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Chapter 5: Investment Treaties, Foreign Investment and Brazilian Law: The Magic of Reality

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(*)

What are we to make from the confusion? One suggestion is that the developing countries' widespread faith in the ability of BITs to attract FDI inflows appears to be precisely that – faith, an idea largely unsupported by objective, scientific evidence. (1)

§5.01 Introduction

This chapter is about reality. A Brazilian reality. In the last two decades, the world has witnessed an unparalleled expansion of investment treaties entered into by countries from all corners of the earth. This phenomenon is largely the result of widespread adherence to the economic assertion that developing countries seeking to increase their inflow of foreign direct investments (FDI) need to sign and ratify Bilateral Investment Treaties (BITs) in order to attract fresh investment. In short, these States, assuming that there is indeed a *positive* correlation between BITs and FDI, have followed the economic ideology behind BITs in the belief that doing so will promote the growth of their national economies.

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In reality, however, there are also several disadvantages to BITs. Firstly, by agreeing to confer specific treatment on foreign investment, in line with previously negotiated standards of protection, States in effect restrict their regulatory powers over certain areas, i.e., they curtail their sovereignty in return for the promise of new flows of investment. Second, by agreeing to submit to international tribunals disputes arising from the investment treaties States to all intents and purposes accept that such tribunals have powers to review the legality and legitimacy of national regulatory measures.

Given the potential downsides, it is rational for a State to carry out a balancing test of the costs and benefits of investment treaties, before deciding to sign and ratify a BIT. It is, furthermore, reasonable for any such balancing test to take into account the fact that the findings of the most relevant econometric studies into the presumed positive impact of BITs are, at best, unclear. To date, there is no hard evidence that BITs actually do lead to an increase in the inflow of additional FDI into the economies of developing countries. The exponential increase in BITs seems, rather, to derive from a firm, widely held *belief* in the positive effects of those investment treaties, a belief, which, in reality, is unsupported by objective evidence.

Brazil has maintained its historical position on BITs and has not yet ratified a single investment treaty. It has, rather, preferred to resolve investment disputes diplomatically or through domestic litigation or arbitration. Whether Brazil should take a different stance on the matter and ratify its first BIT, given the size of the Brazilian economy and its presumed potential for further growth is a recurring issue among Brazilian politicians, economists and lawyers.

In this chapter, we argue that there is no concrete evidence to support the belief that BITs attract additional FDI. We further argue that the costs involved in ratifying investment treaties are considerably higher than the proclaimed and unproven benefits. We conclude that, paying heed to current realities (rather than mere beliefs) there is no reason for Brazil to modify its traditional position.

This chapter is divided into four sections. Following on from this introduction, section §5.02 briefly explores the historical evolution of the protection of foreign investment through the mechanisms of diplomatic protection and investment arbitration (subsection A). In subsection B, we examine the conclusions of the main econometric studies into the existence, or otherwise, of a positive correlation between BITs and FDI. We then apply these conclusions to the case of Brazil. In section §5.03, we compare the most common substantive standards of protection provided for in investment treaties with the relevant Brazilian constitutional and administrative law on property rights. In section §5.04 we set out our conclusions, arguing that there are as yet no convincing reasons for any radical change in the Brazilian policy on the protection of foreign investment.

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§5.02 International Standards of Protection and Foreign Direct Investments: From Diplomacy to Arbitration Without Privity

[A] Protecting Foreign Direct Investments

[1] Diplomatic Protection

Diplomatic protection was, historically, the main instrument of international law used for the defence of foreign investment against violations committed by host States within their territory. (2) The International Law Commission defines it as:

the invocation by a State, through diplomatic action or other means of peaceful settlement, of the responsibility of another State for an injury caused by an internationally wrongful act of that State to a natural or legal person that is a national of the former State with a view to the implementation of such responsibility. (3)

A home State invokes diplomatic protection in order to seek, in its own name, reparation of loss caused to one or more of its nationals by the unlawful conduct of the host State. (4) Diplomatic protection was so widely used during the eighteenth and nineteenth centuries that it came to be considered a basic tenet of international law. (5) The exercise of diplomatic protection is based on the *fiction* that loss caused to a national of a given State is, in fact, caused to the State itself, which has legitimate standing to seek adequate compensation from the offending State. (6)

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There are three basic rules of international law covering the exercise of diplomatic protection and the espousal by a home State of an investment claim of one of its nationals. First, the home State must comply with the international rules governing the *nationality* of claims. (7) Said rules determine whether a claim may be espoused by the State and to what extent continuous nationality is required from the occurrence of the harmful event up until the adjudication of the claim. (8) Second, diplomatic protection can only be exercised if there has been *exhaustion of local remedies*. As such, in order for the home State to be entitled to exercise diplomatic protection its national must have already filed a claim for redress before the municipal courts in the host State and exhausted the relevant means of obtaining redress, including all available forms of appeal. (9) The burden is on the home State to prove exhaustion of local remedies. (10) Finally, the exercise of diplomatic protection is a *discretion* of the home State. It is solely up to the State to decide when and on what terms it will espouse the claims of its national. (11)

Contemporary trends in the diplomatic protection of foreign investors have their roots in the 1794 Treaty of Amity, Commerce, and Navigation between Great Britain and the United States and known as the *Jay Treaty*, which provided for the establishment of arbitral commissions to handle the private claims of British and American citizens arising out of the American War of Independence. (12) The judgment of the claims of nationals by arbitration commissions was also used in the 1795 Treaty of Amity, Frontiers and Navigation between the United States and Spain. This treaty is known as the *Pinckney Treaty* and was aimed at handling claims of American citizens P 74 P 75 ● in relation to losses caused to American vessels during hostilities between France and Spain. (13)

In the nineteenth and early twentieth centuries, there was a proliferation of treaties providing for the establishment of mixed arbitral commissions judging disputes arising out of losses caused to foreign nationals, (14) in which home States asserted, in their own name, the rights of their nationals viz a viz host States. Following the First World War there were some cases in which individuals were permitted to directly seek reparations by means of international arbitration, (15) but the general trend throughout most of the twentieth century continued to be that only States, and not their individual nationals, had standing in such proceedings. (16)

The very few cases on investment disputes submitted to the International Court of Justice demonstrate some of the limitations and imperfections of the mechanism of diplomatic protection of foreign investment. (17) For example, in the *Barcelona Traction* case, Belgium argued that certain decisions of the Courts in Spain, which declared said company bankrupt, constituted a denial of justice and were tantamount to expropriation of the shares held by Belgium nationals in the company. In its objections to the ICJ's jurisdiction, Spain argued that Belgium was not entitled to exercise diplomatic protection on behalf of a Canadian company, even if it were owned by Belgian nationals. The court accepted the arguments raised by Spain. The ICJ ruled that, considering that the company had been incorporated in Canada and that there was no treaty between Canada and Spain conferring jurisdiction on the ICJ, Belgium had no standing to bring a claim before the ICJ. (18)

In the *Ahmadou Sadio Diallo* case, the ICJ accepted in part the objection raised by the Democratic Republic of the Congo as to the lack of standing of the Republic of P 75 P 76 ● Guinea to exercise diplomatic protection ‘of Mr Diallo in respect of alleged violations of rights of Africom-Zaire and Africontainers-Zaire’. (19) In that case, the Court ruled that, because Africom-Zaire and Africontainers-Zaire had independent legal personality from their shareholders and had Congolese nationality, Guinea, Mr Diallo's home State, could not exercise diplomatic protection for the alleged violation of those companies' rights, even if owned by a Guinean national. In the *Anglo-Iranian Co.* and *Certain Norwegian Loans* cases diplomatic protection was not exercised as the ICJ held that the declarations of acceptance of Iran and Norway did not cover the disputes submitted to the Court. (20)

Despite its historic use and its contribution to the creation of various principles of customary international law on the rules of state responsibility, the mechanism of diplomatic protection has proved inadequate as a means of effectively defending the rights of foreign investors, particularly following the 1980s worldwide boom in foreign investment.

First, the home State may simply lack the political will to commence proceedings against another State merely to defend the interests of some citizens. The home State will certainly need to weigh up several factors in deciding on the desirability of asserting diplomatic protection for the benefit of its nationals. Even when the investor manages to convince the home State to defend the relevant investment interests before an international body, international law confers no means by which the investor might control the way in which diplomatic protection is exercised, or when and how long for. The ICJ explicitly stressed this in the *Barcelona Traction* case. (21) Furthermore, even if diplomatic protection is successfully exercised, and the host State pays out damages, the home State is not bound to transfer the amounts received to the investor. (22)

In the light of the inherent difficulties in exercising diplomatic protection and the gradual acceptance of the notion that citizens and corporations, and not just States, are the subject of law at an international level, (23) investment treaty arbitration has, in recent decades, become the preferred method of resolving investment disputes. The 1990s saw an unprecedented proliferation of investment treaties and disputes in which the P 76 P 77 basic premise was that investment treaties confer rights on investors, which they may directly assert in arbitration proceedings. (24) We turn to this in the next section.

[2] Investment Treaty Arbitration

In the period following the Second World War, investment-related disputes were frequently the object of international commercial arbitration, arising out of of concession agreements or contracts for the exploitation of the natural resources of developing countries. However, the tension existing between, on the one hand, the need of developing countries to secure economic sovereignty and, on the other, their quest for foreign resources to boost development, gave rise to concerns of expropriations and nationalizations of the assets of foreign investors or the breach of contracts by the home States. In fact, this period witnessed several cancellation or nationalization of concession contracts that led to highly sophisticated arbitrations and reflected the unresolved issues existing between capital importing and capital-exporting countries. (25) Notwithstanding these difficulties, particularly those related to the application of general principles of international customary law to the proper law of the contract, foreign investors consistently preferred submitting disputes to international commercial arbitration rather than to local courts. (26)

However, this form of arbitration presupposed the existence of 'consent' in the traditional sense, i.e., the execution of an arbitration agreement conferring jurisdiction on the arbitral tribunal to resolve the investment dispute. In the absence of this formal consent to arbitration, the investment dispute had to be submitted either to the municipal courts of the host State or to diplomatic protection. This was the situation up until 1985.

In that year, in the case of *SPP v. Egypt*, (27) an arbitral tribunal chaired by Judge Eduardo Jimenez de Arechaga held that Egypt had in effect consented in advance to investment arbitration proceedings by offering to arbitrate all disputes relating to investments made in its territory, as provided for in Egyptian Law No. 43. (28) When SPP P 77 P 78 sent to Egypt its letter of acceptance of the offer to arbitrate the investment dispute, Egypt was deemed to have consented in advance, thereby establishing the jurisdiction of the arbitral tribunal. (29) This case, led for SPP by a young Jan Paulsson, gave rise to a new form of deemed consent widely referred to as *arbitration without privity*. (30)

Nowadays the jurisdiction of arbitral tribunals to hear investment disputes stems from three main forms of consent. First, consent may be given in a contract entered between the parties, as was the common practice of the concession contracts for the exploration of oil of the 1950s and 1960s. (31) Second, a State may consent to arbitrate by enacting legislation declaring that it will submit investment disputes to arbitration provided the relevant national legislation remains in force (as was the case in the *SPP v. Egypt* dispute). (32) Finally, the jurisdiction of the investment tribunal may result from a provision in a treaty between the host State and the State of the investor. (33) In the latter two instances, investor consent will be given either by accepting the offer in writing or by initiating the arbitral proceedings. Once consent has been given by both parties, investors have a *direct right* to submit their disputes to international investment tribunals, in accordance with the applicable procedural rules of the arbitration agreement, national law or treaty.

The *procedural* feature of investment protection treaties is the guarantee that if investors believe that their property rights have been unlawfully infringed, they are entitled to have their grievances against host States resolved by binding arbitration before a neutral and specialized forum. The objective of such procedural provisions is to remove the resolution of investment disputes from municipal courts and the political process. (34) *Substantively*, treaties confer a range of broad rights on investors, such as the right to be free from expropriation without just compensation, to be free from discrimination based on nationality, the right to fair and equitable treatment (FET), and P 78 P 79 the commitment from the host States that contractual obligations will be honoured. (35) This unique combination of procedural and substantial safeguards has given rise to vast literature on the subject of investment treaties with intense debate ensuing as to certain aspects.

Nevertheless, the alleged positive impacts that Bilateral Investment Treaties (BITs) may have on the capacity of developing States to attract *additional* FDI into their economies remain the subject of heated controversy. Given the fact that, by agreeing to submit certain disputes to international arbitration, host States are unequivocally renouncing a part of their regulatory sovereignty, it is critical to examine whether the underlying premise of those investment treaties – i.e., that they stimulate the inflow of FDI into developing countries – is supported by *evidence*. As we will demonstrate in the following sections of this article, the sensitivity of the issue, especially for the Brazilian audience, lies in the fact that Brazil continues to be one of the most coveted destinations for FDI notwithstanding not having to date ratified a single investment treaty. Should Brazil modify its policy regarding investment treaties? To put it another way: is there hard evidence to justify Brazil ratifying an investment treaty? Or is it the case that the arguments in favour of such a move are essentially based on an ideological view of the world, unsupported by reliable data? We will attempt to address these issues in the next section.

[B] Is There a Positive Correlation between BITs and FDI?

