Sustainable International Investment Law After the Pax Americana: The BOOT On the Other Foot

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ABSTRACT: An increasing proportion of outward foreign direct investment ('FDI') now originates from emerging market economies. This represents a new stage of globalization that appears to have resulted in modifications to the existing regime of international investment law, created largely to serve the needs of Western multinational enterprises (MNEs) in the 20th Century. This article will examine some trends in international investment law that may indicate a rejection of liberalization in favour of greater control by host states, some aspects of which should be viewed in a positive light because of their acknowledgement of important public interest concerns. While these regulatory restrictions on FDI may not have been pursued specifically to disadvantage emerging market MNEs, these firms may face difficulties that their western counterparts did not, in large part because of greater recognition of the need for sustainability in international investment policy, entrenching so-called 'first mover advantage'. The article concludes by recommending greater use of partnerships between host states and foreign investors as well as a balanced approach to the interpretation of FDI-restrictive laws.

I INTRODUCTION: FDI FLOWS TOWARDS EQUILIBRIUM

The rapidly emerging economies of Asia, Latin America and Africa are poised to become the dominant economic powers of the 21st Century, possibly overtaking many of the largest advanced economies of the West, including Germany, the United Kingdom and even the United States. China's decade of unprecedented growth has already led it to surpass Japan as the world's second largest economy. India will shortly become the most populated country in the world, with a relatively young and educated workforce. Brazil has begun to harness its resource wealth and embrace a market economy to become a major economic power within Latin America. Many of these so-called "southern" states are achieving economic maturity, marked notably by

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rising GDP per capita as well as receipt and, importantly for the purposes of this article, *export* of foreign direct investment ('FDI'). Recent data on the flows of outward FDI from emerging market states reflects the appearance and rise of the emerging market multinational enterprises ('MNE')s on the world stage that had once been dominated by American, Japanese and European companies.

FDI *from* developing countries accounted for approximately one quarter of global FDI outflows in 2010 but has been the focus of limited legal academic commentary, primarily from the fields of business and international relations.[1] In that sense it could be stated that the ascendency of emerging market MNEs has occurred to some extent unobserved by the West, which appears to remain pre-occupied with exporting FDI to the emerging states in order to take advantage of their burgeoning middle class. Yet outward FDI from the non-Western world is accelerating relatively more rapidly, and was also more quick to rebound from the global financial crisis of 2008-10 than that of FDI from developed countries.[2] FDI from emerging economies is rising at a relatively faster rate and may ultimately equal or exceed that of Western firms. MNEs from the emerging markets are globalizing at a faster pace than their developed world counterparts, at an earlier stage of their existence, and there are no indications that this will abate in the near future.[3] The Boston Consulting Group claims that fifty of the firms listed in its annual compilation of "Global Challengers", meaning firms from rapidly emerging economies, will qualify for inclusion on Fortune's highly regarded list of the 500 largest companies in the world.[4] This reveals

[1] E.g. K Sauvant and G McAllister eds. FOREIGN DIRECT INVESTMENT FROM EMERGING MARKETS (Palgrave, 2010); R Ramamurti and J Singh, EMERGING MULTINATIONALS IN EMERGING MARKETS (Cambridge University Press, 2009) and K Sauvant ed. THE RISE OF TRANSNATIONAL CORPORATIONS: THREAT OR OPPORTUNITY (Edward Elgar, 2008)

[2] UNCTAD WORLD INVESTMENT REPORT 2011, at xix <http://www.unctad.org/en/docs/wir2010_en.pdf> (April 2011)

[3] A Rugman, *Theoretical Aspects of MNEs from Emerging Economies* in Ramamurti and Singh above n 1

[4] http://www.bcg.com/documents/file70055.pdf at 4 (April 2011)

both the large quantity of capital held by emerging market MNEs, often backed directly by their home country governments, as well as the dynamic nature of these firms that appear less troubled by the risks that Western firms have associated with internationalization, such as political unrest and legal instability in host states. While Western MNEs will continue to invest abroad in Asia and Latin America, as well as in Europe and other developed regions, this will occur alongside and in ever-intensifying competition with MNEs from the emerging markets. Whereas 20th Century globalisation was associated with the establishment by Western firms of international markets for their goods and the acquisition of raw materials or low cost manufactured products overseas, these new shifts in capital movement represent what could be described as the defining characteristic of 21st Century globalisation. The description of this new paradigm of international commercial activity as a kind of reverse economic neo-colonialism is compelling: emerging markets may ultimately influence western society including not just economic impacts but possibly also cultural ones.[5] As with the economic expansion of the 20th Century, there is a danger that vulnerable groups will suffer from this process.

It is not difficult to suppose that many Western countries, now more aware of environmental and social harms that can occur as a consequence of unrestrained growth, will be hostile to this shift. These countries may consequently attempt to arrest this process through the same systems of international investment law that had once underpinned their expansionary interests. This is ironic because the success of emerging market investors has occurred largely because of principles of international investment law developed to serve Western investors during the Pax Americana.[6] While it is beyond the scope of this article to debate the issue, this period is thought

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[5] See e.g. JOHN TOMLINSON, GLOBALIZATION AND CULTURE (Cambridge University Press, 1999)

[6] A term used to describe the period of relative peace in the western world in the second half of the 20th Century in which the US occupied a position of singular geopolitical dominance.

by some to have concluded following a series of events in the first decade of the 21st Century heralding the decline of the US, including the 2001 terrorist attacks against the US as well as the global financial crisis of 2008-10.[7] At the height of American economic power and influence, the home states of western companies, established largely one-sided international investment agreements ('IIA's) that protected their investors from the regulatory actions of host states overseas, often in the developing world. Emerging market investors have begun to use these investor-friendly agreements to suit their objectives. Many of these may be counter to the interests of the West as host state recipients fearful of competition with more efficient producers, as well as mindful of non-economic risks such as environmental degradation and unemployment. The international legal framework governing international investment is undergoing a process of adaptation to this new global order in which capital flows both ways. Whereas IIAs had once been predominately pro-investor, these instruments are now tend to take a more balanced approach to the delineation of the rights and obligations of investors and host governments. Importantly, they also include provision for public policy goals to protect the interests of vulnerable groups.

