A FRESH APPROACH TO INTERNATIONAL INVESTMENT RULES

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EXECUTIVE SUMMARY

Money makes the world go round. Although money flows are global, the rules governing investment are bilateral and regional. Cross-border investment is governed by a patchwork of over 3,000 bilateral investment treaties (BITs), regional and bilateral trade agreements (FTAs) with investment chapters, as well as the trade-related investment provisions of the World Trade Organization. While many states have signed international investment agreements (IIAs), they do not cover all states, investors, or categories of investments. Taken in sum, these IIAs have many problems, including:

- The 3,000-plus IIAs vary significantly and do not offer clear and uniform guidelines to protect international investment.
- The tribunals set up to arbitrate disputes between investors and governments often yield inconsistent and confusing decisions.
- Tribunals have no effective means of enforcing their decisions.
- Some investors and states take advantage of the hodgepodge of rules to "game the system" through forum-shopping and other strategies.
- Investors are increasingly challenging government regulatory or budgetary policies that reduce the value of their investments as "indirect expropriations."
- Citizens in the United States, EU, and other countries are increasingly critical of the balkanized, uneven investor-state arbitration process.

We believe it is time for a fresh approach to international investment agreements: one that builds a more universal, consistent, and accountable system. In this policy brief, we put forward three concrete steps that can promote and protect foreign investment, advance the rule of law, preserve the ability of governments to regulate, and link trade and investment.

Step 1: At the behest of the G-20, the WTO and international organizations with investment competence should establish a committee of experts to develop a code of norms and best practices. G-20 members should use this code as a template for future investment agreements and encourage all WTO member states to sign up.

Step 2: WTO members should set up an Investment Appellate Body to review and if necessary, override controversial arbitrations where the rights of investors or governments were inadequately protected. The Investment Appellate Body will stand beside the WTO's Trade Appellate Body.

Step 3: To give the Investment Appellate Body teeth, one or more WTO member states should ask the WTO Secretariat to explore the feasibility of using trade policy to retaliate against states that fail to comply with its decisions.

Key Abbreviations:

BIT - bilateral investment treaty

IIA - international investment agreement

FTA - free trade agreement

WTO - World Trade Organization

A BRIEF OVERVIEW OF THE PROBLEM

Investment is sustenance: every country on the planet needs some foreign investment to stimulate growth. Despite the importance and global nature of investment, it is governed by a hodgepodge of rules that don't consistently provide clear guidance to investors or states. As of 2012, the UN Conference on Trade and Development (UNCTAD) reported that the 193 countries of the world participate in 3,196 international investment agreements (hereafter IIAs), which include 2,837 BITs and 359 "other IIAs," including free trade agreements (FTAs) with investment provisions, economic partnership agreements, and regional agreements (see Appendix Chart 2 for a look at the increase in IIAs over time).[1] Although BITs are plentiful, they are not universal. UNCTAD admitted, "Today's…regime…is too big and complex to handle for governments and investors alike…Yet it offers protection to only two-thirds of global FDI stock and covers only one-fifth of possible bilateral investment relationships."[2]

The patchwork of rules governing cross-border investment is fraying. Governments sign international investment agreements to assure investors that their property rights will be protected in an independent and unbiased forum. Many BITs allow investors to ask for an independent tribunal to weigh whether or not a state has expropriated an investment, and then to determine just compensation. However, because many IIAs do not clearly spell out states' or investors' responsibilities, arbitrators often come to inconsistent conclusions. Moreover, because these tribunals have no means of enforcing their decisions, some governments simply refuse to meet their obligations. In such cases, investors have no means of ensuring enforcement. Meanwhile, policymakers in a growing number of countries are concerned that investors and states alike are exploiting gaps in the rules. Nonetheless, investors and states increasingly rely on these tribunals. In 2012, UNCTAD reported 58 new investor-state challenges, the highest number of known treaty-based disputes.[3]

These investment agreements generally work well. But at times they may not sufficiently protect investors, as a recent Argentine case illuminates. In early 2001-2002, the Argentine economy was in free fall. Facing a dramatic rise in unemployment, the government devalued its currency and eventually defaulted on its debt. The government nationalized several companies, and foreign investors invoked BITs to obtain compensation for their loss of property. Although several arbitration tribunals required Argentina to pay compensation, the government refused, insisting that claimants resort to Argentine courts for execution of these awards.[4]

Brazil, Russia, India, and China (the BRIC countries), as well as Taiwan, Saudi Arabia, South Africa, and the United Arab Emirates, are now important sources of foreign investment.

The European Union, the U.S. State Department and Congress have called on Argentina to meet its obligations to protect foreign investors' property rights.[5] As of this writing, there are approximately 20 pending investor-dispute settlement cases against Argentina.[6] In February 2014, however, Argentina settled a major investment dispute with the Spanish energy producer Repsol. We don't know whether this move signals a new commitment by the government to abide by investor-state arbitration decisions.

While Argentina provides an example of how investor-state arbitration can fail investors, Canada provides an example of how the system may cause concerns for policymakers and their constituents. Investors sometimes use arbitration to assert that a government policy amounts to the equivalent of an expropriation. In general, IIAs define expropriation as the direct or indirect seizure of property. However, when governments regulate, cut subsidies, or slash budgets, investors may see their investments losing value, directly or indirectly as the result of such government action. For example, in 2000, the delivery giant UPS sued the Canadian government under NAFTA's investment provisions. The company alleged that Canada Post (a government-owned company that provides mail and courier services but acts as a private company) engaged in anti-competitive practices because it provided "its courier products with advantages that were not provided to UPS Canada." In addition, UPS alleged that the Canada Border Services Agency provided less favorable treatment to UPS Canada than to Canada Post's courier services.[7] In 2005, the parties established an investment tribunal to weigh UPS's allegations. The Tribunal rejected all of UPS' claims, arguing that certain activities of Canada Post were "arms-length" from the Canadian government and, therefore, not subject to challenge by the investor. Leaving its merits aside, the case raised important questions about how far investors could go in using investment treaties to challenge government policies.[8]

These cases underscore the need for a clear set of norms to underpin international investment agreements; a more uniform approach to investor-state dispute settlement; an appeals system; and a system of enforcement for tribunal decisions. However, although all parties would benefit from major systemic reform (an international investment system with clear uniform rules and one system of dispute settlement), policymakers, investors and even some critics of the status quo fear that international negotiations could yield an even weaker system.

THE LANDSCAPE FOR INVESTMENT

The current patchwork of bilateral treaties and free trade agreements cannot effectively govern the huge flows of capital moving between states. After plunging during the Great Recession (2007-2010), foreign direct investment rebounded from 2010-2011, rising 16%. Outward foreign investment from developed countries totaled $1.24 trillion in 2011, which reflects a 25% increase over its recession-affected 2010 levels. Although outward FDI from developing economies declined 4% from 2010 levels to $384 billion in 2011, developing countries' share of global outflows remained high at 23%.[9] Outward global investment totaled $1.391 trillion in 2012, while inflows totaled $1.351.[10] These cross-border flows of money drive development, growth, and employment, both in America and abroad.

