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1

Introduction

I. The Growth of Foreign Direct Investment in Services from Brazil, Russia, India, and China

The world's four largest emerging economies, often identified as the BRIC states¹ of Brazil, Russia, India, and China, are poised to become the leading global economic actors in the twenty-first century; possibly overtaking many of the largest advanced economies of the West, including Germany, the UK and even the US. These four countries are now emblematic of the modern concept of globalization, at least in economic terms if not yet political or cultural. China's decade of unprecedented growth has already led it to eclipse Japan as the world's second-largest economy. India will shortly become the most populated country in the world, with a relatively young and increasingly educated workforce. Although in a sense a fallen empire, Russia possesses vast resources that have supported its position as a global energy power. Brazil has harnessed its resource wealth and embraced a market economy to become Latin America's largest economy. These trends are well captured in recent data on the flows of Foreign Direct Investment ('FDI') both to and from these states, the latter figure reflecting the appearance and rise of the BRIC's multinational enterprises ('MNE') on the world stage.² FDI outflows from the world's developing countries were \$384 billion in 2011, accounting for 23 per cent of global FDI outflows, a slight decline from that of 2010.³ Together, the BRICs alone accounted for \$146 billion FDI outflows in 2011 (China \$65 billion, Russia \$67 billion, India \$15 billion, and Brazil with a negative annual outflow of \$1 billion). This is almost 10 per cent of the world's total yearly FDI outflow of \$1.5 trillion, shared among four developing

¹ This term was coined by Jim O'Neill the Chief Economist for the Goldman Sachs investment bank in a 2001 article 'Building Better Economic BRICs' Goldman Sachs, Global Economics Paper No: 66 (30 November 2001) <<http://www.goldmansachs.com/our-thinking/topics/brics/brics-reports-pdfs/build-better-brics.pdf>> accessed 5 November 2012.

² The term transnational enterprise or transnational corporation is often used interchangeably with multinational enterprise, which is the term that will be used throughout this book. A multinational enterprise is often defined as a large firm where at least 10 per cent of sales or production is done overseas and having foreign affiliates in three or more countries: A Rugman, *Inside the Multinationals: The Economics of Internal Markets* (Columbia University Press, 1981).

³ World Investment Report 2012, UNCTAD, 2012 at xiv, <<http://www.unctad-docs.org/files/UNCTAD-WIR2012-Full-en.pdf>> accessed August 2012.

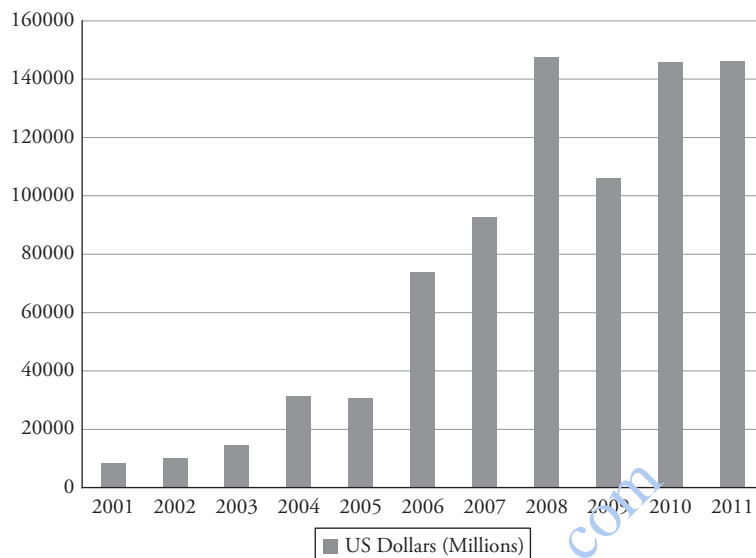


Fig. 1.1 FDI Outflows from the BRIC States (2001–2011)

Source: UNCTAD 2012.

economies whose global contribution had been virtually negligible ten years ago. See Figure 1.1 for details.

The increase in volume of FDI *from* the BRIC states is a more recent development than the widely recognized trend of BRIC states as the locus of investment opportunities for Western firms. Emerging market MNEs are becoming key sources of FDI directed into other emerging economies, the developed world, and also the rest of the developing world, especially in Africa. While global outward FDI continues to be dominated by firms from developed countries such as the US and the countries of the European Union, there are indications that outward FDI from emerging economies is rising at a relatively faster rate and may ultimately equal or exceed that of Western firms.⁴ Indeed, the most significant change in the composition of the world's 500 largest global firms has been the enlarged presence of those from emerging markets such as the BRICs. MNEs from the emerging markets are globalizing at a faster pace than their developed world counterparts.⁵ This reveals both the large quantity of capital held by BRIC MNEs, often backed directly by their home country, as well as the dynamic nature of these firms that globalize at an earlier stage of their existence, seemingly undaunted by the risks that Western firms have associated with internationalization.

⁴ World Investment Report 2012, n 3 at 6.

⁵ K Sauvart, W Maschek, and G McAllister, 'Foreign Direct Investment By Emerging Market Multinational Enterprises, the Impact of the Financial Crisis and Recession and Challenges Ahead' in K Sauvart, G McAllister, and W Maschek, eds., *Foreign Direct Investment From Emerging Markets* (Palgrave Macmillan, 2010).

In addition to this startling feature of economic globalization, an increasing percentage of outward FDI by firms from emerging markets is in the services sector, although this figure has declined somewhat since the financial crisis of 2008–09.⁶ The general trend of the past decade of FDI orientation towards services represents in part the emerging markets' strategy of diversifying their economies away from traditional engines of economic growth such as energy and low-cost manufacturing. This indicates a greater degree of sophistication and higher value-added focus of companies from these countries that are now competing in foreign markets. More significantly, the growth in services FDI reflects the maturing information age in which the internet has facilitated the acquisition of knowledge to a degree unprecedented in history, just as other technological advances have supplanted human labour in many fields. While firms from Brazil and Russia remain dominant in the extractive sector, Brazil's Andrade Gutierrez and Russia's Sistema are rising global players in the construction and telecommunications sectors, respectively. Indian and Chinese multinationals' leading status in global services have been seen in recent acquisitions of Western firms, including the acquisitions by Dr Reddy's, an Indian pharmaceutical, and China Unicom, the telecommunications giant. Services outward FDI from the BRICs are expected to grow relative to non-services outward FDI in the near future and will likely represent the dominant FDI paradigm of the twenty-first century. There has been a worldwide FDI shift towards services in recent years, away from manufacturing and the extractive industries that dominated FDI in the 20th century. In 2011, services FDI rebounded sharply from previous years, reaching approximately \$570 billion, roughly 38 per cent of all FDI flows.⁷

These shifts in direction and variety of capital movement represent perhaps the first defining characteristic of twenty-first century globalization. This phase is distinct from that of the previous century, which was associated with the establishment by Western firms of international markets for their goods and the acquisition of raw materials or cheaply manufactured products overseas. While Western firms continue to engage in this process, they are doing so now in competition with firms from around the world, rather than simply from other developed nations. If the surge of outward FDI from emerging markets coupled with a focus on higher value services industries is not then a complete role reversal, it is at least an illustration of the increasing global economic equality that will denote the coming decades.

This crucial aspect of globalization must be viewed in light of what is perhaps a third significant trend that has marked the first decade of the twenty-first century: the growing entrenchment of universal social values, such as human rights, environmental protection and cultural preservation as essential components of policy in international economic relations. Increasingly vocal and interconnected citizens have come to expect, if not demand, that they live in a transparent, democratic, and safe society in which the financial interests of corporations, such as foreign investors, are not paramount. This phenomenon is embodied by the concept of sustainability, a long-term perspective in which future concerns, such as environmental

⁶ World Investment Report 2012, n 3 at xii.

