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International Investment Law: Is it Time to Change the Traditional BIT System?

Key words:
BIT regime | BITs | BRIC countries | common commercial policy | ICSID | international investment regime | liberalism | MAI | Marxism | mercantilism | North--South confrontation | renegotiation of BITs | TFEU

Abstract | *This paper argues that the current international investment regime predominantly based on bilateral investment treaties (BITs) is exhausting its capacity as an efficient tool for regulating international investment. The increasing number of international investment agreements (IIAs) further perpetuates and accentuates the defragmented international investment regulation. Moreover, the existing regime can hardly accommodate the needs of developed states concerned with increasing investments from former capital-importing economies (e.g., BRIC countries) and sovereign wealth funds.*
Based on historical experience, it remains unlikely that a new multilateral investment treaty initiative will be successful in near future. However, the international community may deepen regional co-operation and foster conclusion of regional investment treaties better designed for current challenges. It might become a provisional measure which would facilitate negotiation of a MAI remaining on the international agenda.

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I. Introduction

6.01. Being deprived of centralized decision-making features and a multilateral treaty covering investment-related issues like, for example, in the GATT/ WTO, UN or EU, the system of international investment law has been predominantly based on numerous BITs and regional free trade agreements (FTA) like NAFTA or MERCOSUR, as well as an extensive case law developed by investment arbitration. It took a while to create this system, to establish its basic principles sacrificing sovereignty of investor-importing states and multiplying the number of existing BITs. The North-South confrontation which froze in the 1970s after a series of compromising UN resolutions on sovereignty of host states seems to re-appear nowadays. Developing capital-importing states are once again concerned about their sovereign rights to deal with foreign investments in their territory, demonstrate frustration in the ICSID arbitration, which they consider one-sided and prejudiced toward host countries[1]. Growing outward investments from former capital-importing states like Brazil, Russia, India or China (so-called BRIC countries), BIT re-negotiation problems in the EU after the Lisbon Treaty, complicate the situation even further. History is cyclic in this case; old problems with the international investment regime are at stake once again. Will the current BIT system survive or will it be converted into a complex of regional multilateral agreements like, for example, between the EU and third countries or other international entities like NAFTA? If BIT arrangements were to shift into regional multilateral treaties, would it be a smooth process? To answer these difficult questions, it appears useful to briefly recall the past (the legal history on this matter).

II. From Military Coercion to Investment Treaties

6.02. Nowadays nobody challenges the postulate that states are entitled to give diplomatic support to their citizens in other (foreign, host) states. At the same time, foreigners, being in a host state, must obey the laws of that state; to put it in other words, foreigners have to accept rights and obligations existing for citizens of the host state, and there is no possibility of the host state exempting foreigners from its jurisdiction[2]. These rather simple diplomatic rules brought about the emergence of a concept, according to which a foreign investor is obliged to obey a host state in

[1] Existing concerns and problems have been briefly described and analyzed in a rather unconventional publication prepared recently by the Investment Working Group of the Seattle to Brussels Network, see Reclaiming Public Interest in Europe's International Investment Policy. EU Investment Agreements in the Lisbon Treaty Era: A Reader, Amsterdam: Seattle to Brussels Network (R. Eventon ed., 2010)

[2] See Malcolm N. Shaw QC, International Law, Cambridge: Cambridge University Press 722–723 (5th ed. 2003).

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exchange for protection of his property against wealth deprivation[3] and permission to exercise business activities in the host state's territory. It took centuries to work out these customary rules, and three political economy theories concerning the relationship between the State and the market: mercantilism, Marxism and liberalism played a decisive part in the process.

6.03. Mercantilism came into existence together with the strengthening of colonialism in the sixteenth – seventeenth centuries. Mercantilism advocated extensive state regulation in pursue of national interests, it equated national wealth and prosperity with the quantity of gold available to the State and sought to restrict imports simultaneously increasing exports in order to increase the supply of gold[4]. Resources (mainly gold), according to mercantilists, were to be procured in colonies; at the same time, colonies were regarded as markets for the State's export. Therefore, all capital placements had to be performed with the purpose of expanding colonial possessions[5]. Mercantilism traditionally regarded trade as a source to earn capital for further investment. There was no necessity to work out legal instruments for protection of traders because the whole idea of protection was based on military power of the empire, bayonets substituted laws and soldiers substituted lawyers.

6.04. Mercantilism managed to live without challenges for a remarkable period of time. In the eighteenth century, liberals (Smith and Ricardo) started to argue that wealth was best measured by the productivity of people rather than by the amount of gold, and that the productivity was best achieved by unregulated market[6]. Liberals opposed the very idea of restricting international trade claiming that market must rule the trade[7]. Liberal theory became the foundation for the international free trade movement in Europe (*laissez faire*) already by mid nineteenth century.

6.05. Despite all these developments in the economic theories scholars of the time were not much concerned with international investment[8].

[3] Weston in particular stressed that "wealth deprivation" is a term which avoids most, if not all, of the major ambiguities and imprecision of the traditional terminology. See Burns H. Weston, *'Constructive Takings' under International Law: A Modest Foray into the Problem of 'Creeping Expropriation',* 16 Va. J. Int'l L. 103, 112 (1975). Thomas Pollan calls the history of FDI law "the history of expropriation". See Thomas Pollan, Legal Framework For The Admission Of FDI, Ultrecht: Eleven International Publishing 64 (2006).

[4] Dominick Salvatore, International Economics, Englewood Cliffs, N.J.: Prentice-Hall 26–28 (5th ed. 1995); Kenneth J. Vandevelde, *Sustainable Liberalism and the International Investment Regime*, 19 Mich. J. Int'l L. 373, 375 (1998).