Large-scale foreign investment is a relatively recent phenomenon. In the years after World War II, many developing countries were hostile to foreign investment. Policymakers from many countries feared that investors would attempt to control their economic resources, so they determined to develop by relying mainly on internal investment. But attitudes began to change in the 1980s, when a growing number of multinationals in the United States, Japan, and the EU began to source production in emerging markets.[11] Policymakers in countries such as China, Brazil, and Mexico welcomed foreign investment as means of facilitating growth.

Thirty years later, industrialized countries often compete with emerging nations for investment. Like the United States or Germany in the 20th century, many emerging markets are both home (source) and host (recipient) countries for investment.[12] Brazil, Russia, India, and China (the BRIC countries), as well as Taiwan, Saudi Arabia, South Africa, and the United Arab Emirates, are now important sources of foreign investment (see Appendix Chart 3).[13] Today's foreign investors include multinational firms, investment funds, and individual investors, as well as state-owned enterprises and sovereign wealth funds (state-owned and directed investors).[14]

Since Germany and Pakistan signed the first BIT in 1959, most countries have agreed to at least one treaty or agreement to encourage and protect investment. Korea, India, Japan, and China actively negotiate BITs. However, China, which has signed over 120 BITs, has long refused to include language that provides for what most investors want- the ability to invest in the majority of China's economic sectors and clear investor-state dispute resolution provisions.[15] In July 2013, China and the United States agreed to negotiate a new BIT. According to the U.S. Trade Representative, "China has for the first time agreed to negotiate a Bilateral Investment Treaty on the basis of principles that will be critical to achieving access to China's market and leveling the playing field for American firms." USTR is signaling China has agreed to treat all investors equally."[16]

Although each treaty or agreement is unique, most IIAs have some common characteristics. First, they define which investors are covered under the agreement. Individuals and companies are footloose, and recent IIAs contain language to ensure that

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investors are truly foreign and not nationals who have used shell corporations to gain access to a BIT or FTA. Second, each agreement defines the types of "investment," such as a portfolio (stock) or direct investment (more than 15% ownership of a company, real estate, and other assets), that is covered. The United States began to list the specific assets covered under its BITs and free trade agreements in 1993; they include intellectual property rights, real estate, turn-key and services contracts, and holding companies. Some BITs, such as the German or the United Kingdom variants, define investment even more broadly.

In general, these agreements commit nations to give private foreign investment 'fair and equitable treatment,' and to treat foreign investors the same as domestic ones 'national treatment'. Many IIAs also set limits on expropriation and guarantee fair compensation when it occurs. IIAs also give investors the right to transfer funds in and out of host countries using market exchange rates. Finally, the parties to an investment pact often set up state-to-state, and more frequently, investor-state dispute settlement provisions.[17] These provisions allow investors to challenge state actions and policies that may affect the value of an investment. Recently, some agreements have included provisions which explicitly state that governments have a right to pursue important national regulatory objectives such as promoting labor rights or protecting the environment; they delineate that investors may not challenge such regulations. Scholars call this ensuring that governments have "policy space."[18]

Just as traders benefit from a uniform system of rules that creates efficiency, clarity, and predictability, so would investors.

Researchers are divided as to the effects of these treaties and agreements. While they generally believe investment can promote development,[19] they disagree as to whether BITs and FTAs increase investment.[20] Although research confirms the common sense notion that investors are attracted to states with good governance,[21] where the rule of law is respected, scholars have been unable to show that BITs influence investment decisions—influence as measured by statistically significant, substantively meaningful correlations between the number of BITs a host state has signed and FDI inflows.[22]

A growing number of nations, including the United States, have used free trade agreements (FTAs) to liberalize and protect investment. In doing so, policymakers can create a set of shared rules to govern cross-border trade as well as investment. Although FTAs are more comprehensive and hence harder to negotiate than BITs, they may deliver larger economic benefits for all parties. Moreover, BITs have a limited duration (U.S. BITs are often for 10 years); while a trade agreement lasts forever (unless participating states renounce it).[23]

In theory, more FTAs might help rationalize the patchwork of investment rules. But there is no common template for FTAs; some countries cover investment as well as services, labor, and environmental issues, while others simply cover trade in goods. Moreover, U.S. FTAs' language on investment can be very different from that found in EU or Canadian FTAs. Thus, policymakers' growing reliance on FTAs does little to simplify or harmonize the patchwork of investment rules.

The WTO also contains rules governing trade-related investment in an agreement called Trade Related Investment Measures (TRIMs). The General Agreement on Trade in Services (GATS) also includes rules governing foreign investment in services.[24] However, although TRIMS and GATS are designed to stimulate trade-related investment, they do not *protect* investment per se, or delineate the rights and responsibilities of both investors and states.

THE CASE FOR REFORM

This report examines five major problems with the current patchwork of rules governing international investment:

1. In contrast to trade, the rules governing international investment lack clear definitions and norms.

2. There is no broadly accepted multilateral mechanism for resolving investment disputes. As a result, tribunals are yielding contradictory decisions on similar investment issues, leading to uncertainty for states and investors.

3. Investor-state tribunals have no enforcement mechanism to use against recalcitrant states and investors.

4. Some investors game the system; they pick specific treaties or forums to hear disputes. Moreover, some investors may rely on BITs to jump over a host country's legal systems in the belief they may be better positioned to gain compensation.

5. Investors are increasingly challenging government regulatory or budgetary action as "indirect expropriations." While government regulatory or budgetary decisions may often affect the value of an investment, governments must preserve their "policy space"—their flexibility to govern in the public interest.

PROBLEM 1. NO COMMON "RULES OF THE ROAD"

Trade and investment are complementary, yet they are governed under separate and unequal rules.[25] Just as traders benefit from a uniform system of rules that creates efficiency, clarity, and predictability, so would investors. Governments have signed bilateral, regional, and international trade agreements, but all such agreements must conform to the WTO's comprehensive trade rules. While trade agreements regulate only the behavior of states, investment agreements regulate the behavior of private investors and companies as well as states, and mix international law and private law (commercial arbitration) governing states and investors.

Diplomats have been negotiating trade agreements for centuries. Most trade agreements contain shared norms such as transparency, nondiscrimination, and due process. But the international system governing BITs is not as coherent. Although most BITs include the concepts of national treatment, most-favored nation (MFN) treatment, fair and equitable treatment, and full protection and security for investors, they contain legal and/or textual variations. Moreover, each BIT or FTA may or may not have investor-state provisions, contain provisions for transparency, or include definitions of key terms such as direct and indirect expropriation.

As the patchwork of investment rules has grown, it has become increasingly inconsistent. While the system generally works for both investors and states, scholars and international organizations such as the OECD and UNCTAD have found growing evidence that states and investors take advantage of holes and/or flaws.

