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National FDI Policy Competition and the Changing International Investment Regime

Karl P. Sauvant

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1. Introduction

Dr. SKB Asante was the leading in-house expert on matters related to investment policy-making, both at the national and international levels, at the United Nations Centre on Transnational Corporations. Regarding the national level, he brought his knowledge to bear on the Centre's technical assistance programme, advising countries on how to attract foreign direct investment (FDI) and benefit from it. In issues regarding the international level, Dr. Asante was actively involved in the negotiations on the United Nations Code of Conduct, not only in terms of advising delegates on highly complex technical questions in the negotiations, but also in terms of insightfully publishing on that subject.[1] This contribution to this *Festschrift* focuses therefore on national and international investment policy issues. At the national level, the focus is on policies aimed at competing for, and benefitting more from, FDI, as well as policies supporting outward FDI. At the international level, the focus is on the rise of bilateral investment treaties and the changing perspectives of developed and developing countries on the international investment regime. It discusses not only where we stand today in these areas, but it identifies also some of the challenges we face. These challenges arise from the growth of FDI, which is the culmination of the emergence of an integrated international production system established by multinational enterprises (MNEs) through a myriad of equity and non-equity relationships and the evolution of national and international investment policies. The growth of FDI, an integrated international production system, and the global value chains associated with it was possible because of an enabling policy framework, both at the national and international levels. The hallmarks of this framework are that countries not only allow FDI to take place, but actively seek to attract and protect it through international investment agreements, especially bilateral investment treaties.

2. The National Level

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[1] For an analysis of the United Nations Code negotiations and a number of references to Asante's work on this subject, see Karl P Sauvant, "The Negotiations of the United Nations Code of Conduct on Transnational Corporations: Experience and Lessons Learned" (2015) 16 J World Investment & Trade 11.

(a) Inward FDI Policies

The defining characteristic of national FDI policies has been to make the investment climate more welcoming for foreign investors. Concretely, some 95 per cent of all FDI policy changes around the world during the 1990s involved the liberalisation of national investment regimes or otherwise facilitating inward FDI.[2] This reflects the desire of all countries to attract FDI to help them advance their economic growth and development. Typically, governments have reduced entry barriers (especially by opening up sectors to foreign investors), facilitated the operations of such investors in their countries, and offered various kinds of incentives.

The establishment of investment promotion agencies (IPAs), whose principal purpose was – and remains – to attract FDI, further complemented such policy measures. There are at least 10,000 agencies world-wide whose terms of reference are, or include, to attract investment.[3] Virtually every country in the world has established a national IPA (and, not surprisingly, they vary greatly in their capacity).[4] As this figure implies, many more exist at the sub-national or even city levels. The implication is that there is strong competition among IPAs for foreign investors.

The nature of this competition has evolved over time. In what could be called a first generation of investment promotion, countries simply opened up to FDI, typically by liberalising their FDI regimes. In a second generation, countries began to engage in active promotion of a general nature, for instance, by signaling to investors (for example, through advertising in newspapers) that they are open to FDI; a number of IPAs are still at that stage. In a third generation, a rising number of IPAs have moved toward targeting foreign investors in light of their development priorities or other considerations (for example, to diversify their sources of FDI). Such targeting involves a more judicious utilisation of typically scarce resources; but it also entails the risk of wrong sectors being targeted, if it is not done on the basis of a careful analysis of the strengths, weaknesses, opportunities, and threats of the given location to determine the country's comparative advantages.

One area that a number of developing countries are targeting concerns transfer of technology and the establishment of innovative capacities, especially research-and-development (R&D) facilities. A number of developing countries have been successful in this respect. The opportunities for attracting such FDI are improving, for a number of reasons, as well as various push and pull factors. One of the reasons concerns the

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[2] See UNCTAD, *World Investment Report*, various editions. Online: < http://unctad.org/en/pages/DIAE/World%20Investment%20Report/WIR-Series.aspx >

[3] Millennium Cities Initiative, *Handbook for Promoting Foreign Direct Investment in Medium-Size, Low-Budget Cities in Emerging Markets* (New York: Columbia University, 2009).

[4] International Finance Corporation, *Global Investment Promotion Best Practices 2012* (Washington: World Bank, 2012).

evolution of MNEs into integrated international production networks and the global value chains that are part of them: in such a context, it is less possible for firms to use advanced technology in one part of their systems (for example, their home countries), and less sophisticated technology in another part of their systems (for example, their host – developing countries), precisely because of the integrated nature of these productions systems and their global value chains. Rather, MNEs need to apply state-of-the-art technology throughout their corporate systems, especially if their production is destined for the demanding markets of the developed countries, either through assembly or exports. As a result – and to the extent that developing countries can attract such investment – they are in a good position to encourage transfer of technology to the foreign affiliates located in their territories.

