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David Collins*

An increasing proportion of outward foreign direct investment (‘FDI’) originates from emerging market economies, indicating a new stage of globalization in which multinational enterprises from the developing world will increasingly engage in commercial operations in the developed world. This trend will place pressure upon the existing regime of international investment law, created largely to serve the needs of American multinationals in the 20th Century and with little regard for permitting policy space of developing host states vulnerable to foreign competition. This article will consider the key transformations within international investment law, as embodied variously by multilateral and bilateral instruments of the 21st Century, which may be embraced to address the rising FDI flows from the emerging world. Some areas of convergence between the interests of the new and traditional capital exporting states are observed, such as regulatory transparency and neutral dispute settlement. There are also crucial areas of divergence, including the need to accommodate state owned enterprises and allow pre-establishment screening for various public policy goals. This new stage of globalization in which FDI flows both ways and the concepts of home and host state become meaningless will require a more balanced approach to international investment law.

I INTRODUCTION: THE RISE OF OUTWARD FOREIGN DIRECT INVESTMENT FROM EMERGING MARKETS

The rapidly emerging economies of Asia, Latin America and eventually Africa are poised to become the dominant economic powers of the 21st Century, possibly overtaking many of the largest advanced economies of the West, including Germany, the United Kingdom and even the United States. China’s decade of unprecedented growth has already led it to surpass Japan as the world’s second largest economy. India will shortly become the most populated country in the world, with a relatively young and educated workforce. Brazil has begun to harness its resource wealth and

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embrace a market economy to become a major economic power within Latin America. Many of these so-called “southern” states are achieving economic maturity, marked notably by rising GDP per capita as well as receipt and, importantly for the purposes of this article, export of foreign direct investment (‘FDI’). An indicator of economic prosperity as well as a barometer for globalization, FDI consists of both cross-border mergers and acquisitions with existing foreign firms as well as the establishment of entirely new commercial enterprises in other countries, or greenfield investments. Recent data on the flows of FDI from emerging market states reflects the appearance and rise of the emerging market multinational enterprises (‘MNE’)s on the world stage that had once been dominated by American, Japanese and European companies.

FDI from developing countries accounted for approximately one quarter of global FDI outflows in 2009 but has been the focus of limited academic commentary primarily from the field of business.¹ In that sense it could be stated that the ascendency of emerging market MNEs has occurred largely unobserved by the West. But crucially, outward FDI from the emerging world is accelerating relatively more rapidly, and was also more quick to rebound from the global financial crisis of 2008-09 than that of FDI from developed countries.² While outward FDI continues to be dominated by firms from developed countries such as the US and those of the European Union, FDI from emerging economies is rising at a relatively faster rate and may ultimately equal or exceed that of Western firms. MNEs from the emerging markets are globalizing at a faster pace than their developed world counterparts, at an

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

earlier stage of their existence, and there are no indications that this will abate in the near future. The Boston Consulting Group claims that fifty of the firms listed in its annual compilation of ‘Global Challengers’, meaning firms from rapidly emerging economies, will qualify for inclusion on Fortune’s highly regarded list of the 500 largest companies in the world. This reveals both the large quantity of capital held by emerging market MNEs, often backed directly by their home country governments, as well as the dynamic nature of these firms that appear undaunted by the risks that Western firms have associated with internationalization, such as political unrest and legal instability in host states. While Western MNEs will continue to invest abroad in Asia and Latin America, as well as in Europe and other developed regions, this will occur alongside and in ever-intensifying competition with MNEs from the emerging markets. Whereas 20th Century globalisation was associated with the establishment by Western firms of international markets for their goods and the acquisition of raw materials or low cost manufactured products overseas, these new shifts in capital movement represent what could be described as the defining characteristic of 21st Century globalisation. The description of this new paradigm of international commercial activity as a kind of reverse economic neo-colonialism is compelling: emerging markets may ultimately influence western society including not just economic impacts but possibly also cultural ones. It is not difficult to imagine that many Western countries will be hostile to this shift and they may consequently attempt to arrest this process through the same systems of international investment law that had once served their expansionary interests.

3 A Rugman, *Theoretical Aspects of MNEs from Emerging Economies* in Ramamurti and Singh above n 1
5 See e.g. JOHN TOMLINSON, GLOBALIZATION AND CULTURE (Cambridge University Press, 1999)
The growing success of emerging market investors has occurred in many ways in spite of principles of international investment law developed mainly through the experience of western investors during the Pax Americana, a term used to describe the period of relative peace in the western world in the second half of the 20th Century in which the US occupied a position of singular geopolitical dominance. While it is beyond the scope of this article to debate the issue, this period is often thought to have concluded following a series of events in the first decade of the 21st Century heralding the decline of the US, including the 2001 terrorist attacks and the global financial crisis of 2008-10. At the height of American power and influence, the home states of western companies, notably the United States and the countries of Europe established largely one-sided investment treaties that protected their investors from the regulatory actions of host states overseas, often in the developing world. Ironically, emerging market investors now seek to implement these investor-friendly agreements to suit their objectives, which may be contrary to the interests of the west as host state recipients fearful of competition with more efficient producers. Thus the international legal framework must ultimately be adapted to the new global order in which capital flows both ways and it must do so by delineating the rights and obligations of investors and governments in a more balanced manner.

This article will attempt to illustrate how the existing regime of international investment law has and will be transformed in response to the shift in FDI flows from East to West that represents 21st Century phase of globalization. As the focus of this article is the international regulation of investment, national laws governing FDI, including outflows from the emerging world and inflows to the developed world, such

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6 An associated decline of the West generally has been observed and linked to developments like the sovereign debt crisis as well as falling birth rates in Europe. There is a voluminous amount of literature on this subject, among the best recent examples of which are: I MORRIS, WHY THE WEST RULES FOR NOW (Profile, 2010); D MARQUAND THE END OF THE WEST: THE ONCE AND FUTURE EUROPE (Princeton University Press, 2011); D MOYO, HOW THE WEST WAS LOST (Penguin, 2011)
as the Committee on Foreign Investment in the United States, will not be explored. The article will be structured as follows: Part II will examine the multilateral and bilateral instruments that govern international investment and Part III will discuss some of the key changes that have begun to occur in this regime given the dynamic discussed above. Part IV will offer some brief conclusions.