PROBLEM 2. INVESTMENT DISPUTE TRIBUNALS YIELD INCONSISTENT DECISIONS

The WTO has a widely-used system of dispute settlement as well as an appellate body to judge trade disputes. The dispute settlement system underpins the rule of law among members, and makes the trading system more predictable. The system has clearly-defined rules, procedures, and timetables for completing a case.[26] It features credible enforcement mechanisms and ways to punish those who violate trade rules. If the dispute settlement body decides that a member state has violated WTO obligations, the complaining party can seek compensation from the nation in violation. If the complaining and violating parties can't reach agreement on such compensation, the complaining country may ask the Dispute Settlement Body for permission to impose trade sanctions against the respondent that has failed to implement the decision.[27]

In contrast, each investment tribunal consists of different arbitrators and each arbitration venue has different procedures. Arbitrators disagree as to what is and what is not covered in these IIAs. As a result, arbitrators can develop divergent interpretations of the same general obligation under different agreements.[28] Different tribunals yield varied results for investors and states. Decisions are not supposed to be based on precedent, although panelists frequently cite other tribunal decisions.[29] Sometimes arbitrators make contradictory decisions on the same issue using the same BIT.[30] For example, Argentina reneged on some of its obligations under its BIT with the United States after the financial crisis in 2001-2002. Argentina claimed that its actions were "necessary" to preserve public order and security, and, therefore, "non-precluded measures" (that is, they were acceptable expropriations) under Article XI of the U.S.-Argentina BIT. In five disputes under this BIT, two arbitration panels accepted Argentina's "necessity" defense; but three rejected it, yielding considerable confusion.[31] Because arbitrators have different experiences and understanding of BITs, some scholars have asserted that tribunals grappling with similar issues often come to opposite conclusions.[32]

PROBLEM 3. TOOTHLESS ENFORCEMENT OF DECISIONS

In contrast with the trade system, there is no single, multilateral forum for arbitrating investment disputes, nor is there a straightforward means of enforcement. Many, but not all, IIAs rely on the International Centre for Settlement of Investment Disputes (ICSID), an arm of the World Bank, which was designed to resolve disputes. ICSID is the only international arbitration tribunal specifically designed to address complex disputes over foreign investment contracts where one party is a national government. Other treaties rely on the UN Commission on International Trade Law (UNCITRAL) to resolve disputes; still others use commercial arbitration facilities such as those at the International Chamber of Commerce.[33] We know little about the disputes at many of these venues, because the ICSID is the only transparent arbitration venue.

Typically the tribunals consist of three arbitrators: one appointed by the investor, one appointed by the state, and the third presiding arbitrator appointed by agreement of both parties.[34] Once the arbitrators reach a decision, it can't be challenged in national courts. Moreover, there is no appellate body for any of the tribunals.[35]

As Appendix Chart 6 illuminates, sometimes governments ignore decisions that they don't want to implement. When governments refuse to pay compensation for property they've expropriated, investors have several options. The claimant (the investor) can try to enforce the award in its home country, seek diplomatic backing from its own government, or settle with the respondent state.[36] After they lose a case, governments sometimes delay paying compensation, or pay less than the value of the property expropriated. For example, investors have settled claims with Mexico and Georgia for lesser amounts than arbitrators awarded them. As of 2012, three nations have flatly refused to pay their awards. According to UNCTAD, Argentina has not paid three awards to U.S. investors and one to a French investor. Kyrgyzstan and Zimbabwe have also refused to comply with tribunal decisions. Argentina also has the dubious distinction of the most investment disputes over time with 52 cases, followed by Venezuela (34), Ecuador (23), Mexico (21), Czech Republic (20), Canada (19) and the United States (17).[37]

States have also experienced problems with enforcement. In theory, states could bring a counterclaim for frivolous cases, but no state has ever succeeded with a counterclaim. In addition, tribunals can demand that firms compensate states for the costs of a dispute, but some firms have refused to pay these costs.[38] In these circumstances, states have no recourse to enforce decisions.

PROBLEM 4. INVESTORS AND STATES EXPLOIT GAPS IN THE RULES

Because of the number, complexity, and uneven nature of IIAs, some investors and states are "gaming the system." For example, several tribunals have allowed investors to invoke "most favored nation" language in other countries' BITs that is more investor-friendly than the agreements between their home and host countries. Consequently, some investors can "cherry pick" the most favorable language from different treaties.[39]

UNCTAD and the OECD report that some investors also engage in "treaty shopping" by invoking the protection of bilateral investment treaties to which they are not a party.[40] Some investors set up holding companies in countries to take advantage of a BIT they see as particularly favorable to their interests. Other investors transfer ownership to a foreign entity in a country with a favorable IIA, which then enables the firm to bring a case.[41]

Consider the case of *Saluka v. Czech Republic*. Japan and the Czech Republic did not have a bilateral investment treaty, so Nomura, a Japanese company, set up a shell company named Saluka in the Netherlands to gain investor protection under a Dutch-Czech BIT. In 2000, the Czech Republic expropriated Nomura's investment. Nomura, working through its shell Saluka, then challenged the Czech government's expropriation. The Czech Republic challenged the standing of Saluka, arguing that it was a shell company that existed solely for the purpose of taking advantage of the BIT. The tribunal ruled that Saluka was entitled to qualify as an investor under the Dutch-Czech BIT. The arbitrators explained that they "cannot in effect impose upon the parties a definition of 'investor' other than that which they themselves agreed. That agreed definition required only that the claimant-investor should be constituted under the laws of (in the present case) the Netherlands and it is not open to the tribunal to add other requirements, which the parties could themselves have added but which they omitted to add."[42] As a result, Saluka was granted standing and ultimately won the decision. (See Appendix Chart 4 for other examples of gaps in the system.)

IN CONTRAST WITH THE TRADE SYSTEM, THERE IS NO SINGLE, MULTILATERAL FORUM FOR ARBITRATING INVESTMENT DISPUTES, NOR IS THERE A STRAIGHTFORWARD MEANS OF ENFORCEMENT.

Because Japan does not have a BIT with the Czech Republic, it makes sense that Nomura sought protection under a BIT using a shell company. Investors' decisions to navigate the system are not always egregious, as investors may rationally search for more favorable BITs. However, when firms resort to BITs rather than the domestic legal system to bring suits as foreign investors like Nomura did, they effectively jump over national laws and regulations and gain advantages that may not be available to domestic firms.[43] Moreover, some companies that are not covered by BITs may not have the funds or legal expertise to create such shell companies.