[5] Kenneth J. Vandevelde, *supra* note 4, at 375.

[6] See Jeffrey A. Frieden & David A. Lake, *International Politics and International Economics, in* International Political Economy, New York: St. Martin's 1, 25 (J. A. Frieden, D. A. Lake eds., 3rd ed. 1996).

[7] *Ibid.;* George T. Crane, Abla Amawi, The Theoretical Evolution Of International Political Economy, Oxford: Oxford University Press 6 – 7, 55 – 58 (1997).

[8] Kenneth J. Vandevelde, *supra* note 4, at 376.

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Communication and travel difficulties prevented foreign direct investment (FDI)[9], though large capital surpluses created during the nineteenth century industrialization became available for the purpose. But the vast majority of those investments, as Cameron notes, was portfolio investment(s)[10]. The situation changed by the end of the nineteenth century when the corporate form of business became widely spread. Following the increase of foreign investment, it became more common for host states to seize the investments, and for capital-exporting states to demand compensation for those seizures. As of that time lawyers received more say in the matter. To illustrate, Brownlie noted that, within 100 years after 1840, some sixty claims commissions had been established to settle disputes arising from injuries to the interests of aliens[11]. However, reference to legal protection tools was an exception rather than a rule in those years. Besides, nobody made any distinction between pure trade, investment, and other forms of economic activity. Protection of own citizens as well as property abroad remained the concern of the government that preferred to rely on the language of military force.

6.06. Consequently, with the booming foreign investments, Marxist theory came onto the stage. Being concerned with the prosperity of the working class and peasants, Marxists contended that the accumulation of large quantities of surplus capital in industrialized countries would lead to an oversupply and thus reduce profits earned by investors[12]. Such situation forced capitalists to invest in non-industrialized states, and this, in its turn then was to help the economic development there, a necessary step on the way to socialism. But, as Marxists stressed, the development was achieved by means of low wages for workers, cheap raw materials and lands which means misery for the working class and the necessity of the proletarian revolution[13]. It is a paradox, but with all their hatred for increased profits and private property Marxists were among the first

[9] Different opinions, do, however, exist. Transnational corporations (TNC) or multinational enterprises (MNE) are regarded as the main carriers of FDI. British East India Company and Dutch East India Company are classical examples of the first such carriers in human history. *Cf.* Karl Moore and David C. Lewis insist that the first "multinationals" were Assyrian traders circa 2000 B.C. See, Karl Moore, David C. Lewis, *The First Multinationals: Assyria circa 2000 B.C.*, 38 (2) Management International Review 95 (1998). Other scholars claim that first MNEs emerged in the late 19th century due to the development of telegraph, steamships and railroads which made it possible to control investments. See The Growth Of Multinationals, International Library Of Critical Writings In Business History, London: Edward Elgar Publishing Ltd. 1 (M. Wilkins ed., 1991).

[10] Rondo Cameron, A Concise Economic History Of The World, Oxford: Oxford University Press 130–62 (3rd ed. 1997).

[11] Ian Brownlie, Principles Of Public International Law, Oxford: Oxford University Press 521 (4th ed. 1990).

[12] Kenneth J. Vandevelde, *supra* note 4, at 380–81.

[13] Vladimir Lenin, Imperialism: The Highest Stage Of Capitalism, New York: International Publishers 63 (1977).

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to develop ideas which later became central for direct investment (cheap labour and resources, higher profits, lack of local capital).

6.07. Despite the booming investments, internationally, cases of legal protection of foreign investors and their property were very rare even in the first decade of the twentieth century. In fact, no instruments of legal protection existed. The explanation was easy – *"[n]o elaborate framework for foreign investments was needed at the time because most investment was conducted within Europe, between the U.S. and Europe and within their colonial territories"*[14]. States still relied mostly on the military to protect their citizens and their property abroad. The situation changed marginally after the World War I and the Bolshevik Revolution in Russia, when aggrieved states and private parties started to file claims with different arbitration institutions[15]. While settling disputes the arbitral institutions broadened the old concept of the right of a state to exercise diplomatic protection of its citizens abroad (to seek redress for injuries to its citizens caused by action(s) of foreign powers) by applying it to protect foreign investments[16]. In 1929–31, the International Chamber of Commerce (ICC) and the League of Nations undertook efforts to draft a multilateral agreement on foreign investment but failed[17]. At the same time, the reversed processes were typical during that time (end of the nineteenth century – end of World War II). The United States, for example, reserved the exclusive prerogative to use military force to collect private debts in the Americas (so-called Roosevelt Corollary to the Monroe Doctrine). In fact, it was a response to South American states relying on the Calvo Doctrine rejecting foreigners a right to any kind of preferential treatment, denying the right of home states to exercise diplomatic protection of their nationals abroad[18], and to a newly born ideas of economic nationalism

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14 Thomas Pollan, *supra* note 3, at 64.

15 Among the most famous cases are: *Case Concerning the Factory at Chorzów* (Germany v. Poland), 1928 P.C.I.J. (Ser. A) No. 13, at 63–64 (September 13); *Case Concerning Certain German Interests in Polish Upper Silesia* (Germany v. Poland), 1926 P.C.I.J. (Ser. A) No. 7, at 81–82 (May 25); *Shufeldt Claim* (U.S. v. Guatemala), 2 Rep. Int'l Arb. Awards 1080 (1930).

16 Kenneth J. Vandevelde, *supra* note 4, at 377; Ian Brownlie, *supra* note 11.

17 Arthur S. Miller, *Protection of Private Foreign Investment by Multilateral Convention*, 53 Am. J, Int'l L. 371, 373 (1959), available in the JSTOR Archive at: http://www.jstor.org/stable/2195809 (accessed on September 20, 2010);
Peter Muchlinski, Multinational Enterprises And The Law, Oxford: Blackwell Publishers Inc. 573 (1999).