II SOURCES OF INTERNATIONAL LAW ON FOREIGN INVESTMENT

The international legal framework for the protection of FDI consists of multilateral rules derived from the western Bretton Woods institutions of the World Trade Organization (WTO), World Bank and International Monetary Fund (‘IMF’) as well as and more importantly, a network of bilateral and regional investment treaties. Together these sources of law and institutions of global governance comprise one of the most remarkable achievements of the Pax Americana, raising the living standards of millions worldwide by dismantling barriers to the movement of goods and capital that had characterized earlier part of the 20th Century. International investment law as variously practiced by and through these instruments has itself been in part developed also from the rules of customary international law; the law practiced by states arising from the understanding that they are required to act in that manner by virtue of their membership in the international community. This second source of international law will not be examined in this article as modern international investment law appears to be increasingly governed by treaty-based rules, again derived primarily to serve the interests of developed nation MNEs.

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7 Art 38(1)b of the Statute of the International Court of Justice lists the various sources of international law.
8 E.g. A Lowenfeld, Investment Agreements and International Law 42 COLUMBIA JOURNAL OF TRANSNATIONAL LAW 123 at 128
i) The WTO – GATS, TRIMs and TRIPs

The WTO is an international organization that supervises trade relations between countries with a view to liberalizing investment flows as a means of raising living standards worldwide. Created in 1995 as the institutional foundation of the earlier General Agreement on Tariffs and Trade, the WTO consists of 153 Member states as of 2011, including many of the largest, rapidly growing economies, the most recent addition of which was Vietnam in 2007. In addition to administering and facilitating further negotiations of agreements that impact upon international investment, the WTO also provides a comprehensive dispute settlement facility to adjudicate matters arising out of the implementation of the agreements by Member states. Recommendations of the Dispute Settlement Body (‘DSB’), of which increasing participation has arisen among emerging market Members, most notably China\(^9\), provide a vital understanding of the concepts found in the text of the WTO agreements, although this facility offers no recourse to disaffected private investors seeking redress against their host states. The dominant developed nations have been the principle users of the DSB and indeed its structure is often thought to represent Anglo-American style litigation.\(^10\)

The most important of the WTO agreements for the purposes of FDI is the General Agreement on Trade in Services (‘GATS’). FDI is covered by Mode 3 of the GATS: the supply of a service of one Member through the commercial presence in the territory of any other Member.\(^11\) GATS contains general obligations which require that Members accord most favoured nation treatment to other members, meaning that no Member would be granted a regulatory advantage over any others as well as ensure

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\(^9\) J Ya Qin, China, India and WTO Law in M Sornarajah and J Wang eds. CHINA, INDIA AND THE INTERNATIONAL ECONOMIC ORDER (Cambridge University Press, 2010) at 193


\(^11\) Art I.2 d)
that domestic laws are administered in a transparent manner.\textsuperscript{12} National treatment requires Members to grant foreign suppliers of services the same as domestic ones, and market access commitments prevent Members from placing limitations such as the number and size of service suppliers operating within its territory, whether domestic or foreign.\textsuperscript{13} Specific Commitments are set out in each Members’ Schedules, either horizontally (across all service sectors) or for specific sectors only. The extent of these specific commitments and any exceptions therein, will dictate the degree of FDI liberalization for a particular Member in terms of its acceptance of incoming investment. The effect of the emerging market economies’ specific GATS commitments on outward FDI is less obvious however, because emerging market MNEs depend upon the GATS obligations undertaken by the host states in which they operate, as GATS specific commitments are not reciprocal. GATS does not provide a complete set of investment protection rules, such as would contain guarantees against expropriation or nationalization by host states. This has been achieved instead through bilateral instruments, as will be discussed below.

Another important multilateral agreement that has affected global FDI flows that has been achieved through the WTO is the Trade Related Investment Measures (‘TRIMS’) Agreement. This agreement was only intended to address the “trade distorting”\textsuperscript{14} effects of investment related measures, not to be an exhaustive treaty on the regulation of FDI, largely due to objections from developing countries which held that certain trade-related investment measures were necessary to control the abusive practices of MNEs.\textsuperscript{15} The TRIMS Agreement essentially prohibits WTO Members from applying TRIMS that are inconsistent with the central commitments of the

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\textsuperscript{12} Arts II, III and VI
\textsuperscript{13} Arts XVII and XVI
\textsuperscript{14} TRIMS, preamble
\textsuperscript{15} S LESTER & B MERCURO, \textit{WORLD TRADE LAW: TEXT, MATERIALS AND COMMENTARY} (Hart, 2008) at 635
\end{flushright}
WTO’s General Agreement on Tariffs and Trade (‘GATT’); namely requirements of national treatment for imported goods and prohibitions on quantitative restrictions on imports and exports.\textsuperscript{16} TRIMS themselves are left undefined; instead there is an annex containing an illustrative list of investment measures that are inconsistent with these GATT commitments. Inconsistent measures include requirements that enterprises must use local materials or that usage of imported products is limited according to the volume of exports. Such conditions may be imposed on foreign investors in order to stimulate the local economy by assisting local suppliers.

The WTO’s Trade in Intellectual Property (‘TRIPS’) agreement has a significant effect on FDI because intellectual property is a viewed type of investment for the purposes of international investment law.\textsuperscript{17} This has been especially important to western MNEs that operate in high technology disciplines where proprietary information is expensive to create yet would be relatively easy to duplicate, particularly in countries that have poorly developed protections for intellectual property (‘IP’). TRIPS thus mandates minimum protections for copyright, patents, trademarks and other varieties of intellectual property to be provided by Members’ national laws. This includes mechanisms for establishing and enforcing these rights through the domestic legal system of WTO Member states.

