Broadening the Perspective: Human Rights, Environment and the Legitimacy of International Investment Law

Lecture 10

International Investment Law

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I. Investment Law in a Broader Perspective

Prelude:

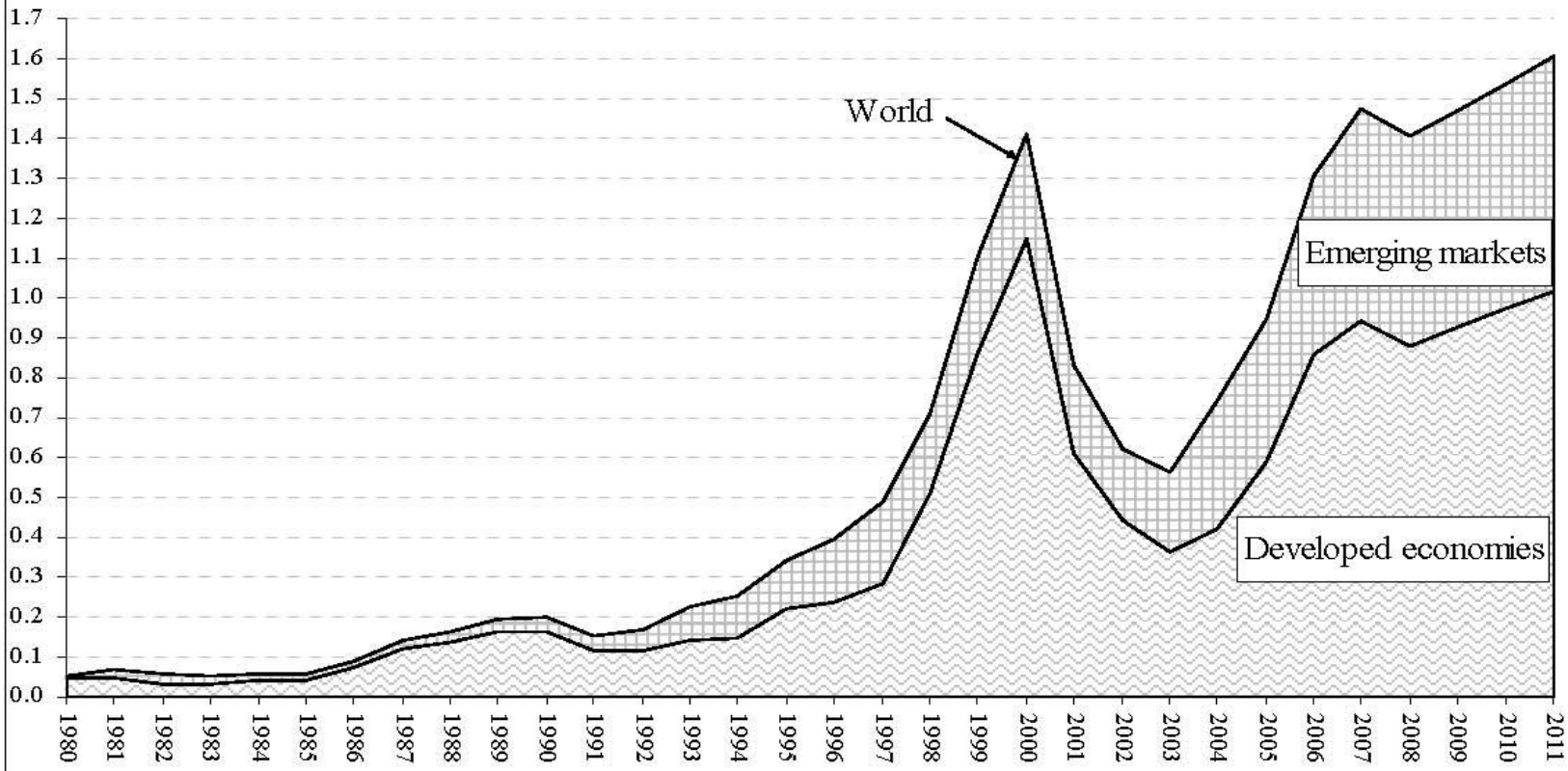
International investment law has always been, and probably always will be, in flux. Why?

