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Emerging markets and the international investment law and policy regime

by

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Abstract

Multinational enterprises, including those headquartered in emerging markets, operate within the confines of the international investment law and policy regime. On the one hand, this regime prescribes the extent to which these firms can invest abroad, and it provides various protections for their investments. On the other hand, the regime prescribes increasingly that the operations of these firms need to be conducted in a responsible manner. The relevant standards are formulated by governments. This chapter discusses the rise of the international investment regime, its substantive and procedural content and how and why the regime has changed over time, paying special attention to issues relating to emerging markets. Accordingly, the focus of this chapter is on the actions of governments, illustrating in the process of discussions how emerging market multinational enterprises can both benefit from the regime and how they are constrained by it.

Introduction

All firms operating abroad are subject to the laws and regulations of their host countries, including the rights and responsibilities that these rules confer upon them. This includes the foreign affiliates of firms headquartered elsewhere. National rules, in turn, are complemented by international investment agreements (IIAs) and other instruments that, together, constitute the

international investment law and policy regime that governs the activities of multinational enterprises (MNEs) and their foreign affiliates. This regime sets the parameters for national regulatory frameworks relating to foreign direct investment (FDI) and for the actions of enterprises. This chapter focuses on the international investment regime from the perspective of emerging markets.¹

The structure of the chapter is as follows. It begins with delineating the universe of international investment rules—which consists of both binding and non-binding rules, the former primarily addressed to governments, the latter to MNEs—before reviewing the substantive and procedural coverage of these rules. This coverage, as the next section shows, has changed over time, for a number of reasons and with various implications. Specifically, the growth of outward FDI from emerging markets is leading to a new constellation of interest of these economies: their defensive approach to the regime as host countries (which focuses on preserving policy space and avoiding the risk of arbitral disputes) is being balanced by an offensive approach as home countries (which focuses on protecting and facilitating their firms' investments abroad). At the same time, MNEs are increasingly being expected to conduct their operations in a responsible manner, in particular by observing a number of international instruments that define responsible business conduct.

A. The universe of investment rules

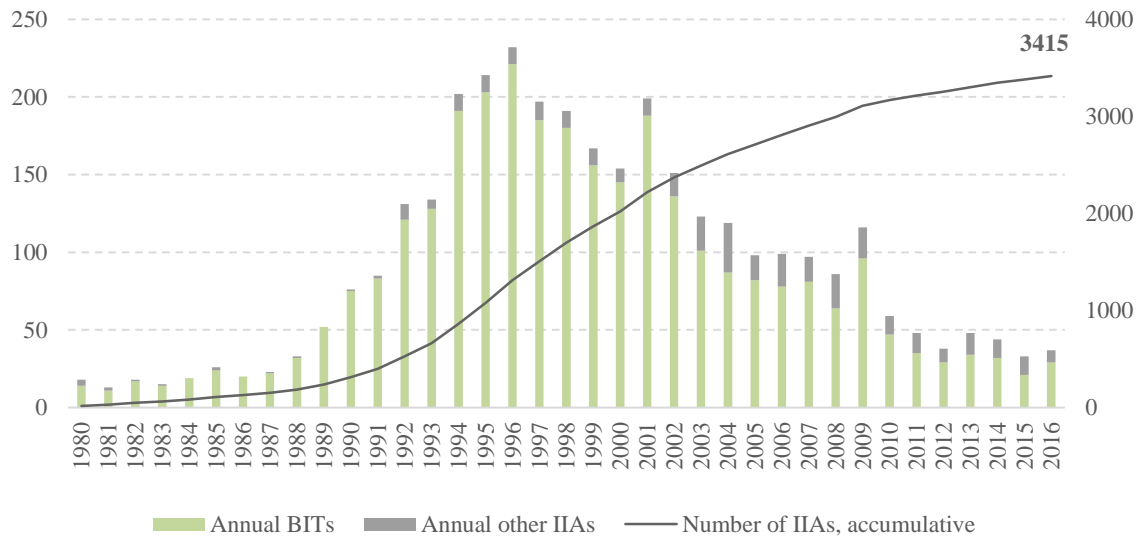
While MNEs and their foreign affiliates are subject to national laws and regulations, they are also endowed with additional rights by *binding* international investment agreements, that is, treaties that address significant issues related to the activities of MNEs and their foreign affiliates.² These treaties are concluded between and among governments at the bilateral, regional, inter-regional, and global (multilateral) levels. As of the end of 2016, 3,324 of such treaties had been concluded

(UNCTAD, 2017: 11),³ involving 237 countries and territories out of the 258 listed on UNCTAD's website.⁴

The great majority (2,957) of these treaties are bilateral investment treaties (BITs). The first BIT was concluded in 1959 between a developed and a developing country, namely Germany and Pakistan, entitled “Treaty for the Promotion and Protection of Investments (with Protocol and exchange of notes)”.⁵ But it was only in the 1990s that their number rose substantially (figure 1). Eventually, economies in transition also concluded BITs with developed and developing countries, as did developing countries and economies in transition among themselves. At the end of 2016, 40 percent of all BITs were between developed and developing countries, 13 percent between developed countries and transition economies, 8 percent between developing countries and transition economies, 28 percent between developing countries, and 3 percent between transition economies; there are also a few BITs between developed countries (8 percent).⁶

Figure 1

Trends in IIAs signed, 1980-2016



Source: UNCTAD's Investment Policy Hub, available at <http://investmentpolicyhub.unctad.org/>.

Apart from BITs, 367 other treaties (end 2016) contain significant binding provisions regarding the activities of MNEs and their foreign affiliates. These “other IIAs” include, among others, bilateral free trade agreements,⁷ regional trade and investment agreements,⁸ sector-specific agreements,⁹ and the WTO’s General Agreement on Trade in Services (GATS) and the WTO’s Trade-Related Investment Measures (TRIMs) agreement.¹⁰ The focus of the investment chapters of these other IIAs (except the WTO’s) typically is the same as that of BITs, except that these chapters are normally part of agreements that cover a number of additional subject matters.

Finally, there are also a number of other instruments that deal with MNEs and their foreign affiliates and have been adopted by governments. However, these instruments are *non-binding*. Most prominent among them are first, the Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy of the International Labour Organization (ILO),¹¹

negotiated and adopted by home and host country governments and global representative bodies of employers and workers; second, the Guiding Principles on Business and Human Rights of the United Nations;¹² and third, the Guidelines for Multinational Enterprises of the Organisation for Economic Co-operation and Development (OECD),¹³ developed primarily by governments of the home countries of MNEs, to guide the behavior of their companies in host countries.¹⁴ These instruments focus largely on the responsibilities of international investors, complementing in this manner the focus of IIAs on protection. However, as these instruments are not legally binding, their application depends on the good will of the actors involved. Further, they are as a rule not subject to a binding dispute-settlement process.

But these three instruments have an implementation and compliance monitoring mechanism that can increase their effectiveness. Thus, the OECD Guidelines—adhered to by 48 governments (35 OECD members and 13 other economies)—have a long-standing implementation process that includes National Contact Points (NCPs) for responsible business,¹⁵ to deal with complaints against MNEs and their foreign affiliates for non-compliance with the Guidelines. Complaints can be raised by individuals, communities and civil society groups (particularly trade unions and non-governmental organizations (NGOs)) in any country in which a firm has a link to a MNE in any of the 48 adhering countries, regardless of whether that link is through affiliates or other arrangements of global value chains. In fact, even if an MNE is headquartered in a non-adherent country but also listed on a stock exchange of an adherent country, it is expected to adhere to the OECD Guidelines (see the examples in box 1).

Box 1. Soft law with hard consequences: three examples

Soft law, especially if combined with follow-up mechanisms, can have—and has—consequences for the behavior and strategies of MNEs. A prime example is the OECD Guidelines for Multinational Enterprises (which, as discussed in the text, also cover the substance of the ILO

MNE Declaration and the Guiding Principles on Business and Human Rights of the United Nations). The Guidelines are implemented primarily through National Contact Points (NCPs). As can be seen from the examples below, the OECD Guidelines can have concrete implications in case of non-observance.

1. Canada Tibet Committee vs. China Gold Int. Resources

In January 2014, the Canada Tibet Committee requested the Canadian NCP to review a case alleging that China Gold Int. Resources (China Gold), a Chinese state-owned enterprise also listed on the Toronto stock exchange, had breached various provisions of the OECD Guidelines. Specifically, the Canada Tibet Committee alleged that China Gold had breached general policies, disclosure, human rights, employment and industrial relations, and environment provisions of the Guidelines. It was a major landslide burying 83 mine workers alive in the Gyama Copper Polymetallic Mine in Central Tibet at one of China Gold's wholly-owned subsidiaries, the Tibet Huatailong Mining Development Ltd, that triggered the request. In addition to the allegations of inadequate environmental due diligence leading to environmental degradation and loss of life, and other health and safety issues, China Gold was accused of not respecting human rights through discriminatory hiring practices, forced evictions, the expropriation of land, violations of freedom of expression and information, and of the failure to disclose accurate information on the environmental, health and safety risks to local communities.^a

China Gold was unwilling to enter into mediation after multiple requests of the NCP. Consequently, the NCP concluded that China Gold had not *prima facie* demonstrated that it was operating consistently with the OECD Guidelines. The NCP's final statement of April 8, 2015 included six recommendations designed to promote dialogue and disclosure:^b

^a See a summary of the case by the OECD at <https://mneguidelines.oecd.org/database/instances/ca0012.htm>.