\textit{ii) The World Bank: ICSID and MIGA}

Two of the most important multilateral instruments for the regulation of international investment have resulted from the efforts of the International Bank for Reconstruction and Development, or the World Bank, an international organization consisting of 187

\textsuperscript{16} TRIMS Art 2, referring to GATT Arts III and XI
\textsuperscript{17} R DOLZER \& C SCHREUER, \textit{INTERNATIONAL INVESTMENT LAW} (Oxford University Press, 2008) at 60 and M SORNARAJAH, \textit{THE INTERNATIONAL LAW ON FOREIGN INVESTMENT} (Cambridge University Press, 2010) at 12-13
member countries as of 2011 with an objective of improving the economic condition of developing countries around the world, in part through loans intended to assist with development and infrastructure related projects. The World Bank is headquartered in Washington, DC and the US remains the dominant voice in its governance due to the allocation of voting rights based upon economic power.\textsuperscript{18} The first investment-related instrument maintained through the World Bank is the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, also known as the Washington Convention or the ICSID Convention.\textsuperscript{19} This treaty created the International Centre for the Settlement of Investment Disputes (‘ICSID’) which is now the principal system of arbitration for the resolution of disputes between foreign investors and the host states in which they invest.\textsuperscript{20} As of 2011, 144 states had become parties to the convention. China and other large emerging markets such as Mexico and South Africa have ratified the Convention, although Brazil, India and Russia have yet to do so. ICSID is advantageous because it provides a recognized, neutral forum for dispute settlement of investment related matters with a standardized procedure and institutional support. Tied to the consent of the parties, the dispute settlement process is self-contained, meaning that it is independent of the influence of outside bodies such as courts. Awards of the tribunal are final and binding, except in very narrow circumstances, and are enforceable automatically in all party states, obviating the need of other enforcement mechanisms such as the New York Convention. As an agency of the World Bank, ICSID can use the denial of World Bank assistance as a sanction against the refusal to enforce its awards. Thus far US and European MNEs have been the dominant complainants in ICSID-based arbitrations.

\textsuperscript{18} The US holds approximately 16\% of the voting power, far more than the next largest member, Germany with 4.4\%, <http://siteresources.worldbank.org/BODINT/Resources/278027-1215524804501/IBRDCountryVotingTable.pdf> (April 2011)
\textsuperscript{19} 575 UNTS 159, 4 ILM 524 (1965)
\textsuperscript{20} DOLZER AND SCHREUER, above note 17 at 222
The second major contribution of the World Bank in the fostering of FDI of emerging market MNEs is the Multilateral Investment Guarantee Agency (‘MIGA’), created in 1988 with the purpose of providing guarantees against non-commercial risks faced by investors operating in developing states. These so-called “political risks” cover four main categories: host country restrictions of currency transfers; expropriation; breach or repudiation of contract by the host government where there is no effective judicial processes available; and war or civil disturbance.\(^{21}\) Only investments that contribute to the host country’s development and are in conformity with its laws are eligible for MIGA coverage.\(^{22}\) While MNEs from emerging markets have shown less sensitivity to political risk than their developed country counterparts,\(^{23}\) the availability of PRI may become increasingly important given the increasing involvement of emerging market firms in high-risk areas such as Africa, particularly where they are operating in conjunction with Western firms for whom MIGA type assurances are more common.

**iii) IMF and Capital Transfers**

Emerging markets’ membership in the International Monetary Fund (‘IMF’) has also been influential in augmenting OFDI flows. The IMF is an international organization, created in the aftermath of World War II and also headquartered in Washington DC that is currently composed of 187 member countries, with the US as the dominant member by voting power.\(^{24}\) The IMF is charged with maintaining free transfer of

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\(^{22}\) Art 12

\(^{23}\) P N Satyanad, *How BRIC MNEs Deal with International Political Risk* Columbia FDI Perspectives no. 22, Vale Columbia Center on International Sustainable Investment (5 May 2010)

\(^{24}\) The US currently holds 16.8% of votes <http://www.imf.org/external/np/sec/memdir/members.aspx> (April 2011)
currencies, as well as safeguarding member states’ balance of payment deficiencies with short-term loans, on condition that structural reforms are implemented that reduce government expenses and raise revenues, often while de-valuing the currency. Most importantly for international investment, the IMF’s prohibition on currency restrictions as a barrier to capital flows are a pivotal component of home state policies towards outward FDI and have played a key role in augmenting the FDI from emerging market MNEs. Firms from these countries have been able to use their domestic currency to fund operations abroad. However the IMF’s emphasis on maintaining sovereign liquidity and the maintenance of balance of payments equilibrium may challenge investor protection guarantees from host states that emerging market MNEs rely upon. This is especially important given the increasing incidence and severity of sovereign debt problems worldwide, most recently in several European countries. While the IMF has shown recent willingness to condone restrictions on capital inflows to avoid crises, its traditional more liberalized approach may be re-established to the advantage of emerging market MNEs in light of the restructuring of voting power within the IMF to reflect the economic size of countries like China and India.

iv) International Investment Agreements

The most important means of regulating OFDI are the various bilateral and regional agreements that contain provisions regarding the protection of foreign investments. Many emerging economies have explicitly mentioned the promotion of OFDI as one of their reasons for the participation in bilateral investment treaties which have

proliferated enormously in recent years. This goal has further led to the conclusion of numerous regional agreements for the protection and promotion of investment, some, like ASEAN and MERCOSUR of which are of great significance to emerging markets.27 Taken together, international investment agreements (‘IIA’)s contain provisions that protect foreign investments through minimum standards of treatment for investors from one contracting state in the territory of the other state and became a key component of western powers’ international economic policy following World War II.28 IIAs provide a stable and predictable legal environment that is attractive to foreign investors and on the basis of reciprocity which is advantageous to investors from both or all parties to the agreement seeking to expand abroad. Although minor differences can be found in the IIAs used around the world, commentators observe a high level of commonality in the contents of these agreements as many of the concepts therein originated from customary international law.29 Common provisions in IIAs include definitions of investment, mandatory national treatment and most favoured nation commitments, guarantees against expropriation, fair and equitable treatment by the host state legal system and full protection and security from physical violence. Neutral dispute settlement by recourse to international investment arbitration is an important ubiquitous feature of treaty commitments in this area, and it is often directed to ICSID.