1. Competing Ideologies
2. Changing Economies
3. Variance of Legal Norm Entrepreneurship

1. Foreign Investment

- Global foreign investment flows are now larger than trade (Dolzer and Schreurer)
- 2007: Foreign investment inflows: 1.5 Trillion US Dollars
- Traditionally a developed-to-developed country phenonemon
- Now a third of foreign investment is in 'emerging markets'
- Most of the volume of foreign investment in the South goes to select Asian countries
- But foreign investment can account for a larger proportion of GDP in some poorer African and Asian countries
- Multinationals are often the face of foreign investment and many have an economy larger than states.
- Global supply chains are also a newer phenomenon

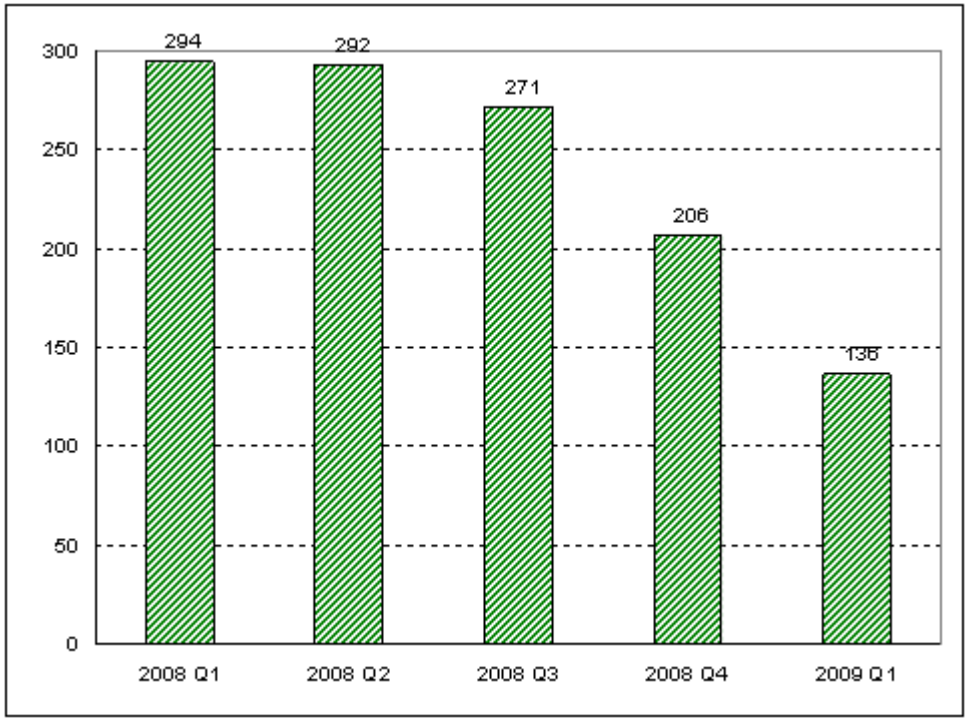
Figure 1. FDI inflows, global and by group of economies, 1980-2011*
(Trillion US dollars)



* FDI inflow projections for 2007-2011 are derived from data in World Investment Prospects, whose regional definitions vary slightly from World Investment Report data.

Source: UNCTAD, *World Investment Report 2007: Transnational Corporations, Extractive Industries and Development* (New York and Geneva: United Nations, 2007), p. 3, and Laza Kekic and Karl P. Sauvant,

- But investment partly susceptible to financial shocks:

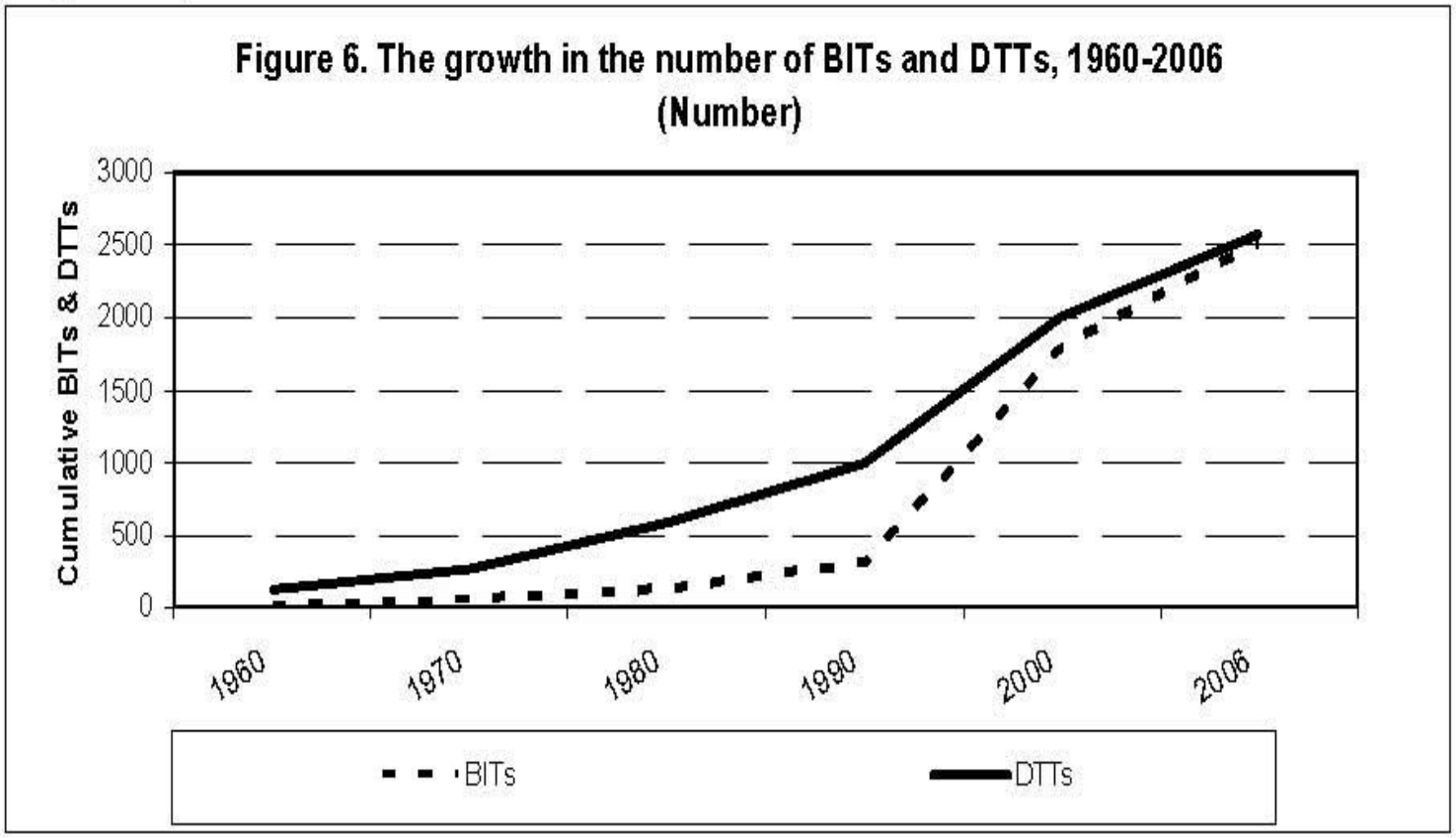


2. The Rise of Investment Law

'Vital' Statistics:

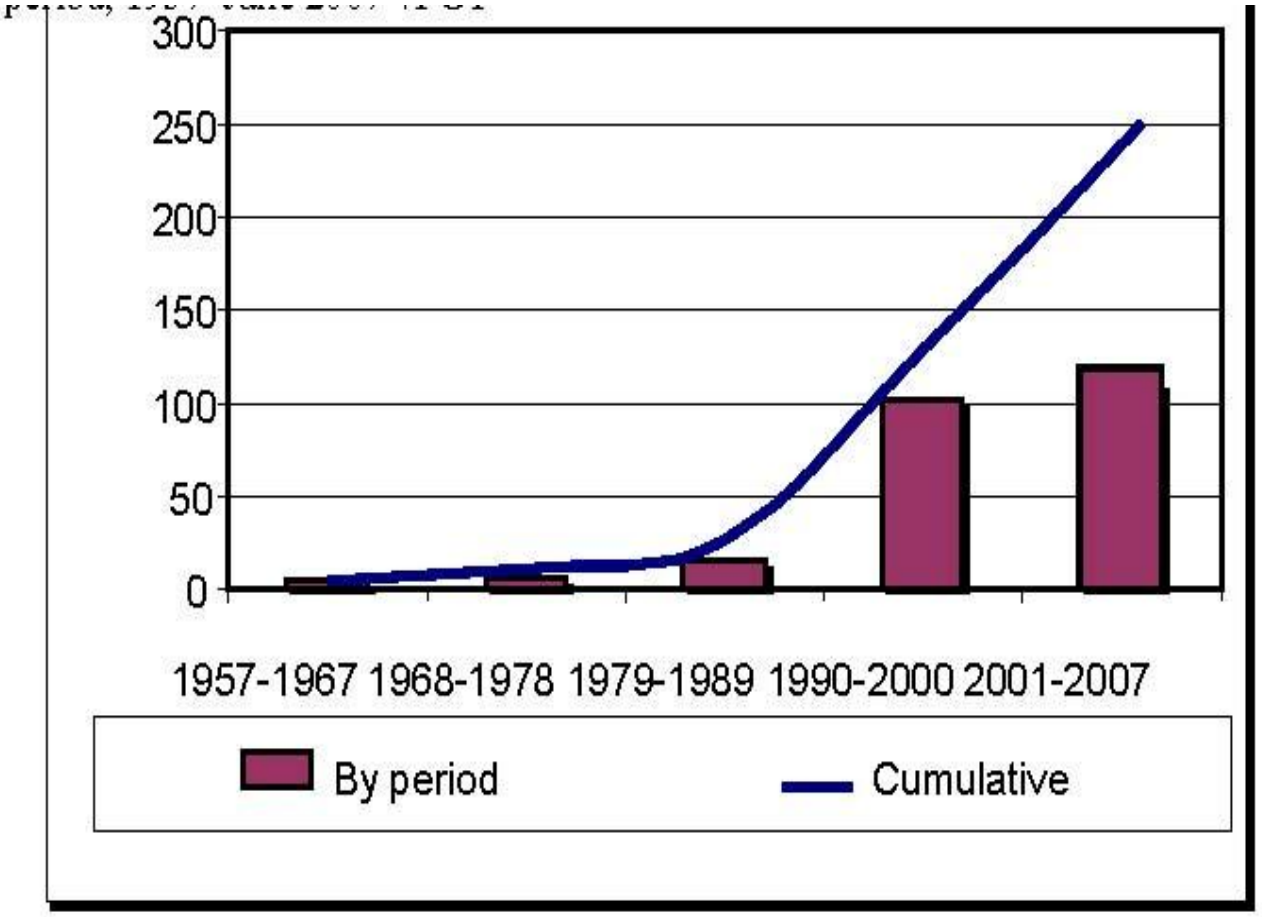
- 2676 bilateral investment treaties (UNCTAD, June 2009)
- Traditionally North-South but increasingly South-South: 20-25%
- 279 other agreements (mostly free trade) with investment chapters.
- Exponential rise in the number of investment arbitrations
- States have won 38 per cent of 164 concluded cases with 29 per cent being won by investors and 34 per cent settled.
- But some argue Host States also change behaviour in the shadow of investment law: i.e., they acquiesce before litigation.

Number of BITs (Bilateral Investment Treaties)