This more restrained approach of international investment law, seen by some as a departure from the dominant Washington Consensus model of governance rooted in free markets[8], is not necessarily differentially disadvantageous to foreign over local investors. Many of the changes in international investment law that will be discussed below affect domestic firms equally because they facilitate domestic legislation applicable to all firms regardless of origin. In this way, the observed pull-back in

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[7] An associated decline of the West generally has been observed and linked to developments like the sovereign debt crisis as well as falling birth rates in Europe. There is a voluminous amount of literature on this subject, among the best recent examples of which are: I MORRIS, WHY THE WEST RULES FOR NOW (Profile, 2010); D MARQUAND THE END OF THE WEST: THE ONCE AND FUTURE EUROPE (Princeton University Press, 2011); D MOYO, HOW THE WEST WAS LOST (Penguin, 2011)

[8] J ALVAREZ, THE PUBLIC INTERNATIONAL LAW REGIME GOVERNING INTERNATIONAL INVESTMENT (Hague Academy of International Law, 2011) at 152

investor protections in favour of tighter regulation should be viewed as a way of developed countries entrenching "first mover advantage" for their own firms. Western firms were able to obtain market dominance because they were able to flourish during period when there was less government intervention and greater protection for foreign investors abroad, as enshrined in many older IIAs. Western firms can preserve this advantage with respect to the emerging market MNEs because these new firms will face a much less hospitable regulatory environment, with weaker protections for foreign investors.

This article will attempt to illustrate some of the ways in which the existing regime of international investment law has begun to undergone a transformation in response to the shift in FDI flows from East to West, or what might be described as the 21st Century phase of globalization. It will suggest that, at least in some circumstances, the re-adjustments that have been observed in international investment law should be viewed in a positive light, particularly because of their facilitation of domestic regulation that addresses the needs of important social concerns, embodying what might be described as sustainable international investment. These changes are welcome provided that they do not lead to undue protectionism, which could impede FDI flows and have devastating effects on the global economy. This article will outline five main categories of change that have resulted in more restrictive climate for international investment: investor-state arbitration, political risk insurance, capital transfer, public interest exceptions, and the definitions of investment and expropriation. It will conclude by offering two very brief recommendations to maintain high levels of FDI flows while preserving some of the policy advances that have been made as a consequence of the observed changes.

II. FALTERING INTERNATIONAL INVESTMENT ARBITRATION

The World Bank's International Centre for the Settlement of Investment Disputes ('ICSID') is now the pre-eminent system of arbitration for the resolution of disputes between foreign investors and the host states in which they invest.[9] As of 2011, 144 states had become parties to the convention. ICSID has been so well-received investors because it provides a recognized, neutral forum for dispute settlement of investment related matters with a standardized procedure and institutional support. Encouragingly, China has demonstrated a willingness to enlarge its participation in international arbitration to matters beyond simply the quantification of compensation, as it had done in the past, as demonstrated in its recent BIT with the Netherlands in which it directs investor-state disputes to ICSID, or an UNCITRAL tribunal.[10] Thus far American and European MNEs have been the dominant complainants in ICSID-based arbitrations, although the myth of an anti-developing country bias in ICSID decisions has been dispelled through empirical studies,[11] suggesting that it is both fair and effective.

Still, perception of ICSID's fairness as a forum for investment dispute settlement may count for more than reality. Bolivia and Ecuador have withdrawn from the ICSID Convention, possibly because of the sizable awards that had been levied by the tribunal against Argentina in the early 2000s. While China and other large emerging markets such as Mexico and South Africa have now ratified the Convention,

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[9] R DOLZER & C SCHREUER, INTERNATIONAL INVESTMENT LAW (OXFORD UNIVERSITY PRESS, 2008) AT 60 AND M SORNARAJAH, THE INTERNATIONAL LAW ON FOREIGN INVESTMENT (CAMBRIDGE UNIVERSITY PRESS, 2010) at 222. UNCITRAL arbitration is also growing in importance, particularly in countries that have not ratified the ICSID Convention, such as India and Brazil.

[10] Art 10(3) a

[11] S Franck, *The ICSID Effect? Considering Potential Variations in Arbitration Awards* 51:4 VIRGINIA JOURNAL OF INTERNATIONAL LAW 977 (2011)

Brazil, India and Russia have yet to do so.[12] Although ICSID's Additional Facility Rules allow for non-parties (or their investors) to use it provided that at least one of the two parties is a member, these hold-outs may be cause for concern in the future. If ICSID ceases to remain the dominant forum for investor state dispute settlement, then much of the jurisprudence that it has developed may begin to unravel, undermining some of predictability that FDI relies upon. ICSID continues to develop a growing body of arbitration decisions, which although not strictly precedential in nature, tend to demonstrate legal consistency and policy coherence.[13] Most worrying in this regard is the recent statement from the Australian government that it will no longer include provision for international investor state arbitration in its IIAs, as this would offer foreign investors the potential for remedies that would be unavailable to domestic investors.[14] In the belief that the local courts of signatory states are adequate to deal with foreign investors' complaints, the Australia-US FTA does not contain a dispute settlement provision. There is concern that Australia's apprehension may spread. Moreover, criticisms concerning ICSID's narrow annulment provision and inconsistent decisions issued by annulment committees, as well as tribunals, persist.[15] The debate continues regarding ICSID's need of an appellate mechanism in order to

[12] Although see clause 9(2)a) of the Brazil-Finland BIT which points to ICSID as a forum for dispute settlement 'as soon as Brazil becomes a party to the Convention,' suggesting that it intends to in the future.

[13] J Alvarez, *The Rise of Emerging Market Multinationals: The Legal Challenges Ahead* in K Sauvant and G McAllister, eds FOREIGN DIRECT INVESTMENT FROM EMERGING MARKETS: THE CHALLENGES AHEAD (Palgrave Macmillan, 2010) at 431

[14] L Nottage *What Future for Investor-State Arbitration Provisions in Asia Pacific Treaties* East Asia Forum, 26 April 2011 <http://www.eastasiaforum.org/2011/04/26/what-future-for-investor-state-arbitration-provisions-in-asia-pacific-treaties/> (last accessed October 2011)

[15] E.g. W Burke-White and A Von Standen, *Private Litigation in the Public Law Sphere: The Standard of Review in Investor-State Arbitrations* 35 YALE JOURNAL OF INTERNATIONAL LAW 283 (2010) at

ensure consistency and predictability.[16] These issues have led commentators to question the legitimacy of international investment arbitration going forward.[17]

There appears to be a growing trend within the procedure of international investment arbitration that, with the objective of enhancing transparency and accessibility, might be viewed as anti-investor. This is tied to the presumption that public perception of multinational corporations tends to be more negative than positive and as such greater transparency will be against the interests of firms. Given the growing influence of the anti-globalization movement, it is unlikely that the general public will take the side of foreign investors against governments when disputes arise. Increased transparency is seen in the growing commonality of *amicus curiae* briefs,[18] and the increased regularity of publication of decisions.[19] The strongest opposition to mandatory transparency in UNCITRAL arbitrations, for example, has been voiced by industrialized states such as France and Germany and China, home of many of the world's largest corporations. In contrast, developing countries have remained silent on this matter, reflecting their awareness that increased transparency could be advantageous to them as respondents.