[1] Overview of the Literature

The substantive standards of protection accorded to investors by international treaties significantly and inevitably restrict the sovereignty of States. [36] When a host State provides assurances, for example, that foreign investors will receive FET, that there will be no discrimination against foreign investment or that there will be no expropriation of investors' assets without immediate payment out of just and prompt compensation, it commits itself to aligning its conduct to the standards of protection envisaged in the respective investment agreement. According to the rules of customary international law, no State is, strictly speaking, obliged to accept the entry of foreign investment onto its territory. If, however, a State does admit such investment, it should provide the necessary protection in line with the standards set by the applicable treaty. Clearly, when a State enters into an agreement that contains specific and clear rules as to the protection of investment, it balances the potential economic advantages offered by the treaty against the ensuing legal restrictions on sovereignty. The inevitable limitations on the sovereignty of the State should therefore, from this perspective, be P 79 P 80 seen as a necessary corollary to the given aim of creating an environment which is attractive to foreign investment and which fosters good administrative governance. [37]

The ratification of a BIT may however lead to the host State incurring significant costs which are frequently not adequately analysed by the relevant national authorities prior to the acceptance of the treaty rules. For example, the costs involved in investment arbitration proceedings are normally high and arbitral awards may, albeit rarely, require the host State to pay substantial amounts in damages. Furthermore, the inevitable restriction on State sovereignty may extend to areas such as economic affairs, the environment, property rights and taxation. The prospect of having to pay out major damages and adopting certain policies deemed necessary for protecting local interests may well be a significant disincentive to the implementaton of those policies and therefore a hindrance to the development of a country. [38]

In addition, concerns have been expressed in specialist literature on this area to the effect that the resolution of investment disputes by international arbitral tribunals may have a negative impact on the rule of law in developing countries, by reducing the pressure to improve local democratic institutions. [39]

Certain provisions of investment treaties normally state that 'the encouragement and contractual protection of such investments are apt to stimulate private business initiative and to increase the prosperity of both nations'; [40] 'the promotion and the protection of investments of investors of one Party in the territory of the other Party will be conducive to the stimulation of mutually beneficial business activity, to the development of economic cooperation between them and to the promotion of sustainable development'; [41] 'agreement on the treatment to be accorded such investment will stimulate the flow of private capital and the economic development of the Parties'. [42] P 80 P 81 Given that the ratification of investment treaties gives rise to the undeniable existence of certain risks to the host States, it is necessary to consider whether, and to what extent, there is a correlation between the ratification of treaties and an increase in FDI to the host country. [43]

BITs are international agreements signed by two States with a view to reciprocally stimulating the promotion and protection of investment by individuals and corporate entities from one signatory State in the territory of the other. The first BIT was signed in 1959 by Germany and Pakistan, and since then there has been a dramatic rise in the number of such treaties – from around 500 in 1991 to 2,833 at the end of 2011. [44] In their efforts to adequately comprehend the phenomenon, international commentators have made strenuous efforts to study the causes of this proliferation – the results, however, have been largely inconclusive. Some theories advance the explanation that the boom resulted from the direct relationship between the existence of a BIT and an increase in the influx of foreign investment, whilst other theories see the cause as being the competition for foreign investment between potential host States. (45)

In the case of Brazil – which has not ratified any international investment protection treaty – and particularly in relation to the question of whether it is time for a shift in the country's position on the issue, it is necessary to establish whether there is indeed any *evidence* that the ratification of a BIT increases the amount of FDI or otherwise benefits the development of the country and its democratic institutions. (46) In P 81 P 82 this section we analyse the conclusions of several pertinent studies and examine whether, in the case of Brazil, the ratification of a BIT might give rise to significant benefits in terms of increased FDI, so as to justify the inherent restrictions on its sovereignty.

In 1998, UNCTAD undertook the first major econometric study of the alleged relationship between BITs and FDI. In analysing the inflow of FDI to seventy-two host states over a period of thirty years, the authors concluded that, statistically, the relationship between BITs and the increase in FDI was weak and there was no significant evidence of the existence of the supposed correlation. (47)

In 2003, Rashmi Banga, analysing data on the inflow of FDI to fifteen Asian countries found a positive correlation between increased flow and treaties in which at least one of the signatories was a developed country. In the case of treaties signed solely by developing countries, however, there was no increase in the inflow of FDI as a result of the ratification of an investment treaty. (48) In the same year, Mary Hallward-Driemeier, a World Bank researcher, concluded after examining data on twenty years P 82 P 83 of FDI flow from OECD Member States to developing countries, that there was little evidence that BITs had, in fact, generated fresh investment. On the contrary, the author stated that countries with fragile institutional infrastructure received no additional benefits because of the mere ratification of a BIT, whilst countries with more solid democratic institutions were those that probably least needed a BIT. (49) In fact the models used in the study indicated that BITs were either irrelevant in terms of increasing the flow of FDI or actually hindered the receipt of fresh foreign investment. (50)

Jennifer Tobin and Susan Rose-Ackerman arrived at very similar conclusions in their 2003 study. Having analysed the impact of BITs on the FDI inflow to around forty-five developing countries, between 1975 and 2000, the authors concluded that there was no positive relationship between the ratification of a BIT and an increase in FDI. Bearing in mind the legal, political and economic risks assumed by developing countries in entering into investment treaties, the authors argued that the stated objectives of the BITs might, indeed, never be attained. (51) - (52)

Peter H. Egger and Michael Pfaffermayr, however, examined the flow of FDI from nineteen OECD home States to fifty-seven host States and concluded that there may be an increase in FDI flow when investment treaties are effectively implemented. (53) In another study, Tim Büthe and H. V. Milner reached similar conclusions. Starting off P 83 P 84 with the premise that a country's attractiveness to foreign investment increases with the number of BITs signed, they stated that there is a 'predicted positive, statistically and substantially significant correlation between BITs and subsequent inward FDI into developing countries.' They however recommended that each country carry out a specific evaluation of the costs and benefits of committing to international obligations of investment protection, given that: 'BITs certainly are not required for attracting FDI, though the competitive dynamic may mean that retaining the status quo of no or few BITs might become increasingly costly over time.' (54)

In a 2005 study, Jeswald W. Salacuse and Nicholas P. Sullivan analysed the aggregate effects of BITs on FDI inflow, particularly in relation to investment treaties signed with the United States. According to the study, the ratification of a treaty with the US might lead to an overall increase in FDI of up to 85% in a given year, for a given country, whilst entering into a BIT with another OECD country would not have any significant effect in terms of increasing FDI. (55) According to the authors, the justification for the existence of these different effects arising out of BITs was the greater normative flexibility of the US BITs. (56) (57)

Eric Neumayer and Laura Spess conducted another study covering 119 countries between 1970 and 2001, reporting the existence of hard evidence of a positive effect of BITs on FDI flow to developing countries along with evidence that BITs were capable of functioning as substitutes for or complements to the strengthening of local political institutions. (58) Jason Webb Yackee examined the issue of the correlation of BITs and FDI using another methodology and different data. He found little evidence that BITs were capable of increasing FDI flow. (59)

In another econometric study of the issue, Emma Aisbett stated that earlier studies which had sought to demonstrate a supposed positive impact of BITs on FDI growth had failed to take into account certain methodological challenges, which, if correctly addressed, would in fact have demonstrated the non-existence of any correlation between BITs and FDI flow:

Bilateral investment treaties are one of the most popular policy initiatives undertaken by low-and middle-income countries in the race to attract a larger share of P 84 P 85 global FDI. Like most such initiatives, BITs are not without costs. Resources are expended on the design and negotiation of BITs. When ratifying BITs, states sacrifice policy flexibility and risk sizable fines and legal costs if they are sued by an investor. The experience of the United

States and Canada under the BIT-like Chapter 11 of NAFTA shows that even well documented actions undertaken by countries which are renowned for their investor protections, and undertaken to protect public health or the environment, may be subjected to claims by investors. Yet the number of BITs and similar agreements embedded in regional trade agreements continues to grow. Countries appear to believe that the FDI-promoting abilities of BITs outweigh these legal and policy costs. I find no evidence to support this belief. Furthermore, my results suggest that previous findings of a positive impact of BIT participation (Neumayer and Spess (2005) and Salacuse and Sullivan (2004)) are almost certainly due to misspecification and insufficient attention paid to the endogeneity of BIT participation. (60)

The first question that needs to be asked in an analysis of the issue is: why is there such divergence in the results obtained? Why has it not been possible to reach a clear conclusion although there are around 2,800 investment treaties in force? After examining the studies referred to above, Jonathan Bonnitcha explains that some of those studies conclude that only certain types of BITs increase FDI (Banga); other studies identify an increase in FDI as a result of BITs entered into with the US, while others indicate that there is no FDI increase at all (Salacuse & Sullivan and Gallagher & Birch, respectively). Some studies reject the notion that there is any relationship between BITs and FDI flows (Hallward-Driemeier; Aisbett and J. Tobin and S. Rose-Ackerman), concluding that the correlation between BITs and FDI is, at best, unclear. (61) In our view, even if the divergence of results could be attributed to the different methodologies applied, the rational conclusion to be drawn at this time is that enthusiasts of the pro-FDI effect of BITs have yet to prove their case.

Even if we were to assume that FDI is effectively beneficial to the economic growth of developing countries, we need to consider whether *investment arbitrations* are capable of facilitating FDI, albeit indirectly, by bolstering the rule of law in countries whose political institutions are still somewhat fragile. As is the case with the issue described above, the lack of hard evidence for the possible impact of investment arbitrations on FDI raises doubts as to whether investment treaties should be ratified on the unproven presumption that the improved resolution of disputes might facilitate the flow of FDI. (62)

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In relation to the *costs* associated with the ratification of an investment treaty, the central premise of BITs has always been that the benefits afforded by the investment agreements would offset the restrictions on the regulatory autonomy of the signatory States. The widespread enthusiasm for investment treaties from the 1990s onwards was undoubtedly based on the belief that the inherent costs of BITs would be outbalanced by the benefits generated. It was only more recently that it became possible to comprehend the precise extent of the costs to sovereignty of these investment treaties. (63) For example, several arbitral tribunals have examined the extent to which national regulatory measures implemented by host States are compatible with obligations assumed under investment treaties, so as to decide, whether in a given case, said regulatory measure amounts to indirect expropriation, for which compensation is due. (64) Although the settled view in case law is that 'regulatory measures pursued for legitimate objectives cannot be regarded as indirect expropriation', (65) the validity of any regulation issued by a State can only be determined in a concrete case, which means, in practice, that States cannot know in advance whether a given regulation will be deemed legitimate by arbitral tribunals. (66)

The clearest example of the tension between the regulatory powers of States and the limitations imposed by investment treaties can be seen in the cases involving Argentina following the country's 2001 crisis. It has been estimated that approximately forty-three arbitrations were filed against Argentina, giving rise to potential awards for compensation totalling USD 80 billion. (67) It is reasonable to suppose that, in the light of the effects of the 2001 Argentine crisis, other States have became more reluctant to submit to international arbitral tribunals, especially given the significant unpredictability of the outcome of such proceedings. In other words, as the inherent costs of waiving a parcel of sovereignty has become clearer, the impetus towards ratifying fresh BITs has decreased. (68)

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[2] The Brazilian Case

Brazil has maintained its traditional position on this issue and has not, as yet, ratified any treaty for the protection of foreign investment. (69) In the 1990s, the generally accepted belief was that the ratification of BITs was essential to attracting FDI. As shown above, the scientific evidence for this view is by no means conclusive and, in fact, the Brazilian data on net FDI supports the notion that BITs do not have a positive impact on foreign investment inflow.

Data taken from the Economic Commission for Latin America and Caribbean (ECLAC) website shows that Brazil received total FDI of approximately USD 442 billion between 1993 and 2012. Net FDI value stood at USD 801 million in 1993 and increased steadily, with an influx of approximately USD 19 billion in 1998. There was a slight fall in 1999, followed by a return to growth in 2000, when the country received approximately USD 30 billion. From 2001 to 2006 FDI declined, but 2007 saw a fresh growth cycle, with the injection of around USD 27 billion and USD 66 billion in 2012. (70)

Brazil, therefore, was the highest ranking South American country, in terms of FDI inflow from 1993 to 2012. The FDI indexes of all other South American countries as well as Mexico (a Member State of NAFTA) were significantly lower. (71) Although this comparison does not take into account the relative size of the national economies, (72) it still provides a strong indication that the number of ratified BITs does not directly P 87 P 88 correlate with the overall FDI levels – with not a single signed BIT, Brazil is ranked last in terms of ratified treaties. (73)

Further evidence of the ineffectiveness of BITs can be drawn from more detailed scrutiny of two exemplary cases. Mexico's and Argentina's advancing conclusion of BITs seems not to have had any perceivable effect on their respective FDI levels.

As is depicted in Figure 5.1, below, Mexico signed 25 BITs from 1995 to 2006. Despite this rapid increase in BITs, the amounts of FDI did not follow suit. Even if allowing for a certain period for a BIT to develop its alleged positive effects, the increase in BITs is not reflected in any way in the FDI levels. Particularly in the years following 2002, i.e., after a significant increase in the number of BsITs, one should have expected a growth in FDI. In fact, however, these years were marked by a downward trend in FDIs. In addition to that, after the outbreak of the financial crisis in late 2007, foreign investors turned towards 'treatyless' Brazil – and not to the BIT guarded safe haven of Mexico.

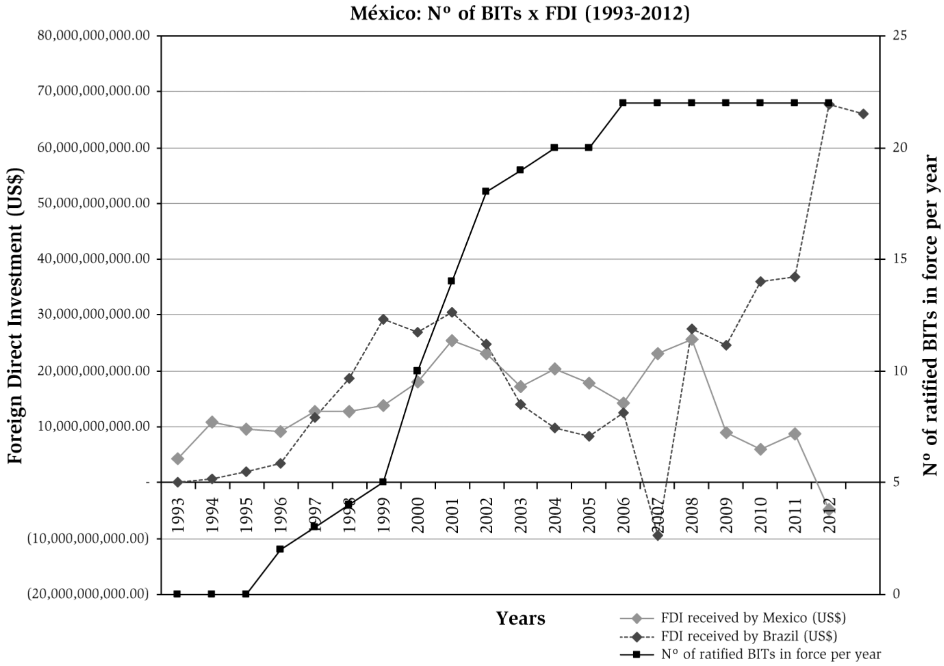

Figure 5.1 Development of FDI versus Number of BITs in Mexico (1993–2012)

* Data on the number of BITs rati fied per year was retrieved from the ICSID database at https://icsid.worldbank.org/ICSID/FrontServlet and data on the value of FDI was retrieved from the ECLAC database at http://interwp.cepal.org/sisgen/ConsultaIntegradaFlashProc.asp.