⁷ World Investment Report 2012, at xiv.

and economic prosperity are given equal consideration to more short-term goals of quarterly profits or termly election-cycle victories.

The legal framework governing international investment must accordingly adapt to a new global order in which capital flows both ways and in which services are viewed as essential to economic prosperity. Old bilateral investment treaties ('BITs') instigated by developed capital exporting states in the twentieth century were largely one-sided, placing obligations on host states that were predominantly developing countries, in favour of Western firms, which were most often engaged in resource extraction. By the 1970s and 1980s, such treaties began to include investor-state arbitration provisions. It was not anticipated that these treaties would operate in any other way than to protect developed states against alleged abuses by host states. However, the North American Free Trade Agreement ('NAFTA') is a good example where there are as many, if not more, cases brought by investors against the US and Canada than Mexico. Accordingly, modern international investment law must delineate the rights and obligations of investors and governments in a more balanced manner that is mindful of social values as expressed by the needs of the citizens in host states, which may now equally be in the developed world.

One of the most startling aspects of the realignment of global FDI flows is the lack of attention that has been paid to it by the international legal community. While the investment opportunities available to Western firms in emerging markets are well known, the growing presence of non-Western firms in Europe and the US has been largely unobserved. Several commentators monitoring the increase in outward FDI from the BRICs and other emerging markets have evaluated the economic rationales underlying the business decisions for emerging market companies to globalize.⁸ Yet there has been relatively little analysis of the international legal environment that has made this movement possible, or more importantly, how international law should respond to ensure that this process proceeds in a beneficial manner for citizens as well as corporations and governments. This book will consequently fill a gap in the academic literature by exploring the international regulation of outward FDI from the BRIC states. The approach taken here will narrow the discussion of outward FDI from each of Brazil, Russia, India, and China to the services sectors only, as opposed to the manufacturing and extractive industries where most of FDI has traditionally been situated. Attention is warranted in this sphere because services remain the most restricted sector with respect to FDI.⁹ This is problematic for developing countries because although outward FDI in services continues to originate predominantly from developed countries that have entrenched technical capabilities, outward FDI in services from emerging economies is expected to increase. Services will become a key feature of continued development and prosperity in these states, and much of this may depend on expansion into foreign markets. In recognition of this, emerging market firms seek to enhance the skills base of their workers through education, know-how and

⁸ Eg K Sauvart, 'New Sources of FDI: The BRICs—Outward FDI from Brazil, Russia, India and China' 6:5 *Journal of World Investment and Trade* 639 (2010).

⁹ World Investment Report 2012, n 3 at xvii.

infrastructure at home as well as through collaboration with their existing overseas affiliates. Barriers to services FDI will prevent emerging markets firms from achieving these goals. The temptation of some developing states to resist the growth and expansion of their services sectors is founded upon their strengths in low-cost labour and natural resources, which naturally leads to concentration in manufacturing and extraction. Diversification towards services through access to foreign service markets is essential to the sustained growth of developing countries because the gradual rise in labour standards at home will ultimately result in higher production costs within emerging markets, requiring them to shift to services to retain value.¹⁰ Diversification away from the extractive sector is essential because extraction is not sustainable in the long term, nor can it sustain full employment and higher living standards in isolation. The shift away from manufacturing and extraction can be facilitated by the removal of barriers to services, especially in infrastructural services such as banking and telecommunications where FDI can assist in capacity building.

The trend towards services FDI among the emerging markets will undoubtedly place competitive pressure on developed economies that are heavily services-focused and which are unable to compete as effectively in manufacturing and extraction because of high labour costs. This may lead to protectionism, which may take the form of restrictions on foreign ownership, lack of recognition of foreign professional qualifications, or worse, expropriation of foreign-owned assets. Services FDI is needful of international regulation because policies used to attract FDI, such as tax incentives and subsidies, are usually focused on manufacturing, whereas domestic laws that regulate services often tend to discriminate against foreign investors in services such as utilities, financial services, transport and construction.¹¹ This resistance is puzzling in one sense, given that services tend to be less invasive than manufacturing or extraction. For example, services typically do not raise issues of environmental damage or labour exploitation as readily as those of the extractive or manufacturing sectors.¹² FDI in services offers many of the advantages of FDI in other sectors, including employment, enhanced competition and knowledge transfer. At the same time, it is arguable that services-oriented FDI is less needful of international protection from regulatory interference because it typically involves lower sunk-costs than that of manufacturing and extraction.

The regulation of outward FDI in services involves a complex interplay of national, regional, and in some cases, multilateral rules, each of which can encroach upon sensitive issues of domestic governance. Unlike FDI in manufacturing and extraction, FDI in services has traditionally favoured the policy interests of the host state rather than the home state of the investor. This is primarily because of the high degree of national regulation in service sectors, requiring specific competencies or

¹⁰ S Maswood, *International Political Economy and Globalization* (2nd edn, World Scientific, 2008), 199.

¹¹ S Golub, 'Openness to Foreign Direct Investment in Services: An International Comparative Analysis' 1245 *The World Economy* (2009), at 1245.

¹² This is by no means axiomatic: construction services may lead to environmental harms and restaurant workers as well as domestic help are often the victims of labour abuses.

localized methods of delivery. Many countries, including those with market economies, have created public monopolies in the provision of services, often excluding foreign investors. Some services, such as utilities, have been deemed vital to the national economy and as such are restricted to foreign firms. Sectors such as transportation and telecommunications are vulnerable to attack in a manner that could threaten national security.

This book will explore the existing international framework through which laws of this nature are permitted and how this has affected the regulatory approach of the BRICs towards their multinational services investors. The BRICs have each moved from a stance that was hostile to outward FDI to one that permitted it, then finally to a stage where it is actively promoted. Emerging markets such as the BRICs struggle within an environment of limited resources to establish policies that support domestic firms' capacity to internationalize competitively while at the same time seeking to attract sufficient FDI to achieve economic growth and acquire skills and training. This can entail a difficult balancing act, often through reservations in bilateral and multilateral agreements.

II. Rationale and Effects of FDI

While a comprehensive discussion of the economic purpose and effect of FDI is beyond the focus of this book, some general observations should be made. For the MNE foreign investment offers the possibility of new markets or lower cost production. Either of these rationales can represent an increase in profits beyond those available to exclusively domestic firms which may have exhausted local markets or face high labour or material costs at home. In the case of services-oriented FDI, establishing an overseas subsidiary will typically provide access to new consumers where no equivalent service exists at all, the local supply is non-competitive, or there are a limited number of providers and consequently unfulfilled demand. Profitable firms are of value to the MNE's home economy because of tax revenue as well as potential employment opportunities abroad for workers. Affiliations with foreign firms may also allow consumers in the home state to purchase brands or technologies that had previously been unavailable.¹³ For the host state, FDI is often said to increase economic growth, as defined variously by increases in GDP as well as improvements to the quality of life, as measured potentially by indicia such as literacy and life expectancy. It does this by bringing foreign capital, lowering the cost of goods and services, as well as providing employment, training and knowledge transfer for locals, which can be seen as an aid to development in some low income countries.¹⁴ In the case of FDI inflows into

¹³ P Buckley, J Clegg, A Cross, and H Voss, 'What Can Emerging Markets Learn from the Outward Direct Investment Policies of Advanced Countries?' in K Sauvant, G McAllister and W Maschek, eds., *Foreign Direct Investment from Emerging Markets* (Palgrave Macmillan, 2010).

