Introduction to International Investment Law

Lecture 10

JUR5850 International Trade and Investment Law

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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 Entrepenuership

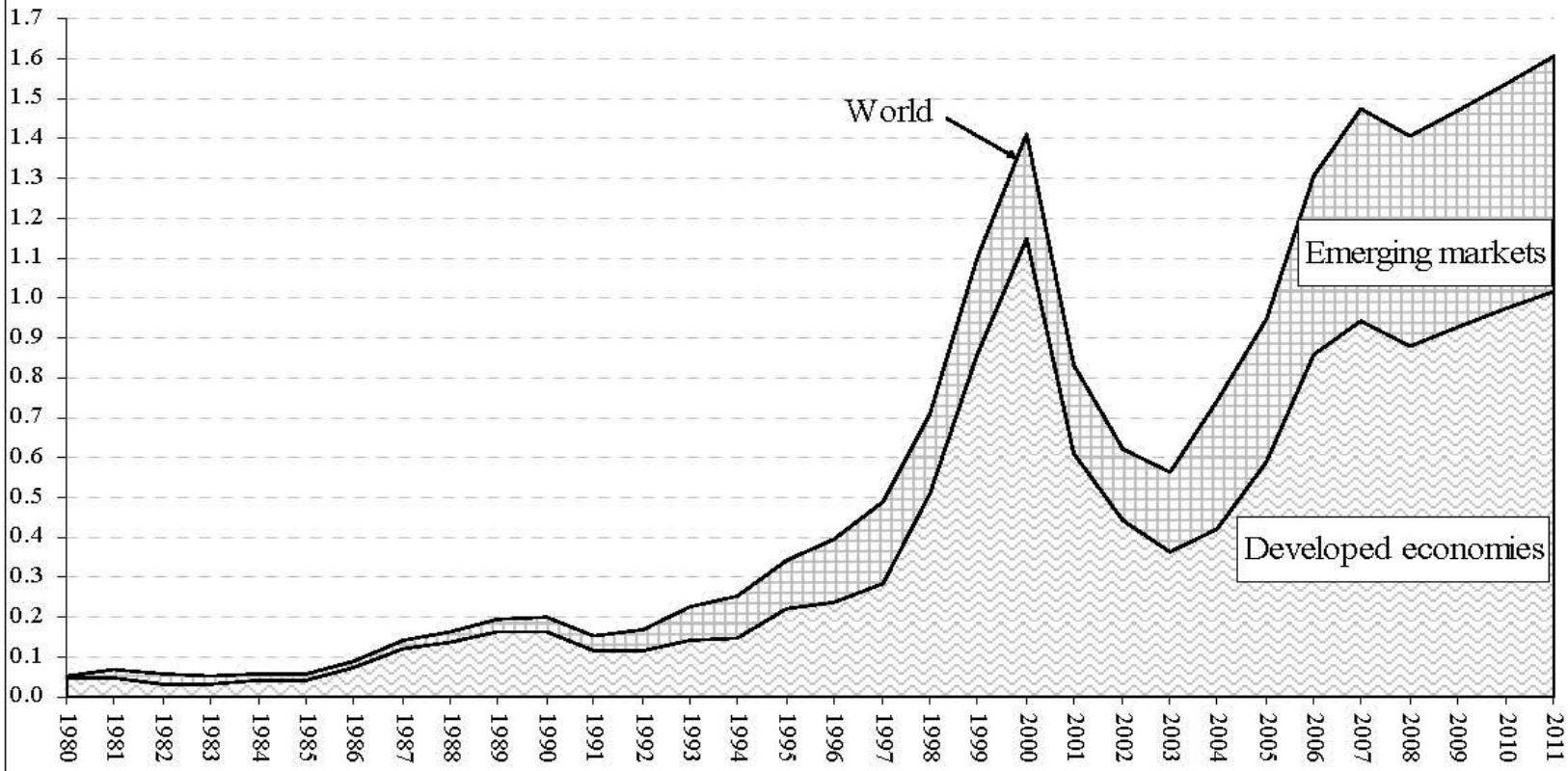
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1. Foreign Investment

