

Introduction

International Investment Law in Transition

Karl P. Sauvant and José E. Alvarez

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The international investment regime is in a phase of transition.

Developed countries,¹ the principal exporters of capital, have driven the creation of this regime. Until recently, they accounted for about 90 percent of world outward foreign direct investment (FDI) flows; even at the end of the first decade of the twenty-first century, they accounted for more than four-fifths of such flows and of the world's outward FDI stock. Accordingly, the principal objectives of developed countries in creating the international investment regime have been, first and foremost, to give strong international investment law protection to investments made by their firms abroad and, second, to facilitate the entry and operations of their firms in other countries. Overall, an open, stable, predictable, transparent, and enforceable regime associated with the rule of law to govern the way in which foreign investors would be treated was meant to achieve these objectives. At the same time, such a regime was expected to contribute significantly to the flow of FDI to emerging markets, in this manner channeling to them a range of tangible and intangible resources—capital, employment, technology, skills, access to markets, etc.—that are central to development.

For investments by developed country firms into other developed countries, protections under international law were not considered as necessary, as the judicial systems of these host countries were seen to be strong enough to provide for the rule of law. In any case, a number of developed countries had concluded treaties of friendship, commerce, and navigation (FCNs) that assured their respective treaty traders as well as investors certain minimum standards of treatment, and these treaties were backed by the possibility of interstate dispute settlement, commonly before

¹ “Developed countries” are all members of the Organisation for Economic Co-operation and Development (OECD), minus Chile, Mexico, the Republic of Korea, and Turkey. “Emerging markets” are all economies that are not members of the OECD, plus Chile, Mexico, the Republic of Korea, and Turkey. “Developing countries” are all emerging markets that do not belong to the Commonwealth of Independent States and South-East Europe. See UNCTAD, *World Investment Report 2009: Transnational Corporations, Agricultural Production and Development* (Geneva: UNCTAD 2009) for individual members of these groups [UNCTAD, *WIR 2009*].

the International Court of Justice.² Enhancing investor protections beyond those assured by FCNs was considered particularly important for investments in developing countries and, after the demise of communism at the end of the 1980s, in the economies in transition.³ The governments of the capital-exporting countries—the home countries of most of the world’s multinational enterprises (MNEs)—accordingly sought additional international commitments from the governments of these developing and transition economies as treaties were seen as more credible commitment devices than the assurances made under national laws, which could be changed unilaterally by the legislative bodies of host countries.

The *facilitation* of cross-border investment was another matter, especially when it came to securing the right of establishment for foreign firms. Developed countries themselves had—and continue to have—a number of rules and regulations on their books that limit the entry and operations of foreign investors or otherwise made the investment climate less welcoming (e.g., by imposing performance requirements).⁴ Thus, developed countries pursued, first of all, the liberalization of the conditions for entry and establishment among themselves, which led to the adoption of the “Code of Liberalisation of Capital Movements”⁵ and the “Code of Liberalisation of Current Invisible Operations”⁶ by the Organisation for Economic Co-operation and Development (OECD) in 1961. The OECD also provided the framework for peer-review and peer-pressure in order to strengthen the treatment of foreign investors (e.g., through the adoption of a Decision on National Treatment in 1976⁷) and to reduce gradually limitations to the entry and operation of foreign investment. In 1986, most importantly, the right of establishment was agreed upon. Eventually, the pursuit of this objective was also extended to emerging markets. The United States led in obtaining national treatment at the preestablishment phase via treaty commitments, and this became one of the most important rights sought by capital-exporting states.⁸

Bilateral investment treaties (BITs) and, more recently, free trade agreements (FTAs) with substantial investment chapters, have been the instruments of choice to achieve these objectives, in particular since multilateral efforts in the World Trade Organization⁹ and the OECD had failed. While the first BIT was concluded by

² See, e.g., KENNETH VANDELDE, *UNITED STATES INVESTMENT TREATIES POLICY AND PRACTICE* 9–10 (Boston: Kluwer Law and Taxation 1992) [VANDELDE, *UNITED STATES INVESTMENT*].

³ FDI in the formerly communist countries of central and eastern Europe had been negligible.

⁴ See OECD, *Forty Years’ Experience with the OECD Code of Liberalisation of Capital Movements* (Paris: OECD 2002).

⁵ OECD, *Code of Liberalisation of Capital Movements* (Paris: OECD 1961); OECD, *Declaration on International Investment and Multinational Enterprises* (Paris: OECD 1976).

⁶ OECD, *Code of Liberalisation of Current Invisible Operations* (Paris: OECD 1961).