¹⁴ A Griffiths and S Wall, *Applied Economics*, Ch 7 (11th edn, Prentice Hall, 2007) and Buckley, Clegg et al. in Sauvant, McAllister, and Maschek, eds., *Foreign Direct Investment from Emerging*

already developed countries, the presence of foreign MNEs can offer added competition, which can improve industry standards and lower prices to the advantage of consumers.¹⁵ This may be particularly true in the service sectors which are highly predicated on technological advancement to sustain market share. Similarly, outward FDI is thought to be beneficial to home states through productivity improvements linked to increased specialization of firms competing in international markets as well as the indirect importation of knowledge and technology.¹⁶

The extent to which FDI flows have assisted in the development of host states and in so doing improved the welfare of their citizens is the subject of much controversy. Recent commentators emphasize the overall loss of sovereignty and lowered social standards, particularly among developing country host states, that results from international commitments aimed at augmenting FDI.¹⁷ This view tends to focus on the one-sidedness of traditional BITs, as noted above. In terms of adverse economic impact, FDI is often said to prevent the development of local industry and the associated rise of an entrepreneurial class who would otherwise establish industries that do not rely on foreign capital. A dependency problem may be created, which could be disastrous to host states when a foreign investor suddenly withdraws, the so-called ‘capital flight’ scenario. The increase in industry density associated with the entrance of foreign investors may be of no advantage to local workers, which may simply move from an existing job at a local firm to a foreign one. New positions created by MNEs may merely offer only short-term employment at low rates of pay.¹⁸ It is thought that MNEs often ‘crowd out’ firms in developing countries, especially in services like banking where local providers have comparatively limited sophistication and geographical diversification.¹⁹ Regarding valuable technology transfer, FDI may have limited capacity to improve local innovative capabilities, particularly in situations where there are insufficient basic skills to adopt technological learning.²⁰ Similarly, a recent study showed that FDI only benefits countries that have a certain minimum level of education, below which FDI has a negative effect on development.²¹ Useful technology transfer through FDI is said to be less likely where foreign firm’s activities have little in

Markets. Improving the host state’s balance of payments status is also often cited as another advantage of FDI: P Muchlinski, *Multinational Enterprises and the Law* (Oxford University Press, 2007) at 88.

¹⁵ Griffiths and Wall n 14, at 127–34, noting improvements in the UK automotive sector due to competitive pressures from Japanese MNEs.

¹⁶ S Gliberman and D Shapiro, ‘Outward FDI and the Economic Performance of Emerging Markets’ in K Sauvart, ed., *The Rise of Transnational Corporations from Emerging Markets* (Edward Elgar, 2008) at 236.

¹⁷ D Scheiderman, *Constitutionalizing Economic Globalisation* (Cambridge University Press, 2008); M Sornarajah, *The International Law on Foreign Investment* (Cambridge University Press, 2010).

¹⁸ Muchlinski, n 14 at 87.

¹⁹ World Investment Report 2012, n 3 at xxiii.

²⁰ WTO Working Group on the Relationship Between Trade and Investment, Communication of the European Community and Its Member States, WT/WGTI/W65 (9 October 2000).

²¹ J Dine, *Companies, International Trade and Human Rights* (Cambridge University Press, 2005) at 24.

common with those of local firms.²² This situation could arise readily in services investment, for example where telecoms companies establish in a jurisdiction where there had been no existing telecoms infrastructure, such as in many African states, which are now the destination of much Chinese FDI. Accordingly, commentators have suggested that bilateral treaty regimes aimed at enhancing FDI flows can only function if concluded between states of broadly similar economic development.²³

There are also perhaps more populist concerns that in pursuit of lower cost production, MNEs are attracted to jurisdictions with comparatively weak regulations and by engaging in commercial activity in these regions they inflict undue harm on, for example, the local environment and local workers. This theory, associated closely with the anti-globalization movement suggests that the lax international regulation of FDI has led to downward pressures on the domestic legal oversight of important social concerns such as the environment, labour, and culture.²⁴ States are said to intentionally lower their regulatory standards to attract FDI, creating ‘pollution havens’ for MNEs seeking to lower costs. This so-called ‘race to the bottom’ model of FDI is tied to the characterization of the international law of foreign investment as a harmful scheme of ‘re-constitutionalization’ or ‘global administrative law’. In this view, mandatory international arbitration, for example, has undermined host states’ capacity for self-government in favour of the commercial, expansionist interests of the West and its profit-obsessed MNEs.²⁵ Lastly, while most of the critical studies on the negative aspects of FDI have focused on host states, some concern has been expressed that outward FDI may damage home states by substituting exports, reducing domestic capital investment, and causing job loss. These adverse effects are believed to be offset by the gains in terms of increased competitiveness of firms, technological advancement, tax and repatriation of capital including income and profits.²⁶

The criticisms of FDI must be contrasted to the perhaps more orthodox position, held generally by the international organizations such as the Organisation for Economic Co-operation and Development (‘OECD’), the United Nations Conference on Trade and Development (‘UNCTAD’) and the World Trade Organization (‘WTO’) that FDI is a positive force in the global economy and has contributed to growth and the alleviation of poverty throughout the world.²⁷

²² K Mascus, ‘The Role of Intellectual Property Rights in Encouraging Foreign Direct Investment and Technology Transfer’ 9 *Duke Journal of Comparative and International Law* 109 (1998) at 7.

²³ J Siqueiros, ‘The Judicial Regulation of Transnational Enterprises’ *New Directions in International Trade Law* 1 (1978) at 288.

²⁴ Eg D Collins, ‘A New Role for the WTO in International Investment Law: Public Interest in the Post Neoliberal Period’ 25 *Connecticut Journal of International Law* (2010) 1.

²⁵ Eg Schneiderman, n 17 and S Montt, *State Liability in Investment Arbitration: Global Constitutional and Administrative Law in the BIT Generation* (Hart, 2009).

²⁶ F De Beule, ‘Changing Policy Regimes in Outward Foreign Direct Investment: From Control to Promotion’ in K Sauvart, G McAllister and W Maschek, eds., *Foreign Direct Investment from Emerging Markets* (Palgrave Macmillan, 2010) at 277.

²⁷ See eg OECD Guidelines for Multinational Enterprises—Declaration on International Investment and Multinational Enterprises (7 June 2000) at 5; UNCTAD, World Investment Report 2009 Chapter III: TNCs and Agricultural Production in Developing Countries at 95; see generally the WTO Report on G20 Trade and Investment Measures (8 March 2010).

Collectively most institutions of international economic governance advocate the removal of barriers to the flow of goods, services, and capital in order to stimulate competition, lower prices and in so doing achieve economic stability and growth.

In particular, outward FDI can mitigate the one-sidedness of globalization by allowing the home state's firms to increase their profitability as a vehicle for the country's entrance into the global economy.²⁸ Moreover, fears of regulatory regression that capture the public's anxiety over globalization have been seriously challenged by empirical studies.²⁹ Concerns that outward FDI reduces the domestic savings available to fund domestic capital investments in home states is believed to be unwarranted, particularly in the case of emerging markets that tend to enjoy relatively large savings surpluses.³⁰ Firms that invest abroad enjoy lower levels of bankruptcy and are less likely to suffer job losses than firms that remain domestic, all of which represents an advantage to home states.³¹ It is widely held that FDI, both inward and outward, has lifted millions of people out of poverty in the BRICs and elsewhere throughout the world. FDI achieves this through capacity building—the physical and legal infrastructure upon which international business relies is advantageous to citizens.