^b See the "Final statement on the request for review regarding the operations of China Gold International Resources Corp. Ltd., at the Copper Polymetallic Mine at the Gyama Valley, Tibet Autonomous Region" at

- (i) for China Gold to familiarize itself with, and incorporate, the OECD Guidelines, as well as other corporate social responsibility standards recommended by Canada;
- (ii) for China Gold to engage in a dialogue with the Canada Tibet Committee and stakeholders affected by the raised issues, including its workers and local communities;
- (iii) for the Canada Tibet Committee to continue to reach out to China Gold to engage in a dialogue;
- (iv) for China Gold to conduct a due diligence by reviewing its environmental, human rights, labor, and health and safety activities through audits of past and current activities, and to undertake assessments of the potential impacts of anticipated activities on the environment, human rights, labor, and health and safety;
- (v) for China Gold to take steps to address the environmental, human rights, labor, and health and safety issues raised, in particular by aligning its operations with local and international corporate social responsibility standards in collaboration with the affected stakeholders; and
- (vi) for China Gold to improve its transparency toward its stakeholders about its policies, practices and their implementation.

Moreover, the NCP imposed sanctions for the first time in the NCP system for failing to engage in the complaint process. Based on Canada's enhanced corporate social responsibility strategy^c(which includes new measures to be applied in case of non-participation in the NCP process), China Gold faces withdrawal of the Canadian Trade Commissioner Service and/or Export Development Canada financial services. More concretely, China Gold will likely be

<http://www.international.gc.ca/trade-agreements-accords-commerciaux/ncp-pcn/statement-gyama-valley.aspx?lang=eng> .

^c See "Doing business the Canadian way: A strategy to advance corporate social responsibility (CSR) in Canada's extractive sector abroad" as Annex 4 at <http://www.international.gc.ca/trade-agreements-accords-commerciaux/ncp-pcn/statement-gyama-valley.aspx?lang=eng>.

ineligible for economic diplomacy instruments of the government of Canada, unless it submits a request for review to the NCP or shows the government of Canada it has engaged in good-faith dialogue with the Canada Tibet Committee.

2. Paracuta vs. Kinross BrasilMineração

On June 18, 2013, the Brazilian NCP received a request for review from residents of the districts of Machadinho, a rural community near Paracatu, and three urban districts, Bela Vista II, Alto da Colina and Amoreiras II, alleging that Kinross Brasil Mineração (Kinross), a subsidiary of the Canadian Kinross Gold Corporation Group, had breached the general policies, human rights and environment provisions of the OECD Guidelines. More specifically, it was alleged that Kinross' use of explosives damaged surrounding homes, and that some of the infrastructure built by Kinross made access from the rural area of Machadinho to Paracatu difficult.^d

In August 2013, the NCP accepted the submission for further examination. After conducting a preliminary analysis and meeting with each of the parties individually, three mediation meetings took place between September 2015 and September 2016. Although several studies found no causality between Kinross' use of explosives and the damage to homes, the parties reached an agreement that Kinross would repair the damaged homes through a partnership project with Paracatu City Hall and active participation of the community.^e The NCP's final statement of December 21, 2016 included the following recommendations for Kinross: (i) to invite the Machadinho community and give guidance on how to apply for the company's other existing programs in cooperation with Paracatu's City Hall through which compensation could be offered (such as e.g. the Generation of Work and Income Program) (ii) to inform residents from neighboring areas of Kinross' work and future plans that may interfere with residents' lives, to

^d See a summary of the case by the OECD at <http://mneguidelines.oecd.org/database/instances/br0020.htm>.

^e See the "Final statement on the request for review regarding the operations of Kinross" at <http://www.pcn.fazenda.gov.br/assuntos/english/final-statements>.

foster a relationship of trust between Kinross and Paracatu's residents; and (iii) to conduct due diligence processes to assess the adverse impacts of mining activities. The NCP has also requested to remain informed of the partnership project between Kinross and Paracatu City Hall. Kinross' 2016 Corporate Social Responsibility Report stated "A mediation process regarding allegations of damage to houses as a result of vibration from mining activities was successfully concluded in late 2016."^f

3. Former employees of Bralima vs. Bralima and Heineken

On December 14, 2015, the Dutch NCP received a request for review from three former employees of Heineken, alleging that the company and its subsidiary operating in the Democratic Republic of Congo (DRC), Bralima, had breached the OECD Guidelines when dismissing 168 employees in the DRC during the civil war between 1999 and 2003.^g More specifically, the request concerned allegations regarding human rights violations, cooperation with the rebel movement RDC-Goma, serious errors in mass dismissals by Bralima (including unjustified dismissal of 168 Bralima employees), and irregularities and deliberate omissions in the individual redundancy schemes of the dismissed employees.^h

Both parties accepted the Dutch NCP's mediation services in September 2016 and reached an agreement less than one year later. In this agreement, a monetary compensation of more than US\$ 1 million was awarded to a group of former Bralima employees, a unique result of an NCP procedure.ⁱ The NCP's final statement of August 17, 2017 included the following

^f See "Kinross Corporate Responsibility Report: 2016 supplement and communications on progress," at http://s2.q4cdn.com/496390694/files/doc_downloads/corp-responsibility/2016/Kinross-2016-Corporate-Responsibility-Supplement.pdf, p. 8.

^g See a summary of the case by the OECD on <http://mneguidelines.oecd.org/database/instances/nl0027.htm>

^h See the "Final statement on the request for review regarding the specific instance of former employees Bralima vs. Bralima and Heineken" at <https://www.oecdguidelines.nl/notifications/documents/publication/2017/08/18/final-statement-notification-bralima-vs-heineken>.

ⁱ See <http://oecdinsights.org/2017/09/15/beer-conflict-and-compensation-heineken-congo-agreement/> and <https://www.nrc.nl/nieuws/2017/08/18/heineken-betaalt-congolezen-na-klacht-12563201-a1570284> for a further analysis of this case.

recommendations for Heineken and Bralima: (i) to provide employees and their representatives with information to help them form a true and fair view of the company's performance; (ii) to provide reasonable notice of upcoming changes in the company's operations that could have a major impact on employees' livelihoods; (iii) to implement this transparency and communication approach to employees in its policies for dealing with conflict settings; and (iv) to monitor and evaluate the handling of complaints by current or former employees within the company group. In addition, the NCP was asked by the parties to monitor the recommended steps, and it further encouraged Heineken to continue actively to monitor, evaluate and improve its business conduct code. As a result, Heineken also indicated that it would draw up a policy on how to operate in volatile and conflict-affected countries.

So far, NGOs have by far been the most active group bringing complaints under the Guidelines. The NCPs seek to find solutions via mediation, and about half of the complaints accepted for mediation lead to a mediated agreement between the parties. If agreement cannot be reached, the NCPs make authoritative recommendations on the conduct of the company. Moreover, parties can make substantiated submissions about a non-functioning NCP to the OECD's Investment Committee and can also ask for clarifications about the Guidelines.

The ILO's MNE Declaration, as a result of its 2017 revisions, provides for a set of operational tools to enhance its implementation. These tools include regional follow-up mechanisms, tripartite appointed national focal points to promote the instrument, ILO technical support in all its member states, ILO company-union dialogue facilitation, and a procedure for the examination of disputes concerning the application of the Declaration (International Labour Organization, 2017: Annex II).¹⁶ The compliance mechanism of the United Nations' Guiding Principles is comprised of the following three components: policy commitment, human rights due diligence

and remediation. Under this compliance mechanism, business enterprises are required to develop policies and procedures to ensure their effective management of human rights risks.

Since the ILO's MNE Declaration and the United Nations' Guiding Principles are reflected in the OECD Guidelines, the NCPs also provide a complaint mechanism for more specific labor and human rights. Moreover, the OECD has prepared due diligence guidance for various industries, namely the mining (OECD 2016a), agriculture (OECD 2016b), extractives (OECD, 2017a), garments (OECD, 2017b), and financial (OECD, 2017c) industries, which help MNEs implement the OECD standards.

Still, when everything is said and done, any non-binding rules are typically not enforceable. Despite these weaknesses, though, a number of these instruments, as “soft law”, are influential. For example, they serve as models or as benchmarks against which the activities of MNEs and their foreign affiliates can be evaluated. More importantly, as box 1 illustrates, even soft law instruments can have hard consequences for MNEs and influence their actions and strategies (Nieuwenkamp, 2018). Increasingly, therefore, MNEs will need to pay attention to such instruments lest they risk adverse action to be taken against them. This applies not only to MNEs headquartered in emerging markets adhering to the OECD Guidelines, but also to MNEs headquartered in non-adhering countries that are listed (also) on stock exchanges of adhering countries.

Together, these various distinct and separate instruments constitute the international investment law and policy regime. It is a regime in the sense that it constitutes a governance construct for the relationships between international investors and governments, consisting of “principles, norms,

rules, and decision-making procedures around which actors' expectations converge in a given area of international relations" (Krasner, 1982: 186), including the manner in which conflicts are resolved (Puchala & Hopkins, 1982).¹⁷ (A more expansive interpretation of the concept "regime" could also include various other, primarily non-governmental, instruments.¹⁸) The regime covers, in one way or the other, virtually every country in the world. It is multi-layered and multi-faceted, as it involves instruments of various levels of coverage, degrees of strength, types of rights and responsibilities, and levels of enforcement. Its coverage ranges from bilateral to multilateral, its strength varies from mandatory to voluntary, its content differs in terms of the rights and responsibilities that governments and international investors have, and its enforcement ranges from no enforcement to binding decisions of dispute-settlement panels.

B. The substantive and procedural coverage of international investment rules

Originally, IIAs—and especially BITs—were primarily concluded between developed and developing countries.

