Dulac and Savage, 2008).

Since its accession to the ICSID Convention, no cases have been brought against China (Jun, 2007). In fact, the only case pending refers to the arbitration demand by a *Chinese* investor against Peru (Tza Yap Shum v. Peru)120 (*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.

Thus, the PRC 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.

Conclusions

The fall of the Berlin Wall at the beginning of the 1990s that epitomized the end of Communism in Europe was followed by a wave of multilateral and bilateral agreements promoted primarily by OECD countries, which ushered in a new era of market friendly policies characterized by foreign trade liberalization and foreign investment protection and liberalization. While most developing countries and transition economies actively bought into or passively acquiesced in the neoliberal packages offered them, especially the new trade and investment treaties, four larger market reworked their national development strategies to define a more complementary role for foreign investment and actively sought to limit or reduce the risks associated with FDI, in particular those associated with procedures in international investment agreements which facilitated individual foreign investors recurring to international arbitration in their disputes with host governments. In this sense, the four BRICs "stood tall" in comparison to the other developing countries and transition economies. The BRICs were able to capitalize on foreign investor interest in their large and growing national markets, natural resources and other advantages (wage levels, market access, etc.) to negotiate better deals in terms of trade and investment treaties with the home governments of foreign investors and limit or reduce their risks in terms of international arbitration for investment dispute settlement. In distinct manners, these countries improved the impact of FDI on national development priorities by adopting policies that better defining a more complementary role for FDI. For the PRC, FDI provided a sharp boost to exports of manufactures and the consolidated global export platforms and supply chains that sustained them, a progressively broadened process of coastal growth and development, and increasing impacts on national industrial restructuring and technological upgrading. In the case of the Russian Federation, FDI was used as a counterfoil that allowed the central government to re-establish its influence over the natural resource sector and reorder the priorities of that industry in terms of the national development strategy. Brazil was able to enlist the support of FDI in breaking out of the indebted industrialization model plagued by balance of payments constraints in order achieve macroeconomic stability, increased exports of natural resources and manufactures, and modernized services. India broke out of its stultifying Licence Raj model in part using the promise of FDI inflows in a liberalized environment as justification. In all cases, FDI was given a more complementary role within the national development strategy and national companies were strengthened, directly or indirectly, as a consequence which was reflected in outward FDI flows emanating from the BRICs indicating the internationalisation of those companies.

As well as redefining FDI into a more complementary role in national development, the BRICs sought to lower the risks linked to the international arbitration procedures for investment disputes stemming from their IIAs. The PRC used a very cautious and evolutionary IIA policy to limit is exposure to such risks, initially accepting IA-ISDS procedures exclusively for the definition of any compensation for expropriations recognized by national courts, and gradually extending the coverage and content of its new agreements to create the second largest global IIA network, one which today can contemplate foreign investment liberalization measures, such as RTAs (with ASEAN) and even the Energy Charter, in a confident and assured manner. The fact that the PRC does not face any known IA-ISDS disputes suggests that the PRC has been very successful in managing such risks and calibrating them in terms of the national growth and development model and its concomitant internationalisation process.

Brazil adopted a distinct strategy and limited its IA-ISDS risks to zero by not exposing itself to the global FDI protection and liberalization framework. It remaining outside the Washington Treaty (ICSID) and did not ratify any of the 14 BITs it negotiated nor the two Mercosur protocols, during the 1990s. Finally, Brazil waged an active campaign against the US-centric RTA for Latin America and the Caribbean – FTAA – until it died. A backdoor attempt to introduce IA procedures into Brazilian business practice seems have had the brake put on it by the national judicial system. While Brazil has avoided all IA-ISDS risks, it has done so at the cost of IA-ISDS protection for its own increasingly internationalised companies.

The cases of the Russian Federation and India are less definitive in terms of managing IA-ISDS risks. Both countries face a number of outstanding cases. The experience of the Russian Federation has turned out to be somewhat scary because its short encounter with a kind of capitalist big bank in the early 1990s seems to have created huge and permanent IA-ISDS risks associated with the Energy Charter even though it was never ratified by the Russian Federation. Most of the outstanding cases based on IA-ISDS procedures stem from the Energy Charter and the November 2009 (*ITN Network*, December, 2010) decision by the arbitral tribunal that found jurisdiction in the Yukos case holding that the Russia Federation is bound to extend the protections of the Energy Charter Treaty on a "provisional" basis due to the Federation's signature to the agreement (in spite of the subsequent lack of ratification). This IA-ISDS procedure could eventually challenge the centerpiece of the Federation's national development strategy, that is, State control of hydrocarbon resources.

