

***“BILATERAL INVESTMENT TREATIES OF  
SOUTH AMERICAN COUNTRIES AND  
THEIR CONSEQUENCES AT THE  
INTERNATIONAL LEVEL”***

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## INTRODUCTION

The development of foreign investment rules already started in the 19<sup>th</sup> century and continued as part of international law. In the 1950s to 1970s when states sought to entrench these rules at a multilateral level, the rules proposed by the majority went through a debacle, and the rules for foreign investments culminated being defined by Bilateral Investment Treaties (BITs), which are the current framework for international investments, instead.

The first multilateral level forum in which the rules for international investment were proposed was at the United Nations. However, there was a clear debate between developed countries and developing countries on the rules that would form the framework for international investments. Developed countries wanted to establish a mechanism that surpassed international law and by which, for any mistreatment on foreign property, developing countries would pay a prompt, adequate and effective compensation and that any disputes arising thereof be detached from domestic courts. Developing countries wanted to build a framework by keeping what international law and their domestic laws stated on foreign investments, and to have disputes arising from these foreign investments to be ruled by the courts where the investment was made.

The formal structure of the forum allowed developing countries' interests to outweigh those of developed countries because developing countries formed alliances with all developing countries sharing the same interest. Thus, UN resolutions had passed, which favoured developing countries' interests on matters of foreign investments.

However, noting that UN resolutions are not binding, only a few years after the last UN resolution favouring the interests of developing countries on international investments, developed countries initiated bilateral programs. Interestingly, around the 1990s South American countries signed Bilateral Investment Treaties (BITs) which contained rules on international investment that reflected the exact rules that were proposed by developed countries in the debate and which were the opposite to what developing countries were fighting for at a multilateral level.

Facing the boom of BITs in the 1990s, scholars concentrated on the question of why suddenly so many BITs were signed and especially by developing countries since BITs contained less favourable rules than those proposed at a multilateral level. Scholars found in the actions of developing countries a paradox. It was a paradox because developing countries agreed to a framework that did not benefit them. In the search of answering this phenomenon some explanations arose.

When trying to overcome this paradox, some scholars saw the rationale of BITs in the benefits. Dolzer (1981) claimed that developing countries accepted BITs because of all the benefits that BITs provide for them.<sup>1</sup> Vandeveld (2000) has disclosed the debates in political economy

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<sup>1</sup> Dolzer, R. "New Foundations of the law of Alien Property" 75 AM J.INT'L 1981. p. 567

theories between liberal theories and interventionist theories, claiming that only productivity is sought under the liberal model.<sup>2</sup> Vandeveld (2005), Salacuse and Sullivan (2005) and some UN reports also stated that developing countries have liberalized their markets in order to increase their foreign direct investments (FDI).<sup>3</sup> And indeed, the preamble of the BITs discloses as their purposes to have mutual benefit and increase the country's prosperity.<sup>4</sup>

Other scholars argued that BITs were instruments that arose from competition among developing countries.<sup>5</sup> Guzman (1998) concluded that there were conflicting interests when a country acted on its own or when it acted as group, and so that developing countries are in the prisoner's dilemma. Elkins, Guzman and Simmons (2006), on the other hand, with an empirical study, claimed that BITs emerged from the international competition among developing countries and that it is a "take it or leave it" deal for developing countries.

Although the scholarship proposes these two theories as the rationale for BITs, the development on the area of international investments did not end there. The UN forum was not the only forum where investment provisions were sought to be regulated at a multilateral level. In the last decade, rules for the regulation of foreign investments were also proposed at the World Trade Organization (WTO). What developed countries proposed at the 1996 Singapore, 1999 Seattle, 2001 Doha and 2003 Cancun WTO Ministerial Conferences, was not accepted by South American countries, and because of this those negotiations failed. So in the same sense as it once happened in the UN forum, South American countries, once again, united and upheld their interests against those of developed countries. This was only possible due to the alliances that developing countries formed.

However, also similarly to what once happened at the UN level, paralelly to the WTO conferences, South American countries continued to sign BITs. In these BITs these developing countries have agreed to investment and other issues (under the umbrella of investment protections) that they opposed at the WTO.

Thus, the current framework for international investments resulted from rules created in a bilateral and not in a multilateral framework. This framework for international investments (also referred to as the BIT regime) provides the rules for actors to operate on matters of foreign

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<sup>2</sup> Vandeveld, K. "The Economics of Bilateral Investment Treaties" 41 Harv. Int'l L. J. 469 2000 p. 484

<sup>3</sup> See for example Vandeveld, K "A Brief History of International Investment Agreements" University of California. Davis Journal of International Law and Policy. Vol.12. 2005–2006; Salacuse, J. and Sullivan, N. "Do BITs Really Work?: An Evaluation of Bilateral Investment Treaties and Their Grand Bargain" 46 Harvard International Law Journal 67 2005; UNCTAD, Bilateral Investment Treaties in the Mid-1990s. U.N. Doc. UNCTAD/ITE/IIT/7 (1998) p.145

<sup>4</sup> See Appendix IV.

<sup>5</sup> Arguing that BITs were a necessity because of all the confusion concerning international laws and the dispersed regulation of international investment, the contracting parties of BITs wanted to make the rules for international investment clear through them. See Sornarajah, M. *The international law on foreign investment* (Cambridge University Press, Cambridge. 2004) p.213; Kaushal, A. "Revisiting History: How the Past Matters" Harvard International Law Journal. Vol 50 Issue 2. 2009.; and Kononov, O. "International Investment Law. Is it Time to Change the Traditional BIT System?" Czech Yearbook of International Law. 2011.

investments; it is the platform in which actors relate to each other when there are matters of foreign investment involved. The framework comprehends the treaties as the main core of it, but it also comprises of international arbitration conventions, national arbitration laws, and international arbitration institutions, the combination of which are necessary for the operation of the framework.

So *a prima facie*, the paradox of why developing countries agreed to a framework for international investment that has been defined by bilateral relations in which their interests did not prevail, still stands. However, none of the given theories sufficiently explains the paradox, as both theories, that taking the benefits and that taking the competition as explanations, can be counter argued. On the theory that claims that developing countries have signed BITs to increase their FDI, many empirical studies performed to check this fact have proven otherwise, and empirical studies from international organizations have all claimed that there is no correlation between a BIT and FDI increase.<sup>6</sup> The competition theory is also contested since in the South American region there is Brazil which has the highest FDI in the region and yet has not signed any BITs with developed countries.

Furthermore, these theories have the presumption of conceptualizing BITs as a bargain or as a product of coercion. This correlation, however, derives from specific lenses used to analyze the BIT regime. Therefore, what I argue is that there is no paradox and that what is lacking is the analysis of this phenomenon through a different lens. I argue that what lacks in the literature of international investment is an analysis of power as a holistic phenomenon in the framework for international investments.

So far, BITs have been studied as a localized factor, the focus remained on just the treaty. However, there are more elements that must be seen in connection to the treaties because these elements are also part of the framework for international investments. Then, we can see something that the existing literature has not considered, namely, that is that power is a holistic phenomenon in the framework or the BIT regime and it is a feature of relationships when entering into force BITs.

Therefore, my purpose is to analyze the role of power in relation to the BIT regime as a whole. This includes the analysis of power in the multilateral attempts to regulate international investments and in the bilateral relations that created the framework for international investments through BITs. From this it can also be determined which consequences the use of BITs can have vis a vis the power that developing countries have gained at international level.

For this challenge my analysis of power in the international investment framework picks a developing country perspective. As pointed out by Robert W. Cox: *“All theories have a perspective. Perspectives derive from a position in time and space, specifically social and*

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<sup>6</sup> Chapter V describes these studies in detail.



*political time and space.*"<sup>7</sup> The deadlock at multilateral level is being produced by developing countries' insistence of including their interests in the agenda. It is also developing countries that have entered into force BITs that award foreign investors special protection in their territory and they are the ones having more fundamental issues as delegation of their sovereignty as a consequence. Therefore, the issue should be analysed from a developing countries' perspective and I restrict it to the South American region.

In regard to my theoretical approach, I use Susan Strange's theory (in Chapter I). Strange tries to come closer to analyse the world and actors' relationship considering state and non-state actors. Accordingly, she has explained the effects of power in international relations in a way that becomes more accurate for this work.

Susan Strange has long ago pointed out that international relations should not be analysed with the sole consideration of states. She has criticized the classical theories and researchers using them because if they are concentrated just in their theory, they would not see the clear overall picture. She was open for flexibility and has sought to see things by adapting ourselves to the not ordinary events that could affect international relations. This is quite accurate especially because the studies of social sciences will always be dynamic due to the social element which is always in motion: developing itself, erring and progressing. She writes:

*"If the myopia of international relations theorists is derived from their obsession with the problematic of war and peace and conflict between states, the equal myopia of western political theorists is derived from a similar obsession with values of political liberalism. Their current literature focusses a great deal on the nature, extent and promotion of democracy and liberty. Look in vain for any consideration of the structural power in democratic states based on the financial system which - as Polanyi clearly perceived - could directly affect both the international political system - the gold standard - and the relative influence of social classes over domestic politics."*<sup>8</sup>

She brings to our attention how researchers are too concerned either with realist or liberalist theories, and that further research with structural power theory is lacking. This thesis takes this challenge. By an analysis of exemplary treaties and investment disputes, it intends to show that indeed the framework for international investments can and should be analyzed through the lens of structural and relative power theory.

Susan Strange mentions three forms of power maintained by the actors which affect international relations, namely, structural power, relational and relative power. She developed only the first

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<sup>7</sup> Cox, R. and Sinclair, T.J. "Approaches to World Order" Cambridge Studies in International Relations. 40. Cambridge University Press. 1996. p. 87

<sup>8</sup> Strange. S. "What Theory? The theory in Mad Money" CSGR Working Paper No 18/98. December 1998. p. 6

one. However, even though relative power is mentioned in a superficial manner by Strange, with the work in this thesis, I pursue to give keen attention and research further the concept of relative power. My intention is to continue the development of such a concept that for unknown reasons was left without further research by Susan Strange. By complementing the concept of relative power with that of structural power, I intend to establish a connection between both forms of power when analyzing the bilateral and the multilateral context of the international investment framework.

While at the multilateral level, developing countries have maintained their interests thanks to their coalitions and alliances, also due to the emerging countries' strength and economic relevance,<sup>9</sup> by doing so, developing countries are also influencing the development of the future framework that would establish the rules on a given issue. This is the relative power of developing countries at the multilateral level.

Relative power, as it is described by its attribute, is neither full control nor power to command others, it is a power allowing those bearing it to have certain influence -even though it could be a minor influence- in the structure of international relations which pertains to the formation of the international investment framework. When this happens, those bearing relative power are not subjects who just abide such structure; instead they are part of its development.

On the other hand, the bilateral relations by developed countries which have the purpose of regulating international investments can be analyzed using the lens of structural power. The indicators of structural power in the BIT regime can be spotted when analysing how developed countries can obtain a more predictable outcome regarding their preferences on investment matters.