From the perspective of developing countries, the principal reason for concluding such treaties was to attract higher amounts of FDI flows, to advance their growth and development. This was expected to happen because of an indirect mechanism: by subjecting developing countries to international treaty disciplines, IIAs would strengthen the stability and predictability of their national investment regimes, further enhanced by the dispute-settlement mechanism provided for in these treaties. This, in turn, was expected to help countries attract FDI, even at the cost of restricting countries' freedom to implement domestic policies on account of the substantive and procedural provisions contained in IIAs.¹⁹ It was a "grand bargain" (Salacuse & Sullivan, 2005).

From the perspective of developed countries (and their MNEs), the principal reason for concluding IIAs was that their foreign investments would benefit from the enforceable international treaty disciplines provided by these treaties.²⁰ Such protection was considered necessary, as the legal systems of especially the newly independent developing countries were considered to be weak and cumbersome.²¹ Hence international investors—at the time the BITs movement began, overwhelmingly based in developed countries—sought additional protections under international law. These protections (see box 2 for excerpts from a recent treaty) relate, in particular, to:

- Non-discrimination of foreign investors vis-à-vis national firms in host countries (national treatment) and foreign investors from other countries (most-favored-nation treatment), both relative standards as they relate the treatment of foreign affiliates to that of other firms.
- Fair and equitable treatment, which is an absolute standard and reflects, at its root, the rule of law (Schill, 2010: 154).
- Expropriation (both direct and indirect), unless it is done for a public purpose, in a non-discriminatory manner and upon payment of prompt, adequate and effective compensation in accordance with due process of law.
- Unencumbered transfers of funds into and out of a host country relating to a given investment.
- Free entry of key personnel.
- Prohibiting performance requirements.

Box 2

Key Protections in the Canada-China BIT

Minimum Standard of Treatment (Article 4)

“Each Contracting Party shall accord to covered investments fair and equitable treatment and full protection and security, in accordance with international law.”

Most-Favoured-Nation Treatment (Article 5)

“Each Contracting Party shall accord to investors of the other Contracting Party treatment no less favourable than that it accords, in like circumstances, to investors of a non-Contracting Party with respect to the establishment, acquisition, expansion, management, conduct, operation and sale or other disposition of investments in its territory.”

National Treatment (Article 6)

“Each Contracting Party shall accord to investors of the other Contracting Party treatment no less favourable than that it accords, in like circumstances, to its own investors with respect to the expansion, management, conduct, operation and sale or other disposition of investments in its territory.”

Performance Requirement (Article 9)

“The Contracting Parties reaffirm their obligations under the WTO *Agreement on Trade-Related Investment Measures* (TRIMs), as amended from time to time.”

Expropriation (Article 10)

“Covered investments or returns of investors of either Contracting Party shall not be expropriated, nationalized or subjected to measures having an effect equivalent to expropriation or nationalization in the territory of the other Contracting Party [...], except for a public purpose,

under domestic due procedures of law, in a non-discriminatory manner and against compensation.”

Compensation for Losses (Article 11)

“Investors of one Contracting Party who suffer losses in respect of covered investments owing to war, a state of national emergency, insurrection, riot or other similar events, shall be accorded treatment by the other Contracting Party, in respect of restitution, indemnification, compensation or other settlement, no less favourable than it accords in like circumstances, to its own investors or to investors of any third State.”

Transfers (Article 12)

“A Contracting Party shall permit transfers relating to a covered investment to be made freely and without delay.”

Claim by an Investor of a Contracting Party (Article 20)

“An investor of a Contracting Party may submit to arbitration under this Part a claim that the other Contracting Party has breached an obligation... and that the investor or a covered investment of the investor has incurred loss or damage by reason of, or arising out of, that breach.”

Source: Excerpts from the Agreement Between the Government of Canada and the Government of the People's Republic of China for the Promotion and Reciprocal Protection of Investments, available at <http://international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/china-chine/fipa-apie/index.aspx?lang=eng>.

Most of the key protections of IIAs have remained largely unchanged since the early BITs. However, some new ones have become more widespread over time. In particular, a growing number of treaties address the issue of market access by providing for national treatment at the pre-establishment stage of a project, that is, the right of foreign investors to invest in a country. In addition, the list of performance requirements that are prohibited has become lengthier. Moreover, IIAs have become longer as they have become more detailed, partly as a result of a learning process. Their key concepts also have become more clearly defined, partly to preclude too expansive an interpretation by arbitral tribunals, partly to narrow certain protections, like indirect expropriation.

Accepting these various protections in their IIAs did not mean, however, that emerging markets did not have defensive interests, especially in terms of seeking to protect their policy space in the investment area. In particular, most of them resisted granting pre-establishment national treatment (i.e., market access) to foreign investors, and they sought to limit national treatment and to keep the list of prohibited performance requirements short.²²

Moreover, and very importantly, the great majority of IIAs also contain procedural provisions for dispute settlement. In particular, in addition to state-to-state dispute settlement, many of them provide for investor-state dispute settlement (ISDS) through ad hoc arbitral tribunals consisting of three members.²³ By being able to bring claims directly to international arbitral tribunals, investors can bypass the domestic judicial processes of host countries. Moreover, ISDS makes investors independent of their home country governments (unlike in the case of the WTO, where they have to go through their government) when they wish to bring a claim. In fact, only investors can initiate the ISDS process—governments only can, at best, bring counter-claims in cases brought by foreign investors if they have grounds for such counter-claims. Awards given by ISDS tribunals are enforceable worldwide through the New York Convention (Convention on

the Recognition and Enforcement of Foreign Arbitral Awards, 1958). The ISDS mechanism makes the international investment regime one of the strongest international regimes in existence.

Granting these substantive and procedural treaty-based protections to international investors reflect the approach increasingly taken by developing countries since the mid-1980s at the national level: after a decade or so of restrictive policies on FDI (which included, for example, a surge in nationalizations (Kobrin, 1984: 329-348)), developing countries gradually opened up to FDI and actively sought to attract it.²⁴ The data on national changes in FDI laws tell the story: between 1991 and 2000, 95% of the 1,185 FDI policy changes undertaken by countries during this period went in the direction of making the investment climate more welcoming (table 1). In addition, governments began to establish investment promotion agencies (IPAs) whose principal brief was—and remains—to attract FDI. Today, some 8,000 such institutions exist at the national, sub-national and city levels (Vale Columbia Center on Sustainable International Investment and Millennium Cities Initiative, 2009: 1).

| Table 1 | | | | | | | | | | |
|---|------|------|------|------|------|------|------|------|------|------|
| <i>National FDI regulatory changes, 1991-2000</i> | | | | | | | | | | |
| Item | 1991 | 1992 | 1993 | 1994 | 1995 | 1996 | 1997 | 1998 | 1999 | 2000 |
| Number of countries that introduced changes in their investment regimes | 25 | 43 | 57 | 49 | 64 | 65 | 76 | 60 | 63 | 69 |
| Number of regulatory changes of which: | 82 | 79 | 10 | 110 | 112 | 114 | 151 | 145 | 140 | 150 |
| More favourable to FDI ^a | 80 | 79 | 101 | 108 | 106 | 98 | 135 | 136 | 131 | 147 |

| | | | | | | | | | | |
|--|---|---|---|---|---|----|----|---|---|---|
| Less favourable to FDI ^b | 2 | - | 1 | 2 | 6 | 16 | 16 | 9 | 9 | 3 |
| <p><i>Source:</i> UNCTAD, 2001: 6.</p> <p>a. Including liberalizing changes or changes aimed at strengthening market functioning, as well as increased incentives.</p> <p>b. Including changes aimed at increasing control as well as reducing incentives.</p> | | | | | | | | | | |

One additional observation is in order. Because IIAs were initiated to safeguard the protection of investors and their investments (i.e., they focus on the rights of investors and the responsibilities of host countries), they do not, as a rule, provide for rights of host countries and the responsibilities of investors. The purpose of these treaties was, by design, to limit the rights of the governments of host countries; the governments of home countries, again by design, did not want to impose the potential costs of behavioral obligations on their firms operating abroad.

This does not mean, however, that efforts were not made to seek to balance the rights of investors with responsibilities. The earliest comprehensive example of such efforts, driven by developing countries, was made by the United Nations in intensive negotiations between 1978 and 1983, when the members of that organization sought to negotiate a code of conduct dealing with MNEs. This code sought to define, in a balanced manner, the rights and responsibilities of MNEs and host country governments. By way of illustration, investors' responsibilities were meant to include respect for national sovereignty and observance of domestic laws, regulations and administrative practices; adherence to economic goals and development objectives, policies and priorities; review and renegotiation of contracts; adherence to socio-cultural objectives and values; respect for human rights and fundamental freedoms; non-interference in internal political affairs; non-interference in intergovernmental relations; and abstention from corrupt practices (Sauvant, 2015).

The United Nations code negotiations were never successfully completed.²⁵ But (as mentioned earlier), other—parallel and subsequent—efforts have led to instruments that were adopted. Most prominent among them are the ILO MNE Declaration, the OECD Guidelines and, most recently, the United Nations Guiding Principles.²⁶ These three instruments are the most important (albeit non-binding) international instruments addressing the responsibilities of MNEs.