The purpose of this book is not to engage with the debate on the merits and effects of FDI directly in a normative sense. Rather, it will adopt the premise that the removal of unnecessary barriers to investment should be seen as a vital goal of public international law with a view to increasing FDI flows. Even if the negative, exploitative characterization of FDI were accurate, which it may be in some cases, the controversy must be re-assessed in light of BRIC outward FDI. Capital flows are increasingly occurring within the developing world (so-called 'south-south' investment), and originating from the emerging markets of the developing world and flowing into the developed world ('south-north' or 'up market' investment). As suggested above, these trends are defining features of twenty-first century globalization. South-south FDI is particularly sensitive from the perspective of domestic governance because there may be an unwillingness to recognize the rights of host state citizens in either the capital importing or capital exporting state. Transactions of the latter may raise concerns that host state measures regulating incoming investments are unwarranted or protectionist, posing unfair barriers to economic relations under the guise of due process, public interest, or sustainability. In this way it is ironic that treaties that once protected the activities of Western MNEs abroad to the alleged detriment of host countries may come to haunt Western states that have become the destination of investments from BRIC MNEs. Clearly old paradigms must be

²⁸ De Beule, n 26 at 279.

²⁹ For example, the 'Pollution Haven' theory is seen as illusory: A Harrison, 'Do Polluters Head Overseas? Testing the Pollution Haven Hypothesis', *ARE Update* (University of California Giannini Foundation of Agricultural Economics), 1 December 2002, at 7.

³⁰ Globerman and Shapiro, n 16 at 262.

³¹ T Moran, 'What Policies Should Developing Governments Adopt Towards Outward FDI? Lessons from the Experience of Developed Countries' in K Sauvant ed., *The Rise of Transnational Corporations from Emerging Markets* (Edward Elgar, 2008) at 278.

revisited now that FDI is no longer the exclusive sphere of US corporations and populist notions of expansionary capitalism have become entrenched as the normal way of doing business by firms from all countries.

Again, this book will not explore the economic and social impact (or lack thereof) associated with the international regulation of FDI in services as pursued by BRIC economies beyond the level of rudimentary description. Instead, it will approach this subject from the perspective that outward FDI in services should be liberalized. This is founded on the assumption that increased FDI flows do, generally speaking, improve the economic condition of capital importing and capital exporting states. It will be suggested that this liberalization must be done in a manner that is sensitive to public policy issues such as the environment, national security, and human rights that are coming to be accepted in modern discourse as crucial non-economic values. Thus in the case of services, FDI brings capital, skills, and technology that nations need to establish and sustain competitive industries. It offers new markets in which businesses can expand, to the advantage of shareholders, employees, and consumers. This beneficial aspect of FDI is the view emphasized most frequently by UNCTAD in its annual World Investment Report, which generally advocates policies that welcome inward investment.³² This book will suggest that to the extent international investment agreements have pressured lower standards in such areas as environmental protection and labour rights, these important values can be balanced through properly constructed exceptions to investment protection guarantees as well as accessible, transparent dispute settlement in international investment tribunals.

Perhaps less controversially, this book will show that FDI from the BRICs, particularly in services, occurred for broadly similar reasons. These include seeking greater knowledge and skills abroad and escaping strenuous regulations and competition at home. The BRIC countries also approached the regulation of outward FDI in much the same fashion, moving from resistance, to tolerance, disinterest, and ultimately active promotion. Most importantly, the BRIC states each engaged with international investment law to varying degrees. International investment law was used by these states initially as a means to attract inward FDI. It should now also be viewed as part of the strategy to facilitate the expansion of their firms. In that sense the BRICs share the transition from the mindset of exclusively seeking FDI from abroad to one in which there is also the desire to establish access to foreign markets as well as gain protection from unreasonable measures in foreign countries. Multilateral and bilateral laws embrace common themes, such as definitions of investment, standards of treatment, as well as dispute settlement and importantly, the need to make allowances for public interest concerns raised by the provision of services from emerging market suppliers.

³² Eg the recommendation that structurally weak economies promote FDI in industries which are less prone to cyclical fluctuations: World Investment Report 2009, UNCTAD at xix <http://unctad.org/en/docs/wir2009_en.pdf> accessed April 2012.

III. Multilateral Regulation of FDI in Services

This book will focus on the regulation of outward FDI in services from the BRIC states at the international level rather than through a detailed comparative analysis of national laws. This will primarily involve an analysis of these states' international treaty commitments at the multilateral, regional, and bilateral level and the extent to which these obligations are reflected in these countries' domestic laws. There will be some additional analysis of each of the four BRIC countries' domestic policy towards outward FDI, notably in relation to the administrative approval processes that domestic firms require in order to internationalize, which have generally been streamlined in all states in recent years. It must be clarified from the outset that the responsiveness of these emerging economies to incoming FDI, which has traditionally been viewed as more restrictive than that of the leading developed states,³³ will not be examined directly, as this is already the subject of a large and growing body of literature. As noted above, a worldwide trend towards increasing liberalization of services FDI has been observed³⁴ and is believed to be partially responsible for the success of emerging market MNEs,³⁵ as well as heralding an improvement in the global economy generally.³⁶ Just as these international agreements also control inward FDI to the BRIC states by restructuring domestic investment laws, the reciprocal nature of many of these obligations impact upon outward FDI from the BRICs through their effect on the regulations of various host states around the world. The national laws of the world's dominant home and host states, namely the US, the largest economies of the EU such as Germany and the UK, and Japan will not be discussed.

i) The WTO—GATS, TRIPS Agreement, and TRIMS Agreement

The WTO is an international organization that supervises trade relations between countries with a view to liberalizing trade in goods and services in order to raise living standards worldwide. It was created in 1995 and consists of 157 member countries as of mid-2012. All four of the BRICs are now members of the WTO, with India and Brazil as original members, China acceding in 2001 and Russia in 2012. The WTO administers various multilateral treaties that facilitate the free flow of goods and services, including most notably the General Agreement on Tariffs and Trade ('GATT') which has been in place since 1948 and has been incorporated into the GATT 1994. The WTO also provides a comprehensive dispute settlement facility to adjudicate matters arising out of the implementation of the various agreements by members. Rulings of the WTO's Dispute Settlement

³³ World Investment Report 2009, n 32 at 10.

³⁴ World Investment Report 2009, n 32 at 9–10.

³⁵ Eg R Ramamurti, 'Why Study Emerging Market Multinationals?' in R Ramamurti and J Singh, eds., *Emerging Multinationals in Emerging Markets* (Cambridge University Press, 2010) at 16.

³⁶ 'Lamy: Trade in Services Will Play a Key Role in Economic Recovery' WTO News, 22 Sept 2010 <http://www.wto.org/english/news_e/sppl_e/sppl171_e.htm> accessed October 2012.

Body provide a vital understanding of the concepts found in the text of the WTO agreements. Importantly though, as a state-to-state dispute resolution body, this facility offers no direct recourse to disaffected private investors seeking redress against their host states.

In most cases foreign investors are also traders, so in a sense all trade rules within the WTO system have at least an indirect impact on foreign investors. Developing countries may seek inward FDI because they need capital to improve their capacity to produce and trade goods competitively in international markets. Firms may engage in outward FDI in order to circumvent trade barriers, many of which have been reduced because of membership in the WTO and in regional trade agreements.