Therefore, I use this new lens- Susan Strange's theory of structural and relative power – to explore and explain the changes caused by BITs and bilateralism, and also the changes taking place at multilateral level. However, Susan Strange has also left many questions without an answer, hoping they would be answered in the future. Her future is our present and I accept the challenge of providing explanations and answers while maintaining the focus on bilateral investment treaties and their enforcement in developing countries.

Under this theoretical lens, my hypothesis is that Bilateral Investment Treaties (which resulted from the structural power of developed countries) weaken the relative power of developing countries at the multilateral level. The clash of these powers produces the weakening of one of them. This explains developed countries' preference over bilateralism, which is how the current international investment framework is constructed.

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<sup>9</sup> Chapter II will describe some of international investment history at a multilateral level will disclose the development of efforts to have rules and norms on international investment.

The methodology of the work comprises an analytical and empirical study of the BIT regime. The thesis aims to work multi-disciplinary, taking law and political sciences as the building blocks for the research.

Firstly, the analysis of the multilateral level includes the analysis of the attempted regulations for international investments at the multilateral level and the relationship of countries. The developing countries efforts, firstly at the UN and then, the lack of agreement among countries at the World Trade Organization, and the reasons for it are going to be analyzed insofar as investment issues are concerned.

Therefore, the empirical analysis for the multilateral level shall include the analysis of the UN General Assembly Resolutions pertaining to investment, and the statements of the South American countries' representatives at the WTO ministerial conferences in which investment regulations were proposed between 1996 and 2003. (In Chapter II)

Secondly, for the analysis of the bilateral level, I use all the South American BITs (from 12 countries) that have been entered into force with the US and with Germany, France, UK and Spain, in total 39 BITs. These developed countries are chosen based on the criteria of being strong world economy countries and their presence in the region. The reason for choosing the USA is due to the power and influence they have on South American countries. The reason for choosing the EU countries is due to the effect of strong economies in the region, namely, Germany, France and United Kingdom and Spain.<sup>10</sup> These EU countries and their transnational companies are also major investors in South America.<sup>11</sup> This selection of developed countries will also allow finding the differences, if any, of the US and European policies regarding investment in South America.

The comparative analysis among BITs will include the BITs structure, its clauses and its enforcement. I will also focus on the history of the development of the framework for international investments that we have today, as it intends to reveal factors that support the thesis. (In Chapter III and IV).

Considering the empirical results, I return to the explanations of why South American countries have signed BITs and show the loopholes in these explanations. (In Chapter V). Last but not least, I analyze other surrounding factors that aided the development of the framework, some

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<sup>10</sup> Although the latter is not such a strong economy in the EU, it has a lot of historical and therefore strong connection to the South American region.

<sup>11</sup> According to a statistic provided by the firm América Economía, companies from France, Spain and Germany are among the first five companies investing in Latin America with gains reaching 20.000 million dollars. América Economía. Sub-ranking based on foreign property. Available at <http://rankings.americaeconomia.com/2010/500/privadas-extranjeras.php> (last visited March 12, 2013)

news changes introduced to the framework and the case law derived from the disputes on foreign investments that were submitted by investor companies against South American countries to the International Centre for Settlement of Investment Dispute (ICSID). I will concentrate on disputes that show legal tension or that infringe the sovereignty of South American countries.

The analysis of the enforcement of BITs is very important because the enforcement of BITs provokes a chain reaction which affects all actors and their relationships. The results of this analysis, coupled to that of the development of the framework for international investment, shows indicators of structural power in the BIT regime. They can be classified in two categories: internal (considering the indicators derived from the substance of BITs) and external (considering the indicators derive from external factors to BITs).

In the internal category, the indicators are the overall acceptance of developed countries' Hull principle by developing countries (when it was already multilaterally settled something else that was more beneficial for developing countries). Also, the conflicting views between developed and developing countries with the Calvo clauses, which although they exist on BITs, in practice the investment cases are taken to an international jurisdiction.

In the external category, the indicators are the developing country's acceptance of liberal policies favouring foreign investors; international arbitration as part of the liberalization process; the use of ICSID as the main arbitration institution; the unintended sovereignty costs for developing countries for entering into force BITs; and the element of conditionality when developing countries receive credits from international institutions. Another indicator that comprehends both categories as it defines the framework is the one that points out how the framework is being changed as to include the preferences of a party. (In Chapter VI).

For the conclusion, the results provide sufficient explanations not only to reject the idea of a paradox in the BIT regime, it further contributes to answering challenging questions of the international investment framework: (i) why developing countries have agreed to the BIT regime, (ii) why the international investment framework is evolving (contrary to the popular thinking that it is collapsing), (iii) why developing countries are reacting against the BIT regime, and (iv) why the multilateral attempts to regulate international investments failed.

Ultimately, the analysis leads to important international consequences resulting from BITs. The BIT regime has strengthened companies' access to international relations at a level that was traditionally reserved for states. In this sense, through BITs, the distinctions between public and private actors become less relevant for having an influence on international investment relations. This reflects how states, by accepting transnational activities such as these, are getting away from their own established control over their activities, in this case, on foreign investments.

The effect of these activities on the rules for foreign investment, however, translates into the definition of a framework. The definition of the BIT regime under structural power, and through bilateral relationships, which contain the preferred rules for developed countries, conflicts or clashes with the relative power of developing countries, which express interests favouring developing countries, at a multilateral level. And it is in this sense that the relative power that developing countries have at the multilateral level gets weakened by BITs.

## **CHAPTER I: Fitting a Theory of Power into the BIT Regime.**

Kuhn (1968) has argued for an alternative conception of “theory” according to which a theory amounts to what Kuhn calls a “paradigm.” A paradigm provides the scientific community believing in it with a world-view, a set of coloured glasses through which its members see the world.<sup>12</sup> A paradigm can be described in a narrow and a wider sense according to Kuhn. A paradigm in the narrow sense is an exemplary solution of a given problem which has been so successful that future research tries to mirror the pattern of that solution when trying to solve other problems.

A paradigm in the wider sense (which Kuhn termed “disciplinary matrix”) is a complicated structure made up of hypotheses, values, practices, exemplars and shared tacit knowledge of the members of a scientific community which belong to the same disciplinary matrix, and which thus look at the world through glasses of the same colour. It is in this sense of a disciplinary matrix, or paradigm in the wider sense, that I will use the term “theory” in this work.

When analyzing the international investment framework, I claim that some issues that have been regarded a paradox can be rejected as such when viewing the international investment framework through a theory of power. This is because the complex questions surrounding the framework, like, for example, why developing countries have signed BITs, why the international investment framework is evolving, why developing countries are reacting against the BIT regime and why the attempts to regulate investment at a multilateral level have failed; all these questions can be sufficiently explained using a theory of power when analyzing the international investment framework.

For the theoretical approach, the main challenge is to find out which theory of power will better suit the explanation of an international investment framework. On an abstract level, theories of international relations encompass the different concepts of power that can be developed in each theory. On the other hand, international political economy theories translate these concepts into the explanation given for trade and investment. I keep the focus of these on the area of international investments. In order to combine both disciplines and using elements of their theories, I provide a simplified taxonomy of the theories that is relevant for understanding my paradigm in the present work.

Menzel (2001) has classified the theories of international relations in four main groups, namely realism, idealism (liberalism), institutionalism and structuralism. For realism the aim is security and its ideas can be traced back to Hobbes; for idealism the aim is peace and its ideas can be traced back to Kant; for institutionalism the aim is cooperation and its ideas can be traced back to Grotius; and for structuralism the aim is function and its ideas can be traced back to Marx.<sup>13</sup>

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<sup>12</sup> Kuhn, T. *The Structure of Scientific Revolutions* 2<sup>nd</sup> Edition. University of Chicago Press. 1974.

<sup>13</sup> Menzel, U. *Zwischen Idealismus und Realismus. Die Lehre von den Internationalen Beziehungen* Suhrkamp. Main. 2001

However, because there are convergent elements in what idealism and institutionalism pursue, for the purpose of understanding power in the realm of theories, I will focus on realism, liberalism and Marxism.

Firstly, realism claims that the state is the main unit or actor, and its behavior should always be considered as aiming for the survival of the state.<sup>14</sup> There is a notion of self-help to achieve these purposes and the value cherished is security. How exactly can the state's objectives be achieved? This theoretical approach leads us to power.

The underlying assumptions of the theory can be traced back to Hobbes.<sup>15</sup> Hobbes defined the power of a man as "his present means, to obtain some future apparent Good."<sup>16</sup> However, Hobbes speaks of a 'grim equality' which is the power of men to kill each other (eg. Cain and Abel), a power that is always there, it just has been 'managed'.<sup>17</sup>

This management of power entertains realists in numerous ways.<sup>18</sup> From Morgenthau's 'struggle for power'<sup>19</sup> or Bull's idea of the 'anarchical society' in which power meant a capability of order<sup>20</sup> to the neorealism of Waltz,<sup>21</sup> which "presupposes that states are security-maximizing units"<sup>22</sup>, the balance of power theories' importance was without a doubt recognized in the discipline of international relations.

Under the realist perspective, power is given by "material resources" of one state, which mainly involves military resources. Power is seen as a justification for the state's survival and any state regulation should be in a way that power is never lost.<sup>23</sup> Therefore, the government should

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<sup>14</sup> Referring to Morgenthau and E.H.Carr in Menzel, U. *Zwischen Idealismus und Realismus. Die Lehre von den Internationalen Beziehungen* Suhrkamp. Main. 2001

<sup>15</sup> *ibid*

<sup>16</sup> Hobbes for example presents the idea of instrumental powers (acquired by a natural power: faculties of the body or mind) that serves 'to acquire more' riches, reputation, etc. Hobbes, T. (1651) *Leviathan* Penguin Books. London 1985. p. 150

<sup>17</sup> The analogy is mentioned in Claude, I.L. *Power and International Relations* Random House. New York. 1962

<sup>18</sup> Within realism there are theoretical approaches, namely balance of power (again with different models – Morgenthau; Bull, Waltz, Mearsheimer) collective security and world government. See Claude, I.L. *Power and International Relations* Random House. New York. 1962 and Little, R. *The Balance of Power in International Relations* Cambridge University Press. 2007

<sup>19</sup> Morgenthau, H.J. *Politics Among Nations: The Struggle for Power and Peace* 5th edn. New York: Alfred A. Knopf. 1973

<sup>20</sup> Bull (1977) had stated "...to pursue the idea of world justice in the context of the system and society of states is enter into conflict with the devices through which order is at present maintained." Bull, H. *The Anarchical Society* The Macmillan Press LTD. Great Britain 1977. p. 88

<sup>21</sup> Waltz refers to power being fungible, i.e. military power means economic power. In Waltz, K. *Theory of International Politics* Addison-Wesley. London. 1979

<sup>22</sup> Little, R. *The Balance of Power in International Relations* Cambridge University Press. 2007 p.170

<sup>23</sup> See Gilpin, R. *Global Political Economy* Princeton University Press. 2001. p. 15-23 and Gilpin, R. *The Political Economy of International Relations* Princeton University Press. 1987. pp. 25 and 26

operate, control and regulate the citizens and their economic activities (mercantilism, interventionism).<sup>24</sup>

This means, however, that the power growth of one state means the power loss of another state.<sup>25</sup> Even under the regime theory which is based on an underlying assumption of the existence of cooperation in an anarchical world, realists like Grieco (1988) have suggested that cooperation implies the loss of independence and security.<sup>26</sup>

This material power entitles one state to make another state do something that it does not want to do. Therefore, power under a realist perspective is a conception of 'power to', materializing this faculty in the power to coerce.