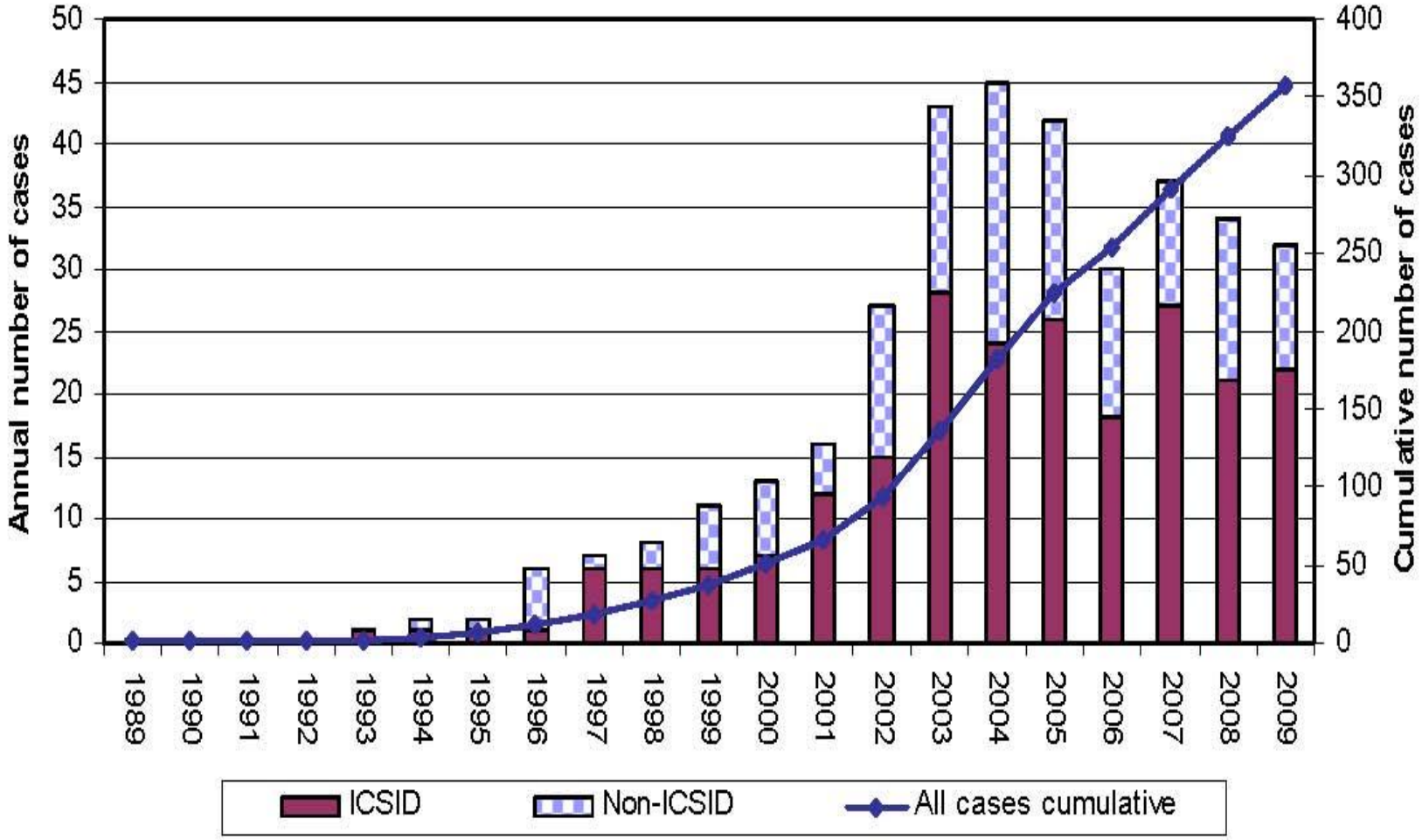


Source: UNCTAD (http://www.unctad.org/iia).

Other Agreements with Investment Chapters



Investment Arbitration



3. Why Do States Make BITS?

- Studies indicate that the presence of investment treaties does not signficantly affect decisions on foreign investment?
- Brazil is the classic case: it has ratified no treatries but is 3rd highest amongst developing countries in attrracting investment.
- But weaker less developed countries risk signalling disinterest in investment (Gallagher and Zarsky 2006)
- Studies do indicate that BITs are one factor, even if not decisive for investors, and thus in at least the interest of capital-exporting states.
- Elkins, Guzman and Simmons (2006) ask why less developed countries sign BITs when they bear all of the obligations.
- They argue it is the result of a prisoners dilemma: it is strategically better for such states to oppose the development of a global regime and then 'defect' and sign the BITs in the *hope* of preferential treatment by foreign investors.
- They also note other significant explanatory variables, such as:

  (1) *uncertain legal regimes* vis-a-vis property rights (China being the classic case which has signed numerous treaties while Western countries have signed few between themselves) and

  (2) *Washington-based coercion* (e.g., there is a high correlation between signing of BITs and countries classified as highly indebted and reliant on IMF loan re-financing).