⁷ OECD, *National Treatment for Foreign-controlled Enterprises* (Paris: OECD 2009).

⁸ See the 1984 U.S. Model BIT. The text of the model BIT can be found in VANDELDE, *UNITED STATES INVESTMENT*, *supra* note 2 (reproducing the 1984 model BIT in full).

⁹ Governments concluded, however, the Agreement on Trade-Related Investment Measures (TRIMs) and the General Agreement on Trade in Services (GATS) in the framework of the WTO. The latter is particularly important as considerably more than half of FDI takes place in the services

Germany (with Pakistan) in 1959, the modern wave of BIT negotiations occurred in the 1990s, after the fall of the Berlin Wall. Originally, developed countries were the initiators of BITs, and most of the early BITs adhered to model agreements formulated by European capital exporters. Today, the proliferating number of investment agreements include an increasing number that are concluded between emerging markets. BITs, FTAs,¹⁰ along with more specialized multilateral agreements such as the Energy Charter,¹¹ constitute today's international investment law regime. This regime provides, first of all, distinct protections for the postentry treatment of foreign investors, including fair and equitable treatment, full protection and security, treatment otherwise in accordance with the international minimum standard, and prompt, adequate, and effective compensation in case of expropriation. Second, most modern investment agreements go beyond the old FCNs to provide investors, and not merely their home states, a direct right to enforce these protections through investor-state arbitration. More recently, a growing number of these instruments also seek to facilitate the entry and operations of investors, most importantly by granting national treatment at the preestablishment phase and most favored nation (MFN) treatment.

Given the origins of the investment regime, it is no surprise that many of the investment treaties now in existence reflect the priorities of the traditional home countries of MNEs. This corresponds to the reality that, until recently, the bulk of all FDI originated in the developed countries, with developing countries and (later) economies in transition being overwhelmingly the recipients of such capital flows. To this day, the regime focuses on the rights of investors and the responsibilities of their hosts. For the most part, therefore, the object and purpose of BITs and FTAs is precisely to secure strong rights for foreign investors and to establish correspondingly binding obligations on states that are enforceable under international law. The many facets of the investment regime have been described and analyzed in an ample literature and need therefore no further elaboration here.¹² Except as discussed

sector. Note should also be taken of the Multilateral Investment Guarantee Agency, established in 1988 in the framework of The World Bank Group.

¹⁰ The great majority of recent FTAs contain an investment chapter. See, e.g., Australia–United States Free Trade Agreement (AUSFTA), entered into force on January 1, 2005; and United States–Chile Free Trade Agreement, entered into force on January 1, 2004. U.S. FTAs are at <http://www.export.gov/FTA/index.asp>.

¹¹ Energy Charter Treaty (ECT), Part III, Arts 10–17, at <http://www.encharter.org>.

¹² It is for this reason that this volume does not include a chapter on the expectations of developed countries as regards the international investment regime. See, e.g., *INTERNATIONAL INVESTMENT LAW FOR THE 21ST CENTURY: ESSAYS IN HONOUR OF CHRISTOPH SCHREUER* (Christina Binder, Ursula Kriebaum, August Reinisch, & Stephan Wittich eds., New York: Oxford University Press 2009); *JESWALD W. SALACUSE, THE LAW OF INVESTMENT TREATIES* (New York: Oxford University Press 2010); *THE OXFORD HANDBOOK OF INTERNATIONAL INVESTMENT LAW* (Peter Muchlinski, Federico Ortino, & Christoph Schreuer eds., New York: Oxford University Press 2008); *PETER MUCHLINSKI, MULTINATIONAL ENTERPRISES AND THE LAW* (2d ed. New York: Oxford University Press 2007); *RUDOLF DOLZER & CHRISTOPH SCHREUER, PRINCIPLES OF INTERNATIONAL INVESTMENT LAW* (New York: Oxford University Press 2008); *AUGUST REINISCH, RECENT DEVELOPMENTS IN INTERNATIONAL INVESTMENT LAW* (Paris: A. Pedone 2009). For more critical views, see, e.g., Gus

below, the broad objectives of the capital-exporting countries that established the first BITs remain the same: namely to encourage the free flow of capital and promote the free market.

As the chapters contained in this volume suggest, the international investment regime is changing, however. It is no longer as simple as it once was to describe the regime's contours. The regime is far more complex than it once was, when developed countries and their goals could be seen as its linchpin. Five developments, in particular, emerge from this volume. First, a number of governments, including some that would once have been identified as "capital exporting," no longer consider *all* incoming or outgoing foreign investment flows to be a "good" thing for their economies, especially when these flows take the form of mergers and acquisitions (M&As). A second development has been the rise of MNEs from emerging markets, including a growing number that are state-controlled. A third development has been the greater emphasis being put, particularly since September 11, on "national interest" or "essential security" concerns. A fourth development has been the relatively sudden spurt in public investor-state disputes and the resulting flow of arbitral awards. Finally, there has been greater empirical attention paid to the relationship between investment agreements and the flow of capital.