Secondly, according to liberalism or idealism the aim of actors' behavior in world politics is peace and by understanding human behavior as rational, proponents of the theory believe that peace can be achieved through cooperation, and that cooperation as such could be achieved through institutions.<sup>27</sup> Under the liberal lens, actors pursue to cooperate because it will allow actors to maximize their gains by coordinating actions at international level. Arendt (1970)<sup>28</sup> for example stated that "power corresponds to the human ability not just to act but to act in concert."<sup>29</sup>

When translating these assumptions into the economy, liberal theories typically depart from ideas of intervention and promote free trade,<sup>30</sup> achieving interdependence among states. All the efforts are aimed to achieving the best possible situation in the states' economy and social welfare.<sup>31</sup> The pluralists consider the non-state actors in the international system which together with states can be part of the system. The international system, through multilateral endeavours and agreements among actors, can set the regulations that affect all countries. There is the idea

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<sup>24</sup> Friedrich List for example was an early promoter of the protection and the active intervention of state. In List, F. *The national system of political economy* London : Longmans, Green. 1885

<sup>25</sup> Expressed as Morgenthau's law in Little, R. *The Balance of Power in International Relations* Cambridge University Press. 2007 p. 97

<sup>26</sup> See Grieco, J. "Anarchy and the Limits of Cooperation: A Realist Critique of the Newest Liberal Institutionalism" *International Organization*, Vol. 42, No. 3. 1988, pp. 485-507

<sup>27</sup> Idealism's objective is peace and the teachings can be traced back to Kant. Institutionalism's objective is cooperation and the teachings can be traced back to Grotius. Menzel, U. *Zwischen Idealismus und Realismus. Die Lehre von den Internationalen Beziehungen* Suhrkamp. Main. 2001

<sup>28</sup> I include Arendt under this category because of her definition of power as a cooperative tool. It has been mentioned that it is difficult to classify her under the traditional doctrines although it was also claimed that she is not an anti-liberal. See d'Entreves, M. P. "Hannah Arendt", *The Stanford Encyclopedia of Philosophy* (Fall 2008 Edition), Edward N. Zalta (ed.)

<sup>29</sup> Arendt, H. *On Violence* Harcourt Brace Janovich Publishers. San Diego, New York, London. 1970 p.44

<sup>30</sup> Anarchical problem should be solved through peace, enlightenment; constitution; cooperation. In economy Adam Smith and David Ricardo. See Menzel, U. *Zwischen Idealismus und Realismus. Die Lehre von den Internationalen Beziehungen* Suhrkamp. Main. 2001

<sup>31</sup> See the idea on comparative advantage in: David Ricardo *On the Principles of Political Economy and Taxation* 2<sup>nd</sup> American Edition. J.B. Bell. Washington. 1830. p. 107-134



of an interdependence relationship among actors, which can nevertheless be asymmetrical. In such a case the actors just have a bargaining advantage.<sup>32</sup>

Therefore, although the liberal conception tends to depart from power,<sup>33</sup> the concept of power has remained as a bargaining advantage. Keohane and Nye describe sources of influences that give actors a better bargaining position which then results in asymmetries. On the other hand, Nye (2002) developed the concept of soft power<sup>34</sup> by which an actor like the United States, with resources that are attractive to others (attractive culture, ideology and institutions) can make other actors to do (and wanting to do it) what the United States wants, instead of coercing them.<sup>35</sup>

Ergo, power under this lens is no longer achieved only through material resources, but through resources 'and' capabilities. These resources or capabilities position actors on a bargaining advantage in relation to the other actors.<sup>36</sup> Thus, the conception presupposes the idea of a bargain.

Thirdly, marxism, dependency and world system theories have dealt with the ills of capitalism and the struggle of classes or the structure of the market, which mainly encore the capitalist world-economy.<sup>37</sup> These theories have claimed the existing exploitation of classes by those in control of production means and have pointed out inequalities in the international operation of states. In this sense, this theory also considers a material basis, namely the inequality of power and welfare. The value which these theories cherish is, therefore, to get rid of inequalities and have justice.<sup>38</sup>

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<sup>32</sup> Keohane, R. and Nye, J. *Power and Interdependence* 3<sup>rd</sup> Edition. Longman. New York. 2001.

<sup>33</sup> For neoliberalism, Moravcsik, and for social constructivism Wendt or Finnemore. See Menzel, U. *Zwischen Idealismus und Realismus. Die Lehre von den Internationalen Beziehungen* Suhrkamp. Main. 2001 and Little, R. *The Balance of Power in International Relations* Cambridge University Press. 2007

<sup>34</sup> Nye, J. *The Paradox of American Power* Oxford University Press. New York. 2002

<sup>35</sup> This is a concept that could be related to Fulbright who in the 1960s developed the idea that peace could be achieved by exchanging language and culture and allowing foreign leaders to live in western countries and in that way when they return to their countries, they would already be fond of the western countries principles, ideologies and potentially promote them in their countries. Fulbright, J. W. *The Arrogance of Power* Harmondsworth. Pinguin. 1970.

<sup>36</sup> See Keohane, R. and Nye, J. *Power and Interdependence* 3<sup>rd</sup> Edition. Longman. New York. 2001

<sup>37</sup> Wallerstein refers to this in a comment about the work of Rosa Luxemburg "The Accumulation of Capital", in Wallerstein, I. "The Rise and Future Demise of the World Capitalist System: Concepts for Comparative Analysis" *Comparative Studies in Society and History*, Vol. 16, No. 4. Cambridge University Press. 1974

<sup>38</sup> Representatives of this theory would include Karl Marx; Rosa Luxemburg; Immanuel Wallerstein. See for example, Marx, K. *Capital* Vol I. Chapter VI. Translated from the third German edition by Samuel Moore and Edward Aveling and edited by Frederick Engels. Elecbook London. 1998; Wallerstein, I. *The Politics of the World Economy* Cambridge University Press. 1984; and Cornejo, B. "The Social Doctrine in Prebisch Thought". In *International Economics and Development*. Edited by Luis Eugenio Di Marco. Academic Press. New York and London. 1972.

Power viewed under this lens is derived from the control over labour<sup>39</sup> and therefore a control of the production means.<sup>40</sup> Thus, the relationship between an actor that has the control of the production means and one that does not, turns into an exploitation relationship in which the ones being exploited remain in dependence.<sup>41</sup>

However, as Wallerstein (1984) has expressed it, “In a capitalist world-economy, the states are expressions of power.”<sup>42</sup> This is because the state can continue to control capital flow and labour, for example. Therefore, the control on the production means is what gives an actor power to persuade, to impose on weak states.<sup>43</sup>

When translating these theories into the economy, they converge on capitalism as the structure of the world economy. Under these theories mercantilism is a mechanism of defense by capitalist states,<sup>44</sup> because it is a way of creating national barriers. Formerly, the Marxist and dependency theories gave the justification that states invest in other states to extend the capitalism structures to their colonies.<sup>45</sup>

Thus, under this paradigm, power has traditionally been seen as power to influence and impose, and just like the realists have claimed, to coerce. However, power under this lens is also seen as resources or capabilities because it considers a material basis and because power is given by those in control of production means, who can make others actors dependent on them.

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<sup>39</sup> Marx defines labour power in the following way: “By labour-power or capacity for labour is to be understood the aggregate of those mental and physical capabilities existing in a human being, which he exercises whenever he produces a use-value of any description.” In Marx, K. *Capital* Vol I. Chapter VI. Translated from the third German edition by Samuel Moore and Edward Aveling and edited by Frederick Engels. Elecbook London. 1998 p. 242

<sup>40</sup> Another form of power under marxist theories are those refer to the class itself. Wallerstein commenting on Mao Tse Tung has said that the political power refers to the dictatorship of the proletariat. See Wallerstein, I. “The Rise and Future Demise of the World Capitalist System: Concepts for Comparative Analysis” *Comparative Studies in Society and History*, Vol. 16, No. 4. Cambridge University Press. 1974 p.396

<sup>41</sup> Rosa Luxemburg stated “...capital’s unrestricted power of command over the pool of labour power, how long and under what conditions men were to work, live and be exploited.” In Luxemburg, R. (1913) *The Accumulation of Capital* Translated by Agnes Schwarzschild with a new introduction by Tadeusz Kowalik. Routledge Classics. London New York. 2003 p.415. See also Marx, K. *Capital* Vol I. Part III. Translated from the third German edition by Samuel Moore and Edward Aveling and edited by Frederick Engels. Elecbook London. 1998. Note that this is why theories that follow this line of thought are called “Dependency” theories.

<sup>42</sup> Wallerstein, I. *The Politics of the World Economy* Cambridge University Press. 1984. p. 4

<sup>43</sup> Wallerstein have stated “Once we get a difference in the state-machineries, we get the operation of ‘unequal exchange’ which is enforced by strong states on weak ones, by core states on peripheral areas.” Wallerstein, I. “The Rise and Future Demise of the World Capitalist System: Concepts for Comparative Analysis” *Comparative Studies in Society and History*, Vol. 16, No. 4. Cambridge University Press. 1974 p.401. See also Menzel, U. *Zwischen Idealismus und Realismus. Die Lehre von den Internationalen Beziehungen* Suhrkamp. Main. 2001

<sup>44</sup> Wallerstein, I. “The Rise and Future Demise of the World Capitalist System: Concepts for Comparative Analysis” *Comparative Studies in Society and History*, Vol. 16, No. 4. Cambridge University Press. 1974

<sup>45</sup> Commenting on Rosa Luxemburg, in Menzel, U. *Zwischen Idealismus und Realismus. Die Lehre von den Internationalen Beziehungen* Suhrkamp. Main. 2001

Therefore, what the three paradigms or lenses (realist, liberal and Marxist) have in common is the view of power as resources or capabilities and the view of power “in relation” to another actor, i.e. relational power.

Weber defined power as the “probability that one actor within a social relationship will be in a position to carry out his will despite resistance, regardless of the basis on which this probability rests.”<sup>46</sup> Weber further states that “All conceivable qualities of a person *and all conceivable combinations of circumstances* may put him in a position to impose his will in a given situation.”<sup>47</sup> On the other hand, Dahl (1957) defined power in the following way: “A has power over B to the extent that he can get B to do something that B would not otherwise do.”<sup>48</sup> Under both conceptualizations of power, the perspective is concentrated on the actors of the relationship, of which one does not want to do something or resists it. Furthermore, there is an intention when manifesting power. The actor intends to use power cognitively and there is also a cognitive intention on the other party of doing what he does not want to do.<sup>49</sup>

To clarify it with an example, if I am the big brother and my mother only allows my little brother to go out and play if I am with him, knowing this advantage allows me, the big brother, to decide which game I will make my brother play with me. My brother also knows that if he does not play my game, I will go inside and he will not be allowed to play outside. Therefore, he does something (consciously) that he does not want to do. This analogy relates to the power that I, as big brother, have *in relation* to my little brother.