In sum, the international investment law and policy regime arose largely out of the desire of developed countries to protect the investments of their firms in developing countries. Developing countries, in turn, concluded IIAs (in particular BITs) out of a desire to attract FDI and, for that purpose, were prepared to accept a number of restrictions concerning the treatment of foreign investors. Developing countries were rule-takers in this regime, with developed countries largely determining the substantive and procedural contents of these treaties. Accordingly, IIAs focused, by design, on the protection of investors and their investments, that is, the rights of investors and the responsibilities of host countries. Both national and international investment policies of developing countries, joined in the 1990s by the economies in transition, were geared toward creating a welcoming investment climate for MNEs. Efforts to include rights of host countries and responsibilities of investors were, in the international context, undertaken only in non-binding agreements.

In the course of the growth of the international investment law and policy regime, its substantive rules have become parameters for national investment policy making. Thus, for example, if governments discriminate in their policies in favor of their domestic firms or in favor of MNEs from one home country compared to another one, or if they do not provide fair and equitable treatment (e.g., by infringing on the legitimate expectations of an investor concerning the performance of its investment in a host country), investors—be they from developed countries or economies in transition--can take directly recourse to international arbitration if they so choose.

Prior to the early 2000s', the parameters that were imposed by the regime on national policy making and the possibilities that these parameters could be enforced through the ISDS mechanism were not much of an issue, as few investors made use of the ISDS mechanism. However, since the beginning of this century, more and more investment disputes have arisen, contributing to a change of how the international investment regime is accepted by a number of developing countries. But this, in turn, needs to be seen against the change brought about by the rise of emerging markets as outward investors, and its implications for the constellation of interest of emerging markets and developed countries vis-à-vis the international investment regime. Both changes may lead to a certain rebalancing of the investment regime, driven by the defensive and offensive interests of countries.

C. Changes over time, their reasons and implications

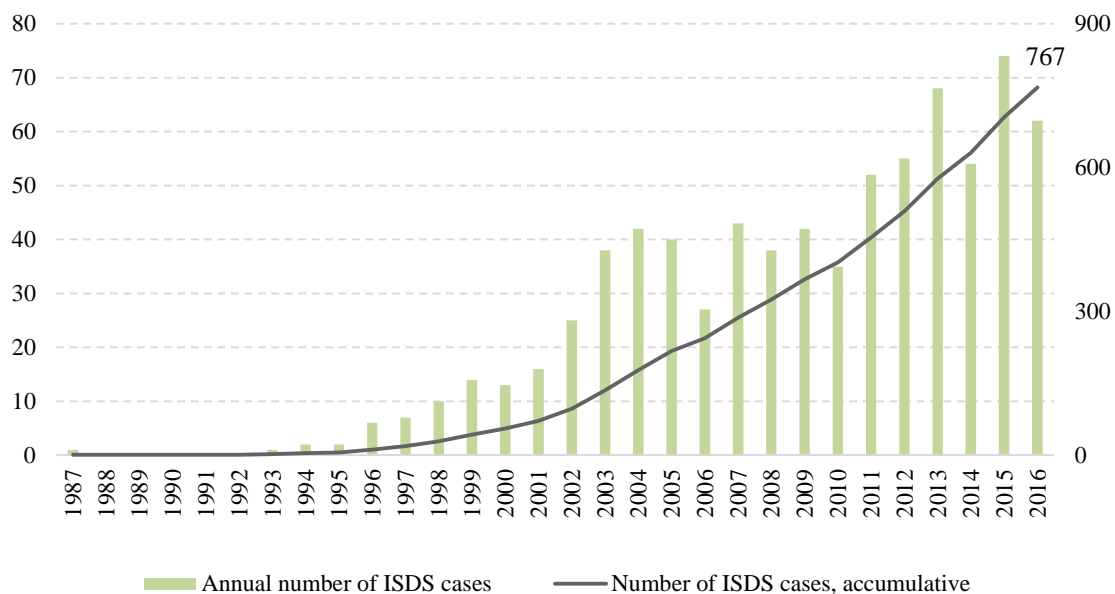
1. Defensive interests assert themselves

The rise of investment disputes is one of the principal factors driving changes in the international investment regime, by strengthening the defensive interests of all groups of countries vis-à-vis this regime. Although the International Centre for Settlement of Investment Disputes (ICSID—a part of the World Bank) was established in 1965, it was only since the end of the 1990s that the number of investment disputes that were brought for arbitration began to rise substantially (figure 2). In 2015 alone, investors initiated 74 known treaty-based investment disputes, followed by 62 in 2016 (UNCTAD, 2017: 114). This indicates that MNEs increasingly pay attention to—and take advantage of—IAs and the protections that they contain.

This growing number of ISDS cases highlights the fact that the substantive protections enshrined in IIAs, combined with the ISDS mechanism, can have direct and serious consequences for national policy making. In particular, actions that governments were able to take in the past to promote their national policy objectives increasingly need to be considered against the international (investment policy) obligations governments have entered into. This is because some of these actions might lead to conflicts with foreign investors who, in turn, could invoke the dispute-settlement mechanism in a country's IIAs.

Figure 2

Known treaty-based ISDS cases, 1987-2016



Source: UNCTAD 2017: 115.

Note: Information has been compiled on the basis of public source, including specialized reporting services. UNCTAD's statistics do not cover investor-State cases that are based exclusively on investment contracts (state contracts) or national investment laws, or cases in which a party has signalled its intention to submit a claim to ISDS but has not commenced the arbitration. Annual and cumulative cases numbers are continuously adjusted as a result of verification and may not match case numbers reported in the previous years.

And the potential for conflicts is substantial. To begin with, FDI is much more intrusive than, say, trade, as it involves the entire range of issues that relate to the production process over the life-cycle of a given foreign affiliate and, more broadly, the relationship of foreign affiliates with host country governments. Therefore, it is unavoidable that, in this situation, disputes arise from time to time. This is compounded by the fact that, in many jurisdictions, various national government agencies—let alone sub-national ones—may violate IIAs simply because they are unaware of the protections enshrined in these agreements. Other factors that may amplify the potential for conflict are the large number of MNEs (which is easily substantially over 100,000), foreign affiliates (which is easily substantially over one million) and investors in these affiliates (which can involve individual persons), all of which may have a right to initiate arbitral proceedings, depending on the applicable IIA. Add to this situation that many key concepts (such as fair and equitable treatment) in investment treaties are not clearly defined, leaving tribunals often wide latitude as to whether or not a given protection has been violated. As a result, the potential for conflict between host countries and foreign investors (and hence the potential for arbitral cases) is indeed substantial—in fact it is not even possible to estimate the potential liabilities involved.

Moreover, the costs of conflict can be very high, both in terms of reputational damage for host countries and litigating disputes (with costs easily reaching millions of dollars) and settling awards. While not typical, of the 231 awards that had been rendered (131) or for which a settlement had been reached (100) as of May 2017 (Investment Policy Hub, n.d.), nine were higher than US\$1 billion, all involving emerging markets (table 2).²⁷

Table 2

Known treaty-based disputes

| Rank | Short case name | Amount awarded or settled for (USD million) | Year of initiation |
|---|---|--|-----------------------|
| 1 | Hulley Enterprises v. Russia | 40,000 | 2005 |
| 2 | Veteran Petroleum v. Russia | 8,203 | 2005 |
| 3 | Repsol v. Argentina | 5,000 | 2012 |
| 4 | Eureko v. Poland | 4,379 | 2003 |
| 5 | Yukos Universal v. Russia | 1,846 | 2005 |
| 6 | Occidental v. Ecuador (II) | 1,769 | 2006 |
| 7 | Mobil and others v. Venezuela | 1,600 | 2007 |
| 8 | Abaclat and others v. Argentina | 1,350 | 2007 |
| 9 | Crystallex v. Venezuela | 1,202 | 2011 |
| Source: @UNCTAD ISDS Navigator, available at: http://investmentpolicyhub.unctad.org . | | | |

While the highest awards so far have involved emerging markets only, developed countries, importantly, have also become respondents in international investment disputes. This result was unexpected because, as discussed earlier, investor-state dispute-settlement provisions were incorporated in investment treaties because foreign investors did not trust the legal systems of developing countries. Hence, it was assumed that only governments of developing countries would be respondents, including because, at that time, the outward FDI of these countries was negligible. This changed in the late 1990s, when the United States became the respondent in a growing number of cases in the framework of NAFTA. By the end of 2016, 228 of the total

number of 767 investor-state disputes had an OECD member as a respondent (Investment Policy Hub, n.d.).

No wonder, then, that the current dispute-settlement mechanism, for these and other reasons, has attracted widespread criticism. Concerns include “inconsistencies in [arbitral] decision-making, insufficient regard by some arbitral tribunals to the host State’s right to regulate in interpreting IIAs, charges of bias of the system in favour of foreign investors, concerns about the lack of independence and impartiality of arbitrators, limited mechanism to control arbitral tribunals and to ensure correctness of their decisions, and increasing costs for the resolution of investment disputes” (Schill, 2009: 1). Some of these concerns may well be overstated, some are more troubling than others and a number do not reflect a consensus view. Yet, these (and other) criticisms have made the international investment regime in general a matter of widespread discussion and have led to proposals for reform. In particular, the current dispute-settlement mechanism has led to a mobilization of defensive interests of governments. This has taken various forms.

A number of developing countries have sought to disengage from (part of) the international investment regime by terminating their BITs (Peinhardt & Wellhausen, 2016: 571-576).²⁸ In particular, Bolivia, Ecuador, India, Indonesia, and South Africa have terminated (unilaterally or jointly) their BITs (or at least some of them), in some cases (e.g., India) with the intention to renegotiate them on the basis of new models (UNCTAD, 2017: 143).²⁹ In addition, many treaties have been, are being or could be renegotiated, normally upon expiration of the initial period for which they were negotiated (typically 10-15 years): as shown in figure 1, most treaties were concluded during the 1990s and, therefore, could probably be unilaterally terminated by any one of the contracting parties, if they so desire.