In the case of R&D facilities, host countries are helped in their efforts to attract such facilities by various push and pull factors. R&D facilities are traditionally very "sticky", that is, they are typically located in home countries, often in research triangles, near universities, and close to crucial production operations. However, R&D activities are increasingly subject to the same pressures as manufacturing and other services: they need to be located where they can be done best from the perspective of the corporate systems as a whole. The push factors include the competitive pressure to innovate at an increasing rate, while keeping costs in check. Raising wages for R&D personnel, combined with bottlenecks in certain areas, encourages firms to look outside their traditional R&D bases, the developed countries, and to tap into knowledge centers elsewhere. Pull factors include improved national systems of innovation in developing countries and their widening skills base at considerably lower costs. Moreover, creating integrated global R&D networks permit a continuous process of innovation: through use of shared databases, R&D specialists can work on-line in one country and pass on their work at the end of the day to their colleagues in other time zones.

However, the challenge does not stop with encouraging technology transfer to foreign affiliates located in host countries or attracting R&D facilities. Host countries have an interest in encouraging foreign affiliates to disseminate the technology that is being transferred to them to domestic firms, to assist the latter in their upgrading to world market standards. There are a number of ways in which this can be done. These include the conclusion of joint ventures, spillovers, demonstration effects, and employee turnover. But the best manner in which this can be done is through the backward and forward linkages of foreign affiliates.[5]

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[5] For a comprehensive discussion of linkages between foreign affiliates and domestic firms in host countries and policies for linkage promotion, see UNCTAD, *World Investment Report 2001: Promoting Linkages* (Geneva: United Nations, 2001). See also Michael Hansen, "From Enclave to Linkage Economies? A Review of the Literature on Linkages between Extractive Multinational Corporations and Local Industry in Africa", DIIS Working Paper 2014:02, Danish Institute for International Studies, online: <en.diis.dk/files/publications/WP2014/wp2014-02%20Michael%20Hansen%20for%20web.pdf>; and Vito Amendolagine, Amadou Boly, Nicola Daniele Coniglio, Francesco Prota, and Adnan Seric, "FDI and Local Linkages in Developing Countries: Evidence from sub-Saharan Africa" (2013) 50 World Development 41.

Backward linkages (i.e., local sourcing) are particularly important. They are in the mutual interest of both host countries and foreign investors. Host countries benefit from them because linkages are the single most important channel through which technology and other assets, such as business experience and management practices, can be transferred to local enterprises, upgrading these in turn to world standards and, in the end, helping host developing countries in their economic development. They also embed foreign affiliates more firmly in their host countries' economies. MNEs benefit from such linkages – assuming (and this is a critical assumption) that price and quality are competitive – because they can obtain local inputs at a lower price (without compromising on quality) and, importantly, reduce the risk of supply-chain disruption.

Considerations related to the latter factor are becoming more important as outsourcing becomes more common, just-in-time production is adopted by more MNEs and global value chains become longer and more specialized, with one implication being that disruptions are more likely to occur. Such disruptions can occur for various reasons They include natural disasters, such as the 2011 floods in Thailand and the 2011 earthquake and tsunami in Japan; in both cases, international supply chains involving both countries were severely disrupted, at significant costs for the firms involved.[6] In the case of the disaster that befell Japan, it was estimated that one-third of the daily global automotive production was affected because of supply chain disruptions, at estimated daily losses of US$200 million.[7]

But disruptions can also occur on account of political risk – and political risk was ranked second by firms among the factors constituting a constraint on investing in developing countries.[8] These risks can include (as identified in a survey of investors in 2013), in order of importance, adverse regulatory changes, breach of contract, transfer and convertibility restrictions, civil disturbances, non-honoring of financial obligations, expropriation, terrorism, and war.[9] Moreover, precisely because of outsourcing, just-in-time production and global value chains, political risks event in one country can have immediate implications for production in other countries.

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[6] See Jun Yang, "Worst Thai floods in 50 years hit Apple, Toyota supply chain", Bloomberg Business (21 October 2001) online: <www.bloomberg.com/news/articles/2011-10-20/worst-thai-floods-in-50-years-hit-apple-toyota-supply-chains> and Miyoung Kim and Clare Jim, "Japan quake tests supply chain from chips to ships", Reuters (14 March 2011) online: <www.reuters.com/article/2011/03/14/us-japan-quake-supplychain-idUSTRE72D1FQ20110314>.

[7] See Justin Rohrlich, "Effects of Japan Disaster on Global Supply Chain still Unknown" (2011). Online: < http://www.minyanville.com/businessmarkets/articles/japan-automotive-shipping-logistics-supply-chain/3/29/2011/id/33645 >

[8] See MIGA, *World Investment and Political Risk* (Washington: MIGA, various years).