Under this scheme, therefore, the idea of one actor not wanting to do something is easy to spot when we consider the two brothers’ relationship. However, one has to note that the mother’s condition is not included in the relationship. The mother’s condition is contained in a bigger dimension that *includes* the actors’ relationship.

The problem of not noticing the bigger dimension is exactly what happens when we only consider one lens when viewing power. I do not want to dispute the appropriateness of any lens but the overall picture of a situation might change if we choose a lens that considers not only the focus on the actors, but also the factors surrounding the relationship and the whole framework in

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<sup>46</sup> Weber, M. *Economy and Society. An Outline of Interpretive Sociology* Edited by Guenther Roth and Claus Wittich. Bedminster Press, New York, 1968. p. 53

<sup>47</sup> In Weber, M. *Economy and Society. An Outline of Interpretive Sociology* Edited by Guenther Roth and Claus Wittich. Bedminster Press, New York, 1968. p. 53. Emphasis added.

<sup>48</sup> Dahl, R. “The concept of power” *Behavioral Science* Vol. 2 No. 3, pp 201-215. 1957. pp. 202 - 203

<sup>49</sup> According to Lukes’ analysis of power, there is a one-dimensional view of power that focus on the behavior of actors and on an overt conflict of interests. The two-dimensional view of power criticizes the one-dimensional view of power because there could be cases where conflict is not overt and actors can manage the agenda. This two-dimensional view, however, keeps the focus on the behavior of actors. Lukes’ three-dimensional view of power that escapes the merely behavioural aspect, by alluding to a power to control the agenda, and relating to issues that can be kept out of politics and it includes the formation of values and ideas that can shape the ‘wanting’ of one of the actors. Lukes, S. *Power: A Radical View* Basingstoke: Palgrave Macmillan. 2nd Ed. 2005.

which the relationships stands. This is the reason why I argue that we need a lens that allows us to view power as a holistic phenomenon.

### 1.1. Power in the BIT regime

In the international investment framework or the BIT regime, the assumptions of power in the BIT regime are not evident. However, I find a similarity between the political science and law literature, which converge in the use of ‘bargain’ and ‘coercion’. I apply the ideas of these theories to the international investment framework as it has resulted that BITs have been contemplated firstly, as a bargain and secondly, as a result of coercion; and sometimes as a product of coercion in the bargain.

The theory of asymmetrical interdependence of Keohane and Nye (2001), indirectly relates to the international investment context, as it sees power in terms of bargaining, whereas, from the theories of Simmons, Dobbin and Garret (2006) and in the theory of soft imperialism of Hettne and Söderbaum (2005), power is contemplated in terms of coercion.

With regard to the first, Keohane and Nye’s theory has suited the explanation of how states needed each other for the development of their relations. Keohane and Nye have explained the relation between states in a form of interdependence. They state that “Interdependence in world politics refers to situations characterized by reciprocal effects among countries or among actors in different countries.”<sup>50</sup> Thus, for interdependence to exist, Keohane and Nye state that the transactions’ costs also need to be reciprocal, otherwise it would not be interdependence, it would just be interconnectedness.<sup>51</sup>

However, Keohane and Nye extend the definition of the interdependence concept further from just mutual benefit because otherwise relationships between developed and developing countries, for example, could not easily be explained.<sup>52</sup> For this they use a cost/benefit criterion<sup>53</sup> and claim that it is not the case of one party gaining from the other party’s loss; instead, they can all gain from the relationship.<sup>54</sup> So for them, this would lead to a cooperative relationship from which all actors would gain.<sup>55</sup>

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<sup>50</sup> Keohane, R. and Nye, J. *Power and Interdependence* 3<sup>rd</sup> Edition. Longman. New York. 2001. p. 7 Emphasis added.

<sup>51</sup> Keohane and Nye have stated that “Interdependence, most simply defined, means mutual dependence”. Keohane, R. and Nye, J. *Power and Interdependence* 3<sup>rd</sup> Edition. Longman. New York. 2001. p. 7

<sup>52</sup> *ibid* p. 8

<sup>53</sup> Keohane and Nye have stressed two perspectives for analyzing the costs and benefits of an interdependent relationship: one is joint gains or losses and the other is relative gains and distributional issues.

<sup>54</sup> They provide the following example: “if most or all participants want a stable status quo, they can jointly gain by preserving the balance of power among them.” Keohane, R. and Nye, J. *Power and Interdependence* 3<sup>rd</sup> Edition. Longman. New York. 2001. p. 9

<sup>55</sup> Keohane and Nye do mention that the focus on joint gain may obscure the issue about how these gains are divided, but they never explained this distribution. They criticize comparative advantage because of focusing just on the joint gains. For them the “who gets what”, i.e. the distributional issues, are also part of interdependence. This

When defining the interdependence relationship, they say: “interdependent relationships will always involve costs, since interdependence restricts autonomy; but *it is impossible to determine a priori whether the benefits of a relationship will exceed the costs*. This will depend on the *values of the actors* as well as on the *nature of the relationship*.”<sup>56</sup> (my highlights)

It is in these mutual dependencies that are not balanced (i.e. they are asymmetrical) when the actors get sources of influences.<sup>57</sup> These sources of influences give actors power, which under Keohane and Nye’s theory, translates into having an actor with a superior position when ***bargaining*** over an issue. This is what Keohane and Nye have called the political bargaining process that results from the asymmetrical interdependent relationship.

Keohane and Nye define power as “the ability of an actor to get other to do something they otherwise would not do (and at an acceptable cost to the actor).”<sup>58</sup> Keohane and Nye see power as a resource or capabilities and they therefore say: “When we say that asymmetrical interdependence can be a source of power we are thinking of power as control over resources, or the ***potential*** to affect outcomes.”<sup>59</sup> They stress the word potential because they say that in the asymmetrical interdependence relationship, even if one of the parties has political resources in his benefit, the control over the outcomes cannot be guaranteed.

Therefore, the bargaining advantage of an actor, which translates the power resource into power over outcome (political bargaining process) is a translation of that potentiality into effects. However, Keohane and Nye have pointed out that the political bargaining process or the translation (of the potential into effects) does not guarantee the outcomes. The outcome of the asymmetrical interdependent relationship *cannot* be determined.<sup>60</sup>

To sustain and explain this idea, Keohane and Nye distinguish two dimensions which they claim exists in every interdependent relationship, those are sensitivity<sup>61</sup> and vulnerability.<sup>62</sup> Sensitive amounts to the responsiveness of actors, “the liability to costly effects imposed from outside before policies are altered to try to change the situation”<sup>63</sup> and the vulnerability amounts to the costs’ alternative which actors have, “an actor’s liability to suffer costs imposed by external events even after policies have been altered.”<sup>64</sup>

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becomes noticeable when explaining the bargaining process which occurs in interdependent relationships. Keohane, R. and Nye, J. *Power and Interdependence* 3<sup>rd</sup> Edition. Longman. New York. 2001. p. 9

<sup>56</sup> Keohane, R. and Nye, J. *Power and Interdependence* 3<sup>rd</sup> Edition. Longman. New York. 2001. p. 8

<sup>57</sup> *ibid* p. 9

<sup>58</sup> *ibid* p.10. Note how Keohane and Nye have maintained Dahl’s definition of power but they have given an addition to it in regard to costs.

<sup>59</sup> *ibid* p. 10

<sup>60</sup> *ibid*. pp. 15-16

<sup>61</sup> Sensitivity is the degree of responsiveness within a policy framework.

<sup>62</sup> Vulnerability has to do with the alternatives one has facing this sensitivity. The one with more alternatives will be less vulnerable.

<sup>63</sup> Keohane, R. and Nye, J. *Power and Interdependence* 3<sup>rd</sup> Edition. Longman. New York. 2001. p. 11

<sup>64</sup> *ibid* p. 11

The vulnerability dimension, for Keohane and Nye, is more important in the interdependent relationship than the sensitivity dimension because by the fact that an actor can have alternatives when facing liability to costs, then that already is a power resource.<sup>65</sup>

Therefore, under this theoretical framework, Keohane and Nye's theory of asymmetrical interdependence might seem to be a possible lens with which we can find explanations for the BIT regime, in the sense that treaties imply reciprocal effects (costs) in relationships that are characterized not only by mutual benefit. Also, because of its connection to power, Keohane and Nye's asymmetrical interdependence theory establishes the existence of sources of influences that give power to bargain. The outcome, however, cannot be determined.

On the other hand, referring to the second approach that considers coercion, Hettne and Söderbaum (2005) when trying to describe Europe as a global actor and its foreign policy, make interesting remarks in their analysis of power. In these relationships, the idea of bargaining is not contemplated. They propose that the EU has a kind of relative power which relates to the strength of its counterpart and to the extent of EU actorness.<sup>66</sup> These factors influence the application of two different forms of power that the EU could use: "Civilian power" which comprehends dialogue, pluralism, democracy or a "soft imperialism" by which there is an imposition of norms coming from the EU's own interests.

However, which of the two kinds of power will be used depends on whether the counterpart actor is weak or strong. They state: "The stronger the counterpart, the more concessions are given by the EU and the more relevant is the use of civilian power and pragmatic diplomacy. With weaker partners, the EU dictates much more of the conditions for interregional cooperation which tends to lead to more imperial relations."<sup>67</sup> This is a very important consideration of a previous type of power which an actor has that would determine the type of model which would be applied. In the interregional relations between the EU and Latin America, they claim that both models apply because the relations are still evolving. However, when weaker parties are involved, Hettne and Söderbaum considered an element of coercion (i.e. in the application of soft imperialism).

In a similar vein, Simmons, Dobbin, and Garrett (2006) claimed that the behavior of actors is determined by four elements, namely, coercion, learning, competition and emulation. They have

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<sup>65</sup> In regard to the uses of asymmetrical interdependence, Keohane and Nye claim that there are rankings determining their dominance: military is above vulnerability and the latter is above sensitivity. This is because the power resources given by military interdependence dominates those power resources given by vulnerable interdependent relations and this also dominates the power resources given by sensible interdependent relations. "Actors will tend to use power resources that rank higher in both dominance and cost." Keohane, R. and Nye, J. *Power and Interdependence* 3<sup>rd</sup> Edition. Longman. New York. 2001. p. 14

<sup>66</sup> Hettne and Söderbaum explain that the "union's relative weight just by existing (demographically; economically) has an impact on the rest of the world." and that this is what Bretherton and Vogler claim is actorness, a capacity to act. In Hettne, B. and Söderbaum, F. "Civilian Power or Soft Imperialism? The EU as Global Actor and the Role of Interregionalism" *European Foreign Affairs Review* 10: 535-552. 2005. p.550

<sup>67</sup> *ibid* pp. 550- 551

claimed that coercion, as a diffusion mechanism, explains the spread of liberalism and that “this mechanism may involve the threat or use of physical force, the manipulation of economic costs and benefits, and/or even the monopolization of information or expertise—all with the aim of influencing policy change in other countries.”<sup>68</sup> In this way, countries with power, according to Simmons, Dobbin and Garrett, can make weaker countries do what the powerful countries want them to do.