- 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

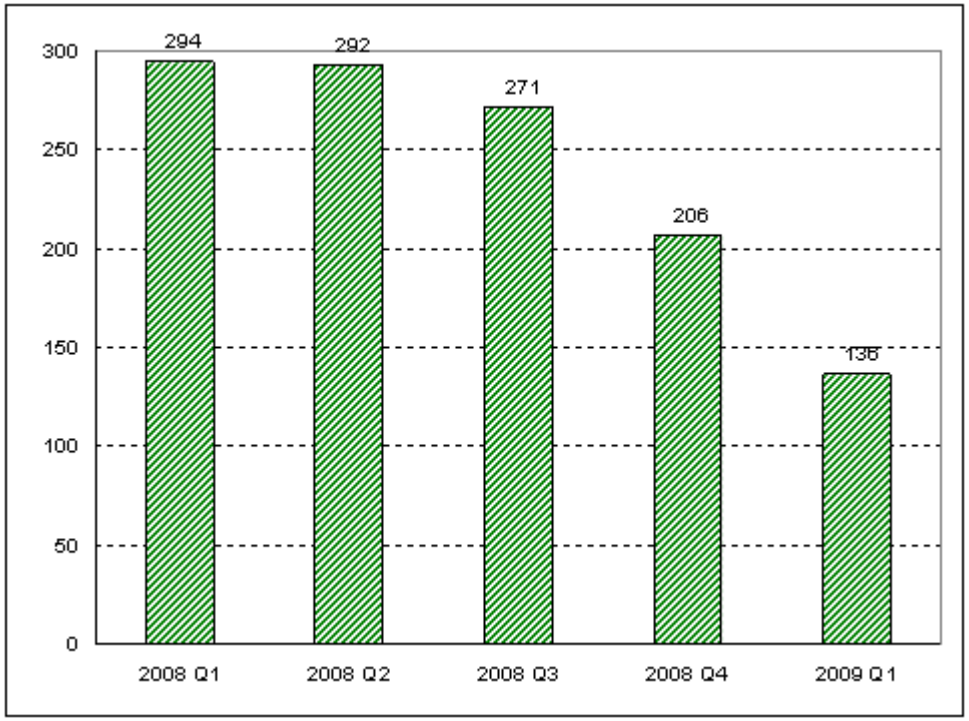
Figure 1. FDI inflows, global and by group of economies, 1980-2011*
(Trillion US dollars)



* 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:



II. The Rise of Investment Law

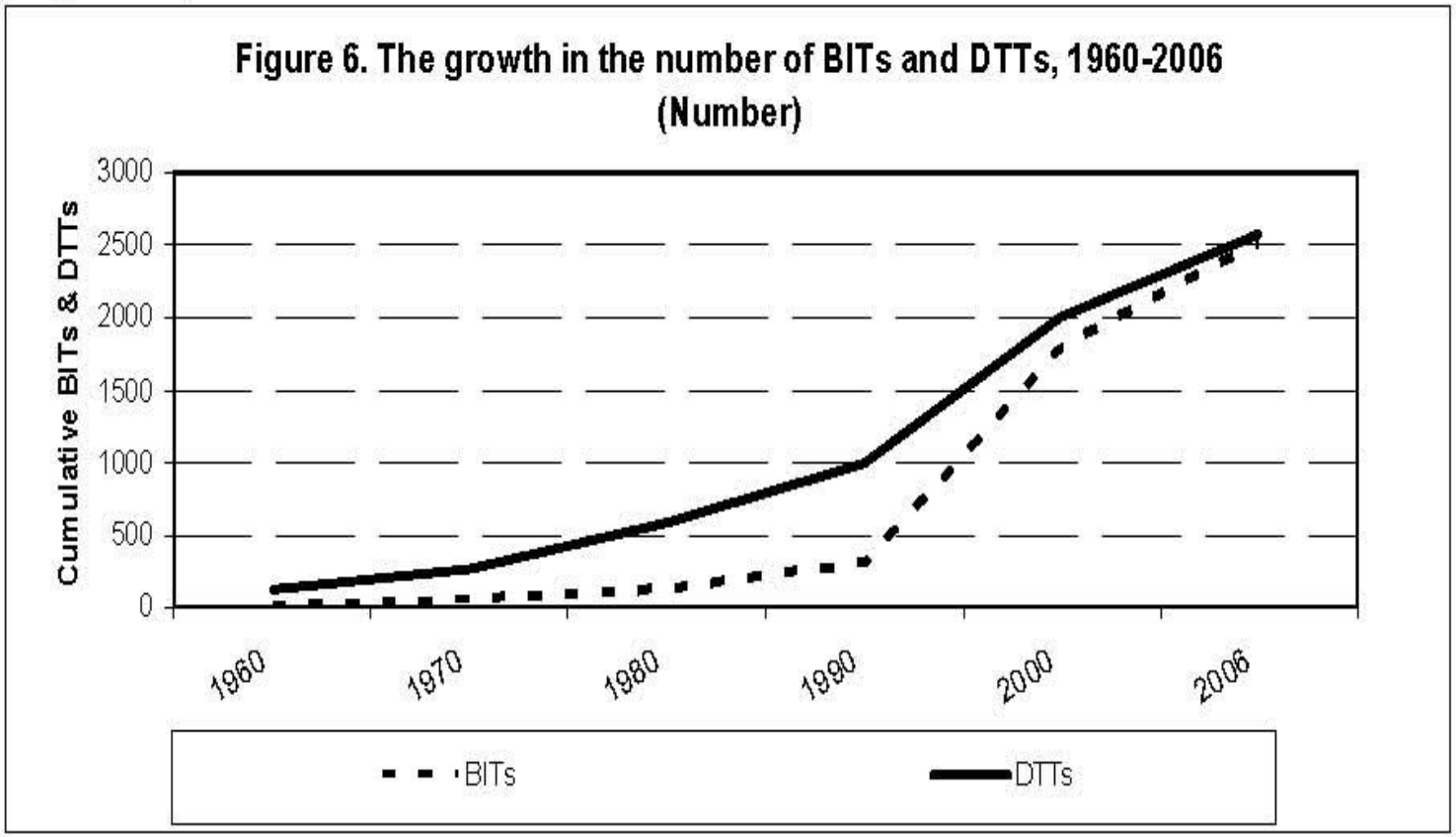
'Vital' Statistics:

- 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.



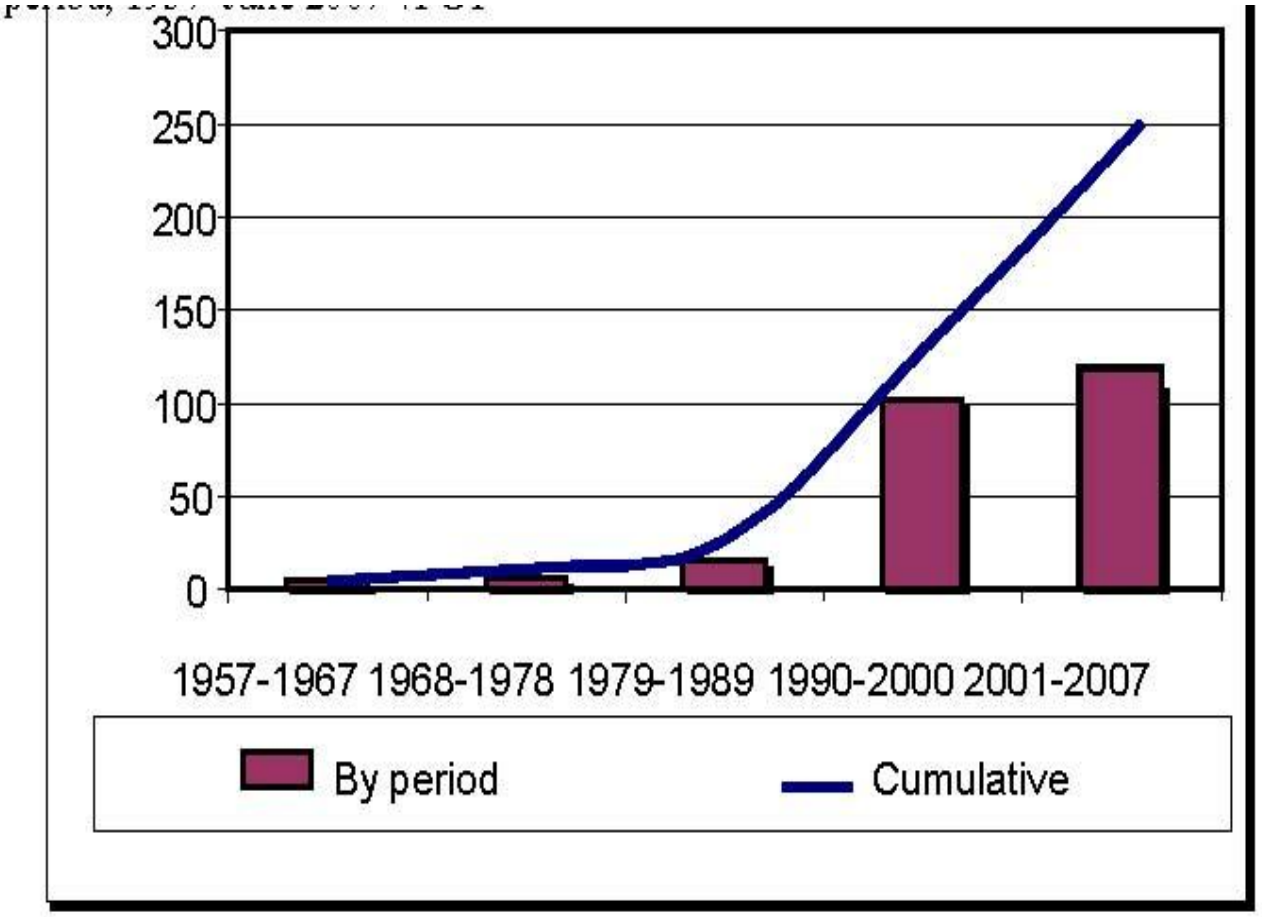


Number of BITs (Bilateral Investment Treaties)