The most important of the WTO agreements for the purposes of services FDI is the General Agreement on Trade in Services ('GATS') which entered into force in 1995. FDI in services is covered by Mode 3 of the GATS: the supply of a service of one member through the commercial presence in the territory of any other member. This mode of service delivery is often the only practical way in which some services can be provided, such as energy distribution. The widely acknowledged benefits of FDI have led many WTO members to make foreign access to certain services industries contingent on the local presence of providers. GATS consists of general obligations, applying to all measures affecting trade in services, and specific obligations, which require individualized commitments by members in specific sectors. The general obligations are most favoured nation ('MFN') treatment and regulatory transparency. MFN treatment is a guarantee against discrimination on the basis of nationality, meaning that no member's service suppliers will be granted a regulatory advantage over those of any other member. Exemptions are permitted for the MFN obligation as specified in each member's accession protocol, provided that they conform to the requirements in the GATS Annex II on exemptions, essentially requiring periodic review of the exemption by the GATS Council on Trade in Services and that they last no longer than 10 years.³⁷ The Annex II exemptions of the RNIC states will be discussed in their respective chapters in this book. There are also MFN exemptions for regional economic integration agreements that have substantial sectoral coverage and work towards the reduction in discriminatory measures among all parties to such agreements.³⁸ Transparency essentially requires that all domestic laws that impact upon services are accessible and are administered in a reasonable and impartial manner. This includes the requirement to publish all relevant measures and to inform the GATS Council for Trade in Services of any changes in relevant laws.³⁹

GATS's specific commitments relate to market access and national treatment in certain services sectors for which members were prepared to make commitments. National treatment prevents discrimination on the basis of foreignness, requiring members to treat foreign services and service suppliers the same as domestic ones in committed service sectors.⁴⁰ As with MFN, measures imposed by Members on

³⁷ Art 2.2.³⁸ Art V.³⁹ Art III.⁴⁰ Art XVII.

services or service suppliers in these industries must not discriminate on the basis of nationality, either directly (by expressly referring to nationality in the application of the relevant measure) or indirectly (by imposing a measure that has the effect of harming foreign service suppliers and not domestic ones, while not specifically mentioning nationality). Market access commitments prevent members from placing limitations such as the number and size of services or service suppliers in listed service sectors operating within its territory, whether or not they are domestic or foreign.⁴¹ Specific commitments are set out as a ‘positive list’ in each member’s Service Schedule. These may include limitations or conditions that are horizontal (across all service sectors) or for specific sectors only, or which restrict certain modes of supply, such as the commercial presence/FDI mode. The absence of a positive commitment in a sector does not necessarily imply a restriction. A country may simply have chosen not to list that sector in its Schedule to retain policy flexibility. GATS further includes annexes providing special rules for the telecommunications and financial services sectors, to which some of the BRICs have acceded. Each of the BRICs’ specific commitments made under the GATS will be considered in this book.

The extent of these specific commitments and any exceptions relating to commercial presence dictates the degree of FDI liberalization for a particular member in terms of its acceptance of *incoming* investment. The effect of a country’s specific GATS commitments on *outward* FDI in services is less obvious, because MNEs depend upon the GATS obligations undertaken by the host states in which they operate as GATS specific commitments are not reciprocal. The specific commitments undertaken by the four BRIC countries demonstrate the responsiveness of the emerging markets to liberalized FDI in services. This in turn illustrates their willingness to negotiate a comprehensive multilateral instrument for investment in services. Equally importantly, the openness of countries to inward FDI can influence the extent of their outward FDI because the internationalization strategies of many of the BRIC firms was linked to competitive pressures in domestic markets from foreign firms. Of the four modes of supply of services, most specific commitments undertaken through the GATS, including by developing countries, have been through the commercial presence, or FDI, mode. It is thought that this reflects the desire of host countries to be able to regulate MNEs that are located within their territory rather than doing business within their borders from a remote location under another jurisdiction’s control.⁴²

Importantly GATS provides for exceptions to its obligations, including national security, balance of payments as well as general exceptions covering public interest issues such as health and public order.⁴³ GATS further requires that members ensure that monopoly suppliers do not abuse their dominant positions⁴⁴ and that standards for maintaining minimum levels of quality in services should be mutually

⁴¹ Art XVI.

⁴² A Zampetti and P Sauve, ‘International Investment’ in A Guzman and A Sykes, eds., *Research Handbook in International Economic Law* (Edward Elgar, 2007) at 255.

⁴³ Arts XII–XIV.

⁴⁴ Art XI.

recognized between members.⁴⁵ GATS does not, however, provide a complete set of investment protection rules, such as guarantees against expropriation or nationalization by host states. The less than comprehensive approach of GATS towards the regulation of FDI is common to services-specific international investment agreements, such as those seen in Asia and Latin America. Thus more general investment agreements applying to all sectors, such as BITs, are often said to complement service specific regimes.⁴⁶ In this way several layers of international commitment are required to regulate services FDI.

GATS has been credited with creating a more secure environment for trade in services through the progressive removal of barriers to trade, in part because of the availability, through the WTO framework, of recourse to the impartial dispute settlement mechanism instead of unilateral pressure.⁴⁷ At the same time, some commentators have criticized the agreement for failing to more fully liberalize trade in services⁴⁸ and there are populist accusations that the GATS has led to the exploitation of developing countries in favour of Western corporate interests.⁴⁹ Again, the view that GATS has empowered MNEs at the expense of vulnerable economies must be re-assessed in light of the ascendancy of BRIC MNEs that has characterized the beginning of the twenty-first century. The rapid rise of emerging markets following WTO accession should be viewed as evidence that controlled liberalization has made a positive contribution to development, in part by encouraging member countries to enact laws that are conducive to business.

The Agreement on Trade Related Investment Measures (TRIMS Agreement) is another important multilateral agreement regarding FDI concluded at the WTO, however its impact on services is minor. This agreement was only intended to address the trade-distorting effects of investment-related measures, not to be an exhaustive treaty on the regulation of FDI.⁵⁰ The TRIMS Agreement essentially prohibits WTO members from applying restriction on foreign investors that are inconsistent with the central commitments of the WTO's GATT 1994. Thus the TRIMS Agreement imposes national treatment for imported goods and prohibits quantitative restrictions on imports and exports as a condition of entry of foreign firms.⁵¹ Trade-related investment measures are themselves left undefined; instead there is an annex containing an illustrative list of investment measures that are inconsistent with these GATT commitments. Inconsistent measures include

⁴⁵ Art VII.

⁴⁶ Some international investment agreements (IIAs) contain provisions identical to those of GATS or explicitly incorporate GATS by reference, eg the ASEAN Framework Agreement on Services: International Investment Agreements in Services, UNCTAD Report 2005 <http://www.unctad.org/en/docs/iteiit20052_en.pdf> accessed September 2010 at 34 and 62.

⁴⁷ P Delimatsis, *International Trade in Services and Domestic Regulations* (Oxford University Press, 2007) at 19.

⁴⁸ See eg R Adlung, and M Roy, 'Turning Hills Into Mountains? Current Commitments Under the General Agreement on Trade in Services and Prospects for Change' 39:6 *Journal of World Trade* (2005) 1161.

⁴⁹ Eg J Kelsey, *Serving Whose Interests? The Political Economy of Trade in Services Agreements* (Routledge Cavendish, 2008).

⁵⁰ S Lester and B Mercurio, *World Trade Law: Text, Materials and Commentary* (Hart, 2008) at 635.