These developments are antithetical to the confidential nature of arbitration process that had originally made it an attractive method of dispute settlement for companies. Whereas investor-state arbitration had been a largely secretive procedure, disseminated only sporadically through ICSID's incomplete and non-user friendly

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[16] E.g. K Sauvant ed, APPEALS MECHANISM IN INTERNATIONAL INVESTMENT DISPUTES (Oxford University Press, 2008)

[17] E.g. D Schneiderman *Legitimacy and Reflexivity in International Investment Arbitration: A New Self-Restraint?*' 2(2) Journal of International Dispute Settlement 471 (2011)*;* M Sornarajah, *The Neo-Liberal Agenda In Investment Arbitration: It's Rise, Retreat and Impact on State Sovereignty*, in W Shan, P Simons and D Singh eds. REDEFINING SOVEREIGNTY IN INTERNATIONAL ECONOMIC LAW (Hart, 2008)

[18] Methanex Corporation v United States of America, 15 January 2001 para 49 (UNCITRAL Rules); Pac Rim Cayman v El Salvador ICSID Case No. ARB/09/12

[19] Notably on websites such as Investment Treaty Arbitration: <http://www.italaw.com/> (last accessed October 2011). The ICSID website included a live stream of an arbitration: *Pac Rim Cayman v El Salvador*, ibid. on 31 May and 1 June 2011

website, investment arbitration decisions and awards are now comparatively well-reported on the internet and widely debated through blogs and other on-line fora. In many instances this information has given anti-globalization organizations a focus for attack. Dissenting opinions of investment arbitrators are also now regularly published.[20] While dissents could equally favour investors as states, coupled with increased transparency the presence of readily accessible dissent judgments may exacerbate public resentment towards an investor even if it is has won a claim by presenting a reasoned argument to the contrary. If MNEs fail to conform to the pressure to comply with the growing emphasis on transparency in ICSID and other mechanisms, they risk damaging their public reputations in a now very conspicuous manner. It is difficult to escape the conclusion that the heightened openness of investor state dispute settlement, which should itself be viewed as a step towards legitimacy and inclusiveness as components of sustainability, might end up undermining foreign investor's access to justice. This could shift the balance of power in the procedure in favour of state parties, the natural champions of the broader public. Worse, it could alienate MNEs from the investment arbitration process altogether. Investors may ultimately respond by insisting on private contractual arrangements with governments that specify recourse to the local courts of their home state. Eager to attract FDI, host states may be pressured to accept such terms.

Investor-state dispute settlement has been dealt a further blow by the elimination of umbrella clauses in Western IIAs. Umbrella clauses grant foreign investors the right to international arbitration for breaches of the relevant treaty as well as breaches of any other obligations undertaken by the state. This guarantee is often extended to private contractual matters, elevating them to the level of a treaty

[20] E.g. Abaclat and Others (Case formerly known as Giovanna a Beccara and Others) v. Argentine Republic, ICSID Case No. ARB/07/5 (decision 4 August 2011, dissent opinion forthcoming); Impregilo S.p.A. v. Argentine Republic, ICSID Case No. ARB/07/17

violation. The elimination of the umbrella clause arguably focuses claims in order to safeguard host states that do not have the resources to litigate investment disputes at multiple fora concurrently. In that sense it protects countries from vexatious claims, achieving equality of arms between powerful corporations and vulnerable developing states. The removal of umbrella clauses also allows host states to avoid international arbitration in a wide range of circumstances, such as breach of contract with the foreign investor, forcing the investor to use local court procedures, the avoidance of which is one of the central purposes of international arbitration. Unlike its earlier version, the newer US Model BIT does not contain an umbrella clause, protecting the US government from facing international arbitration for violations of commitments that are not captured in the text of its IIAs. This change deprives foreign investors of one of their most powerful tools: access to neutral international dispute settlement as an alternative to possibly biased, expensive and non-confidential local courts.

As an alternative to treaty arbitration, the World Trade Organization (WTO)'s state-to-state dispute settlement grievance procedure will offer limited recourse to the emerging states that seek an agenda of liberalized FDI. Wide-ranging reservations are still maintained by WTO Members over incoming FDI in the General Agreement on Trade in Services (GATS), which covers FDI through the commercial presence mode of delivery of services, facilitating market access and prohibiting discrimination based on nationality.[21] The GATS has failed to liberalize trade in key services, with many states maintaining minimum foreign ownership requirements on enterprises in sectors such as telecommunications and banking. For example, the US places numerous domestic citizenship and registration requirements on foreign banks seeking

[21] Art I.2 d)

establishment within its territory,[22] and some countries in the European Union require the authorization of their Ministers of Finance to allow mergers and acquisitions by entities outside the European Community.[23] Given limited specific commitments under GATS relating to FDI, there is little room to bring a WTO claim against developed states seeking removal of an offensive measure as alternative to cash compensation through investor-state arbitration. This is particularly problematic as services investment continues to grow in proportion to manufacturing and extraction as a leading source of FDI, which had been the dominant sectors in the 20th Century. From the perspective of an emerging market MNE, the lack of access to effective dispute settlement, either through investor-state arbitration or through WTO's state-to-state mechanism, could represent an unfortunate barrier to continued growth because of the increased risk of inadequate legal redress. This disadvantage is one that their competitors from the developed world were largely spared from in the late 20th Century when investor-state arbitration clauses began to appear in BITs. Of course the extent to which the availability of international arbitration actually affects an investor's decision where to invest is uncertain, however it can be expected that jurisdictions for which this option is unavailable will appear less attractive.

III) Lack of Availability of Political Risk Insurance

A second significant barrier to the success of FDI from emerging markets, at least in relation to that directed at the developing world, is the lack of availability of political risk insurance ('PRI'). This problem will be felt more acutely by MNEs from emerging markets than by their western counterparts because of the greater familiarity that developed country firms have with these processes. PRI products have been

[22] GATS/SC/90/Suppl.3 26 February 1998 (98-0709)
[23] E.g. Belgium, GATS GATS/SC/31/Suppl.4/Rev.1 18 November 1999 (99-5018)

largely designed by organizations that are now sensitive to non-economic matters such as indigenous people's rights and environmental protection. The Multilateral Investment Guarantee Agency (MIGA) of the World Bank mandates consideration of these issues in its policies, as do many of the regional development banks. Now many private investment insurance providers in the West insist on environmental or other performance assessments, often under the rubric of socially responsible guidelines such as those promulgated by non-governmental organizations. Such principles have been embraced by Western institutions in response to a growing awareness within civil society, spearheaded by increasingly powerful lobby groups, that subordinates economic progress to sustainability concerns. While adhering to these often complex and administratively onerous guidelines may be less problematic for firms from China because of its large state-sponsored system for outward FDI, firms from smaller emerging markets like Turkey and Mexico may struggle to access developing countries from their less well-funded domestic PRI providers without MIGA support. The result is that existing dominant western MNEs that have grown accustomed to sustainability-based processes have a distinct advantage over non-western MNEs when it comes to lucrative FDI possibilities in high-risk countries, such as the numerous resource rich African states.