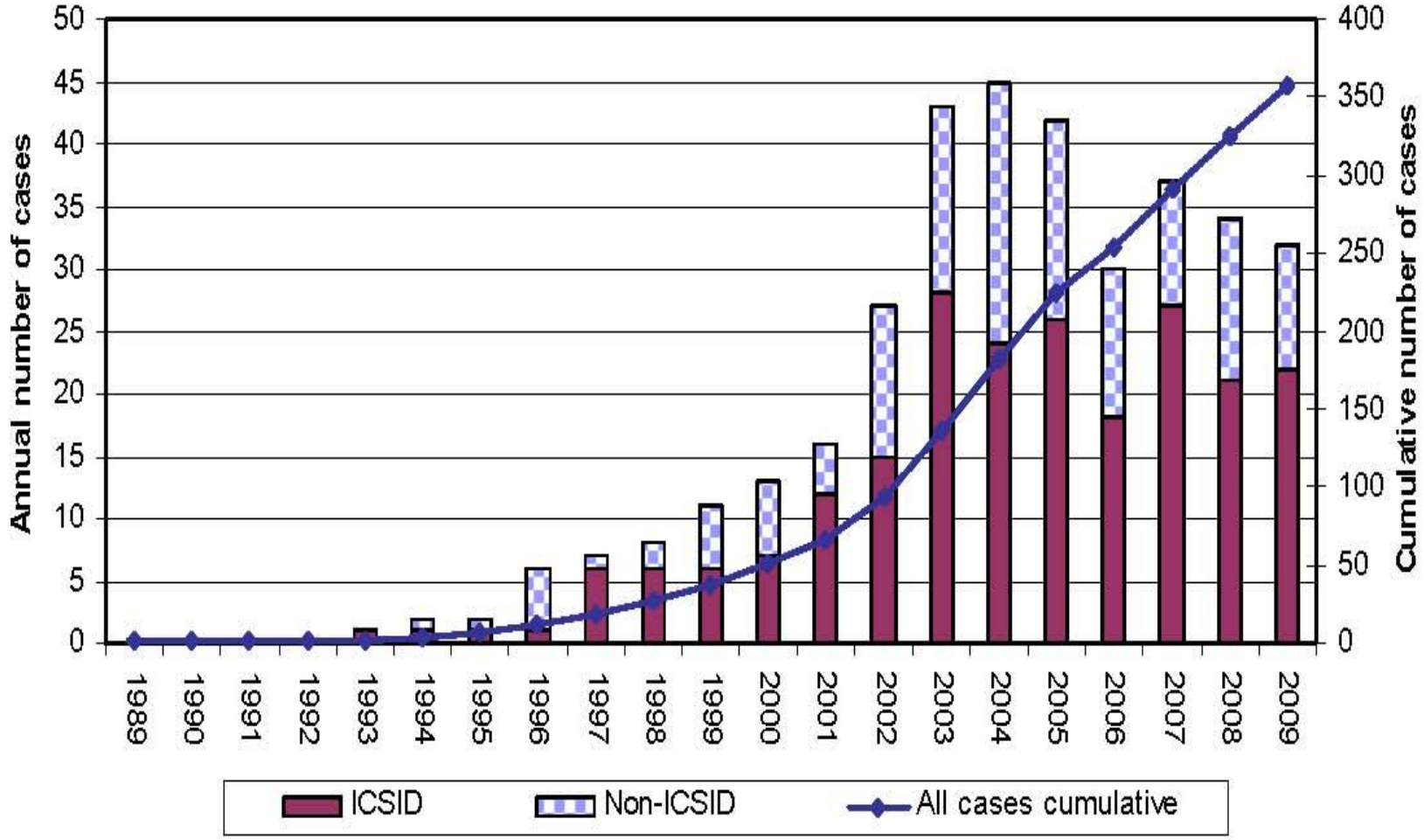


Source: UNCTAD (http://www.unctad.org/iia).

Other Agreements with Investment Chapters



Investment Arbitration



III. 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).

IV. Heterogeneous Sources of Law

1. Customary international law
2. Bilateral investment treaties
3. Regional free trade agreements with investment chapters
4. Bilateral free trade agreements with investment chapters
5. Trade-Related Investment Measures
6. General Agreement on Trade in Services
7. *Sui generis* regimes: E.g. European Energy Charter, EFTA, and EC Treaty (Articles 56, 43)
8. Regional Human Rights Systems:
   - European Convention on Human Rights
   - American Convention on Human Rights
   - Southern African Development Cooperation

Sources 2-4 have become the most important globally.

V. Heterogeneous Adjudication

1. ICSID
2. UNICTRAL
3. Stockholm Chamber of Commerce
4. Ad hoc adjudication
5. ECJ/EFTA Court
6. Regional Human Rights Courts/Tribunals
7. International Court of Justice

VI. What is ”Investment”?

- See Dolzer and Schreuer, pp. 60-71
- General treaties in PIL often refer to all “property rights and interests”
- Economic definition of investment: (a) transfer of funds (b) longer-term project (c) for the purpose of regular income (d) some form of participation in management (e) business risk.
- Economic definition excludes portfolio investment, ordinary commercial transactions or short-term financial transaction (e.g. 90 day bond, currency).

- International Investment Law?
- Largely adopts an economic definition but through a treaty-based prism?
- *Fedax v Venezula* (1997) is best guide; 3 steps:

  1. Examine definition in Article 25 ICSID Convention (for jurisdictional purposes)

  2. Examine definition in relevant BIT

  3. Distinguish investment from ”ordinary commercial transaction’: ”The basic features of an investment have been described as involving a *certain duration*, a certain regularity of profit and return, *assumption of risk*, a *substantial commitment* and a *significance for the host State’s development*.