The situation of India is complex. India's widespread IIA network of about 50 traditional BITs obviously makes the country vulnerable to IA-ISDS risks. India's experience has been difficult and most of the 9 known cases of IA-ISDS procedure relate to one sole investment project: the Dabhol power project. As a result of that experience, India has been introducing significant innovations into its new IIAs, especially its RTA with Singapore, to reduce or limit new IA-ISDS risks and extending many of those innovations into its existing IIA network to dealt with current risks. Some of these innovations, such as implementing exceptions to exproproation clauses, reducing the coverage of national treatment clauses and avaoiding IA-ISDS commitments go a long way in that direction.

Taken together, these BRIC policies to better define the role of FDI in their national development strategies and limit or reduce IA-ISDS risks represent a sharp break with the dominant tendencies apparent in developing countries and transition economies after the fall of the Berlin Wall and the

wave of multilateral, regional and bilateral treaties promoting trade and investment liberalizing policies. The BRICs have learned to use their increased bargaining strength with foreign investors and their home governments to improve the impacts of FDI on their national development and limit the risks associated with their IIAs. In this sense, the BRIC are clearly standing taller. The remaining question is to what extent developing countries and transition economies with more limited negotiating strength can follow their examples.

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Endnotes

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[1] For instance, in the automobile industry, most of the value-added came from fully foreign-owned TNC operations. In contrast, foreign investors played a more secondary role in the food and beverage industries and in commodities, here TNCs usually entered into associations with local Brazilian firms. Some sectors were restricted or closed to foreign investors; for example, restrictions were imposed in the capital goods industry and other "strategic" sectors as the chemical and petrochemical industries. In other cases, foreign investors were obliged to enter into joint ventures with local partners, or forced to accept special obligations involving the transfer of their technology. FDI were obliged to register in the Central Bank in keeping with existing foreign exchange and tax controls.

[2] The liberalization process comprised three different waves of tariff reductions. First, nominal tariffs were reduced from 57.5% to 32.1%. Secondly, the government fixed them at 13.5% coupled with the elimination of several non-tariffs barriers. Finally, in 2004 average nominal tariffs were fixed at 11.2% (Abreu, 2004).

[3] New legislation became effective in 2002 (Law 10,610) allowing up to 30% foreign participation in media companies (Investment Climate Statement – US Department of State). Furthermore, in order to attract moreFDI, the government also introduced changes in the Law on information technology.

[4] Some restrictions on FDI remained in several sectors (nuclear energy, health services, rural property, media and telecommunications, postal services, air transport and aero-spatial industry). What is more, the country did not provide "national treatment" to foreign investors (UNCTAD, 2005).

[5] The previous legislation on foreign capital and profit remittance (promulgated at 1962) focused on balance of payments issues. The 1992 tax code reform removed past prohibitions on remittances for royalty and technical services payments between related parties.

[6] Including a significant simplification of the FDI registration process undertaken by the Central Bank.

[7] The auto industry was one of the sectors that most benefited in the context of a special policy oriented towards the reduction in the sector's chronic trade imbalance. In response, the federal government increased import tariffs and imposed import quotas (to be eliminated later). Different State governments played an active role in order to attract car manufacturers by way of tax incentives.

[8] The government introduced a new system to promote investment and transfer of technology (SIPRI). Later, in order to promote more FDI inflows, the federal government created the Invest Brazil agency.

[9] During 1991-2002, the privatisation of state-owned companies to private investors amounted to US$ 105 billion. The privatization programme attracted both domestic and foreign investors. In a first phase, from 1991 to 1994, the federal government sold companies in the non-services sector (aeronautics, mining, chemicals, petrochemicals and fertilizers), mainly to local investors. Later, in a second phase, the federal government privatized public utilities, mainly to foreign investors. (UNCTAD, 2005)

[10] Vale became a global player after the equity purchase of 75.66% of the Canadian company, INCO.

[11] Created in October 1953, PETROBRAS internationalized in the 1990s. Throughout 1957 - 1997, this state-owned company maintained a monopoly status over petroleum exploration and production operations in Brazil, as well as other activities related to the gas, and derivative sector. It was the leading Brazilian firm in marketing derivates. The company is now present in 27 countries. In 1997, it was producing more than a million barrels of petroleum a day, placing PETROBRAS in the top producers league. By 2003 the company reported to be producing two million barrels per day and became, four years later, the world's 7th biggest oil company (http://www2.petrobras.com.br/ingles/ads/ads_Petrobras.html).

[12] This "global player" has operations in Spain (after entering as the principal equity holder of SIDENOR in 2004), the US (after the acquisition of Sheffield Steel Corporation, Fargo Iron y Callaway Building Products). It also become partner in the company originated from Pacific COSAT Steel & Bay Area Reinforcing), Colombia, Peru and Argentina.

[13] This company, operating abroad since 1979, has operations at Africa (Angola), Latin America (Argentina, Bolivia, Chile, Colombia, Ecuador, Dominican Republic, Panama, Peru, Uruguay, and Venezuela), Europe (Portugal) NAFTA (Mexico and US), and the Middle East (Djibouti and UAE).