[9] See MIGA, *2013 World Investment and Political Risk* (Washington: MIGA, 2014) at 21.

The incipient trend towards "in-shoring" is partly fueled by the desire of firms to shorten supply chains. From the point of view of host countries, therefore, these considerations create opportunities to build linkages with foreign affiliates and, in this manner, benefit from the technology that these affiliates utilise.

Forging such linkages requires that there is domestic capacity (in particular suppliers), that is, firms that are "linkage-ready" in that they are able to deliver at a quality and price that is internationally competitive – a challenge in many developing countries. While MNEs may undertake their own efforts to help local firms to become linkage-ready (especially if they have a strong self-interest to source supplies locally) through their supplier development programmes, the governments of interested host countries may need to help where this is not the case. Recognising this challenge, and acknowledging the importance of linkages, a number of developed and developing countries have instituted linkages programmes through which they help, on the one hand, domestic firms to get ready to link up with foreign affiliates and, on the other, encourage foreign affiliates to build such linkages with domestic firms. [10]

The single most important bottleneck in this respect is often insufficient local technological and managerial capacity, combined with inadequate quality standards. At the same time, these same factors determine to a large extent the ability of host economies to absorb and benefit from the knowledge that technology linkages can entail. The governments of host countries can pro-actively help overcome the underlying capability and information gaps. Concrete measures include providing information; matchmaking between domestic firms and foreign affiliates; encouraging foreign affiliates to participate in programmes that seek to upgrade the technological capabilities and quality standards of domestic suppliers, including through technological alliances between domestic firms and foreign affiliates; promoting the establishment of supplier associations and business clinics; providing various services, especially through training; encouraging foreign affiliates to obtain product mandates from their parent firms; helping domestic suppliers to obtain access to finance needed to upgrade their capabilities; offering focused incentives to upgrade technology; and establishing industrial parks and technology clusters.[11]

Finally, and this is particularly important for countries seeking to encourage the dissemination of technology through linkage programmes or otherwise, the regulatory environment needs to be such that MNEs do not fear to transfer technology to their foreign affiliates (and, through them, to local suppliers) on account of possibilities of technology leakage to unauthorised other firms. The adequate protection of intellectual property is therefore important. At the same time, such protection may be less important in some sectors (especially for many services, standardized manufacturing, natural

[10] For an extensive discussion of what governments can do to foster linkages, see UNCTAD, *supra* note 5.

[11] *Ibid.*

resources) than in others (e.g., pharmaceuticals, software). Still, this is a policy aspect that host country governments need to consider carefully.

While encouraging the transfer of technology and its dissemination is important as a means to advance their economic growth and development, it is the building up of innovative capacity that is key in the longer run. Attracting R&D facilities is one way to accelerate this process. The protection of intellectual property is relevant here as well (if not even more so), of course, but so is the nurturing of domestic capacity. This can be done through, for example, encouraging link-ups with domestic universities and the creation of technology parks. Again, this is not an easy endeavour. To be successful requires a careful assessment of local capacities and government intervention to create the necessary incentives for MNEs to match their own requirements with local capabilities. The fact that R&D personnel in developing countries – and especially in such countries as China and India – is becoming more plentiful and is available at costs considerably lower than in developed countries, is very helpful in this respect. Countries that fulfill these pre-conditions are in a favourable position to attract R&D facilities. Focusing on targeting such facilities is increasingly an option – and opportunity – for a growing number of developing countries.

It needs to be recognised, though, that the competition among IPAs to attract FDI in general and technology-intensive projects in particular, has become more sophisticated, for instance, by paying more attention to policy advocacy and focusing more on after-investment services to court investors that are already established in the country:[12] IPAs have come to realize that satisfied foreign investors are a country's best "ambassadors" to help attract other investors. As the national FDI regulatory frameworks become similar across the world, investment promotion gains in importance.[13]

In recent years, however, national policies toward FDI have become more nuanced, reflected in the increasing share of national policy measures that make the investment climate less welcoming. Partly, this is a result of the reaction of countries to the rise of FDI from emerging markets (as discussed earlier). This development has made developed countries more aware that they are not only the principal home countries but also have been the principal host countries. They are now also becoming important host countries for non-traditional investors, including investors headquartered in countries that have

[12] Reinvested earnings account for a substantial share of world FDI flows: a record level of 67 per cent of FDI flows from developed countries were composed of reinvested earnings in 2013; See UNCTAD, *World Investment Report 2014: Investing in the SDGs. An Action Plan* (Geneva: UNCTAD, 2014) at 5.