There continues to be broad consensus that free capital flows are beneficial to economic growth and development, and that incoming FDI contributes to it regardless of whether it takes the form of greenfield investment or M&As.¹³ This view has led to the liberalization of FDI regulations¹⁴ and the establishment of investment promotion agencies¹⁵ in virtually every country of the world. While this view certainly continues to hold sway and, on balance and with qualifications, is supported

VAN HARTEN, *INVESTMENT TREATY ARBITRATION AND PUBLIC LAW* (New York: Oxford University Press 2007); José E. Alvarez, *The Evolving Foreign Investment Regime*, IL POST, American Society of International Law, 2008, at <http://www.asil.org/ilpost/president/pres080229.html> [Alvarez, *The Evolving Foreign Investment Regime*]; José E. Alvarez, *The Once and Future Foreign Investment Regime*, in *LOOKING TO THE FUTURE: ESSAYS ON INTERNATIONAL LAW IN HONOR OF W. MICHAEL REISMAN* (Mahnoush Arsanjani, Jacob Katz Cogan, Robert D. Sloane, & Siegfried Wiessner eds., forthcoming 2011); MUTHUCUMARASWAMY SORNARAJAH, *THE INTERNATIONAL LAW OF FOREIGN INVESTMENT* (2d ed. Cambridge: Cambridge University Press 2004); and Muthucumaraswamy Sornarajah, *A Coming Crisis: Expansionary Trends in Investment Treaty Arbitration*, in *APPEALS MECHANISM IN INTERNATIONAL INVESTMENT DISPUTES* 39–80 (Karl P. Sauvant with Michael Chiswick-Patterson eds., New York: Oxford University Press 2008).

¹³ UNCTAD, *World Investment Report 2000: Cross-border Mergers and Acquisitions and Development* (New York and Geneva: UNCTAD 2000) [UNCTAD, *WIR 2000*]; Steven Globerman & Daniel Shapiro, *Modes of Entry by Chinese Firms in the United States: Economic and Political Issues*, in *INVESTING IN THE UNITED STATES: IS THE US READY FOR FDI FROM CHINA?* (Karl P. Sauvant ed., Cheltenham: Edward Elgar 2010) [Sauvant, *Investing in the United States*].

¹⁴ UNCTAD determined that, during 1992 to 2008, 2650 changes of FDI laws took place, 90 percent of them in the direction of creating a more welcoming framework for FDI; see UNCTAD, *WIR 2009*, *supra* note 1.

¹⁵ The World Association of Investment Promotion Agencies (WAIPA), established in 1995, had 249 members agencies from 157 countries at the beginning of 2010, at <http://www.waipa.org> (last visited Mar. 31, 2010). According to Millennium Cities Initiative and the Vale Columbia Center on Sustainable International Investment, *Handbook for Promoting Foreign Direct Investment in Medium-Size,*

by the evidence,¹⁶ M&As, the principal form of market entry for foreign investors in developed countries and an increasingly important form of market entry also in emerging markets, are considered at times with more reservations. The reasons include that M&As merely represent a change in ownership and are often accompanied by restructuring (and hence often involve a reduction in employment if not closing down some production capacities), while greenfield investments create new productive capacity.¹⁷ Moreover, when cross-border M&As target firms in sensitive sectors (which can range from military hardware to critical infrastructure) or national champions, the political reaction can be particularly strong.¹⁸ In countries such as the United States, there is also continuing discomfort with outgoing investment flows that some see as being responsible for an export of jobs, irrespective of empirical evidence to the contrary.¹⁹ Such political concerns, particularly potent in the wake of the ongoing economic crisis and historically high levels of unemployment, has led to recent threats by some in the U.S. Congress to block the approval of BITs or FTAs or even to withdraw from existing agreements, including the North American Free Trade Agreement (NAFTA).²⁰

Adverse reactions to incoming investment can be even stronger when the acquirer is a firm headquartered in an emerging market.²¹ FDI flows from emerging markets have indeed become important, having reached US\$351 billion in 2008, around

Low-Budget Cities in Emerging Markets 1 (New York: MCI and VCC 2009), there are now an estimated 8000 national, regional, and city level investment promotion agencies in existence.