PROBLEM 5. SOME DISPUTES ENCROACH ON GOVERNMENT POLICY SPACE

Most investment disputes focus on actual expropriations. However, some investors have used these disputes to challenge domestic laws and regulations that could reduce the value of an investment (a "regulatory taking"). For example, over 100 countries have enacted restrictions on smoking or the sale of cigarettes since Mexico issued the first smoking ban—in 1575![44] In 2011, Phillip Morris International initiated an investment dispute against Uruguay's efforts to regulate tobacco marketing to discourage smoking. Uruguay maintained that it acted out of concern for its citizens' health, while Phillip Morris said the government's actions were unreasonable and effectively reduced the value of its investments in Uruguay.[45] Phillip Morris has also contested Australia's 2011 "plain packaging" law, which mandates that all cigarettes be sold in the same color packaging without distinguishing features. The tribunal request was filed by Phillip Morris, a Hong Kong-based subsidiary of the Virginian tobacco giant, under the Hong Kong-Australia BIT.[46] Neither of these cases has gone to arbitration, but the tribunals' decisions could have a worldwide effect on how tobacco policy is crafted.

Investors also have challenged environmental policies as regulatory takings. In October 2012, after the province of Ontario banned offshore wind farms in 2011. They challenged the bans under NAFTA's investment provisions. These clean energy investors claimed the ban violated their contracts with Canadian companies.[47] Similarly, a Swedish investor demanded compensation for the loss of German subsidies for nuclear power, after the German government announced plans to phase out its nuclear power plants following the Fukushima disaster in Japan.[48]

One state did change its regulations in response to an investor challenge (a non-pecuniary damage). In *Goetz v. Burundi*, the tribunal ordered that Burundi either pay compensation or rescind an order that had resulted in the claimant's loss (Goetz was deprived of a mining license).[49] The tribunal allowed Burundi to make a sovereign decision about whether to pay the claimant or rescind the order; Burundi ultimately paid part of the pecuniary award and rescinded part of the order.[50] Phillip Morris is seeking a non-pecuniary award in Australia's cigarette packaging law.[51] If this case is decided in favor of Phillip Morris, it could open the door to future decisions that give sovereign states the choice between paying multi-million (or multi-billion) dollar payouts, or rescinding or altering domestic legislation aimed to improve their citizens' wellbeing.[52]

In countries where the rule of law is weak, bilateral investment treaties can give foreign investors rights that domestic citizens, civil society groups, and domestic investors don't enjoy.

Some scholars claim that the threat of expensive international arbitration payouts may make policymakers reluctant to regulate in the public interest. NYU Law professor Alan Sykes notes that developing countries regularly suffer shortages of hard currency, and may have trouble paying large awards denominated in currencies that they cannot print.[53] Other scholars have said that this scenario can lead to payouts by national governments that debilitate the national economy.[54] In an effort to avoid such payouts, countries may become less willing to legislate on issues that could lead to an investor-state challenge, creating a "regulatory chill" within the country.[55]

Investors might well challenge such regulations in domestic courts if there was no investor-state dispute settlement system. But using international investment treaties to challenge democratically determined legislation could undermine public support for investor-state provisions in BITs. Ultimately, both investors and states would benefit from clearer and more universal rules as to when investors can legitimately challenge domestic regulations as regulatory takings.

Appendix Chart 5 illustrates other interesting cases involving investor-state challenges to government regulation.

INVESTMENT AGREEMENTS MAY UNDERMINE THE RULE OF LAW

Investment agreements were designed to advance the rule of law—which can be defined as the underlying framework of rules and rights that make prosperous and fair societies possible. According to the World Justice Project, in a system with the rule of law, no one is above the law. Laws protect fundamental rights such as property rights and free speech and the laws are applied evenly. In addition, the process by which the laws are enacted, administered, and enforced is *accessible, fair, and efficient*.[56]

By signing investment agreements, developing countries signal to investors they will be protected by the rule of law. If the host country's legal system failed to protect foreign investors, the investor may invoke the investor-state arbitration process.[57]

International investment agreements may improve domestic institutions and the rule of law in the short run. According to University of Chicago Professor Tom Ginsburg, "BITs can contribute to competition that can break domestic monopolies and oligopolies." IIAs can also "spur domestic courts to compete for the business of resolving commercial disputes" and thus improve the quality of local courts.[58]

However, there is growing evidence that at times, and without deliberate intent, investor-state dispute settlement procedures can undermine the development of a consistent set of rules governing international investment. Not all investors and not all types of investment are protected by IIAs. Moreover, some countries (such as Brazil) will not sign IIAs. In this regard, the investor-state dispute system is not *accessible* to all property rights holders. As noted above, because investment agreements vary in how they define covered investments, indirect expropriations, and other key terms, the investor-state dispute settlement system is not always consistent or fair. Tribunals do not develop precedent, even under the same trade agreement or investment treaty, so arbitrators do not have incentives to ensure that their decisions follow earlier tribunal decisions. As a result, according to UNCTAD, investors using the system are subject to uncertainty, "lack of predictability," and "erroneous decisions."[59] There is no appellate body to review the quality of and consistency of decisions. As a result, IIAs don't provide a common, rule-of-law framework for international investment.

Moreover, IIAs may inhibit the spread of good governance in developing countries because they provide stronger legal protections to foreign than domestic investors. According to Johns Hopkins President Ron J. Daniels, BITs can give foreign investors a special legal enclave, "where many of the risks of legal and political failure that confront domestic investors…are substantially lessened or, indeed eradicated."[60] When investors "exit" a national legal system and have recourse to a separate arbitration system, these investors have less of a stake in pushing the host country legal system to be accessible, evenhanded, and accountable. They do not become "demandeurs" of good governance.[61] These foreign investors will not fully participate in legislative or executive branch debates on how to regulate. Finally, when powerful foreign actors ignore or jump over the developing country legal system, they stunt the development of host country judicial systems over the longer term. Judges learn by experience—by mediating real disputes, and in doing so, balancing investor rights and responsibilities. BITs were not intended to prevent judges from learning to achieve that balance; they were meant to be temporary (however, it is important to note that this is not true for

investment chapters of FTAs). According to Simon Lester of the CATO Institute, these agreements encourage litigation outside of domestic courts.[62] University of Chicago Law Professor Tom Ginsberg concludes that over time and in a world of global investment flows, "local judicial institutions…face insufficient incentives to compete with the global alternatives…This means that developing countries can find themselves in a trap of low-quality institutions."[63]

Conversely, investment agreements also may undermine the rule of law in the industrialized world. The OECD and UNCTAD have noted that IIAs allow investors to bypass domestic court systems that are widely seen as effective, transparent, and legitimate.[64] As investors increasingly use investor-state disputes to challenge budgetary or regulatory decisions, a growing number of critics see international arbitration as an indirect means of undermining democracy and the rule of law.[65]

Finally, arbitrators award payouts based on the rules outlined in IIAs. These arbitrators have no internationally accepted framework for making such decisions. They sometimes award investors huge payouts, which may be deserved, but which can cause financial difficulties for governments. These governments should compensate investors, but they also must find ways to balance such huge payouts with their obligations to their citizens.