[13] According to one study, every US$1 spent on investment promotion leads (with some qualifications) to US$189 in additional FDI inflows in the case of developing countries; See Torfinn Harding and Beata Smarzynska Javorcik, "Roll out the Red Carpet and they will come: Investment Promotion and FDI Inflows", Working Paper, Department of Economics, University of Warwick, Coventry, June 2010, online: <wrap.warwick.ac.uk/57330>; And Torfinn Harding and Beata Smarzynska Javorcik, "Roll out the Red Carpet and they will come: Investment Promotion and FDI Inflows" (2012) Columbia FDI Perspectives No 72.

different economic systems, may have a critical attitude toward developed countries in general (or some of these countries in particular) and may even be strategic competitors. When firms headquartered in such countries engage in incoming mergers and acquisitions (M&As) – especially if these take place in sensitive industries or are undertaken by state-controlled entities – this may create concerns, in the public and in governments, for the reasons discussed earlier, especially national security concerns.

National FDI policies have also become more nuanced on account of the evaluation by governments that greenfield investments are more desirable than M&As. From the perspective of firms, M&As are often the preferred mode of entry into foreign markets as they allow the acquiring firms to establish themselves quickly, acquire market share and benefit from the established networks (including suppliers and sales agents), brand names and technological capacity of the targets. For host countries, the cost/benefit calculation is different. In particular, M&As often are associated with the closing of production lines and lay-offs. Most importantly, they do not create new production capacity – an objective of particular importance for developing countries. Hence, M&As are sometimes regarded with suspicion. This is one of the reasons for the strengthening of review mechanisms for incoming FDI. While red tape has not replaced red carpet for incoming FDI, governments are taking a more differentiated approach towards such investment.

More broadly, government expectations concerning inward FDI are changing. After all, for them such investment is just a tool to contribute to the economic growth and development of their countries. This influences not only their attitude towards the benefit of M&As, but governments are now beginning actively to encourage more sustainable FDI, that is, investment that makes a maximum contribution to the economic, social, and environmental development of host countries and takes place within mutually beneficial governance mechanisms while being commercially viable – sustainable FDI for sustainable development. In the end, this may give rise to a fourth generation of investment promotion strategies, that is, efforts to attract sustainable FDI.[14] In other words, governments are increasingly concerned with the *quality* of investment, not simply its *quantity*. Related to that, governments are paying more attention to competing objectives, especially national interests, essential security, the promotion of national champions, and the protection of certain national industries.

(b) Outward FDI Policies

The discussion so far has focused on inward FDI policies only. Another policy area that is increasingly attracting attention concerns outward FDI policies and, more specifically, policies to help one's own firms invest abroad through various home country measures. These measures are typically intended to advance a home country's strategic economic

[14] By the same token, more investors recognise the need to undertake investments that respond to the sustainable development needs of host countries and hence incorporate such considerations into the implementation of their investments – not simply as corporate social responsibility add-ons, but as core strategies and practices.

interests and, in particular, enhance the international competitiveness of its firms by helping them establish a portfolio of locational assets. Governments of developed countries have since long put in place such policies and the instruments that go with them, but only a few developing countries have followed suit so far. This raises the question of whether developing countries that do not have such policies in place are putting their own MNEs into a competitive disadvantage. This is the new frontier of national FDI policy making.

Home country measures involve the granting of specific advantages by a home country government (or one or more of its public institutions) in connection with the establishment, acquisition or expansion of an investment by a home country firm in a foreign economy.[15] They span a wide spectrum of measures and are provided by a range of institutions.

Thus, governments provide information services on, for example, the economic and legal investment climate in host countries, their political environment and business opportunities there. They may offer advice and consulting services and organise investment missions, match-making events and training and educational services related to outward FDI. Home country measures can also involve concrete financial measures, such as grants for feasibility studies, other pre-investment work, deferring costs of setting up foreign offices, training staff for employment in such offices, and executive training programs for managers. Financial assistance can also include loans, structured financing options, public-private/public-public risk-sharing arrangements, development financing, and equity participation (direct or as development financing). Furthermore, some home country governments have introduced certain fiscal measures to help their foreign investors. These can include tax exemptions of various kinds, deductions for certain expenditures (for example, R&D), tax deferrals on incomes earned overseas and tax credits for certain kinds of expenditure, as well as corporate tax relief. Common is also the provision of political risk insurance. Such insurance can cover expropriation, war damage, political violence, the conversion of local currency (or its transfer out of the host country), the suspension of remittances, and the forced abandonment of assets. Each of these types of assistance helps investors establish themselves abroad and, therefore, provides them with an advantage over investors from countries whose governments do not provide such support.

Many countries have eligibility criteria to qualify for home country measures. Particularly popular is special support for small and medium-size companies as these enterprises typically have difficulties venturing into foreign markets. Sectors in which investments are being made (with natural resources being an example, perhaps combined with a requirement to send these back to the home country) can come into play, as well as the destination of an investment (for example, whether it is in a developing country), type of activity (for example, whether it is technology-oriented), and effects of an investment

[15] See Karl P Sauvant, et al., "Trends in FDI, Home Country Measures, and Competitive Neutrality" (2012-2013) Yearbook Int'l Investment L & Policy 3.

on home/host countries (for example, in terms of employment, technology transfer, impact on the environment).