Clearly these instruments limit party states’ capacity to regulate their economic affairs and may be viewed as an encroachment on national sovereignty of host states. The need for sensitivity in this area will accordingly intensify as developed states, less accustomed to scrutiny of their laws, find themselves as the

27 P Gugler and J Chaisse, Patterns and Dynamics of Asia’s Growing Share of FDI in J Chaisse and P Gugler eds, EXPANSION OF TRADE AND FDI IN ASIA, (Routledge, 2009) at 11
29 E.g. Lowenfeld, above n 8
destination of capital. It should be noted that there is much academic debate as to whether IIAs have actually contributed to the increase in FDI flows, with Brazil often cited as an example of a country that has attracted FDI without a comprehensive IIA program. An array of studies on this issue applying varying methodology has revealed results both for and against this theory.\textsuperscript{30} It is often alleged that emerging market countries such as China, which has an extensive regime of IIAs, have in the past only chosen to sign these agreements in order to signal their willingness to receive FDI rather than to improve the access of their firms overseas.\textsuperscript{31} This regulatory approach will need to be re-assessed in light of the shift in global FDI towards a more balanced flow of capital between East and West. Emerging markets will undoubtedly seek to protect their investors through robust treaties modelled on earlier western treaties.

IV SUBSTANTIVE LEGAL PRINCIPLES AND INVESTOR PROTECTION: EMERGING CONSENSUS

The following are the main principles of international investment law that will, often in modified form, provide the legal framework upon which FDI will continue to rely in the newest phase of globalization characterized by growing dominance of emerging market investors.

\textit{i) Definitions of Investment and Investors}

\textsuperscript{30} See generally K Sauvant and L Sachs eds, \textit{THE EFFECT OF TREATIES ON FOREIGN DIRECT INVESTMENT: BILATERAL INVESTMENT TREATIES, DOUBLE TAXATION TREATIES AND INVESTMENT FLOWS} (Oxford University Press, 2009)

\textsuperscript{31} M Sornarajah, \textit{India, China and Foreign Investment} in M Sornarajah and J Wang eds. Above n 9 at 145
As noted above, FDI refers to the transfer of capital from one country into another in order to purchase an existing business or to establish a new one. It is distinguished from indirect or portfolio investment in that those who own the capital in the home state maintain a degree of management or control over the enterprise in the host state. Such control may involve a direct hand in the day to day operations of the enterprise, or it may mean majority share ownership, with the threshold normally set at a minimum of 10% of the ordinary shares or voting power by non-resident investors, with some lasting interest in management.”

In keeping with this open-ended language, commentators have observed an expansive understanding of the notion of investment, as enshrined in various international agreements and as considered by arbitration tribunals. Most bilateral investment treaties contain a general phrase defining investment as constituting “all assets” with several groups of illustrative categories. The Washington Convention which established ICSID does not contain a definition of investment, an implicit acknowledgement that the concept is a fluid one that changes over time and among investing parties. Similarly, the TRIMS agreement did not attempt to provide a definition of investment, opting instead for an Annex comprising an illustrative list of investment-oriented measures. Emerging market firms will seek to preserve this expansive understanding in order to maximize the protection afforded their commercial activities abroad.

As outward FDI from the emerging markets expands, one important change to the concept of investor must capture the activities of state owned enterprises (‘SOE’s). SOEs contribute an enormous percentage of FDI from India, China and Russia.

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33 See e.g. DOLZER AND SCHREUER, above n 17 at 60 and J SALACUSE, THE LAW OF INVESTMENT TREATIES, (Oxford UniversityPress, 2010) at 162
34 SALACUSE, ibid at 63, see e.g. Free Trade Agreement between the Government of the United States of America and the Government of the Republic of Chile, 6 June 2003, Art 10.27
reflecting the different political heritage of these countries where governments have traditionally played a much larger role in the marshalling of the economy than the free-enterprise capitalist West. Many of the largest firms in India, China and Russia are SOEs, including India Oil, China’s Sinopec, and Russia’s Gazprom, are also among the largest firms in the world as ranked by Fortune. Yet few western-conceived IIAs use definitions of investor that include SOEs, an omission that has been criticized by commentators for failing to reflect the reality of investment structures in non-market economies. International investment law must acknowledge these entities, in particular by modifying the dispute settlement provisions of ICSID to allow claims brought by SOEs. Similar provision should be made for sovereign wealth funds, which are also poised to grow as sources of FDI, especially that from emerging economies. While there has been little movement in these key understanding of investment, China’s new IIAs now include in their definitions of investor entities that are not authorized by the Chinese government, clearly expanding the scope of protection to a wider range of economic actors.

Another significant change in the concept of investment that must acknowledge the rise of emerging market MNEs is that of IP rights. Although as noted above many IIAs as well as the TRIPS agreement provide for expansive definitions that include IP rights, claims for protection of IP oriented investment have yet to materialize from emerging market firms. Indeed, India was reluctant to engage in bilateral investment arrangements because of strong IP protections required by

36 Gugler and Chaisse above n 27 at 10
37 M Nolan and F Sourgens, State-Controlled Entities As Claimants In International Investment Arbitration: An Early Assessment, Columbia FDI Perspectives, Vale Columbia Center on Sustainable International Investment No. 32, 2 December 2010.
38 Gugler and Chaisse above n 27 at 10
39 J Xiao, Chinese BITs in the Twenty-First Century in Chaisse and Gugler eds. Above n 27 at 125, referring to the China-Germany BIT
developed states as this was viewed as a threat to India’s acquisition of scientific and technical expertise.\textsuperscript{40} This attitude will undoubtedly change as companies from places like India, Iran, Turkey and Israel begin aggressively to develop their own technological and innovations.\textsuperscript{41} Perhaps more significantly, China is expected to soon begin to develop its own brands\textsuperscript{42} and accordingly will certainly seek protection for any associated regulatory interference by the host states in which it invests. The concern here is more directed at investment in other developing countries, such as those in south-east Asia and Africa, rather than in the host states of North America and Europe, where IP protections are already robust.