This change in attitude toward the regime is further strengthened by the perception that the costs of being part of the regime in terms of limiting policy space and exposing a country to possible litigation does not seem to be balanced by benefitting from additional FDI inflows on account of IIAs. The reason is that the causal link between IIAs and investment flows is not clear—which, perhaps, is not surprising, given the importance of the economic FDI determinants in attracting such investment (Sauvant & Sachs, 2009).³⁰ In other words, the “grand bargain” of protection in exchange for more investment does not seem to hold (Salacuse & Sullivan, 2005).

Moreover, under public pressure from NGOs, the Commission of the European Union has made a far-reaching proposal to replace the current ad hoc ISDS mechanism with a multilateral investment court with a first-instance standing court and an appeals mechanism (European Commission, 2016).³¹ Importantly, such a court system would allow for the full participation of judges from emerging markets and establish a high degree of transparency. Naturally, the establishment of such a system presents a number of important challenges, including the question of how to deal with all the treaties that are already in force and that foresee only the ISDS mechanism.³² However, if a multilateral investment court could be established and dispute settlement institutionalized in this manner, it would greatly improve the current dispute-settlement regime and strengthen therefore the legitimacy of the investment regime.

This legitimizing effect would be further improved if an advisory center on international investment law were to be established. Such an advisory center would address another important shortcoming of the current regime, namely the difficulties that many emerging markets have in actually making use of the investment regime’s dispute-settlement mechanism: many emerging markets typically do not possess the human and financial resources to defend themselves adequately in arbitral tribunals. The establishment of such a center would alleviate this

shortcoming by providing administrative and substantive support to emerging markets that face arbitrations.³³

Finally, in order to reduce the risks of conflicts and, hence, the likelihood that investors take recourse to the dispute-settlement regime, governments of both developed countries and emerging markets have begun to define key concepts in IIAs more precisely. In some cases, this is done by limiting the reach of key protections, to avoid that arbitral tribunals interpret these very expansively, leading to awards against governments. This process was led by the United States (which, as noted above, had become a respondent of investment disputes during the 1990s), and it involves such important concepts as fair and equitable treatment and expropriation. This approach is further enhanced by an explicit recognition, in IIAs, of the government's right to regulate.

Regardless of the precise future nature of the dispute-settlement mechanism, it seems very likely that this mechanism will remain at the heart of the investment regime, as it underpins the various protections provided by the regime. However, it can be expected that a reformed dispute-settlement mechanism will increasingly be combined with more precise and narrow definitions of key concepts in IIAs and an explicit recognition of the right to regulate that more clearly delineates the policy space of governments.

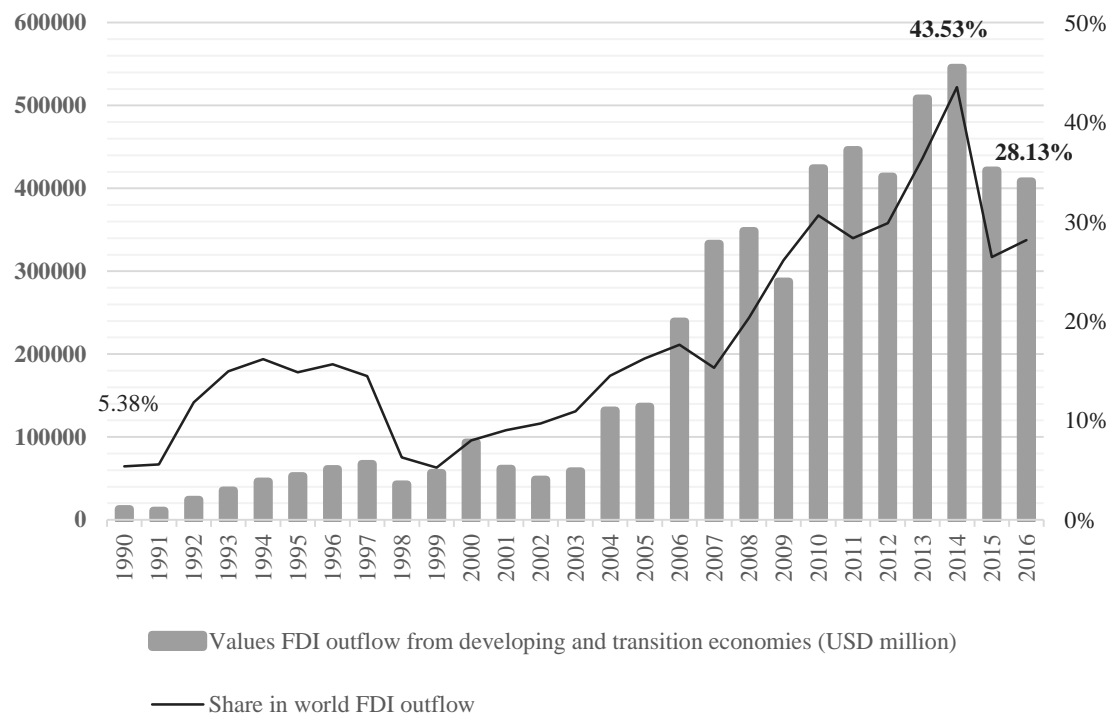
2. Offensive interests are coming to the fore

While the defensive interests discussed in the previous section concern both developed countries and emerging markets, the rising outward FDI from emerging markets is altering the configuration of interests of emerging markets vis-à-vis the international investment regime. In particular, this development is giving rise to offensive interests of emerging markets.

The growth of FDI from emerging markets—various aspects of which are discussed elsewhere in this volume—has been impressive indeed (figure 3). Outflows amounted to an average of US\$26 billion during 1990-1994, rising to an average of US\$460 billion during 2012-2016.³⁴ In 2016, FDI outflows from emerging markets were US\$409 billion, roughly nine times of average *world* FDI flows during the first half of the 1980s.³⁵ During 2012-2016, 131 emerging markets reported outflows at least for one of these five years. As a result, the share of emerging markets in world FDI outflows rose from an average of 11 percent 1990-1994 to an average of 33 percent during 2012-2016.³⁶ In 2016, their share amounted to 28 percent of world outflows (figure 4). More than 30,000 firms located in emerging markets were responsible for these outflows (UNCTAD, 2011: annex table 34). In other words, a large number of emerging market firms have become sufficiently competitive to invest abroad.³⁷

Figure 3

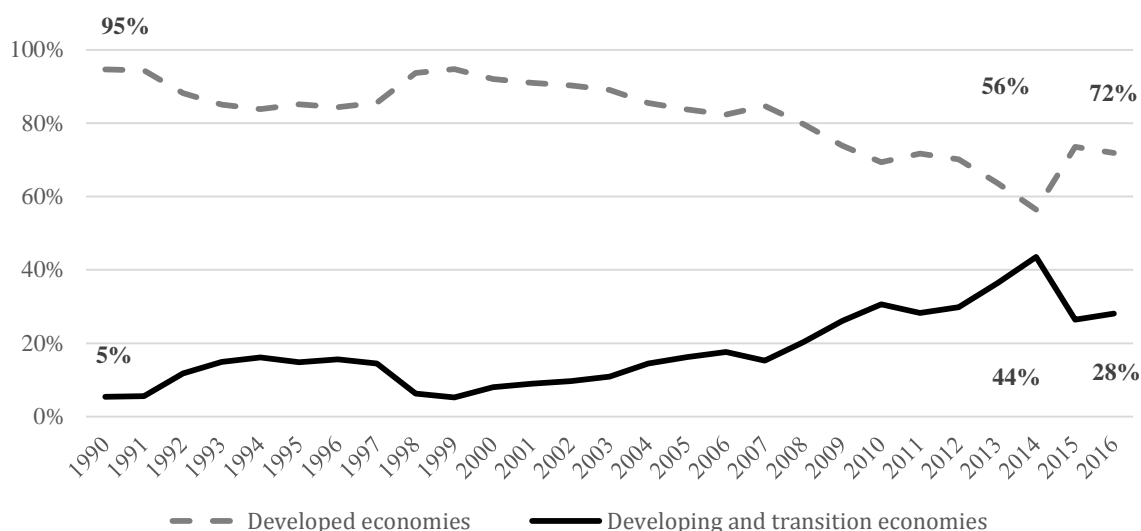
The growth of outward FDI from emerging markets, 1990-2016



Source: UNCTAD 2017, Annex Tables, available at <http://unctad.org/en/Pages/DIAE/World%20Investment%20Report/Annex-Tables.aspx>.

Figure 4

The share of FDI outflows by group of economies, 1990-2016



Source: UNCTAD 2017, Annex Table 02, available at [http://unctad.org/en/Pages/DIAE/World Investment Report/Annex-Tables.aspx](http://unctad.org/en/Pages/DIAE/World%20Investment%20Report/Annex-Tables.aspx).

This development is leading to a fundamental change in the manner in which a growing number of developing countries and economies in transition view the international investment regime. As mentioned earlier, originally emerging markets concluded IIAs primarily for the purpose of attracting FDI and the tangible and intangible assets it represents. While, in return, they were willing to incur the costs of limiting their own policy space, they maintained a defensive posture in terms of seeking to protect at least some of this policy space to pursue policies they deemed necessary to advance their growth and development. With the growth of their outward FDI, the leading outward investors among emerging markets in particular are realizing that they have not only defensive interests but also offensive ones: they (like the established home countries, that is, the developed countries) increasingly desire to protect and facilitate their firms' investments abroad and to ensure that their firms have access to foreign markets. Accordingly, they are beginning to look at the investment regime from a different perspective than in the past.