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In the same vein, Figure 5.2, below, shows that FDI in Argentina remaind basically at the same level from 1993 through to 2012, despite the number of BITs skyrocketing from 7 to 42. The deviation in the years 1999 and 2000 were owed to the exceptional dynamics during the country's crisis and can be disregarded for present purposes.

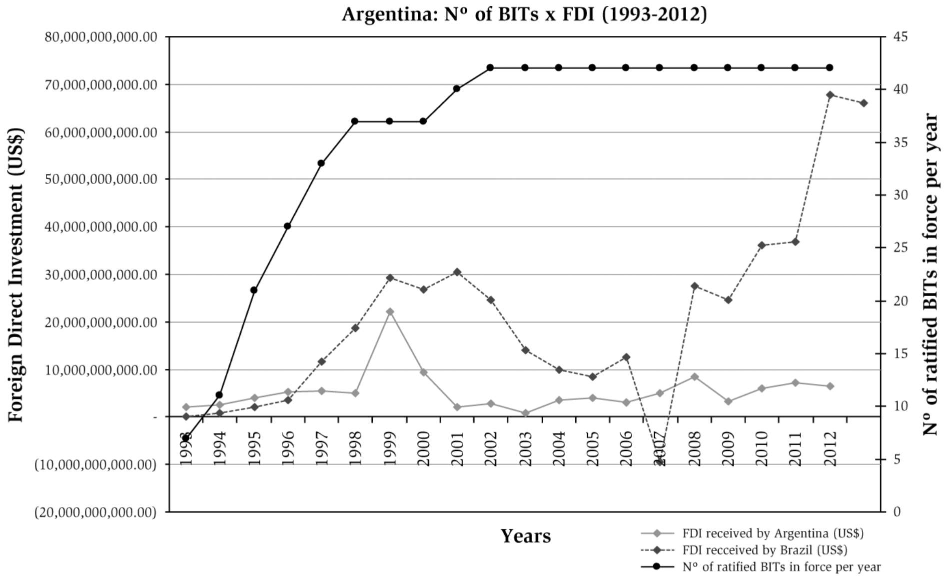

Figure 5.2 Development of FDI versus Number of BITs in Argentina (1993–2012)

The development of post 1993 Brazilian FDI levels, together with the findings of a large number of the econometric studies examined above, show that the Brazilian experience reinforces the view that BITs are not necessary to increase or maintain FDI levels. Given the significant costs to sovereignty inherent to the ratification of a BIT, there would hence not appear to be any reason for drastic change of Brazilian policy on this issue.

More recently, the arguments put forward in support of Brazil ratifying BITs have shifted from the hackneyed claim that ratification will lead to an increased flow of FDI; proponents now concentrate on the need to confer greater protection on *Brazilian investments abroad.* The thrust of this argument is that the increasing internationalization of Brazilian companies has given rise to a need to confer additional protection on Brazilian investors. As such, according to this view, the restrictions on part of sovereignty as a result of the P 89 P 90 ratification of BITs are justified, not by the prospect of increase in internal FDI, but by the need to establish a legal environment which is more favourable and secure for the foreign operations of Brazilian multinationals. (74)

However, there are no empirical studies which back up this proposition. In any event, in countries where local institutions are solid and reliable, such as in countries traditionally classified as *exporters* of capital, Brazilian investors can generally rely on effective local legal instruments capable of protecting their investment. Brazilian investors in other developing countries have the option of creating an investment structure involving the setting up of a company in a third country which has a BIT with the host State. This was the method employed by Petrobras – which invested in Bolivia via a company established in the Netherlands, a country which has a BIT with Bolivia. When Bolivia subsequently nationalized Petrobras' assets, the company could have instituted arbitration proceedings under the auspices of the Dutch-Bolivian BIT. (75) On the face of it, therefore, there are no solid reasons for Brazil to commit itself to wide-ranging obligations within national territory whilst obtaining no significant advantage in return.

In relation to the unfounded allegation that Brazil is unjustifiably clinging to an isolationist position on investment arbitrations, (76) it should be noted that in point of fact Brazil is one of the very few countries which, in a very short period of time, introduced a range of laws permitting recourse to arbitration, including arbitration involving the State and its agencies. Following on from the introduction of the Brazilian Arbitration Act in 1996, Brazil ratified the principal international conventions on arbitration, (77) and passed several laws under which certain disputes with the State became arbitrable. (78) This further reinforced an already arbitration-friendly regulatory framework, conferring greater protection on both P 90 P 91 domestic and foreign investment. Brazilian arbitration case law clearly reflects the fact that Brazilian institutions are committed to private mechanisms of dispute resolution and that party autonomy is a fundamental principle of the Brazilian legal system. (79)

Brazilian policy, far from being isolationist or an attempt to resuscitate the bygone Calvo doctrine – which, in fact, never took firm hold in Brazil (80) – is indeed justified, for the time being. There is no clear evidence that investment treaties produce a positive effect on FDI flow. Factors such as the scale of the Brazilian market, rates of return on investment, the country's GDP, the relative solidity of Brazilian institutions and the existence of a regulatory framework favourable to *commercial* arbitration would appear to be, at least in part, the explanation for the substantial levels of investment enjoyed by Brazil over the past twenty years. The Brazilian unwillingness to enter into BITs is no grounds for concern by foreign investors, as it stems from econometric issues and cost-benefit considerations.

The reality is that BITs do not promote a significant increase in the inflow of FDI of developing countries and therefore cannot justify the ratification of investment treaties. The belief in such FDI increase is simply that: a belief, which is unsupported by scientific evidence. Brazil has implemented the domestic changes needed to create an appropriate climate for neutral dispute resolution, including the enactment of pro-arbitration legislation, rules on protection of property rights and enforcement by local courts of the rule of law principle. The absence of a treaty should not be seen as a barrier to investment in Brazil.

§5.03 The Substantive Protections Accorded to Foreign Investors

Any country considering the ratification of a BIT should be aware of the risks to national sovereignty, and should weigh up these risks against the advantages – bearing in mind the divergence of opinion amongst economists as to whether or not BITs have any positive impact on the inflow of FDI. In particular the State will need to ponder: (i) the protection that will be afforded by the BIT to the nationals of the signatory States and the manner in which such protection is likely to affect regulatory powers in certain key areas; and (ii) the extent of any disparity between the international standards of protection provided for in the BIT and the signatory State's own national laws on the protection of property rights.

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If the national rules on property rights of a signatory State are not particularly robust, BITs may have at least a marginal impact as a substitute for, or complement to, institutional quality. On the other hand, if local rules are firm and clear, signing a BIT may lead to an excessive burden on the signatory's sovereignty.

We set out below a brief overview of the main substantive protections afforded to investors by international treaties. By comparing these protections with the Brazilian legal rules on property rights and the constitutional limitations on state actions, we are going to show that Brazilian substantive law and arbitration affords solid protection to foreign investors and investments. (81)

[A] The Main Substantive Protections Afforded by International Treaties

[1] Expropriation

Investment treaties contain specific provisions regulating the exercise of state sovereignty over the property of foreigners. In fact, the legal rules on expropriation attempt to balance two fundamental principles of international law: a State's right to exercise permanent sovereignty over its territory and natural resources, as opposed to the need to respect the acquired rights of foreigners. Whilst international law does not preempt States from regulating, taxing or even nationalizing the property of foreigners, such prerogatives can only be exercised for a legitimate public purpose, in a non-discriminatory manner, respecting due process and providing for payment of just and prompt compensation. (82)

Article 5 of the Italian Model BIT, for example, determines that foreign investments are not to be expropriated 'except for a public purpose in accordance with law on a non-discriminatory basis and subject to fair and equitable compensation.' (83) Norway's Model BIT establishes in its Article 6 that no expropriation is to be made 'except in the public interest and subject to the conditions provided for by law and by the general principles of international law.' (84) Similarly, Article 6(1) of the US Model BIT prohibits contracting states from expropriating the property of nationals except 'for a public purpose; in a non-discriminatory manner; on payment of prompt, adequate, and effective compensation; and in accordance with due process of law ...'. (85)

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Expropriation of investment is *direct* when the State seizes the property of the foreign national or transfers it to a third party. (86) *Indirect* expropriation takes place when measures short of an actual seizure of property result in the effective loss of management, use or control, or in a significant depreciation of the value of the assets of a foreign investor. (87) Case law and literature also refer to indirect expropriation as de facto, disguised, constructive, regulatory, consequential, or creeping expropriation. (88)

With respect to the *scope* of the protected property rights, most BITs reflect customary international law and extend the protection against unlawful expropriation to intangible property and contractual rights. (89) However, breach of a contract can be deemed tantamount to expropriation of contractual rights only if the host State acted in its sovereign capacity. (90) The mere non-performance of a contractual right by the host State does not constitute expropriation. (91)

Actions of the host State that do not observe legality, transparency and consistency, which frustrate the investor's legitimate expectations, which are disproportionate to the ends sought by the host State or which unlawfully discriminate against foreign investors may constitute grounds for compensation for indirect expropriation. (92)

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Actions which constitute indirect expropriation include: disproportionate tax increases; (93) appropriation of third party property, rendering worthless patents and contracts held by a managing company; (94) interference with contract rights leading to a breach or termination of the contract by the investor's business partner; (95) breach of contractually acquired rights, when there is discriminatory intent; (96) interference with the management of an investment; (97) revocation or denial of government permits or licenses, (98) and revocation or denial of general operating licenses. (99) - (100)

[2] Fair and Equitable Treatment

The FET standard of protection is a broad and far-reaching concept of international law aimed at protecting investors against governmental abuse and ensuring that state sovereignty is exercised in line with the rule of law. The overlapping elements of the FET standard include the prohibition of undue discrimination and the requirement for good faith at all levels of state action. (101) Essentially, government measures that do not guarantee (i) the stability, foreseeability and consistency of the legal framework; (ii) the protection of investors' legitimate expectations; (iii) procedural and administrative due process; (iv) transparency, as well as measures that are not (v) reasonable and proportional, are likely to be a violation of FET. As BITs usually do not define the exact content of FET, (102) investment tribunals and commentators have had to identify the specific elements of the standard.

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Regarding the need to ensure a stable, predictable and consistent legal framework – which is also known as the full protection and security principle –, investment arbitral tribunals have held that legal security is a vital element in the FET standard of protection. (103) State measures which are irreconcilable with that principle are illegal under international law. (104)

With respect to the investors' legitimate expectations, the tribunal in *Tecmed v. Mexico* ruled that FET requires that States perform actions that do not 'affect the basic expectations that were taken into account by the foreign investors in making the investment'. (105) Similarly, the tribunal in *Saluka v. Czech Republic* referred to the concept of legitimate expectations as 'the dominant element of that [fair and equitable treatment] standard'. (106) Other arbitral tribunals have reached equivalent conclusions. (107) However, for these purposes, the investor's legitimate expectations must arise from an implicit or explicit representation from the host State, (108) and cannot be relied P 95 P 96 upon in exceptional circumstances, when extraordinary restrictive measures may be justified. (109) To determine whether FET has been breached, arbitral tribunals must apply a balancing test in which 'the Claimant's legitimate and reasonable expectations on the one hand and the Respondent's legitimate regulatory interests on the other ...' are properly measured and weighed. (110) - (111)

Even if a given state measure is theoretically desirable, basic principles of due process require that governments ensure that investors have access not only to the local judicial apparatus, but also to a fair and prior *administrative* review of the proposed measure. Some arbitral tribunals have held that there is a breach of FET when a State fails to comply with administrative due process. (112) In addition, governmental action must be transparent and free from ambiguities and inconsistencies. (113) Finally, in order to determine whether a particular measure is compatible with the FET standard provided for in the BIT, arbitral tribunals must consider whether the contested measure is *reasonable* and *proportional*, in order to ascertain whether the interference of host States in foreign investments is legitimate. (114) - (115)

[3] Most-Favoured-Nation (MFN) and National Treatment Clauses

MFN and National Treatment clauses are commonplace provisions in investment treaties. As most modern model BITs indicate, National Treatment clauses provide that the home State is to treat foreign investors no less favourably than its nationals in like circumstances. Similarly, MFN provisions establish the obligation of home States to afford to investors or investments from other contracting BIT parties treatment which is no less favourable than that which the State accords, in like circumstances, to investors or investments from any non-party in its territory. (116)

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In order to establish actual infringement of those standards of protection, the investor must prove that the nationals of the host State, or foreigners from another contracting home State, have received more favourable treatment in like circumstances. The rationale for adopting MFN and National Treatment clauses is to limit State measures that discriminate against investors on grounds of the nationality of the foreign individual, goods, services or investment. (117)