\textit{ii) Non-Discrimination and Right of Entry}

American-style IIAs, including both BITs and RTAs such as NAFTA have traditionally provided for pre-entry national treatment, meaning that investors from all countries will be considered on an equal footing to domestic investors even before the investment has been established in the territory of the host state. It is unlikely that emerging markets such as China and India will allow this type of arrangement, as their markets remain much more closed than those of the West and are expected to remain so for some time.\textsuperscript{43} Still, China has recently demonstrated a remarkable shift towards the granting of the much more common post-entry national treatment in its IIAs, not even requiring that investments are done in accordance with local laws, a commitment that was unheard of in its investment treaties from the previous century.\textsuperscript{44} This is as much an indication of the expansionary intent of Chinese MNEs

\textsuperscript{40} H Taylor and A Nolke, \textit{Global Players From India: A Political Economy Perspective} in Sauvant and McAllister eds above note 1 at 166
\textsuperscript{41} C Cookson, \textit{Emerging World on Science Fast-Track} \textsc{Financial Times} (London), 29 March 2011
\textsuperscript{42} A Moody, \textit{Brand Building} \textsc{International Herald Tribune}, 31 March 2011
\textsuperscript{43} Sornarajah above n 31 at 162
\textsuperscript{44} J Xiao, above n 39 at 125, referring to the China-Germany BIT
as it is the country’s eagerness to receive inward FDI. In contrast, there is evidence that western countries are already becoming more restrictive toward inward FDI. Perhaps the best example of this is Canada’s recent denial of the acquisition of a substantial portion of its potash industry by Australia’s BHP Billiton, citing concerns that Canada was unwilling to lose sovereignty over its natural resources based on a “net benefit” test contained Canada’s foreign investment legislation. This may be indicative of a trend away from pre-establishment rights in favour of the European-style IIA in which only post establishment national treatment is granted, allowing the host state to deny inward FDI for whatever reason it wishes, including the desire, perhaps disguised, to protect domestic firms from foreign competitors.

A significant portion of FDI from investors in developed states has been conducted via of Build-Own-Operate-and Transfer agreements or ‘BOOT’s as they are often described. BOOTs are a form of project finance for international investment in which a foreign investor designs and constructs a project or facility, such as a bridge, power plant or airport, is granted ownership over it by the host government and operates it as a business for a specified period, after which title to the project is transferred to the government at a previously agreed upon or market price. Financing for the project is therefore ultimately supplied by the government, or in some cases private partner in the host state, allowing the foreign investor to recover all their construction and operational costs. One of the reasons that BOOT arrangements have been so popular in emerging Asian countries such as Thailand and Vietnam is because they mandate cooperation between the foreign investor and the host state partner. Consequently there is no need to extend national treatment to the pre-investment stage, as the terms of the project are dictated by the local partner that provides the

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45 Investment Canada Act 1985, c. 20, s. 16; B Simon, H Thomas and W MacNamara, Canada Rejects Bid for Potash FINANCIAL TIMES (London) 4 November 2010
investment capital.\(^46\) It might be expected, then, that BOOT-type arrangements will become the customary mode of entry for emerging market MNEs seeking to do business in the less-welcoming North America and Europe. One possible means of resolving the rising tension between rights of establishment resulting from the influx of FDI to the developed countries that had traditionally exported capital overseas may be to establish different standards of treatment for greenfield and mergers and acquisition based FDI. It is widely acknowledged that greenfield investments are both more welcome by host states because they bring in entirely new capital and do not involve job losses that are often associated with corporate reconstructions. Mergers and acquisitions can be particularly problematic in the case of high-profile, hostile takeovers that create a negative perception of the foreign entity, which might ultimately lead to invasive regulatory action at a later stage.\(^47\) Greenfield investment could therefore be granted pre-establishment rights, provided of course that the investment is legal under domestic law, whereas mergers and acquisitions may be required to satisfy a comprehensive screening process before entry is permitted.

Emerging markets such as China and India have been required to surrender some performance requirements imposed on foreign investors as a condition of entry as a result of the TRIMS agreement. India in particular has demonstrated an aversion to this WTO obligation and it, like China, has refused to include comprehensive prohibitions of performance requirements in their IIAs. In contrast, the IIAs of the US, Canada and Japan contain performance requirements that are wider than those of the TRIMs.\(^48\) It is unlikely that the emerging markets will be willing to adopt this western feature of IIAs in the near future because, despite the evident success of their

\(^{46}\) Sornarajah above n 31 at 146
\(^{47}\) K Sauvant, *Is the United States Ready for Foreign Direct Investment from Emerging Markets? The Case of China*, in Sauvant and McAllister eds above n 1 at 375
\(^{48}\) Sornarajah above n 31 at 150-151
MNEs globally, their domestic markets remain vulnerable to foreign competition at least for the time being. Or, they may attempt to maintain inward restrictions while demanding freedom for their foreign investors, perhaps based upon the assertion of developing-nation status in the WTO. Claims like this will become increasingly tenuous as emerging markets’ prosperity continues. Consequently it is likely that developments in 21st Century international investment law may move towards greater protection against performance requirements through TRIMS as well as bilateral instruments.

iii) Fair and Equitable Treatment and Full Protection and Security

The Fair and Equitable Treatment (‘FET’) clause is one of the most flexible and ambiguous standards of protection found in customary international law and now regularly included in the text of IIAs. Breach of this standard is also the most common claim brought by foreign investors in investment arbitration. Generally embodying a due process standard of procedural fairness, in the past it was evoked often for the most egregious of regulatory and judicial irregularity, although its malleability led to the ready application in a number of circumstances. Emerging MNEs will of course seek to expand the understanding of FET in order to maximize the protections afforded to them by IIAs, whereas host states will seek to narrow the its scope to relieve themselves of an excessively onerous obligation. As the international community embraces a universal rule of law as embodied by such practices as regulatory transparency, due process, judicial independence and consistency, FET type guarantees are one aspect of international investment law that

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49 Ibid.
50 DOLZER AND SCHREUER, above n 17 at 128
should tend towards convergence in the coming decades. In many ways this is precisely what is envisioned already by the multilateral GATS requirements of reasonable, impartial administration of regulations.\textsuperscript{52} Indeed commentators have urged a general standard of reasonable regulation as practiced by civil societies as an overarching theme of international investment law.\textsuperscript{53}

Civil disturbances in volatile host states will clearly remain a feature of the 21\textsuperscript{st} Century, as events throughout the Arab world in 2011 demonstrate unequivocally, and investments from the emerging world are no less vulnerable than those from their western counterparts. As the concept of investment has been extended to cover intangible property such as IP, foreign investors may fear that these assets are vulnerable to increasingly common and virulent cyber-attacks and this may require a re-conceptualization of traditional international investment law protections. This modern variety of “civil unrest” should be covered by an enlarged understanding of the Full Protection and Security (‘FPS’) clauses common to IIAs, which require that host states must protect foreign investors against violence or physical harm to their assets.\textsuperscript{54} While computer based attacks were viewed as more likely to occur in developing countries with less sophisticated computer infrastructure, these attacks are now regularly occurring in the West, as well as in least developed country environments such as Africa where nations like China have invested heavily. Consequently, emerging market investors may be among the most regular claimants of FPS violations where host states have failed to provide sufficiently secure digital infrastructure.