This is most notable in China's change of approach to the investment regime.³⁸ Traditionally, China's BITs clearly reflected its position as a host country. This can be seen from its limited approach to national treatment and ISDS, opposition to pre-establishment national treatment and insistence on a positive list approach to exceptions in its older treaties (Vadi, 2013: 705-724). Since then, and especially with China becoming the single most important outward investor among emerging markets and its investments being considered with some suspicion in some quarters (Sauvant & Nolan, 2015: 893-934), it revised its position on some treaty issues. As a result, the country's IIAs have become quite similar to those of the traditional principal home countries.³⁹ In particular, China now accepts more comprehensive substantive provisions in its IIAs and full investor-state dispute settlement, in line with the practice of the developed countries. What is more, Chinese outward investors have become active users of the investment regime. With the first arbitration initiated in 2007, Chinese firms had begun four publicly known treaty-based international arbitrations against host countries by May 2017 (firms from Hong Kong and Macao initiated an additional one dispute each) (Investment Policy Hub, n.d.).⁴⁰ In recent IIAs, moreover, China has also recognized the importance of maintaining health, safety and environmental measures whilst promoting and protecting investment.⁴¹ It is even possible to pinpoint the date on which China's home country interests became equal to, or more important than, its host country interests: July 11, 2013. On that day, China agreed, in the framework of the United States-China Strategic and Economic Dialogue, to continue negotiations of a BIT with the United States on the basis of pre-establishment national treatment and the negative list approach to exceptions to such treatment⁴² – both of which were strongly opposed by China in the past.⁴³

China, in addition, has led the effort within the G20 to adopt the “Guiding Principles for Global Investment Policy Making” (G20, 2016), and it initiated efforts within the G20 to adopt guidelines on investment facilitation.⁴⁴ Together with a number of other developing (and

developed) countries, China also drives the discussion of investment facilitation that began in 2017 in the WTO in the framework of an informal “Friends of Investment Facilitation for Development” Group. China had announced the creation of the Group at a WTO’s General Council meeting at the end of February 2017, encouraging other WTO members to join. The Group focuses its discussion on new and cooperative approaches to facilitating investment rather than on more controversial subjects such as investment establishment (market access), protections and dispute settlement (Hees & Cavalcante, 2017). Many emerging markets (as well as developed countries) have so far attended the Group’s meetings. All countries ought to be interested in investment facilitation because they all seek to attract investment. Home countries, and especially emerging markets, in addition, may also be motivated by the fact that, since the beginning of past decade, national investment regulations have become less welcoming (UNCTAD, 2017: 99, table III.1) and investment protectionism seems to be rising (Sauvant, 2009: 197-216).⁴⁵

With the rise of China as an outward investor, its interests as a host country to protect its policy space have increasingly been complemented by its interests as a home country to protect the investments of the country’s firms abroad and to facilitate their operations.

More generally, with the rise of outward investment from emerging markets, more and more of the countries involved now have a (home country) stake in the investment regime, very similar to that of developed countries: they seek to protect their firms abroad and facilitate their operations (including in other emerging markets). In their investment treaty making, this interest needs to be balanced against their interest as host countries to preserve their policy space.

This evolution is reflected in the number of treaty-based international investment arbitrations initiated by firms from emerging markets: the number of such disputes rose from below five in

2007, to over fifteen in 2016, for a cumulative total of almost 140 by end of 2016 (figure 5). This makes firms from emerging markets increasingly active users of the international investment regime. If anything, emerging market MNEs are likely to make even more use, in the future, of the regime's dispute-settlement mechanism as their outward FDI grows, they become more aware of the opportunities the regime offers them to protect themselves and their governments begin to value the constraints the regime places on policy makers in host countries, especially if FDI protectionism becomes more wide-spread.

Three examples illustrate how emerging market MNEs are using the dispute-settlement mechanism enshrined in IIAs, both vis-à-vis developed countries and other emerging markets whose governments are alleged to have violated certain treaty protections:

- The first case exemplifies a situation in which an investor from a developing country brought a case against the government of a developed country. More specifically, in 1997, the Argentinian national Mr. Emilio Agustin Maffezini filed a request for arbitration with ICSID against Spain concerning the treatment that his firm EAMSA received from Spanish authorities in connection with his investment in an enterprise for the production and distribution of chemical products in Galicia, Spain (*Maffezini v. Spain*, 2000). This production was supposed to be carried out as a joint venture with the Sociedad para el Desarrollo Industrial de Galicia (SODIGA), a public-private state entity with a mandate to encourage industrial development in Galicia. The claims were brought against Spain on the basis of the 1991 Argentina-Spain BIT and, via the most-favored-nation clause, the 1991 Chile-Spain BIT. The tribunal found that some of the acts of the government "amounted to a breach by Spain of its obligation to protect the investment as provided for in Article 3(1) of the Argentine-Spain Bilateral Investment Treaty (*Maffezini v. Spain*, 2000: 27)." The tribunal continued with observing: "[m]oreover, the lack of

transparency ... is incompatible with Spain's commitment to ensure the investor a fair and equitable treatment in accordance with Article 4(1) of the same treaty" (*Maffezini v. Spain*, 2000). Accordingly, the claimant was awarded 57,641,265.28 Spanish pesetas in the award issued by the tribunal Spain (*Maffezini v. Spain*, 2000: 31).

- The second case exemplifies a situation in which an investor from an economy in transition brought a case against a developing country. More specifically, in 2012, Rusoro Mining Ltd., a Russian-backed company incorporated in Vancouver, Canada, with extensive gold production investments in Venezuela, filed a request for arbitration with ICSID against Venezuela. It claimed that the decree nationalizing the Venezuelan gold sector violated the 1996 bilateral investment treaty between Canada and Venezuela because Rusoro's investment was expropriated without payment of compensation (*Rusoro Mining Ltd v. Venezuela*, 2016). Rusoro also claimed that the government failed to accord its investments fair and equitable treatment; failed to accord its investments full protection and security; failed to accord it treatment no less favorable than the treatment it grants to its own investors; failed to guarantee it the unrestricted transfer of its investments and returns, and imposed restrictions on the exportation of gold, in contravention of the BIT (*Rusoro Venezuela*, 2016: 51). *Mining Ltd v.* During the arbitration, the government did not deny that an expropriation had taken place, but it claimed that it was done in a legal manner. However, the tribunal found that the government of Venezuela "breached Art. VII of the [Canada-Venezuela] BIT by expropriating Rusoro's investment in Venezuela without payment of compensation" (*Rusoro Venezuela*, 2016: 197). It therefore ordered the government of Venezuela to pay Rusoro USD 966,500,000 as compensation for the expropriation of its investment (*Rusoro Venezuela*, 2016). It furthermore ordered the government to pay Rusoro USD1,277,002 as damages suffered as a consequence of the breach of paragraph 6 of the

Annex to the [Canada-Venezuela] BIT because it had imposed additional restrictions on the export of gold (Rusoro Venezuela, 2016). Furthermore, the government of Venezuela was ordered to pay interests on these two amounts for the period between September 16, 2011 and the date of actual payment,⁴⁶ and it ordered it to pay Rusoro USD 3,302,500 as costs of this arbitration.⁴⁷ All other claims and counterclaims were dismissed.

- The third case exemplifies a situation in which investors from a developed country whose ultimate parent was a firm in a developing country brought a case against the government of another developing country. More specifically, in October 2008, Cemex Caracas Investments B.V. and Cemex Caracas II Investments B.V., companies incorporated in the Netherlands but whose ultimate parent firm was Cemex, Mexico, filed a request for arbitration with ICSID against Venezuela (*CEMEX Caracas Investments B.V. et al v. Venezuela*, 2010). The claims were brought under the 1991 Netherlands-Venezuela BIT. The claimants had an indirect ownership interest⁴⁸ in the Venezuelan cement production company Cemex Venezuela, and the claims arose out of the government's 2008 nationalization of foreign-owned cement companies in Venezuela, including the claimants', and disagreements over the amount of compensation owed to CEMEX. After the tribunal found in favor of the claimants, the parties settled for a payment of US\$600 million by Venezuela to CEMEX.⁴⁹

What these cases show is that there are various ways in which international investors can make use of IIAs to protect their investments against government actions that they consider have violated their rights. This applies also to investors headquartered in emerging markets, and, as the data cited earlier show, they have done so.