Thus, when contrasting these perceptions to the BIT regime, even if the relation to it is not directly, it would view power in the BIT regime, if any, in terms of coercion.

I have brought to light these two approaches, of a bargaining on the one hand and of coercion on the other, because of what happens in the scholarship of BITs: Even though the bargaining account is what prevails when seeking to explain why developing countries have agreed to the rules that have formed the BIT regime, coercion is also mixed in the ideas of bargaining power.

In the legal literature, the direct connotation of power in the BIT regime is given by the following: Kaushal (2009) claimed that BITs are a bargain: with BITs, states have bargained away their sovereignty in order to have foreign investment. “The regime of bilateral investment treaties has shifted the line between the protection of foreign investments and of state sovereignty.”<sup>69</sup> Kaushal says that the bargain is in the expansion of property and contract rights for the home investor country and the trade-off of regulatory sovereignty for host states.

Although Kaushal refers to the conditionality that developing countries have as part of receiving credits from the IMF and the World Bank, implying that coercion could be a factor, he nevertheless thinks that developing countries are bargaining with developed countries when signing BITs.

Kalderimis (2004) refers to a “bargaining” power when entering into force BITs. According to Kalderimis this bargaining power is the power that rich countries have and use to exploit developing countries which cannot bargain because of the conditionality to the IMF. Poor countries are ‘coerced’ to accept the bargain in which “its inherent asymmetry is troubling.”<sup>70</sup>

Supnik (2009) has also referred to a bargaining power but has concluded that: “Unequal bargaining power often translates into a developing country’s acceptance of international investment agreements on a take-it-or-leave-it basis”.<sup>71</sup> This ‘take it or leave it’ momentum is, according to Elkins, Guzman and Simmons (2006), the choice of developing countries when

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<sup>68</sup> Simmons, B; Dobbin, F and Garrett, G. “Introduction: The International Diffusion of Liberalism” *International Organization* 60, Fall 2006 p. 790

<sup>69</sup> Kaushal, A. “Revisiting History: How the Past Matters” *Harvard International Law Journal*. Vol 50 Issue 2. 2009 Pg 510

<sup>70</sup> Kalderimis, D. “IMF Conditionality as Investment Regulation: A Theoretical Analysis” *beppress Legal Series Paper 4* 2003. Berkeley Electronic Press p. 16

<sup>71</sup> Supnik, K. “Making Amends: Amending the ICSID Convention to reconcile competing interests in International Investment Law” *Duke Law Journal*. Vol 59 Issue 2. 2009 p. 345.

signing BITs. However, they conclude that: “It may be that potential hosts are coerced or at least strongly encouraged to enter into BITs”<sup>72</sup> and expressly agree with a theory of power, but only in terms of coercion as suggested by Simmons, Dobbin and Garrett.

A more independent acknowledgement of the role of power per se in the BIT regime, however, can be found in what pertains to one of the BIT clauses, namely, the dispute settlement clause. Kaushal (2009) has pointed out the following: “The creation of the dispute settlement mechanism is an instance in which power has played an important role in shaping international norms.”<sup>73</sup>

Allee and Peinhardt (2010) have mentioned that introducing or delegating investment disputes to an specific international arbitration institution (ICSID) in the dispute settlement clauses has been possible due to a kind of relative bargaining power.<sup>74</sup> They assume that with BITs both parties bargain on equal terms, but that due to the asymmetries in bargaining this power often plays a major role in negotiated outcomes, which they say is the inclusion of ICSID.

Likewise, Dieter (2006), when contrasting the dispute settlement mechanisms of bilateral trade agreements and that of the WTO,<sup>75</sup> concludes that concepts of power and hierarchy have returned to international trade. He mentions the existence of an asymmetrical relationship in bilateral agreements which involve a larger country and a smaller country and that by having an alternative with bilateral agreements, the step forward gets deteriorated because powerful countries take advantage of bilateral agreements to promote their cases. Dieter concludes that instead of complementing the WTO bilateral agreements compete with it.

All these scholars, although referring specifically to BITs, find the use of power in the dispute settlement clauses contained in BITs as the only argument to explain the rationale of their existence. However, they limit themselves to just one clause of the treaty.

## **1.2. What is lacking with BITs and the concept of power?**

The theories that have analysed power in connection to BITs, have ended with concepts of bargain and coercion. Thus, we can be aware of the lenses used to reach these conclusions. The problem is that analyzing the BIT regime through only one specific theory has not provided sufficient explanation for questions like:

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<sup>72</sup> Elkins, Z. Guzman, A. and Simmons, B. “Competing for Capital: The Diffusion of Bilateral Investment Treaties, 1960-2000” *International Organization* 60, Fall 2006 p. 833

<sup>73</sup> Kaushal, A. “Revisiting History: How the Past Matters” *Harvard International Law Journal*. Vol 50 Issue 2. 2009. p. 518

<sup>74</sup> It is in the line of Kalderimis (2004) and Supnik (2009) when relating to bargaining power but it differs from those in the sense that Allee and Peinhardt only allege this power for dispute settlement clauses.

<sup>75</sup> He claims that in issues of trade and because of the dispute settlement mechanism provided by the WTO, we were getting closer to a global governance because weak countries can face powerful countries. He speaks in favour of the WTO because he says that smaller countries through the dispute settlement mechanism of the WTO can “balance the power of America and Europe in commerce” Dieter, H. “Bilateral Free Trade Agreements” *Journal of Australian Political Economy*. Edition 58 December 2006. p. 95



- Why have developing countries agreed to BITs? (the literature in the scholarship considers this fact a paradox);
- Why is the international investment framework evolving?
- Why are developing countries reacting against the BIT regime? (feared by some as a signal of collapse) and,
- Why have the attempts to regulate investment at the multilateral level failed?

Thus, both conceptions leave many loopholes in reaching an explanation for the establishment of the international investment framework and its current challenges. Keohane and Nye's asymmetrical interdependence theory which focuses on the concept of bargaining is presented with the following problems. According to Keohane and Nye's asymmetrical interdependence theory the interdependent relationships have reciprocal effects (not only of mutual benefit); in interdependent relationships it is impossible to know a priori whether the benefits of the relationships exceed their costs because the values and nature of the relationship are impossible to know; and the interdependent relationship is characterized by a bargaining process which does not guarantee outcomes.

In BITs, the rights and obligations are allegedly reciprocal and BITs were supposed to entail a benefit for both parties. Empirical studies have contested both claims. Hallward-Dreimeier (2003) has pointed out that: "It should be noted that the rights secured in a BIT are reciprocal; investors from country A investing in B are the same as those given to investors from country B investing in country A. However, in practice there is usually tremendous asymmetry as almost all the FDI flows covered by BITs are in fact in one direction."<sup>76</sup> Using Keohane and Nye's terminology, we cannot have interdependence if we do not have reciprocal effects as then the relationship is just 'interconnectedness'.

Furthermore, in the BIT regime the values and nature of the relationship can be known contrary to the interdependent relationship where it is impossible to know them. The document establishing the relationship, namely the treaty, is what describes the parties' values and nature of the relationship. In the negotiation of a BIT, the actors are states and the values of these actors are disclosed in the preamble of the treaty. In law it is what is called the *ratio legis* of the legal instrument. The nature of the parties' relationship is formalized by the type of instrument that the parties use, so the nature of their relationship, formalized with BITs, is characterized by its international foreign investment public nature.<sup>77</sup>

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<sup>76</sup> Hallward-Dreimeier, M. "Do Bilateral Investment Treaties attract FDI? Only a bit...and they could bite" World Bank DECRG 2003 p. 8

<sup>77</sup> As in regard to the other actors, since companies are not directly parties to these treaties, the *ratio legis* of the treaty does not reflect their values but one can nevertheless know the values and nature of their relationship. Every company has articles of association which determine its values, nature or merely the reason for their existence. Although articles of associations vary from company to company, those companies doing foreign investments and which benefit from BITs are lucrative corporations. Their aim is to operate in the best interest of the company and their value is wealth; the nature of the relationship is merely a commercial one.

The bargaining process is also a fundamental feature of the interdependent relationship. For Keohane and Nye, their idea of power is expressed as the sources of influences that provide political bargaining advantage, but which nevertheless does not guarantee outcomes. If we assume that the sole purpose of BITs has been to increase FDI of the parties, then it is true that it will remain uncertain whether that happens or not beyond the negotiation point.<sup>78</sup> However, one has to look at the development of the framework for international investments to see what the parties really wanted to achieve with BITs: the establishment of foreign investment rules that every country should comply with.<sup>79</sup>

For this reason, the work herein does not consider the negotiation period but the rules given by the framework or BIT regime. One has to consider the fight of interests to achieve the set of rules for international investment at multilateral level and how these were agreed upon and written in the special treaties for that purpose (BITs). Furthermore, although the rules of international investments are mainly comprised by BITs, there are other rules that are needed in order to make these treaties work. All these issues that have formed the framework or BIT regime go beyond just the negotiation.

From a legal perspective, for a bargaining to take place, in whatever form, it needs the consent of the parties, and for consent to take place, it needs freedom. Parties have to be free to express their consent and thus perform a bargain. When parties are not free to express this consent, the relationship will be characterized by distress and not bargain.<sup>80</sup> Alvarez and Khamisi (2009) have even suggested that these agreements, for the reason of parties' inequalities, should be null and void.<sup>81</sup>

Alvarez (1992) has pointed out: "A BIT negotiation is not a discussion between sovereign equals. It is more like an intensive training seminar conducted by the United States, on U.S. terms, on what it would take to comply with the U.S. draft"<sup>82</sup> The outcome in such a scenario is likely be determined.

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<sup>78</sup> Bargaining in the context of Keohane and Nye refers to the BITs negotiation period.

<sup>79</sup> The big dilemma on establishing the framework for the international investment rules had two clear counter perspectives (from developed and developing countries respectively). Developed countries sought the initiative through BITs with the intention of putting an end to this dilemma. In this way the expected outcome was achieved, i.e. to have as investment rules the rules that were in the best interest of developed countries.

<sup>80</sup> See further Garcia, F.J. "Is Free Trade "Free?" Is It Even "Trade?" Oppression and Consent in Hemispheric Trade Agreements" Seattle Journal for Social Justice 5. 2007

<sup>81</sup> When referring to the US-Argentina BIT they stated: "...some might describe the *US-Argentina BIT* not as the prototypical treaty between sovereign equals presumed by the Vienna Convention on the Law of Treaties but as a contract of adhesion. Those sensitive to horizontal critiques of the regime would add that if this is the case, that treaty should be subject to rescission or even rendered null and void on the basis of unconscionability or, at a minimum, should be interpreted *contra proferentem*." Alvarez, J. and Khamisi, K. "The Argentine Crisis and Foreign Investors: A Glimpse into the Heart of the Investment Regime" Yearbook of International Investment Law & Policy 379. Karl P. Sauvant, ed., 2009. p. 473. They were not in favour of the posture that BITs were contracts of adhesion because of the third beneficiaries and the transparency of such BIT.