18 The Latin American states claimed that foreign states abused their rights in the exercise of diplomatic protection of their citizens. See Donald R. Shea, The Calvo Clause: A Problem Of Inter-American And International Law And Diplomacy, Minnesota: University of Minnesota Press 17–20 (1955), cited from Kenneth J. Vandevelde, *supra* note 4, at 379; Karl P. Sauvant, Victoria Aranda, *The International Legal Framework for Transnational Corporations, in* 20 United Nations Library On Transnational Corporations-Transnational Corporations: The International Legal Framework, London: Routledge 85 (A.A. Fatouros ed., 1994).

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which justified the improvement of a State's economic situation at the expense of other states, restrictive trade measures and other protectionist measures, phenomenon that was common all over Europe and America in the late nineteenth and beginning of the twentieth centuries. Moreover, unprecedented expropriation of foreign property by the Bolsheviks after the Russian Revolution and Civil War, European turmoil between the two World Wars, and the economic crisis of the 1930s contributed to the "conservative reaction" of the main economic powers of the time. On the one hand, all these in complex delayed the development of the international protection of FDI for years, on the other hand, the U.S. – Mexico conflict on the nationalization of oil and agrarian property owned by the U.S. nationals which dragged in the 1920s-1930s resulted in a very important principle which exists up to date and is known as the Hull Rule of *"[p]rompt, adequate and effective compensation"*[19].

6.08. A real breakthrough in the development of international investment regime took place only after the end of World War II during the Bretton Woods negotiations, when Keynes inspired the idea of creating an International Trade Organization (ITO)[20]. Draft documents related to the Organization contained very extensive provisions on foreign investment. For example, the Draft Charter for an International Trade Organization (widely known as Havana Charter) in its preamble stressed that the ITO members pledged themselves *"[t]o foster and assist industrial and general economic development, particularly of those countries which are still in the early stages of industrial development, and to encourage the international flow of capital for productive investment"*[21]. Though the Charter was not ratified, its significance for the development of the foreign investment law is beyond any doubt because it was the first document to recognize the importance of the issue and the necessity to get rid of economic nationalism in treating foreigners. Creation of the UN in 1945 put an end to the armed protection of property abroad[22]. It was the beginning of liberal era (sustainable liberalism) in international investment regime.

[19] Thomas Pollan, *supra* note 3, at 64–65; Tali Levy, *NAFTA's Provision for Compensation in the Event of Expropriation: A Reassessment of the 'Prompt, Adequate and Effective' Standard*, 31 Stan. J. Int'l L. 423, 428 (1995). The Hull Rule became the most attacked customary international law principle by developing nations. In particular, the Hull Rule was ignored by Iran in 1951 during nationalization of British property; by Libya during *Liamco's* concessions expropriation in 1955; by Egypt in the process of Suez Canal nationalization in 1956.

[20] The plan was that ITO would become the third pillar of the international economic system together with the International Monetary Fund (IMF) and the International Bank for Reconstruction and Development (IBRD).

[21] Havana Charter for an International Trade Organization, March 24, 1948, available at: http://www.wto.org/english/docs_e/legal_e/havana_e.pdf (accessed on September 20, 2010).

[22] Art. 2(1) of the UN Charter prohibits *"threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations."*

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6.09. Naturally, liberal investment regime based on the liberal economic theory (which assumes protection of property through an autonomous legal system) needed a body of international investment law[23]. Setting new rules for the international trade also furthered the necessity of some universal approach in dealing with foreign investments. Many attempts to adopt some kind of an international convention on private investment protection had been made in the 1940s and 1950s, but none was successful[24]. The GATT (1947)[25], however, achieved some progress on this topical issue. Despite the fact that GATT did not contain rules similar to those of the Havana Charter, its provisions on the most-favoured nation (MFN) treatment[26], reducing trade tariffs between signatory states[27], national treatment[28], and general elimination of quantitative restrictions[29] also contributed to the development of the international investment regime and legally separated trade and investment once and for all. In relation to this matter it seems important to mention the remarkable role of the 1955 GATT Resolution on International Investment for Economic Development, which, *inter alia*, urged countries to conclude bilateral agreements to provide protection and security for foreign investment. In 1959, the first BIT in the world was concluded (between West Germany and Pakistan), other countries followed suit and already by 1965 the number of BITs increased to 40[30]. At that time, BITs were perceived as a protection of investments after their establishment, a *"[d]eliberate policy response to what the capital-exporting countries perceived as a threat to traditional international standards for the treatment of foreign investors..."*[31]. BITs and other IIAs (*e.g.*, FTAs, DTTs of mostly bilateral nature) were destined to fill in the vacuum in international regulation of FDI and become the primary source of international investment law.

[23] Kenneth J. Vandevelde, *supra* note 4, at 382.

[24] In 1949, the ICC issued a draft Private Investment Protection Code; in 1957, the ICC again called for adoption of an international convention and initiated an international conference under the auspices of the UN Economic and Social Council (ECOSOC), International Financial Corporation (IFC), and the International Bank of Reconstruction and Development (IBRD); in the same year, the West German Society to Advance the Protection of Foreign Investment (*Gesellschaft zur Förderung des Schutzes von Auslandsinvestitionen e. V.*) published a draft called *"International Convention for the Mutual Protection of Private Property Rights in Foreign Countries."* In fact, the West German initiative can be called successful because the mentioned draft became a prototype for future German BITs. For detailed information on the developments in the 1947–1959 see Arthur S. Miller, *supra* note 17, at 371–378.