Policymakers may spark a public backlash if they prioritize compensating foreign investors over providing basic public goods, such as education, health, and defense.[66]

Some proponents of the current system believe these rule-of-law arguments are flawed. They note "just as U.S. environmental and other public welfare legislation is not exempt from court review in the United States' own legal system, no government commitment internationally should be above these basic rules of law-abiding nations." They stress that firms should have the right to challenge regulations that are the equivalent of regulatory takings to ensure the rule of law.[67] Moreover, they argue that investors should not have the responsibility to spread good governance to the countries they invest in. After all, private investors do not sign BITs, nor are they responsible for their implementation. However, we note that private investors benefit from good governance and tend to want to invest in countries where the rule of law is strong. Hence, we believe they should want to research potential negative spillovers of the IIA system and find ways to improve the system.

In sum, IIAs have mixed effects upon the rule of law. In weighing the costs and benefits of these effects, investors should encourage clear language in IIAs that encourage investment protection, but also curb frivolous challenges.

THE LEGITIMACY PROBLEM

The balkanized, uneven, and opaque investor-state arbitration process is out of step with public expectations for governance in the Internet age. Citizens expect their laws and policymakers to be evenhanded, transparent, and accountable, as well as informed by public consent. They also expect the system to be consistent, because if similar cases are not resolved in similar ways, the OECD notes, "public confidence in the system is weakened," and their legitimacy is undermined.[68]

Not only do investment agreements yield inconsistent results, they are inconsistent in design. They clearly delineate investor rights and state obligations, but rarely spell out investor responsibilities (although some have language pertaining to corporate social responsibility). In 2012, the International Chamber of Commerce issued voluntary guidelines for investors, as well as home and host governments. The ICC stressed that investors and states have "shared responsibilities," and investors must respect countries' policy space and help foster sustainable development.[69]

The arbitration process also raises questions of legitimacy. Many attorneys work as lawyers in some cases and arbitrators in others. These functions require different skills: lawyers must aggressively defend their client's interests; arbitrators must have a judicial temperament and weigh competing interests and perspectives.[70] The process requires that arbitrators review government regulatory, administrative, and at times fiscal policy through the narrow lens of commercial arbitration.[71] As more cases focus on indirect expropriations related to government policy decisions, policymakers and investors acknowledge that even experienced arbitrators may lack expertise in public law adjudication and may not understand the policies they review.[72] The OECD reports that "inconsistent rulings may compel states to renegotiate numerous treaties in order to reduce legal uncertainty."[73]

In the future, policymakers could require that all investment disputes and arbitration decisions be made public. The most widely used platform, the World Bank's ICSID, maintains an open docket, so both its proceedings and decisions are

More transparency could help promote consistency and, over time, foster a more accountable and legitimate system.

public. However, the other venues are not open and do not even disclose disputes or decisions. For example, the OECD reported that about 33% of decisions were not made public.[74] As a result, policymakers and other interested parties lack a full and accurate picture of the totality of ongoing investment disputes. In some venues, neither the dispute nor the tribunal's decisions are made public, even though taxpayers would have to reimburse investors if their governments lose.

RISING INTEREST IN REFORM

Many governments are reassessing their obligations under investment treaties. India and South Africa are reviewing all BITs and FTAs with investment chapters. Argentina and Ecuador have declared that they will agree to no new investment agreements, while Bolivia and Ecuador have withdrawn from the World Bank's arbitration body (ICSID). Ecuador has also unilaterally terminated some BITs.[75]

United States and Canadian officials were caught off-guard by investor-state claims under NAFTA in the 1990s.[76] Both countries rewrote their BIT to clarify terms and procedures, prevent frivolous investor-state challenges, and clearly delineate the responsibilities of states to regulate.[77] Nonetheless, the United States and the EU (and the EU and Canada) have decided they will include an investment chapter in the new trade pacts they are negotiating.[78] The EU has promised to curb frivolous claims and to ensure that the agreement will not give foreign investors greater rights than domestic investors. Finally European officials acknowledged that they must build public support and understanding for investment provisions; they have promised to seek public comment on investment provisions in the free trade agreement.[79] In this vein, Australia refuses to sign investor-state provisions in FTAs because the government believes they give foreign business greater legal rights than domestic firms and they constrain the government's ability to regulate.[80] Brazil considers investment agreements unnecessary and refuses to negotiate them.[81]

Given this changing climate, many nations are working together to improve the governance of investment. At the April 2009 G-20 Summit, members pledged to maintain an open investment regime. They also called on the WTO and UNCTAD to monitor adherence to their efforts. And when the G-8 met later that year, its members declared, "We commit to enhance cooperation…to agree upon shared principles which may serve as the basis for a more structured and wider process towards an agreed common multilateral framework in the long run, creating a predictable and stable climate for investment."[82]

Countries can agree on internationally acceptable rules that signal openness to investment and guarantee investor protections. However, states have been unable to find common ground on exceptions to the rules, on enforcement, or on investor responsibilities.

Some academics and international organizations have suggested ideas for reform that go beyond tinkering with investor-state provisions. Simon Lester of Cato has proposed rethinking the international investment system towards a more simple and direct policy of liberalization.[83] Anders Aslund of the Peterson Institute for International Economics, and Karl Sauvant of the Vale Columbia Center on Sustainable International Investment, propose a new Multilateral Agreement on Investment. The World Economic Forum, as well as a Consultative Board to the WTO, have called for policies to link trade and investment rules more holistically, by finding ways for the WTO to cover FTAs and other trade agreements with investment provisions.[84] In the interest of maintaining better relations between investors and states, both the OECD and UNCTAD have worked to encourage new ideas and procedural reforms. The OECD has sponsored a dialogue and public comment on dispute settlement provisions in investment treaties.[85] In May 2013, UNCTAD proposed five options to reform the dispute settlement system including limiting investor access to investor-state dispute settlement (ISDS), introducing an appeals facility, and creating a standing international investment court.[86]

Some business leaders are calling for reform as well. Although his company won an investment dispute against Mexico, Grant Kesler, CEO of the U.S. waste management company Metalclad, fretted that the arbitration process had undermined years of good relations between his firm and the Mexican government. He said it would be preferable for companies to find a middle ground by relying on more informal ways to resolve disputes, such as mediation.[87] The ICC code of conduct for investors discussed earlier is an example of a business association providing a voluntary framework for reform.

Before we turn to a discussion of practical ways to make investment rules more consistent, universal, enforceable, and accountable, it would help to understand why past efforts to forge a comprehensive international investment regime have fallen short.