[14] For example, Santisa Textil (a company of the Camargo Correa holding), merged with the Spanish Tevex in 2006 and that allowed it to become a worldwide leader in denim.

[15] As for the cases of Banco do Brasil, Bradesco e Itaú.

[16] SABO become global after adopting a "follow sourcing" strategy that led it to invest in Argentina, Austria, Germany and Hungary (Bianco, Moldovan & Porta, 2008).

[17] After the merger of AMBEV and Interbrew (Belgium) - a US$ 7 billion operation (UNCTAD – Occasional Note, 2004)

[18] In a speech to the Portuguese Industrial Association, Brazilian President Lula induced Brazilian firms to lose any fear of going global. In the same vein, the Ministry of Commerce and Industry suggested to entrepreneurs that Brazil have [at least] ten leading TNCs by the time Lula left office (F. Furlam speech at Dom Cabral Foundation, March 22, 2003). This policy could be seen in the attitude adopted by the federal government in the face of the merger of Perdigão and SADIA to create an international leading firm at the food industry.

[19] The rapid transfer of public sector assets to private ownership characterized the Russian program of economic reforms. Whereas in a first stage the programme favoured workers and management (voucher privatization), later a "loans-for-share" scheme favored a number of well-connected businessmen and politicians to acquire valuable assets at a substantial discount to their market value. This special scheme was utilized in particular inthe hydrocarbons industry.

[20] In order to sterilize those windfall profits the government launched a stabilization fund that, by the end of 2007, had accumulated a total of US$ 160 billion.

[21] The command industrialization model initiated under the Stalin regime made Russia the dominant force within the USSR While the model permitted the accelerated industrialization of the country, the absence of market signals led to inefficiencies and an absence of technological upgrading which eventually contributed directly to the downfall of the communist regime around 1990.

[22] In this group could be included Yukos, TNK and Sibneft. Others companies, like Lukoil and Surgutneftegaz, were mainly industrial holdings.

[23] The industry became characterized by overexploitation coupled with low investment in exploration. Private firms expanded exports in order to increase the value of its assets (cash stripping) at the same time they constantly searched to purchase new firms in order to increase reserves (asset stripping).

[24] The first big operation involved the purchasing of the 74.95% of the state-owned Slavneft by Sibnef/TNK. Later, in February 2003, TNK merged with BP, in order to become the 3rd largest petroleum company in the country. Finally, the merger between Yukos and Sibneft was announced but the operation was never completed (Kononcsuk, 2006). A decade later, BP shook up again the M&A market with an operation involving US$1 billion worth of shares offered by Rosneft during the IPO (http://www.bp.com/sectiongenericarticle.do?categoryId=9009632&contentId=7018810)

[25] Contractually, FDI in the sector could be conducted under joint–ventures (JVs) or by production sharing agreements (PSA). Under this last scheme it might be worth mentioning the Sakhalin I and Sakhalin II agreements, and the PSA concerning the Kharyaga Deposit (Locatelli, 2007). The Sakhalin I, signed in 1996, is run by Exxon Mobil (30%), a Japanese consortium Sodeco (30%), the Russian Sakhalinmorneftegaz-Shelf (23%) and Rosneft (17%). Sakhalin II operators included Shell (55%), Mitsui and Diamond Gas (20%). This qualified as the single largest petroleum and gas project in the world.

[26] Forty percent of FDI was directed to this sector in 2005. An important portion corresponded to Sakhalin offshore project, in which participated Royal Dutch/Shell (US$ 20 billions) and Exxon Mobil (US$ 12 billions). Another operation included the U$ 2 billion that ConocoPhillips paid in order to increase its share in Lukoil from 7.6% to 16.4% (US State 2006 – Investment Climate Statement).

[27] One of the earliest movers was Yukos, which in 2001 began its expansion abroad. In 2002, Mr. Khodorkovsky, the company's CEO, stated its intention was to transform Yukos into a transnational corporation.

[28] Norilsk Nickel is world leader in the production of several strategic metals (palladium, platinum, nickel, cobalt and copper) with foreign affiliates at the US (Stillwater) and Canada (Lion Ore). According to UNCTAD data it is considered the main Russian TNC. Recently it purchased the US firm Gold Field for U$ 1.6 billion (USRBC, 2009).

[29] This company has operations in Italy (Paline e Bertoli) and in the Czech Republic (Vitkovice Steel)

[30] It became international after taking over Rouge Industries (US). Later it acquired Lucchini industries (Italy). Furthermore, it purchased low-cost plants at Kazakhstan (coal), Romania (steel mills) and Lithuania (steel product manufacturing).

