Academy of International Business

Insights

Vol. 16, No. 1, 2016

International Trade and Investment Agreements: Sovereignty at Bay in the 21st Century?

Editorial Commentary

Daniel Rottig, *Editor*
Lutgert College of Business
Florida Gulf Coast University, USA

Klaus Meyer, *Guest Editor*
China Europe International
Business School, China

There has been no other time more exciting for international business. International challenges and opportunities are permeating business activities in nearly every country and industry around the globe, economic boundaries across nations have nearly disappeared, technological innovations and instantaneous global communication are transforming the way people and firms around the world conduct business, and the way universities around the globe educate. Institutions in form of political, legal, economic and socio-cultural rules of the game are becoming increasingly complex in both developed and emerging markets, and thus more fascinating to study. With the beginning of the second half of these post-recession "Transformative Teens" in this 21st century comes the exciting opportunity to explore new knowledge, fresh ideas and the next frontiers in international business.

AIB Insights constitutes a distinct outlet for such new, innovative and path-breaking knowledge and ideas. In its unique format, *AIB Insights* publishes interesting, topical, current and thought-provoking articles that are free of professional jargon and technical terms, light on references, but heavy on insight from the authors' experiences and research. In so doing, *AIB Insights* aims to disseminate "ideas worth sharing" in international business research, education, policy and practice. I am very excited about having been selected as the new editor of *AIB Insights* and to continue serving for the journal by facilitating the spreading of ideas in international business in this role. During my tenure as associate editor over the past three years, I have enjoyed working with Romie Littrell. Romie and I have received prodigious support from the AIB and I am very much looking forward to continue working with the *AIB Insights* production team and all of the past and future authors and contributors without whom this journal would not exist. *AIB Insights* truly is a unique and very special publication by and for the AIB community and we look forward to receiving, publishing and thus sharing your ideas in international business.

This focused issue, co-edited by Klaus Meyer, provides a discussion of the controversies surrounding the investor-state dispute settlement (ISDS) system in the context of recent international trade and investment agreements, and its implications for the sovereignty of nation-states in the 21st century. In his last book titled "In the Hurricane's Eye" (1998) with the warning subtitle "The Troubled Prospects of Multinational Enterprises", the late Raymond Vernon alerted to the controversial rise of large multinational enterprises whose increasing commercial and political power have led to diminished national sovereignty and consequently weakened nation-states. As a member of the Marshall Plan team and a central player in the development of the International Monetary Fund and of the General Agreement on Tariffs and Trade, Vernon accumulated unique insights and a wealth of knowledge and experiences in international trade and economics that later informed his studies of the impact of globalization and the controversial interaction between multinational enterprises and nation-states.

With this focused issue, we hope to spark an insightful scholarly conversation and thought-provoking classroom discussions on this very issue and fundamental question: "International Trade and Investment Agreements: Sovereignty at Bay in the 21st Century?"

Reference

Vernon, R. 1998. *In the Hurricane's Eye: The Troubled Prospects of Multinational Enterprises*. Boston: Harvard University Press.

Special Feature

To acknowledge the editorial work of the previous editors of *AIB Insights*, this issue features Betty Jane Punnett (founding editor, 2001-03), Tamir Agmon (editor, 2004-08), Ilan Alon (editor, 2009-12) and Romie Littrell (editor, 2013-15) on pages 21-22. Many thanks to these outstanding colleagues for their invaluable service and contributions to the journal!

International Trade and Investment Agreements: Sovereignty at Bay in the 21st Century?

Klaus Meyer, China Europe International Business School, China

Daniel Rottig, Florida Gulf Coast University, USA

The rules of the game for international business (IB) are increasingly set in bilateral and multilateral treaties between nation states. Throughout the second half of the 20th century, this regulatory framework has evolved to facilitate international business, and thus to enable economic globalization. Yet, many treaties have been controversial as citizens do not appreciate their merits relative to their associated restrictions, and governments increasingly realize the costs and risks of the related loss of sovereignty. The debate over "sovereignty at bay" led by Ray Vernon (1968, 1971) in the 1970s has thus been reignited. Concerned citizens resent shifts in bargaining power caused by new treaties, which are feared to limit citizens' ability to determine their own destiny, and the reduced power and influence by national governments has led to greater fiduciary risks (e.g., litigation by foreign investors against host governments through arbitration tribunals that are outside their jurisdictions).

The editors and contributors of this focused issue believe that these controversies are so important that students of IB should be aware of the key arguments, and hence teachers of IB ought to introduce these themes in their classrooms. This issue of *AIB Insights* thus introduces pivotal contemporary controversies with the aim to stimulate classroom discussions. Moreover, we believe these issues merit more research by IB scholars, and we thus are pleased about the AIB initiative to create a new scholarly journal covering, among other topics, the supra-national institutional environment.

This introduction sets the overall stage for the debates by outlining the historical context, introducing the contributions in this special issue, and by suggesting additional resources that educators may use in their classrooms.

Historical Perspective

Traditionally, the regulatory framework for businesses has been set by the national authorities in each country. Following the principles of national sovereignty, each country established rules and regulations that applied to all persons and firms operating within its borders—including foreign visitors and multinational enterprises (MNEs). This national sovereignty, together with the principles of democracy, theoretically ensures that the citizens of a country can determine the rules under which they want to live.

Yet, when each country establishes its own rules, these rules are bound to be inconsistent with each other and so may create barriers to international trade and investment. Worse, the regulatory process may be captured by influential interest groups, and thus not reflect the interests of citizens at large. The classic examples are the tensions between consumers benefitting from lower prices of imported goods and domestic businesses lobbying for trade protection to curtail foreign competition and so retain their profitable businesses. National rules without coordination between nations can thus create barriers to international trade that undermine economic prosperity.

Governments around the world have committed to numerous treaties and organizations that aim to eliminate such trade barriers. Agreements have emerged both regionally and globally. For example, member countries of the European Community, as the European Union (EU) was known before 1993, committed to abolish all tariffs between member countries by the year 1968. Globally, the General Agreement on Tariffs and Trade (GATT) established a framework for the reduction of tariffs between members over the course of eight multilateral trade negotiation rounds between 1947 and 1994. While these tariff reductions clearly facilitated international trade, many other forms of trade barriers remained.

New rounds of international integration aimed to reduce non-tariff barriers. The EU, for example, introduced the principle of mutual recognition of product standards, which stipulates that all goods meeting the regulatory requirements in one member country can be freely traded within the EU. Yet, as that principle caused concerns about low standards, the EU itself assumed the responsibility for setting standards for many sectors – which by now have developed into a complex regulatory system that some believe inhibits innovation and flexibility. At a global level, the World Trade Organization (WTO), since its establishment in 1995 as a direct outcome of the final GATT trade negotiation round from 1986-1994, has introduced procedures to assess whether national rules represent trade barriers, along with an arbitrage mechanism that helps countries to solve conflicts over alleged trade barriers.

Each commitment to rules set in supra-national treaties, such as GATT (now administered under the umbrella of the WTO), or multilateral organizations, such as the WTO, create constraints on national legislators in setting rules that apply within their national boundaries. Local governments and regulators therefore cannot (normally) raise tariffs to protect an industry, subsidize domestic companies or industries to give them a competitive advantage over foreign competitors (and so discriminate against foreign MNEs), or introduce product standards that discriminate against imports. While the basic ideas behind such rules are relatively uncontroversial, their implementation is often complex and controversial. The long running conflicts between the EU and the US over subsidies for their aircraft industries (Airbus versus Boeing) and over health standards regarding beef (hormone treatment being illegal in the EU) illustrate the political sensitivity of these matters.

New Treaties, New Commitments, New Controversies

Recent public debates have become heated as a result of two contrarian trends. First, in the aftermath of the Great Recession of 2007-2010, governments, particularly in emerging markets, have been more protective of their economies regarding both international trade and investment leading to a new face of globalization referred to as "guarded globalization" (Bremmer, 2014), thus creating unique institutional challenges for MNEs trading with and investing in these markets (Rottig, 2016). In this focused issue, Premila Nazareth Satyanand discusses the recent revision of rights and protections of foreign investors in India according to the Indian government's new policy toward bilateral investment agreements.

Second, treaties that have recently been completed, such as the Pacific Rim's Trans-Pacific Partnership (TPP), and that are currently being negotiated, such as the US-EU Transatlantic Trade and Investment Partnership (TIPP), go much further than commitments to abolish tariffs and harmonize industry regulations that have triggered new controversies. For example, the EU-Canada Comprehensive Economic and Trade Agreement (CETA) contains commitments in at least five areas that are expected to generate economic benefits yet are opposed by some interest groups (Meyer, 2016).

First, the abolition of most tariffs is controversial in previously protected industries, such as cheese and wine producers in Canada, or beef and pork farmers in Europe. With transitory support for these particular affected industries, the principle of reducing tariffs to zero is widely supported.

Second, the commitment to align regulatory regimes may lead to some not immediately obvious complications. For example, a commitment to longer patent protection increases costs for the Canadian health care system. Also, Canadian local authorities lose the ability to favor local businesses in their procurements of goods and services. The requirement for an open tender for all public procurement has been a central element of the EU's common market regulation since the 1990s, but it is new to Canadian provinces and municipalities. In Europe, consumer groups are concerned that the treaty might open the market for food products previously banned or tightly regulated, such as hormone treated beef or genetically modified foods.

Third, the facilitation of work permits for professionals from the EU and Canada to work in each other's territories has not triggered much debate in the case of the CETA. However, this issue is more sensitive in other contexts as many national legislators have been increasing rather than reducing barriers to travel and migration in recent years.

Fourth, the CETA aims to create a level playing field for foreign direct investment in service sectors. The treaty thus commits the partners not to change their legal frameworks in ways that unfairly harm foreign investors. Concerns arise whether such commitments would disable national governments to introduce new regulations in response to emergent health, safety, or environmental concerns, as discussed in this focused issue by Christine Côté. Moreover, those favoring delivery of some services by state agencies such the National Health Service in the UK, local utilities in Germany, or social housing in the Netherlands are concerned that these services may be constrained in areas of potential competition with private foreign investors. Furthermore, the regulatory lock-in created in treaty committees appears to imply that liberalization or privatization of a sector by one government cannot be reversed if after an election a subsequent government favors a different form of regulation.

Fifth, the CETA contains a commitment to conflict resolution processes between governments and foreign investors, also known as investor-state dispute settlement (ISDS) tribunals. These controversies regarding ISDS tribunals have received the most media attention and are discussed in this focused issue by Srividya Jandhyala, by Premila Nazareth Satyanand, and by Lise Johnson and Lisa Sachs.

Public debates on the TPP and specifically the under-negotiation TTIP, which both involve the USA as a partner, raise similar issues, but have become more emotional because they also involve regulatory commitments that are expected to impact for example the use and labelling of genetically modified organisms (GMO), the regulation of financial services, geographic designations and appellations for several product categories as well as travel and visa requirements, which have become a particularly sensitive public issue due to the recent terrorist attacks in several countries.