While MNEs from emerging markets have shown less sensitivity to political risk than their developed country counterparts, the availability of PRI may grow in importance given the increasing involvement of emerging market firms in high-risk areas. Few firms from the large emerging markets of Brazil, India and China use PRI at all, although it is common in Russia, possibly because of the higher risks associated with extractive industry investment compared to services-oriented investment.[24] With the exception of China, very few emerging economies maintain PRI providers with significant levels of capitalization. The low priority for the insurance of non-commercial risks as a home state policy in emerging economies may reflect the relative scarcity of potential investors: these states did not need to create institutionalized PRI insurance schemes because there were insufficient investors to make use of them. MNEs from developing countries may also be more familiar with unfavourable conditions in their home states and as such have gained greater experience operating in politically unstable environments with corrupt bureaucracies. Yet as MNEs from emerging market countries expand overseas and face oppressive regulation and civil unrest in developing host states, they may be more inclined to seek PRI, such as that offered by the MIGA or other regional development banks. It is thought that PRI guarantees from international agencies like the World Bank's MIGA are viewed as inaccessible by emerging market firms because the process of obtaining it is too cumbersome relative to the coverage obtained.[25] Indeed, the often exhaustive process for obtaining PRI from many development banks would appear to favour Western firms that are accustomed to requirements such as the performing of environmental impact assessments or engaging in consultations with local citizens.[26] Many development banks also maintain grievance procedures for citizens that have been adversely affected by the operations of foreign investors,[27] and while these are usually optional, pressure to participate in these processes could result in apprehension among MNEs from countries that are not familiar with this level of

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[24] P N Satyanad, *How BRIC MNEs Deal with International Political Risk* Columbia FDI Perspectives no. 22, Vale Columbia Center on International Sustainable Investment (5 May 2010)
[25] Ibid.
[26] D Collins, *Environmental Impact Statements and Public Participation in International Investment Law* (2010) 7:2 MANCHESTER JOURNAL OF INTERNATIONAL ECONOMIC LAW 4 (2010)
[27] D Collins, Alternative Dispute Resolution for Stakeholders in International Investment Law <http://ssrn.com/abstract=1788243> (last accessed October 2011)

public involvement in the investment process. Many of these screening and monitoring features should be welcomed as a positive method of assessing projects that may be harmful to host states and as a way of empowering stakeholder groups. However they could represent barriers to emerging market FDI in developing states. Thus the goal of sustainability in international investment law could place firms from traditional FDI exporting countries at an advantage, at least for a time, when seeking investment opportunities in high-risk states.

IV) Capital Controls and Economic Emergency Measures

During the aftermath of the recent global financial crisis, the International Monetary Fund ('IMF') has relaxed its stance on the need to preserve free flows of capital internationally.[28] The IMF's prohibition on capital controls had been a pivotal component of home state policies towards outward FDI. They played a key role in augmenting the FDI from emerging market MNEs as firms from these countries have been able to use their domestic currency to fund operations abroad. There is a danger that the legitimization of greater capital controls for the purposes of economic crisis aversion could undermine the stability and predictability in the host state's management of its economy, possibly to the detriment of foreign investors. The IMF's greater emphasis on maintaining sovereign liquidity and the maintenance of balance of payments equilibrium embraces long-term economic stability over short term profits. It could, however, result in the imposition of domestic measures that are harmful to foreign investors, such as abrupt changes a taxation regime or rescission of concession contracts.

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[28] International Monetary Fund: World Economic Outlook 2010: Rebalancing Growth, Executive Summary at xvi <http://www.imf.org/external/pubs/ft/weo/2010/01/pdf/exesum.pdf> (April 2011)

A number of IIAs now specify that states are able to maintain capital controls in order to fulfil their obligations under the IMF, including their capacity to maintain balance of payments equilibrium. Similarly, the US Model BIT contains an exception to its investment protection obligations for measures aimed at preserving the integrity of the financial system.[29] The GATS contains a safeguard to allow for measures to address balance of payments difficulties[30] as well as an Annex on Financial Services which permits Members to take prudential measures to protect investors that would otherwise violate of GATS obligations.[31] Japan has IIAs that allow it to impose capital controls for its IMF obligations.[32] The importance of these provisions can be seen in the case of Argentina's economic crisis of the turn of the millennium. Argentina's success in pleading the defence of economic necessity for currency-related measures taken during its financial crisis of 2000-01 may pave the way for such justifications by developed and developing country host states alike.[33] While these extensions of permissible government actions may remove scrutiny of economic management from private arbitral tribunals accustomed to assessing more routine commercial transactions, the result is that investors may not be compensated for measures undertaken in the broader economic interest of the host state.

Ensuring that governments have the capacity to regulate their economy for the purpose of crisis management is an aspect of sustainability in that such decisions are intended to preserve the long-term health of society, often at the expense of immediate interests such as the performance of contracts or concession agreements with foreign companies. These economic sustainability-focused restrictions could represent a significant barrier to FDI, precisely at the moment where emerging market

[29] Art 20
[30] Art XII
[31] GATS Annex on Financial Services Art 2.
[32] Japan-Bangladesh Art 8.2
[33] Sempra Energy International v. Argentine Republic, ICSID Case No. ARB/02/16

firms are enjoying an ascendency. While this will affect developed country MNEs as adversely as their emerging market counterparts, it is worth observing that the financial crisis that led to many of these restrictions was a consequence of financial policies undertaken in the West.

V) EXPANSIVE GENERAL EXCEPTIONS

Among the most restrictive features of modern IIAs are there general exceptions relating to public policy interests like the environment, labour, as well as national security and culture. Host states may claim that protections provided under their IIAs can be forsaken in certain circumstances because of non-FDI related concerns that supersede the interests of foreign investors. It thought by some that MNEs should conduct business in a manner that does not harm local communities,[34] a view that has been advanced considerably through the efforts of muscular NGOs. In some respects this awareness of the need for sustainability in international investment represents a more mature stage of capitalism as practiced by the West which has, with the affluence created under the Pax Americana, have been able to devote resources social policy goals, such as the environment and full employment. Consumers in these societies have correspondingly begun to seek products that were created in a sustainable manner. Most notably, the environmentalism movement has grown to become a powerful lobbying force, affecting the decisions of government and industry alike. While environmental protection and labour rights preservation are laudable goals, they could represent barriers to the flow of FDI because of increased compliance costs associated with tighter regulation. These costs will be proportionally greater for firms from countries that do not have strong traditions of

[34] E.g. M SORNARAJAH, THE INTERNATIONAL LAW ON FOREIGN INVESTMENT (Cambridge University Press, 2010) at 154 and S SUBEDI, INTERNATIONAL INVESTMENT LAW: RECONCILING POLICY AND PRINCIPLE (Hart, 2008)

labour rights and environmental protection and which consequently struggle to adapt to a world that holds multiple values. Indeed, the improved "governance" associated with the application of Western standards to lesser developed countries is often viewed as one of the greatest advantages of FDI.