[31] Russian gas is crucial for Europe and of growing importance for Central and Eastern Asian. The significance of thiswas seen in the conflicts with Ukraine and Belorussia and the dilemma generated around the pipeline route connecting Kazakhstan to China and Japan. Turkmenistan must also be considered as essential for the Russian natural gas strategy (Locatelli, 2007). Finally, the example of Alexander Medvedev, Russia's president was previously Deputy Chairman of Gazprom´s Management Committee By the same token, Igor Setchine, Russia's Vice-Prime Minister, occupied a relevant post in Rosneft's council of administration

[32] A position fixed by the First Ministry in its "Foreign Investment Policy Statement" of April 1949. Foreign capital inflows were seen as necessary to technologically update the country but they were to be complementary to Indian investment. For a short time following the 1957-58 external crisis, FDI liberalization was implemented.

[33] A third of industries previously under the licence regime were liberalized as of 1985.

[34] The new legislation permitted full foreign ownership in the manufacture sector, although FDI continued to be excluded from some sectors and limited in others. Foreign investors were allowed partially ownership in banking (49%); insurance (26%); financial companies (51%); telecommunications (49%); Internet (74%); air transport (40%); foreign and exchange trade companies (51%); radio (49%); publicity (74%); and, up to 51% in health or educational companies.

[35] Services were also the leading sector in the 1990s. Considering the 1991- 2005 period, 16.5% of FDI outflows related to software and electronics). In second place came the transport industry (10.3%) (Government of India, 2006).

[36] The Electricity Act & Electricity Supply Act introduced the initial reforms in 1991 but private operators were prevented entering until the end of the nineties. The poor performance is mainly related to the institutional design: although competition was present at the generation stage, a single buyer upstream (Virmani, 2004) engendered the system failure and Enron's project viability – the legal consequences of which will be considered in the following section.

[37] This country acts as a tax haven for Indian investors (Kumar, 2003).

[38] During August 1991 – December 2005, these countries were among the ten principal sources of foreign capital. After Mauritius (37.25%) comes the US (15.80%). (Government of India, 2006).

[39] Principal destination countries were: UK, US, Russia, South Korea, Singapore and South Africa.

[40] The operation was closed in 2004. According to D.S Brar, Ranbaxy's chief executive "France is strategic to our European expansion plans. The acquisition of RPG Aventis will be a very important move for Ranbaxy as it would place us among the top generic companies in the French market".

[41] The TATA Group was founded in the mid-19th century. At present it owns almost 100 companies operating in sectors ranging from services to energy to consumer products.

[42] The size of the operation reached US$ 407 million in 2002. Three years later, Tata Coffee acquired the US Company, Eight O´Clock Coffee, for US$ 200 million.

[43]Jaguar and Land Rover are both sited in the UK, (West Midlands and Merseyside), employing about 16,000 people. It cost TATA $ 2.3 billion for those assets. According to TATA, the operation will give the Group the opportunity to expand its presence in the passenger car market beyond India and gives it the clout necessary to compete with international players. It worth mentioning that, in January 2008, the company launched the NANO, the world's cheapest car priced at US$ 2,500 (whereas Jaguar's XF was priced ataround US$ 64,000).

[44] At the time of this operation, CORUS ranked as Europe's second-largest steel producer and the eighth largest in the world. The takeover of the Anglo-Dutch steelmaker (US$ 8.08 billion) represented corporate India's biggest acquisition. Two years before, Tata Steel LTD acquired Millennium Steel PLC Company (Thailand) and Finmetal (Bulgary) and in 2004 it bought Singapore's NatSTeel Asia PTE.

[45] Following the decision taken at the 11º Congress of the Chinese Communist Party (December, 1978), the Central government decided to move from the "class struggle" focus towards one centred on "economic development".

[46] Including three cities in Guadong (Censen, Zhuhai y Shantou), and one at Fujian (Xiamen). Local authorities were then allowed to authorize projects up to US$ 30 million.

[47] Differences were perceived in relation to local autonomy at the time of authorizing foreign investments. Whereas in Shanghai and Tianjin the ceiling was fixed at US$ 30 millions, in Dalian it was limited to US$ 10 millions. For the others, US$ 5 million projects were the maximum amount which could be authorized by the local government.

[48] At that time, the reform process was being questioned – and opponentsgained influence. Nevertheless, Xiaoping's viewpoint won out. Consequently, the CCP re-launched the original challenge in favor of the establishment of a dual society -- a political socialist system and a market economy (14th Congress in November 1993). The Constitution was reformed at the end of the 1990s, harmonizing the treatment of private and public property.

[49] Until then, the central government maintained a differentiated exchange rate regime, as did a number of other countries, in order to protect local production from foreign competition. It might be stressed that capital controls remained in place for a longer period, allowing the PRC to isolate itself from many of the noxious effects of the Asian crisis. FDI flows to the PRC increased during the peak of the crisis and the Central government increased its reserves during this period by more than US$ 145 billions. The exchange rate was mainly stable, appreciating slowly (from 8.7 yuan per dollar in 1994 to 83 in 1998).