Contributions in this Focused Issue

This focused issue contains four essays that introduce specific aspects of the broader debate on supra-national institutions, in general, and international investment agreements (IIA) and related investor-state dispute settlement (ISDS) mechanisms, in particular, and so explore "sovereignty at bay" in the 21st century. The first essay, by Srividya Jandhyala, introduces the topic of ISDS tribunals, which she characterizes as "the most controversial aspect of global economic governance." She asks, why do countries commit to ISDS tribunals for disputes with foreign investors? Since ISDS processes are widely controversial, as they contain potential liabilities for national governments, it is necessary to consider the political processes that led to the commitment to ISDS in the first place. Jandhyala discusses three explanations for why governments may commit to ISDS and concludes that, given the wide-spread controversies about ISDS, it has become a key challenge to explore an improved dispute settlement mechanism based on a middle path: a balanced approach between government intervention and impartial arbitration.

Lise Johnson and Lisa Sachs take a step back and critically examine whether the purported benefits of ISDS outweigh the costs on governments. The negotiating parties of the recently completed Trans-Pacific Partnership (TPP), a trade agreement among twelve Pacific Rim countries (including the USA), suggested that the ISDS mechanism is included in the TPP in an "improved 21st century form," but Lise Johnson and Lisa Sachs argue that the changes made to the ISDS in the TPP were marginal, leaving intact most of the fundamental concerns about the traditional ISDS mechanism. These authors outline the impact of the ISDS on domestic law and institutions, on the rule of law in host government treaty parties, and on constituents and entities affected by investments and the outcome of ISDS disputes. The authors conclude that the benefits of the ISDS are tenuous at best, that the costs are significant, and that several alternative means for protecting investors' rights would be preferable to continuing to include ISDS provisions in future treaties.

Christine Côté, in her essay titled "Is It Chilly Out There? International Investment Agreements and Government Regulatory Autonomy," explores whether international investment agreements (IIAs) influence or constrain national legislators when they consider new regulation, and thus whether they may impact domestic regulatory development. Reflecting on her extensive research involving interviews and surveys of Canadian regulators in the area of health, safety, and the environment (HSE), Côté reveals that HSE regulators were unaware of the regulatory implications of IIAs and that there is little evidence that these regulators took the threat of an investment dispute into consideration when developing regulations. She then discusses the broader implications of her findings for the regulatory development in other countries. She argues that IIA-related regulatory challenges are greater in emerging economies due to their weak institutional development and concludes by raising the question of whether emerging country governments are able to make informed decisions when signing IIAs and implementing domestic regulation if governments of developed countries (such as HSE regulators in Canada) are unable to do so (or unaware when doing so).

Premila Nazareth Satyanand explicitly addresses this question in her essay titled "Once BITten, Forever Shy: Explaining India's Rethink of Its Bilateral Investment Treaty Provisions." In the specific emerging market context of India, she illustrates how the local government deliberately changed its policy toward bilateral investment agreements (BITs) as a direct result of the considerable liabilities it faced due to several disputes involving litigation by foreign investors. She illustrates these liabilities based on several brief cases of foreign investors that have litigated against the Indian government under the auspices of ISDS provisions included in IIAs signed by the government, and then discusses the key ideological changes of the Indian government toward BITs and the implications for foreign investors.

Further Resources for Educators

Multilateral institutions are commonly introduced in the classroom by focusing on international trade and thus the WTO. A discussion of the WTO and its arbitrage mechanisms lays a good foundation for discussing ISDS-related issues. Popular cases to discuss the WTO arbitrage mechanism include the Bombardier Embraer conflict (either Harvard #9-703-022 or Ivey # 9A99M004). Also, a two-volume set of case studies in multilateral trade policymaking and dispute settlement is available via the Peterson Institute for International Economics. Volume 1 (ISBN 0-88132-362-4) includes a total of five cases on trade negotiations and trade policy rulemaking, and Volume 2 (ISBN 0-88132-363-2) presents six additional cases on key trade disputes at the WTO and dispute resolution in the trading system. The set also includes a case study on the failure of the multilateral agreement of investment (MAI). Combined, these cases help IB educators to illustrate how trade policy actually works and so bring the reality of trade policy into the classroom. At this time, we are not aware of good cases on international investment agreements, or specifically on ISDS, such that we recommend using policy documents as a foundation for classroom discussion.

Instructors wishing to provide further materials to their students will find the websites of the United Nations Conference on Trade and Development (UNCTAD) a valuable resource. First, the investment policy hub website (http://investmentpolicyhub.unctad.org/) provides a variety of different sources ranging from statistical data, recent analytical reports, reform proposals, and blogs on investment policy related topics. For example, an interesting study published in June 2015 reviews all cases brought to ISDS by Dutch companies, the majority of which in fact are subsidiaries of MNEs headquartered in third countries.[1] Second, the *World Investment Report* (WIR), published annually by UNCTAD, provides not only rich data and an analysis of FDI flows and stocks but also overviews of contemporary policy issues related to FDI and MNEs.[2] For example, the 2015 WIR (UNCTAD, 2015) contains a detailed review of the debates around international investment treaties (see chapter IV of the report).

Alternatively, educators may consult the following two websites, which provide information on dispute resolution primarily from a legal perspective: www.transnational-dispute-management.com and www.naftaclaims.com. Some legal cases have gained considerable attention in the media and can be introduced on the basis of newspaper reports, most notably the use of international arbitration mechanisms by the tobacco industry in its fight against labelling requirements and other restrictions (see, e.g., www.mccabecentre.org/focus-areas/tobacco/philip-morris-asia-challenge).

In conclusion, new regulations created through international treaties and multilateral organizations have potentially profound implications for international direct investments, and hence the operations of multinational enterprises. We hope the essays in this focused issue will encourage our colleagues to introduce these topics in their classrooms.

References

Bremmer, I. 2014. The new rules of globalization. *Harvard Business Review*, 92(1): 103-107.

Meyer, K. E. 2016. Canada and the EU negotiate CETA. In M.W. Peng & K.E. Meyer, *International Business* (2nd edn). London: Cengage Learning.

Rottig, D. 2016. Institutions and emerging markets: Effects and implications for multinational corporations. *International Journal of Emerging Markets*, 11(1): 2-17.

UNCTAD. 2015. *World Investment Report 2015*. Geneva: UNCTAD.

Vernon, R. 1968. Economic sovereignty at bay. *Foreign Affairs*, 47(1): 110-122.

Vernon, R. 1971. *Sovereignty at bay: The multinational spread of US enterprises*. New York: Longman.

Endnotes

1 http://investmentpolicyhub.unctad.org/Upload/Documents/treaty-based-isds-cases-brought-under-dutch-iias-an-overview.pdf

2 http://unctad.org/en/Pages/DIAE/World%20Investment%20Report/World_Investment_Report.aspx

Klaus Meyer (kmeyer@ceibs.edu) is the Philips Chair and Professor of Strategy and International Business at China Europe International Business School (CEIBS) where he moved from the UK in 2011. He is a Fellow and a former Vice President of the AIB. In 2015, he received the *JIBS* Decade Award. He published over 60 articles in scholarly journals, mostly in *Journal of International Business Studies*, *Strategic Management Journal* and *Journal of Management Studies.*

Daniel Rottig (drottig@fgcu.edu) is Associate Professor of International Business and Strategic Management in the Lutgert College of Business at Florida Gulf Coast University. He is a Fellow and former Chairman of the AIB Southeast USA Chapter. He has published in *Management International Review*, *Thunderbird International Business Review*, *Academy of Management Learning and Education*, *Decision Sciences Journal* and other respected outlets and received several awards and award-nominations from the AIB and the Academy of Management.

Why Do Countries Commit to ISDS for Disputes with Foreign Investors?

Srividya Jandhyala, ESSEC Business School, Singapore

Introduction

No matter how attractive a foreign investment opportunity appears to be, government intervention post-investment can alter the sustainability and profitability of the project. Host country political events, economic crises, and social factors can induce governments to change domestic regulations, revoke licenses, withdraw subsidies, deviate from contract terms, alter tax rates, or expropriate foreign investments. In recent years, foreign investors have discovered a potent tool, the investor–state dispute settlement (ISDS), to address disputes arising from actions of host governments. Disputes between foreign firms and host governments—which might otherwise be settled through diplomacy, informal means, or domestic courts—can now be settled by an arbitration tribunal outside the jurisdiction of the host country. By 2014, there were over 600 treaty-based claims brought by foreign investors against both developed and developing countries (World Investment Report, 2015). They have sometimes proved to be extremely costly for host governments, often in sensitive areas of regulation, making investor–state arbitration one of the most controversial aspects of global economic governance.

What Is ISDS?

ISDS is a procedure to resolve disputes between foreign investors and host governments. Foreign investors facing disputes with the host government may be concerned about getting a fair trial in a host country against the government. The ISDS system allows foreign investors to seek redress in a neutral international arbitration forum. Investors often gain this right through clauses enshrined in bilateral investment treaties (BITs) or free trade agreements.

In order to bring a case forward, the foreign investor must claim that the host country breached rules established in the agreement (e.g., uncompensated expropriation, breach of contract). Once arbitration is initiated, a tribunal is formed. The focus of the tribunal is usually on the request of the plaintiff for a monetary award. If the panel rules in favor of the plaintiff, it must also determine the amount of the award. Generally, ISDS panels do not overturn domestic laws or regulations; rather they are limited to providing compensation for loss or damage of investment. Unlike domestic courts, states have little control over the process or final decision of the international arbitration tribunal. Decisions have limited avenues for appeal and cannot be amended by the domestic court system or legislation. The ability to make claims against host country governments in front of tribunals is a major departure from conventional international law and significantly expands the rights of MNCs.

International arbitration is typically structured by the rules established by the International Center for Settlement of Investment Disputes (ICSID) or the UN Commission on International Trade Law (UNCITRAL). The firm's home government need not be involved in this process and may not even know when or how foreign investors challenge host governments.

Why Commit to ISDS?

Host governments have, in effect, constrained their policy space and ceded aspects of their own sovereign immunity by giving foreign investors access to ISDS. Why have so many governments signed treaty clauses that could hurt them? I will explore three potential explanations for the rise of ISDS.

Attracting FDI through Credible Commitments

One mechanism by which host governments can credibly indicate that they will not expropriate foreign investors (or adopt other value-decreasing policy changes post-investment) is by tying their own hands upfront. In other words, if host governments design a system that makes it costly for them to expropriate foreign investors, then the interests of foreign investors and host governments are aligned, thus improving the country's credibility in the eyes of foreign investors. ISDS allows governments to signal such a commitment.

ISDS increases the costs of expropriation by making host governments vulnerable to significant economic payoffs. If the arbitration tribunal rules in favor of the foreign investor, the host government may face large financial liabilities. In addition, this may convey negative information to a broader investment community, discouraging potential foreign investors from choosing the host country for their investments. Thus, including ISDS clauses in international investment agreements may help to constrain the state's policy discretion and make credible commitments to foreign investors.

Some studies have shown that developing countries commit to ISDS by signing Bilateral Investment Treaties (BITs) when their competitors for FDI have done so (Guzman, 1998; Elkins, Guzman, & Simmons, 2006), when they face economic slowdowns (Simmons, 2014), or under conditions of capital scarcity, for example, facing high US interest rates and net external financial liabilities (Betz & Kerner, 2015). Further, countries facing ISDS cases or those losing a dispute suffer notable FDI losses (Allee & Peinhardt, 2011).