<sup>82</sup> Alvarez, J.E. "The Development and Expansion of Bilateral Investment Treaties: Remarks" 86 AM. SOC'T INT'L L. PROC. 532, 555. 1992. p. 553

A power-bargaining concept does not include the broad perspective of the whole framework and that is why under this lens the outcomes cannot be determined, when per definition, power per se “is the capacity to produce, or contribute to, outcomes.”<sup>83</sup> However, we can see the inadequacy of the theory of asymmetrical interdependence in Keohane and Nye’s own explanation of a foreign investment situation under their theory:

*“For instance, in a concession agreement, a multinational oil company may seem to have a better bargaining position than the host government. The agreement may allow the company to set the level of output, and the price, of the petroleum produced, thus making government revenues to company decisions. Yet such a situation is inherently unstable, since the government may be stronger on the vulnerability dimension. Once the country has determined that it can afford to alter the agreement unilaterally, it may have the upper hand. Any attempt by the company to take advantage of its superior position on the sensitivity dimension, without recognizing its weakness at the vulnerability level, is then likely to end in disaster.”<sup>84</sup>*

With their example Keohane and Nye claim that if a set of rules puts an actor in a disadvantageous position, that actor will probably try to change those rules if it can do so at a reasonable cost.<sup>85</sup> However, in this typical example of a foreign investment situation, such an argument cannot be upheld the moment a BIT is involved. In such an example, and considering the existence of a BIT, if a host government unilaterally modifies the concession agreement, the multinational company can immediately sue the host state. This is because the foreign investment of the multinational company in the host country is subject to the rights and obligations of the treaty and therefore, in such a case, a unilateral modification entails a breach of the treaty. In such event the company can submit a claim to an international arbitration institution, leaving the host country with absolutely no bargaining position whatsoever at any stage of the investment’s existence.<sup>86</sup> The inadequacy results for considering only the actors of the relationship and not the overall structure of the framework of international investments.

However, viewing the BIT regime only in terms of coercion also presents its challenges. In Hettne and Söderbaum’s analysis, power and its connection to BITs is indirect. Their conception of power in terms of coercion comes about in the form of ‘soft imperialism’ but they only mentioned power from the EU perspective and have a focus on interregionalism and not direct bilateral relationships with each individual country.<sup>87</sup> This would give us a different picture than

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<sup>83</sup> Outhwaite, W. and Bottomore, T.B. *The Blackwell Dictionary of Twentieth-century Social Thought*. In Blackwell Reference. Blackwell. 1994

<sup>84</sup> Keohane, R. and Nye, J. *Power and Interdependence* 3<sup>rd</sup> Edition. Longman. New York. 2001. p. 15

<sup>85</sup> *ibid* p.16. Keohane and Nye’s argument regarding the unilateral decision on changing the relationship might apply for developed countries. For example, when developed countries were in a disadvantageous position of reaching a negotiation at multilateral level, they did change the rules and started operating bilaterally, even if it meant competing with the WTO system.

<sup>86</sup> See sovereignty costs in Chapter VI.

<sup>87</sup> The only reference with bilateralism is when describing the relation with the USA but still not with individual countries but a whole region, in this case with Latin America, and they said that bilateralism complements

the bilateral relationships with developed and developing countries alone, which will strengthen the weakness of the counterpart. Therefore, what Hettne and Söderbaum's analysis lacks in order to apply it to the BIT regime, is assessing power in strictly bilateral relations between developed and developing countries where power can play an important role.<sup>88</sup>

On the other hand, Simmons, Dobbin and Garrett have also focused on coercion but also only as a diffusion mechanism to explain the spread of liberalism. They do not develop a concept of power and do not use the factor of coercion in the context of particular relations. Although both Hettne and Söderbaum as well as Simmons, Dobbin and Garrett's theories could be reconciled with those of realist, Marxist and dependencies theories that have connected and viewed power in terms of coercion, these scholars do not specifically address the possibility that power could be applied in the context of international investments.

However, the scholars who have maintained a direct connection of the assumptions of the aforementioned theories (with the elements of bargain and coercion) with international investments, still provide theories with loopholes for the following reasons.

Kalderimis (2003) analyses coercion but overlooks the element of power in the BITs regime. Although he claims how the conditionality of the IMF has affected the investment regime and that liberalizing markets is not necessarily good for developing countries, he did not focus on explaining this issue considering any kind of power that the aforementioned may attribute to developed countries in the system or in the BITs regime. Kalderimis keeps the conception of BITs as bargains.

Kaushal (2009) also speaks of a bargain many times and how this bargain involves developing countries giving away their sovereignty to expand property and contractual rights of developed countries. Furthermore, he points out that through this grand bargain foreign investors are the ones who benefit the most from the BITs regime. It is, however, worth pointing out that Kaushal gives explanations of all the tensions in the BITs regime but he cannot escape the idea of a paradox when explaining why developing countries have shifted their policies in favour of signing BITs.

Kaushal makes strong remarks that can witness the influence of power in the BIT regime when analyzing the conditionalities of the IMF and the World Bank for providing credits to developing countries. However, because his arguments are based on the historical evolution of the BIT regime, he sees this conditionality also as just part of BIT's evolution and therefore he does not

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interregionalism. Hettne, B. and Söderbaum, F. "Civilian Power or Soft Imperialism? The EU as Global Actor and the Role of Interregionalism" *European Foreign Affairs Review* 10: 535-552. 2005. p. 544

<sup>88</sup> Hettne and Söderbaum have made interesting remarks on the ability of regions to act together but they have not seen this fact as a phenomenon that can indicate relative power of developing countries. See definition of relative power further in this Chapter.

focus on the element of power in the framework and does not relate to the issue when analyzing the BITs regime.<sup>89</sup>

Elkins, Guzman and Simmons (2006) and their theory of competition for explaining why developing countries sign BITs only considers the relationship of developing countries in a horizontal level but it does not analyze the relationship of the parties to the treaty per se. As well as Supnik (2009) these scholars have also seen BITs as results of bargaining power but in a characterization given by a 'take it or leave it basis' in which coercion is added to the formula. Neither, however, analyzed power in the BIT regime.

In regard to the scholars who did consider directly that power in some way plays a role in the BIT regime, Dieter (2006) uses a concept of power but only when relating to the dispute settlement mechanisms (by contrasting the multilateral dispute mechanism of the WTO and the dispute settlement mechanism on BITs). He does not consider that power may be found in the whole structure of the WTO regime and BITs and that it could be the reason from changing multilateral relations to bilateral relations. Similarly to Dieter, Kaushal (2009), Allee and Peinhardt (2010) have considered power but only in relation to the ICSID clause contained in BITs which involves the dispute settlement mechanism.<sup>90</sup>

Therefore, the allusions referring to bargaining<sup>91</sup> and coercion do not directly address the concept of power in the relationships nor as the ability of defining the framework for international investments. On the other hand, the scholars that found an element of power in BITs have only analyzed it restrictively, concentrating on just one clause of BITs. This is nothing more than just the tip of the iceberg; an analysis of power should reside on its basis, the framework.

What is lacking in the literature of international investments is an analysis of power as a holistic phenomenon in the international investment framework. The loopholes and paradoxes are found because of concentrating on only one theory. These, however, may be overcome when we use an alternative lens with which we can view the holistic phenomenon of power in the framework for international investments. It allows the possibility of including the whole framework rather than focusing on specific elements such as just the treaties.

### **1.3. An Alternative for Understanding Power in the BITs Regime: Susan Strange's Theory of Structural Power.**

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<sup>89</sup> Kaushal did consider power in dispute settlement clauses, see further comments below in this chapter.

<sup>90</sup> Allee, T. and Peinhardt, C. "Delegating Differences: Bilateral Investment Treaties and Bargaining Over Dispute Resolutions Provisions" *International Studies*, 54. 2010

<sup>91</sup> The caveat in the legal scholarship regarding this terminology is that 'bargain' when used in connection to BITs refers to the treaty, as contrast to being the institutionalized process of bargaining, if we consider Keohane and Nye's idea of the negotiation period, or for example Easton's idea of inputs and outputs that have consequences in the environment where the system exists. In Easton, D. "An Approach to the Analysis of Political Systems" *World Politics*, Vol. 9, No. 3. 1957.

A theory which can allow us to understand some key questions about the BIT regime and lead us to understanding its consequences at the international level is extremely important. Such a theory should consider all actors involved and the changing developments throughout the foreign investment and BIT regime history. I will use Susan Strange's theory of structural and relative power as the lens for analyzing the international investment framework, and argue that it can help us substantially in this endeavour.

The critical theories challenge the traditional approaches summarized above and with the consideration of a new perspective, new theories can be built. Robert Cox (1981) has stated that to give rise to a critical theory, we have "to become clearly aware of the perspective which gives rise to theorizing and its relation to other perspectives; and to open up the possibility of choosing a different valid perspective from which the problematic becomes one of creating an alternative world."<sup>92</sup> Strange's theory lines up with Cox's (1981) conception of a critical theory because Strange was aware of the existing perspectives and yet showed us another perspective which allowed for an alternative. Susan Strange's structural power theory derived from an international political economy perspective<sup>93</sup> and gives room to an alternative in understanding the complexity of power in our times. She provided a new lens to view international relations and how power is affected in it. Thus, this critical theory of power constitutes a paradigm comprehending a bigger dimension.

Susan Strange's theory differs from the traditional theories in the sense that realists, according to Strange, lack the grasping of the effect of power as to affect the outcome because they are mainly concerned with just states as the main actors, and are obsessed with the power of hegemons - especially the United States- and do not consider power in other spheres. She claimed: "the evidence used still dealt only with power derived from resources, not from the capacity to influence outcomes."<sup>94</sup> Susan Strange, in her book "Retreat of the State" has given an example of Gilpin's suggestion<sup>95</sup> to show how power was still conceived in terms of resources as capabilities and "not as a feature of relationships, nor as a social process affecting outcomes."<sup>96</sup>

Liberal theories too have seen power as resources or capabilities of the one possessing it. The difference between Keohane and Nye's theory and that of Susan Strange is that Strange suggests

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<sup>92</sup> Cox, R. and Sinclair, T.J. "Approaches to World Order". Cambridge Studies in International Relations. 40. Chapter 6: "Social forces, states, and world orders: beyond international relations theory (1981). Cambridge University Press. 1996. p. 88

<sup>93</sup> This is typically found in structural theories, for example, Kenneth Waltz has also focus on economy to develop his theory.

<sup>94</sup> Strange, S. *The Retreat of the State* Cambridge Studies in International Relations. Vol. 49. Cambridge University Press. 1996. p. 22

<sup>95</sup> When relating to foreign investment, the realist Gilpin (1975) has suggested that the US should not follow the British path with international investments because it will lose human and financial resources.

<sup>96</sup> Strange, S. *The Retreat of the State* Cambridge Studies in International Relations. Vol. 49. Cambridge University Press. 1996. p. 23

that outcomes can be determined because power allows to put certain preferences above the preferences of others, and by doing so, a result can be expected.