\textsuperscript{52} Art IV
\textsuperscript{53} S Montt, \textit{State Liability in Investment Treaty Arbitration}, (Hart, 2009)
\textsuperscript{54} D Collins, \textit{Applying the Full Protection and Security Standard of International Investment Law to Digital Assets} 12:2 \textit{Journal of World Investment and Trade} (2011)
Emerging market investors are increasingly investing in other developing countries, many of which suffer from unstable political regimes and weak legal infrastructure. In these situations, investors from emerging markets, especially those from countries where there is not significant home governmental financial support, may come to rely on political risk insurance (‘PRI’) *ex ante* rather than bringing FPS-type claims in investment tribunals for compensation. Yet studies have shown that few firms from the large emerging markets of Brazil, India and China use PRI at all, although it is common in Russia, possibly because of the higher risks associated with extractive industry investment compared to services-oriented investment. Emerging market MNEs found that PRI was too expensive and the process of obtaining it cumbersome.\(^{55}\) The low priority for the insurance of non-commercial risks as a home state policy in emerging economies may reflect the relative scarcity of potential investors: these states did not need to create institutionalized PRI insurance schemes because there were insufficient investors to make use of them. Furthermore, MNEs from developing countries may be more familiar with unfavourable conditions in their home states and as such have gained greater experience operating in politically unstable environments with corrupt bureaucracies. As MNEs from emerging market countries continue to expand overseas and face oppressive regulation and civil unrest in developing host states, they may be more inclined to seek PRI, such as that offered by the World Bank’s MIGA, or other regional development banks, which tend to have similar application criteria. This process could in turn assist in the standardization of the process by which FDI is conducted in developing countries by both Western and non-Western investors.

\(^{55}\) Satyanad, above n 23
iv) Guarantees Against Expropriation

Direct expropriation of foreign investments, meaning the outright taking of title of an investor’s property, has always been viewed as a violation of customary international law and this should remain uncontroversial investment treaty based rights as the outward FDI shifts to the East. Emerging market investors will be no more tolerant of nationalizations than their developed country counterparts were in the 20th Century, despite potentially weaker protections of private property at home than are enjoyed by Americans. Countries like Venezuela, now notorious for its abrupt nationalizations of private property, will need to be mindful of this as it courts investment from places even like China and Russia where the state still remains dominant in the economy. The situation is more contentious with respect to indirect takings of foreign property and the increasingly convoluted concept of measures tantamount to expropriation that are argued regularly in investment arbitration. It is clear that Western states have held a much more strongly developed concept of private property than those of Asia and Latin America and this may colour approaches such claims. The right to private property remains a cornerstone of the US Constitution and indeed was a key philosophical foundation of the European Enlightenment. As such, modern international investment law, developed largely through the lens of American companies abroad has prohibited many varieties of regulatory measures that have effectively interfered with the use and enjoyment of an investor’s property by the host government, or at least mandated full compensation in exchange.56

Buoyed by the New International Economic Order of the United Nations that recognized the inalienable sovereignty of a state over its natural resources, developing countries from Latin American and Asian have so far resisted this enlarged scope of

56 E.g. D Schneiderman, CONSTITUTIONALIZING ECONOMIC GLOBALIZATION: INVESTMENT RULES AND DEMOCRACY’S PROMISE (Cambridge University Press, 2008) ch 2 and Sornarajah above n 31 at 148-150
expropriation as claimed by American investors abroad. This attitude is poised for a radical shift as emerging market MNEs invest overseas. These countries are now the home state of companies that own private property at risk in foreign territory and they may come to demand the same high level of protection against indirect regulatory expropriations, which have been defined as loosely as any measure by a host state which impairs the profitability or meaningful use the investment. Twenty-first Century globalization may therefore contain a re-assertion of the traditional American emphasis on private property. Prohibitions on all types of expropriation without full compensation will most likely become enshrined in the IIAs concluded by emerging markets like China and Russia even though their understanding of private property is quite different from that of the West. It is unclear how Western countries will respond to these pressures, as developed states may feel compelled to expropriate foreign property when it fits their policy goals, particularly given the growing sensitivity to these issues. Provided that full compensation is paid, these actions by host states will remain permissible. Consequently the disputes concerning the legitimacy of expropriation will shift to the question of calculation of compensation. Additionally, as noted above, the increased usage of PRI by investors from emerging markets seeking entry into high risk host states may be expected to lessen the frequency of claims based on expropriation without compensation as these may be satisfied by pay-outs from these policies. Expropriation is one of the key non-

57 DOLZER AND SCHREUER above n 17 at 92. See e.g. 2004 US Model BIT Art 6(1) and Metalclad Corp v. Mexico, Award, 30 August 2000, 5 ICSID Reports (2002) 209 at par 108
58 See e.g. L Nottage & K Miles, Back to the Future for Investor-State Arbitrations: Revising Rules in Australia and Japan to Meet Public Interests (2009) 26:1 JOURNAL OF INTERNATIONAL ARBITRATION (2009)
commercial eventualities covered by most PRI as provided by development banks such as MIGA.\textsuperscript{59}

\textit{v) Dispute Settlement and Compensation}

The future of dispute settlement in international investment law appears to be rooted firmly in international arbitration, although it is unlikely that a standing tribunal, such as that modelled on the WTO dispute settlement body will ever take hold. However, the increasing popularity of ICSID as a forum for aggrieved investors to bring claims against states may indicate a shift in favour of this mechanism on the part of emerging market MNEs which in turn should encouragingly lead towards standardization of international investment dispute settlement. While Russia and India have yet to ratify ICSID there is strong indication that they will do so in the near future. The greatest resistance to the ICSID regime has come from Latin America, with Bolivia withdrawing from the Convention in 2007 and Ecuador, Venezuela, Mexico and Brazil never signing it. As firms from these countries, especially Brazil, continue to expand aggressively overseas, it is likely that ICSID arbitrations will become the forum of choice as host states may come to demand it. ICSID is developing a growing body of arbitration decisions, which although not strictly precedential in nature, tend to demonstrate legal consistency and policy coherence.\textsuperscript{60} This balance of certainty and flexibility will be appealing to investors seeking the assurance of a neutral forum to resolve international disputes, particularly when the increased commercial sophistication of the emerging markets translates to a greater number of arbitrators from these countries with exposure to their varied legal systems. China has