Less clear, however, is whether commitment to ISDS actually results in greater FDI inflows. A large body of empirical literature testing the relationship between BITs and FDI inflows reveals inconclusive and conditional results (see, for example, Kerner, 2009; Hallward-Driemeier, 2009; Jandhyala & Weiner, 2014). Thus, it is unclear if foreign investors view ISDS as credible mechanisms by which governments can effectively tie their own hands.

Arising from Unintended Policy

A second explanation for the rise of ISDS suggests that host governments, especially in developing countries, signed away sovereignty without recognizing the implications of their actions. During the 1990s, about 100 BITs were being signed each year. Research suggests that these treaties were not carefully considered for their benefits and costs, and there was no political awareness of what governments were signing. Rather, following neoliberal reforms many countries adopted ISDS to demonstrate that they were adhering to what had become widely accepted as a global standard or norm about the treatment of FDI as established by international organizations and Western states (Jandhyala, Henisz, & Mansfield, 2011).

Without significant discourse, the treaties were simply assumed to be a piece of paper to be signed and a good photo opportunity for a visiting dignitary. As a former South African official remarked, "we were essentially giving away the store without asking any critical questions or protecting crucial policy space" (Provost & Kennard, 2015). The potential downside, like other low-probability, high-risk events, was completely downplayed and not realized until the country was sued for the first time by a foreign investor (Poulsen, 2014). Take, for example, the case of Pakistan. As Poulsen and Aisbett (2013) document, when the country was sued for the first time by a Swiss investor, the claim took the Pakistani bureaucracy by complete surprise. Pakistan's Attorney General, an expert on international public law, had to look up "BITs" and "ICSID" on Google. There were no records of Pakistan's BIT negotiations with Switzerland in any of the relevant ministries, and a copy of the treaty had to be requested from Switzerland. Thus, evidence suggests that signing up to ISDS may have also been unintended or uninformed.

> "*as long as FDI continues, there will be disputes between foreign investors and host governments … identifying a middle path is the challenge of the next decade.*"

Resolving Investment Conflicts without Creating Political Conflicts among States

A third argument suggests that government consent to ISDS was an attempt to de-politicize disputes. Prior to the establishment of the ISDS system, foreign investors often relied on diplomatic protection to secure their investments abroad. This resulted in gunboat diplomacy—with diplomatic and military intervention in defense of private investors—which could compromise the home country's foreign policy objectives.

The history of US government intervention in commercial disputes abroad during the 20th century provides a classical example. Maurer (2013) notes that US sugar firms lobbied the US government to cut Cuba's sugar quotas in response to Cuban initiated land reforms in the 1950s and 1960s. Although officials noted that "keeping Cuba out of the Sino-Soviet orbit … is more important than salvaging of U.S. investments in Cuba" (Maurer, 2013: 322), under pressure from private investors, the US nonetheless blocked the entry of Cuban sugar into the US. The result was a foreign policy disaster as Cuba moved further into the Soviet orbit. Similar narratives in other countries (e.g., Brazil, Indonesia) suggest that while US investors almost always managed to receive fair compensation from expropriating foreign governments through such diplomatic interventions, US foreign policy objectives were compromised.

Wouldn't it be better if home governments could separate commercial disputes from foreign policy objectives and direct investors to an alternate system of dispute resolution that doesn't rely on diplomatic intervention? ISDS was that system. It allowed a home government to direct investors to a legal process while credibly denying them diplomatic support. They could call back their gunboats and diplomats, while still providing significant rights for investors.

Or could they? Recent research suggests that we should at least consider this explanation more critically. The findings suggest that although few recent disputes invoke explicit threats of sanctions from home governments, investment disputes are not insulated from diplomatic intervention and access to ISDS has no substantial impact on the likelihood of home country diplomatic intervention in a dispute between foreign investors and host governments (Jandhyala, Gertz, & Poulsen, 2015). Similarly, diplomatic intervention by the Spanish Government continued in response to Argentina's nationalization of Repsol—the Spanish oil company—even while the company sued under the Spain–Argentina BIT.

Conclusion

ISDS continues to be controversial in both developed and developing countries. Recent cases have highlighted the broad scope of these rights. For example, Philip Morris sued Uruguay and Australia for their anti-tobacco regulations, and Sweden's energy company Vattenfall sued Germany for regulations phasing out nuclear power. Countries such as South Africa, Indonesia, and India—which found themselves at the receiving end of recent claims—are examining ways to restrict investor rights. And notwithstanding the recent signing of the Trans-Pacific Partnership (which includes an ISDS clause), opposition to ISDS continues in the US and in the EU (which is negotiating its own trade agreement with the US, the TTIP).

Some of the opposition is focused on the arbitration process itself—for example, should it be secret, decided by commercial lawyers acting as arbitrators in cases involving public policy, where the rights are one-sided? Others argue that investor rights are too broad causing a chilling effect on government policy. Yet others suggest that ISDS is a weak bargain—that states accept significant constraints on sovereignty for little in terms of returns. It is clear that ISDS is not a perfect solution. But as long as FDI continues, there will be disputes between foreign investors and host governments which need to be settled. Identifying a middle path is the challenge of the next decade.

References

Allee, T. L., & Peinhardt, C. W. 2011. Contingent credibility: The impact of investment treaty violations on foreign direct investment. *International Organization*, 65(3): 401-432.

Betz, T., & Kerner, A. 2015. The influence of interest: Real US interest rates and bilateral investment treaties. *The Review of International Organizations*, 1: 1-30.

Elkins, Z., Guzman, A. T., & Simmons, B. A. 2006. Competing for Capital: The Diffusion of Bilateral Investment Treaties, 1960-2000. *International Organization*, 60(4): 811-846.

Guzman, A. T. 1998. Why LDCs Sign Treaties That Hurt Them: Explaining the Popularity of Bilateral Investment Treaties. *Virginia Journal of International Law*, 38: 639-688.

Hallward-Driemeier, M. 2009. Do Bilateral Investment Treaties Attract FDI? Only a Bit... and they could bite. In K. P. Sauvant & L. E. Sachs (Eds), *The Effects of Treaties on Foreign Direct Investment. Bilateral Investment Treaties, Double Taxation Treaties, and Investment Flows*. Oxford: Oxford University Press.

Jandhyala, S., Henisz, W. J., & Mansfield, E. D. 2011. Three Waves of BITs: The Global Diffusion of Foreign Investment Policy. *Journal of Conflict Resolution*, 55(6): 1047-1073.

Jandhyala, S., & Weiner, R. J. 2014. Institutions sans frontières: International agreements and foreign investment. *Journal of International Business Studies*, 45(6): 649-669.

Jandhyala, S., Gertz, G., & Poulsen, L. N. S. 2015. *Legalization and Diplomacy: Evidence from the investment regime*. Working Paper.

Kerner, A. 2009. Why Should I Believe You? The Costs and Consequences of Bilateral Investment Treaties. *International Studies Quarterly*, 53(1): 73-102.

Maurer, N. 2013. *The empire trap: the rise and fall of US intervention to protect American property overseas, 1893-2013*. Princeton, NJ: Princeton University Press.

Poulsen, L. N. S. 2014. Bounded Rationality and the Diffusion of Modern Investment Treaties. *International Studies Quarterly*, 58(1): 1-14.

Poulsen, L. N. S., & Aisbett, E. 2013. When the claim hits: Bilateral investment treaties and bounded rational learning. *World Politics*, 65(2): 273-313.

Provost, C., & Kennard, M. 2015. The obscure legal system that lets corporations sue countries, *The Guardian*, 10 June: http://www.theguardian.com/business/2015/jun/10/obscure-legal-system-lets-corportations-sue-states-ttip-icsid. Accessed 10 January 2016.

Simmons, B. A. 2014. Bargaining over BITs, arbitrating awards: The regime for protection and promotion of international investment. *World Politics*, 66(01): 12-46.

World Investment Report. 2015. *Reforming international investment governance*. New York and Geneva: United Nations Conference on Trade and Development.

Srividya Jandhyala (srividya.jandhyala@essec.edu) is an Assistant Professor of Management at ESSEC Business School, Singapore. Her research examines the role of international institutions and political risk in international business transactions. She received her Ph.D. in Management from the Wharton School, University of Pennsylvania.

The Outsized Costs of Investor–State Dispute Settlement

Lise Johnson, Columbia Center on Sustainable Investment, USA

Lisa Sachs, Columbia Center on Sustainable Investment, USA

The negotiation of several mega-treaties in 2015, including the Trans-Pacific Partnership (TPP), the Trans-Atlantic Trade and Investment Partnership (TTIP), the EU-Canada Comprehensive Economic and Trade Agreement (CETA), and other regional agreements, has generated substantial public discussion about the protections and privileges afforded to multinational enterprises through the investor–state dispute settlement (ISDS) mechanism in these treaties. ISDS has increasingly raised concerns among certain governments and civil society groups, particularly as a growing number of ISDS cases involve investors challenging a range of governmental measures taken in good faith and in the public interest, including measures related to environmental protection, public health and safety, and financial stability. Even representatives of international businesses – the purported beneficiaries of these texts – have voiced concerns about the costs of ISDS proceedings, uncertainty regarding outcomes of disputes, and an absence of rules to ensure the independence and impartiality of arbitrators.

The TPP negotiating parties deflected the underlying concerns about ISDS by assuring constituents that ISDS would be included in the TPP in an improved "21st century" form, resolving the controversial elements. When the text of the TPP was released in November 2015, it became evident that while the ISDS mechanism in the TPP includes some changes around the margins, its basic elements remain generally unchanged. Therefore, a cost-benefit analysis of ISDS remains essential. There are two fundamental questions: Is ISDS effective or necessary to produce its purported benefits? And do the potential benefits outweigh the costs? An analysis of ISDS as included in the TPP shows that the costs outweigh the alleged benefits, and alternative strategies should be employed to protect investors and promote the rule of law.

Is ISDS Effective or Necessary to Produce Its Purported Benefits?

ISDS is said to provide three core benefits: (1) increasing investment flows by providing potential investors additional security and protections, (2) depoliticizing investment disputes, and (3) improving the rule of law in the host state.

The first question is, therefore, is ISDS necessary or even effective in increasing investment flows and, if so, are these investments beneficial and to whom?

After roughly ten years of scholarly and practical inquiry with increasingly rigorous methodologies, there is no strong evidence that international investment agreements (IIAs), much less ISDS, impact investment flows. The various empirical studies examining trends in FDI flows establish no clear statistical relationship between signing a treaty and receiving increased investment (see, e.g., Berger et al, 2013; Sauvant & Sachs, 2009). Similarly, a survey of in-house counsel in large US multinationals revealed that IIAs do not play any significant role in foreign investment decisions (Yackee, 2010). Some of the largest cross-border investment flows take place in the absence of treaties, including between the US and China, India, Brazil and the United Kingdom; in fact, Brazil, a major capital importer and exporter, has no treaties in force with ISDS, nor does it plan to include ISDS in its future agreements.