- See Dolzer and Scheurer, pp. 68-71 for further case law on each of these factors

VII. What Type of Legal Creature?

- Dolzer and Schreur:

  “Foreign investment law consists of layers of general international law, of general standards of international economic law and of distinct rules peculiar to its domain” (p.3)
- But it is a slippery legal creature in at least four ways:

1. International or Domestic Law?

- UK House of Lords, *Occidental Exploration & Production Company and The Republic of Ecuador:*

  "Bilateral investment treaties such as the present introduce a new element, and create a "very different" situation (cf *Zachary Douglas* in *The Hybrid Foundations of Investment Treaty Arbitrations* (2003) BYIL 151, 169). The protection of nationals is crystallised and in the present Treaty expanded to cover every kind of investment "owned or controlled directly or indirectly by nationals or companies of the other Party" (Article 1), but the investor is given direct standing to pursue the State of the investment in respect of any "investment dispute"

- The Court finds they occupy the terrain more traditionally dealt with under domestic constitutional or human rights law.
- Moreover, the jurisdiction for arbitration and enforcement is "domestic" but the law to be applied is "international".

2. Public or private law?

A host state's actions and omissions in both its public and private capacity is often relevant in investent disputes.

3. *Sui generis* field of international economic law?

- Doolzer and Sheurer (pp. 3-7) argue that you can't automatically apply IEL rules due tot he particular nature of investment: sunk costs and long-term risk.
- They say that the principle of good faith needs to be used to particularise investment obligations of host States

4. Broader characterisation

- Is it now a *transnational legal order* (Leubuscher 2003) or *international constitutionalism* (Shneidermann (2008)?