4. A Historical Perspective

800s

- Third Abbasid Caliph made a capitulation to Emporer Charlemagne
- Foreigners laws apply to foreigners

1536

- Most notable Middle Age *capitulation* France and Turkey
- Later expanded to East Asia and North Africa

1796

- Treaty on Friendship, Commerce and Navigation: France and USA
- Domestic protection of alien property

1868

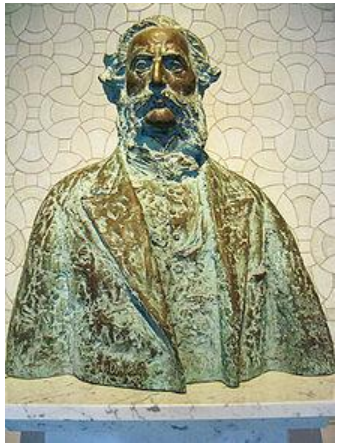
- Carlos Calvo, *Derochos Internacional Teorico y Practico de Europe y America*

1907

- Drago-Porter Convention

1910

- A settled general customaey international standard for protection of alien property (e.g. Elihu Root, 1910)?



1917

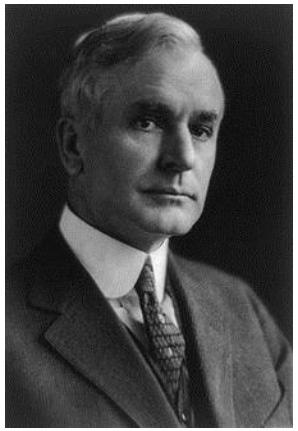
- Bolshevik Revolution
- Capitulations have now fallen into disgrace

1938

- Hull Doctrine: ”Prompt, adequate and effective”

1938

- Eduardo Hay, Mexican FM: Calvo doctrine applies



1948-

- Universal Declaration
- ECHR and ACHR

45-66

- US negotiates 21 FCN Treaties, with some investment protection

1957

- Germany proposes global investment treaty

1959

- First bilateral investment treaty: Germany and Pakistan

1962

- GA Resolution 1803
- ”appropriate compensation”

1962

- Draft OECD Global Treaty – not accepted but became model for BITs

1964-

- US Supreme Court ”“There are few if any issues in international law today on which opinion seems to be so divided as the limitation on a state’s power to expropriate the property of aliens” 376 U.S. 398, at 428

1965

- ICSID Conventiion

1966

- ICCPR and ICESCR
- Right to economic self-determination included
- No right to property

1974

- New International Economic Order, GA Res
- International rules abolished?

59-89

- Slow rise in BITs

1989

- Berlin wall falls

  Market economies become global norm

1993

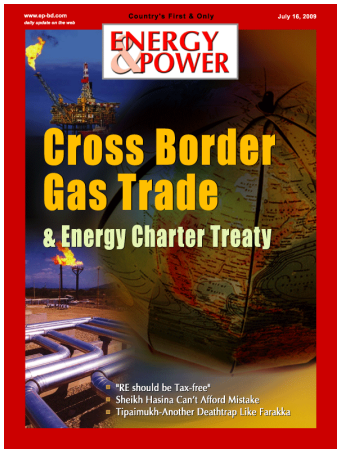
- BITs take-off point

1994

- TRIMS
- NAFTA
- European Energy Treaty

1995

- OECD Attempt at Multilateral Investment Treay



1998

- Death of OECD initiative
- WTO Attempt at Mulilateral Investment Treaty

1999

- Battle of Seattle
- MAI dies
- BITS thrive

2000s

- Doha Agenda…
- US Model BIT and ICSID Amendments
- *Backlash against Investment Arbitration* (Walters Kluwer, 2010)

II. Human Rights and Environmental Law

1. Relationship of investment law with other branches of international law

- *Vienna Convention*: In interpreting treaties, one must take into account "any relevant rules of international law applicable in the relations between parties" (Art. 31(3)(c).
- Bilateral investment treaties do refer to other international law but varies:

  1) Usually general or applicable international law incorporated.

  2) Sometimes incorporated only if more favourable for investment

  3) Sometimes specific rules of international law mentioned: e.g. Taxation treaties, labour, health and environmental rights

2. Jurisprudence

- Decisions are not formally united on this point, compare these cases:

  S*t Elena v Costa Rica (*ICSID Case 2000): "The international source of the obligation to protect the environment does make no difference."