Importantly, even the basic presumption that increased investment flows of all types will necessarily lead to positive development outcomes in the host country is wrong, since the benefits depend on the details of each investment (such as the sector, technologies transferred, and jobs created, among other factors). Indeed, the Overseas Private Investment Corporation (OPIC), a US government entity which provides political risk insurance to foreign investors, recognizes that only certain types of investment create development benefits. OPIC therefore screens investments seeking coverage to ensure that at least a minimum development benefit is realized, and it prohibits support for projects that will result in harms in the host country.

Even less certain is the extent to which increased *outward* investment would generate benefits for the home country and its constituents. While outward investment could result in increased capital income and tax revenues at home, it can also result in outsourcing of jobs and tax structuring to decrease tax liabilities. Again, OPIC and other government-provided risk insurances recognize these potentially negative consequences and shape their insurance policies and decisions accordingly.

The TPP, like other treaties and the majority of tribunals interpreting those agreements, ignores the development impacts of investments that are afforded the benefits under the treaty, and it provides premium-free political risk insurance to investments irrespective of their development impacts or negative effects at home or abroad.

Second, proponents of ISDS argue that it is important for "depoliticizing" investment disputes, freeing host states from diplomatic pressure and the threat of "gunboat diplomacy" and home states from having to advocate on behalf of their domestic firms. In fact, whether a home state gets involved in an investor's dispute with its host state does not vary based on whether or not there is a treaty with ISDS in place; a recent study found no evidence that countries that have signed an investment treaty with the United States face any less diplomatic pressure in investment disputes (Jandhyala et al., 2015). Notably, the TPP does not prohibit home states from exercising diplomatic pressure before, during, or after an investment claim has been filed.

A third argument for ISDS is that this supra-national system strengthens the rule of law of treaty parties by reinforcing the importance of legal commitments. Yet, to the contrary, ISDS and investment treaties have been shown to weaken domestic rule of law (Ginsburg, 2005; see also Sattorova, 2014). The myriad reasons for this are elaborated below; the TPP, in its modifications, makes no attempt to correct for these failures.

Therefore, none of the purported core benefits of ISDS (increased investment flows, depoliticizing disputes, or improving the rule of law in host states) has been effectively realized by the inclusion of ISDS in investment treaties. Proponents of the system, including the investors and the lawyers and arbitrators who have an interest in the system's survival and growth, continue to tout these claims as the reason the mechanism is necessary, including in the TPP, but the empirical evidence continues to reveal that ISDS is neither effective nor necessary for achieving these benefits; indeed, these objectives can be realized through other means, as discussed below.

Do the Purported Benefits of Investment Treaties Outweigh Their Costs?

The second fundamental question is what ISDS costs host governments and their constituents, and whether the purported benefits outweigh the costs. These costs include negative impacts on (a) domestic law, policy, and institutions, and (b) costs of litigation, liability, and loss of regulatory space.

Costs Related to Domestic Law, Policy, and Institutions

Many ISDS claims are actually domestic law issues of administrative, contract, tort, or constitutional law that are merely removed from domestic legal institutions and processes and taken up in a parallel and specialized system available only to foreign investors, with fewer procedural barriers and greater substantive protections. A foreign investor seeking to challenge conduct of the US government, for example, can take a substantive or procedural due process action, a contract action, an action governed by the Administrative Procedures Act, or a tort claim against the government, and decide whether to bring it under domestic law or as a violation of a treaty's fair and equitable treatment (FET) provision — or both, in some cases. If the investor opts for ISDS instead of pursuing the domestic law claim, it can bypass all otherwise applicable procedural rules that may have complicated or frustrated its claim, including domestic rules of standing, statutes of limitation, requirements of exhaustion, doctrines of abstention, limits on judicial review, limits on available remedies, and rules regarding discovery, privilege, and evidence. Such domestic rules have been developed and refined over time and reflect important policy choices about the scope of public and private rights.

In addition to creating a parallel and preferential legal system for foreign investors, ISDS actually creates and protects new property rights at a cost to the broader public interest. In a growing number of cases, tribunals have created and restated a rule that specific representations or assurances given by government representatives can give rise to investors' "legitimate expectations," which are protected under the treaty's FET obligation from government interference. Tribunals have protected "legitimate expectations" even when the official who made the relevant commitment did not have actual authority to bind the government or when the commitment did not comply with necessary procedural requirements. While the TPP states that a breach of investors' "legitimate expectations" will not, standing alone, constitute a violation of the FET obligation, it suggests that investors' "legitimate expectations" can still be a factor considered by tribunals when determining whether a state has breached its FET obligations, effectively creating and protecting "rights" that would not be recognized under domestic law.

From the rule of law perspective, ISDS also upsets the separation and balance of powers. If domestic legislation sets the scope of administrative officials' ability to grant or define property rights, and administrative officials exceed that authority, a decision by a tribunal giving legal effect to the administrative officials' actions overrides legislative dictates. Moreover, many projects that trigger investor–state disputes are projects in which negative impacts are concentrated at the local level, but benefits (e.g., increased tax revenue) are realized at the national level. Through its protection of "legitimate expectations," ISDS allows investors to transform non-binding representations that favor their interests into rights protected under international law, weakening the voice and power of regulatory institutions and affected communities that might otherwise shape or constrain investors' proposed projects.

This parallel legal system also undermines the role of domestic institutions and courts in their core responsibilities of developing, interpreting, and applying the law. Particularly in common law jurisdictions where courts play a crucial role in shaping the substantive contours of the law over time, the ability of investors to sidestep domestic courts through recourse to ISDS effectively undercuts those domestic institutions' abilities to fulfill their important functions.

The closed nature of ISDS disputes further exacerbates the problems created by this parallel legal system. Despite the public importance of these cases, disputes under most existing and many new IIAs are still litigated and decided or settled behind closed doors. While the TPP requires significant transparency of ISDS proceedings, and authorizes (but does not require) ISDS tribunals to accept amicus curiae submissions from non-parties to the dispute, the interests and rights of non-parties can remain marginalized. Even if they will be affected by the treaty claims and outcomes, non-disputing parties have no legal rights to actually participate in the proceedings or shape the outcomes of the disputes. While domestic law often has a number of ways in which interested and affected individuals and entities are protected, including by requiring judicial oversight of settlements, allowing those affected to participate in proceedings, or requiring dismissal of claims when such individuals or entities cannot be joined, ISDS, in contrast, contains no such safeguards.

The system of providing special protections for investors is based on the presumption that foreign investors face bias and discrimination in domestic legal systems. In reality, these fears are overstated. Only eight of the more than 600 known ISDS cases have successfully alleged a violation of the national treatment obligation (protecting foreign investors against discrimination in favor of domestic investors)[1]; and in not one of them did the tribunal find that there was intentional nationality-based discrimination against the foreign investor. Rather, in those eight cases, liability was usually based on strategic protection of domestic producers that negatively affected the foreign investor claimant, measures that can be and have been challenged in inter-state trade dispute settlement mechanisms. In fact, studies show that foreign investors generally have greater power and influence over their host governments than domestic investors, particularly as governments around the world are competing for capital. The rational for establishing a privileged legal system for foreign investors is therefore based on an illusory threat.

> *"Given that ISDS is not effective or necessary to achieve its intended benefits ... its inclusion in treaties, including in the TPP, is unjustified"*

Thus, despite the assertion that ISDS strengthens the rule of law, the evidence is very much to the contrary. ISDS exacerbates inequality under the law by giving foreign investors access to a parallel and preferential legal system; diminishes the role of various government actors and institutions; and poses challenges to transparency and public participation. Moreover, to the extent that IIAs make it less risky for foreign investors to invest in jurisdictions with little respect for the rule of law, ISDS reduces incentives for governments to improve their investment climate, procedural fairness, domestic legal systems, and other aspects of the rule of law that would benefit domestic stakeholders as well. Overall, ISDS risks undermining rule of law objectives by upsetting and usurping the fundamental processes for developing, enforcing, and applying the law.

Costs of Litigation, Liability, and Loss of Regulatory Space

Finally, there are the actual costs of ISDS litigation and liability and those that result from the loss of policy space.

The costs of litigation and liability can be significant. Average costs of defending cases now approach $5 million, and even victorious states often are left to bear those fees (see Hodgson, 2014). ISDS awards, estimated by some to be roughly $75 million on average,[2] can reach staggering sums, such as the $1.8 billion award in Occidental v. Ecuador and the $50 billion combined award in three closely related cases against Russia. While the TPP does contain some relatively new provisions regarding allocation of costs and compensation in awards, those changes do not result in any meaningful changes for states in terms of exposure to costs of litigation and liability.

While the costs that result from a loss of policy space are more difficult to assess and calculate, they are potentially even more damaging in their welfare effects. As Jonathan Bonnitcha's recent analysis of the economic impacts of investment treaties suggests (Bonnitcha, 2014), investment protection through ISDS can discourage economically efficient government regulation in the public interest.

Moving Forward: What Are the Alternatives?

Given that ISDS is not effective or necessary to achieve its intended benefits and that the costs are so substantial, its inclusion in treaties, including in the TPP, is unjustified. Yet if ISDS is removed from treaties, what recourse would foreign investors have for harm suffered due to host state conduct? Fortunately, there are other less costly and more appropriate mechanisms that can protect investor rights.

The first place for recourse for foreign investors should remain the domestic law system of the host countries, where all other domestic investors and stakeholders resolve their disputes. Debates around ISDS are premised on the false assumption that domestic systems are inadequate; in fact, many domestic legal systems do function well, particularly when exhaustion is required, giving governments the ability to correct lower level errors. In countries where legal systems and processes are weak, the focus of international agreements should be on strengthening those legal systems to ensure their robust development for *all* users, not undermining their development by creating a parallel process and set of rules for select foreign investors.

Second, investors can purchase additional protections through political risk insurance, which is designed to price political risk on the market, sending a signal to both the investors and the host states about the security of investments in the host jurisdictions.[3] If a particular jurisdiction has a higher cost for political risk insurance, the host government will likely have the incentive to take steps to improve the investment climate for foreign investors, thereby strengthening rule of law incentives.

A third avenue is through existing human rights mechanisms such as regional mechanisms established in Europe (the European Court of Human Rights), the Americas (the Inter-American Commission and Court for the Protection of Human Rights), and Africa (the African Court and Commission on Human and People's Rights).[4] These mechanisms are available to those aggrieved by government expropriations, discrimination, or denial of justice. To the extent that investors (or states) consider these mechanisms to be inadequate for resolving such claims, then as with inadequate domestic legal systems, the parties should take steps, through treaties and other collaborative means, to strengthen these human rights mechanisms for all stakeholders.

Fourth, as a last resort state parties may agree to treaty-based state-state dispute resolution mechanisms to resolve allegations of discriminatory or egregious treatment. There are plenty of precedents for robust, well-functioning state-state dispute resolution mechanisms including that of the World Trade Organization.[5] Similar legal mechanisms can be used for resolution of investment disputes.

While it's laudable that the drafters of the major mega-treaties have recognized the need for reform of the traditional ISDS model, much more could and should have been done in the TPP to create alternatives to a fundamentally flawed system. The marginal changes that were made to ISDS in the TPP do not address the significant and justified concerns about that mechanism. The logic and evidence point to the need to drop ISDS altogether, and instead to strengthen and support national judicial processes and the rule of law, complemented, as necessary, through international human rights protections and state-to-state dispute resolution.