The non-discrimination principle contained in MFN and National Treatment clauses involves a comparative test in which the investor must identify another investor (national or foreign, the *comparator*) receiving better treatment from the home State. If the investor succeeds in proving the existence of the comparator, the State measure will be deemed invalid unless the respondent State proves (i) that the comparison is flawed or (ii) that there is a reasonable non-discriminatory justification for the differentiation. (118) With respect to MFN standards, the protections assured by BITs to investors can be both substantive (119) and procedural. (120)

[4] Umbrella Clause

FDI is routinely adopted within the territory of importing capital countries via the execution of investment agreements with host States or with entities subject to host State control. Foreign investors played a major role in privatization in Latin America in the 1980s and 1990s, by acquiring equity in formerly state-owned companies, which explored, *inter alia*, the production and distribution of energy, postal, telecommunications, transportation, and financial services. As a general rule, the investments were formalized by means of investment contracts (normally concession agreements), which contained specific provisions for dispute resolution and choice of substantive law. Nevertheless, in the event of breach of the investment contract, the general trend was for investors whose home States had entered into a BIT with the host State to pursue a claim under the auspices of the BIT directly against the host State. (121)

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Some investment treaties contain a catch-all declaration that all provisions negotiated by the parties to an investment *agreement* will also be protected by the treaty. (122) In such situations, the contractual duties are placed *under the umbrella* of the treaty-based protections and on that basis investors seek to submit their investment contractual disputes directly to investment arbitral tribunals. (123)

As we have explained earlier, however, not every breach of an investment contract by the home State qualifies as a breach of a treaty standard of protection. In order to establish the international liability of a State for the breach of an obligation contained in an investment contract, it is necessary to demonstrate, first, that the State – or one of its agents – acted in its sovereign capacity. If the State exercised merely a *commercial* function, international liability does not arise. Second, the breach of contract must also constitute a breach of one of the obligations assumed by the State in the BIT, such as when the State does not provide FET to the investor. (124)

Unfortunately, the case law on this issue does not provide clear-cut criteria to determine in what circumstances breaches of investment contracts will be tantamount to violation of investment treaty obligations. For example, whilst the Tribunal in *SGS v. Pakistan* held that '(t)he text itself of Art. 11 does not purport to state that breaches of contract alleged by an investor in relation to a contract it has concluded with a State (widely considered to be a matter of municipal rather than international law) are automatically "elevated" to the level of breaches of international treaty law ...', (125) the arbitral tribunal in *SGS v. Philippines* held that 'Article X(2) [of the Switzerland-Philippines BIT] includes commitments or obligations arising under contracts entered into by the host State'. (126) Other investment arbitral tribunals confronted with the same issued have reached divergent conclusions on the matter. (127)

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[B] Regulatory Framework of Brazilian Administrative Law on Investment

Foreign investment in Brazil is, traditionally, closely tied in with the economic reality of the Brazilian State. Such investment is one of the means which enable the State to execute development projects – particularly in the infrastructure sector – and is therefore regarded as one of several juridical elements which make up a network of structured and interlinked contracts sustaining project financing. Looking at foreign investment purely from a legal perspective, the applicable limits and guarantees are those provided for in the exact wording of the various insurance and guarantee agreements which form the contractual structure of major projects. The Public Administration, in turn, deals with the foreign investment in the manner provided for in contractual terms to which it (the Administration) agreed.

We note, however, the existence of two significant trends. The first is the increasing recognition of the fact that foreign investment has impacts beyond the scope of the source contract. The second is the existence of constitutional, statutory and legal bases, which are now sufficiently robust to permit us to consider that there is a specific system of protection for foreign investment which derives directly from Brazilian Administrative Law. The first trend reflects the significant repercussions of foreign investment in the geographical location in which it is made and the consequent need for greater commitment by the Public Administration to investment protection. The second trend reflects the phenomenon of *contractualization* which is altering the way in which the Brazilian Public Administration operates – in other words the State is establishing contractual relationships with private companies and civil society entities in an evolution of modern Administrative Law known as '*joint Public Administration*' (*Administração Pública paritária*). (128)

[1] Protection System Specific to Foreign Investment by Brazilian Administrative Law

Investment, as is well-known, generates a chain of effects which extend beyond the boundaries of the contract which sustains it. From the preparatory actions performed with a view to receiving such investment all the way through to the effective application of the funds – these being acts performed by the players in the investment chain (the agents of the Public Administration, investment companies, financing agents etc.) –, investment fosters the free circulation of goods and services as well as the generation of wealth. Foreign investment has an impact on the infrastructure and way of life of the local population. It has a social value. The effects of such investment are therefore a matter of public interest.

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The Brazilian Public Administration is aware of the significance of the extra-contractual effects of foreign investment and this is one of the reasons it actively seeks foreign investment (out of the range of options available) as a means of ensuring the viability of major projects. Given the public interest which permeates foreign investment, all players involved in the process have a responsibility to ensure efficacy in the exercise of their attributes at all stages of the investment chain.

It should be borne in mind that foreign investment is based on the following premises: stability, security and confidence. In order for the Public Administration, as a player in the investment field, to uphold these premises it is necessary for the administrative spheres responsible for the investment to gain the confidence of the other players by providing legal security, so as to engender an atmosphere of stability for the contractual network which supports the investment. Recent changes in the characterization of the legal nature of contemporary Brazilian Public Administration feature constitutional and legal bases, which provide the administrative structure and apparatus necessary for public sector players to pursue the investment premises referred to above.

[2] Constitutional Grounds for the Protection System Specific to Foreign Investment

It is possible to discern a specific system for the protection of foreign investment in the current legal-normative structure of Brazilian Public Administration, starting with the constitutional provision for the entry of such investment, set out in Article 172 of the 1988 Federal Constitution:

Art. 172. The law is to regulate, based on national interests, foreign capital investment is to encourage reinvestment and is to regulate the remittance of profits.

This constitutional provision, albeit of a programmatic nature, demonstrates that the Public Administration should be zealous in meeting its responsibilities for the maintenance of the premises for foreign investment. In fact, the core provisions of the Constitution also reflect these responsibilities, setting out the guaranteed right to private ownership of property (129) and free initiative as cornerstones of the Brazilian Democratic State under Rule of Law. Measures protecting against the expropriation of capital are also present in this system, such as the rules on compulsory acquisition and the constitutional obligation to provide equitable financial redress in advance, (130) which inhibit the use of such acquisition by the Public Administration.

Furthermore, the separation of powers principle, the Brazilian legislative process and the requirements of due process serve as a tacit, albeit effective, guarantees for the foreign investor that his invested capital will not be subject to arbitrary action by government agencies in political machinations involving the administration of public assets.

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[3] Legal Grounds for the Protection System Specific to Foreign Investment

Some aspects of the administrative law regime which is part of the system of protection for foreign investment are particularly worthy of note: Federal Law N. 4.131/62 is the Brazilian statute that deals with foreign investments. Article 1 defines foreign capital as:

the materials, machinery and equipment which enter Brazil, without there being any initial disbursement of foreign currency, destined for the production of goods or provision of services, as well as financial or monetary resources, introduced into the country for application in economic activities, provided that, in both cases, they are owned by individuals or legal entities who are resident, domiciled or headquartered abroad. (131)

It is important to stress that the Brazilian State seeks to avoid drawing distinctions based on the origin of the capital. This can be seen from the provision set out in Article 2 of Federal Law N. 4.131/62, which provides that ‘foreign capital invested in this country is to be afforded legal treatment which is identical to that given to national capital, and on equal conditions, with any discrimination not provided for in this law being prohibited’.

Although the Federal Law is not entirely capable of satisfactorily dealing with the twenty-first century issues emerging in this field it does reflect the receptivity of the State to the investments and is an element in the body of legislation favourable to foreign capital. The new juridical models applied to infrastructure projects – examples of such models being public service concessions and permissions under Federal Law N. 8.987/95 and, more recently, public-private partnerships (Federal Law N. 11.079/04) –, offer greater parity in contractual relationships pertaining to the economic activities of the Public Administration. There has consequently been a shift away from an authoritarian-style Public Administration and towards contracts which are considerably more transparent and which give rise to contractual performance which is much more interdependent; private entities are given guarantees which would be unusual in the traditional contracts entered into by the Public Administration.

Another reflex of the stimulus for the contractual activity of the Public Administration is the – originally North American – phenomenon of ‘agencification’ (132) in the organizational structure of the Public Administration. This phenomenon consists of the de-centralization of the powers of the direct Public Administration to entities that have greater independence from the Executive and which have well-defined, regulatory and management functions. The practical consequence of this phenomenon is that some agencies – which are considered to be regulatory agencies – effectively exercise the role of P 101 government in the juridical models of infrastructure projects (they also manage the P 102 infrastructure sectors for which they were established and exercise control over the entities that operate in these sectors). The National Electric Energy Agency (ANEEL), (133) the National Telecommunications Agency (ANATEL), (134) the National Petroleum Agency (ANP) (135) and the National Agency for Road Transport (ANTT) (136) are examples of such agencies.

Examples of agencies which form part of the indirect Public Administration and have administrative autonomy, being quasi-governmental in nature – known in Brazil as autarquias – are the Brazilian Anti-Trust Authority (CADE), (137) which seeks to protect free competition in the market, and the Brazilian Securities and Exchange Commission (CVM). (138) These agencies are a significant force in the markets in which they operate.

This independent sectorial regulation of the Public Administration removes the command of strategic sectors from government management (which may be driven by underlying interests).

[4] The Concept of Good Administration under Brazilian Administrative Law

The Public Administration needs to undergo a constant process of updating and qualification – in its structure, organization, functioning and control, as a means of combating inadequate use or functioning of the state administrative system. This is necessary not only in order keep pace with all these changes but also so as to better meet the needs of the population at which the actions and services of the Public Administration are aimed.

One of the proposals (originally from Italy) which is being debated internationally and currently being developed in the European Union (2000) (139) is that of *Good Administration*, which is being looked at, in particular, from the perspective of control and liability. It requires attention to be paid to the efficacy and efficiency of administrative actions and reinforces and expands the internal and external duties of administration entities.

Within the ambit of the European Union, *Good Administration* requires administrative bodies to comply with their rules and principles by which they are bounds, with a view to improving the quality of services and relations with citizens. This is more than merely a legal value – it, is, in fact a fundamental right of European citizens, which they are entitled P 102 to assert against the Administration of the European Union. It falls, principally, to the P 103 European Ombudsman to file proceedings or rule on (140) complaints of maladministration. There are also the concepts of 'overriding rights' (super law), synthesis rights and guaranteed rights which combine with and reinforce the observance of other rights provided for in the European legal system.

The legal nature of *Good Administration* is that of a *strictu senso* duty which is objective in nature and for which there is no corresponding subjective right. The concept behind *Good Administration* is that the administrative activity should translate into actions driven by the need to satisfy, as quickly and rationally as possible, the public aims established by the Constitution and by infra-constitutional laws.

Brazil has a normative framework which is favourable to the adoption of the concept of Good Administration, to wit:

- the constitutionalization of Administrative Law by the Federal Constitution of 1988;
- the constitutional principiology of the Public Administration (Article 37 of the 1988 Federal Constitution);
- the [duty on] the Administration to be a protagonist in putting fundamental rights into effect;
- the broad range of explicit and implicit duties of the Administration, set out in the 1988 Constitution and infra-constitutional legislation;
- the predominance of constitutional duties over public sector prerogatives;
- the democratization of the Administration and public governance;
- the responsible conduct of public affairs with the inclusion in the decision-making process of individuals and entities at whom the decision is directed.

The role of the Brazilian judiciary has been increasing in relevance, due to its monitoring and external control of the Public Administration, with the establishment of parameters for the conduct of public administrators, based on the tenets of the Brazilian legal system. (141) , (142)

Thus, following necessary adjustments, the concept of Good Administration is a driving force in state activity, establishing greater accountability for the public player, which may be held liable for its acts not only under the traditional constitutional and legal bases of the system of protection for investors but also under the requirement for transparency and the good governance of public affairs.

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[5] Judicial Grounds for the Protection System Specific to Foreign Investment

The judicial control of the acts of the Public Administration also offers legal security to the investor. The existence of systems for the harmonization of the rulings of Brazilian courts, including the binding precedent (*súmula vinculante*) system, (143) means that the prevailing position [on an issue] of Brazilian courts is foreseeable, guaranteeing stability and confidence in the Brazilian judicial system.

It is nonetheless relevant to mention the Public Administration's increasing recourse to arbitration as a mechanism of dispute resolution. Despite the fact that there is still some resistance to this in the most conservative quarters of legal doctrine and in the rulings of some administrative accounting tribunals, (144) the favourable prevailing view in the doctrine and in the decisions of the superior courts (145) has encouraged public agents to insert arbitration clauses into the new modalities of administrative contracts.

In addition to the stance taken by the judiciary, there is favourable legislative provision (146) as to the adoption of arbitration in administrative contracts. The favourable legal and legislative scenario has encouraged the professionalization of public sector attorneys and private practitioners who practice in the field as well as [the development of] national institutions that administer arbitral proceedings. (147)

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[6] Exposure of the Challenges for the Effectiveness of the Protection System Specific to Foreign Investment

Having described the foundations upon which an investment protection system, arising out of Brazilian Administrative Law is based, we now turn to the problematic issues in this field. The deficit in the establishment of the premises for investment – confidence – security and stability – is due to difficulties in putting into effective practice the constitutional and legislative bases and case law. In other words, the operational application of the tools provided to public players has not yet reached the desired level.

Although the constitutional and statutory framework is consolidated and grants the investor legislative security, there are still challenges to be dealt with in the application of the concepts of Good Administrative Governance to public administration. Further challenges are to be found in the need to institutionally strengthen the agencies (which came into existence comparatively recently) and the need for the definitive consolidation of arbitration as a more adequate means of the resolution of disputes between the Public Administration and private entities in relation to infrastructure contracts.

We do not, however, consider that it is necessary to import legal techniques, in the form of investment treaties, for the purposes of the effective concretization of the premises for investment. Brazilian Administrative Law has the necessary framework with which to establish an environment of stability and to gain the confidence of other investment players, on the basis of legal security in the contractual relations.