¹⁶ See, e.g., THEODORE H. MORAN, *HARNESSING FOREIGN DIRECT INVESTMENT FOR DEVELOPMENT: POLICIES FOR DEVELOPED AND DEVELOPING COUNTRIES* (Washington: Center for Global Development 2006); *DOES FOREIGN DIRECT INVESTMENT PROMOTE DEVELOPMENT?* (Theodore H. Moran, Edward M. Graham, & Magnus Blomstroem eds., Washington: IIE 2005); John H. Dunning, *Re-evaluating the Benefits of Foreign Direct Investment*, 2 *TRANSNATIONAL CORPORATIONS*, 23–51 (1994); and JOHN H. DUNNING & SARIANNA M. LUNDAN, *MULTINATIONAL ENTERPRISES AND THE GLOBAL ECONOMY* (Cheltenham: Edward Elgar Publishing 2008) [Dunning & Lundan, *Multinational Enterprises*]. However, it should be noted that national policies are important to maximize the positive effects of FDI and minimize any negative ones.

¹⁷ The advantages and disadvantages of M&As versus greenfield FDI is discussed, in great detail, in UNCTAD, *WIR 2000*, *supra* note 13; Steven Globerman & Daniel Shapiro, *Modes of Entry by Chinese Firms in the United States: Economic and Political Issues*, in Sauvant, *Investing in the United States*, *supra* note 13.

¹⁸ See, e.g., the attempted acquisition of Unocal (United States) by CNOOC (China) or the rumored acquisition attempt of Danone (France) by PepsiCo (United States).

¹⁹ For the United States, see, e.g., Theodore H. Moran, “American Multinationals and American Economic Interests: New Dimensions to an Old Debate” (Washington: Peterson Institute of International Economics, Working Paper No. 09-3, 2010).

²⁰ See, e.g., Doug Palmer, *U.S. Lawmakers Launch Push to Repeal NAFTA*, *WASHINGTON POST*, Mar. 4, 2010, at <http://www.reuters.com/article/2010/03/04/us-usa-congress-nafta-idUSTRE6233MS20100304>. See generally Report of the Subcommittee on Investment of the Advisory Committee on International Economic Policy Regarding the Model Bilateral Investment Treaty (indicating the wide disparity of views concerning the future of the U.S. Model BIT), at <http://www.state.gov/e/eeb/rls/othr/2009/131098.htm> [Report of the Subcommittee].

²¹ See, e.g., the discussions surrounding the acquisition of Arcelor by Mittal, Lenovo’s acquisition of the PC division of IBM, and Tata’s bid for Corus; see Karl P. Sauvant, *Driving and Countervailing Forces: A Rebalancing of National FDI Policies*, in *YEARBOOK ON INTERNATIONAL INVESTMENT LAW*

seven times the average of *world* FDI outflows during the first half of the 1980s.²² On average, emerging markets accounted for 11 percent of global FDI outflows during 1995–2000; that share rose to 14 percent during 2003–2008. In 2008 alone, emerging markets accounted for almost one-fifth of global outflows.²³ These aggregate data are, of course, a reflection of the growth in foreign assets of MNEs headquartered in emerging markets (of which there are over 20,000²⁴), and whose value has risen faster than the assets of their competitors headquartered in the industrialized world. In 2007 (the latest year for which these data are available), the foreign assets of the one hundred largest MNEs from developing countries rose by 34 percent over the previous year, while the corresponding growth rate for MNEs worldwide (overwhelmingly from industrialized countries) was only 16 percent.²⁵

This rise of MNEs headquartered in emerging markets changes the global FDI landscape. It remains to be seen whether the developed countries and their MNEs will accept these new competitors on equal terms (as the investment treaties demand), or whether they will seek to impose new restrictions on entry, particularly when it takes the form of M&As in high-profile sectors. The integration of these new global players is a difficult process, especially when they are different or operate differently from established MNEs. One of these differences is that, in the case of a number of the new home countries, the most important players include state-controlled entities, in particular state-owned enterprises (and, probably increasingly, SWFs). In the case of China (an extreme case), some 80–90 percent of outward FDI flows and stock are controlled by state-controlled enterprises.²⁶ This aspect has given rise to special concerns (justified or not) about, for example, whether state-controlled entities pursue noncommercial objectives when investing abroad, benefit from nontransparent favorable government treatment, or lack proper governance and accountability structures. As a result, some countries, such as Australia, Canada, and the United States, have become more cautious about sovereign FDI.²⁷

AND POLICY, 2008–2009 (Karl P. Sauvant ed., New York: Oxford University Press 2009) [Sauvant, INVESTMENT YEARBOOK 2009].