[25] The General Agreement on Tariffs and Trade (GATT 1947), available at: http://www.wto.org/english/docs_e/legal_e/gatt47_01_e.htm (accessed on September 20, 2010).

[26] *Ibid.,* Art. I.

[27] *Ibid.,* Art. II.

[28] *Ibid.,* Art. III.

[29] *Ibid.,* Art. XI.

[30] Zachary Elkins, Andrew T. Guzman, Beth Simmons, *Competing for Capital: the Diffusion of Bilateral Investment Treaties, 1960–2000,* U. Ill. L. Rev. 265, 269 (2008).

[31] Thomas Pollan, *supra* note 3, at 72; Peter Muchlinski, *supra* note 17, at 618.

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6.10. Conclusion of BITs has been a non-stop trend since the 1960s. According to UNCTAD, as of the end of 2009, there were 2,750 BITs[32]. However, their influence on a country's ability to attract more foreign investment is rather questionable. Some experts claim that BITs help capital-importing states to attract more FDI[33], diminishing their role of "protective instruments" and liberalizing access for investors (positive investment climate). Others insist that empirical evidence thereof is inconclusive, existence of BITs does not by itself increase inward investment flows[34]. Indeed, popularity of BITs contrasts sharply with the collective resistance developing countries have shown toward principles protecting foreign investors and their investments and the failure of the international community to make progress on a multilateral investment agreement[35]. As a matter of fact, many developing states had no other choice and had to accept the conditions on take-it-or-leave-it basis to win the foreign investment attraction competition[36]. Moreover, as will be stressed in the following part of the paper, the process of concluding new BITs and other IIAs further perpetuates and accentuates the patchwork of existing treaties with its inherent complexities, inconsistencies and overlaps, and its uneven consideration for development concerns[37].

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[32] United Nations, UNCTAD World Investment Report 2010: Investing in a Low-Carbon Economy, New York and Geneva: United Nations Publications 81 (2010).

[33] Thomas Pollan, *supra* note 3, at 73; Zachary Elkins, Andrew T. Guzman & Beth Simmons, *supra* note 30, at 274–79.

[34] Anne von Aaken, *Perils of Success? The Case of International Investment Protection*, 9 (1) EBOR 9-10 (2008); Susan D. Franck, *Foreign Direct Investment, Investment Treaty Arbitration and the Rule of Law*, 19 Pac. Mcgeorge Global Bus. & Dev. L. J. 337, 339 (2007).

[35] Zachary Elkins, Andrew T. Guzman & Beth Simmons, *supra* note 30, at 266. The authors explain this phenomenon as follows: the proliferation of BITs and the liberal property rights regime they embody is propelled in good part by the competition among potential host countries for credible property rights protections required by direct investors.

[36] Joseph E. Stiglitz, *Regulating Multinational Corporations: Towards Principles of Cross-Border Legal Frameworks in a Globalized World. Balancing Rights with Responsibilities*, 23 Am. U. Int'l L. Rev. 451, 468 (2008); Kate M. Supnik, *Making Amends: Amending the ICSID Convention to Reconcile Competing Interests in International Investment Law,* 59 Duke L.J. 343, 345 (2009); Zachary Elkins, Andrew T. Guzman & Beth Simmons, *supra* note 30, at 277.

[37] Unctad, World Investment Report 2008: Transnational Corporations and the Infrastructure Challenge, New York and Geneva: United Nations Publications 17 (2008).

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III. Failure of Multilateral Agreements and Imperfect BIT Regime

6.11. Establishment of the BIT regime did not stop further international debates about foreign investment. The very composition of the international rules covering foreign investment proved to be the cause of disagreement[38]. The North-South dialogue between developed and developing economies is the most significant example of the events in the 1960s -1970s. In fact, the discussion on national sovereignty, expropriation and compensation, became an ideological battle[39] between the North and the South[40]. In response to these extensive debates and under the pressure of developing countries UN established a rule that every country has a sovereign right to regulate and control foreign investments within its territory, once again it brought about a series of restrictive UN resolutions[41] and domestic laws adopted by developing countries.

6.12. Further efforts to create binding legal instruments under the auspices of World Bank were partially successful. Adoption of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID) in 1965 did not settle arguments on substantive law notions so disturbing in the North-South dialogue. Neither did the creation of the Multilateral Investment Guarantee Agency (MIGA) in 1988[42].

6.13. The end of the 1970s – beginning of the 1980s was marked by new "FDI disturbances" which again illustrated the complexity of the international

[38] Ralph H. Folsom, International Business Transactions, USA: West Group Publishing §25.1 (3rd ed.), available in West Law as INTBUSTRAN.

[39] Thomas Pollan, *supra* note 3, at 66.

[40] Position of the South can be shortly expressed by citing Nikita Khrushchev (USSR leader in 1953–64) who once said: "*[W]e declare war upon you in the peaceful field of trade*". See Arthur S. Miller, *supra* note 17, at 371. Developing countries (especially new independent nations of Africa in the 1960s) strongly believed that all their misfortunes were due to the economic and political intrigues of the rich developed states. According to this southern point of view, the gap between the North and the South was increasing all the time. They made very unrealistic demands addressed at developed nations, like transfer of progressive technologies at little or no cost, capital investments in companies with the majority local control and ownership. Besides, developing countries instigated by the socialist ideology challenged the standards of treating the investors claiming that in reality customary public international law did not contain rules requiring paying for expropriation.