  Asian Agricultural Products Ltd v Republic of Sri Lanka (ICSID Case1990): BITS are "not a self-contained closed legal system limited to provide for substantive material rules of direct applicability, but it has to be envisaged within a wider juridical context in which rules from other sources are integrated through implied incorporation methods, or by direct reference to certain supplementary rules, whether of international law character or of domestic law nature."

- See also *Iran v USA* (2003); ICJ

  Majority: International law on use of force forms "an integral part of its interpretation" of 1995 Iran-US Treaty of Amity.

  Separate opinion of Justice Higgins: Treaty of Amity was a commercial treaty and did not "envisage "incorporating the entire substance of international law on a topic not mentioned in the clause".

3. Human Rights and Environment

- Claims that investment arbitration negatively affecting human rights but others claims effect overstated (see Langford, 2011)
- Four approaches in jurisprudence of human rights and investment adjudication:

  1. Human rights supremacy:

  Sawhoyamaxa vs. Paraguay, Inter-American Court of Human Rights: "The application of bilateral commercial agreements do not provide a justification for the breach of states obligations emanating from the American Human Rights Convention; on the contrary, their application must always be compatible with the American Convention"..

  2. Balancing I: Regulatory Favourable

  Methanex v United States (NAFTA-ICSID, 2005) "as a matter of general international law, a non discriminatory regulation for a public purpose, which is enacted in accordance with due process and, which affects inter alia, a foreign investor or investment is not deemed expropriatory and compensable

3. Balancing II: Investment Favourable Alternative

SD Meyers v Canada (NAFTA-ICSID, 2001)

"Where a state can achieve its chosen level of environmental protection through a variety of equally effective and reasonable means, it is obliged to adopt the alternative that is consistent with open trade".

4. Investment *Lex specialis*:

S*t Elena v Costa Rica (*ICSID Case 2000): "The international source of the obligation to protect the environment does make no difference."

- In the first case in which a State (together with an amicus) extensively relied on human rights argument, the tribunal found:

  "Argentina has suggested that its human rights obligations to assure its population the right to water somehow trumps its obligations under the BITs and the existence of the human right to water also implicitly gives Argentina the authority to take actions in disregard of its BIT obligations. The Tribunal does not find a basis for such a conclusion either in the BITs or international law. Argentina is subject to both international obligations, *i.e. human rights and* treaty obligations, and must respect both of them. Under the circumstances of this case, Argentina's human rights obligations and its investment treaty obligations are not inconsistent, contradictory, or mutually exclusive. Thus, as was discussed above, Argentina could have respected both types of obligations."

  Suez, Sociedad General de Aguas de Barcelona S.A., and InterAguas Servicios Integrales del Agua S.A. v. The Argentine Republic (ICSID 2010)

- **Which approach is this?**

Some recent cases

- Argentina post-crisis arbitration and the "necessity" defence
- Tobacco regulation litigation: *Philip Morris Brans Sarl v Uruguay*, ICSID Case no. ARB/10/7; *Philip Morris Asia Limited v. Australia,* UNCITRAL.
- India's claim on development status: *White Industries v. India, Final Award, 30 Nov 2011*.
- Freedom of expression of investors: *Perez v Ecuador*, ICSID, filed 2011.
- Claimant argued ECHR more favourable investment agreement: *Roussalis v. Romania, ICSID* ARB/06/1, Award of 7 Dec 2011.
- Yukos litigation: *RosInvestCo v. Russia,* Final award made on 12 September 2010, Stockholm Sweden. SCC Arbitration V (079/2005)
- Chevron and Ecuador epic - new chapter: *Chevron &Texaco v Ecuador*, PCA, Procedural Order No. 10, 2012 plus inter-state arbitration.

III. Legitimacy: Critiques and Reforms

1. Criticisms of Arbitration and Treaties

- Lack of consistency in jurisprudence
- Lack of procedural fairness and transparency
- Excessive pro-investor legal interpretations
- Lack of receptivity of arbitrators to issues of corruption or changing macroeconomic policy
- Arbitral awards can lead to conflicts with other areas of international law
- No obligations on investors
- Tim Nelson (2010) - current international investment regime is not fragile and history shows that it is durable and capable of surviving changing economic and political conditions.
- However, while only Bolivia, Venezuela and Ecuador have responded with absolute rejection there is a broader disquiet that will probably influence future developments.
- Some arbitration tribunals seem to be moderating their position.