5.04 Conclusions

BITs are frequently assumed to have a positive impact on FDI inflow to developing countries. The evidence for such an assertion is, however, inconclusive. The leading econometric studies conducted to date have failed even to reach a consensus on the proper methodology to be applied. Unsurprisingly, their conclusions are inconsistent. The real message that should be taken from these studies is that the supposed positive relationship between BITs and FDI has yet to be proven. The increase in the number of BITs in the last twenty years is probably due to a belief in the positive effect of investment treaties on the economies of developing countries. No clear evidence has yet been found to support that belief.

The case of Brazil is, in our view, highly significant. Brazil has received approximately USD 442 billion in FDI over the past twenty years without ratifying a single BIT in the same period. Considering the lack of concrete evidence as to the possible positive effects of BITs on economic growth in general and, further, bearing in mind the costs to the country's regulatory sovereignty associated with BITs, we see no reason for a sudden departure from Brazil's traditional position on this matter.

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Our view is that the reasons for Brazil's relative success in obtaining fresh flows of FDI lie, primarily, in the scale of its market, the rates of return it offers on investment, its GDP, the relative solidity of Brazilian institutions and the existence of a regulatory framework which is favourable to domestic arbitration and the protection of property rights. Although it is conceivable that some positive effect on institutional quality might follow on from the ratification of a BIT, this potential benefit appears to us be relatively minor in comparison to the scale of restriction on the country's sovereignty that would be required in return.

References

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1) Jason Webb Yackee, *Are Bits Such a Bright Idea? Exploring the Ideational Basis of Investment Treaty Enthusiasm*, 12 U. Cal. Davis J. Intl. L. 219 (2005).

2) In this article, we use ‘home State’ to refer to the State of which the individual investor is a national or in which the corporate investor was set up or where it has its head office. ‘Host State’ refers to the State in which the investment was made.

3) Article 1 (*Draft Articles on Diplomatic Protection, with commentaries*, 2006, Yearbook of the International Law Commission, 2006, vol. II, Part Two. Text adopted by the International Law Commission at its fifty-eighth session, in 2006, and submitted to the General Assembly as a part of the Commission’s report covering the work of that session (A/61/10). See also J. Dugard, *First Report on Diplomatic Protection*, A/CN.45/506 (2000), http://untreaty.un.org/ilc/documentation/english/a_cn4_506.pdf (accessed 28 Ago. 2013) and subsequent reports.

4) ‘Under international law, a State is responsible for injury to an alien caused by its wrongful act or omission. Diplomatic protection is the procedure employed by the State of nationality of the injured persons to secure protection of that person and to obtain reparation for the internationally wrongful act inflicted.’ (*Draft Articles on Diplomatic Protection, with commentaries*, *supra* n. 3).

5) So held the Permanent Court of International Justice in the well-known case of *Mavromatis Palestine Concessions: ‘It is an elementary principle of international law that a state is entitled to protect its subjects, when injured by acts contrary to international law committed by another state, from whom they have been unable to obtain satisfaction through the ordinary channels’* (*PCIJ Rep Series A no. 2* (1924)).

6) See E. de Vattel, *The Law of Nations or the Principles of Natural Law Applied to the Conduct and to the Affairs of Nations and Sovereigns* vol. III ch. VI, 136 (1758, English translation by C.G. Fenwick, Carnegie Institution, Washington 1916); Newcombe, Andrew; Paradell, Luís. *Law and Practice of Investment Treaties* 5 (Kluwer L. Intl. 2009) and J.L. Brierly, *The Law of Nations: An Introduction to the International Law of Peace* (6th ed., Clarendon Press 1963), Sir H. Waldock ed., at 276-277.

7) Newcombe, Andrew; Paradell, Luís *supra* n. 6, at 6.

8) See Arts 3 through 10 of the *Draft Articles on Diplomatic Protection, with commentaries* (*supra* n. 3). See also *The Loewen Group, Inc. and Raymond L. Loewen v. United States*, http://italaw.com/sites/default/files/case-documents/ita0470.pdf (accessed 7 Jul. 2013); *Tokios Tokelės v. Ukraine*, https://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC2232_En&caseId=C220 (accessed 7 Jul. 2013), *Waguih Elie George Siag and Clorinda Vecchi v. Egypt*, http://italaw.com/sites/default/files/case-documents/ita0786_0.pdf (accessed 7 Jul. 2013); and J. Paulsson, *Denial of Justice in International Law* 183-184 (Cambridge U. Press 2005).

9) As the ICJ stated in the *Interhandel* case: ‘[t]he rule that local remedies must be exhausted before international proceedings may be instituted is a well-established rule of customary international law; the rule has been generally observed in cases in which a State has adopted the cause of its national whose rights are claimed to have been disregarded in another State in violation of international law. Before resort may be had to an international court in such a situation, it has been considered necessary that the State where the violation occurred should have an opportunity to redress it by its own means, within the framework of its own domestic legal system.’ (*Switzerland v. USA*, I.C.J. Reports 1959, at 27).

10) *Elettronica Sicula S.p.A.* (ELSI) (*United States of America v. Italy*), I.C.J. Reports 1989, at 43-44, para. 53.

11) ‘A State has the right to exercise diplomatic protection on behalf of a national. It is under no duty or obligation to do so. The internal law of a State may oblige a State to extend diplomatic protection to a national, but international law imposes no such obligation.’ (*Draft Articles on Diplomatic Protection, with commentaries*, *supra* n. 3, at 29). See also Newcombe, Andrew; Paradell, Luís *supra* n. 6, at 6.

12) For an account of earlier exercise of diplomatic protection, see I. Brownlie, *Principles of Public International Law* 500 (6th ed., Oxford U. Press 2003).

13) Roberto Castro de Figueiredo, *As Origens do Uso da Arbitragem como Modo de Solução de Controvérsias em Disputas Relativas a Investimentos*, Revista Brasileira de Arbitragem, Edição Especial, *A Proteção ao* Investimento Estrangeiro (2011) at. 8-9.

14) I. Brownlie, *Principles of Public International Law* 500 (6th ed., (Oxford U. Press 2003).

15) The Iran-US Claims Tribunal was the first international tribunal established to decide on investment claims. Its case law remains a valuable source for the decisions of modern investment treaty tribunals (Newcombe, Andrew; Paradell, Luís *supra* n. 6, at 39).

16) Newcombe, Andrew; Paradell, Luís *supra* n. 6, at 7.

17) See *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, Preliminary Objections, Judgment, I.C.J. Reports (2007), at 582; *Pulp Mills on the River Uruguay* (*Argentina v. Uruguay*); *Anglo-Iranian Oil Co. Case* (*UK v. Iran*), ICJ Rep 93 (1952); *Case of Certain Norwegian Loans* (*France v. Norway*), ICJ Rep 9 (1957); *Barcelona Traction, Light and Power Company Ltd.* (*Belgium v. Spain*), ICJ Rep 3 (1970); *Elettronica Sicula S.p.A. (ELSI)* (*US v. Italy*) ICJ Rep 15 (1989).

18) *Barcelona Traction, Light and Power Company Ltd. supra* n. 17 and Newcombe, Andrew; Paradell, Luís *supra* n. 6, at 35-6. In order to resolve the issues raised by the ICJ in this case, the rules of the *Draft Articles on Diplomatic Protection* of the International Law Commission provide that, in certain cases, the place of incorporation of a company may be ignored for the purposes of diplomatic protection: 'Article 9. State of nationality of a corporation. For the purposes of the diplomatic protection of a corporation, the State of nationality means the State under whose law the corporation was incorporated. However, when the corporation is controlled by nationals of another State or States and has no substantial business activities in the State of incorporation, and the seat of management and the financial control of the corporation are both located in another State, that State shall be regarded as the State of nationality.' (*Draft Articles on Diplomatic Protection, with commentaries*, *supra* n. 3, at 52).

19) *Ahmadou Sadio Diallo supra* n. 17, at 617.

20) Newcombe, Andrew; Paradell, Luís *supra* n. 6, at 36.

21) 'The state must be viewed as the sole judge to decide whether its protection will be granted, to what extent it is granted and when it will cease. It retains in this respect a discretionary power the exercise of which may be determined by consideration of a political nature, unrelated to the particular case' (ICJ Rep 3 (1970)). See also *Panevezys-Saldutiskis Railway case* (*Estonia v. Lithuania*), PCIJ, Series A/B, No. 76 (1939), and the *Nottebohm Case* (*Lichtenstein v. Guatemala*), ICJ Report (1955), at 4.

22) *West Rand Central Gold Mining Co. v R* (1905) 2 KB 391.

23) 'In the early years of international law the individual had no place, no rights in the international legal order. Consequently if a national injured abroad was to be protected this could be done only by means of a fiction - that an injury to the national was an injury to the State itself. This fiction was, however, no more than a means to an end, the end being the protection of the rights of an injured national. Today the situation has changed dramatically. The individual is the subject of many primary rules of international law, both under custom and treaty, which protect him at home, against his own Government, and abroad, against foreign Governments. This has been recognized by the International Court of Justice in the *La Grand* and Avena cases' (*Draft Articles on Diplomatic Protection, with commentaries*, *supra* n. 3, at 25-26).

24) Zachary Douglas, *Hybrid Foundations of Investment Treaty Arbitration* (2003) 74 BYIL 151, at 183. See also the decision of the English Court of Appeals in *Occidental Exploration & Production Company v. Ecuador*: 'The functional assumption underlying the investment treaty regime is clearly that the investor is bringing a cause of action based upon the vindication of its own rights rather than those of its national State.' (QB 432 (2006), par. 18).

25) See *Petroleum Development Ltd. v. The Sheikh of Abu Dhabi* (1951) 18 ILR 144; *Ruler of Qatar v. International Marine Oil Co.* 20 ILR 534(1953); *Saudi Arabia v. Arabian American Oil Co.(ARAMCO)* 27 ILR 117 (1963); *Sapphire International Petroleums Ltd. v. National Iranian Oil Co.* 35 ILR 136 (1963); *BP Exploration Company Ltd. v. Libya* 53 ILR 297 (1979); *Texaco Overseas Petroleum Co. (TOPCO) and Californian Asiatic Oil Co. v. Libya* 53 ILR 389 (1979); *Libyan American Oil Co. (LIAMCO) v. Libya*) 20 ILM 1 (1981); *Kuwait v. American Independent Oil Company (AMINOIL)*, 21 ILM 976 (1982), and *Elf Aquitaine Iran v. NIOC* 11 YCA 112 (1982).

26) Newcombe, Andrew; Paradell, Luís, *supra* n. 6, at 24.

27) *Southern Pacific Properties (SPP Middle East) Limited v. Egypt* (Decision on Jurisdiction, 27 Nov. 1985) 3 ICSID Rep 112.

28) Article 8 of Law no. 43 provided in relevant part: 'Investment disputes in respect of the implementation of the provisions of this Law shall be settled in a manner to be agreed upon with the investor, or within the framework of the agreements in force between the Arab Republic of Egypt and the investor's home country, or within the framework of the Convention for the Settlement of Investment Disputes between the State and the nationals of other countries to which Egypt has adhered by virtue of Law No. 90 of 1971, where such Convention applies'.

29) 'On the basis of the foregoing considerations, the Tribunal finds that Art. 8 of Law No.43 establishes a mandatory and hierarchic sequence of dispute settlement procedures, and constitutes an express 'consent in writing' to the Centre's jurisdiction within the meaning of Art. 25(1) of the Washington '38' Convention in those cases where there is no other agreed upon method of dispute settlement and no applicable bilateral treaty.' (*SPP v. Egypt*, *supra* n. 27).

30) Jan Paulsson, *Arbitration without Privity*, 10 ICSID Rev. 232 (1995).

31) See *supra* n. 25.

32) See also Investment Code of Guinea, Ordinance No. 001/PRG/87 of 3 Jan. 1987, the Investment Code, http://www.wipo.int/wipolex/en/text.jsp?file_id=193938 (accessed 7 Jul. 2013); Sri Lanka, Sec. 26 (1) of the Greater Colombo Economic Commission Law, 1978, http://www.customs.gov.lk/docs/25380.pdf (accessed 7 Jul. 2013); and the Investment Code of Togo, Art. 4 of Law No. 85-3 of 29 Jan. 1985, http://www.droit-afrique.com/images/textes/Togo/Togo%20-%20Code%20des%20investissements.pdf (accessed 7 Jul. 2013).

33) *Asian Agricultural Products Ltd (AAPL) v. Sri Lanka* (Award, 27 Jun. 1990, ICSID Reports, 4 (1997), at 246).

34) Charles N. Brower & Lee A. Steven, *Who Then Should Judge?: Developing the International Rule of Law Under NAFTA Chapter 11*, 2 Chi. J. Intl. L. 193, 196 (2001); Catherine A. Rogers, *The Arrival of the 'Have-Nots' in International Arbitration*, 8 Nev. L. J. 341, 356–57 (2007), and Andrea Kupfer Schneider, *Getting Along: The Evolution of Dispute Resolution Regimes in International Trade Organizations*, 20 Mich. J. Intl. L. 697, 717 (1999).

35) Susan D. Franck: *Development and Outcomes of Investment Treaty Arbitration*, 50 Harv. Intl. L. J. 442 (2009).

36) Jason Yackee *supra* n. 1, at 221.

37) Gustavo Fernandes de Andrade, *Exceções e Defesas nas Arbitragens de Investimento*, Revista Brasileira de Arbitragem, Edição Especial, *A Proteção ao Investimento Estrangeiro* (2011), at 181.

38) Jason Webb Yackee, *Do Bilateral Investment Treaties Promote Foreign Direct Investment: Some Hints from Alternative Evidence*, 51 Va. J. Intl. L. 397, at 405.