[41] See, for example, United Nations General Assembly Resolution 1803 (XVII) on Permanent Sovereignty over Natural Resources (1962); United Nations General Assembly Resolution 3281 (XXIX): Charter of Economic Rights and Duties of States (1974); United Nations General Assembly Resolution 3201 (S-VI): Declaration on the Establishment of a New International Economic Order (1974); United Nations General Assembly Resolution 3202 (S-VI): Program of Action on the Establishment of a New Economic Order (1974). The effect of these resolutions is unclear. Lawyers still argue whether they can be regarded as a reflection of customary international law. See Thomas Pollan, *supra* note 3, at 68.

[42] However, practices of these two bodies, especially in dispute settlement and interpretation of BITs became very important sources of international investment law.

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regulation of FDI. The first one occurred in February 1979 – the Islamic Revolution in Iran. After unprecedented expropriation of foreign property (mainly American) and seizure of the U.S. embassy in Tehran, the U.S. responded by freezing all Iranian assets in the U.S. The crisis was partially solved only in 1981, when with the active participation of Algiers the rivals signed the so-called Algiers Declaration[43], which resolved the hostage issues and formed the Iran-United States Claims Tribunal authorized to settle expropriation claims[44]. The following years of the Tribunal's work resulted in a massive contribution to the international practice of settlement expropriation claims and compensation under international law[45].

6.14. In 1982, the U.S. challenged the Canadian Foreign Investment Review Act (FIRA)[46] alleging that Canada's practices under FIRA violated Canada's GATT obligations. This dispute forced to include the issue of applying GATT principles to FDI in the agenda of the Uruguay Round. However, raising the issue of a universal foreign investment regulation within the framework of the GATT/WTO also proved to be unsuccessful. The Agreement on the Trade-Related Investment Measures (TRIMs)[47], as one of the products of the Uruguay Round compromise, is not a complete investment agreement since it contains no rules on screening and establishment issues, repatriation of capital, free movement of personnel, expropriation and, most importantly, adequate compensation[48]. On the other hand, experts note that the TRIMs Agreement clearly placed FDI issues on the WTO agenda[49]. During the Doha Round, provisions of the 2004 Framework Agreement explicitly excluded investment issues from

[43] The Algiers Declaration of January 19, 1981, reprinted in 20 ILM 224 (1981), 75 AJIL 418 (1981).

[44] See background information on the Iran-United States Claims Tribunal, available at: http://www.iusct.org/background-english.html (accessed on September 22, 2010).

[45] The list of awards and decisions available at: http://www.iusct.org/lists-eng.html (accessed on September 22, 2010). For more details, see also George H. Aldrich, *What Constitutes a Compensable Taking of Property? The Decisions of the Iran-United States Claims Tribunal*, 88 Am. J. Int'l L. 585 (1994).

[46] See Canada-Administration of the Foreign Investment Review Act, (30th Supp.) GATT B.I.S.D. 140 (1984).

[47] Agreement on Trade Related-Investment Measures (TRIMS 1994), available at: http://www.wto.org/english/docs_e/legal_e/18-trims.pdf (accessed on September 22, 2010).

[48] Eric M. Burt, *Developing Countries and the Framework for Negotiations on Foreign Direct Investment in the World Trade Organization*, 12 Am. U. J. Int'l L. & Pol'y 1015, 1038 (1997).

[49] OECD Trade Directorate, Investment and the Final Act of the Uruguay Round: A Preliminary Stocktaking (OECD Doc. COM/TD/DAFFE/IME (94) 56/REV 1) 5 (1994); Mark Koulen, *Foreign Investment in the WTO, in* Multilateral Regulation of Investment, The Hague: Kluwer Law International 181–203 (E.C. Nieuwenhuys, M.M.T.A. Brus eds., 2001).

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the negotiations agenda[50], however, experts and scholars insist that the GATT/WTO framework might still be used to resolve existing discord between the capital-exporters and developing states[51] where the latter argue that restrictive investment policies are their sovereign right and an element of national economic policy. Developing states consider liberalization of investment policies a danger of abuse by MNEs and a loss of sovereign control over national development[52]. Indeed, despite the traditional separation between the trade and investment, the GATT/WTO roof appears to be a more logical choice, especially if one recalls the futile attempt to negotiate the Multilateral Agreement on Investment (MAI) under the auspices of the OECD. The MAI initiative failed first of all because of the choice of the OECD as a venue (too many developing states were excluded from negotiations); secondly, NGOs resisted the MAI very stubbornly; finally, some OECD member states did not support the initiative[53].

6.15. The current state of affairs in the international investment regime has a tendency for further complication. The spaghetti bowl of BITs and other IIAs[54], many of which are "*grounded in anachronistic assumptions*"[55] and hegemony of capital-exporting states[56], where contracting states are often deprived of an opportunity to interpret IIAs provisions[57], where capital-importing states are afraid to apply regulatory measures for public good and development in order not to invoke costly investment arbitration and measures protecting foreign investors, poses challenges for stability and legal certainty of the regime itself. Besides, as noted by Peterson, *"[w]hile proposed agreements such as the OECD Multilateral Agreement on Investment (MAI) were subjected to rigorous public scrutiny, many hundreds of bilateral agreements have entered into force without public notice or scrutiny. This reality casts some doubt on the oft-repeated claim*

[50] Thomas Pollan, *supra* note 3, at 127; Ian F. Ferguson, Charles E. Hanrahan, William H Cooper and Danielle J. Langton. *The Doha Development Agenda: The WTO Framework Agreement.* CRS Rep. Order Code RL32645 3 (2005).

[51] For example, Kate M. Supnik notes that there is a possibility to introduce changes to the ICSID by using an analogy with the WTO General Exceptions (art. XX GATT, art. XIV GATS, art. III TRIMS) to reconcile differences in an international investment regime. See Kate M. Supnik, *supra* note 36.

[52] This position was made public by India at the Singapore Ministerial Conference. See Eric M. Burt, *supra* note 48, at 1017.