\textsuperscript{59} MIGA coverage includes losses arising from creeping or partial expropriation in addition to outright nationalization: http://www.miga.org/guarantees/index_sv.cfm?stid=1547 (April 2011)

\textsuperscript{60} J Alvarez, \textit{The Rise of Emerging Market Multinationals: The Legal Challenges Ahead} in Sauvant and McAllister eds above n 1 at 431
already demonstrated a willingness to enlarge its participation in international arbitration to matters beyond simply the quantification of compensation, as it had done in the past, as demonstrated in its recent BIT with the Netherlands.\textsuperscript{61} In that sense there should be a high degree of convergence between the interests of the traditional capital exporting states and the newly capital exporting states with respect to dispute settlement. The establishment of a standing Appellate Body within ICSID would provide even greater legitimacy for this forum and it could be expected that emerging markets will lend their influence to this important modification of ICSID procedure in the coming decades.\textsuperscript{62} As part of the global legitimization of international investment arbitration, at ICSID or elsewhere, it should be further expected that highly contentious umbrella clauses in IIAs\textsuperscript{63}, which raise breaches of investment contracts to the level of treaty violations such that international arbitration is permissible, will soon attract more widespread enforceability at the request of non-Western firms, enlarging access to international arbitration instead of to domestic courts.

There may be a degree of consensus among the developed and emerging market investors with respect to what in the past had been among the most controversial aspects of international investment law: the level of compensation for breaches of various investment guarantees.\textsuperscript{64} Capital exporting states had traditionally argued in favour of the Hull Formula for compensation for harms to investment: compensation must be prompt, adequate and effective, meaning soon after the damage is done, at full market value, and in a currency convertible to US Dollars. Conversely,

\textsuperscript{61} Sornarajah above n 31 at 138
\textsuperscript{62} S Subedi, INTERNATIONAL INVESTMENT LAW: RECONCILING POLICY AND PRINCIPLE (Hart, 2008) at 205
\textsuperscript{63} See e.g. Dolzer and Schreuer above n 17 at 160
\textsuperscript{64} See e.g. M Marboe, CALCULATION OF COMPENSATION AND DAMAGES IN INTERNATIONAL INVESTMENT LAW (Oxford University Press, 2009)
capital importing states, notably those in Latin America, drew upon the Calvo Doctrine to gauge the level of compensation: compensation would be determined by the national laws of the host state and would also take into account the extent of the profits already made by the investor. Commentators often emphasized that the widely cited dicta of the Permanent Court of International Justice in *Chorzow Factory* outlining full reparation, was not, as Hull Formula apologists often claimed, the appropriate measure of compensation for all takings of property, but only illegal ones, thus allowing the Calvo Doctrine to rule over legal takings. Again, ironically it may soon be that the developing states that had argued in favour of the Calvo Doctrine and against full compensation as dictated by the Hull Formula, will be the very states that demand full compensation for their nationals whose property has been interfered with by other developing or developed host countries. While offensive to many MNEs, this will allow greater national discretion to consider policy objectives when setting compensation levels.

**vi) Exceptions: Economic Necessity, Security and Public Interest**

Host states may claim that protections provided under international investment law can be forsaken in certain circumstances because of non-FDI related FDI concerns that supersede the interests of foreign investors, or as noted above, may entitle host states to pay less in compensation for any regulatory takings. This is an area where the new era of international investment law is both highly divisive in some respects and merging towards global consensus in others.

First, general public interest issues may be cited by host states to justify violations of national treatment or to legalize expropriations. While there is a

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65 SUBEDI, above n 62 at 14-16
66 *Germany v Poland*, PCIJ Rep (1928) Series A No 17
67 SORNARAJAH, above n 17 at 428
growing recognition of standards of conduct on the part of MNEs by the international community that embody public interest concerns such as environmental protection, labour and human rights as well as cultural conservation through both formal and informal instruments, rejection of these concerns may be precisely that which renders host states attractive to foreign investors. The so-called “race to the bottom” theory in which states compete for the least restrictive regulations has supposedly led to a general weakening of public interest protections, especially in the developing world that relies heavily on FDI as an alternative to foreign aid. MNEs are expected by NGOs and inter-governmental organizations like the United Nations and the Organization for Economic Cooperation and Development to engage in corporate social responsibility initiatives, involving generally transparency, accountability and the avoidance of corruption. Accordingly, MNEs should conduct business in a manner that does not harm the local communities in which they operate and in fact may even be seen to have the obligation to proactively assist in the economic advancement of host states. This awareness perhaps represents a more mature stage of capitalism as practiced by the West which has become a more ethical society where consumers seek products that were created in a sustainable manner. Emerging market MNEs, however, may be seen as less likely to adhere to this growing body of “soft law” disciplines in relation to their investment activities in places like Africa and Latin America where regulatory restraints are weakest. This problem is exacerbated by the fact that some of the poorest host states in these regions may be complicit in environmental or human rights abuses. While the World Bank requires recognition of public interest issues in investment projects oriented towards development which

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68 E.g. GATS Art XIV
70 SORNARAJAH above n 17 at 154
receive its funding or insurance\textsuperscript{71}, investments backed by capital from wealthy home state governments, such as the case with many Chinese MNEs, will not need funding by a development bank and are therefore free to operate on their own terms. It is therefore difficult to envision that key public interest concerns and corporate social responsibility will be formalized in international investment treaties to which emerging market states are signatories. A decline of public interest awareness may be an unfortunate side-effect of the ascendancy of outward FDI from the emerging world.