WHAT POLICYMAKERS CAN LEARN FROM PAST ATTEMPTS

Policymakers have tried and failed four times to establish an international system to govern investment. First, during WWII, U.S. and British officials worked to draft an international economic plan to govern a wide range of domestic policies that could affect international economic relations. In 1947, 47 nations agreed to a draft Charter for an International Trade Organization (ITO) to cover trade, employment, business practices, and investment. U.S. firms wanted the system of rules governing trade to also include investment, because many executives feared communist or socialist regimes might expropriate their investments. But in 1947, many nations were still recovering from the war, and they insisted that any new agreement include exceptions to the free flow of investment which might allow foreigners to control key productive assets. Meanwhile, many American firms that had pushed for investment provisions in the ITO became frustrated with these exceptions. The ITO lost support, the Charter never came to a vote in the U.S. Congress, and the United States abandoned the ITO in 1950. U.S. investors scuttled the ITO because it did not provide consistent rules for state responsibilities vis-à-vis investment.[88]

Western policymakers next tried to negotiate an international investment agreement at the United Nations. In 1972, the United Nations Economic and Social Council set up a study group and called for the negotiation of a code of conduct for international investors. UN diplomats spent twenty years trying to negotiate a code, but could never resolve its scope, legal standing, and implementation strategy. They abandoned this effort in 1992. At the same time, the OECD tried to develop a common code of business responsibility. In 1976 it issued a Declaration on Investment, as well as a code of conduct for investors called the OECD Guidelines for Multinational Enterprises. The Declaration set rules to stimulate investment, while the Guidelines gave policymakers recommendations regarding how their multinationals should behave overseas when they invested and produced abroad. The Guidelines have been updated six times since 1976.[89] Although a growing number of member states have signed onto the Guidelines, which are non-binding. OECD nations have done little to prod their home country firms to follow the Guidelines.

Thirdly in 1995, OECD members tried to go a step further and negotiate a multilateral agreement on investment (MAI) at the OECD. The effort foundered when some countries insisted on exceptions to investment openness. After civil society groups in the United States and Europe received a leaked copy of the draft MAI, they became vociferous opponents. Many development, consumer, and environmental groups feared that the MAI would empower firms to challenge public policies as regulatory takings, and could give foreign investors greater rights than domestic investors because they could seek compensation for regulatory takings through the international agreement. With civil society opposition, and widening government ambivalence, the members of the OECD abandoned their efforts to negotiate the MAI.[90]

Nevertheless, Japan and several European countries weren't willing to give up on the quest for a multilateral investment agreement. In 1996, members of the WTO agreed to undertake exploratory work on investment. India, China, and several other developing countries, however, were not enthusiastic. WTO members could not agree on the scope, timing, and strategy for investment negotiations. In September 2003, when negotiators arrived at Cancun for the WTO ministerial conference, many developing countries objected

In future meetings, the G-20 leaders should address the patchwork of international investment rules by calling for a set of norms and best practices.

to discussing investment until other priority issues such as subsidies and agriculture were addressed. Since members could not agree on the scope or timing of negotiations, the talks collapsed, and the fourth attempt failed.[91]

What can be learned from these failed efforts? Countries can agree on internationally acceptable rules that signal openness to investment and guarantee investor protections. However, states have been unable to find common ground on exceptions to the rules, on enforcement, or on investor responsibilities. Moreover, business leaders seem reluctant to accept changes that could limit their access to investor-state arbitration.

A WAY FORWARD

This history suggests that it would be exceedingly difficult to achieve a single, binding multilateral treaty governing international investment. Nonetheless, there is growing interest in harmonizing global investment rules and creating more accountable and effective mechanisms for resolving investment disputes.

We believe reform should:

- Strengthen international investment rules by spelling out the rights and responsibilities of investors and states;
- Define key terms such as investment, direct and indirect expropriation, and clearly delineate the difference between legitimate government policy-making and regulatory takings.
- Establish an appellate body to review complicated investor-state arbitration decisions. This review body could help address mounting public concern about the functioning of the investor-state system; and
- Weigh whether governments should use trade policy to enforce the decisions of investor-state tribunals.

Step 1: At the behest of the G-20, the WTO and international organizations with investment competence should establish a committee of experts to develop a code of norms and best practices. G-20 members should use this code as a template for future investment agreements and encourage all WTO member states to do so.

The G-20 already wrestles with the relationship between investment and sustainable development. In future meetings, the G-20 leaders should address the patchwork of international investment rules by calling for a set of norms and best practices. The G-20 should direct the WTO Secretariat to work with the OECD, ICSID, and UNCTAD to set up a committee of experts to develop “Norms for International Investment Rules,” building on the OECD Guidelines and the ICC Guidelines for International Investment, as well as modern BITs and FTAs. The experts should clearly define key terms such as ‘most favored nation,’ ‘national treatment,’ and ‘indirect expropriations,’ and highlight ways in which governments can preserve legitimate regulatory powers and ensure investment is protected..

Next, these experts should build on the OECD and ICC Guidelines and explain the rights and responsibilities of investors as well as home and host states. Finally, the WTO Secretariat and its partners should identify best practice for investor-state mechanisms, including ways to increase transparency of decisions. Best practices should include a requirement that all investor-state disputes and decisions be made public; reasonable time limits as to when investors can make claims (e.g. up to 18 months after an expropriation); strategies to lower the costs of claims (which can especially tax developing country governments or small firms); and some means to ensure that decisions designed to safeguard fair compensation to expropriated investors or disgruntled states are enforced.

If the United States and other G-20 countries adopt these norms, it's likely other countries will follow. The time is ripe: UNCTAD reports that, by the end of 2013, more than 1,300 bilateral investment treaties will be at the stage where they could be terminated or renegotiated at any time. Such agreements account for 45% of the bilateral investment treaties in existence today. Furthermore, between 2014 and 2018, another 350 BITs will reach the end of their initial duration.[92] Over time, these norms could make the hodgepodge of investment rules more universal, consistent, and accountable. Moreover, as time passes, these norms could become reality-guiding how states behave.

But the uneven system of investment treaties and investment chapters in FTAs cannot effectively and consistently provide investors and states with the predictability, consistency, and legitimacy they deserve.

Step 2: The G-20 should call for the creation of an Investment Appellate Body at the WTO. Working with UNCTAD, ICSID, and OECD, the body would be empowered to adjudicate tribunal decisions or review situations where countries refused to comply with them. All countries participating in investment agreements or the WTO could appeal arbitration decisions at this multilateral body.

The appellate body would review disputes where one of the parties refused to accept the decision, did not comply with the tribunal's decision within the given deadline, or where one party saw errors of jurisdiction, procedure, or fact. This appellate body would be an impartial panel, consisting of individuals with acknowledged standing in the field of investment law and international trade, but not representing any particular government. They would bring deep understanding of administrative, trade, and commercial arbitration. Members would serve for four-year terms.[93] The WTO is the natural home for such a body because of its successful dispute settlement expertise.

Many states and international organizations have called for something along these lines. The U.S. Congress suggested such a body in the Bipartisan Trade Promotion Authority Act of 2002,[94] and the ICSID proposed a single Appeals Facility in 2004.[95] The EU called for such a body in its draft negotiating plan for the Trans-Atlantic Trade and Investment Partnership. University of Ottawa law professor Debra Steger notes, "A standing appellate tribunal would bring coherence and over time legitimacy to a rules-based system, akin to the WTO appellate body."[96]

While WTO members set up this appellate body, they should provide capacity-building to developing countries, which may need help in investor-state arbitrations. To this end, the WTO should also establish and fund an advisory center on investment law to work alongside its Center on Trade Law. The center could advise developing countries on claims and in so doing help lower their costs for outside counsel.