[53] Thomas Pollan, *supra* note 3, at 125.

[54] As of the end of 2009, UNCTAD reported 5,939 IIAs, see *supra* note 32, at 81.

[55] Kate M. Supnik, *supra* note 36, at 347.

[56] Robert Crawford, Regime Theory In The Post-Cold War World: Rethinking Neoliberal Approaches To International Relations, Dartmouth: Darmouth Publishing Group (1996); Robert O. Keohane, After Hegemony: Cooperation And Discord In The World Of Political Economy, Princeton: Princeton University Press (2005).

[57] For more information on the existing dilemmas of investment treaty interpretation, see Anthea Roberts, *Power and Persuasion in Investment Treaty Interpretation: The Dual Role of States*, 104 Am. J. Int'l L. 179 (2010).

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that the defeat of the MAI was somehow a "major victory" for critics of unfettered globalization. For those who take the extreme view that investor protection is an illegitimate international goal, the sober reality is that there have been rather more 'losses' than 'victories' of late, as bilateral treaties have proliferated with surprisingly little public notice"[58]. Eventually, one may conclude that shifting from multilateral efforts to bilateral negotiations is, in fact, not such a good solution but rather a temporary measure.

6.16. According to Salacuse, today's international investment regime faces four major challenges:

- disappointing regime results;
- perceived defective decision-making process and unjustified constraints on national sovereignty;
- divergence of participant expectations;
- the impact of the global economic crisis[59].

6.17. The above listed challenges are not new to the international investment regime. Once again it demonstrates the old unsolved problems that have been at stake for decades. Developing and transition economies are more and more frustrated with the existing "one-sided" rules of the game when private investors can successfully sue them via international arbitration whenever new regulatory measures are introduced[60]. Withdrawal of Ecuador and Bolivia from the ICSID has not been considered a serious threat for the existing international investment regime, or at least not so far. At the same time, omission of the investor-state dispute provision in the 2004 USA – Australia FTA[61], Russia's non-ratification of the ICSID Convention[62] and decision to terminate its provisional application of the Energy Charter Treaty (ECT) as of October 18, 2009[63], Brazil's refusal

[58] Luke Eric Peterson, *The Global Governance of Foreign Direct Investment: Madly Off in All Directions*, 19 Friedrich Ebert Stiftung Dialogue on Globalization Occasional Papers 25 (2005). Tollefson stresses that *"[i]nternational legal sovereignty" is so important in the contemporary global economy that "any adverse impacts on Westphalian sovereignty are more than offset by the benefits that derive from [participation in the international investment] regime."* See Chris Tollefson, *Games Without Frontiers: Investor Claims and Citizen Submissions Under the NAFTA Regime*, 27 Yale J. Int'l L. 141, 144 (2002); Kate M. Supnik, *supra* note 36, at 350.

[59] Jeswald W. Salacuse, *The Emerging Global Regime for Investment*, 51 Harv. Int'l L. J. 427 (2010).

[60] See, *e.g.,* The S2B Investment Working Group, *Introduction: 50 Years of BITs is Enough, in* Reclaiming Public Interest in Europe's International Investment Policy. EU Investment Agreements in the Lisbon Treaty Era: A Reader, Amsterdam: Seattle to Brussels Network 9-10 (R. Eventon ed., 2010).

[61] USA – Australia Free Trade Agreement of May 18, 2004, available at: http://www.ustr.gov/trade-agreements/free-trade-agreements/australian-fta/final-text accessed on September 22, 2010).

[62] The Russian Federation signed the ICSID Convention on June 16, 1992.

[63] *What is Russia's Status with the Energy Charter?,* available at: http://www.encharter.org/index.php?id=18 (accessed on September 22, 2010).

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to participate in BITs and the ICSID Convention[64] are more alarming signs for both investors and the host states. Thus, examples of Ecuador and Bolivia "*resisting the global investment agenda*"[65] may be only the beginning. The most striking feature of the current state of affairs in the international investment regime is the fact that there have been more and more protectionist measures introduced by developed nations;[66] as a matter of fact, capital-exporting states switch roles with capital-importing states in terms of sovereignty concerns and the necessity to protect public security and public policy. In relation to this matter, it is essential to remember that it is not solely the recent world financial crisis that can be blamed for this[67]. Increasing outward investments from the BRIC countries and other developing and transition economies (emerging markets)[68] pose new challenges for the existing BITs and investment arbitration designed to protect investors from the developed nations. It remains a million dollar question how the existing ICSID regime or any other investment arbitration will react in case a developing state challenges regulatory measures introduced by a developed state.

6.18. Recent developments in the EU, namely the Lisbon Treaty coming into force and allocation of FDI to the common commercial policy pursuant to art. 207 TFEU, pose more questions than answers. Common commercial policy does not include portfolio investments which, along with direct

[64] Brazil concluded a few BITs (14 as of 2006), none of them has been ratified.

[65] Antonio Tricarico, Roberto Sensi, *Bolivia Resisting the Global Investment Agenda, in* Reclaiming Public Interest In Europe's International Investment Policy. Eu Investment Agreements In The Lisbon Treaty Era: A Reader, Amsterdam: Seattle to Brussels Network 35–36 (R. Eventon ed., 2010).

[66] OECD, Status Report: Inventory Of Investment Measures Taken Between 15 November 2008 And 15 June 2009 (2009); United Nations, UNCTAD World Investment Report 2006: FDI From Developing And Transition Economies: Implications For Development XVIII–XIX, New York and Geneva: United Nations Publications (2006); Karl P. Sauvant, *Reservoirs of the Future, in* What's Next? Strategic Views On Foreign Direct Investment, ISA, UCTAD, WAIPA 91 (S. Passow, M.Runnbeck eds., 2005); Karl P. Sauvant, *We Must Guard Against Growing Protectionism*, Shanghai Daily (August 4, 2009); Karl P. Sauvant, *The Rise of FDI Protectionism, in* Oco Insight-A New Investment Paradigm, Oco Global 31 (2008/09).