VIII. A History of International Investment Law

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

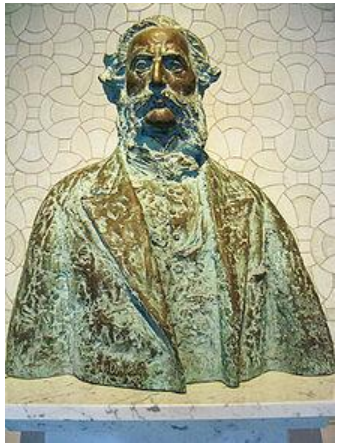
- Carlos Calvo, *Derochos Internacional Teorico y Practico de Europe y America*

1907

- Drago-Porter Convention

1910

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



1917

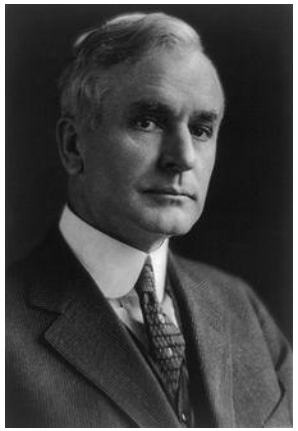
- Bolshevik Revolution
- Capitulations have now fallen into disgrace

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

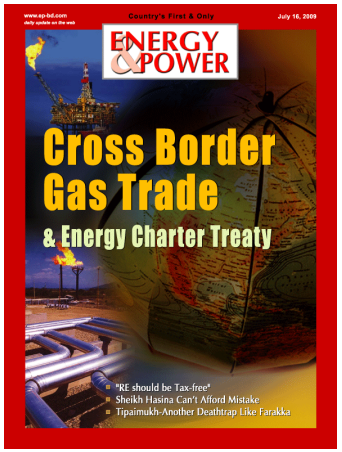
- BITs take-off point

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)



IX. TRIMS

- TRIMS are foreign investment requirements (e.g. conditionalities for investment approval) that affect free trade by benefiting nationals.
- 1984 GATT Panel Decision *Canada-Administration of the Foreign Investment Review Act* : requiring an investor to provide undertakings, even if voluntary, violated Canada's national treatment obligation.
- TRIMS Agreement 1994 (promoted by US to clarify this area)
- Article 2.1 "no member shall apply any TRIM that is inconsistent with the provisions of Article III or Article XI of GATT"
- But no general rules: just an illustrative list in Annex of TRIMS inconsistent with obligation of national treatment and general elimination of quantitative restrictions.
- States have time to phase out (2, 5 and 7 years) or seek waiver.
- TRIMS Agreement's codification of the 1984 GATT decision is confirmed by WTO Panel in *Indonesia-Autos 1998:* tax incentives and customs duty benefits linked to local content requirements falls foul.
- Jurisprudence: don't always need TRIMS: just show violation of GATT.

X. GATS

- GATS Article 2.d: ”trade in services is defined as the supply of a service” … “by a service supplier of one Member, through presence of natural persons of a Member in the territory of any other Member.”
- If a WTO Member has made market access commitments then actions affecting foreign investors providing services can fall under GATS.

Specific GATS Commitments, Article XVI:

"In sectors where market-access commitments are undertaken, the measures which a Member shall not maintain or adopt either on the basis of a regional subdivision or on the basis of its entire territory, unless otherwise specified in its Schedule, are defined as:

(a) *limitations on the number of service suppliers* whether in the form of numerical quotas, monopolies, exclusive service suppliers or the requirements of an economic needs test;

(b) *limitations on the total value of service transactions* or assets in the form of numerical quotas or the requirement of an economic needs test;

(c) *limitations on the total number of service operations* or on the total quantity of service output expressed in terms of designated numerical units in the form of quotas or the requirement of an economic needs test;

(d) *limitations on the total number of natural persons that may be employed* in a particular service sector or that a service supplier may employ and who are necessary for, and directly related to, the supply of a specific service in the form of numerical quotas or the requirement of an economic needs test;

(e) measures which restrict or require specific types of legal entity or joint venture through which a service supplier may supply a service; and

(f) *limitations on the participation of foreign capital* in terms of maximum percentage limit on foreign shareholding or the total value of individual or aggregate foreign investment."

XI. The Structure and Text of Bilateral Investment Treaties

- Compare the US Model BIT and UK-SA BIT and discuss:

  1. What is their aim: economic liberalism, economic nationalism or development? (See both preamble and text)

  2. What is defined as an investment?

  3. How does each treaty approach and regulate admission of investment?

  4. What are the similarities and differences in host State obligations between treaties?

  5. What is the nature of the dispute process?