²² See UNCTAD, *WIR 2009*, *supra* note 1; FOREIGN DIRECT INVESTMENTS FROM EMERGING MARKETS: THE CHALLENGES AHEAD (Karl P. Sauvant & Geraldine McAllister, with Wolfgang Maschek eds., New York: Palgrave Macmillan 2010). In fact, in 2008, outward FDI flows from China were higher than the average of world FDI flows during the first half of the 1980s.

²³ Developing countries alone (excluding the Commonwealth of Independent States and the countries of South-East Europe) accounted for 16 percent of global outflows in 2008; see UNCTAD, *WIR 2009*, *supra* note 1.

²⁴ *Id.* at 222–23.

²⁵ *Id.* at 23 and 19. To a certain extent, of course, this reflects the lower level of assets from which the former started as outward investors, compared with the latter.

²⁶ See Leonard K. Cheng & Zihui Ma, “China’s Outward FDI: Past and Future” (July 2007) at 15, at http://www.nber.org/books_in_progress/china07/cwt07/cheng.pdf. It should be noted that a number of developed country state-owned entities undertake FDI as well; in fact, their outward FDI stock is higher than that of their counterparts from emerging markets.

²⁷ For a review, see Karl P. Sauvant, *Driving and Countervailing Forces*, in Sauvant, INVESTMENT YEARBOOK 2009, *supra* note 21.

Concerns about “national interest,” “national security,” or “essential security interests” have become more important in recent years, with these concepts not always clearly distinguishable from each other, and individual countries focusing on different aspects of them. For example, in the post–September 11 United States, essential security FDI related concerns have achieved greater saliency and renewed concerns over foreign control over critical infrastructure. Such concerns are particularly evident when, in the case of M&As, the prospective acquirer is headquartered in a country that may be considered a strategic competitor of the United States, as is China, or is based in a country whose political allegiances are viewed with some suspicion (e.g., some Islamic states). For Western and Central European countries, “national security” concerns may reflect political fears of domination by investors from some countries (e.g., Russia or perhaps China) or concerns of threats to the “national interest” posed by foreign takeovers of national champions in key industries. For Russia, in turn, “national interest” or “security” concerns may emerge from investments related to the exploitation of natural resources or military technology. For some emerging markets, such as China, “national security” is being defined primarily in terms of economic development and hence focuses on strategic industries seen as crucial to continuing growth. And in yet other contexts, such as Argentina in the wake of its 2001–2002 economic crisis, “essential security” concerns have come to be associated with that nation’s right to take “emergency” actions in the wake of domestic turmoil.²⁸ What is common to all these approaches is that the underlying security threat to the nation is intentionally left undefined. This is not surprising, as governments typically want to have the flexibility to define “national interest” and similar concepts in relation to specific circumstances, without being straitjacketed by preestablished definitions and commitments.

The number of treaty-based international investment disputes has risen dramatically in recent years, with more than half of the 317 known arbitration cases having arisen between the beginning of 2004 and the end of 2008.²⁹ These disputes involve both developed countries and emerging markets, and they can lead to substantial awards against respondent countries.³⁰ Both the number of disputes as well as the types of claims being made in them are giving rise to second thoughts on the part of BIT and FTA signatories, many of which did not expect the types of challenges to government regulation or even judicial actions that are now emerging in the course of ICSID, UNCITRAL, or other arbitrations. Complaints that state parties to investment treaties are increasingly put on the defensive in investor-state claims and that

²⁸ On Argentina, see, e.g., José E. Alvarez & Kathryn Khamsi, *The Argentina Crisis and Foreign Investors: a Glimpse into the Heart of the Investment Regime*, in Sauvant, INVESTMENT YEARBOOK 2009, *supra* note 21 at 379–478. Note that the lessons of Argentina have apparently been taken to heart by others; see, e.g., the latest Canadian Model BIT (permitting “prudential” measures with respect to the banking sector); the latest U.S. BIT (self-judging essential security).

²⁹ UNCTAD, *Latest Developments in Investor-state Dispute Settlement*, 1 IIA MONITOR 3 (2009).