[67] For example, increasing investments by sovereign wealth funds (SWFs) from Russia, China and Gulf States are met by developed states with caution. German Chancellor Merkel noted: "*[W]ith those sovereign funds we now have a new and completely unknown element in circulation.... One cannot simply react as if these are completely normal funds of privately pooled capital.*" See Carter Dougherty, *Europe Looks at Controls on State-owned Investors*, Int'l Herald Trib., July 13, 2007.

[68] In 2007, emerging markets accounted for 15% of global outward FDI flows, in 2009, almost 9% of all FDI outflows came from BRIC countries. See United Nations, UNCTAD World Investment Report 2010: Investing In A Low-Carbon Economy, New York and Geneva: United Nations Publications 7 (2010); Karl P. Sauvant, *Is the US Ready for the FDI from Emerging Markets: The Case of China, in* Foreign Direct Investment From Emerging Markets: The Challenges Ahead, New York: Palgrave Macmillan (K. P. Sauvant, G. McAllister, W. A. Maschek eds., 2010).

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investments, are normally covered by BITs. In terms of the existing BITs between Member States and third countries, the European Commission acknowledged that it would be impossible for the Union to abruptly take over negotiation competencies from Member States[69]. At the same time, the proposed scheme authorizing Member States to negotiate new BITs and/or re-negotiate the existing treaties will hardly solve the problems already at stake. Withdrawal of the authorization from Member States by the Commission are highly unlikely, resistance of individual Member States and absence of a common (model) EU BIT template[70] will take their toll. On the other hand, individual efforts of some Member States have been far from successful, especially when BITs with big players like the US or Canada are involved, here the bargaining power of small Member States is crucial. Memorandum of Understanding Concerning the Applicability and the Preservation of Bilateral Investment Treaties Concluded between the US and the New EU Member States, or Countries – Candidates for Accession signed in September 2003[71] by no means accelerated or facilitated negotiations with the US. Government of the Czech Republic, generally perceiving BITs as a "necessary evil"[72], has been disappointed with its new BIT with Canada which has replaced the 1990 BIT now incompatible with EU law[73]. Renegotiation of the existing BITs might encounter the stubborn position of third countries on such cornerstone issues as, for example, non-discriminatory application of capital transfer restrictions by the EU[74], besides, new issues caused by environmental and

[69] Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions towards a comprehensive European international investment policy, COM (2010) 343 final (Brussels, July 7, 2010); Proposal for a regulation of the European Parliament and of the Council establishing transitional arrangements for bilateral investment agreements between Member States and third countries, COM (2010) 344 final (Brussels, July 7, 2010).

[70] Thomas Eilmansberger, *Bilateral Investment Treaties and EU Law,* 46 CML Rev. 383 (2009); Armand de Mestral C. M., *Is A Model EU BIT Possible – or Even Desirable?* 3 (21) Columbia FDI Perspectives (2010).

[71] United Nations Conference on Trade and Development, Recent Developments in International Investment Agreements, (UNCTAD/WEB/ITE/ITT/2005/1), New York and Geneva: United Nations Publications 6 (2005).

[72] Filip Černý, Jaroslav Heyduk, *Report: Czech – Canadian BIT Concluded, in* Czech Yearbook of International Law. Second Decade Ahead: Tracing the Global Crisis 340, 342 (A. Bělohlávek, N. Rozehnalová eds., 2010).

[73] *Ibid.*

[74] See the recent ECJ case law: Judgment of 3 March 2009, Case 205/06, *Commission of the European Communities v Republic of Austria* [2009] 2 C.M.L.R. 50; Judgment of 3 March 2009, Case 249/06, *Commission of the European Communities v Kingdom of Sweden* [2009] 2 C.M.L.R. 49; Judgment of 19 November 2009, Case 118/07, *Commission of the European Communities v Republic of Finland* [2009], available at: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62007J0118:EN:HTML (accessed on September 29, 2009). For critical comments on the ECJ position and on the general EU position toward re-negotiation, see Eileen Denza, *Bilateral Investment*

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other public policy concerns might further complicate the process. In any case, this time, third countries will not be that willing to unilaterally accept conditions offered by individual Member States, position of BRIC countries and other emerging markets might be especially strong. Re-negotiation of the existing BITs will give the latter a unique chance to broaden both their rights as host and home states.

6.19. As I have argued at the beginning of this paper, the history is cyclic. The existing BITs-based international investment regime is challenged more and more often. Nowadays, the issue of a multilateral investment treaty is at stake once again. Old North-South issues of state sovereignty and investors' protection are now accompanied by new concerns of both developed and developing economies. Political concerns of the developed nations toward growing outward investments from the emerging markets are counterbalanced by the emerging markets' willingness to secure equal rules of the game where the old stereotypes of the Cold War should not apply. It is very unlikely that this discord can be effectively solved via BITs, it will only further defragment the existing legal and policy framework, let alone sustainable development and good governance. The new MAI initiative is hard to imagine being successful under the present conditions, irrespectively of the prospective venue (UN, WTO, OECD, IMF, World Bank). Gradual modification of the ICSID and closer regional co-operation (*e.g.,* between the EU and ASEAN, NAFTA, MERCOSUR, perhaps even BRIC countries as one entity) seem to be more feasible as provisional measures. International investment regime can and must be re-shaped.