39) 'By providing foreign investors with an escape clause, the impetus for broader improvement of domestic institutions – particularly as a result of external pressure – might be expected to be reduced. The ramifications of these special dispute procedures, with their special avenues for foreign investors, may be negative in human development terms. One author, in a recent study of the impact of BITs upon governance in developing countries, has warned that 'developing countries can find themselves in a trap of low quality institutions wherein no political coalition can form to support institutional improvement. Indeed, the presence of international alternatives to adjudicatory or regulatory bodies may reduce local institutional quality under certain conditions.' (Mark Halle & Luke Erik Peterson, *Investment Provisions in Free Trade Agreements and Investment Treaties - Opportunities and Threats for Developing Countries* 24). See also, Susan D. Franck, *Foreign Direct Investment, Investment Treaty Arbitration, and the Rule of Law*, 19 Global Business & Development L. J. 337, at 365 (2007) and Tom Ginsburg, *International Substitutes for Domestic Institutions: Bilateral Investment Treaties and Governance*, 25 Intl. Rev. L. & Econ. 107, at 119-122.

40) Germany Model Treaty 2008, http://www.italaw.com/sites/default/files/archive/ita1025.pdf (accessed 7 Jul. 2013).

41) Canada Model Treaty 2004, http://italaw.com/documents/Canadian2004-FIPA-model-en.pdf (accessed 7 Jul. 2013).

42) US Model Treaty 2012, http://www.italaw.com/sites/default/files/archive/ita1028.pdf (accessed 7 Jul. 2013).

43) As Mary Hallward-Driemeier put it, 'Recent and pending cases of international investment disputes covered by investment treaties have raised concerns of the potential costs to host governments – both in terms of the size of potential awards and in the possible reduction of viable choices open to policy makers due to their adverse effects on foreign investors. Critics speculate that these cases will serve to encourage firms to look for ways to exploit the terms of the treaty as a lucrative way of doing business, seeking compensation for risks that they had not previously expected to be protected from. Given the increasing concern about the potential and often unanticipated costs of BITs, it is all the more important to examine whether BITs are delivering their expected benefits. If so, policy makers have the task of weighing the benefits and potential costs against in other.' (*Do Bilateral Investment Treaties Attract FDI? Only a bit and they could bite* (2003), at 22, http://elibrary.worldbank.org/docserver/download/3121.pdf?expires=1372265316&id=id&accname=guest&checksum=CAAB88835825805F1AC0E2258CE63193 (accessed 7 Jul. 2013)).

44) <UNCTAD World Investment Report 2012: Towards a New Generation of Investment Policies, p. 84, http://www.unctad-docs.org/files/UNCTAD-WIR2012-Full-en.pdf > (accessed 28 Ago. 2013).

45) T. Büthe, T. & H.V. Milner, *The politics of foreign direct investment into developing countries: Increasing FDI through trade agreements*?, http://www.duke.edu/~buthe/downloads/ButheMilner_AJPS_Oct2008.pdf (accessed 7 Jul. 2013); Z. Elkins, A. T. Guzman & B. A. Simmons, *Competing for capital: The diffusion of bilateral investment treaties, 1960-2000*, http://scholar.harvard.edu/bsimmons/files/bsimmons_competing_capital.pdf (accessed 7 Jul. 2013); E. Neumayer & L. Spess, *Do bilateral investment treaties increase foreign direct investment to developing countries?* http://eprints.lse.ac.uk/627 (accessed 7 Jul. 2013); Suzan Rose-Ackerman and Jennifer Tobin, *Foreign direct investment and the business environment in developing countries: the impact of bilateral investment treaties* http://deepblue.lib.umich.edu/bitstream/2027.42/39973/3/wp587.pdf (accessed 7 Jul. 2013).

46) There are studies which argue that BITs increase FDI (e.g., K. Sauvant & L. Sachs eds., *The Effects of Treaties on Foreign Direct Investment: Bilateral investment treaties, double taxation treaties and investment flows* (Oxford U. Press 2009); J. Salacuse & N. Sullivan, *Do BITs really work? An evaluation of bilateral investment treaties and their grand bargain*, 46 Harv. Intl. L.J. 67 (2005); D. Swenson, *Why do developing countries sign BITs?* (12 J. Intl. L. & Policy 131-154 (2005); R. Grosse & L. Trevino, *New Institutional economics and FDI in Central and Eastern Europe* (2005, MIR, 45: 123-135); K. Gallagher & M.B.L. Birch, *Do Investment agreements attract investment? Evidence from Latin America*, 7 J. World Investment & Trade 1–21 (2006), whilst others show completely opposite results: Hallward-Driemeier, *supra* n. 43; Jason Webb Yackee, *Do BITs really work? Revisiting the Empirical Link Between Investment Treaties and Foreign Direct Investment* (*in* The Effects of Treaties on Foreign Direct Investment 379 (Karl P. Sauvant & Lisa E. Sachs eds., 2009)) and Emma Aisbett, *Bilateral investment treaties and foreign direct investment: correlation versus causation*, Munich Personal RePEc Archive (2007), http://mpra.ub.uni-muenchen.de/2255/ (accessed 7 Jul. 2013).

47) 'A first econometric analysis by UNCTAD (1998b) had assumed that BITs should impact on FDI in bilateral flows between BIT contracting parties close to the year of concluding the BIT. However, the analysis of time-series data on bilateral FDI flows – three years prior to and three years after the conclusion of a BIT – in relation to 200 BITs during 1971–1994 did not indicate an impact. The examination of the correlation between the amount of FDI and the number of BITs in 133 countries in 1995, however, showed an impact, although not a strong one. In explaining the difference, UNCTAD speculated that the impact of a BIT on FDI flows may materialize many years after its conclusion, when additional necessary FDI determinants are put in place, such as more openness to FDI or improvement of macroeconomic conditions and other components of the FDI framework (UNCTAD, 1998b: 117–118). In addition, after finding evidence that foreign investors often encourage their governments to enter into BITs with host countries – irrespective of whether they have already made an investment in these countries – and that BITs may matter as a special protection for small and medium-sized enterprises (SMEs), UNCTAD concluded that BITs do have an impact on FDI flows, although the investment amounts involved may be too small to affect significantly the total or bilateral flows of the host countries involved in these analyses. (United Nations Conference On Trade And Development, *The Role of International Investment Agreements in Attracting Foreign Direct Investment to Developing Countries*, UNCTAD Series on International Investment Policies for Development (2009), at 34 http://unctad.org/en/Docs/diaeia20095_en.pdf (accessed 07 Jul. 2013). See also Yackee, *supra* n. 38, at 407.

48) 'Bilateral investment treaties (BITs) which emphasize on non-discriminatory treatment of FDI, play an important role in attracting FDI inflows into developing countries. However, bilateral investment agreements with developed countries and developing countries may have differential impact. Results show that BITs with developed countries have a stronger and more significant impact on FDI inflows as compared to BITs with developing countries. With respect to regional investment agreements we find that different regional investment agreements have different impact. While APEC is found to have a significant positive impact on FDI inflows ASEAN is not found to affect FDI inflow. However, it is noted that regional agreements may be still too new to show an impact in the period studied' (*Impact of Government Policies and Investment Agreements on FDI Inflows* (2003), at 34 http://dspace.cigilibrary.org/jspui/bitstream/123456789/21650/1/Impact%20of%20Government%20Policies%20and%20Investment%20Agreements%20on%20FDI%20Inflows.pdf? (accessed 7 Jul. 2013).

49) 'Analyzing twenty years of bilateral FDI flows from the OECD to developing countries finds little evidence that BITs have stimulated additional investment. Those countries with weak domestic institutions, including protection of property, have not gotten significant additional benefits; a BIT has not acted as a substitute for broader domestic reform. Rather, those countries that are reforming and already have reasonably strong' (*Do bilateral investment treaties attract foreign direct investment?*, at 22, http://elibrary.worldbank.org/docserver/download/3121.pdf?expires=1372265316&id=id&accname=guest&checksum=CAAB88835825805F1AC0E2258CE63193org/docserver/download/3121.pdf?expires=1372265316&id=id&accname=guest&checksum=CAAB88835825805F1AC0E2258CE63193 (accessed 07 Jul. 2013).

50) Yackee, *supra* n. 38, at 407.

51) 'Overall, we conclude that the relationship between BITs and FDI is weak. In general, BITs appear to have little impact on FDI. Likewise, we find little relationship between the existence of a BIT with the United States and the level of US FDI. Where there is a relationship, it is weakly negative. However, BITs are not always ineffectual. Indeed, when countries are relatively risky, we find that BITs do attract greater amounts of FDI. This indicates that one of the major reasons for signing BITs, decreasing the risk of property rights infringement for foreign investors, may indeed be fulfilled. BITs, therefore, appear to be important instruments for riskier countries that wish to attract FDI, but, in general, they may not fulfill their major objective.' (*Foreign Direct Investment and the Business Environment in Developing Countries: the Impact of Bilateral Investment Treaties,* at 31 http://deepblue.lib.umich.edu/bitstream/handle/2027.42/39973/wp587.pdf?sequence=3 (accessed 07 Jul. 2013).

52) In a later, 2006, study, the authors suggested that BITs have a positive effect on FDI to developing countries, but this impact depended largely on the political and economic environment of that country, so that, for example, poor countries need to improve their political institutions and lower their perceived political risks before an increase in FDI may be perceived. (*When BITs Have Some Bite: The Political-Economic Environment for Bilateral Investment Treaties*, The Review of International Organizations (March 2011) Volume 6, Issue 1, at 1-32).

53) *The impact of bilateral investment treaties on foreign direct investment*, 32 J. Comp. Econ. Elsevier 788–804 (2004).

54) *Bilateral investment treaties and foreign direct investment: a political analysis*, *in* K.P Sauvant & L.E Sachs (2009). *The Effects of Treaties on Foreign Direct Investment: Bilateral Investment Treaties, Double Taxation Treaties and Investment Flows.* New York. Oxford U. Press, at 213-4.

55) *Do BITs really work? An evaluation of bilateral investment treaties and their grand bargain*, 46 Harv. Intl. L. J.67–130, at 408. Salacuse and Sullivan conclude that: '1. A United States BIT is more likely than not to exert a strong and positive role in promoting United States investment. 2. A United States BIT is more likely than not to exert a strong and positive role in promoting overall investment. 3. A United States BIT is likely to exert more of an impact than other OECD BITs in promoting overall investment' (at 110).

56) *Apud* Yackee *supra* n. 38, at 408.

57) K.P. Gallagher and M.B.I Birch however reached the opposite conclusion, finding no increase in FDI to countries that ratified BITs with the US (*Do investment agreements attract investment*? *Evidence from Latin America*, 7 J. World Inv. & Trade 961–974, 972 (2006).

58) *Do bilateral investment treaties increase foreign direct investment to developing countries?* 2005 (http://eprints.lse.ac.uk/archive/00000627).

59) *Bilateral Investment Treaties, Credible Commitment, and the Rule of (International) Law: Do BITs Promote Foreign Direct Investment?* 42 Law & Socy. Rev. 805, 827-828 (2008).

60) Emma Aisbett, *supra* n. 46, at 31-32.

61) *Outline of a normative framework for evaluating interpretations of investment treaty protections*, Evolution in Investment Treaty Law and Arbitration, Chester Brown and Kate Miles eds, 1st ed. Cambridge: Cambridge U. Press (2011) 117-144, at 131.

62) 'As there is mixed empirical and anecdotal evidence about the impact investment treaties have on FDI, it is not surprising that the evidence with regard to the specific effect of investment treaty arbitration is also unclear. Nevertheless, the substantive and procedural rights offered in investment treaties have important implications for foreign investment decisions and the rule of law, and they are certainly worthy of ongoing consideration' (Susan D. Franck, *Foreign Direct Investment, Investment Treaty Arbitration, and the Rule of Law*, McGeorge Global Business and Development Law Journal, vol. 19, p. 337 (2007), at 373.

63) Jason Yackee *supra* n. 1, at 221.

64) Cf. *Generation Ukraine, Inc. v. Ukraine*, ICSID case no. ARB/00/9, 16 September 2003, http://italaw.com/sites/default/files/case-documents/ita0358.pdf (accessed 07 Jul. 2013); *Saluka Investment BV v. The Czech Republic*, Uncitral Partial Award, 17 March 2006 http://italaw.com/sites/default/files/case-documents/ita0740.pdf (accessed 07 Jul. 2013); *Sedco, Inc. v. National Iranian Oil Co.*, 9 Iran-US CTR 248 (1985); *SD Myers, Inc. v. Government of Canada*, Partial Award of 13 November 2000, 40 ILM 1408 (2001); and *CME Czech Republic BV v. The Czech Republic*, Uncitral Arbitral Tribunal, Final Award of 14 March 2003, http://www.cetv-net.com/ne/articlefiles/439-Final_Award_Quantum.pdf (accessed 07 Jul. 2013).

65) *The Oxford Handbook of International Investment Law*, Peter Muchlinski, Federico Ortino and Christoph Schreuer editors, chapter 11, *Expropriation*, August Reinisch, Oxford University Press, (2008).

66) 'Predictability is one of the most important objectives of any legal system. It would be useful if it were absolutely clear in advance whether particular events fall within the definition of an 'indirect' expropriation. It would enhance the sentiment of respect for legitimate expectations if it were perfectly obvious why, in the context of a particular decision, an arbitral tribunal found that a governmental action or inaction crossed the line that defines acts amounting to an indirect expropriation. But there is no checklist, no mechanical test to achieve that purpose. The decisive considerations vary from case to case, depending not only on the specific facts of a grievance but also on the way the evidence is presented, and the legal bases pleaded. The outcome is a judgment, i.e. the product of discernment, and not the printout of a computer programme' (*Generation Ukraine, Inc v. Ukraine*, *supra* n. 64, at para. 20.29).

67) William W. Burke-White, *The Argentine Financial Crisis: State Liability under BITs and the Legitimacy of the ICSID System*, in *The Backlash against Investment Arbitration, Perceptions and Reality*, Michael Waibel et al. eds., Wolters Kluwer (2010), at 407-412.