References

Berger, A., Busse, M., Nunnenkamp, P., & Roy, M. 2013. Do trade and investment agreements lead to more FDI? Accounting for key provisions inside the Black Box. *International Economics and Economic Policy*, 10(2): 247-275.

Bonnitcha, J. 2014. *Substantive Protections under Investment Treaties: A Legal and Economic Analysis*. Cambridge: Cambridge University Press.

Ginsburg, T. 2005. International Substitutes for Domestic Institutions: Bilateral Investment Treaties and Governance. *International Review of Law and Economics*, 25(1): 107-123.

Hodgson, M. 2014. Costs in Investment-Treaty Arbitration: The Case for Reform. *Transnational Dispute Management*, 1.

Jandhyala, S., Gertz, G., & Skovgaard Poulsen, L. N. 2015. *Legalization and Diplomacy: Evidence from the Investment Regime*. Paper presented at 2015 Annual Meeting of the American Political Science Association.

Sattorova, M. 2014. The Impact of Investment treaty Law on Host State Behavior: Some Doctrinal,Empirical, and Interdisciplinary Insights. In S. Lalani & R. P. Lazo (Eds), *The Role of the State in Investor-State Arbitration*. Leiden: Nijhoff/Brill.

Sauvant, K., Sachs, L. (Eds) 2009. *The Effect of Treaties on Foreign Direct Investments*. New York: Oxford University Press.

Wagner, D. 2012. *Managing Country Risk: A Practitioner's Guide to Effective Cross-Border Risk Analysis*. New York: CRC Press.

Yackee, J. 2010. Do Bilateral Investment Treaties Promote Foreign Direct Investment? Some Hints from Alternative Evidence. *Virginia Journal of International Law,* 51: 397.

Endnotes

1 This analysis is based on the information available through UNCTAD's Investment Dispute Settlement Navigator ("ISDS Navigator") as of December 14, 2015, and a review of the cases the ISDS Navigator lists as finding a national treatment violation. The ISDS Navigator is accessible at http://investmentpolicyhub.unctad.org/ISDS (updated as of September 1, 2015).

2 Estimates vary based on the datasets used, and the fact that many cases are not public. The figures above come from Hodgson (2014). They are based on data from cases with a public award as of December 31, 2012. They therefore do not include the $50 billion Yukos awards.

3 Political risk insurance can be purchased from government and private entities. Government providers include entities established by individual home states (e.g., the US's OPIC) and entities established by multilateral institutions (e.g., the World Bank's Multilateral Investment Guarantee Agency). Private political risk insurance providers include Chartis, Lloyd's, Sovereign, and Zurich. See, e.g., Wagner(2012).

4 For an overview of these systems, see, e.g., http://www.ijrcenter.org/courts-monitoring-bodies/.

5 For more information on the WTO's dispute settlement mechanism, see, e.g., https://www.wto.org/english/thewto_e/whatis_e/tif_e/disp1_e.htm.

Lise Johnson (ljj2107@columbia.edu) is the Head of Investment Law and Policy at the Columbia Center on Sustainable Investment. She focuses on analyzing the contractual, legislative, and international legal frameworks that govern international investments, and that affect the positive and negative externalities generated by those investments. She received a Bachelor of Arts from Yale University, a Juris Doctor from University of Arizona, and a Masters in Law from Columbia University.

Lisa Sachs (lsachs1@law.columbia.edu) is the Director of the Columbia Center on Sustainable Investment, where she oversees the Center's three areas of focus: investments in extractive industries, investments in land and agriculture, and investment law and policy. She received a Bachelor of Arts in Economics from Harvard University, and earned her Juris Doctor and a Masters degree in International Affairs from Columbia University.

Is It Chilly Out There? International Investment Agreements and Government Regulatory Autonomy

Christine Côté, London School of Economics and Political Science, UK

Concerns that international investment agreements (IIAs) impact a government's right to regulate and lead to "regulatory chill" have once again surfaced in the wake of the negotiations on the Pacific Rim's Transpacific Partnership (TTP) and the US-EU Transatlantic Trade and Investment Partnership (TTIP). These concerns are not new and have persisted since NAFTA Chapter 11 on investment highlighted the threat of private access to international arbitration through investor state dispute settlement provisions (ISDS) and led to unprecedented challenges to government regulations, particularly in the area of health, safety, and the environment (HSE). Are these concerns valid, and to what extent do such trade and investment agreements impact the regulatory development process and lead to regulatory chill? In this essay, I briefly introduce some insight from my on research based on interviews with HSE regulators in Canada, before reflecting on the broader implications for international trade and investment policy and domestic regulatory development in other countries.

How Much Do Regulators Actually Know?

In my own research (Côté, 2014), I have investigated the impact of international investment agreements, particularly NAFTA Chapter 11 on the Canadian regulatory development process, through in-depth interviews and an extensive survey of Canadian regulators. Canada provided a perfect case for testing the theory of regulatory chill, given the high number of legal challenges the country has faced to its HSE regulations. By talking to Canadian HSE regulators, I sought to determine their level of awareness of international investment agreements and the potential for legal challenge by private actors as well as the extent to which they took these investment commitments into account when developing regulations. The empirical analysis revealed that Canadian regulators were not focused on avoiding investment disputes when developing regulation. Regulators were instead more interested in complying with international standards and commitments and harmonizing regulations with the US and internationally. They were focused on responding to health, safety, and environmental needs, to advances in science and technology, and to the expectations of stakeholders. Furthermore, while Canadian regulators sought to ensure that their regulations did not act as barriers to the flow of international trade, they did so while responding to recent domestic streamlining and modernization initiatives.

The strongest predictor of a regulator's likelihood to consider trade and investment dispute avoidance as a factor was with respect to the WTO, where investment disputes do not lead to direct challenges and litigation from private actors. Interestingly, regulators were generally not able to differentiate between the different types of trade fora or agreements or their implications. Most references to trade and investment commitments referred to Sanitary and Phytosanitary (SPS) or Technical Barriers to Trade (TBT) commitments under the WTO or NAFTA, while NAFTA Chapter 11 did not rank high as an influencing factor. Where there had been a NAFTA Chapter 11 dispute that had impacted one of their regulatory measures, the level of knowledge was still quite vague and the understanding of the implications or costs associated with such a challenge was not high. Only 12% of regulators were aware of any such threats of investment disputes, and among those regulators that were aware of NAFTA Chapter 11 disputes, 42% claimed that despite this awareness it did not in any way influence the regulatory development process.

At the same time, a statistical analysis of HSE regulatory changes in the study between 1998 and 2013 showed an increasing trend in the stringency and comprehensiveness of regulations in health safety and environment. Senior Federal HSE regulators in Canada confirmed the point that regulations in HSE have generally been increasing in stringency and comprehensiveness driven by new areas now being regulated, deeper science requirements, a strong international influence, increasing public scrutiny and demands, and the push for harmonization of regulations with the US.

My research found little consistent evidence of either downward trends in stringency and comprehensiveness of HSE regulations on the back of NAFTA investment disputes, or evidence that regulators took a threat of an investment dispute into consideration when developing regulations. Furthermore, my study also highlighted a number of other trends in regulatory development which inform the debate on the impact of globalization and concerns about regulatory chill.

Regulation: Racing to the Bottom, or to the Top?

Just as globalization scholars have considered whether competitive pressure and the threat of exit by mobile firms and capital have had constraining influences on national policies, there is a view that the threat of litigation through rights provided to private actors by IIAs will constrain the regulatory ability of the state, leading to regulatory chill. My research has found weak empirical support for the hypothesis on regulatory chill in the case of Canada, suggesting that international investment agreements, as one component of globalization, may not be restricting national regulatory autonomy in the area of health, safety, and the environment as is feared. This result suggests policy divergence whereby globalization in the form of IIAs has not prevented different approaches to national policies, hindered national policy autonomy, or resulted in a decline in social welfare policies.

To the contrary, my study provides evidence for an *upward* convergence in regulation, or a "race-to-the-top" (Drezner, 2001) driven by ideational forces or policy diffusion, rather than a "race to the bottom" driven by competition for capital or investment (Spar, 1998). This policy diffusion or emulation is "characterized by the voluntary adoption of policies put forward by experts and international organizations, rather than their adoption through coercion" (Simmon, Dobbin, & Garret, 2008).

This trend was evidenced first by the focus on harmonization as outlined in the Canada–US context across many key regulatory areas. Regulators placed harmonization with the US high on the list of influencing factors, and the statistical analysis of HSE regulations revealed a series of regulatory increases in areas such as transport safety and the reduction of vehicle emissions to reduce greenhouse gases which were overwhelmingly motivated by a desire to align with higher US standards. Regulators also highlighted the influential nature of the work of international standard setting bodies such as the WHO organization on international food standards (CODEX) and the Intergovernmental Panel on Climate Control (IPCC). These bodies set high level standards on food safety and emissions, which countries such as Canada seek to emulate.

The overall evidence thus points to a shift towards *better* regulation rather than *less* regulation. This reflects the concept of re-regulation in which governments "reorganized their control of private sector behaviour, but do not substantially reduced the level of regulation" (Vogel, 1996) and the absence of a zero sum trade-off between governments and markets. This new approach to regulating was very much in evidence in the case of Canada, where regulators consistently claimed that efforts at modernization, efficiency improvement, and streamlining of regulations were not done at the expense of regulatory stringency or comprehensiveness but continued to be driven by the core goals of meeting health, safety, and environmental sustainability needs. The manifestation of this approach was a shift from process to output based regulations, a greater cost/benefit focus, the use of alternative control mechanisms, as well as the movement to smarter focused regulations. Initiatives such as the 2007 *Cabinet Directive on Streamlining Regulations* and the 2012 *Red Tape Reduction Plan* in Canada are examples of this point.

Regulatory Chill in a Broader Trade and Investment Context

If interviewees in my study considered the impact of trade and investment at all, they focused almost exclusively on the WTO or on TBT and SPS commitments in other trade agreements. This is not surprising given the involvement that health, safety, and environmental regulators are likely to have with TBT and SPS issues within the WTO and within NAFTA in the case of Canada. The high profile nature of WTO disputes and potential impact on the policies of member states is also most certainly a defining factor. Past cases at the WTO have been high profile and resulted in tribunal rulings on the trade compatibility of HSE measures, providing pressure for countries to undertake amendments to ensure compliance. The US-EU Beef Hormones Dispute regarding "Measures Concerning Meat and Meat Products (Hormones),"[1] the Mexico-US Tuna Dolphin Dispute regarding "Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products,"[2] and the US-Indonesia Cigarette Clove Dispute regarding "Measures Affecting the Production and Sale of Clove Cigarettes"[3] all serve to highlight the stakes for developed and developing countries in this forum on HSE regulatory issues.