Some unity may be observed in 21\textsuperscript{st} Century globalization with respect to two more specific exceptions to foreign investor protection: economic emergencies and national security. The global financial crisis of 2008-10 demonstrated that the financial markets of the West and East are inextricably linked and consequently equally vulnerable to economic shocks, such as those that may be consequent to sudden changes in the value of a currency, or the rapid departure of foreign capital. Thus the IMF has recently urged that countries should be permitted to adopt currency controls, which while restrictive to FDI flows, may create a crucial safety valve in times of economic crisis.\textsuperscript{72} This strategy will be appealing to both developed and emerging markets seeking to insulate their economies from global shocks. Moreover, both the US and China have engaged in currency devaluation, and although this may be pursued at least in part to achieve illegitimate trade competitiveness, this strategy also appears to have been condoned by the IMF in order to resolve short-term economic crises.\textsuperscript{73} Argentina’s success in pleading the defence of economic necessity for currency-related measures taken during its financial crisis of 2000-01 before an

\textsuperscript{72} IMF \textit{World Economic Outlook} 2010 above n 25 at xvi
\textsuperscript{73} Ibid at xvi
ICSID tribunal may pave the way for such justifications by developed and developing country host states alike.\footnote{Sempra Energy International v. Argentine Republic  ICSID Case No. ARB/02/16} In this regard it is worth noting that the GATS agreement contains a safeguard to allow for measures to address balance of payments difficulties\footnote{Art XII} as well as an Annex on Financial Services which allows Members to take prudential measures to protect investors that would otherwise violate of GATS obligations.\footnote{GATS Annex on Financial Services Art 2.} Greater latitude in currency controls for the purpose of crisis avoidance may raise the risk that these strategies will be pursued for illegitimate, protectionist reasons against the interests of international investors, and some international oversight in this regard may be warranted. The IMF, with increased governance by nations such as China, India and Russia, may be poised to fill this role more proactively.

National security will become an established exception to liberalization commitments in the 21\textsuperscript{st} Century international investment law, given the on-going prominence of terrorism, including that which is perpetrated through the internet. The high-profile blockage of Dubai World takeover of several US ports by the US government for national security reasons is perhaps the best recent example of this phenomenon.\footnote{Alvarez, above n 60 at 427} Many western IIAs now contain an “essential security” exception under which signatory states are entitled, notwithstanding other provisions of the treaty, to take measures to protect their essential security interests. These restrictions are typically self-judging, which means that the host state government alone may decide whether the measure taken is necessary given the situation.\footnote{Sauvant above n 47 at 373, see e.g. 2006 US-Peru Trade Promotion Agreement Art 22.2. The new US version of this provision has been replaced by an even wider one that allows it to take “any measures” that it considers necessary” to protect national security: US-Uruguay BIT Art 18} GATS also contains an exception which permits Members to breach obligations relating to
services liberalization for matters that it (the Member) considers to be in its essential security interests.\textsuperscript{79} Such unilateral regulatory decisions by states could clearly be used in a manner designed to illegitimately restrict the investment activities of foreign investors that are viewed as harmful to local competition. Indeed, commentators have viewed these clauses as indicative of an evisceration of essential investor protections.\textsuperscript{80} International oversight of such treaty provisions is unlikely given the sensitive nature of these decisions. As such national security based exceptions stand to remain a highly contentious and common feature of international investment law.

Linked to national security are concerns relating to health epidemics in which states may seek to be able to breach IP protections for pharmaceutical products in order to save lives. This is encapsulated in the compulsory licensing scheme of the TRIPS agreement which allows developing states to make generic reproductions of patented drugs in times of crisis.\textsuperscript{81} It might be expected that as pharmaceutical companies, such as those from India which have shown a propensity to merge with firms in the developed world, begin to develop expertise in this area they will strongly resist the implementation of this provision in practice.

\textbf{VI. CONCLUSION: BALANCING HOME AND HOST STATE INTERESTS}

Emerging markets MNEs have thrived under global economic institutions established by the Pax Americana; the Bretton Woods trio of the WTO, IMF and World Bank, as well as the network of bilateral treaties that have established a \textit{de facto} body of international investment law. It remains to be seen what changes will be made to this legal regime by both the developed and emerging world in response to the rapid rise of FDI from emerging markets. The strong protections afforded foreign investors by

\textsuperscript{79} Art XIV.1a)
\textsuperscript{80} Alvarez, above n 60 at 430
\textsuperscript{81} Art 31
wide definitions of investment, pre-establishment rights, FET, FPS, guarantees against expropriation and dispute settlement may be re-invigorated by emerging market MNEs just as America and Europe seek to undermine them in their new roles as “host states” vulnerable to foreign competition. Developed countries, led by the US, may pull back on the liberal principles that facilitated 20th Century globalization perhaps even by exploiting the recent global financial crisis, terrorism, climate change mitigation and resistance to state-intervention in the economy as justifications for tighter control of inward FDI. Convergence between West and East has been observed in some legal principles, such as regulatory transparency and neutral international arbitration, whereas certain issues are poised to mark points of greater divergence, such as pre-establishment rights and public policy exceptions. Given the tensions discussed in this article, it is unlikely that a comprehensive multilateral agreement on investment will be concluded in the near future. Such attempts failed in the past in part because the difficulties in achieving consensus between the developed and developing world and these have not evaporated, although the relative positions may have changed. In the meantime, mergers and acquisitions as well as the establishment greenfield of investments by emerging market MNEs will most likely continue to grow relative to that from the developed world, and this will be, for now, founded upon the heritage of mostly Western-conceived international investment laws.

As the 20th Century labels of “home” and “host” states become meaningless in a world in which FDI flows from East to West tend towards equilibrium, a more balanced approach to the standards that inform international regulation of FDI must

82 See e.g. S Amarsinha and J Kokott, Do We Need a Multilateral Investment Agreement? in P Muchlinski, F Ortino and C Schreuer eds. OXFORD HANDBOOK OF INTERNATIONAL INVESTMENT LAW (Oxford University Press, 2008); P Muchlinski, The Rise and Fall of the Multilateral Agreement on Investment: Where Now? 34 INTERNATIONAL LAW 1033 (2002); and SORNARAJAH above n 17 at 26
ultimately be taken; one that is sensitive to public interest concerns that affect the citizens of host states and more flexible in terms of national policy space. This article has identified some points of contention without attempting to formulate comprehensive solutions. One way of resolving some of the difficulties associated with this process may be to encourage more partnerships between foreign investors and local industry and or governments, with profits shared between all parties, possibly including citizen groups. This may resolve competitive tensions as well as alleviate regulatory dissonance where classic international investment treaties have not. These project-specific arrangements may thus become a more dominant mode of FDI in the traditional developed states as they have been in Asia. In this sense, as we embark upon 21st Century globalization, the proverbial BOOT will truly be on the other foot.