68) Jason Yackee *supra* n. 1, at 222-223.

69) Brazil singed, without ratifying, the following treaties for the protection of foreign investment: 1) Portugal, February 1994; 2) Chile, March 1994; 3) United Kingdom, July 1994; 4) Switzerland, November 1994; 5) France, March 1995; 6) Finland, March 1995; 7) Italy, April 1995; 8) Denmark, May 1995; 9) France, May 1995; 10) Venezuela, July 1995; 11) Republic of Korea, September 1995; 12) Germany, September 1995; 13) Cuba, June 1996; 14) Holland, November 1998; 15) Belgium and Luxembourg, January 1999; https://icsid.worldbank.org/ICSID/FrontServlet (accessed 07 Jul. 2013). Within Mercosul, Brazil entered into two treaties, the 'Protocol of Colonia for the Promotion and Reciprocal Protection of Investments' and the 'Protocol of Buenos Aires for the Promotion and Protection of Investments from Non-Member Countries' (Adriana Noemi Pucci, *Arbitragem e Investimentos Estrangeiros*, Revista Brasileira de Arbitragem, ano I, n.º 2, abril-junho de 2004, at 17-18).

70) The figures for Brazilian FDI inflow from 1993 to 2012 are as follows: 1993 USD 801,000,000; 1994 USD 2,035,000,000; 1995 USD 3,475,000,000; 1996 USD 11,667,000,000; 1997 USD 18,608,000,000; 1998 USD 29,192,000,000; 1999 USD 26,886,000,000; 2000 USD 30,497,600,000; 2001 USD 24,714,900,000; 2002 USD 14,108,100,000; 2003 USD 9,894,200,000; 2004 USD 8,338,900,000; 2005 USD 12,549,600,000; 2006 USD (9,380,300,000); 2007 USD 27,518,200,000; 2008 USD 24,601,100,000; 2009 USD 36,032,800,000; 2010 USD 36,917,000,000; 2011 USD 67,690,000,000, and 2012 USD 66,136,500,000, http://interwp.cepal.org/sisgen/ConsultaIntegradaFlashProc.asp (accessed 07 Jul. 2013).

71) The FDI ranking is as follows: (1) Brazil: USD 442,282,600,000; (2) Mexico: USD 277,580,100,000; (3) Argentina: USD 108,863,100,000; (4) Chile: USD 81,104,800,000; (5) Colombia: USD 74,459,800,000; (6) Venezuela: USD 22,419,500,000; (7) Uruguay: USD 17,433,300,000; (8) Bolivia: USD 9,527,500,000; and (9) Paraguay: USD 3,271,500,000, http://interwp.cepal.org/sisgen/ConsultaIntegradaFlashProc.asp (accessed 07 Jul. 2013).

72) Even if the relative sizes of the national economies are taken into account, the picture basically remains the same. Brazil is still amongst the top three countries in a ranking of accumulated FDI (1993-2012) per GDP (est. 2012 according to CIA World Fact Book 2013): (1) Uruguay 0,3256; (2) Chile 0,2539; (3) Brazil: 0,1872; (4) Bolivia 0,1753; (5) Mexico 0,1576; (6) Colombia 0,1490; (7) Argentina 0,1458; (8) Paraguay 0,0796; and (9) Venezuela 0,0558.

73) The ranking in terms of number of *ratified* BITs is as follows: (1) Argentina: 47; (2) Chile: 39; (3) Uruguay: 26; (4) Mexico: 22; (5) Paraguay: 21; (6) Bolivia and Venezuela: 19; and (8) Brazil: and Colombia: 0, https://icsid.worldbank.org/ICSID/FrontServlet (accessed 07 Jul. 2013).

74) See Eugênia Zerbini, *O Brasil à distância do direito internacional dos investimentos*, RDB 35/11; Gilberto Giusti and Adriano Drummond C. Trindade, *As Arbitragens Internacionais Relacionadas a Investimentos: A Convenção de Washington, o ICSID e a posição do Brasil*, RARB 7/49; José Carlos de Magalhçães, *Acordos Bilaterais de Promoção e Proteção de Investimentos*, RARB 20/53; Jean Kalick and Susana Medeiros, *Investment Arbitration in Brazil: Revisiting Brazil's Traditional Reluctance* Towards ICSID, BITs, and Investor-State Arbitration, RARB 14/57; and Eduardo Felipe P. Matias, *O Brasil e os Instrumentos Internacionais de Proteção aos Investimentos*, RARB 21/114.

75) Bolivia: Supreme Decree no. 28.701, Nationalization of Hydrocarbons Sector, 1 May 2006, 45 ILM 1020 (2006).

76) See Jean Kalick and Susana Medeiros, *supra* n. 73.

77) Inter-American Convention on International Commercial Arbitration, Panama Convention of January 30, 1975, Decree n. 1.902, of May 9, 1996; Las Leñas Protocol, Decree 2.067, of November 12, 1996; Inter-American Convention on the Extraterritorial Efficacy of Foreign Orders and Arbitral Awards, Montevideo Convention 1979, Decree 2.411, of December 2, 1997; New York Convention 1958, Decree n. 4.311, of July 23, 2002; Trade Agreement on Commercial Arbitration in Mercosul, with Argentina, Paraguay and Uruguay, Legislative-Decree n. 4.719, of June 4, 2003.

78) Law 8.987 of 1995 (Law of Concessions and Public Service Permissions), Art. 23-A; Law 9.472 of 1997 (General Law of Telecommunications), Art. 93, XV; Law 9.478 de 1997 (Law of Petroleum), Art. 43, X; Law 10.233 de 2001 (ANTT, ANTA and DNIT), Art. 35, XVI; Law 10.303 de 2001 (Reform of the Law of Corporations.); Art. 109, para. 3; Law 10.848 de 2004 (Law of the Electricity Sector), Art. 4, paras 5 and 6, Law 11.079 of 2004 (Law of PPPs), Art. 11, III; State PPP Laws: Minas Gerais (Law 14.868 of 2003); Santa Catarina (Law 12.930 of 2004); São Paulo (Law 11.688 of 2004); Goiás (Law 14.910 of 2004); Rio Grande do Sul (Law 12.234 of 2005); Ceará (Law 14.391 of 2009).

79) See research conducted by Fundação Getúlio Vargas and CBAR (Brazilian Committee on Arbitration): 'To sum up, it was possible to verify over time a clear evolution in the interpretation and enforcement of the Arbitration Law by the Courts. Furthermore, a particularly noticeable reality is the increasing acquaintance of the Judiciary with its technical concepts and the development of a virtuous circle between Judiciary and Arbitration, marked by the cooperation between judges and arbitrators, and by judicial control, when necessary, so as to ensure that the arbitration is treated as a legitimate and efficient means of dispute resolution, whose effects should be recognized when the parties voluntarily and validly opt for their use.' (translation by the author, http://cbar.org.br/PDF/Relatorio_Convencao_arbitral_ing.pdf (accessed 07 Jul. 2013)).

80) José Carlos de Magalhães, *supra* n. 74.

81) Investment treaties provide a broad range of general and specific standards of protection, such as fair and equitable treatment; the prohibition of arbitrary and discriminatory measures; full protection and security; compensation for extraordinary losses; more favorable treatment, as well as rules of international law on expropriation, transfer rights and compliance with contractual obligations (Newcombe, Andrew; Paradell, Luís *supra* n. 6, at 233). It would be beyond the scope of this article to provide a complete overview of all those standards, and we therefore focus on a select few.

82) Newcombe, Andrew; Paradell, Luís *supra* n. 6, at 321.

83) http://www.italaw.com/sites/default/files/archive/ita1026.pdf.

84) http://www.italaw.com/sites/default/files/archive/ita1031.pdf.

85) http://www.italaw.com/sites/default/files/archive/ita1028.pdf.

86) *Amco Asia Corporation v. Indonesia* (Award of 20 Nov. 1984) at para. 158 (1 ICSID Rep 413, at 455).

87) See *Metalclad v. Mexico*, http://www.italaw.com/sites/default/files/case-documents/ita0510.pdf (accessed 07 Jul. 2013); *Waste Management v. Mexico*, http://www.italaw.com/sites/default/files/case-documents/ita0900.pdf (accessed 07 Jul. 2013); *Pope & Talbot Inc. v. Canada* http://www.italaw.com/sites/default/files/case-documents/ita0674.pdf (accessed 07 Jul. 2013); *SD Myers v. Canada,* http://www.italaw.com/sites/default/files/case-documents/ita0747.pdf (accessed 07 Jul. 2013); *Compañía del Desarrollo de Santa Elena, S.A. v. Costa Rica,* https://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC539_En&caseId=C152 (accessed 07 Jul. 2013); *Generation Ukraine v. Ukraine*, http://www.italaw.com/sites/default/files/case-documents/ita0358.pdf (accessed 07 Jul. 2013); *Marvin Roy Feldman Karpa v. Mexico*, http://www.italaw.com/sites/default/files/case-documents/ita0319.pdf (accessed 07 Jul. 2013); and *Consortium RFCC v. Morocco*, http://www.italaw.com/sites/default/files/case-documents/ita0226.pdf (accessed 07 Jul. 2013).

88) *The Oxford Handbook of International Investment Law*, *supra* n. 65.

89) See *German Settlers' case* (*Germany v. Poland*, Advisory Opinion of 10 September 1923, PCIJ Ser B, no. 6, 1923*; Norwegian Shipowners' Claims* (*Norway v. USA*, PCA, 13 October 1922, 1 RIAA 307)*; Oscar Chinn case* (*UK v. Belgium*, 12 December 1934, PCIJ Ser A/B, no. 63)*; German Interests in Polish Upper Silesia* (*Germany v. Poland*, 25 May 1926, PCIJ Ser A, no. 7, 1926)*; Starret Housing Corp v. Iran* (4 Iran-US CTR 122, 1983)*; Amoco International Finance Corporation v. Iran* (15 Iran-US CTR 189, 1987)*; SPP v. Egypt* (3 ICSID Rep 189, 1992); *Wena Hotels v. Egypt* (6 ICSID Rep 68, 2000)*; Pope & Talbot Inc v. Canada*, http://www.naftalaw.org (accessed 07 Jul. 2013)*; Methanex Corp v. US* (Final Award of 3 August 2005, http://ita.law.uvic.ca/documents/MethanexFinal-Award.pdf (accessed 07 Jul. 2013)*; Biloune and Marine Drive Complex Ltd v. Ghana Investment Center and the Government of Ghana* (Award of 27 October 1989, 95 ILR 183)*;* and *CME Czech Republic BV v. The Czech Republic* (Award of 13 September 2001, 109 World Trade and Arbitration Materials 2002).

90) See *Impregilo SpA v. Pakistan* (Award of 22 April 2005, at http://ita.law.uvic.ca/documents/impregilo-decision.pdf (accessed 07 Jul. 2013)) and *Consortium RFCC v. Morocco* (Award of 22 December 2003, at http://ita.law.uvic.ca/documents/impregilo-decision.pdf (accessed 07 Jul. 2013)).

91) *Waste Management v. Mexico* (ARB(AF)/00/3, Award of 30 April 2004) and *SGS v. Philippines SGS* (Award of 29 January 2004, http://www.worldbank.org/icsid/cases/SGSvPhil-final.pdf (accessed 07 Jul. 2013)).

92) *The Oxford Handbook of International Investment Law*, *supra* n. 65.

93) *In the Matter of Revere Copper and Brass Inc. v. Overseas Private Investment Corporation* (56 ILR 258).

94) *German Interests in Polish Upper Silesia* (*Germany v. Poland*, 25 May 1926, PCIJ Ser A, no. 7, 1926).

95) *CME Czech Republic BV v. The Czech Republic* (Award of 13 September 2001, 109 World Trade and Arbitration Materials 2002).

96) *Eureko B.V. v. Republic of Poland* (http://www.italaw.com/sites/default/files/case-documents/ita0308_0.pdf (accessed 07 Jul. 2013)).

97) *Biloune and Marine Drive Complex Ltd v. Ghana Investment Center and the Government of Ghana* (Award of 27 October 1989, 95 ILR 183)*; Benvenuti and Bonfant v. Congo* (1 ICSID Rep 330, 1993)*; Starret Housing Corp v. Iran* (4 Iran-US CTR 122, 1983)*; Tippetts Abbett, McCarthy, Sratton v. TAMS-AFFA Consulting Engineers of Iran* (6 Iran-US CTR 219, 1984), and *Phillips Petroleum Co v. Iran* (21 Iran-US CTR, 1989).

98) *Goetz and Others v. Republic of Burundi* (6 ICSID Rep 5) and *Middle East Cement Shipping and Handling Co SA v. Egypt* (7 ICSID Rep 178).

99) *Tecnicas Medioambientales Tecmed S.A. v. The United Mexican States* (ICSID case no. ARB (AF)/00/2), Award of 29 May 2003, and *Metalclad v. Mexico*, http://www.italaw.com/sites/default/files/case-documents/ita0510.pdf (accessed 7 Jul. 2013).

100) *The Oxford Handbook of International Investment Law*, *supra* n. 65.

101) Newcombe, Andrew; Paradell, Luís *supra* n. 6, at 279.