> *"The high profile nature of WTO disputes and potential impact on the policies of member states is also most certainly a defining factor."*

It is certainly conceivable that the possibility of challenges within this forum as well as an actual dispute such as the one launched by numerous countries against Australia's plain packaging legislation is having a chilling impact. The survey results certainly suggest that countries take this into account more than any other trade and investment factor. What is the implication of this for our question of regulatory chill? One key difference is that these WTO disputes are driven and championed by other countries rather than private actors (although the spectre of industry influence is large in many cases). This would in general suggest that the debate on regulatory chill needs to be recast with respect to the arguments put forward by public policy advocates, NGOs, and the general public. Those scholars who have looked at the issue of the impact of IIAs have tended to take a narrow focus on one fora or another but rarely across all to consider the broader impact. The results of my study suggest that scholars might be well placed to broaden the scope of their focus to encompass the influence of this larger set of trade and investment issues. It was clear from discussions with regulators that they did not often differentiate between fora, or tended to consider the impact of disputes across all fora (WTO, domestic litigation, FTA) as one set of factors on trade and investment that could have an impact on the regulatory development process.

Challenges for Developing Countries

A key differentiating factor between developed and developing countries is the relative strength of domestic institutions and their ability to support regulatory choices. As Rodrik (2007: 195) has argued, "globalization benefits countries with strong existing institutions while hindering the ability of nations to build institutions to address both regulatory and redistributive issues." While not relevant to the Canadian study, the reality is that less developed countries engaged in international trade and investment are often struggling to put in place the most basic levels of regulatory policy, and are often consumed with ensuring that their existing regulations are actually being implemented. They are more vulnerable to intimidation by industry groups (such as in the case of the tobacco industry), which can serve to hinder the establishment of strong policies.

Another differentiator for developing countries is the potentially greater relative financial burden they face with respect to investment challenges and the deterring impact this is likely to have on their desire to pursue policies that could result in a dispute. Concerns in general about the cost of arbitration are driven by both the size of the awards and the costs of defending the state. Most recently, in 2012 "the highest known award of damages in the history of investment treaty arbitration featured in *Occidental v. Ecuador II* where the investor was awarded US$1.77 billion plus pre and post award interest" (UNCTAD, 2013: 19).[4] This is not a new trend and has been an issue of some concern for a number of years. On average the cost of an arbitration case is upwards of US$8 million per party, with legal fees making up 82% of this cost (Graukrogder & Gordon, 2012).

Finally, many developing countries face challenges from the lack of available domestic trade and investment expertise. Gottwald (2007: 252) identifies what he sees as the top three barriers for developing nations' participation in the international investment arbitration process: "a lack of affordable access to legal expertise, a lack of transparency in the arbitration process, and uncertainty over the meaning of key treaty rights." This hinders their ability to negotiate treaties that reflect their interests (through appropriate carve-outs for regulatory policy space) as well as their ability to defend themselves should an ISDS dispute arise. Moreover this absence of trade and investment experience and expertise is also felt amongst HSE regulators and accounts for the low level of awareness of these threats and their implications. Coupled with the financial constraints raised above, the overall possibility that a threat of an ISDS challenge could lead to a chilling of regulation in a developing country seems more plausible. Ultimately, however, if Canadian HSE regulators are unaware of the regulatory implications of international trade and investment treaties, despite the high level of ISDS challenges they have faced, how likely is it that regulators in developing countries are making informed decisions when signing international treaties, and implementing domestic regulation?

References

Côté, C. 2014. *A chilling effect? The impact of international investment agreements on national regulatory autonomy in the areas of health, safety and the environment*. PhD Thesis, London School of Economics. http://etheses.lse.ac.uk/897/

Drezner, D. W. 2001. "Globalization and Policy Convergence." *International Studies Review*, 3: 75-76.

Gaukrodger, D., & Gordon. K. 2012. *Investor-state dispute settlement: A scoping paper for the investment policy community*. OECD Working Papers on International Investment, No 2012/3, OECD Investment Division.

Gottwald, E. 2007. Levelling the Playing Field: Is It Time for a Legal Assistance Center for Developing Nations in Investment Treaty Arbitration? *American University International Law Review*. 22: 237.

Rodrik, D. 2007. *One Economics Many Recipes: Globalization, Institutions and Economic Growth*. Princeton, NJ: Princeton University Press.

Simmons, B. A., Dobbin, F., & Garrett, G. 2008. *The Global Diffusion of Markets and Democracy*. Cambridge: Cambridge University Press.

Spar, D. 1999. The spotlight and the bottom line. *Foreign Affairs*, 77(2): 7-12.

UNCTAD. 2013. *Recent Developments in Investor-State Dispute Settlement (ISDS)*. Geneva: UNCTAD.

Vogel, S. 1996. *Freer Markets, More Rules: Regulatory Reform in Advanced Industrial Countries*. Cornell University Press.

Endnotes

1 http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds26_e.htm

2 http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds381_e.htm

3 http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds406_e.htm

4 Other cases of note were EDF v. Argentina with an award of $13.73 million, Deutsche Bank v. Sri Lanka with an award of $60.36 million and SGS v. Paraguay with an award of $39.02 million.

Christine Côté (C.Cote@lse.ac.uk) is a Visiting Fellow at the London School of Economics and Political Science where she received her PhD in International Political Economy and teaches on foreign direct investment and public management and governance. Prior to entering academia she worked as an international trade negotiator with the Department of Foreign Affairs and International Trade Canada, representing Canada in negotiations at the WTO, the OECD and on bilateral trade and investment agreements.

Once BITten, Forever Shy: Explaining India's Rethink of Its Bilateral Investment Treaty Provisions

Premila Nazareth Satyanand, Independent Researcher

Introduction

On 16 December 2015, the Indian Cabinet approved a new model text for India's bilateral investment treaties (BITs). Over the next few years, India will rely on this text when negotiating, or renegotiating, all bilateral investment agreements and investment chapters in free trade agreements. Significantly, this revised text embodies a fundamental rethink of some of the most hallowed principles underpinning today's international investment agreements (IIA) regime, including the Most Favoured Nation principle and the automatic resort to international arbitration to resolve investor-state disputes. Interestingly, India has narrowed the rights and protections it is willing to offer foreign direct investors when disputes arise, even as it intensifies its effort to attract them.

India: One amongst Many

As UNCTAD's *World Investment Report* 2015 (UNCTAD, 2015a) highlights, India is not alone. More and more countries are similarly reconsidering the commitments they are willing to make in their international investment agreements. All are motivated by the same compulsion: to protect themselves against the unforeseen litigatory overreach enabled by some standard IIA provisions. Though such agreements are only signed between states, in practice they give treaty rights to foreign investors, a growing number of which are suing host governments for perceived breaches of treaty provisions.

In fact, this past decade, treaty-based foreign investor arbitrations against host states have tripled, from just over 200 in 2005 to 668 in 2015 (UNCTAD, 2015b), marring the corresponding global surge in foreign direct investment from US$11 trillion to US$26 trillion (UNCTAD, 2015a). As a result, many host states are finding themselves constrained from making policy in the best national interest (Basedow, 2015; Hodgson, 2015; Perrone & de Cerqueira César, 2015; Sauvant & Ortino, 2013; UNCTAD, 2015a). Moreover, BITs' grant of international arbitration rights to foreign investors renders developing country governments vulnerable to expensive overseas litigation.

Seventy percent of these cases are against developing and transition economies; 80 percent have been filed by developed country investors (UNCTAD, 2015a). Typically, they protest a cancellation or breach of investment contract (29 percent) and the revocation or refusal to grant a license (8 percent). Another major trigger is sudden legislative change (25 percent). Other principal issues include direct expropriation or seizure of investment (15 percent), tax-related complaints (11 percent), and abusive treatment or failure to protect investment (7 percent). A number of cases also relate to judicial acts or omissions, withdrawal of incentives, freezing of bank accounts, sovereign debt restructuring, damage from armed conflict, and interference with management of an investment (UNCTAD, 2015b).

Although 36 percent of the 429 concluded cases ruled in favour of the host country and just 27 percent in favour of the investor (UNCTAD, 2015b), claims and awards are high for developing countries (UNCTAD, 2015a). This is so even in the 26 percent of cases settled through arbitration (UNCTAD, 2015b). This is partly because investors, particularly from industrialized countries, are considerably more fluent and better-resourced in filing international arbitration cases. On average, investors claimed US$1.1 billion in damages[1], and tribunals awarded US$575 million in damages[2]. In 65 cases (15 percent), they claimed well over US$1 billion, with US$40 billion being the highest award made thus far (UNCTAD, 2015a).

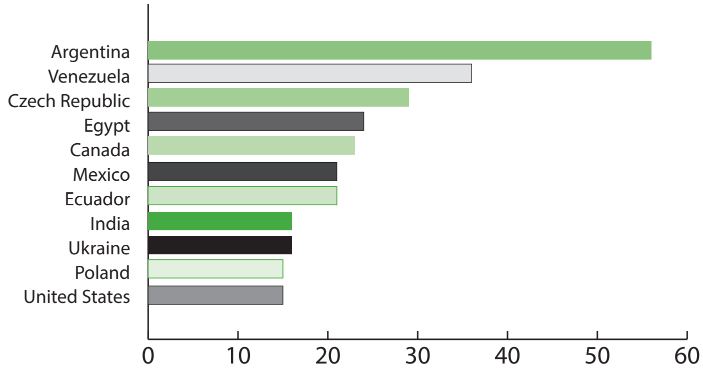
Claims and awards are also sizeable because cases have tended to concentrate in capital intensive sectors. Two-thirds of the 668 known cases relate to public utilities and services, one-fifth to mining, petroleum and natural gas extraction, and only one-seventh to manufacturing. Power and gas account for the bulk (29 percent) of the service sector claims, followed by financial services (12 percent), telecom (8 percent), real estate and civil engineering (both 7 percent). A rash of cases is also seen in water and waste services (both 4 percent), and air transport and warehousing (both 3 percent) (UNCTAD, 2015b).

What Has Triggered India's Rethink?

A closer look at India's experience explains its move to redraft principal provisions in its model BIT text. Firstly, India has had 16 investor-state dispute cases filed against it since 2000[3]. Though this is lower than those against most other global top-ten ISDS respondents, including Canada (Figure 1), India's worry is that the 89 international investment agreements it has signed render it highly vulnerable to expensive litigation (Singh, 2015a), in which disputants can often have an unfair advantage. This is because India's agreements are based on a model text written in 1993, which is no longer in keeping with today's realities.

India first realised this when White Industries Australia (WIAL) won an international arbitration award against Coal India, the country's largest

Figure 1. Most Frequent Respondent States (total number of known ISDS cases as of end 2014)



Source: UNCTAD *World Investment Report (2015: 115)*

public sector miner, in 2012 (Ranjan, 2012). It was the first time that such an award had been issued against India, which had succeeded in settling all nine earlier treaty-based claims against it.[4]

Landmark ISDS Cases in India

The White Industries Australia versus Coal India Case

In 1989, Coal India contracted White Industries Australia to supply mining machinery and develop a coal mine, and promised to pay approximately A$206.6 million (Brower et al., 2011). Once the mine was in operation, a dispute arose between the two entities, with Coal India withholding WIAL's performance bonus and encashing its bank guarantee citing poor production. In 1999, WIAL sought recourse from the International Chamber of Commerce's International Court of Arbitration, which ruled that it was entitled to recover its bonus of A$2.28 million and its bank guarantee of A$2.77 million, but it must pay Coal India a penalty of A$969,060 for under-production (Brower et al., 2011).