³⁰ CME Czech Republic B.V. v. Czech Republic (2003) UNCITRAL, at http://ita.law.uvic.ca/documents/CME-2003-Final_001.pdf (awarding CME Czech Republic B.V. US\$269,814,000 in damages for breach of an investment treaty).

even when states win the underlying disputes the threat of litigation produces an untoward “regulatory chill” has become a common refrain among a number of NGOs, including in developed states. There is also a perception that, although the goal of the investment regime was to promote harmonious and predictable rules, investor-state arbitral decisions have not led to consistent international investment law and have even produced inconsistent rulings arising under strikingly similar facts.³¹ The number of high-profile investor-state decisions and the adverse attention drawn to a number of them that implicate policy questions have also undermined the contention that international arbitrations will successfully “depoliticize” such matters. For all these reasons, governments are becoming more skeptical of their decisions to delegate the right to initiate investment disputes to private third-party beneficiaries and more concerned about the consequences of such delegation on their continuing right to regulate in the public interest.³²

Finally, there are emerging challenges to one of the purposes of international investment agreements, namely the goal of increasing FDI flows, especially to emerging markets, with the help of investment treaties. Empirical research to date has not established a clear relationship between such agreements and FDI flows.³³ In some ways, this is not surprising, as factors relating to host countries’ economies (especially market size and growth, the quality of the infrastructure, skills, and innovatory capacity) are by far the most important FDI determinants.³⁴ It is also not surprising given the fact that most BITs and FTAs were drafted to establish an enabling regulatory framework premised on deregulation and the free market. To this end, most BITs and FTAs do not include or anticipate investment promotion services or agencies and, indeed some treaties, such as those barring certain forms of performance requirements, do not permit governmental measures (such as tax breaks) often associated with such requirements, such as obligations to export at particular levels.³⁵ Although BITs and FTAs presume that the removal of governmental barriers to free capital flows would enhance such flows, the treaties

³¹ For a discussion of Argentina cases, see José E. Alvarez & Kathryn Khamsi, *The Argentina Crisis and Foreign Investors: a Glimpse into the Heart of the Investment Regime*, in Sauvant, INVESTMENT YEARBOOK 2009, *supra* note 21.

³² As is suggested by the United States’ divisive debates over the content of its U.S. Model BIT. See Report of the Subcommittee, *supra* note 20.

³³ The most important studies are contained in THE EFFECT OF TREATIES ON FOREIGN DIRECT INVESTMENT: BILATERAL INVESTMENT TREATIES, DOUBLE TAXATION TREATIES, AND INVESTMENT FLOWS (Karl P. Sauvant & Lisa E. Sachs eds., New York: Oxford University Press 2009). As a recent study observed: “the literature on BITs is stalemated on whether they actually increase FDI...” (see Jennifer L. Tobin & Marc L. Busch, *A Bit Is Better than a Lot: Bilateral Investment Treaties and Preferential Trade Agreements*, 62 WORLD POLITICS 1–42 (2010)). The same study observed however also that BITs might make free trade agreements more likely and, in this manner, indirectly influence FDI flows.

³⁴ For a discussion of the FDI determinants, see UNCTAD, *World Investment Report 1998: Trends and Determinants* c. IV (Geneva: UNCTAD 1998); and Dunning & Lundan, *Multinational Enterprises*, *supra* note 16.

³⁵ See also the TRIMs Agreement.

themselves were not necessarily intended to promote such flows, at least as far as some capital-exporting countries are concerned.³⁶ They were, at best, signaling devices to encourage investors to seek out those host countries with a favorable investment climate. But if the signaling function has not produced the intended effect, it is also not surprising that some governments are less inclined to make further investor-protective commitments.

Some of these developments can influence the national and international regulation of foreign investment, and they can also easily reinforce each other. For example, a Chinese (or Russian or Arab) state-controlled entity acquiring a U.S. corporation in a sector considered to be sensitive is likely to be considered different from a green-field investment undertaken by a privately owned French (or, for that matter, Brazilian) company in a traditional part of the economy.

These developments also complicate the picture because they are beginning to blur the traditional distinction made between developed “capital-exporting” and developing “capital-importing” countries. When both the United States and China are as they are today leading capital-exporting and capital-importing nations, this usual distinction carries considerable less weight.³⁷ To be sure, developed countries have always been the principal host countries for FDI—but this FDI originated in other developed countries, and any issues could be discussed and settled in the framework of the OECD and its instruments. What is new for these countries is the rising influx of FDI from emerging markets. Emerging markets, in turn, continue to remain primarily host countries,³⁸ but the rise of their own MNEs is likely to bear on the evolution of the international investment law regime. Governments in a growing number of emerging markets are now paying more attention to their status as

³⁶ As Vandevelde observed for the United States: “When the BIT program was inaugurated in the Carter Administration, the United States had seen the BITs as a means of building a body of state practice consistent with its view of customary international law while protecting existing stocks of investment. In part because of concerns that labor otherwise would oppose the agreements, United States BIT negotiators initially had made clear not only to potential United States BIT partners but to Congress as well that there was no evidence that BITs would lead to increased outward investment flows. By the early 1990s, however, the promotion of democracy and market economics in the transitional economies was a major foreign policy objective and BITs were regarded as a means of promoting outward investment.” As this observation suggests, the promotion of FDI was not a goal when the U.S. BITs program began in the 1970s. However, over time the argumentation changed, and eventually BITs were justified in the United States as a means of investment promotion. See KENNETH J. VANDELDELDE, *U.S. INTERNATIONAL INVESTMENT AGREEMENTS* 45 (New York: Oxford University Press 2009).