The obvious question for governments of developing countries whose firms invest abroad (or are beginning to invest abroad) is whether they, too, should provide any type of support to their foreign investors and, if so, what kind of support it should be.

In considering this question, they need to weigh various considerations. On the one hand, there are such macro-economic considerations as the need to build productive capacity at home (together with the employment that comes with it), balance-of-payments implications and possible opposition, in particular from trade unions, to outward FDI (as such investment is often seen as transferring jobs abroad).[16] On the other hand, there are micro-economic considerations pertaining in particular to the competitiveness of domestic firms: in a world in which competition is everywhere – through inward FDI, various non-equity forms (licensing, management contracts, subcontracting, among others.) – not allowing one's own firms to invest abroad and providing some help to them in this respect handicaps these firms and puts them at a competitive disadvantage vis-à-vis other firms that are not only allowed to invest abroad but are actually helped by their governments in doing so. Weighing these macro and micro-economic effects and the policy issues surrounding them against each other is not an easy thing to do and, most likely, requires a careful and phased approach.[17] But as more and more firms from more and more developing countries invest abroad, the governments of these countries need to, sooner or later, turn their attention to this new frontier of national FDI policy making.

3. The International Level

Developments at the national level, not surprisingly, are reflected at the international level in the evolution of the international investment law and policy regime. This regime, often neglected by national policy makers, is becoming increasingly important as it provides the parameters for national FDI policy making. Moreover, the international investment regime has "teeth", as it provides investors direct access to an international dispute-settlement mechanism that allows them to seek redress in case they feel their rights have been violated by host countries, with awards against governments potentially being very high (not counting the costs of litigation).

When decolonisation began to gather speed during the mid-twentieth century, combined with international criticism of MNEs at that time, developed countries – whose firms (as documented earlier) were at that time overwhelmingly the most important outward investors – began to worry about protecting the investment of their firms abroad in developing countries. This was all the more important as the international investment

[16] It should be noted that such opposition has arisen, from time to time, in developed countries, most recently in Western Europe (and particularly France) in the context of a discussion of "delocalisation".

[17] For example, countries could begin with providing information services.

regime was, at that time, still in a very rudimentary stage: "foreign investors who sought the protection of international investment law encountered an ephemeral structure consisting largely of scattered treaty provisions, a few questionable customs, and contested general principles of law".[18] Furthermore, the international investment regime was challenged in important respects (in particular concerning issues involving nationalisation and the applicability of international law) by developing countries.

In response, developed countries began to conclude bilateral investment treaties (BITs) and, later, other international agreements dealing in a substantive manner with international investment issues (collectively "international investment agreements" (IIAs)). IIAs had a principal purpose of protecting the investment of developed countries' firms in developing countries, which were seen as having unreliable judicial systems. These treaties provided (and continue to provide) for a series of broadly formulated protections for foreign investors, including national treatment, most-favoured-nation treatment, fair and equitable treatment, provisions for compensation in case of nationalisation, and the repatriation of earnings. Moreover, they typically contain broad definitions of "investment" (basically everything that has a value for foreign investors) and "investors". And, increasingly, they provided for investor-state dispute settlement. This dispute-settlement provision subsequently became very important as it gives firms a private right of action, namely, to bring claims directly against host country governments if they consider that any of their protections contained in an applicable BIT or other IIA[19] were infringed upon. In other words, firms are not dependent, as in the case of the World Trade Organisation, on their governments bringing a case against a country. De facto, therefore, and depending on the applicable IIAs, the great number of MNEs, their foreign affiliates, and even individual shareholders have the power to enforce the international investment law and policy regime.

From a developing country perspective, IIAs were seen as desirable as the promise to protect foreign investment was expected to help attract much-needed FDI – it was a "grand bargain" of protection in exchange for more investment.[20]

Not surprisingly, international investment treaties proliferated. While the first BIT was concluded in 1959,[21] their number had reached 371 by the end of the 1980s.[22] Their number virtually exploded during the 1990s, the heyday of FDI liberalisation (see also the data cited earlier on national FDI policy changes), to reach 1,862 by the end of the

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[18] See Jeswald W Salacuse and Nicholas P Sullivan, "Do BITs Really Work? An Evaluation of Bilateral Investment Treaties and their Grand Bargain" (2005) 46 Harvard Int'l L J 67 at 68.

[19] Through an "umbrella clause", treaty protection can be extended to contracts that foreign investors have with host country institutions, thus widening the reach of a treaty.

[20] See the title of the article by Salacuse and Sullivan, *supra* note 18.