[50] Three years later, full convertibility was in place

[51]Originally, foreign investors were allowed to enter into joint ventures or associations with local producers via contract. F. Guoping (2006) highlights the fact that, after the passing of the new law and its codification, foreign investors possessed many advantages over local entrepreneurs. For instance, foreigners were allowed to contribute capital under different forms, including intellectual property rights (up to 20%), and intangible assets, whereas local investors only could contribute in cash. In order to change this, the Industry and Commerce office along other governmental agencies launched a series of reforms.

[52] This scheme was mainly attached to oil exploration contracts.

[53] In a single year (1993), the incoming FDI was greater than the FDI inflows entering in the whole period 1979 - 1991 (Zhang, 2002).

[54] Including, Chinese in Hong Kong, Macao and Taiwan, plus ethnic Chinese living at Indonesia, Malaysia, Thailand and elsewhere (including the US and the EU). China is at the center of thecommercial and productive hub forming in Southeast Asia.

[55] The Reminbi devaluation in 1994 explains much of this pattern. After a 50% devaluation, the economy's international competitiveness soared, helping exports. In parallel to the Reminbi depreciation, the government introduced the unification of the exchange rates.

[56] As has been explained by the "flying geese hypothesis". [SOURCE?]

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

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

[59] 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.

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

[61] In this group might be included CNOOC (Chinese National Oil Company) with operations in Sudan and Indonesia; CNPC, operating in Kazakhstan, Peru and Bolivia, and SINOPEC. Mineral related companies are buying stakes abroad, as Chinalco exemplifies (see next footnote).

[62]The Aluminium Corporation of China (Chinalco, founded in Beijing in 2001, is becoming a true global player. In 2007 it expanded abroad (Australia, Peru and Vietnam). In February 1, 2008 it spent US$ 14 billion for a 9% stake in Rio Tinto, making the largest overseas purchase ever by a Chinese company. Since the company is majority-controlled by the PRC government, that deal began to generate important political considerations in Australia. Furthermore, Australian policy-makers were afraid that the new equity holders utilized the PRC's sovereign wealth fund in order to finance the operation. Some metal-industry analysts also expect that the deal is directed to prevent a BHP Billiton hostile takeover on Rio Tinto, because it would generate a company with immense pricing power – raising costs for Chinese steel producers. In any case, after the commodity price slump, the Chinese were back. After a $ 19.5 billion cash injection, Chinalco increased its stake from 9 to 18 per cent. At the same time, Chinalco will also begin to control Rio Tinto's best operations, including the Hamersley iron ore operation in Western Australia, the Escondida cooper mine in Chile, and, in Australia, the Weipa bauxite mine, the Yarwin alumina refinery, the Boyne Island aluminium smelter and the Gladstone power station. Obviously, this new operation is facing some opposition from Australian politicians and BHP Billiton – a company with a majority stake in the Escondida copper mine, but also interested in buy a 30% stake at Rio Tinto. ("Why Chinalco´s Buying Into Rio Tinto" *BusinessWeek*, February 5, 2008. "Rio Tinto faces tough questions on Chinalco deal. FT February 12, 2009. "Undermined: Rio Tinto and Chinalco", *Economist* February 14th 2009).

[63] Also, one could be mention the joint venture between Thomson (France) and TLC (PRC).

[64] In July 2004, the Ministry of Commerce with the Ministry of Foreign Affairs published "the guidance list of industries for outward investment by countries".

[65] In November 2004, the National Development and Reform Commission and the Export-Import Bank of China also created a support system of loans for outward FDI, and started lending at preferred interest rates to the recommended projects.

[66] As a consequence, Brazil continued to limitTNCs' ability to contract foreigners by granting only three permanent visas; whereas no such limit applied to nationally-owned companies. The federal government also introduced some differences in the area of governance. In this sense, it obliged TNCs to introduce voting rights if listed on stock exchanges– another restriction not applying to nationally-owned companies. Finally, foreign-owned companies were prevented from operating in the domestic capital market in times of serious balance of payments conditions.

[67] 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.

[68] For the members of Congress, it was inappropriate to grant foreign investors the right to settle investor-State disputes via international arbitration while was not available to national investors.

[69] 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).

[70] Including arbitration law from Spain and the UNCITRAL model. Additionally, Brazil adhered to the New York Convention on the enforcement of IA decisions in 2002.

[71] As stated in the legal text covering public service concessions (Law Nº 8,987/95 and Law 9,074/95), along with the vast legislation introducing the regulation in several sectors (petroleum, communications, transport, etc.). For example, the concession contract originally established by the Telecommunications regulatory agency (ANATEL) t introduced an important space for arbitration. Moreover, the legislation enacted by the petroleum regulatory agency (ANP), recognized international fora (Lemes, 2003).