³⁷ See, e.g., José E. Alvarez, *Contemporary Foreign Investment Law: An “Empire of Law” or the: “Law of Empire”?*, 60 ALABAMA LAW REVIEW (2009).

³⁸ The inward FDI flows of emerging markets were roughly an average of US\$600 billion during 2006–2008, while their outward flows during the same period were an average of US\$300 billion; the inward FDI stock of emerging markets was US\$4.7 trillion in 2008, compared with an outward stock of US\$2.6 trillion; see UNCTAD *WIR 2009*, *supra* note 1.

capital exporters, as their firms, some of which have become major players,³⁹ invest abroad.

Nowhere is this more apparent than in the BITs concluded by China. Chinese BITs began as relatively weak investor protection devices but began to move in the direction of the strongly investor-protective U.S. model of 1984, as Chinese investors invested in significant numbers and amounts abroad.⁴⁰ Most recently, however, Chinese BITs and FTAs have been emulating the United States in the opposite direction, that is, they have adopted some of the more sovereign-protective provisions evident in U.S. investment agreements concluded after 2004.⁴¹ At the same time, neither the United States nor China shows any inclination to revisit their already concluded agreements of the past in order to make these consistent with their more recently concluded treaties. This reality—the existence of old and more recent investment treaties—adds to the complexity of the investment regime. At the same time, the extent to which the two leading capital exporters and importers of the world, China and the United States, are now concluding separate investment agreements with increasingly similar provisions and are even negotiating one as between themselves, gives rise to the hope that, eventually, and despite the proliferation of BITs and FTAs, the “spaghetti soup” of agreements will eventually coalesce around agreed terms for protecting both investors and the governments’ power to regulate.⁴²

As a result of these developments, a number of countries (especially—but not only—developed ones, including all those mentioned earlier) have strengthened their capacity to screen FDI projects, typically focused on M&As. In the case of the United States, the number of notifications to the Committee on Foreign Investment in the United States (CFIUS) and the number of investigations rose, respectively, from 55 and 1 in 2001 to 165 and 22 in 2008. In 2008, one-eighth of CFIUS filings led to investigations.⁴³ While the number of notifications declined in 2009,⁴⁴ perhaps close to half of them may have become investigations.⁴⁵ It should be noted that

³⁹ The four BRIC nations (Brazil, Russia, India, China) alone accounted for roughly a third of FDI outflows from emerging markets during 2006–2008; *see id.*

⁴⁰ Alvarez, *The Evolving Foreign Investment Regime*, *supra* note 12.

⁴¹ *Id.*; *see also* Kenneth J. Vandavelde, *A Comparison of the 2004 and 1994 U.S. Model BITs: Rebalancing Investor and Host Country Interests*, in Sauvant, *INVESTMENT YEARBOOK 2009*, *supra* note 21, at 283–316 and discussion above.

⁴² *See* Alvarez, *The Evolving Foreign Investment Regime*, *supra* note 12.

⁴³ *See* Karl P. Sauvant, *Is the United States Ready for FDI from China? Overview*, in Sauvant, *Investing in the United States*, *supra* note 13.

⁴⁴ The decline may have been the result of the lower number of cross-border M&As into the United States on account of the crisis and the decline of FDI inflows; the number of M&As fell from 1292 in 2007 to 1090 in 2008 and to 256 in the first half of 2009 (*see* UNCTAD, *WIR 2009*, *supra* note 1, annex table B.5, at 270), while FDI flows declined from US\$316 billion in 2008 to US\$136 billion in 2009. It is not known how many cross-border M&As that were intended or initiated but did not go forward because of the new regulatory framework in the United States.