102) See, e.g., India Model BIT (2003): 'Article 3. Promotion and Protection of Investment. (2) Investments and returns of investors of each Contracting Party shall at all times be accorded fair and equitable treatment in the territory of the other Contracting Party.' (http://www.italaw.com/sites/default/files/archive/ita1026.pdf (accessed 7 Jul. 2013)); France Model BIT (2006): 'Article 3. Fair and equitable treatment. Either Contracting Party shall extend fair and equitable treatment in accordance with the principles of International Law to investments made by nationals and companies of the other Contracting Party on its territory or in its maritime area, and shall ensure that the exercise of the right thus recognized shall not be hindered by law or in practice. In particular though not exclusively, shall be considered as de jure or de facto impediments to fair and equitable treatment any restriction on the purchase or transport of raw materials and auxiliary materials, energy and fuels, as well as the means of production and operation of all types, any hindrance of the sale or transport of products within the country and abroad, as well as any other measures that have a similar effect.' (http://italaw.com/documents/ModelTreatyFrance2006.pdf (accessed 7 Jul. 2013)); and Germany Model BIT (2008): 'Article 2. Admission and protection of investments. (2) Each Contracting State shall in its territory in every case accord investments by investors of the other Contracting State fair and equitable treatment as well as full protection under this Treaty.' (http://www.italaw.com/sites/default/files/archive/ita1025.pdf (accessed 7 Jul. 2013)).

103) See *CMS v. Argentina* ('Stable legal and business environment essential for FET', at http://www.italaw.com/sites/default/files/case-documents/ita0184.pdf (accessed 7 Jul. 2013)); *Metalclad v. Mexico* ('Mexico failed to ensure a predictable framework for Metalclad', at http://www.italaw.com/sites/default/files/case-documents/ita0510.pdf (accessed 7 Jul. 2013)); *Tecmed v. Mexico* ('Foreign investor needs to know beforehand any and all rules and regulations that will govern its investments', at http://www.italaw.com/sites/default/files/case-documents/ita0854.pdf (accessed 7 Jul. 2013)); *Occidental Exploration and Production Company (OEPC) v. The Republic of Ecuador*, at http://www.italaw.com/sites/default/files/case-documents/ita0571.pdf (accessed 7 Jul. 2013)). However, FET does not prevents States from amending their laws to adapt to new circumstances (see *Emilio Agustín Maffezini v. The Kingdom of Spain*, http://www.italaw.com/sites/default/files/case-documents/ita0481.pdf and *Elettronica Sicula SpA (ELSI) Case (United States of America v. Italy)*, Judgment of 20 July 1989, I.C.J. Reports 1989, p. 15, para. 74).

104) Kingsbury, Benedict and Schill, Stephan, *Investor-State Arbitration as Governance: Fair and Equitable Treatment, Proportionality and the Emerging Global Administrative Law*' (2009). New York University Public Law and Legal Theory Working Papers. Paper 146 (http://lsr.nellco.org/nyu_plltwp/146 (accessed 7 Jul. 2013)).

105) http://www.italaw.com/sites/default/files/case-documents/ita0854.pdf (accessed 7 Jul. 2013).

106) http://www.italaw.com/sites/default/files/case-documents/ita0740.pdf (accessed 7 Jul. 2013).

107) See *ADF Group Inc. v. United States* (http://www.italaw.com/sites/default/files/case-documents/ita0009.pdf (accessed 7 Jul. 2013)); *MTD v. Chile* (http://www.italaw.com/sites/default/files/case-documents/ita0544.pdf (accessed 7 Jul. 2013)); *Occidental Exploration and Production Company (OEPC) v. Ecuador* (http://www.italaw.com/sites/default/files/case-documents/ita0571.pdf (accessed 7 Jul. 2013)), and *International Thunderbird Gaming Corporation v. Mexico* (http://www.italaw.com/sites/default/files/case-documents/ita0431.pdf (accessed 7 Jul. 2013)).

108) *ADF Group Inc. v. United* States (http://www.italaw.com/sites/default/files/case-documents/ita0009.pdf (accessed 7 Jul. 2013)).

109) *Eureko B.V v. Republic of Poland* (http://www.italaw.com/sites/default/files/case-documents/ita0308_0.pdf (accessed 7 Jul. 2013)) and *Saluka Investments BV v. Czech Republic* (http://www.italaw.com/sites/default/files/case-documents/ita0740.pdf (accessed 7 Jul. 2013)).

110) *Saluka*, *supra* n. 109.

111) Kingsbury, Benedict and Schill, Stephan, *supra* n. 104.

112) See *Waste Management* (http://www.italaw.com/sites/default/files/case-documents/ita0900.pdf. (accessed 7 Jul. 2013)); *SD Myers v. Canada* (http://www.italaw.com/sites/default/files/case-documents/ita0747.pdf (accessed 7 Jul. 2013)); *International Thunderbird Gaming v. Mexico* (http://www.italaw.com/sites/default/files/case-documents/ita0431.pdf (accessed 7 Jul. 2013)); *The Loewen Group, Inc. and Raymond L. Loewen v. United States* (http://www.italaw.com/sites/default/files/case-documents/ita0470.pdf (accessed 7 Jul. 2013)); and *Eureko B.V v. Republic of Poland* (http://www.italaw.com/sites/default/files/case-documents/ita0308_0.pdf (accessed 7 Jul. 2013)).

113) *Metalclad v. Mexico* ('Mexico failed to ensure a transparent and predictable framework', at http://www.italaw.com/sites/default/files/case-documents/ita0510.pdf (accessed 7 Jul. 2013), and *Tecmed v. Mexico* ('State must act free from ambiguity and totally transparent', at http://www.italaw.com/sites/default/files/case-documents/ita0854.pdf (accessed 7 Jul. 2013)).

114) *Pope Talbot Inc. v. Canada* (http://www.italaw.com/sites/default/files/case-documents/ita0674.pdf (accessed 7 Jul. 2013)); *MTD v. Chile* (http://www.italaw.com/sites/default/files/case-documents/ita0544.pdf (accessed 7 Jul. 2013)), and *Tecmed v. Mexico* (http://www.italaw.com/sites/default/files/case-documents/ita0854.pdf (accessed 7 Jul. 2013)).

115) Kingsbury, Benedict and Schill, Stephan, *supra* n. 104.

116) US Model BIT (2012), Art. 3, at http://www.ustr.gov/sites/default/files/BIT%20text%20for%20ACIEP%20Meeting.pdf (accessed 7 Jul. 2013).

117) Newcombe, Andrew; Paradell, Luís *supra* n. 6, at 147.

118) *The Oxford Handbook of International Investment Law*, Peter Muchlinski, Federico Ortino and Christoph Schreuer editors, chapter 6, *Standards of Treatment*, Todd J. Grierson-Weiller and Ian A. Laird, Oxford University Press, 2008.

119) See *AAPL v. Sri Lanka* (4 ICSID Rep 246); *CMS v. Argentina* (http://italaw.com/sites/default/files/case-documents/ita0183.pdf (accessed 7 Jul. 2013)); *Pope & Talbot Inc. v. Canada* (http://www.italaw.com/sites/default/files/case-documents/ita0674.pdf (accessed 7 Jul. 2013)), and *Lucchetti SA and Luchetti Peru SA v. Peru* (ICSID case no. Arb/03/4, at http://www.worldbank.org/icsid (accessed 7 Jul. 2013)).

120) See *Maffezini v. Spain* (ICSID case no. Arb/97/7, 16 ICSID Rev-FILJ 212, 2001) and *Siemens v. Argentina* (ICSID case no. Arb/02/8, at http://www.worldbank.org/icsid (accessed 7 Jul. 2013)).

121) Michael Feit, *Responsibility of the State under International Law for the Breach of Contract Committed by a State-Owned Entity*, 28 Berkeley J. Intl. L. 142-143 (2010).

122) See, e.g., Article 11 of the Swiss Confederation and the Islamic Republic of Pakistan BIT (1998): 'Either Contracting Party shall constantly guarantee the observance of the commitments it has entered into with respect to the investments of the investors of the other Contracting Party.' (http://unctad.org/sections/dite/iia/docs/bits/switzerland_pakistan_fr.pdf (accessed 7 Jul. 2013)); Article 10(1) of the Energy Charter Treaty: '... Each Contracting Party shall observe any obligations it has entered into with an Investor or an Investment of an Investor of any other Contracting Party' (http://www.encharter.org/fileadmin/user_upload/document/EN.pdf (accessed 7 Jul. 2013)), and Article II (2)(c) of the US-Romania BIT (1994): 'Each Party shall observe any obligation it may have entered into with regard to investments.' (http://unctad.org/sections/dite/iia/docs/bits/us_romania.pdf (accessed 7 Jul. 2013)).

123) M. Sornarajah, *The International Law on Foreign Investment* 304 (3d ed., Cambridge Press 2010).

124) Michael Feit, *supra* n. 121.

125) *SGS v. Pakistan* (http://www.italaw.com/sites/default/files/case-documents/ita0779.pdf (accessed 7 Jul. 2013)).

126) *SGS v. Philippines* (http://italaw.com/sites/default/files/case-documents/ita0782.pdf (accessed 7 Jul. 2013)).
127) See *Pan American Energy LLC, and BP Argentina Exploration Company v. Argentina* (http://italaw.com/sites/default/files/case-documents/ita0097.pdf (accessed 7 Jul. 2013)); *El Paso v. Argentina* (http://italaw.com/sites/default/files/case-documents/ita0268_0.pdf (accessed 7 Jul. 2013)); *CMS v. Argentina* (http://italaw.com/sites/default/files/case-documents/ita0183.pdf (accessed 7 Jul. 2013)); *Noble Ventures v. Romania* (http://www.italaw.com/sites/default/files/case-documents/ita0565.pdf (accessed 7 Jul. 2013)); *Eureko B.V v. Republic of Poland* (http://www.italaw.com/sites/default/files/case-documents/ita0308_0.pdf (accessed 7 Jul. 2013)); *Siemens v. Argentina* (http://italaw.com/sites/default/files/case-documents/ita0788.pdf (accessed 7 Jul. 2013)); *Azurix v. Argentina* (http://italaw.com/sites/default/files/case-documents/ita0060.pdf (accessed 7 Jul. 2013)); *Impregilo v. Pakistan* (http://italaw.com/sites/default/files/case-documents/ita0418.pdf (accessed 7 Jul. 2013));
128) See, to this effect Gustavo Justino de Oliveira, coord. *Direito Administrativo democrático.* Belo Horizonte: Ed. Forum (2010), at 245.
129) See Art. 1, item IV and 170 of the 1988 Federal Constitution.
130) See Art. 5, item XXIV of the 1988 Federal Constitution.
131) Translated by the authors.
132) CHITI, Mario P. Principio di sussidiarietà publica amministrazione e diritto amministrativo. *Sussidiarietà e pubbliche amministrazione.* Bolonha: Maggiore (1997), at 110.
133) Established by Federal Law N. 9.427/96.
134) Established by Federal Law N. 9.472/97.
135) Established by Federal Law N. 9.478/97.
136) Established by Federal Law N. 10.233/01.
137) Federal Law N. 12.529/11.
138) Established by Federal Law N. 6.385/76 and modified by Federal Law N. 10.303/01.
139) European Code of Good Administrative Behaviour, European Commission (2000).
140) Judgments of the European Court of Justice (1987 et seq.): 226/86 (need for the setting out of grounds in administrative proceedings and the possibility of appeal to the courts in relation to decisions which have an impact on fundamental rights); C-225/90 (duty of care of the Administration in relation to public employees and service users (administered parties); 374/87 (extension of the application of the principle of proportionality to acts of the Public Administration); C-269/90 (right to be heard and adverse proceedings in administrative cases and the need to set out grounds for administrative rulings).

141) Rulings of the Federal Supreme Court: REx 579.951-RN (duty of morality of the Public Administration and prohibition of nepotism); ADIn-MC 4259-PB (duty of impartiality of the Public Administration).
142) Rulings of the Superior Court of Justice: RESP 980271-SC (The Public Administration's duty to decide); RESP 983659-MS (duty of efficiency of the Public Administration); MS 14.449-DF (duty of transparency of the Public Administration and the right of administered parties to have access to documents).
143) Article 103-A of the Federal Constitution: 'The Federal Supreme Court may, ex-officio or upon request, upon decision of two thirds of its members, and following reiterated judicial decisions on constitutional matter, issue a summula (restatement of case law) which, as from publication in the official press, shall have a binding effect upon the lower bodies of the Judicial power and the direct and indirect public administration, in the federal, state, and local levels, and which may also be reviewed or revoked, as set forth in law. (cano. 45, 2004)

Paragraph 1. The purpose of a summula is to validate, construe, and impart effectiveness to some rules about which there is a current controversy among judicial bodies or among such bodies and the public administration, and such controversy brings about serious juridical insecurity and the filing of multiple lawsuits involving similar issues.

Paragraph 2. Without prejudice to the provisions the law may establish, the issuance, review, or revocation of a *summula* may be requested by those who may file a direct action of unconstitutionality.

Paragraph 3. An administrative act or judicial decision which contradicts the applicable *summula* or which unduly applies a *summula* may be appealed to the supreme federal court, and if the appeal is granted, such court shall declare the administrative act null and void or overrule the appealed judicial decision, ordering that a new judicial decision be issued, with or without applying the *summula*, as the case may be.'

144) See rulings of the Federal Court of Accounts: Plenary Session Orders N. 631/03; 1099/06; 1330/07; 91/08.
145) See decisions of the Superior Court of Justice: AgReg no MS N. 11.308-DF; REsp N. 612.439-RS; Resp N. 606.345-RS; Resp N. 904813-PR.

146) See: Federal Law N. 5.662/71, Art. 5 (BNDES); Decree-law N. 1.312/74, Art. 11 (Guarantees and external loan agreements); Federal Law N. 8.693/93, Art. 1 para. 8 (rail transport); Federal Law N. 8.987/95, Art. 23-A (concession and permission in public service provision); Federal Law N. 9.472/97, Art. 93, XV (Telecommunications); Federal Law N. 9.478/97, Art. 43, X (Oil); Federal Law N. 10.848/04, Art. 4 para. 5 (Electric Energy Trading Chamber – CCEE); Federal Law N. 11.079/04, Art. 11.

147) The Brazil-Canada Chamber of Commerce (CAM-CCBC) established, in 2013 the Commission for the Public Administration in Arbitration, the object of which is to develop better practices in the institutional filed so that the Public Administration, in opting for institutional arbitration managed by the CAM-CCBC, will find an environment of security and legality.