However, WIAL could not get Coal India to pay due to protracted delays in India's legal process. So, it filed a case under the India-Australia BIT, arguing that India's judicial delay contravened key treaty provisions, including the right to fair and equitable treatment, free transfer of funds, protection against expropriation, and the guarantee of an effective means to enforce rights and assert claims. In keeping with BIT procedure, an international tribunal heard the case and ruled in 2011. It dismissed WIAL's complaints relating to free and equitable treatment, free transfer of funds and expropriation. But it granted WIAL an award of over A$4 million with interest, and related court fees, conceding that India's failure to enable it to enforce its rights breached this country's BIT obligations to Australia (Brower et al., 2011).

Most pertinently, WIAL won this case by reaching into India's BIT with Kuwait, using the Most Favoured Nation provision in its treaty with Australia (Singh, 2015b). This was because the India-Australia BIT contained no clause guaranteeing investors an effective means of enforcement. But it promised most favoured nation treatment, which it gave Australian investors the right to be treated at par with investors from those countries India had signed similar agreements with. Since the India-Kuwait BIT promised Kuwaiti investors an effective means of asserting claims and enforcing rights with respect to investment, WIAL's lawyers strategically harnessed this clause in WIAL's favour (Singh, 2015b).

The 2G Scam

A few months later came the collective threat of international litigation stemming from the '2G Scam,' in which collusion was discovered in the grant of telecom licenses in 2008. After some years of hearings, in 2012 the Indian Supreme Court canceled 122 of these licenses on grounds of corruption. The most affected foreign firms threatened to invoke India's bilateral investment agreements, if they were not properly and quickly compensated. All argued that the sudden cancellation of these 122 licenses contravened India's BIT commitment to fully protect and not expropriate investments, even though corruption had been established.

The Vodafone Case

In 2014, when India had already begun to seriously rethink the commitments it was making in its international investment agreements, Vodafone—its largest telecom investor—filed a treaty-based claim against it. Vodafone, already disputing a US$3 billion tax claim by the Indian Government, held that India's plan to retrospectively open tax cases was a breach of the country's BIT obligations and a denial of justice (Varman, 2012).

Other global companies similarly engaged in tax disputes with the Indian Government are considering recourse via India's international investment agreements.

The Principal Modifications in India's Model BIT

The modifications that India has made in its model BIT appear to be intended as much to protect the government's policy space, as to prevent foreign direct investors from "treaty shopping" for favourable provisions that protect them even when at fault. The following sections describe the principal changes.

Treaty Rights and Protections Only for Genuine Foreign Direct Investors

From now on, India's international investment agreements will benefit only real foreign direct investors that contribute to long-term economic development and fully comply with Indian laws (Singh, 2015c). For this reason, the new model BIT stipulates that India only commits to protecting foreign direct investors with real and substantial business operations in the country, characterized by a large and long-term commitment of capital, the assumption of entrepreneurial risk, a significant number of employees, a noticeable contribution to development, and a transfer of technological knowhow (Government of India, 2015).

Moreover, only investors with majority control in a locally-invested enterprise, and with direct control in its policy decisions and directorial/management appointments, will have treaty rights.

In contrast, India's earlier model BIT gave treaty rights to firms with any kind of asset in the country, including moveable and immovable property, shares, debentures, financial contracts, intellectual property rights, and business concessions, even if their business presence was minimal (Singh, 2015c).

Clear Responsibilities for Investors and Their Home States

After delineating India's duty to protect investors and their investments, India's model text also places responsibilities on both investors and their home states to ensure responsible corporate conduct and inclusive and sustainable growth in its territory (Singh, 2015c). It stipulates, for instance, that "investors and their enterprises operating within its territory of each Party shall endeavour to voluntarily incorporate internationally recognized standards of corporate social responsibility in their practices and internal policies, such as statements of principle that have been endorsed or are supported by the Parties. These principles may address issues such as labour, the environment, human rights, community relations and anti-corruption" (Government of India, 2015). Moreover, "an investor shall provide such information as the Parties may require concerning the investment in question and the corporate history and practices of the investor, for purposes of decision making in relation to that investment or solely for statistical purposes" (Government of India, 2015).

In particular, signatory home states are required to act against investors found to be violating Indian laws.

Elimination of "Most Favoured Nation" Clause

India's new framework has excised the "Most Favoured Nation" provision, for reasons that the White Industries Australia case makes clear. Though it grants foreign firms treatment on par with domestic ones, it commits to do so only in like circumstances. The new text does away with the 'umbrella clause,' in which the breach of a routine investment contract between an Indian public sector entity and an investor can be considered a violation of a BIT (Singh, 2015c). Also absent is a clause prohibiting India from unilaterally changing laws and regulations that might impact an investment project from the signatory country (Singh, 2015).

International Arbitration Only as the Last Resort

Disputants must now resolve disputes domestically, resorting to international arbitration only if they can prove they have exhausted all local remedies over a five-year period. This reverses the classic BIT emphasis on guaranteeing immediate international arbitration rights to foreign direct investors. To ensure the impartiality of international tribunals, arbitrators will now be required to abide by strict norms of disclosure and conduct, relating particularly to possible conflicts of interest. At the same time, all documents relating to the dispute are to be shared with the public, who will also have the right to hear tribunal arguments through video links. There are now limits on the international tribunal's power to award monetary compensation.

More Issues Exempted from Treaty Purview

India has dramatically expanded the list of treaty exemptions beyond the national security exemption permitted by the 1993 model BIT. To start with, foreign firms engaged in a tax dispute with the Indian government cannot employ their home country's BIT to seek legal action. Similarly they cannot invoke treaty rights to block new host country policies/regulations relating to compulsory licensing, state subsidies, government procurement, public health and safety, environmental protection, and financial stability.

Renewable, Ten-Year Life for Each Treaty

From henceforth, each new BIT will last just ten years, unless specifically extended, and be reviewed every five years. Treaty provisions can also be amended at the request of either party. While, on the one hand, this means that foreign investors' treaty rights might shift as each treaty lapses or is renewed, it also gives them the opportunity to work through their governments to ask for a more favourable revision of particular provisions.

Conclusion

India's hardened BIT stance seems to contradict its determined push to build global investor confidence and boost inward FDI flows. Well aware of this, the Indian Government is reaching out to other leading FDI home and host economies (including Brazil, South Africa, Canada, Australia, and the United States) to explain its position and explore commonalities. It appears to be encouraged by European countries' wariness of strong ISDS provisions in the investment chapter of the Transatlantic Trade and Investment Partnership (TIPP) agreement, and the widespread resistance to unconditional investor protection from labour unions, environmental groups and civil society in the industrialized world. Significantly, the TIPP has introduced unprecedented provisions to protect states' policy space (Hodgson, 2015), many echoing India's own modifications.

Looking ahead, these IIA-related developments appear to herald a softening of the historical ideological demarcations between industrialized home countries and developing host countries. With 55 percent of yearly global FDI inflows being received by developing countries (UNCTAD, 2015a), many of them, particularly India and China, are of increasing strategic interest to foreign direct investors. Their concerns are thus more likely to be heard internationally. At the same time, since developing countries are now responsible for 35 percent of yearly outward global FDI flows (UNCTAD, 2015a), they might be more sympathetic to traditional home country positions.

All this is likely to work to India's advantage, in triggering a more widespread international renegotiation of the legitimate rights and duties of both investors, and their home and host states.

References

Basedow, R. 2015. Preferential investment liberalization under bilateral investment treaties: How to ensure compliance with WTO law? *Columbia FDI Perspectives*, 162.

Brower, C. N., Lau, C., & Rowley, J. W. 2011. *Final award in the matter of an UNCITRAL arbitration in Singapore under the agreement between the Government of Australia and the Government of the Republic of India on the promotion and protection of investments between White Industries Australia Limited (Claimant) and the Republic of India (Respondent)*. London.

Hodgson, M. 2015. The Trans-Pacific Partnership investment chapter sets a new worldwide standard. *Columbia FDI Perspectives*, 160.

Government of India. 2015. *Model Text for the Indian Bilateral Investment Treaty*. New Delhi.

Perrone, N. M., & de Cerqueira César, G. R. 2015. Brazil's bilateral investment treaties: More than a new investment treaty model? Columbia *FDI Perspectives*, 159.

Ranjan, P. 2012. The White Industries Arbitration: Implications for India's Investment Treaty Program. *Investment Treaty News,* 13 April.

Sauvant, K. P., & Ortino, F. 2013. *Improving the International Investment Law and Policy Regime: Options for the Future*. Helsinki: Ministry for Foreign Affairs of Finland.

Singh, K. 2015a. India and bilateral investment treaties – are they worth it? *Financial Times*, London.

Singh, K. 2015b. Treaties that gave away the store. *The Hindu*, Chennai.

Singh, K. 2015c. *Decoding India's New Model BIT*, New Delhi: Madhyam.

UNCTAD. 2015a. World Investment Report 2015: Reforming International Investment Governance. New York and Geneva: United Nations Conference on Trade and Development.

UNCTAD. 2015b. Investment Dispute Settlement Negotiator. (Web portal). Accessed on 22 December 2015 from http://investmentpolicyhub.unctad.org/ISDS.

UNCTAD. 2015c. UNCTADStat. (Web portal). Accessed on 22 December 2015 from http://unctadstat.unctad.org/wds/TableViewer/tableView.aspx.

Varman, R. 2012. What's really at stake in the Vodafone tax case? *Infochange News and Features,* Pune.

Endnotes

1 This is for the 447 cases for which UNCTAD has the necessary data.

2 This is for the 106 cases for which UNCTAD has the necessary data

3 Nine of the cases against India relate to Enron's ill-fated Dabhol project in Maharashtra, five from the telecommunications-related events discussed in this article, one to coal, and one to ports.

4 All these cases related to Enron's Dabhol power project of the early 1990s.

Premila Nazareth Satyanand (premila@foreigndirectinvestment.in) is an independent researcher specializing on issues of foreign direct investment. She has worked with the United Nations Centre on Transnational Corporations, New York, and the Economist Intelligence Unit, New Delhi, facilitating the Government-MNC dialogue on FDI liberalisation and advising foreign investors on India strategy. She has consulted for UNCTAD, UNDP, and the World Bank Group. Most recently, she conceived and spearheaded a National Council of Applied Economic Research, New Delhi, project on Indian FDI statistics reform.

Special Feature: Previous AIB Insights Editors

Betty Jane Punnett

AIB Insights Founding Editor

2001-2003

Betty Jane Punnett served as the first editor of *AIB Insights*. Upon reflecting on her founding editorship, Betty Jane noted that:

> "I was delighted when the Board liked my ideas. The name *Insights* seemed perfect (a lot of other publications have picked it up, but then it was new) as the publication would include short, insightful pieces that would not normally be published in a journal such as *JIBS*. *AIB Insights* has continued to do this, and I am proud to be associated with the publication."