[72] The award granted at Uniao vs. TMC Terminal Multimodal de Coroa Grande SA (September 27, 2006) is an example. There is a pending case at the Paraná State, where the government denied arbitration because of the defendant's legal status - a public entity controlled by the state government (Companhia de Energía Eléctrica do Paraná (COPEL) v. UEG Araucária).

[73] Founded at the following awards: Companhia Paranense de Gás (Compagás) v. Consorcio Carioca-Passarelli (June 15, 2004), AES Uruguiana v. Compañía Estadual de Energía Eléctrica (CEEE) (October 25, 2005), y Nuclebrás Equipamentos Pesados SA (NUCLEP) v. TMC Terminal Multimodal de Coroa Grande SPE SA (December 5, 2005).

[74] Case of Oleagionosa Moreno Hermanos Sociedad Comercial Industrial Financiera Inmobiliaria y Agropecuaria v. Minho Paulist Ltda.(award of May 17, 2006).

[75] Case Grain Partners SPA v. Oito Exportacao e Importacao de Cereais e Defensivos Agrícolas Ltda. & Cooperativa dos Productores e Trabalhadores Urbanos e Rurais de Sorriso Ltda. – COOPERGRAO (award October 18, 2006).

[76] Sovereignty and regional prominence are crucial to understand Brazil foreign policy in general as well as its policy towards foreign investors in particular. What is more, in political-strategically terms, while Rio Branco suggested the [tactical] benefits of maintaining good relations with the main powers, he always made clear that Brazil should never become subordinated to or depends on them. In this sense, the following paragraph from Alain Rouquíe is worth reading "*Le Brésil, qu´il s´oppose aux "asymétries de l´ordre international" (F.H.Cardoso) ou qu´il prétende "redessiner la carte du commerce mondial" (Lula) en dénonçant "les structures hégémoniques de l´ordre international" (Samuel Pinheior Guimarães), se donne, á travers de formules différents, la même mission: préserver son autonomie de décision et peser les règles du jeu mondial au service du développement national* (Rouquíe, 2007; page 374).

[77] As stated by *Fernando Henrique Cardozo*, the Brazilian tradition to favour multilateralism rather than bilateralism goes back to Rio Branco (Cardoso, 2006; page 603).

[78] With Austria, Belgium and Luxembourg, Great Britain, Germany, Italy, Spain, Canada, Republic of Korea, Netherlands, Finland, France and Switzerland.

[79] In other words, international arbitrators could not challenge the decisions taken by national tribunals. As an example, the BIT signed with UK in its article article 8 [Disputes between an Investor and the Host Contracting Party] states "This article shall apply to any legal disputes between an investor of one Contracting Party and the other Contracting Party in relation to an investment of the former either concerning the amount or payment of compensation under Articles 4 or 5 of this Agreement, or concerning any other matter consequential upon an act of expropriation in accordance with Article 5 of this Agreement, or concerning the consequences of the non-implementation, or incorrect implementation of Article 6 of this Agreement". A similar statement is found in the BIT signed with Spain.

[80] The agreement was originally negotiated to impulse the entry of the Russian Federation into the WTO. The Jackson-Vanik Amendment abolished all trade restrictions on Russian exports to the US. The agreement also introduced other trade-related measures, including intellectual property rights, and financial services.

[81] With the mentioned industrialized countriesand 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.

[82] The treaty was originally signed at The Hague – Netherlands (1991), and ratified in Lisboa,Portugal (1994).

[83] Russia is not the only exception; the list of non-ratifying countries includes Australia, Belorussia, Iceland, and Norway.

[84] Neil Buckley in *Financial Times* (2006-06-16) "Duma votes for Russian Gas Export Monopoly".

[85] In addition, previous approval is necessary for some projects (above a minimum threshold of 100 million roubles).

[86] An example, is the case of Sakhalin II project in which after several months of strained negotiations, Shell and its partners agreed to cede control. Since December 2006 Gazprom has 50 percent plus one voting control on the project (Gazprom´s gas grab –*Financial Times*, December 11, 2006).

[87] By virtue of this new legislation, a foreign investor seeking to acquire over 50% of a strategic enterprise must solicit permission from Russia´s special commission that monitors foreign investment. If the foreign investor is controlled by a foreign state, permission must be sought even at the 25% level. Any foreign investor holding a stake larger than 5% in a strategic enterprise must report its ownership to the commission. (*BOFIT Weekly*, 22 – 28.5.2009).

[88] In particular, the new law established that foreign investors could only participate as partners of the State-owned enterprises. Ben Aris "Russia enacts new law on foreign investment in strategic areas" *Russia Profile*.ORG – June 5 2008.

[89] Two are in 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 tax actions 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).

[90] Yukos was formed in 1993, by combining the oil and gas enterprises formerly owned by the Russian state. After its privatisation, it became the leading integrated international oil company based in the Russian Federation. Yukos shares were traded on the Russian and other stock markets (US, Germany, Britain).