[21] Between Germany and Pakistan.

[22] Only BITs still in effect in 2013. Courtesy UNCTAD Secretariat.

1990s.[23] By the end of 2015 that figure stood at 2,946 BITs and 358 other IIAs.[24] Moreover, the scope of these treaties has gradually expanded to include various liberalising provisions, particularly national treatment at the pre-establishment phase of an investment. Together, these agreements provide powerful protection to foreign investors, even if they do not amount to a multilateral framework on investment. If the current negotiations on various mega-regional free trade agreements (all of which most likely will include investment chapters) should be concluded successfully, the international investment regime would be further strengthened. Particularly important here are the Trans-Pacific Partnership agreement, the Transatlantic Trade and Investment Partnership, and the Regional Comprehensive Economic Partnership Agreement in Asia.
As a result, the "ephemeral structure" of international investment law of the 1960s and 1970s has given way to a strong international investment law and policy regime at the beginning of the 21st century:

> Investment treaties…have built, indubitably, one of the most effective and truly legal regimes within the fragmented and mostly quite rudimentary institutional frameworks for the global economy. Comparable in terms of legal character and effectiveness to the WTO regime, the international investment regime is arguably more advanced, as it fully incorporates the most important and directly affected non-state actors. In a longer-term perspective, claimants (and their lawyers), who are essentially driven by private interests, help ensure greater compliance and effectiveness for the treaties and their underlying objectives than can or is achieved by exclusively inter-state implementation procedures. It also goes beyond the prospective-remedy-only sanction available under the WTO…Investment arbitration is arguably the most astounding success in international law over the past decades…[25]

The strength of the current regime is reflected in the rising number of treaty-based international investment disputes, which, cumulatively, had reached at least 696 by the end of 2015, involving 107 governments.[26] The five countries with the highest number of

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[23] *Ibid.*

[24] UNCTAD, *World Investment Report 2016: Investor Nationality. Policy Challenges* (Geneva: UNCTAD, 2016) at 101. .

[25] Thomas W Wälde, "Improving the Mechanisms for Treaty Negotiation and Investment Disputes: Competition and Choice as the Path to Quality and Legitimacy" (2008-2009) Yearbook Int'l Investment L & Policy 505 at 514, 543.

[26] UNCTAD 2016, op. cit., at 104. The great majority of these disputes were initiated during the past ten years. While this number might appear low (given the number of MNEs and foreign affiliates, combined with broad definitions of "investment" and "investor", and broad protection guarantees), it should be noted that the number of disputes on which panel reports were issued during the existence of the GATT from 1948 to the end of 1994 (when the WTO came into existence) amounted to only 91. (See, Karl P Sauvant, "Driving and Countervailing Forces: A Rebalancing of National FDI Policies" (2008-2009) Yearbook Int'l Investment L & Policy 215 at

known treaty-based disputes were, at the end of 2013: Argentina (59), Venezuela (36), Czech Republic (33), Spain (29), and Egypt (26).[27]

While the international investment regime is strong, it is also fragile and has a number of weaknesses. The regime's fragility is a function of its key characteristics: it is focused primarily on the protection of foreign investment as its principal objective; it has a wide subject coverage, partly as a result of a broad definition of "investment", "investors" and various protections; investment protection standards are at the core of the regime; arbitration is the chosen mechanism to settle investment disputes; the regime is shaped by a multiplicity of legal sources; and the regime has a light and fragmented institutional structure (as there is no multilateral agreement on investment).[28] These salient features of the international investment law and policy regime are partly a function of its origin (namely, to protect foreign investors and their investments) and partly a function of its rapid development over, basically, the past two-to-three decades.

These salient features also explain, at least to a certain extent, the regime's weaknesses. In particular, while the regime is strong in terms of protecting investors, it is less clear that it is satisfactory as seen from the perspective of host countries and other stakeholders. To begin with, there is the question of whether its objective of protecting foreign investors (and, increasingly, facilitating their operations) needs to be complemented with the objective of facilitating sustainable FDI and, with that, sustainable development. This, in turn, has implications for the regime's substantive provisions (which are currently focused on protecting investors) and, especially, the need for policy space for host country governments to pursue legitimate public policy objectives. Related to this issue is also the question of whether the regime's obligations for host countries should be balanced by obligations for investors and perhaps also for home countries.

But the single most important – and urgent – aspect of the regime that requires attention is its dispute-settlement mechanism, that is, the private right to action through investor-state arbitration. As already noted, this is a potent mechanism. Given the growth of FDI, the number of MNEs and their foreign affiliates, the intrusiveness of FDI (involving all aspects of the production process), the great number of IIAs, the broad definitions of "investment" and "investors", the broad protections enshrined in IIAs, and the fact that infringements on investor rights can take place at any level in a given country (that is, not only at the national level but also at various sub-national levels), the potential for disputes is substantial. It is a situation that can involve considerable costs for host governments, as disputes are expensive to litigate and the awards that may be rendered can be high. In

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259.) Note, however, that only states can initiate disputes in the WTO, while investors can do that in the case of applicable IIAs.