⁵¹ TRIMS Agreement Art 2, referring to GATT Arts III and XI.

requirements that enterprises must use local materials or that usage of imported products is limited according to the volume of exports. Such conditions may not be imposed on foreign investors in order to stimulate the local economy by assisting local suppliers, which as noted above is one of the traditional advantages associated with FDI. Importantly, the TRIMS Agreement covers investment-related measures that apply to goods only; it does not apply to services.⁵² As such it is more closely associated with FDI in manufacturing. However, it may still apply to measures relating to services FDI where measures applied to services investors affect trade in goods. For example, measures requiring a services supplier to source locally the materials (goods) it uses for the provision of its services would engage the TRIMS Agreement, such as a construction company being compelled to use locally mined iron or a restaurant compelled to serve locally grown food.⁵³ The prohibition of performance requirements in host states is obviously conducive to outward FDI from home states, however it can limit the benefits associated with inward FDI.

The WTO's Agreement on Trade Related Aspects of Intellectual Property Rights ('TRIPS Agreement') could impact on services-related FDI because of the growing recognition that intellectual property is a type of investment for the purposes of international investment law.⁵⁴ The TRIPS Agreement is aimed at securing and enforcing the protection of intellectual property based investments that are often embodied in bilateral investment instruments. Safeguarding intellectual property rights is especially important to international services investors from the BRIC states as they begin to develop their own technologies that are vulnerable to illegal reproduction overseas. In addition to mandating minimum protections for intellectual property among WTO members, the TRIPS Agreement contains a compulsory licensing provision, which allows members to appropriate patents of inventions originated from foreign suppliers under certain circumstances, deemed to be of greater importance than the right of inventors to profit from their ingenuity. While in theory augmented intellectual property rights are believed to lead to greater flows of FDI, it must be acknowledged there remains little evidence demonstrating that the TRIPS Agreement has actually resulted in significant increases in technology transfer or the flow of FDI to or from WTO members, including emerging markets, some of which assert that the TRIPS Agreement has actually harmed their economies.⁵⁵ This may change as knowledge intensive services continue to grow as a proportion of worldwide FDI.

Some mention should be made of two other WTO agreements. First, the WTO's Agreement on Subsidies and Countervailing Measures ('SCM Agreement') prohibits subsidies which may take the form of investment incentives granted by host states because these can distort the allocation of resources and suppress legitimate competition. While the SCM Agreement's control of these policies is a

⁵² Art I. ⁵³ UNCTAD, n 46 at 41.

⁵⁴ R Dolzer and C Schreuer, *Principles of International Investment Law* (Oxford University Press, 2008).

⁵⁵ E Graham, 'Will Emerging Markets Change Their Attitude Toward an International Investment Regime?' in K Sauvart, ed., *The Rise of Transnational Corporations from Emerging Markets* (Edward Elgar, 2008) at 311.

key aspect of members' regulation of inward FDI, the existence of subsidy programmes can dictate the volume, type, and destination of outward FDI from, as well as to, the BRICs. Finally, the WTO's plurilateral (optional) Agreement on Government Procurement ('GPA'), to which none of the BRIC states is currently a signatory, holds some limited relevance in establishing standards for purchasing of services, such as construction, by government entities. In particular, the GPA obliges signatory parties not to discriminate against suppliers on the basis of their degree of foreign ownership.⁵⁶ Government purchased investment is gaining importance because of the expansion and improvement of infrastructure in many countries throughout the world. Despite popular perceptions of government-owned entities concentrating on extractive sector FDI, state owned enterprises ('SOEs') have a strong presence in services industries.⁵⁷ The significance of the GPA could increase if its membership expands because many regional and bilateral investment agreements exclude government services from their coverage, much as the GATS excludes services supplied in the exercise of governmental authority from its ambit.⁵⁸

ii) The ICSID Convention and the New York Convention

Dispute settlement within international investment law has been multilateralized to a significant degree. This has been achieved in part through the efforts of the International Bank for Reconstruction and Development, otherwise known as the World Bank. The World Bank is an international organization created in 1944 and currently consists of 187 member countries. Bolivia, Ecuador, and Venezuela are no longer parties, having denounced the treaty. Recognizing the value of FDI as an aid to development, but also the dangers of investing in politically volatile countries, the World Bank established the International Centre for the Settlement of Investment Disputes ('ICSID') in 1965.⁵⁹ ICSID has the objective of improving the economic condition of developing countries around the world. It achieves this objective primarily by providing low-interest rate loans to developing countries to fund development projects such as roads and dams, often in conjunction with private investors. ICSID is now the principal system of arbitration for the resolution of disputes between foreign investors and the host states in which they invest. It grants a degree of security to investors located in regions lacking in political or legal stability by providing a means of legal redress for commercial damage caused by the regulatory and administrative actions of host state governments.⁶⁰ While ICSID was used sparsely in the first decades of its existence, the number of cases brought before it has exploded commensurate with the growth of FDI. The popularity of ICSID is largely because it is identified as the forum for dispute

⁵⁶ Art III 1. and 2. ⁵⁷ World Investment Report 2012, n 3 at xiii.

⁵⁸ Art I.3b) and c).

⁵⁹ Established by the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, also known as the Washington Convention or the ICSID Convention 575 UNTS 159, 4 ILM 524 (1965).

⁶⁰ Dolzer and Schreuer, n 36 at 222.

settlement in most BITs. As of 2012, 144 states had become parties to the ICSID Convention however, of the BRICs, only China has ratified the Convention, although Russia signed the Convention in 1992. ICSID is advantageous because it provides a recognized, neutral forum for dispute settlement of investment-related matters between investors and host state governments with a standardized procedure and institutional support. Tied to the consent of the parties, the dispute settlement process is self-contained, meaning that it is independent of the influence of outside bodies such as courts. Awards of the tribunal are final and binding, except in very narrow circumstances, and are enforceable automatically in all party states, obviating the need for additional procedures through domestic courts. As an agency of the World Bank, ICSID can potentially use the denial of World Bank assistance as a sanction against the refusal to enforce its awards and re-engages the right of diplomatic protection by the investor's home state.⁶¹ The strongest criticisms of ICSID are its poor transparency and lack of provision for participation of non-parties,⁶² its lack of an appeal mechanism,⁶³ and inconsistency in its decisions.⁶⁴

The Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the 'New York Convention')⁶⁵ is another key multilateral instrument that has made investor-state dispute settlement possible, increasing the legal security of FDI. The New York Convention requires courts of signatory states to give effect to private agreements to arbitrate, and to recognize and enforce arbitration awards made in other contracting states as if they were judgments of domestic courts. With 149 signatory states as of 2012, including all four BRIC states, the New York Convention is widely considered the foundational instrument for international arbitration, including importantly, that which occurs between investors and host states. Under this treaty, arbitration awards may still be challenged in national courts if there were procedural irregularities in the composition of the arbitral tribunal, or if the tribunal exceeded its jurisdiction. Awards that violate the public policy of the enforcing state may also be disregarded, and in that sense the New York Convention provides an additional layer of sovereign control that is absent from ICSID, often to the irritation of investors. The existence of the New York Convention allows for procedural rules of international arbitration other than those of ICSID to be used, including most commonly those of the United Nations Commission on International Trade Law (UNCITRAL) Arbitration Rules.⁶⁶ Like ICSID Rules, UNCITRAL Rules are often specified as an acceptable procedure for dispute settlement under international investment agreements, including many of those signed by the BRICs. UNCITRAL also created the Model Law on International Commercial Arbitration which is a pattern of law that national governments can adopt as part of their domestic legislation on arbitration, outlining the procedure under which national courts will recognize and enforce arbitration

⁶¹ ICSID Convention Art 27. ⁶² Eg Collins, n 24.

⁶³ Eg S Subedi, *International Investment Law: Reconciling Policy and Principle* (Hart, 2008) at 205.

⁶⁴ Eg Montt, n 25 at 139–41.