Step 3: To give the Investment Appellate Body teeth, one or more WTO member states should ask the WTO Secretariat to explore the feasibility of using trade policy to retaliate against states that fail to comply with its decisions.

Some WTO member states are already using trade policy as a tool to change the behavior of countries that repeatedly ignore investment tribunal decisions. After losing several investment tribunal cases, Argentina refused to pay some $300 million in compensation to U.S. investors. In March 2012, the U.S. government suspended Argentina's preferential trade benefits under the U.S. Generalized System of Preferences (GSP). Now Argentina cannot export a wide range of GSP eligible products duty free as can other countries granted GSP by the United States. The United States did not violate WTO rules, because the GSP program is built on a waiver of those rules. The government says the suspension is temporary until Argentina pays the awards in full.[97]

Spain took a different approach toward using trade policy as a lever. After the Argentine government expropriated Repsol's share of YPF in April 2012, the Spanish government curbed biodiesel imports from Argentina for some eight months. The Spanish government recognized that Argentina is the world's largest exporter of soybean biodiesel. Spain argued that under EU law, it must use only EU fuel to meet quotas for biofuels used in transport. However, Argentina said the law was discriminatory, a violation of WTO rules, and so it threatened a trade dispute. On October 16, 2012, Spain said that it would abandon the order incorporating the EU's renewable energy law into national legislation and soon thereafter Argentina suspended its complaint.[98]

Because trade and investment are closely linked in practice, WTO member states may want greater clarity regarding whether they can make such links under WTO rules. The WTO's dispute settlement body can authorize members to retaliate when a nonmember refuses to comply with a WTO decision. Hence, at the behest of a member, the Secretariat should explore if WTO members could use trade policy as an enforcement tool if the above-proposed Investment Appellate Body finds a significant violation and the country refuses to change its policies.

A FINAL WORD

Global investors and states have a synergistic relationship. To develop, innovate, and grow, countries need capital. To provide those funds, international investors need to know their investments will be protected. When appropriately constructed and rationally enforced, investment agreements fill this role well. But today's uneven system cannot effectively and consistently provide all investors, states and citizens with the predictability, consistency, and legitimacy they deserve. The reforms outlined here can remedy the system's defects by linking the rules governing trade and investment, just as these economic activities are linked in global commerce. The virtue of this approach is that it doesn't require radical change or new international institutions, building instead upon existing investment agreements. By creating a common and transparent framework of investment rules buttressed by more credible enforcement mechanisms, we can both encourage greater capital flows and spur global growth. The steps suggested above are practical and doable. We believe they could bridge the many international investment agreements, create greater legitimacy for investor-state provisions, and over time, support increased trade and investment.

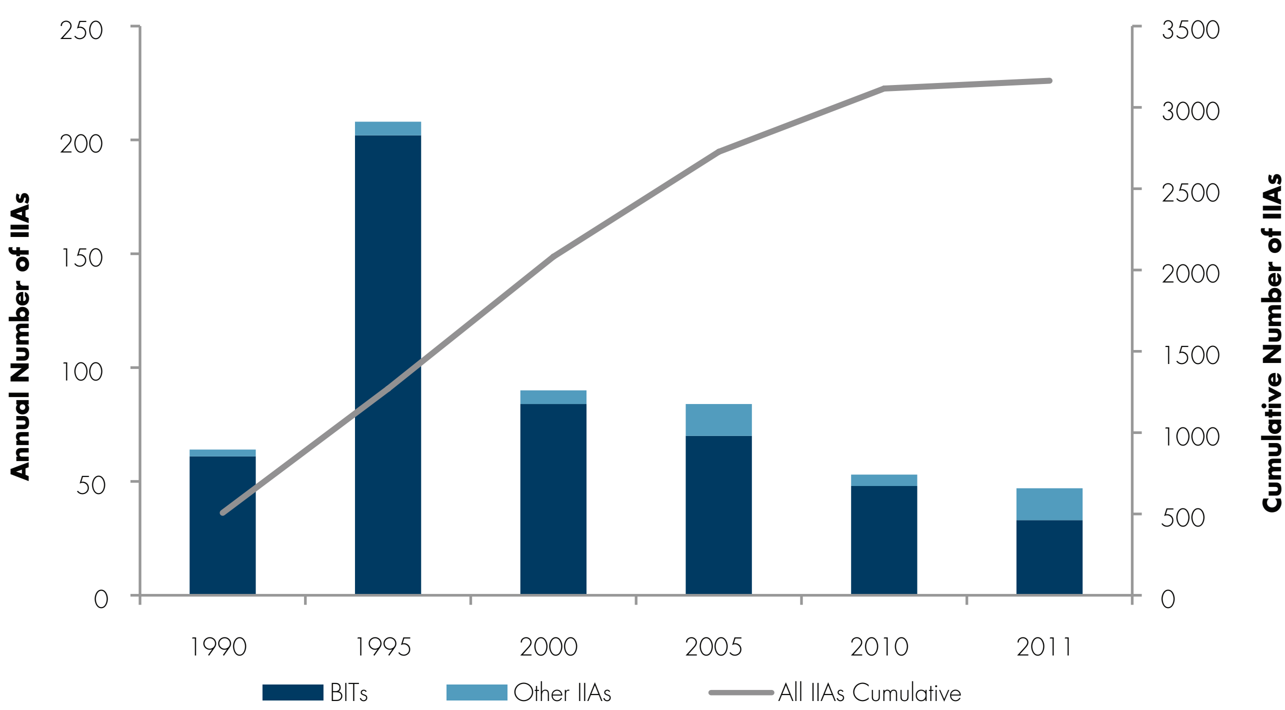
APPENDIX

CHART 1: SOME INTERESTING STATISTICS AND FACTS ABOUT INVESTOR-STATE DISPUTES

58 new cases began in 2012, bringing the known total of cases to 504. 244 of this total were concluded by 2012.
Most of cases involve investors suing developing countries.
Of the settled cases approximately 42% were decided in favor of the State and approximately 31% in favor of the investor. In 70% of the public decisions, investors were awarded money on the merits of the dispute.
95 countries were involved in one or more disputes. For five cases, the respondent country is unknown.
Venezuela had the most cases in 2012 (9), followed by Pakistan (4). Algeria, Egypt and Hungary had 3.
Investors from the United States (123 cases), the Netherlands (50), the U.K. (30) and Germany (27) initiated the most disputes.
Comparing IIAs, NAFTA has had the most cases (49) followed by the Argentina-U.S. BIT (17).