Explicit sustainability-focused goals are now enshrined in many IIAs. The US Model BIT was reformed to recognize the right of states to enact environmental laws.[35] Express reference to environmental protection is missing from the GATS general exceptions, but the agreement does contain a general exception for the protection of human, animal or plant life or health.[36] This is repeated in the Canada Model BIT and the ASEAN Comprehensive Investment Agreement.[37] NAFTA contains a provision which allows countries to enact laws that have an environmental purpose, as long as they do not otherwise violate the agreement.[38] The International Institute for Sustainable Development Model International Agreement for Sustainable Development contains strong protections for labour conditions and human rights.[39] The Draft Norway Model BIT, although subsequently withdrawn by the Norwegian government, prohibited states from lowering their labour standards to attract investment and permits states to regulate for the protection of health and safety.[40] While not an investment agreement, The US-Peru Trade Promotion Agreement contains extensive obligations for upholding core labour rights such as safe working conditions and the right to form unions.[41] Some US IIAs reference a desire to promote respect for workers' rights, but they do not contain substantive obligations in this

[35] Art 8.3 c)
[36] Art XIV b
[37] Art 10.1 a and c of the Canadian Model BIT and Art 17.1 of the ASEAN Comprehensive Investment Agreement
[38] Art 1114.1
[39] Art 21
[40] Arts 11 and 12 respectively
[41] Art 17

regard.[42] The US Model BIT states that parties should strive not to weaken core labour rights in their pursuit of FDI.[43]

A trend of cultural preservation may also severely restrict FDI into the developed world by emerging market firms. Such principles are particularly threatening to emerging market firms seeking to operate in the West because they condone discrimination against foreign investors. Regulations aimed a cultural preservation recognize that the cultural practices of some communities are vulnerable to foreign influences that result from FDI. Laws that are hostile to foreign cultural influences are commonly associated with oppressive regimes, such as that of China, which has faced extensive criticism from the West regarding its harsh censorship of the internet[44] in order to curtail political dissent. This environment has been problematic some foreign telecommunications companies operating there. China maintains heavy barriers to the entry of foreign films which it justifies through cultural preservation,[45] restrictions which could also be viewed as attempts to safeguard national security. Cultural censorship is becoming common in the West as well. Canada omits cultural industries entirely from any obligations in its Model BIT.[46] A similar exception is seen in France's Model BIT.[47] The GATS' exception for measures aimed at protecting the public morals or maintaining public order[48] could be construed so as to safeguard local culture, protecting many companies in the media and entertainment industries. These phrases also appear in Sweden's BIT with

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[42] E.g. preamble to U.S. Bolivia BIT (1998) and U.S. Argentina BIT (1994)
[43] Art 13
[44] As indicated by comments from the US ambassador to China: see A Jacobs *New U.S. Envoy Urges China to Relax Business Restrictions* THE NEW YORK TIMES, 21 September 2011
[45] See CE Heiberg, *American Films in China: An Analysis of China's Intellectual Property Record and Reconsideration of Cultural Trade Exceptions Amidst Rampant Piracy* 15 MINNESOTA JOURNAL OF INTERNATIONAL LAW 219 (2006)
[46] Art 10.6. Admittedly, Canada's cultural restrictions are in some respects less severe today than they were in the 1970s.
[47] Art 1.6
[48] Art XIV a)

Russia.[49] It should be noted that the ASEAN Comprehensive Agreement on Investment now includes protections for national treasures of artistic, historic or archaeological value.[50] The preservation of local culture from foreign influences may be viewed as a key aspect of the long-term functioning of a society; however the ambiguous nature of the concept of "culture" makes it highly susceptible to abuse by governments seeking to disadvantage foreign competitors. Western MNEs entering developing and transition economies in the late 20th century did not face such opposition.

National security has become an established exception to liberalization commitments in the 21st Century international investment law, largely as a result of the ever-present danger of terrorism. As with culture, national security concerns justify outright discrimination against foreign entrants. The extent to which heightened security risks are themselves a consequence of American foreign policy is debatable, but clearly the infrastructure of the developed West remains among the most prominent targets. The high-profile blockage of Dubai World takeover of several US ports by the US government for national security reasons is perhaps the most high profile recent example of security-based barrier to FDI.[51] Canada appears to be among the worst offenders for rejecting FDI on the basis of its incompatibility with domestic interests, including national security as broadly construed. This fact has not escaped media attention in the United States, Canada's largest trading and investment partner.[52] The Canadian government recently blocked a bid by US firm to acquire the aerospace division of the telecommunications company MacDonald, Dettwiler and Associates Ltd. Canada also recently denied the acquisition of a substantial portion of

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[49] Art 3(3)
[50] Art 17.1 e)
[51] J Alvarez, *The Rise of Emerging Market Multinationals: The Legal Challenges Ahead* in Sauvant and McAllister eds above n 12 at 427
[52] I Austen, *Awash in Oil, Canada Looks Towards China,* NEW YORK TIMES, 11 October 2011

its potash industry by Australia's BHP Billiton, citing an unwillingness to lose sovereignty over its natural resources based on a "net benefit" test contained Canada's foreign investment legislation.[53]

Many IIAs now contain an "essential security" exception under which signatory states are entitled, notwithstanding other provisions of the treaty, to take measures to protect their essential security interests. In some cases these restrictions are self-judging, which means that the host state government alone may decide whether the measure taken is necessary given the situation.[54] GATS also contains an exception which permits Members to disregard obligations relating to services liberalization for matters that it (the WTO Member country) considers to be in its essential security interests.[55] While protecting citizens from attacks is a vital aspect of governance, such unilateral regulatory decisions by states could be used in a manner designed to illegitimately restrict the investment activities of foreign investors that are identified as harmful to local competition. Indeed, commentators have viewed these clauses as indicative of an evisceration of essential investor protections.[56] International oversight of such treaty provisions is unlikely given the sensitive nature of these decisions. As such national security based exceptions stand to remain a highly contentious and common feature of international investment law in the coming decades.