[91] Another three related claims were initiated using UNCITRAL procedures by Hulley Enterprises Ltd.; Yukos Universal Ltd.; and Veteran Petroleum Trust. These firms are domiciled in Cyprus.

[92] For past reporting on the other shareholder claims see the report "Russian Federation opens up further front in defence of BIT claim" in *IAReporter* November 30, 2009 edition.

[93] For more on the ECHR case see the report in the March 17, 2009 edition of *IAReporter*: http://www.iareporter.com/Archive/IAR-03-17-09.pdf

[94] In a highly controversial move, based on the most favoured nation (MFN) clause, the arbitral tribunal utilized another Russian bilateral investment treaty (with Denmark) to grant jurisdiction to hear the RosInvesCo claim (Luke Eric Peterson "Russian Federation seeks to overturn jurisdictional award in claiming brought by Yukos shareholders; merits phase of arbitration continues to move forward" *IAReporter*, January 22 2009.

[95] Among other considerations, the arbitral court denied investor's arguments based on the most favoured nation treatment. Furthermore, the judges highlighted the fact that claimant have not direct investment in Russia. For further details, Luke Eric Peterson in *Investment Treaty News*: "Russia prevails in Stockholm arbitration with Belgian construction firm owners" (August 23, 2006) and "Award in Berschader v. Russia BIT arbitration is finally made available to public" (January 11, 2008).

[96] See "Interpreting narrowly-worded arbitration clauses in Soviet-era and Chinese BITs" *Investment Treaty News* January 17, 2008.

[97] The same investor initiated three other causes against the Moldova Republic (Luke E. Peterson "Russian investors pursues multiple treaty arbitrations against Moldova in Stockholm" *Investment Treaty News*, February 17, 2006).

[98] The Union Carbide episode relates to a methyl isocyanate leak at its plant in Bhopal, Madhya Pradesh, which occurred at midnight on 3 December 1984. That spill killed 3,800 people and left several thousand more with permanent or partial disabilities. Although Union Carbide quickly paid the final settlement of U$ 470 million ordered by the Indian Supreme Court in February 1989, and maintained that the incident was a result of deliberate sobtage, this experience made Bophal infamous and identified with TNC abuses. Further information available at http://en.wikipedia.org/wiki/Bhopal_disaster.

[99] The *Investment Incentive Agreement* aimed to protect and promote American investment in India, particularly in energy and power, telecommunications, manufacturing and services. The agreement contained a State-to-State dispute resolution mechanism.

[100] With 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.

[101] "India – Singapore FTA inked, investment provisions include important innovations". Luke E. Peterson, INVEST-SD, *Investment Law and Policy News Bulletin*, August 3, 2005.

[102] Some of these exceptions were introduced intomore recent US and Canadian IIAs in response to the ISDS arbitration experiences of the member countries of the North American Free Trade Agreement.

[103] The two parties attempted to close the door on potentially expansive interpretations of these provisions while, at the same time, providing quite high levels of investor protection by virtue of the commitment to accord foreign investors national treatment.

[104] Although, under certain circumstances foreign investors continued to be entitled to go until international courts using UNCITRAL procedures.

[105] 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.

[106] The project was originally launched by the national government in 1992. Private investors, including foreigners, project developers and lenders were welcomed to participate in the expansion of the Indian power sector through a "fast-track" programme. In this fashion, the US firm Enron signed a memorandum of understanding with the government of the State of Maharashtra. After a series of controversies between the regulator (Maharashtra State Electricity Board, MSEB) and Enron, the project was restarted beginning commercial operations in 1999. After phase 1, and with the power plant in operation, Dabhol began to supply power to the Indian power grid. By 2001 it become clear that the MSEB neither needed, nor could afford, the energy it had committed to buy from the project. Phase II had to be mothballed (Hansen, K.; R.C.O´Sullivan and W.G.Anderson "The Dabhol Power Project Settlement: What happened? and How? – at www.infrastructurejournal.com)

[107] The project's repayment was expected to be linked to a power purchasing agreement. More information could be found at UNCTAD – Latest Development in Investor – State Dispute Settlement, *IIA Monitor* Nº 4, 2005.

[108] Bechtel and GE later dropped claims against the State of India pursuant to a settlement agreement with the government. Later both companies sold their stakes in the Dabhol Power Project to two Indian companies, which enjoyed fiscal concessions granted as part of a rescue package for the project.

[109] "GE/Bechtel cases against India reportedly resolved" INVEST-SD *Investment Law and Policy News Bulletin* (former ITN), August 3, 2005. 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."

[110] "Betchel subsidiary wins arbitration with Indian state of Maharashtra". *Investment Law and Policy News Bulletin*, May 5, 2005.

[111] "Indian Lawyer pursues claim against the United Kingdom under the India-UK BIT" *Investment Treaty News*, November 28, 2008.