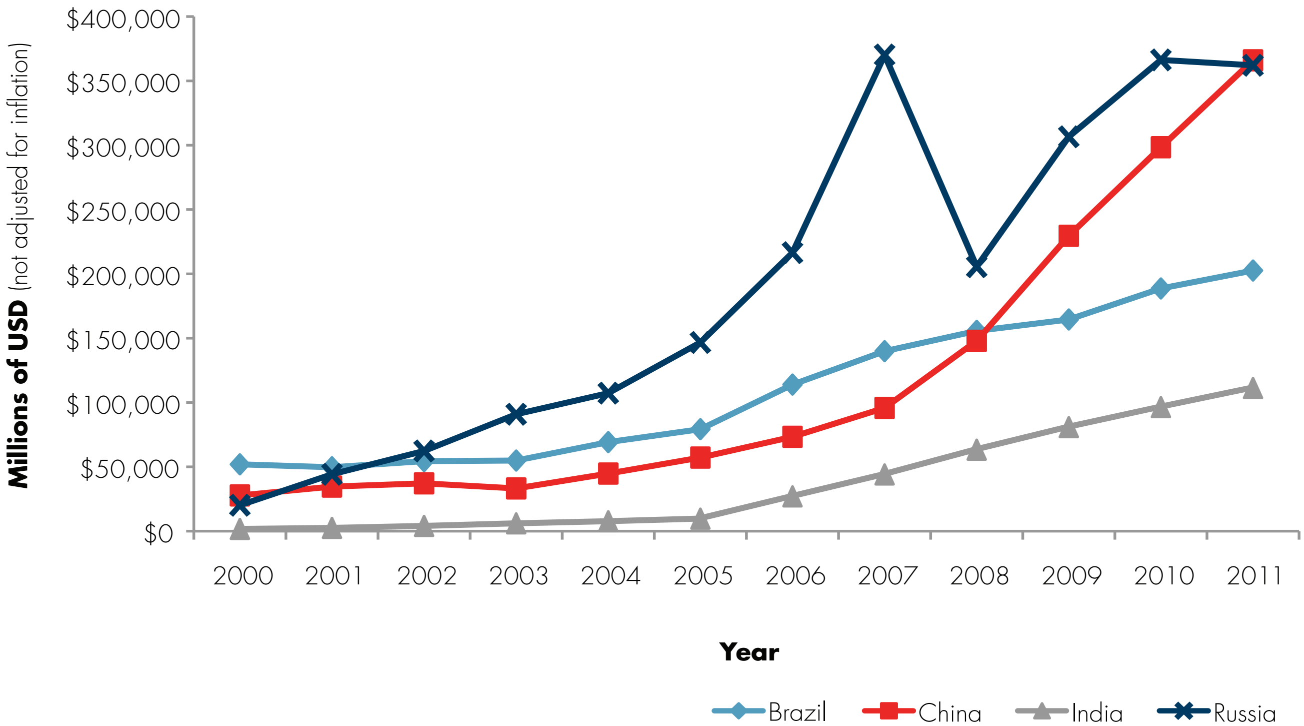
Source: UNCTAD 2012

CHART 2: TRENDS IN BITS AND OTHER IIAS



Source: UNCTAD

CHART 3: BRIC OUTWARD FDI STOCK, 2000–2011



Source: UNCTAD

CHART 4: EXAMPLES OF TREATY SHOPPING INFLUENCING INVESTMENT TRIBUNAL DECISIONS

Case	BIT	Summary	Why is this treaty shopping?	Decision
Aguas del Tunari v. Bolivia	Dutch-Bolivian BIT	Aguas del Tunaryi was a Bolivian company, in which a U.S. parent owned a majority stake.	The United States did not hold a BIT with Bolivia, so by incorporating a shell in the Netherlands the company could take advantage of strong investor protection in the Dutch-Bolivian BIT.	The tribunal ruled that this structure allowed the parent company of Aguas del Tunari to qualify for investor protection.
TSA Spectrum de Argentina S.A. v. Argentine Republic	Dutch-Argentine BIT	TSA Spectrum, an Argentine company investing in Argentine radio spectrum, established a shell parent company in the Netherlands to acquire investor protection.	The Argentine investors believed the Dutch-Argentine BIT would provide them protection similar to the Champions tribunal.	The tribunal threw out the case, ruling that TSA was in practice an Argentine company, so could not bring a claim against Argentina because of Art. 25(2)(a).

Source: Stephan Schill, The Multilateralization of International Investment Law, Cambridge University Press, 2009

CHART 5: NOTABLE CASES IN INTERNATIONAL ARBITRATION

Case	Forum	Claimant View	Respondent View	Final Award
Ping An Life Insurance Company of China, Limited and Ping An Insurance (Group) Company of China, Limited v. Kingdom of Belgium	ICSID	Ping An is the first mainland Chinese firm to pursue a claim through ICSID. As a result of Belgium's nationalization and sale of Fortis, Chinese investors lost significant investment in the bank.	To prevent the collapse of one of its largest banks at the height of the financial crisis, Belgium bailed out Fortis and sold its Belgian operation to BNP Paribas.	Pending
PV Investors v. Spain	UNITRAL	As a result of austerity policies, Spain revoked feed-in tariffs (a type of subsidy) for solar photovoltaic energy. The PV Investors claim that this action is tantamount to indirect expropriation.	Spain claims that this action was necessary, as the subsidies for green investment were too expensive to continue under their required austerity policy.	Pending
Achmea B.V. (formerly known as "Eureko B.V.") v. The Slovak Republic	PCA	Achmea claimed that Slovakia expropriated private insurers in order to return to a single-payer system. This violated Slovakia's obligations under the Dutch-Slovak BIT.	The Government of Slovakia maintained it is inappropriate for health insurers to make a profit, and they should instead spend revenue fully on treatment.	Award of €22 million to Achmea
Metalclad Corporation v. United Mexican States	NAFTA	First major NAFTA Chapter 11 case. Local municipal officials forbade a federally-approved landfill from operating. Metalclad claimed this was a form of indirect expropriation and violated fair and equitable treatment.	Mexican state and local governments claimed that Metalclad did not obtain the proper municipal-level construction permits, and that the facility was an environmental hazard.	Award of U.S.$16.7 million to Metalclad.

Source: Association for International Arbitration, Investment Treaty News, UNCTAD and ICSID, Bloomberg and ICSID

CHART 6: INVESTOR-STATE DECISIONS WHERE STATES REFUSED TO PAY AWARDS

Case	Year	Description
Sedelmayer v. Russian Federation	1998	Award in favor of Mr. Sedelmayer for U.S. $2.3 million. Russia has refused to pay the award. Mr. Sedelmayer has brought the case to German and Swedish courts, hoping to enforce the ruling.
AIG Capital Partners, Inc. and CJSC Tema Real Estate Company Ltd. v. The Republic of Kazakhstan	2001	Award of U.S. $9.95 million in favor of AIG. Kazakhstan refused to satisfy the award, and it has not been enforced.
CMS Gas Transmission Company v. The Republic of Argentina	2005	Tribunal awarded CMS U.S. $133.2 million. Argentina has refused to pay, saying that CMS needs to bring the award to an Argentine court for enforcement.

Source: See Note 99

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