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Summaries

DEU [***Internationales Investitionsrecht: Ist die Zeit reif für Änderung des traditionellen Systems bilateraler Investitionsschutzabkommen (BIT)?***]

Der vorliegende Beitrag argumentiert, dass der gegenwärtige internationale Rahmen für Investitionen, der vorrangig auf bilateralen Investitionsschutzabkommen (BITs) beruht, an die Grenzen seiner Kapazität gestossen ist, was den Einsatz als effizientes Instrument zur Regulierung grenzüberschreitender Investitionen anbelangt. Die wachsende Zahl von Investitionsschutzabkommen (IIAs) schreibt ein internationales Investitionsrecht fort, das defragmentiert ist, und unterstreicht dessen Charakter noch. Darüber hinaus ist der vorhandene rechtliche Rahmen kaum in der Lage, die Bedürfnisse der Industrienationen zu befriedigen, die sich mit zunehmenden Investitionen seitens vormals kapitalimportierender Volkswirtschaften (wie z.B. den BRIC-Staaten) und seitens Staatsfonds auseinandersetzen.

Aufgrund der historischen Erfahrung, dass eine neue Alternative für multilaterale Investitionsabkommen in naher Zukunft wahrscheinlich keinen Erfolg

Treaties and EU Rules on Free Transfer: Comment on Commission v Austria, Commission v Sweden and Commission v Finland, 35 (2) E. L. Rev. 263 (2010).

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haben dürfte. Es ist doch denkbar, dass die internationale Gemeinschaft die regionale Zusammenarbeit vertieft und den Abschluss regionaler Investitionsschutzabkommen fördert, die den aktuellen Anforderungen besser gewachsen sind. Das kann zu einer Übergangsstuffe werden, mit der Weg für die Aushandlung eines multilateralen Investitionsabkommens (MAI) bereitet wird, das noch immer auf der internationalen Tagesordnung steht.

CZE [***Mezinárodní investiční právo: Je čas změnit tradiční systém bilaterálních investičních dohod?***]
Tato stať polemizuje se skutečností, že současný mezinárodní režim ochrany investic založený převážně na dvoustranných dohodách o podpoře a ochraně investic (BID) vyčerpává svoji kapacitu účinného nástroje pro regulaci mezinárodních investic. Rostoucí počet mezinárodních dohod o investicích (IIA) dále prohlubuje a zvýrazňuje roztříštěnost úpravy mezinárodních investičních předpisů. Stávající režim navíc může jen stěží vyhovět potřebám vyspělých zemí, které řeší narůstající investice z bývalých zemí dovážejících kapitál (např. země BRIC), a suverénních investičních fondů.
Na základě historických zkušeností není v blízké budoucnosti pravděpodobné realisticky očekávat úspěch nové iniciativy k uzavření multilaterální investiční dohody. Mezinárodní komunita však může prohloubit regionální spolupráci a podpořit uzavírání regionálních investičních dohod, jež jsou určeny k tomu, aby lépe reflektovaly aktuální problémy a výzvy. Tímto by mohl být vytvořen dočasný nástroj, který by usnadnil vyjednání vícestranné investiční dohody (MAI), jež stále zůstává na programu mezinárodního jednání.

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POL [***Międzynarodowe prawo inwestycyjne: czas na zmiany w tradycyjnym systemie BIT?***]
Niniejszy artykuł stwierdza, że aktualny reżim inwestycji międzynarodowych przeważnie opiera się na dwustronnych umowach o ochronie i wzajemnym popieraniu inwestycji (BIT) i wyczerpuje swoje możliwości efektywnego narzędzia regulacji inwestycji międzynarodowych. Choć wydaje się mało prawdopodobne, aby nowa inicjatywa wielostronnych umów o ochronie i wzajemnym popieraniu inwestycji odniosła sukces, społeczność międzynarodowa może pogłębiać współpracę regionalną i dążyć do zawierania regionalnych umów inwestycyjnych, lepiej dostosowanych do aktualnych wyzwań.

FRA [***Droit des investissements internationaux: le moment est-il venu de modifier le système traditionnel fondé sur les traités bilatéraux d'investissement ?***]
Cet article relate que le régime d'investissement international actuellement en vigueur, basé en premier lieu sur les traités bilatéraux d'investissement (TBI), perd de son efficacité dans le domaine de la régulation des placements internationaux. Bien qu'il soit peu probable que la mise en œuvre d'un nouveau projet de traité multilatéral soit couronnée de succès, il est possible que la communauté internationale élargisse la coopération régionale et favorise la conclusion de traités régionaux d'investissement mieux adaptés aux défis actuels.

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RUS [***Закон о зарубежных инвестициях: не пора ли менять традиционную систему двусторонних инвестиционных соглашений?***]
В настоящей статье приводятся доводы в пользу того, что нынешний режим международных инвестиций, главным образом основанный на двусторонних инвестиционных соглашениях (BIT), уже исчерпывает себя в качестве эффективного инструмента регулирования зарубежных инвестиций. Хотя маловероятно, что новая инициатива о заключении многосторонних инвестиционных соглашений возымеет успех, международное сообщество может укрепить сотрудничество на региональном уровне и активнее заключать региональные инвестиционные соглашения, которые в большей мере отвечают современным требованиям.

ES [***Ley de inversión internacional: ¿Es hora de cambiar el sistema de TBI tradicional?***]
El artículo argumenta que el régimen de inversión internacional actual, basado principalmente en tratados bilaterales de inversión (TBI), está agotando su capacidad como herramienta eficaz para regular la inversión internacional. Aunque el éxito de una iniciativa de tratado de inversión multilateral nueva es improbable, la comunidad internacional puede ahondar en la cooperación regional y fomentar la conclusión de tratados de inversión regional mejor diseñados para los desafíos actuales.

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