⁶⁵ 330 UNTS 38, signed on 10 June 1958, entered into force 7 June 1959.

⁶⁶ UNCITRAL Arbitration Rules (revised 12 July 2010) <<http://www.uncitral.org/pdf/english/texts/arbitration/arb-rules-revised/pre-arb-rules-revised.pdf>> accessed October 2012.

decisions issued by international arbitration tribunals. The UNCITRAL Model Law has been adopted very closely by each of the BRIC states, demonstrating both their receptiveness to this method of dispute resolution for international commercial disputes as well as uniformity in approach to procedural matters.

IV. Regional and Bilateral Regulation of Outward FDI

The most important means of regulating outward FDI are the various bilateral and regional agreements that contain provisions regarding the protection of investments. In addition to the more traditional role of making themselves attractive to foreign investors, many emerging economies have explicitly mentioned the promotion of outward FDI as one of their reasons for the participation in BITs, which have proliferated enormously in recent years. This goal has further led to the conclusion of numerous regional agreements for the protection and promotion of investment, some of which are of great significance to the BRICs.⁶⁷ Whereas GATS' importance to FDI lies in its liberalization to incoming investment in the so-called pre-establishment phase, bilateral investment agreements are primarily protective, meaning that they aim to protect already established investments. Only a minority of investment specific treaties contain commitments to open up markets and generally these have not been adopted by the BRICs.

An ever-increasing number of states have concluded BITs, free trade agreements ('FTAs') and regional trade agreements ('RTAs') that contain provisions that protect foreign investments through minimum standards of treatment for investors from one contracting state in the territory of the other state. Collectively these types of instruments can be labelled international investment agreements ('IIAs'). These commitments provide a stable and predictable legal environment that is attractive to foreign investors and on the basis of reciprocity, will be advantageous to investors from both or all state parties seeking to expand abroad. In the past decade the number of IIAs covering FDI in services has proliferated, especially between developed and developing states.⁶⁸ Although some differences can be found in the IIAs used around the world, commentators observe a high level of commonality in the contents of these agreements, as many of the concepts therein originated from customary international law.⁶⁹ Each of the BRIC states has pursued a regime of IIAs reflecting each state's approach towards foreign investment, primarily from the perspective of their position as host states, however this attitude is changing along with the rise of BRIC outward FDI. Although Brazil has signed only 14 BITs, Russia, India, and China have extensive BIT programmes, with 50, 68, and 130 of such instruments, respectively.

⁶⁷ P Gugler and J Chaisse, 'Patterns and Dynamics of Asia's Growing Share of FDI' in J Chaisse and P Gugler, eds., *Expansion of Trade and FDI in Asia* (Routledge, 2009) at 11.

⁶⁸ UNCTAD, n 46.

⁶⁹ Eg A F Lowenfeld, *International Economic Law* (Oxford University Press, 2008).

From the perspective of outward FDI in services, the primary purpose of IIAs is to protect the continued operation of established foreign affiliates of MNEs. Facilitation of market access is a lesser objective of IIAs, most of which require that foreign investments must be in accordance with host state laws, supplemented by a vague obligation to encourage FDI. Common provisions in BRIC IIAs include definitions of investment, mandatory national treatment and MFN commitments, guarantees against expropriation, fair and equitable treatment by the host state legal system, and full protection and security from physical violence. These concepts will be explored in greater detail throughout this book. Neutral dispute settlement by recourse to international investment arbitration is an important ubiquitous feature of treaty commitments, and it is often directed to ICSID or UNCITRAL rules. IIAs clearly limit party states' capacity to regulate their economic affairs and may be viewed as an encroachment on national sovereignty of host states, leading to some of the criticisms described above. The need for sensitivity in this area will only intensify as developed states, less accustomed to scrutiny of their laws, find themselves as the destination of capital from emerging market investors.

As noted above, there is some controversy as to whether FDI is economically advantageous to host countries. Even more uncertain is the question of whether the many thousands of IIAs have actually contributed to the observed increase in FDI flows, even if this is only in their capacity as signalers of a willingness to treat FDI fairly rather than as instruments of liberalization. An array of studies on this issue applying varying methodologies has revealed varied responses to this question.⁷⁰ It is not the aim of this book to resolve this debate by applying or defending economic indicators on the functionality of investment treaties. However, the failure of some studies on the effects of FDI to consider bilateral flows, including outward FDI from signatory states rather than simply inward investment, is noted.⁷¹ Again, a state may approach an IIA differently depending on whether it conceptualizes itself as a capital exporter or importer, and as this distinction becomes blurred, these instruments should reflect a more balanced approach to investors' and states' rights and obligations. Positive externalities resulting from IIA signage such as improved governance within host states must be considered, even in the absence of hard data on FDI impacts.

This book will examine the provisions of the various IIAs concluded by Brazil, Russia, India, and China, identifying common trends observed in standards of protection, investor compensation, and dispute settlement. Emphasizing uniformity in approach among the BRICs, it will be argued that both traditional developed and developing countries will need to achieve a balance between provisions that are conducive to inward and outward FDI and the retention of sufficient autonomy to pursue national development objectives in their services sectors.

⁷⁰ See K Sauvart and L Sachs, *The Effect of Treaties on Foreign Direct Investment: Bilateral Investment Treaties, Double Taxation Treaties and Investment Flows* (Oxford University Press, 2009).

⁷¹ The only known study to address outward FDI directly is that of T Buthe and H Milner, 'Bilateral Investment Treaties and Foreign Direct Investment: A Political Analysis' in Sauvart and Sachs n 70, at 171, who observe a positive effect.

V. The Multilateral Agreement on Investment in Services ('MAIS')

Having considered some of the central issues that arise in the international regulatory regimes governing outward FDI in services from the four largest emerging markets of Brazil, Russia, India, and China, as well as each of these states' approach to inward FDI, the second part of this book will outline key aspects of a multilateral instrument embodying the growing convergence observed above. This proposed treaty will be aimed at liberalizing both inward and outward FDI in services, among and between both developing and developed states. It will attempt to achieve this objective while safeguarding important public interest concerns, allowing state parties to face challenges raised by the progressive liberalization of services. This single proposed regime, entitled the Multilateral Agreement on Investment in Services ('MAIS'), is aimed at both traditional capital importing and exporting states. It will draw from common trends observed in the various multilateral and bilateral treaties that have been discussed in the first half of the book. The discussion of this proposed treaty will operate on the premise that the rise of outward FDI from countries like the BRICs, as well as observed improvements in services liberalization, signifies the global community's increased receptiveness to a more balanced investment regime. The discussion of the MAIS will not consist of a detailed delineation of its provisions, but rather, a general illustration of some of its most important features.

The feasibility and necessity of the MAIS is predicated primarily upon the growing outward flows of FDI in services observed among the BRIC states in which the needs of the developing and developed states converge. The treaty is founded also upon the need to achieve greater market liberalization and investor protection in the field of services as this sector increases as a component of global FDI flows as well as in the percentage of GDP of national economies. The prospect of success of a global services agreement is linked to the notion that although they remain heavily regulated relative to manufacturing and extraction,⁷² services should cause fewer practical regulatory difficulties than FDI in these other sectors. The extractive sector has been historically problematic because it deals with non-renewable resource, representing a high level of importance since errors in the management of resources cannot be easily corrected. Manufacturing, although often welcomed because it generates employment and knowledge transfer in host states, can lead to tensions relating to environmental harms, labour abuses, or possibly even trade-related complaints such as dumping or subsidization by the home state.