2. Roads (and Dances) to Investment Law Reform

1. Avoid BITs like Brazil or remove arbitration like Australia?

2. Improve Investment Treaties and Arbitration: e.g. domestic exhaustion (Norwegian draft), transparency (US), amicus (Argentina case).
Also include investor duties? See ISSD draft.

3. Look to regional courts for investment arbitration? ECHR, SADC?

3. Corporate Social Responsibiity

- Investor don't carry obligations in investment treaties but should they? See IISD model draft treaty.

And do they have obligations elsewhere?

- 1976/2000: OECD Guidelines for Multinational Enterprises

  - System of Contact Points in finance ministries

  - Weak but increasingly used: see Cernic article

- 1977: The ILO Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy:

  - An ILO procedure exists for providing interpretations but under-used

- 2003: UN Sub-Commission of Human Rights: UN Norms on the Responsibilities of Transnational Corporations and other Business Enterprises.

  - But not approved by UN Human Rights Commission or Council

- 2010: Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie

  - "protect, respect and remedy" framework

  - likely to be the most influential but contested for its minimalism and position on legality.

Transnational litigation

- ***Alien Torts Claims Act*** (USA) but see recent decision in *Shell*.
- Use **Tort law** but challenges of *forum non conveniens (FCN) rule: e.g. In re Union Carbide Corp Gas Plant Disaster at Bhopal* and *Aguinda v Texaco*
- But FCN overcome in some cases: e.g. Lubbe (UK), *Martinez v Dow Chemicals* (US) *Dagi v BHP* (Australia)
- Factual-legal challenges of piercing corporate veil and substantively showing control in the home state.
- Brussels Convention removes FCN test and may open up more Europe-based litigation: e.g. case filed against Shell actions in Nigeria in Netherlands

4. Extraterritoriality and State Obligations

- Do home states have duties to protect individuals in host states of investors against violations?

Human Rights Law

← India USA →

ETO State Obligation?

Non-State ETO Obligation

World Bank

Coca-Cola India
little drops of joy

4.1 Legal Obligations

- Extra-territorial obligations phrased differently across substantive territories and optional protocol complaint mechanisms: e.g.,

  - ICCPR obligations limited by State´*jurisdiction* and *territory*
  - ICESCR has no limitation
  - ICESCR OP limited by State´s jurisdiction

- In interpretive practice, tends to be a convergence on ´jurisdiction´

4.2 Nature of obligations

- Limited CESCR jurisprudence – focus on situations of occupation, sanctions and recommendations on development aid
- "Respect, protect, fulfil" (RPF) paradigm popular (see CESCR GC 15 (2002) as opposed to "international cooperation".
- But does it provide sufficient precision? Perhaps need other standards such as reasonableness and foreseeability? (Ryngaert, 2013) or due diligence: see HRC, *Rubio v Colombia*, ICJ, *Genocide Case*.

4.3 Jurisdiction

Where relevant, contested and confused!

A spectrum:

- Strong and exceptional "effective control "over persons or territory (ECtHR, *Bankovic*). Appears to require "exercise of state authority takes place over a certain duration and/or has overall repercussions on the person concerned"(Rozakis, 2006)
- Capacity or Decisive Influence over Effects: "Even in the absence of effective control of a territory outside its borders, the State still has a positive obligation under Article 1 of the Convention to take the diplomatic, economic, judicial or other measures that it is in its power to take and are in accordance with international law to secure to the applicants the rights guaranteed by the Convention (ECtHR, *Treska v Albania & Italy*, 2006)
- Reasonableness Test? (Ryngaert, 2013)
- Pure Effect or Attribution Test? (Scheinin, 2004)

4.4 Causation

- Direct effect relatively easy to establish in principles
- But causation is a legal construction and the choice of causation theory in international law may affect result: e.g. proximity, foreseeability, 'but for' test, precautionary principle
- Even 'effective control' in some ETO cases (ICJ. *Nicaragua, Genocide*).
- Quite difficult in cases of multiple actors – but "decisive influence" recognised by ICJ and ECtHR.
- Is foreseeability or proximity a better test here?
- CESCR, GC 8 on Sanctions sets out ESC rights "obligations relates to the party or parties responsible for the imposition, maintenance or implementation of the sanctions"

Lykke til!