Lastly, although it is not strictly speaking a public policy exception, many IIAs now contain exceptions for regional investment agreements. This means that

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[53] Investment Canada Act 1985, c. 20, s. 16; B Simon, H Thomas and W MacNamara, *Canada Rejects Bid for Potash* FINANCIAL TIMES (London) 4 November 2010

[54] K Sauvant, *Is the United States Ready for Foreign Direct Investment from Emerging Markets? The Case of China,* in Sauvant and McAllister eds. above n 12 at 373. See e.g. 2006 US-Peru Trade Promotion Agreement Art 22.2. The new US version of this provision has been replaced by an even wider one that allows it to take "*any measures* that it considers necessary" to protect national security: US-Uruguay BIT Art 18

[55] Art XIV.1a)

[56] Alvarez, above n 50 at 430

parties are allowed to ignore most favoured nation guarantees against discrimination in order to advantage investors from states that are a party to a regional agreement.[57] The purpose of this exception is obvious; firms that would be unable to compete globally may be able to compete regionally, a situation that may be offensive to emerging market MNEs as they reach the level of major global players. Unlike restrictions placed on regional economic integration agreements found in the WTO,[58] these exceptions in IIA typically contain no limitations such as the requirement that regional agreements offer greater liberalization or written notification to treaty partners. Regionalism in international investment law, as in trade, is seen by some as a barrier to multilateralism, which is widely recognized as more economically efficient.[59] Such provisions may become common features in Western IIAs as these countries seek to protect their companies from more intense global competition.

VI) NARROWING DEFINITIONS OF INVESTMENT AND EXPROPRIATION

IIAs are showing a tendency to provide a narrower definition of investment such that the protections afforded under the relevant treaty, like national treatment and fair and equitable treatment are unavailable to firms that do not conform. Commentators observed an expansive understanding of the notion of investment in the past, as enshrined in various IIAs and as considered by arbitration tribunals when determining their jurisdiction.[60] Most IIAs still define investments broadly as constituting "all assets" with several groups of illustrative categories.[61] The Washington Convention which established ICSID does not contain a definition of investment, an implicit

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[57] E.g. Germany Model BIT 2008, Art 3(3) and France Model BIT Art 4
[58] GATT Art XXIV
[59] E.g. J BHAGWATI, TERMITES IN THE TRADING SYSTEM, (Oxford University Press, 2008)
[60] See e.g. DOLZER AND SCHREUER, above n 8 at 60 and J SALACUSE, THE LAW OF INVESTMENT TREATIES, (Oxford UniversityPress, 2010) at 162
[61] SALACUSE, ibid at 63, see e.g. Free Trade Agreement between the Government of the United States of America and the Government of the Republic of Chile, 6 June 2003, Art 10.27

acknowledgement that the concept is a fluid one that changes over time and among investing parties. Naturally, newly internationalizing firms will seek to preserve this expansive understanding in order to maximize the protection afforded to the full range of their commercial activities abroad. However more recent IIAs have retreated from this position. For example, the 2004 US Model BIT narrows the definition of investment by excluding claims for payment that do not create rights protected under domestic law.[62] Clearly this could limit the scope of claims brought against the US government by foreign firms accustomed to acquiring commercial rights through their domestic legal systems.

Few western-conceived IIAs use definitions of investor that explicitly include state owned enterprises (SOE)s, an omission that has been criticized by commentators for failing to reflect the reality of investment structures in non-market economies.[63] More problematically ICSID's jurisdiction does not contemplate SOEs, suggesting that such entities might have difficulty bringing claims through ICSID against Western countries. Of course the fact that SOEs are not specifically mentioned in a treaty does not mean that these structures will not be protected, but it does suggest that SOEs will have to argue their entitlement to protections more forcibly than those who are free from government involvement. The bias against government-controlled MNE is further seen in the US' restrictions on the entrance of government owned insurance companies in its GATS commitments.[64] These restrictions are problematic because SOEs contribute an enormous percentage of FDI from India, China and Russia. Many of the largest firms in India, China and Russia are SOEs, including

[62] Art 1
[63] P Gugler and J Chaisse, *Patterns and Dynamics of Asia's Growing Share of FDI* in J Chaisse and P Gugler eds, EXPANSION OF TRADE AND FDI IN ASIA, (Routledge, 2009) at 10, exceptions include Canada's Model BIT, Art I and the US Model BIT, Art I
[64] Full or partial restrictions are maintained by 29 US States: GATS/SC/90/Suppl.3 26 February 1998 (98-0709)

India Oil, China's Sinopec, and Russia's Gazprom, which are also among the largest firms in the world as ranked by Fortune.[65] The lack of express coverage for SOEs undermines access of some of these countries' largest investors to the full protections enshrined in international investment law. In one sense this approach reflects the different political heritage of these countries where governments have traditionally played a much larger role in the economy than the free-enterprise-focused West, where much of modern international investment law was created. The on-going bias against SOEs could equally be viewed as an attempt to suppress non-Western firms from establishing market dominance in the West. Suspicions that SOEs are disguised agents of foreign policy attempting to secure control over strategic assets exacerbates this problem by playing to public discomfort with globalization as well as general xenophobia.[66]

In addition to the lack of provision for SOEs, some IIAs specifically exclude protections for investments in government services.[67] GATS notably excludes government services entirely from its ambit. This may reflect a national security concern for public-type services like defence, or it might indicate that certain sectors are so essential that they cannot be subjected to the risk associated with private, foreign providers, who may discontinue business if profits are not forthcoming. The omission of government services from the GATS also represents a significant lost opportunity for emerging market MNEs, particularly as many of these have established dominance through the provision of government goods and services at home where governments have an enlarged role in the economy. The WTO's Agreement on Government Procurement (GPA) may alleviate some of the concerns in

[65] http://money.cnn.com/magazines/fortune/global500/2010/full_list/ (last accessed April 2011)
[66] See e.g. W Jiang, 'China In Canada Part 2: Some Misconceptions About China' THE NATIONAL POST (CANADA) 11 January 2012
[67] Such as the GATS Art 1.3 b)

this regard should its limited membership increase. The GPA establishes that WTO Members which have chosen to become parties to this agreement must not discriminate against local goods and service suppliers on the basis of their degree of foreign ownership when awarding government contracts.[68] Although the GPA is a plurilateral (optional) agreement, it currently has only 15 signatory parties, including the large economies of the US, Canada, all European countries and Japan as well as emerging markets like Hong Kong and Singapore. Unfortunately for emerging market firms seeking access to these countries, many of the GPA parties maintain significant reservations to their government procurement commitments, particularly at the sub-central level. For example, some Canadian provincial governments do not include highway construction services.[69] Japan's regional governments do not list the production, transportation or distribution of electricity.[70] A number of US States provide no commitments to GPA coverage whatsoever.[71]