[112] Sancheti complains of "blatant discrimination by different organs and functions of the United Kingdom in their dealing with me in my capacity as an Inward Investor." In addition to the Corporation of London, Sancheti also alleges discrimination by the Home Office, the Law Society, and the judiciary.

[113] Judgement of the English Court of Appeal on 21 November 2008. The court of appeal rejected Sancheti's request on the grounds that the Corporation of London is not a party to the BIT arbitration, nor was a "mere affiliation" between the city of London and the government of the United Kingdom deemed sufficient to grant a stay of the court proceedings. "The fact that in certain circumstances a State may be responsible under international law for the acts of one of its local authorities ... does not make that local authority a party to the arbitration agreement," writes Lord Justice Lawrence Collins.

[114] By way of the Nanjing Treaty in 1842, a weak China was forced to sign a series of unequal treaties that resulted in a complete loss of control over vital aspects of its relationship with the international economy, particularly import tariff policy. China was forced to open five port cities (Xiamen, Guangzhou, Fuzhou, Ningbo and Shanghai) to foreign investments and international trade and it was even forced to maintain a British citizen as the head of customs from 1863 until 1908.

[115] China's BIT partners were Albania; Algeria; Argentina; Armenia; Australia; Austria; Azerbaijan; Bahrain; Bangladesh; Barbados; Belarus; Belgium and Luxembourg, Benin; Bolivia; Bosnia and Herzegovina; Botswana; Brunei Darussalam; Bulgaria; Cambodia, Cameroon; Cape Verde; Chile; Congo; Congo DR; Côte d´Ivoire; Croatia; Cuba; Cyprus; Czech Republic; Denmark; Djibouti; Ecuador; Egypt; Estonia; Ethiopia; Finland; France; Gabon; Georgia; Germany; Ghana; Greece; Guyana; Hungary; Island; Indonesia; Iran, Islamic Republic; Israel; Italy;

Jamaica; Japan; Jordan; Kazakhstan; Kenya; Korea, DPR; Korea Republic; Kuwait; Kyrgyzstan; Lao PDR; Latvia; Lebanon; Lithuania; Macedonia; TFYR; Madagascar; Malaysia; Mauritius; Moldova Republic; Mongolia; Morocco; Mozambique; Myanmar; Netherlands; New Zealand; Nigeria; Norway; Oman; Pakistan; Papa New Guinea; Peru; Philippines; Poland; Portugal; Qatar; Romania; Russian Federation; Saudi Arabia; Serbia and Montenegro; Sierra Leone; Singapore; Slovenia; South Africa; Spain; Sri Lanka; Sudan; Swaziland; Sweden; Switzerland; Syrian Arab Republic; Tajikistan; Thailand; Trinidad and Tobago; Tunisia; Turkey; Turkmenistan; Uganda; Ukraine; United Arab Emirates; United Kingdom; Uruguay; Uzbekistan; Vietnam; Yemen; Zambia; and, Zimbabwe. China currently has 89 BITs in force, 14 with industrialized countries and 75 others.

[116] China-Pakistan FTA signed on 24 November 2006, available at: http://www.english.mofcom.gov.cn/topic/cnpk.htmal/1

[117] Providing that if a dispute is not settled by negotiation, it shall be "submitted to the competent court of the Contracting Party accepting the investment but permitting the amount of compensation resulting from expropriation to be determined through international arbitration"

[118] In order to include these new clauses, China also re-negotiated some old BITs with countries, such as Sweden, Trinidad and Tobago, and Tunisia.

[119] Thereby following a soft-Calvo doctrine (as introduced by some Latin American countries at the beginning of the 1990s). For example, the BIT signed with Germany at December 2003, incorporated both ICSID and UNCITRAL related tribunals, but only the administrative has been exhausted, and after a 6-month period.

[120] Mr. Tza Yap Shum, a leading investor at the Peruvian fishmeal sector, launched the claim responding to a tax policy undertaken by the Peruvian tax authority (*Superintendencia Nacional de Administración Tributaria or SUNAT*) in December 2004. SUNAT imposed a US$ 4 million fine following a tax breach by Mr. Shum, freezing his bank accounts. The defendant alleged expropriation and launched a claim in ICSID tribunals demanding a compensation for US$ 20 millions. Surprisingly enough, the original treaty signed at 1994 authorized foreign investors to go to international arbitration tribunals sole to define the amount of expropriation (after the local courts recognized the expropriation). But, Mr Shum might not be alone here. In what seems to be an innovative case, a Chinese financial services company appears to be weighing a potential arbitration claim against the Belgian Government in the context of the PRC-Belgium BIT signed in 1984. In 2007 Mr. Ping An acquired a 4,81% stake in Fortis, a Belgian-Dutch giant; however, the company's declined following the global financial meltdown, and the Chinese investor lost most of their assets. The controversy began when the Belgian government concluded a deal with BNP Paribas in order to sell the distressed firm to this French bank, negatively impacting the assets of Mr Ping An.