Betty Jane is Professor Emerita at the University of the West Indies, Cave Hill. She remains active in research and publishing, and has been teaching on a visiting basis at different universities since her retirement in 2012. Her most recent books are *Management in Africa: A Macro and Micro Perspective* (Routledge, 2013) and *Management: A Developing Country Perspective* (Routledge, 2012). Her research continues to focus on culture and management (see "Caribbean Metaphors" in *Understanding Global Cultures* 2015). She is part of a multi-country study looking at leadership and motivation in Africa and the diaspora (see special issue of the *Canadian Journal of Administrative Studies*, December 2014). She attends AIB whenever possible. Betty Jane lives in St. Vincent & the Grenadines, where she was born, with her husband Don Wood. They are currently seeking to establish an employee-owned venture that will employ poor rural women making children's dresses for export. She has also published on women globally ("Women in the Workforce: A Global Snapshot" in *Handbook on Well-Being of Working Women* 2016).

Betty Jane's message to the AIB community:

"We would love colleagues to visit us in the Caribbean".

Tamir Agmon

AIB Insights Editor

2004-2008

As a Ph.D. student in the Finance Department at the University of Chicago in the late 1960's, Tamir was present at the cradle of International Business as a field of study. He always viewed IB as a meeting place for researchers from various fields of management, economics, cultural studies, politics, and history. Upon reflecting on his editorship of *AIB Insights*, Tamir noted that:

> "Being the editor of *AIB Insights* gave me an opportunity to apply this experience by bringing together research and researchers from different fields and to look at IB from a comprehensive point of view."

Tamir is currently a Visiting Professor at the School of Business Economics and Law at the University of Gothenburg in Sweden. He is Professor Emeritus at the Faculty of Management at Tel Aviv University. He has been the Founding Dean of the Graduate School of Business at the College of Management in Israel. Earlier, Tamir was the IBEAR Research Professor at the University of Southern California in Los Angeles. Tamir is still active in research both in finance and in International Business. His most recent book *The Venture Capital Industry and the Inventive Process* (with Stefan Sjogren) will be published in early 2016 as a Pivot book by MacMillan/Palgrave. He is currently working on a research project titled *Reverse Global Sourcing and Economic Development*. This research is scheduled to be presented at a research workshop in September 2016 at the Center for International Business Studies (CIBS) of the University of Gothenburg.

Tamir's message to the AIB community:

"The beauty of IB research is that it gives an opportunity to develop meaningful discussion among researchers coming from different disciplines in order to get a more complete understanding of the world in which we live."

Ilan Alon

AIB Insights Editor

2009-2012

Ilan's message to the AIB community:

"Work hard, be collaborative, expand your disciplinary horizon, and explore the world."

Ilan Alon took over as *AIB Insights* Editor in Volume 9, Issue 2 (building on the great foundations of previous editors), and handed *AIB Insights* to the able hands of Romie Littrell and Daniel Rottig in Volume 12, Issue 4, shortly after becoming Editor-in-Chief of the *International Journal of Emerging Markets* (Emerald, UK). He repositioned the publication by changing the editorial policy, content and style of articles, updating the looks and packaging, and enhancing the reputation of the publication through obtaining an ISSN number and greater visibility among the AIB community. Upon reflecting on his editorship, Ilan noted that:

> "Articles in ***Insights*** should feature thought leaders (such as K Meyer, R Mudambi, S Tallman, P Buckley, among others) who can provide accurate, intuitive and sagacious perspectives to the field of international business. Unlike other peer-reviewed journal articles, these perspectives were short enough to be sharp-witted but long enough to be deep and influential."

Ilan Alon is Professor of Strategy and International Marketing at the University of Agder, Norway, and a visiting scholar at Georgetown University, USA. Prior to this, he was the George D. and Harriet W. Cornell Chair of International Business, Chairperson of the International Business department, and Director of both the China and the India Centers at Rollins College, Florida, USA. Ilan was also a visiting scholar at Harvard University. He is the author of a popular *Global Marketing* textbook (2nd edition, Routledge, 2016) and numerous articles on China, Franchising and Political Risk, appearing in *Harvard Business Review*, *Journal of International Marketing*, and *Management International Review* among others. He currently serves on the governing boards of the European International Business Academy (EIBA) and the Chinese Globalization Association (CGA).

Romie Frederick Littrell

AIB Insights Editor

2013-2015

Romie's message to the AIB community:

"The success of *AIB Insights* is in your heads and your hands. Reflect on what's happening with you, to you, and around you and share your innovative ideas and interpretations with the rest of the Academy."

Romie Littrell served as editor of *AIB Insights* for the 2013-2015 term. Upon reflecting on his editorship, Romie noted that:

> "In my tenure the publisher (AIB) began the practice of appointing an Editor and an Associate Editor. This is an excellent idea, first to provide experience to an upcoming editor, and additionally, support, as we all have schedules where job duties and other urgent matters put time pressures on the editor. I was fortunate to work with Daniel Rottig as the associate editor, assisting in recruiting authors, editing manuscripts, and occasionally taking full responsibility for an issue. I look forward to his upcoming output as editor. Perhaps my most gratifying experience as editor has been the willingness of contributors to agree to and produce high quality manuscripts for *AIB Insights*, keeping it interesting to AIB members and other readers. I enjoyed my association with the publication, and working with the AIB management team."

After working for several decades in industry in international business, Romie is Associate Professor of International Business in the AUT Business School at Auckland University of Technology in New Zealand. He is the facilitator of several consortia engaging in research and publications related to preferred leader behavior and societal cultural values, see http://crossculturalcentre.homestead.com/index.html. In the past he has served as the editor of the complementary publication, the *International Management Division Newsletter* of the Academy of Management. His primary teaching, research, and publication area is Leadership in International Business. Romie has published extensively, worked in industry, and taught at universities for extended periods in the USA, Latin America, China, Germany, and New Zealand, with visiting professor stints in Turkey and India. He is currently engaged with research collaborators in Brazil, Mexico, Iran, Syria, Iceland, the Baltics, and Russia. See *The Journal of Management Development*, 2013, Vol. 32 Issue 6, for a review of his research. Romie is a Fellow of the International Academy for Intercultural Research.

Call for Special Issue Papers and Proposals

In recent years, AIB Insights has published a number of special issues on current themes and topics that are of interest to the AIB membership. These special topic publications include the current issue on *International Trade and Investment Agreements*, the issues on *Reshoring* (Vol. 15, Issue 4), *AIB and Emerging Markets* (Vol. 15, Issue 1), *International Student Internships* (Vol. 14, Issue 4), *Stepping on Cultural and Religious Assumptions* (Vol. 14, Issue 2), *Chinese Outgoing Foreign Direct Investment* (Vol. 14, Issue 1), *International Business in the Middle East and North Africa* (Vol. 13, Issue 2), *Defining A Domain for International Business Study* (Vol. 13, Issue 1), and an annual *AIB Best Dissertation Award* special issue series (Vol. 15 Issue 3, Vol. 14 Issue 3, and Vol. 13 Issue 3) that will already be published in its fourth year (forthcoming in Vol. 16 Issue 3 this year).

Other themes and topics currently being considered for special issue publications include:

- Gender Issues in International Business Research and WAIB (Women of the Academy of International Business)
- Facts, Misconceptions and Opportunities for IB Research in the Middle East and North Africa Region
- Innovative Experiential Learning Exercises in International Business Education
- Toward Crowdsourcing in International Business Research
- Best Practices for Managing and Developing AIB Chapters

We encourage authors to submit short (around 2500 words), interesting, topical, current and thought provoking articles related to the aforementioned special issue topics. See AIB Editorial Policy on the back cover page.

We further welcome submissions of proposals for special issues and particularly encourage current topics related to IB research, education and business practice from AIB's 18 chapters and respective regions that are of interest and relevance to the broader AIB membership. We further encourage special issue proposals on current themes related to international business in emerging markets as well as innovative and thought provoking new IB research ideas and streams, IB pedagogical methods and trends in IB business practice.

For Submissions, Ideas And Questions, Please Contact: *insights@aib.msu.edu*

AIB Insights (ISSN: print: 1938-9590; online: 1938-9604) provides an outlet for short, topical, stimulating, and provocative articles. Past copies of *AIB Insights* can be accessed through the AIB website at http://aib.msu.edu/publications/insights

Editorial Policy

AIB Insights is the Academy of International Business official publication that provides an outlet for short (around 2500 words), interesting, topical, current and thought provoking articles. Articles can discuss theoretical, empirical, practical or pedagogical issues affecting the international business community. The publication seeks articles that have an international business and cross disciplinary orientation with IB researchers and faculty as the intended primary audience.

Authors should highlight the insight of their article in the first paragraph. They should prompt the reader to think about international business and international business teaching/learning in new ways. Articles sought should be grounded in research, but presented in a readable and accessible format.

Articles written for *AIB Insights* should be free of professional jargon and technical terms, light on references, but heavy on insight from the authors' experiences and research. Terminology should be defined if it is not in the common domain of the IB literature. Authors should remember the intended audience of the publication and write accordingly. A regression equation, a correlation matrix, a table or a graph needed to support a point may be included.

AIB Insights does not seek the kind of articles that are intended for refereed journals in international business, such as the *Journal of International Business Studies*. The publication is intended to inform, educate and enlighten readers with state of the art information on a topic with a broad appeal to the profession. Acceptable articles may fall into one of several categories:

1. Research insights from authors' stream of research
2. Current issues affecting international business as a discipline
3. The use of technology in international business
4. The evolving nature and evolution of the International Business department/function/discipline
5. Internationalization of the curriculum
6. Innovative approaches to teaching international business
7. Teaching pedagogy and content articles
8. Other topics of interest

Please include a cover page with all the authors' contact details (email, university affiliation, full address, telephone, fax if used). The second page should include 50-75 word biographies of participating authors. Articles submitted should follow JIBS referencing style for consistency.

AIB Insights will be published 4 times a year with the AIB Newsletter. Please send your submission or submission idea to the editorial team: Daniel Rottig, Editor, via email to *insights@aib.msu.edu*

Past copies of *AIB Insights* can be accessed through the AIB website at *http://aib.msu.edu/publications/insights*

AIB Insights (ISSN: print: 1938-9590; online: 1938-9604) provides an outlet for short, topical, stimulating, and provocative articles. Past copies of *AIB Insights* can be accessed through the AIB website at http://aib.msu.edu/publications/insights

AIB Insights is jointly published with the AIB Newsletter by the Academy of International Business Secretariat. For more information, please contact G. Tomas M. Hult, Executive Director, or Tunga Kiyak, Managing Director, at:

Academy of International Business
G. Tomas M. Hult, Executive Director
Michigan State University
Eppley Center
645 N Shaw Ln Rm 7
East Lansing, MI 48824 USA

Tel: +1-517-432-1452
Fax: +1-517-432-1009
Email: aib@aib.msu.edu

***AIB Insights* Editorial Team**

Daniel Rottig, Ph.D., Editor
Lutgert College of Business
Florida Gulf Coast University, USA

Anne Hoekman, Managing Editor
Eli Broad College of Business
Michigan State University, USA

insights@aib.msu.edu

Past Editors:
Betty Jane Punnett, Founding Editor (2001-2003)
Tamir Agmon, Editor (2004-2008)
Ilan Alon, Editor (2009-2012)
Romie Littrell, Editor &
Daniel Rottig, Associate Editor (2013-2015)

Copyright © 2016 Academy of International Business

EcoLogo 100% recycled