Developing states often require that for "investments" to be protected under their IIAs, performance requirements may be imposed upon incoming investors, which would otherwise represent a departure from the national treatment guarantee. This is a way for lesser developed countries to ensure that they gain an economic benefit from the presence of the foreign firm, possibly through mandatory use of domestic materials, mandatory employment of locals or mandatory exports. Emerging markets such as China and India have been required to surrender some of the performance requirements they imposed on foreign investors as a condition of entry as a result of the WTO Trade Related Investment Measures (TRIMS) agreement. India has demonstrated an aversion to this WTO obligation and it, like

[68] Art III 2.a)
[69] Canada GPA Annex 2, 19 March 2010 (WT/Let/672)
[70] Japan GPA Annex 2, 1 March 2000 (WT/Let/330)
[71] USA GPA Annex 2, 16 October 2002 (WT/Let/431)

China, has refused to include blanket prohibitions of performance requirements in their IIAs in order to maximize the economic benefit of the incoming FDI.[72] Yet the IIAs of the US, Canada and Germany contain performance requirement prohibitions that are even wider than those of the TRIMs.[73] These prohibitions have no doubt been advantageous for investors from these economically powerful states and they should also benefit emerging market firms now seeking to expand into these countries. It will therefore be interesting to see if the strong performance requirement prohibitions seen in some Western IIAs will be limited in subsequent reiterations of these treaties. For example, new investment treaties may need to accommodate "buy American"-type provisions that featured in the US economic stimulus package of 2009, much to the consternation of Canadian firms seeking to do business in the US.[74] It is noteworthy that the WTO TRIMs Agreement says nothing about employment, and as such mandatory employment for locals by foreign investors could well become a common feature of 21st Century Western IIAs, particularly as economies seek to re-balance themselves away from reliance on the services sector towards labour intensive manufacturing (as is the stated strategy in UK).[75] It should also be mentioned that the anti-performance requirement provisions in the Canada and US Model BITs contain exceptions for incentives that have been granted to foreign firms for the purpose of providing local employment,[76] the likely beneficiaries of which will be labour intensive manufacturing firms. Such policies are indicative of sustainability through

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[72] Sornarajah, ibid at 150-151

[73] E.g. Canada Model BIT Arts 7.1 and 7.2, US Model BIT Arts 8.1 and 8.2, German-Timor-Leste BIT, Protocol Art 3 a)

[74] US Recovery and Reinvestment Act, 54 Public Law 111-5, 2009. This policy is arguably defensible under an economic emergency exception.

[75] S Goff and G Parker, 'Osborne Says Banks Unlikely to Quit City' THE FINANCIAL TIMES (LONDON) 11 January 2012

[76] Canada Model BIT Art 7.4, US Model BIT Art 8.3 a)

diversification – protecting a national economy from shocks due to excessive reliance on a particular sector.

Further evidence of the retreat from the concept of a protected "investment" for the purposes of compensation for expropriation can be found in the WTO's TRIPs agreement. The TRIPs permits compulsory licensing of intellectual property, most notably patents for pharmaceutical products, in emergency situations, such as health epidemics.[77] Although it has a highly worthy aim and one that embodies principles of sustainability, this is unquestionably a form of expropriation, which is typically prohibited under most IIAs. To capture the benefit of this provision on TRIPs in the context of FDI, some developing states, including notably India,[78] maintain exceptions in their IIAs to its obligation to compensate investors for expropriation under these circumstances, re-iterating their TRIPs right to take investor's property, possibly without full compensation when it is needed for the public interest. This circumstance has, until now, been most problematic for Western MNEs that tend to be the sources of the intellectual property that is seized in these situations. However India itself is now home to a number of large pharmaceutical companies, notably Dr Reddy's. These companies may seek full compensation in the event that their parents are taken in TRIPs compulsory licensing type situations by other states. Interestingly, the US Model BIT now includes a provision that the obligation to pay full compensation does not include TRIPs compulsory licensing situations.[79] The US might use the TRIPs to produce generic drugs for export to countries that do not have the capacity to do so themselves.

Finally, the scope of expropriation appears to have been narrowed in Western IIAs, such as the US Model BIT. Guarantees against expropriation of assets by host

[77] Art 31
[78] E.g. India-Columbia BIT Art 6.7
[79] Art 6.5

state governments are among the most crucial feature of international investment treaties. The 2004 Model treaty does not use the language of "tantamount to expropriation" seen in the earlier US treaty and which is contained in many US and European IIAs with capital importing states. Under the newer US Model instrument, claims of expropriation by foreign investors are subject to a three-factor balancing test which requires consideration of the economic impact of the government's action, the extent to which it interferes with distinct, reasonable investment-backed expectations and the character of the government action.[80] This strict assessment clearly allows greater discretion on the part of the host government to act in a manner that could interfere with the foreign investor's activities. In contrast, earlier understandings of indirect expropriation, contained in US and other IIAs were expansive, encompassing almost unlimited measures by home states that could undermine the profitability of the investor's assets.[81] The sustainability-focus of this change is clear: governments should be allowed greater freedom to enact measures that serve wider social purposes because such concerns are often more important than short-term economic targets. The effect of the narrowing is that foreign investors pursuing opportunities in the United States will have a much more difficult time proving expropriation and thereby obtaining compensation for governmental interference. This is a distinctly different environment than that faced by US companies operating in developing states in previous decades. While the change does demonstrate a welcome embrace of important policy goals, signifying a more mature, socially conscious approach to governance, unduly restricting the capacity to claim expropriation raises the risk of abusive over-regulation, arguably intended to suppress the economic activity of rivals.