It is now believed that bilateral treaties may benefit the manufacturing sector because such arrangements help developing countries in particular join international production networks by assisting these countries in adapting to the business laws and regulations of home states through deep integration.⁷³ Such

⁷² UNCTAD, n 3 at xvii.

⁷³ *World Trade Report 2011: The WTO and preferential trade agreements: From co-existence to coherence* (World Trade Organization, 2011) at 147.

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advantages have not been observed with bilateral treaties in the services sector, possibly because there are emerging global standards in many services industries, such as banking and telecommunications, as opposed to distinct regional or national ones. The need for a global framework for international investment law can be seen in the increasing complexity of the existing bilateral and regional arrangements. With some 3,000 IIAs in operation around the world, many ongoing negotiations and multiple dispute-settlement mechanisms, it has come close to a point where this system is too large and complex to handle for either governments or MNEs. Yet in some ways it is still inadequate due to the number of countries that do not have bilateral investment relations with one another.⁷⁴ Previous failed attempts to construct a multilateral instrument on foreign investment were largely due to difficulties in achieving consensus on an overly ambitious range of issues and have been well documented.⁷⁵ The MAIS is premised on the acknowledged trend towards convergence in international investment law⁷⁶ as well as the progress observed in GATS Mode 3 liberalization. Moreover, a global treaty that is both more focused in terms of its coverage (services investment rather than in all forms of investment) and more balanced (sufficiently reflective of the need to maintain party state's capacity to regulate services) could prove successful in further liberalizing service FDI flows worldwide and ultimately act as an aid to further economic development. A multilateral approach is warranted because the adoption of universal investment rules will reduce the cost of administering bilateral regulation and will be accompanied by corresponding increases in compliance, which will divert resources to more productive uses. A legally homogeneous market offered by a multilateral approach to services investment further permits the progressive removal of national regulatory barriers to foreign investment and intra-firm trade.⁷⁷ Incentives for MNEs to exploit regulatory differences among states or regions would be removed through the harmonization of laws, rendering economic factors as the sole objective in channelling capital, thereby enhancing efficiencies.

Drawing on the lessons observed from the BRICs' approach to the regulation of rapidly increasing outward FDI in services, the content and structure of the MAIS will be considered in three parts. First, the proposed agreement's standards of protection for investors, including an enlarged understanding of this concept to reflect state-owned entities, will be established. Pre-establishment national treatment will be granted to investors from all signatory states, although no market access commitments will be included, as this remains one of the most important economic policy tools for national governments. Post-establishment guarantees of national treatment and most MFN will be extended as well as fair and equitable treatment, guarantees against expropriation, and regulatory transparency. Secondly, the MAIS's exceptions for key sustainability concerns such as labour, security,

⁷⁴ UNCTAD, n 3 at x.

⁷⁵ See eg S Amarasinha and J Kokott, 'Multilateral Investment Rules Revisted' in P Muchlinski, F Ortino, and C Schreuer, eds., *Oxford Handbook of International Investment Law* at 138–51.

⁷⁶ S Schill, *The Multilateralization of International Investment Law* (Cambridge University Press, 2009).

⁷⁷ Muchlinski, n 14 at 119.

culture, and economic emergency issues will be outlined, drawing on exceptions seen in various treaties. Lastly, a procedure for investor-state dispute settlement through ICSID arbitration will be recommended. This will involve increased attention to public participation as well as assistance for developing countries. Finally, the MAIS will encourage signatory states to assist in the internationalization of their own firms by lowering barriers to outward FDI where possible, and by participating in formal FDI promotion schemes with other signatories.

The substance of the MAIS will therefore incorporate observed common elements of the BRICs multilateral commitments, including some of the existing standards of investment protection seen in these countries' many IIAs. For WTO members, the MAIS will supplement, not replace commitments made under the GATS and other agreements, providing a narrower focus in some respects (commercial presence only and no market access commitments) and expanded reach in others, including pre-establishment national treatment coverage in all sectors, including government-type services, guarantees against expropriation, and direct access to dispute settlement on the part of investors. The MAIS will be able to function as a workable international agreement because it will engage with stakeholder nations from both capital exporting states (including the BRIC states in their new role as sources of capital rather than simply raw materials and labour); the developed world (where most MNEs still originate and where many BRIC investments are now targeted), and finally the developing world (where weak legal infrastructure raises risks of socio-economic exploitation). Special provisions for compensation will address the concerns of the poorest states. The proposed MAIS will therefore attempt both to liberalize markets and protect foreign investors, as well as maintain safeguards against harms that may be suffered by host states citizens as a consequence of foreign investment activity.

VI. The Structure of this Book

The first part of this book will examine the above noted international (multilateral, bilateral, and regional) commitments of each of Brazil, Russia, India, and China that have enabled each state to enlarge their outward investment flows in services. A chapter will be devoted to each state, discussing each country's internal politico-economic policy treatment of outward FDI in services as well as how international legal commitments have affected this process. The study of these emerging economies' international obligations, as well as their relevant domestic laws, will reveal common trends, including both obstacles to increased outward FDI in services as well as generally weak protections against socio-economic exploitation of host states. While each of the BRIC states represents a unique legal system, there is a remarkable degree of regulatory homogeneity towards outward FDI resulting in broadly similar internationalization strategies of BRIC firms. In that sense, the discussion of these countries will operate as a series of case studies, illustrating how emerging markets countries have become responsive to the global regulation of services-based investment. The international legal commitments of these countries,

including their GATS-specific commitments will also illustrate their approach towards inward FDI, which should inform their responsiveness to a global regime.

The second part will apply themes cultivated from the above study to construct the proposed MAIS aimed at reducing the barriers to FDI in services while balancing necessary elements of the regulatory autonomy of host states in order to consider the interests of their citizens. There will be one chapter on the proposed instrument's primary obligations and standards of treatment; one chapter on exceptions for governance of a properly functioning, sustainability focussed global community; and a final chapter on dispute settlement and the associated issue of compensation for breach of investment protection guarantees. Trends observed in the regulation of BRIC outward FDI and the ways in which these are illustrative of needed changes in international investment law, as generally evident in the text of the MAIS, will be summarized in the final chapter.

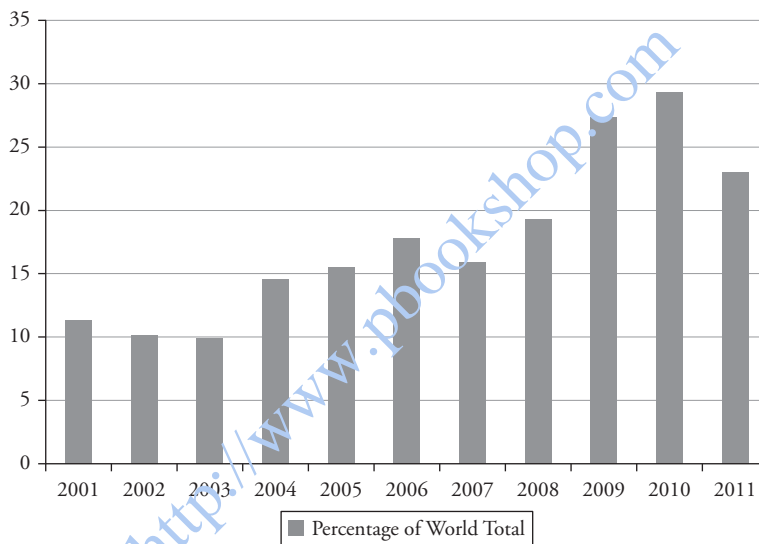


Fig. 1.2 Developing and Transition Economies FDI Outflows (2001–2011)

Source: UNCTAD 2012.