Furthermore, Strange criticized that the word ‘asymmetrical interdependence’ was just an euphemism; that even if it was agreed by many writers that the term “interdependence” does not really describe the inequalities of the parties’ dependences, the use of this terminology “serves to dull or even conceal the reality of relationships, the crude facts of structural power over other governments and over other societies.”<sup>97</sup>

Susan Strange also criticized Keohane and Nye’s claim of greater asymmetries in the vulnerability of states by claiming that Keohane and Nye did not analyze the effects of unequal power that could alter and shape the economic structure; “whereas this is precisely the sort of ‘structural’ power to which attention to key decisions inevitably and naturally draws attention.”<sup>98</sup>

Strange’s theory differs, however, from concepts of power under the Marxist lens because for Strange, power is not imposed nor coerced: the actors are unaware of structural power. However, the power contained in these relationships is what according to Susan Strange affects the outcomes.

Waltz stated that a “structural approach can provide the foundations for a successful theory of international politics.”<sup>99</sup> This can be achieved with Susan Strange’s theory because Strange’s theory sees power neither as capabilities or resources (such as the realist, liberalist and Marxist theories) nor that it is coerced or imposed, and contrary to a focus on the evident intention of actors to use power, she claims that structural power happens unnoticed. Strange has claimed that the aforementioned theories have concentrated excessively on a ‘state as actor’ perspective, and states that the complexities and changes in the world allow for viewing the world, if not imperatively, from a different perspective than that of the traditional theories which still consider the state as managing the world economy. Strange highlights that the changes in the structures provide for new analysis and explanations for the relationship of states and other actors.<sup>100</sup>

Strange’s structural power theory does not disregard the actors’ asymmetries but contrary to the traditionally approaches, considers power as a *feature* of relationships. Power is viewed as determined by the *relationship* in which actors convene; thus, the outcome will definitely be

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<sup>97</sup> In the Preface of Strange, S. *The Retreat of the State* Cambridge Studies in International Relations. Vol. 49. Cambridge University Press. 1996. p. xiii. Something similar, although much earlier, was thought about the ‘balance of power’ from which Frederick the Great said “this same Balance is no more than a bare word, an empty sound” Von Treitschke, Heinrich “The Confessions of Frederick the Great, King of Prussia” Hutchinson & co. London. 1915. Also fully cited by Schuman, F. “International Politics. The Destiny of the Western State System” Fourth Edition. Mc Graw-Hill Book Company. London, New York, Toronto. 1948 p. 80 and in Little, R. *The Balance of Power in International Relations* Cambridge University Press. 2007 p.9

<sup>98</sup> Strange, S. *Casino Capitalism* Basil Blackwell Ltd. Oxford. p. 29

<sup>99</sup> Quote in Little, R. *The Balance of Power in International Relations* Cambridge University Press. 2007 p.168

<sup>100</sup> Strange, S. “Wake up Krasner! The World has Changed” Review of International Political Economy, Vol. 1, No. 2. 1994.

affected. I argue that because of analyzing power in this broader sense, this theory better explains the relationships among actors in the international investment framework. It considers all the actors involved in international relations (state and non-state actors) and it has the assumption that power has slightly moved from states to markets, international organization and corporations, which affects the structures of the system.

Therefore, Susan Strange has defined power quite differently from it being resources or capabilities, she defines power in the following way: “Power is simply the ability of a person or group of persons so to affect outcomes that their preferences take precedence over the preferences of others.”<sup>101</sup> That means quite straightforwardly that I have power when in a contested issue my preference overrides the preference of others, a circumstance which affect the outcome.

Susan Strange discussed three kinds of power altogether: structural power, relational power and relative power. Structural power has been defined by Strange as “the power to shape and determine the structures of the global political economy within which other states, their political institutions, their economic enterprises and their scientists and other professional people have to operate.”<sup>102</sup> Relational power is “the power of A to get to B to do something they would not otherwise do”<sup>103</sup> and relative power is: “The relative power of each party in a relationship is more or less, if one party is also determining the surrounding structure of the relationship.”<sup>104</sup>

The difference between the forms of power lies in the awareness of the party when using one or the other kind of power. For example, with structural power, the fact that it is less visible makes the one using it unaware of its existence. A contrario sensu, with relational power, one has always the comparison of one actor in relation to the other, it comes to a situation where party A already knows that party B does not want to do what A wants but A consciously uses its superior power, in comparison to that of B, to make B do what A wants. There is intention. With regard to this differentiation, Susan Strange claimed: “In relations with others, it is much harder to think of power being exercised by one party over another unconsciously, without deliberate intent. But when you think of power in terms of power over structures, it is easier to understand that relations existing within those structures are affected, even though it may be inadvertently.”<sup>105</sup>

Strange’s idea of conceptualizing structural power as the ability to shape the framework is what makes her theory most relevant for this work. According to Strange, “Structural power, in short, confers the power to decide how things shall be done, *the power to shape frameworks* within

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<sup>101</sup> *ibid* p. 17

<sup>102</sup> Strange, S. *States and Markets* Pinter Publishers Limited. London. 1988. p. 24, 25

<sup>103</sup> *ibid* p. 24. Keohane and Nye’s concept of power is limited only into this form of power.

<sup>104</sup> *ibid* p. 25

<sup>105</sup> Strange, S. *The Retreat of the State* Cambridge Studies in International Relations. Vol. 49. Cambridge University Press. 1996. p. 26



which states relate to each other, relate to people, or relate to corporate enterprises.”<sup>106</sup> The power comes from having control on the structures of the system, and that is structural power.<sup>107</sup>

Structural power determines this framework, it affects different layers, it is not just vertical because it does not imply a hierarchy; it is neither horizontal because it does not affect just one level, it merges in all layers operated by actors, national and international.

According to Strange, within structural power, there are four dimensions: security, production, finance and knowledge. The security structure, provided by the protection against violence and the ability of providing this protection becomes power over others; the production structure, with the combination of factors like labour, capital, technology, which now have no territorial boundaries, gives power to the one controlling this production; financial structure provided by a form of power held by the one in control of credit provision; and finally, knowledge structure, which provides a form of power to the one in control of its communication, and who also has the ability to deny access, acquire or develop knowledge (technology).

Due to this division, structural power becomes less noticeable than just, for example, military power; the control over the four main structures -security, production, finance and knowledge- already sets the framework in which parties operate. In this sense, Susan Strange proposes that power is not conceived in the traditional form. Therefore, while others claimed that the US is losing its hegemony, she had the opinion that it did not because the US still held structural power by having control on the other dimensions of structural power.

It is important to notice that with this division of the structures of power and because they are less noticeable there is no need for the one bearing it to coerce others with it, the choices parties have will just become less narrow when one of the parties have structural power.

Susan Strange gives the example of parenthood, as a comparison to structural power: “When Mother or Father says, ‘If you’re a good boy and study hard, we’ll give you a bicycle for your birthday’, the boy is still free to choose between studying hard and going out to play with friends. But the choice is weighted more heavily in favour of studying by the parents’ structural power over the family budget.”<sup>108</sup>

When explaining the trading system, Susan Strange said that the rules contained in it were the product of the translation of the structural power over security (one of the four elements forming the structure). She claimed “the nuclear protection given to the allies by US missiles and nuclear

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<sup>106</sup> Strange. S. *States and Markets* Pinter Publishers Limited. London. 1988. p. 25. Emphasis added.

<sup>107</sup> This concept of power explains, for example, the power of actors like the EU, who are powerful in spite of having less material resources as compared to other actors, like military power.

<sup>108</sup> Strange. S. *States and Markets* Pinter Publishers Limited. London. 1988. p. 31

weapons was translated into structural power over the rules of the international trading system.”<sup>109</sup>

In her concept of structural power Susan Strange acknowledges not only states but other actors, namely all those who operate in the framework. All actors get affected by structural power it but not in direct relation to each other, they can also get indirectly affected because one of them can alter the framework where they have to operate.

Susan Strange claimed: “[P]ower over others, and over the mix of values in the system, is exercised within and across frontiers by those who are in a position to offer security, or to threaten it; by those who are in a position to offer, or to withhold, credit; by those who control access to knowledge and information and who are in a position to define the nature of knowledge: Last but not least, there is the production structure, in which power is exercised over what is to be produced, where, and by whom on what terms and conditions.”<sup>110</sup>

Susan Strange criticizes Keohane’s adoption in his theory of a liberal economic concept of rational actions motivated by a single objective because of it being static.<sup>111</sup> Depending on the actors’ values, priorities will surface but these priorities can change and so the actors’ actions.<sup>112</sup> As mentioned previously, Susan Strange has claimed that structural power is exercised by those who have power over others and over the mix of values in the system.<sup>113</sup>

Strange has claimed a shift of the power normally conceived, in which the balance of power was just an issue among states. She has pointed out the greater authority that other actors have in the system. She claimed: “the main outcome of this structural power has been a shift in the balance of power from states to markets.”<sup>114</sup>

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<sup>109</sup> Strange, S. *The Retreat of the State* Cambridge Studies in International Relations. Vol. 49. Cambridge University Press. 1996. pp. 25- 26

<sup>110</sup> *ibid* Preface ix

<sup>111</sup> *ibid* p. 20. Also proponents of constructivism have pointed out how cultural and social elements are important factors for international relations because it brings dynamism to it. See Wendt, A. “Social Theory of International Politics” Cambridge University Press. 2008.

<sup>112</sup> Susan Strange proposes that the priority given to values is reflected in world politics. By stating the four basic values by which social organization was formed (wealth, security, freedom and justice), she claims that every society has sacrificed some values in order to give priority to one of these basic values. She claims that the values are like different chemical compounds, “combined in different proportions, they will give quite different chemical compounds.” Therefore, she has claimed that: “Societies therefore differ from each other in the proportions in which they combine the different basic values.” Strange, S. *States and Markets* Pinter Publishers Limited. London. 1988. p. 17

<sup>113</sup> Actors’ self-interests are determining the values and these seem to be providing a cacophony in international relations. State relationships materialized through treaties have a hierarchy in the sense that it is above national law but it was meant to be in that way only for achieving the purpose of living in harmony and to stop the self-interests of some states to make chaos in the world. If we do not pursue the goals for which the international instruments were created, then we are misusing them, and when we are at that stage, we have a problem that should be fixed.

<sup>114</sup> Strange, S. *The Retreat of the State* Cambridge Studies in International Relations. Vol. 49. Cambridge University Press. 1996. p. 29

Susan Strange's structural power is helpful for analyzing the BITs regime because it does not concentrate on just states but also not on the actors per se. Instead it analyses the effects that the control over the structure, the framework which is the foundation of the system, in this case limited to the relations of actors in foreign investments and trading issues. The three assumptions that Susan Strange mentions in her book "The Retreat of the State", are namely that politics is not limited to politicians and their officials, it is a common activity; that markets can exercise power over outcomes and that non-state actors also have authority.

These assumptions make her theory very interesting in relation to the BITs regime because from these three assumptions, three conjectures can be made when we apply them to the BITs regime: 1) Although BITs are only entered into force by states, the BIT regime through its enforcement, shows us that some disputes arose from civil society's interests which attempted against the interests of corporations. In this way, these actors are part of politics, which is a common activity. 2) The activities of corporations exceed the control of the state's territory; states have to react with policies against global market conditions, so in certain circumstances, it is the market which determines in which way and which policies states will have. It is not something new that the activity of transnational companies has influenced markets, but their activities extend beyond a particular state's reach. The major change in the production structure is due to technology, and technology is owned by corporations and not states. 3) BITs show us that actors other than the state are involved. Foreign investors, who are mainly multinational companies, have gained the right to sue host states, without intervention of their own states. They can enforce this right when a host country does anything that would go against the security of their investment in such territory. Corporations are having a preponderant role in the BITs regime.