[27] UNCTAD 2016, op. cit., at 105.

[28] For an elaboration, see Karl P Sauvant and Federico Ortino, *Improving the International Investment Law and Policy Regime: Options for the Future* (Helsinki: Ministry for Foreign Affairs of Finland, 2014).

addition, there is the possibility that certain actions by governments may lead to disputes with investors that, in turn, lead to regulatory chill in national policy-making.

Importantly, developed countries are increasingly becoming respondents in international investment disputes, and this is leading to a change in the configuration of interests of these countries vis-à-vis the dispute-settlement mechanism in IIAs. Investor-state dispute-settlement provisions were incorporated in investment treaties as the BITs movement gathered pace because foreign investors did not trust the legal systems of developing countries. It was furthermore assumed that only governments of developing countries would be respondents, including because at that time their outward FDI was negligible. This changed in the late 1990s, when the United States became the respondent in a number of cases in the framework of NAFTA (and when, later, emerging markets became important outward investors). By the end of 2013, the Czech Republic (27 disputes), Canada (22), Poland (16), the United States (15), and Hungary (12) were the five developed countries with the highest number of known investment treaty claims against them.[29] Of the 568 treaty-based investor-state disputes known at the end of 2013, 162 had an OECD member as a respondent.[30]

With developed countries increasingly becoming respondents in investment disputes, not surprisingly, the investor-state dispute-settlement mechanism has moved to the centre of discussions regarding the international investment law and policy regime, especially in Europe. This is reflected in the fact that the European Commission suspended negotiations of the investment chapter in the Transatlantic Trade and Investment Partnership to allow for on-line public consultations on key investment issues. These consultations, in turn, yielded nearly 150,000 replies on investment protection and investor-state dispute-settlement issues, the overwhelming majority reflecting great skepticism.[31] The European Commission concluded that improvements needed to be pursued in particular regarding the protection of the host government right to regulate; the establishment and functioning of arbitral tribunals; the relationship between domestic judicial systems and investor-state dispute settlement; and the review of investor-state dispute-settlement decisions through an appellate mechanism.[32]

But the discussion on the investor-state dispute-settlement mechanism is not limited to Europe. In the United States, the ranking senior Democrat on the Committee on Ways and Means in the United States House of Representatives (which committee has as part of

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[29] See UNCTAD, *IIA Issues Note*, no 1 (April 2014) at 28.

[30] Using the OECD country list, online: www.oecd.org/about/membersandpartners/list-oecd-member-countries.htm> and data from UNCTAD, *IIA Issues Note*, no 1 (April 2014), Annex 2.

[31] See European Commission, "Press release: report presented today. Consultation on investment protection in EU-US trade talks", Strasbourg, 13 January 2015, online: europa.eu/rapid/press-release_IP-15-3201_en.htm>. Cecilia Malmström, Commissioner for Trade commented: "The consultation clearly shows that there is a huge skepticism against the ISDS instrument".

[32] *Ibid.*

its mandate the responsibility for the country's trade policy) issued a statement in January 2015 in which he laid out his parameters concerning both the right to regulate and investor-state dispute settlement.[33]

More broadly, while the European Union is formulating its own approach to investor-state dispute settlement and IIAs in general, a number of developing countries have also reviewed their approach to these agreements or are in the process of doing so (including Ecuador, India, Indonesia, South Africa) in order to see how these agreements can address current concerns. One way in which this can be done is by circumscribing and clearly defining the various protections contained in IIAs. Some developed countries (led by the United States and Canada) have begun to do just that in order to reduce the likelihood that they become respondents in international investor-state disputes. It is also likely that treaty partners will reserve for themselves in the future certain interpretive powers in relation to treaties, to be able to intervene in disputes should they arise. These developments deserve to be watched closely.

One development that will influence the further evolution of the international investment law and policy regime is the rise of emerging markets as outward investors, complementing their role as host countries. As a result of the rise of emerging market MNEs – not surprisingly – the configuration of interests of these countries is changing as well: having become key active investors in the world FDI market, they now have a stake in the international investment regime as *home countries* seeking to protect their firms

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[33] While these proposals were made in reference to the Trans-Pacific Partnership (TPP), it can be safely assumed that they apply to United States international investment agreements in general. To quote:

"The TPP Agreement must preserve the ability of governments to take measures to protect legitimate public welfare objectives, such as consumer interests, public health, safety, the environment, privacy, the integrity and stability of the financial system, and national security."