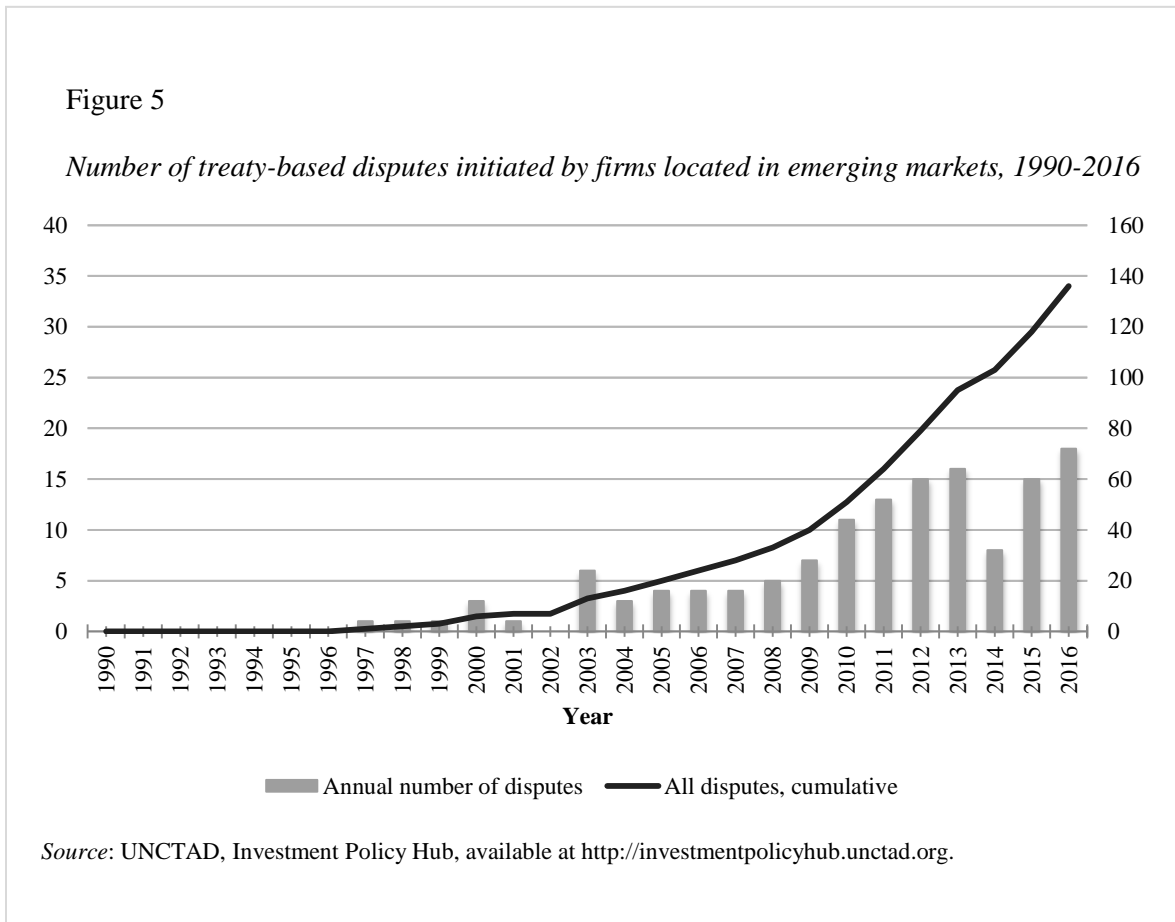
In fact, there are further ways in which emerging markets firms might use the current investment regime, in particular through “treaty shopping” (Lee, 2015) (or “nationality planning”) and

“round-tripping.” Round-tripping refers to an investment made by a national firm abroad that, however, is routed back to the firm’s country to obtain certain benefits—including the protection of an IIA (Lee, 2015: 16).⁵⁰ Treaty shopping, in turn, “refers to the conduct of foreign investors who deliberately shop at their convenience for home countries that have favourable IIAs with the host countries where their investments are to be made” (Lee, 2015: 2) or, for that matter, when the foreign investors’ home countries do not have an IIA with the host country in which the investments are to be made, or when the home country does have an IIA with the prospective host country, but an IIA of a third country with the prospective host country has more favorable procedural and/or substantive provisions. That treaty shopping is not just a theoretical possibility is documented by one study: of 420 ISDS cases considered, 66 (16%) were potential treaty shopping cases (Lee, 2015: 11).⁵¹

Both practices are legally possible in many circumstances. However, they are considered undesirable by a growing number of governments and are legally disputed. In the case of round-tripping, host countries would not benefit from the extra investment that IIAs are meant to attract, apart from giving special privileges to a group of domestic enterprises. Treaty shopping, in turn, is most likely normally an unintended consequence of the conclusion of IIAs, exposing host countries potentially to claims by investors not otherwise eligible for treaty protection; at the same time, the home countries of these investors do not assume any obligations towards host countries that they otherwise might assume.

Hence, governments are increasingly seeking to protect themselves, especially against treaty shopping, by including a “denial of benefit” clause in their IIAs that denies treaty protection to firms that do not have substantial business interests in their alleged home country. However, it may be difficult to determine whether treaty shopping has taken place, as many MNEs have full-fledged regional headquarters or foreign affiliates outside their home countries, with substantial

business operations, from where they invest in third countries for purely business-based reasons. This may give MNEs the flexibility legitimately to make investments from countries that have an IIA with the intended host country and, hence, benefit from the protection that the IIA provides.



3. The responsibilities of investors

Governments largely drive the discussions that bring about changes in the international investment law and policy regime. However, as to meeting the challenge to improve the investment regime's dispute-settlement mechanism, NGOs are very important (if not more important) drivers as well, in particular in the European context. When it comes to the challenge

of balancing the regime by complementing the rights of investors with responsibilities, however, the principal driver is—and will remain—civil society (including trade unions).

Until recently (and as discussed earlier in this chapter), emerging markets (apart from civil society) were the principal drivers of the notion that MNEs and their foreign affiliates ought to have responsibilities vis-à-vis their host countries, as exemplified by the negotiations of the United Nation Code of Conduct on Transnational Corporations. Developed countries, on the other hand, have resisted the inclusion of responsibilities for their firms in binding international instruments, so as to avoid imposing the burden of additional rules on their firms. With emerging markets becoming important outward investors, their governments, too, may well be expected to share this interest. The implication is that it is likely that, in the future, any progress in this area may no longer be driven by emerging markets but rather by civil society.

However, two reasons suggest that the picture of the development of IIA is not clear. For one, a new generation of IIAs, as represented for example by the new Brazilian BITs (Cooperation and Investment Facilitation Agreement, Bra.-Moz., 2015)⁵² and the Morocco-Nigeria BIT (Reciprocal Investment Promotion and Protection Agreement, Mor.-Nga., 2016), explicitly make reference to corporate social responsibility and investors' responsibilities, as do (although typically in weaker language, and often in preambles), some treaties involving other countries.⁵³ Second, since the responsibilities of MNEs and their foreign affiliates (including in the context of corporate social responsibility) typically include encouragements to make a maximum contribution to the economic, social and environmental development of host countries, the notion of "sustainable FDI" could well gain traction.⁵⁴ Developing countries in particular ought to be interested in facilitating sustainable FDI (although this interest may be tempered by the fact that such this notion would also apply to their own firms investing abroad), to increase the contribution that FDI can make to their development. This should be particularly the case in an

age in which the Sustainable Development Goals are meant to be the lodestar of national and international policy making.

Conclusions

As a result of this change in the configuration of interests of the world's principal country groups, the discussions surrounding the international investment law and policy regime are more and more losing the North-South dimension that characterized this issue during the past. To put it differently, both country groups are increasingly interested in an investment regime that balances the defensive interests of countries in their capacity as *host* countries (including with more clearly defined key protections that safeguard sufficient policy space) with the offensive interests of the same countries in their capacity as *home* countries, and the usefulness of a strong dispute-settlement mechanism to enforce the regime. In the case of emerging markets, this recognition of the changing configuration of interest is led by China, but other emerging markets can increasingly be expected to share this recognition as well, namely when their firms become important outward investors. At the same time, it can be expected that MNEs, including those headquartered in emerging markets, will increasingly have to realize that responsible business conduct is no longer optional, that is, that they will have to live up to certain economic development, social and environmental standards and expectations and conduct their operations in the framework of fair governance mechanisms.

Looking further ahead, this convergence of interests could eventually lead to a multilateral investment regime that would also be shaped by emerging markets. Should this occur, it would turn these countries from investment rule-takers into investment rule-co-makers, both as far as the international dimension of these rules are concerned and insofar as these rules become the parameters for domestic rules and regulations. The discussion launched in the WTO on

investment facilitation may well lead eventually to broader discussions of the desirability and feasibility of such a multilateral regime.

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¹ The definition of the country groups used in this chapter follows that of UNCTAD's *World Investment Reports*, annex table 1. See, e.g., UNCTAD, 2017. "Emerging markets" consist of developing countries and economies in transition.

² Treaties normally do not speak about "MNEs" and "foreign affiliates", but rather about "investors" and "investments". Such investments are typically defined in terms of a list of "assets", a list that can be quite long. For example, the bilateral investment treaty between the United States and Uruguay (2005) contains the following in "Article 1: Definitions ... **"investment"** means every asset that an investor owns or controls, directly or indirectly, that has the characteristics of an investment, including such characteristics as the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk. Forms that an investment may take include: (a) an enterprise; (b) shares, stock, and other forms of equity participation in an enterprise; (c) bonds, debentures, other debt instruments, and loans; (d) futures, options, and other derivatives; (e) turnkey, construction, management, production, concession, revenue-sharing, and other similar contracts; (f) intellectual property rights; (g) licenses, authorizations, permits, and similar rights conferred pursuant to domestic law; and (h) other tangible or intangible, movable or immovable property, and related property rights, such as leases, mortgages, liens, and pledges. ..." (footnotes omitted).

³ Not all treaties have been ratified. This number does not include double-taxation treaties that are also of great importance to MNEs. As of the end of 2014, over 3,000 double taxation treaties were in force worldwide (UNCTAD, 2015: 107). At that time, as UNCTAD noted (*ibid.*), two-thirds of the BIT relationships were also covered by double taxation treaties, and half of the double taxation treaty relationships were also covered by BITs.

⁴ Data courtesy of the UNCTAD Secretariat. Note that some territories may not have the right to conclude treaties.

⁵ These treaties, however, have their antecedents in the Friendship, Commerce and Navigation treaties of the United States (Vandeveldt, 2017).

⁶ Data courtesy of the UNCTAD Secretariat.