⁴⁵ Mark E. Plotkin & David N. Fagan, *Foreign Direct Investment and U.S. National Security: CFIUS under the Obama Administration*, 24 *COLUMBIA FDI PERSPECTIVES* (June 7, 2010).

these types of examinations of M&As (in the United States and elsewhere) are typically not subject to judicial review but rather take place within the “black box” of determinations within the relevant government agencies, thereby reducing the transparency of the decision-making process. More generally, the countries worldwide that introduced during 2006–2007 at least one change making their investment climate less welcoming for foreign investors accounted for 40 percent of world FDI flows.⁴⁶

The direction of such changes at the national level toward a more circumscribed treatment of foreign investors and more policy space for governments is also beginning to inform changes in international investment agreements (IIAs). In particular, leading countries such as Canada and the United States are now concluding BITs and FTAs with more limited protections for investors and greater scope for governmental action, including through broad exceptions. Changes to U.S. BITs include a narrower definition of “fair and equitable treatment” and reduced scope for investors to claim that they have been the victim of a regulatory taking.⁴⁷ Canada has opted for an ample list of general exceptions from BIT/FTA protections inspired by those contained in Article XX of the General Agreement on Tariffs and Trade (GATT).⁴⁸ These changes lessen the risk of unpredictably broad interpretations of investment protections by investor-state arbitrators. Most importantly, some countries, such as the United States, are turning to a “self-judging” essential security exception intended to oust certain disputes, at the option of the respondent state, from investor-state arbitration altogether. Given the fact that “essential security” is left undefined, such an exception from arbitrability potentially undermines the entire edifice of international investment law. Also indicative of the change in perspective even among erstwhile strong supporters of the investment regime is the special treatment that state-controlled entities (SWFs and state-owned enterprises) as one class of foreign investors are now receiving, not only at the national level,⁴⁹ but also through such instruments as the Generally Accepted Principles and Practices⁵⁰ for SWFs (elaborated under the aegis of the International Monetary Fund

⁴⁶ See Karl P. Sauvant, *Driving and Countervailing Forces*, in Sauvant, *INVESTMENT YEARBOOK 2009*, *supra* note 21 at 240.

⁴⁷ U.S. Model BIT 2004, at <http://www.state.gov/documents/organization/117601.pdf>.

⁴⁸ Canadian Model BIT 2004, at <http://www.international.gc.ca/trade-agreements-accords-commerciaux/assets/pdfs/2004-FIPA-model-en.pdf>; General Agreement on Tariffs and Trade, http://www.wto.org/english/docs_e/legal_e/06-gatt_e.htm.

⁴⁹ The Foreign Investment and National Security Act of the United States, e.g., establishes a presumption that M&As by state-controlled entities are subject to an investigation by the Committee on Foreign Investment in the United States, unless specifically exempted from it; see Foreign Investment and National Security Act of 2007 (FINSA), Pub. L. 110-49 (2007). For a discussion, see David N. Fagan, *The US Regulatory and Institutional Framework for FDI*, in Sauvant, *Investing in the United States*, *supra* note 13, at 45–84.

⁵⁰ See International Working Group of Sovereign Wealth Funds, “Sovereign Wealth Funds, Generally Accepted Principles and Practices (GAPP)—Santiago Principles” (2008), at <http://www.iwg-swf.org/pubs/gapplist.htm>.

(IMF) and the OECD Guidelines for Recipient Country Investment Policies Related to National Security.⁵¹

This reevaluation of the costs and benefits of FDI and the regulatory framework governing it is reducing the openness, stability, predictability, transparency, and enforceability of the national and international investment framework. Finding the proper balance between the need of investors for the rule of law and fairness of process, on the one hand, and governments' desire to preserve their policy space to pursue their legitimate interests, on the other, is the central challenge that the international investment law regime faces—in the interest of its own legitimacy.

This volume examines a number of issues that bear on the future evolution of the investment regime against this background. Because the current regime still reflects, despite its evolving nature, the expectations of developed countries, this volume focuses on some of the expectations and concerns held by developing countries, nongovernmental organizations and other stakeholders. It also explores ideas for the future transition of the current regime. The concluding chapter of this volume, which distills much of what was discussed at the Second Columbia International Investment Conference entitled, "What's New in International Investment Law and Policy?,"⁵² is of particular interest as it captures the richness of this discussion in terms of a number of the key themes that emerged from it.

It remains to be seen how the various expectations regarding the evolution of the international investment law and policy regime, the interests that are associated with them, and the tensions that are inherent in the position of countries as host and home countries will eventually settle into a new balance of rights and responsibilities of the various stakeholders in the regime. Moreover, it is a balance that is likely to shift as new expectations and interests (e.g., regarding the environmental, social, developmental, and governance sustainability of FDI) come to the fore and assert themselves. In that sense, the international investment regime is always in transition—and we hope that this volume makes a contribution toward a better understanding of some of the challenges that it faces.

⁵¹ See OECD, "Guidelines for Recipient Country Investment Policies relating to National Security," Recommendation adopted by the OECD Council on May 25, 2009, at <http://www.oecd.org/dataoecd/11/35/43384486.pdf>.

⁵² For details, see Acknowledgments in this book.