And:

"TPP should include several new provisions to protect the rights of sovereign nations, including: (1) a recognition of the right of governments to restrict the cross-border transfer of funds where necessary to prevent or mitigate a financial crisis: (2) a clarification of the so-called "minimum standard of treatment" (consistent with the rulings in the Glamis Gold case); (3) the inclusion of a mechanism for the TPP countries to agree on an interpretation of an investment obligation, including a decision that a claim submitted to arbitration is not a claim for which an award in favour of the claimant may be granted by the tribunal; and (4) the incorporation of the language from the May 10 Agreement, explicitly stating that the TPP Agreement does not accord greater substantive rights than domestic investors have under domestic law where, as in the United States, protections of investor rights under domestic law equal or exceed those set forth in the TPP Agreement."

See Sander M Levin, "The Trans-Pacific Partnership: A Path Forward to an Effective Agreement" (22 January 2015) online: <democrats.waysandmeans.house.gov/sites/democrats.waysandmeans.house.gov/files/documents/A%20Path%20Forward%20to%20an%20Effective%20TPP%20Agreement.pdf>.

abroad and facilitate their operations (including in other emerging markets), and not only as *host* countries receiving such investment and seeking to preserve their policy space.

The evolution of China's BITs reflects this change most clearly – and China has more such treaties than any other country, bar Germany. Moreover, China is the largest host and home country among emerging markets. While China's early BITs clearly reflected its position as a host country (for example, through limited application of national treatment and investor-state dispute settlement, and her opposition to pre-establishment national treatment),[34] the situation has changed profoundly since then, and the country's IIAs have become quite similar to those of the traditional principle home countries.[35] In particular, China now accepts full investor-state dispute settlement and more comprehensive substantive provisions in its IIAs, in line with the practice of the developed countries. In recent IIAs, China has also recognised the importance of maintaining health, safety and environmental measures whilst promoting and protecting investment.[36]

It is even possible to pinpoint the date on which China's home country interests became equal to, or more important than, its host country interests: 11 July 2013. On that day, China agreed, in the framework of the United States-China Strategic and Economic Dialogue, to continue negotiations of an investment treaty with the United States on the basis of pre-establishment national treatment and the negative list approach to exceptions to such treatment – both of which were strongly opposed to in the past.[37] With the rise of China as an outward investor, its interests as a *host* country to protect its policy space have increasingly been complemented by its interests as a *home* country to protect the investments of her firms abroad and to facilitate their operations. More generally, with

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[34] Valentina S Vadi, "Converging Divergences: The Rise of Chinese Outward Foreign Investment and its Implications for International (Investment) Law" (2011-2012) Yearbook Int'l Investment L & Policy 705. [Vadi, "Converging Divergences"] See also Karl P Sauvant and Michael Nolan, "China's Rising Outward FDI, its Reception in Host Countries and Implications for International Investment Law and Policy", in Benjamin Liebman and Curtis Milhaupt, eds, *Chinese State Capitalism and Institutional Change* (New York: OUP, 2016.

[35] Vadi, "Converging Divergences", *ibid.* Or, to quote, Schill, the new generation of China's BITs (starting with the BIT with The Netherlands (2001) and Germany (2003)) "conform, despite some remaining limitations, in all major aspects to what can be considered standard treaty practice in approximately 2,500 BITs world-wide," turning the country's BITs "into effective and powerful tools of investment protection." See Stephan W Schill, 'Tearing Down the Great Wall: The New Generation Investment Treaties of the People's Republic of China" (2007) 15 Cardozo J of Int'l & Comp L 76 at 76-77. See also Norah Gallagher and Wenhua Shan, *Chinese Investment Treaties: Policies and Practice* (New York: Oxford University Press, 2009).

[36] See eg, the preambles of the 2004 China-Trinidad and Tobago BIT, and the 2004 China-Guyana BIT. See the discussion in Vadi, "Converging Divergences", *supra* note 34 at 712.

[37] *Xinhua*, July 12, 2013. In making this important policy change, it might well be that internal policy considerations – in particular its implications for domestic economic reform – were equally important.

the rise of emerging markets as outward investors, the international investment discussion is increasingly loosing the North-South dimension that characterized this issue during the 1970s and 1980s.

4. Conclusions

The international investment law and policy regime is in constant flux. The developments outlined above deserve to be closely watched as they most likely will substantially influence how this regime will evolve in the future. This is important because the international investment regime increasingly provides the parameters for national policy making in the investment area. But it is also important for a more fundamental reason: the developments that are underway now will shape how all principal stakeholders in the regime will judge its legitimacy – and any regime that is meant to be stable and predictable needs to be seen to be legitimate because it reflects the interests of all important stakeholders. Dr. Asante was an astute observer and analyst of, as well as participant in, these developments, and I hope that he will continue to play this role for a long time to come.