⁷ For example, the Free Trade Agreement between EFTA States and Georgia (2016); the Economic Partnership Agreement between the Europe Union and its Member States, of the one part, and the SADC EPA States, of the other part (2016).

⁸ For example, the ASEAN Comprehensive Investment Agreement (2009).

⁹ For example, the International Energy Charter Consolidated Energy Charter Treaty (1994).

¹⁰ Available, respectively, at General Agreement on Trade in Services, 1995: Annex 1B; Agreement on Trade-Related Investment Measures, 1994. However, the two WTO agreements are not included in the UNCTAD count of "other IIAs".

¹¹ The ILO MNE Declaration was originally adopted in 1977 and updated in 2017.

¹² The Guiding Principles were endorsed by the United Nations Human Rights Council in 2011.

¹³ The OECD Guidelines were originally adopted in 1976 and updated most recently in 2011.

¹⁴ If one wants to cast the net wider, one could also include a great number of other non-binding instruments, including standards of intergovernmental organizations; global codes of international business organizations; standards of private institutional investors; industry codes; company codes; and models and codes of non-governmental organizations. (For a listing of such instruments, see Sauvant & Mann, 2017, annex II. These instruments, too, reflect what the actors involved expect that MNEs and their foreign affiliates should/should not do in host countries.

¹⁵ See <http://mneguidelines.oecd.org/ncps/>. See also, Nieuwenkamp, 2018.

¹⁶ The MNE Declaration establishes a dispute-settlement procedure (“Procedure for the examination of disputes concerning the application of the Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy by means of interpretation of its provisions by the ILO Governing Body”) that has the purpose to resolve a disagreement on the meaning of the provisions of the Declaration, arising from an actual situation, between the parties to whom the Declaration is commended. But there are many restrictions to the receivability of possible requests (including unanimity of the tripartite groups), as there cannot be any overlap when other ILO supervisory bodies and committees are concerned. On the other hand, since the MNE Declaration incorporates a number of ILO conventions, these are binding when ratified and become part of national law (with which firms have to comply with). Moreover, the MNE Declaration is aligned with the OECD Guidelines and the United Nations Guiding Principles (but goes into more detail as far as social issues are concerned) and takes the United Nations’ Sustainable Development Goals into account.

¹⁷ For a discussion of the applicability of the regime concept to international investment law, see, Salacuse, 2010.

¹⁸ See footnote 14 above.

¹⁹ Governments that so desired could also use the disciplines enshrined in these treaties to move domestic reforms forward. A national treatment provision, for example, would not allow governments to discriminate in favor of domestic firms.

²⁰ Through an “umbrella clause” contained in IIAs, treaty protections can be extended to contracts between MNEs and host country governments.

²¹ At the beginning of this process, the United Nations resolutions relating to a New International Economic Order (NIEO) also strengthened the case for BITs, as the United Nations resolutions challenged customary international investment law that, in any event, was quite weak at that time, as described in the following quote: “foreign investors who sought the protection of international investment law encountered an ephemeral structure consisting largely of scattered treaty provisions, a few questionable customs, and contested general principles of law.” See, Salacuse and Sullivan, 2005. The United Nations resolutions particular relevant in this context were the Declaration on the Establishment of a New International Economic Order (1974), the Programme of Action on the Establishment of a New International Economic Order (1974), and the Charter of Economic Rights and Duties of States (1974).

²² The last of these efforts is also reflected in the fact that the TRIMs agreement (op. cit.) prohibits only four trade-related investment measures.

²³ One member appointed by the claimant investor, one member by the responding government and one member designated by the two members or an independent institution, such as the International Centre for Settlement of Investment Disputes.

²⁴ For a discussion of the changing policies of developing countries and the principal reasons for these changes, see, Sauvant, 2015, pp. 11-87.

²⁵ For an analysis of these negotiations and why they eventually failed, see, *ibid*.

²⁶ *Op. cit*.

²⁷ Amounts awarded or settled are typically below (at times considerably so) of the amounts claimed. As of January 1, 2017, there were 85 disputes for which the damages claimed were

known and in which the amounts claimed by firms were US\$1 billion or more; see <http://investmentpolicyhub.unctad.org/ISDS/FilterByAmounts>. In litigating disputes, international investors may have the possibility of third-party funding, i.e., that another firm finances the costs of litigation, for a share in the award, if successful. This, in turn, may make it easier for some investors to initiate arbitration.

²⁸ Also, a number of European countries have terminated (or are terminating) their intra-European Union BITs as a result of their accession to the European Union, and Italy and Russia withdrew from the Energy Charter Treaty. These countries may, however, have stayed in free trade agreements with investment chapters and, in any event, the WTO. Note, furthermore, that, at the same time, other developing countries and economies in transition further strengthened their integration into the regime by concluding new IIAs.

²⁹ However, the protections granted by IIAs to investments typically remain in place, through sunset provisions, for ten or more years after the end of the treaty involved.

³⁰ For more recent analyses, see, e.g., Busse et al., 2010; and Williams et al., 2017.

³¹ For documents on the proposal for a multilateral investment court, see, the Multilateral Investment Court project, European Commission, 2016.

³² For a proposal, see Kaufmann-Köhler & Potestà, 2016.

³³ For an elaboration, see Sauvant, 2016: 31-33. Such a center could be patterned on the Advisory Centre on WTO Law. That Centre advises its developing country members on all issues relating to WTO law, including by assisting them through all stages of the WTO's regular panel and Appellate Body proceedings as complainants, respondents and third parties. See, the Advisory Centre on WTO Law (ACWL) website.

³⁴ See, UNCTAD database (United Nations Conference on Trade and Development, 2017: Annex Tables.

³⁵ *ibid.*

³⁶ *ibid.*

³⁷ On the rise of emerging market firms, see World Bank, 2017; Ramamurti & Singh, 2009; Marinov & Marinova, 2013; Freund, 2013.

³⁸ It is noteworthy, though, that, for the other BRICS countries, defensive interests remain paramount, although Brazil seems to be moving in the direction of a change in approach.

³⁹ To quote Schill, the new generation of China's BITs (starting with the BIT with The Netherlands (2001) and Germany (2003)) "conform, despite some remaining limitations, in all major aspects to what can be considered standard treaty practice in approximately 2,500 BITs world-wide," turning the country's BITs "into effective and powerful tools of investment protection." See, Schill, 2007: 76-77; Gallagher & Shan, 2009; Cai, 2006: 621-652.

⁴⁰ Russian firms had initiated 14 cases, Chilean firms 9 and Czech and Indian firms 4 each.

⁴¹ See, e.g., the preambles of the Agreement between the Government of Trinidad and Tobago and the Government of the People's Republic of China on the Reciprocal Promotion and Protection of Investments (2004) and the Agreement between the People's Republic of China and the Government of the Republic of Guyana on the Promotion and Protection of Investments (2003).

⁴² This is particularly relevant in the case of exceptions to national treatment. When exceptions are negotiated on the basis of a negative list approach, all sectors for which national treatment is *not* granted need to be listed. When a positive list approach is used, all sectors for which national treatment is granted are listed. The negative list approach implies that, when any new sectors should emerge (e.g., various information technology sectors over the past decade), these are automatically covered by a national treatment provision.

⁴³ *Xinhua*, July 12, 2013.

⁴⁴ In the end, these efforts were not successful—but not for lack of trying on the part of China.

⁴⁵ See also the various editions of OECD, WTO and UNCTAD, “Reports on G20 trade and investment measures”, available on the websites of these institutions..

⁴⁶ Calculated at an interest rate per annum equal to USD LIBOR for one-year deposits, plus a margin of 4 percent, with a minimum of 4 percent per annum, to be compounded annually.

⁴⁷ Ibid.

⁴⁸ Actually, according to the government of Venezuela, a complicated one, as it submitted that: “a Mexican company, Cemex, S.A.B. de C.V. (“Cemex”) owns 100% of Cemex España S.A., which owns 100% of one of the Claimants, a Dutch company called Cemex Caracas. In turn, Cemex Caracas owns 100% of the other Claimant, another Dutch Company called Cemex Caracas II. Cemex Caracas II owns 100% of Vencement Investments (“Vencement”) a company incorporated in the Cayman Islands. Finally, as of 2002, Vencement owns 75.7% of Cemex Venezuela (CemVen), the cement company that was operating in the territory of the Respondent” (*CEMEX Caracas Investments B.V. et al v. Venezuela*, 2010: 6).

⁴⁹ See, *CEMEX Caracas Investments B.V. et al. v. Venezuela*, 2010: 6.

⁵⁰ Lee, 2015, reports that there was at least one case in which the claimant’s parent firm had the nationality of the respondent state, namely in the case of (*Azpetrol International Holdings B.V. and others v. Republic of Azerbaijan*, 2009) brought under the Energy Charter Treaty.

⁵¹ Developing countries were respondents in about four-fifths of these potential treaty shopping cases (ibid., p. 24).

⁵² The English version is available in a side-by-side comparison of the Brazil – Mozambique and Brazil – Angola Cooperation and Investment Facilitation Agreements, IISD, 2015.

⁵³ Agreement on Encourage and Reciprocal Protection of Investments, Nld.-UAE, 2013; Comprehensive Economic and Trade Agreement (CETA), Can.-EU, 2017. For a reference to investor responsibilities in the preamble, see, e. g., Reciprocal Investment Promotion and Protection Agreement, Mor.-Nga., 2016.

⁵⁴ For a discussion of the concept “sustainable FDI” and, in particular, the “sustainability characteristics” that emerge from an examination of various stakeholder groups, see, Sauvant and Mann, 2017.

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