[80] Art 6
[81] See e.g. R DOLZER AND C SCHREUER, PRINCIPLES OF INTERNATIONAL INVESTMENT LAW above n 8 at 92

VII. CONCLUSION: BALANCING HOME AND HOST STATE INTERESTS WITH SUSTAINABLE INVESTMENT

Developed country MNEs have thrived under global economic institutions established by the Pax Americana; the Bretton Woods trio of the WTO, IMF and World Bank, as well as the network of bilateral and regional treaties that have established a *de facto* body of international investment law. It remains to be seen what changes will be made to this legal regime by both the developed and emerging world in response to the rapid rise of FDI from emerging markets as well as the growing recognition that crucial non-economic goals must be served. The strong protections afforded foreign investors such as wide definitions of investment, guarantees against expropriation and access to international arbitration will be sought by emerging market MNEs just as America and Europe attempt to undermine them in their new roles as “host states” vulnerable to foreign competition. Developed countries appear to be pulling back on the liberal principles that facilitated 20th Century globalization, possibly even by exploiting the recent global financial crisis, terrorism, climate change mitigation and resistance to state-intervention in the economy as justifications for tighter control of inward FDI. Ironically concern for these important issues in the West, even where legitimate, may be the consequence of the very affluence that less restrained capitalism was able to provide. Still, rising MNEs from emerging markets should not expect to be able to transgress crucial goals of sustainable international investment, including protection of the environment as well as labour and national security, simply because their Western counterparts may have been oblivious to this in past. Whether or not the trend of de-liberalization discussed herein is an intentional strategy by Western states to undermine the competitiveness of emerging market firms is admittedly conjecture: it is unlikely that governments would admit to this openly, although such statements would undoubtedly satisfy some lobby groups (including both NGOs and MNEs). Some of the restrictive features discussed herein were in place during the period that might be described as the peak of global economic liberalism. Still it is clear that modern MNEs, including new entrants from the developing world, will face a different regulatory landscape than many of the most successful American, European and Japanese firms did in the previous century. It is important to recognize that local firms in developed states will, in many instances, face the same regulatory barriers as foreign firms seeking to enter these regions. However, many of the sustainability-focused impediments discussed above were not in place in the 20th Century. As such Western firms were able to establish dominance during a period in that was quite simply more conducive to economic activity. This first-mover advantage could allow Western MNEs to maintain dominance over their emerging market competitors. As the 20th Century labels of "home" and "host" states become meaningless in a world in which FDI flows from East to West tend towards equilibrium, a more balanced approach to the standards that inform the international regulation of FDI must ultimately be taken; one that is sensitive to public interest concerns that affect the citizens of host states and more flexible in terms of national policy space. This article has identified some areas of contention without attempting to formulate comprehensive solutions, but some potential resolutions could be briefly mentioned.

First, arbitration tribunals called upon to interpret some of the FDI-restrictive provisions in newer IIAs could consider employing a WTO GATT style chapeau test:[82] is the domestic measure actually a disguised restriction to foreign investment? This language is seen already in the US Model BIT in relation to its various public

[82] Art XX

policy exceptions.[83] This assessment could be combined with some kind of proportionality test,[84] along with an investigation into whether a less investment-restrictive method of achieving the stated policy aim was available. At the same time FDI promotion initiatives must include raising awareness of PRI schemes and what is required to obtain them. International arbitration must remain transparent, with reasonably restrictions for confidential information. ICSID's legitimacy could be further enhanced with a badly needed appeals mechanism, which may lend greater utility to the increasingly common dissent opinions. Lastly, and perhaps most creatively, some of the observed conflict between policies that are conducive to inward or outward FDI as well as attentive to principles of sustainability may be mitigated by the encouragement of more partnerships between foreign investors and local industry and or governments, with profits shared between all parties, as well as possibly with citizen groups. Asian-style Build Own Operate Transfer agreements (or 'BOOT's as they are often described) could act as suitable models in this regard.[85]

BOOTs are a form of project finance in which a the investor, which may be a foreign firm, designs and constructs a project or facility, such as a road or airport, is granted ownership over it by the host government and operates it as a business for a specified period. After this title to the project is transferred to the government at a previously agreed upon or market price. The core of the BOOT concept is the private investor's obligation to construct the facility and then operate it. Financing for the project can be provided by a combination of private investments and loans from many

[83] Art 8.3 c)
[84] S SCHILL, THE MULTILATERALIZATION OF INTERNATIONAL INVESTMENT LAW, (Cambridge University Press, 2009) at 378
[85] M Kumaraswamy and D Morris, *Build-Operate-Transfer-Type Procurement in Asian Megaprojects* 128 JOURNAL OF CONSTRUCTION ENGINEERING MANAGEMENT 93 (2002) (these projects are sometimes referred to also as BOTs, skipping the interim ownership stage)

sources, including private banks, however in many cases financing comes directly from the host government. Government involvement often insures that the investor will recover all their construction and operational costs. BOOTs and similar project finance structures were most popular for infrastructure projects in developing countries in the mid 1990s, but became much less so after the Asian financial crisis of the latter part of that decade. The BOOT structure requires close government involvement in the transaction, whereas a feature of economic governance of many countries in recent decades has been the de-coupling of government control over the economy in favour of a regulatory model. The usefulness of BOOTs has been therefore limited, at least in mature economies. Greater government participation in FDI, which appears to underpin many of the observed modifications of IIAs discussed above, could fit with this project finance structure.

BOOTs should also appeal to foreign investors. One of the reasons that BOOT arrangements have been so popular for infrastructure related projects in emerging Asian countries such as Thailand and Vietnam is because they mandate cooperation between the foreign investor and the host state partner, limiting some of the risk that the project will fail, while spreading profits if it is successful. There is also no need to extend national treatment to the pre-investment stage, as the terms of the project are set through negotiation with the local partner that provides the investment capital.[86] The government or local partner then recoups this cost by charging private purchasers for the use of the service, such as electricity or water services. While some BOOT arrangements have resulted in disputes, notably that related to the Dhabhol energy project in India, arbitration over the value of the investment is generally less likely because the transfer price has been pre-established.

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[86] M Sornarajah, *India,China and Foreign Investment* in M Sornarajah and J Wang eds. CHINA, INDIA AND THE INTERNATIONAL ECONOMIC ORDER (Cambridge University Press, 2010) at 146

It is conceivable that BOOT-type arrangements could become the customary mode of entry for emerging market MNEs seeking to do business in North America and Europe in certain infrastructure sectors, such as telecommunications, transportation and utilities. Such participation could address some of the concerns relating to national security and culture, and could facilitate the control of potentially harmful aspects of investment projects, such as environmental damage. Greater governmental involvement in the economy, as demonstrated by auto-sector and financial sector assistance may herald the suitability of BOOT-type approaches to FDI. BOOT arrangements have been recommended as a way of facilitating infrastructure improvements in the US, such as highways and bridges.[87] Such arrangements would provide emerging market partners with insight into the rising awareness of public interest issues, as well as how to obtain PRI and deal with the exigencies of more transparent investor-state dispute settlement, by giving them the assistance of a local partner. This might help address some of the dissonance between inward and outward FDI policies as well as safeguard vulnerable groups that have suffered in the past as a consequence excessive investment liberalization. Such project-specific arrangements may ultimately become the dominant mode of FDI in developed host states as they have been in Asia, paving the way towards uniformity as well as sustainability in international investment law, which for the time being appears to be weighed against the interests of emerging market firms seeking opportunities in the West. When this time arrives, (risking an irresistible extension of the conceit) the proverbial BOOT will truly be on the other foot.

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[87] E.g. T Friedman, ‘Imagined in America’ NEW YORK TIMES, 18 October 2011