The above mentioned considerations make the theory of Susan Strange an adequate theory to be applied and juxtaposed to the BITs regime because of comprehending the awareness of changes in the traditional conceptions of power, of actors and politics.

#### **1.4. Working beyond Susan Strange's concept of Relative Power**

There have already been attempts to expand on the theory of Susan Strange, especially in regard to structural power.<sup>115</sup> Strange's concept of structural power, according to the position of Pustovitovskij and Kremer, lacked operationalization and application. Therefore, they provided more insight to the concept of structural power. According to Pustovitovskij and Kremer, structural power provided resources which could be turned into goods and needs. Furthermore, these resources can also turn into the outside options that a party can have which determines their structural power.

In regard to the outside options which refer to alternatives, the idea of viewing power in relation to these alternatives, would lead us to the line of thought of Keohane and Nye regarding the

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<sup>115</sup> Pustovitovskij, A. and Kremer, J. "Structural Power and International Relations Analysis. "Fill your Basket, get your Preferences" IEE Working Paper. Volume 191. Bochum. 2011

vulnerability element in relationships. The approach of Pustovitovskij and Kremer does not, therefore, reject the possibility of a connection of Susan Strange's theory with Keohane and Nye's theory of interdependence. This claim, though, is difficult to sustain considering all the criticism that Strange gave to the asymmetrical interdependence theory of Keohane and Nye.<sup>116</sup>

Depending on the outside options, it can be said that the party's structural power can be relativized. Pustovitovskij and Kremer claim "structural power does not operate per se but through relativization."<sup>117</sup> The relativization implies the fact that a third party in the relationship can also have outside options, and in this way influence the relationship of the two original parties.<sup>118</sup>

This approach however, concentrates on the power which actors as individuals have in relation to each other. Susan Strange has already pointed out the 'relational' type of power when contrasting the power in relation to another. On this point, this approach, just like Keohane and Nye's relational power, are captured on only one form of power (relational) which Susan Strange criticizes for being intentional.

Furthermore, there is a contradiction between this approach and Strange's theory. Pustovitovskij and Kremer's approach considers that structural power provides resources, the issue that Strange criticized the most, for structural power is not about resources or capabilities, it is a feature of relationships by which players can define the rules of the game. Therefore, I depart from such an approach because my approach focuses on working further Strange's theory which does not consider relational power nor a relativization of a relationship in regard to their resources or alternatives.

Susan Strange only developed the concept of structural power and its implication in world politics in her work. However, she has also defined a relative power as a distinct type of power. Thus, considering the importance of the definition provided, relative power should not be underestimated as it can also affect the structure. For this reason, I concentrate on elaborating further the concept of relative power.

As mentioned above, Strange's definition of relative power was: "The relative power of each party in a relationship is more or less, if one party is also determining the surrounding structure of the relationship."<sup>119</sup> Relative power in this context is not seen as a power of a party in relation

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<sup>116</sup> See Strange's criticism to Keohane and Nye's interdependence theory in section 1.3.

<sup>117</sup> Pustovitovskij, A. and Kremer, J. "Structural Power and International Relations Analysis. "Fill your Basket, get your Preferences" IEE Working Paper. Volume 191. Bochum. 2011. p. 12

<sup>118</sup>The interesting point in Pustovitovskij and Kremer's approach to Susan Strange's theory is that they have seen a relativization of the relationship. The relativization that they saw though, is in regard to the outside options which the parties possess, which relativizes not the structure but the resources which a party has in relation to the other. Pustovitovskij, A. and Kremer, J. "Structural Power and International Relations Analysis. "Fill your Basket, get your Preferences" IEE Working Paper. Volume 191. Bochum. 2011. pp. 9-10 and Figure 2 in. p. 13

<sup>119</sup> Strange, S. *States and Markets* Pinter Publishers Limited. London. 1988. p. 25

to another. It is seen as an element which can modify the structure which those having structural power have determined.

The development of this concept is important because of its application to the analysis of the international investment framework in a way that complements the existing definition of structural power. In this way, the criticism given to Susan Strange's theory in regard to the lack of operationalization and application can be overcome by further developing Strange's concept of relative power and contrasting it to structural power. With this, one could implement the operationalization and application of her theory in the international investment framework.

Let us return to the example of the mother telling the little brother that he can only go out and play if the big brother is with him. I have described this power as relational power because the big brother has power in relation to his little brother (for example when deciding the game they are going to play-even if the little brother does not want to play that game). The moment that the mother sets the conditions or rules by which the little brother can play, the whole relationship – mother-big brother-little brother- is characterized by structural power.

Relative power comes into existence in this example when there is more than one little brother. Let's say the mother has three or even four children and she establishes the same conditions under which the younger children can go out and play. When they all go out and play and the big brother wants to determine the game they are going to play, the two younger brothers, which have a different game in mind that they both want to play, can unite against the big brother. In such an event, it will not be so easy for the big brother to just go in and not play with his younger brothers, because his younger brothers can jointly tell the mother what is going on and point out the unfairness of the situation. In such circumstances, the mother most likely will tell the big brother to play what his younger brothers want. The younger brothers, by uniting with a shared interest, have been able to modify, even if by only a bit, their relationship under their mother's conditions.

It is in this sense that relative power works. It differs from other concepts of relative power: it does not concentrate on the actors but on the effect given to the framework. Relative power can be viewed in addition to structural power with the difference that whilst structural power holds control on all structures, actors with relative power can also affect these structures, even if it is to a lesser degree.<sup>120</sup> While structural power builds or shapes the initial framework in which actors operate, relative power jumps at the already built framework and interacts with structural power by also determining the surroundings of the structure (in this case the framework), partially modifying it.

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<sup>120</sup> How much relative power can affect the framework is a different question. Relative power is relative because it cannot affect structures too much, but the fact that it can affect the structures, even if minimally, means that those bearing relative power can also be part of modifying the framework.

Thus, structural power allows the one bearing it to shape the framework where actors relate, it implies only the one bearing it to determine the structure. However, at the same time that structural power is held by one party, if there is a group united by the same interests, this group gains relative power that, to a lesser degree, can modify the already existing structure.

For this reason, relative power is an important concept that scholars should be aware of because it affects the structure, the grounds, or framework which is the basis provided for countries to operate at international level.

Relative power in comparison to structural power is even less noticeable (the group might not realize the power over the other actor because structural power might still obscure it) but it is equally important as structural power when we want to understand the international investment framework.

In the work herein, I apply this concept, showing that two moments in history have shown that relative power exists at multilateral level. I restrict it to the formation and/or attempts of the international investment framework. Firstly, the existence of relative power in a United Nations setting and secondly, the existence of relative power in the negotiations performed at the World Trade Organization (WTO). Relative power resulted in these settings from the building of coalitions of actors to stand against the powerful actors who held structural power. The ones bearing relative power are developing countries when acting in coalitions at the multilateral level to include their interests in a proposed framework.

These multilateral settings allowed including all countries' interests to establish a framework. In the UN, the General Assembly adopted their resolutions by the majority vote of its members.<sup>121</sup> At the WTO though, with the peculiarity that the resulting decisions are not democratic -the will of the majority does not get upheld in lieu of the will of the minority. Instead, their decisions are carried out by consensus, with one state, one vote.<sup>122</sup> Therefore, the legal formality proclaimed in the UN Charter and in the Agreement establishing the WTO is crucial because without it, relative power could not be used.

By viewing the framework of international investment through the lenses of structural and relative power, I reject the idea of a paradox for explaining why developing countries agreed to the international investment framework because the answer is far from being unclear. We will see that the BIT regime has been possible due to the existence of structural power in the BIT regime. Apart from explaining why developing countries have signed BITs, this further explains why the international investment regime is changing or evolving; why developing countries are reacting against the BIT regime and why the multilateral attempts to regulate foreign investment have failed.

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<sup>121</sup> Charter of the United Nations. Article 18 (2)

<sup>122</sup> Agreement establishing the WTO. Article IX (1). Compare to the practical effects of the consensus discussed at Payne, A. "How many Gs are there in 'global governance' after the crisis? The perspectives of the 'marginal majority' of the world's states" *International Affairs*. Volume 86. Issue 3, 2010 p. 729-740

As the following chapters will show, the analysis of the international investment framework, viewed through the lens of structural and relative power, also shows that there is an international consequence derived from the strength of one form of power over the other. At the point where both structural and relative power clash, the formidability of structural power gets mitigated by the modification that relative power can make to the framework. Both forms of power, structural and relative, determine the framework. However, having and maintaining a preferable option, namely, the route where one's "preference take precedence over the preference of others"<sup>123</sup> weakens the relative power that developing countries have been able to achieve at the multilateral level.

The next chapter II describes two multilateral attempts to regulate international investments. As it will be described, these two multilateral attempts show evidence of the relative power of developing countries to modifying the framework for international investments.

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<sup>123</sup> Susan Strange's general concept of power.

## **CHAPTER II: International Investment at the Multilateral Level**

It is important to recognize the attempts to create international investment rules at the multilateral level because it reveals the intention of states to define a framework for international investments at the multilateral level which has balanced interests.<sup>124</sup>

The first intention to define international investment rules in which participation was also given to developing countries happened at the United Nations (UN) forum. Around the 1960s and 1970s, the UN enacted resolutions concerning foreign investments which contained provisions that favoured developing countries interests. This was achieved by the coalitions of developing countries which allowed them to preserve their interests in these resolutions, in contrast to only those of developed countries being a priority. However, the establishment of these rules as the framework of international investment failed.

From 1994 to 2003 there were once again further attempts to regulate international investments at the multilateral level. This time these attempts had been forwarded to the World Trade Organization (WTO) forum. Once again, at this forum, an attempt to insert rules that favour developing countries was possible through the coalitions of developing countries. However, the establishment of foreign investment rules in this multilateral framework, once again, failed.

This chapter describes these two periods in history that have defined an attempt to establish a framework for international investments at the multilateral level; in these two periods, the coalitions of developing countries played an important role. In both examples, the coalitions formed by developing countries influenced the attempts to establishing a framework for international investments at multilateral level by including their interests in what would have become the rules of the game. In both setting however, the attempts failed.

Understanding why the attempts failed is part of the objective of this thesis. The first section 2.1. deals with the history of the UN resolutions and the role that coalitions had for these resolutions to be enacted. Section 2.2. describes the negotiations at the WTO Ministerial conferences and further attempts to regulate investments. Section 2.3. describes the position of developing countries in the Ministerial conferences and how shared interests of developing countries developed at the WTO. Finally, section 2.4. highlights the importance of the coalitions of developing countries at the multilateral level and gives concluding remarks about how they brought about the relative power of developing countries.

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<sup>124</sup> At the multilateral level, both developed and developing countries propositions can be considered for establishing a framework thanks to the legal formalities of international organizations decision making process. For the United Nations it is established that the UN General Assembly resolutions are passed by majority vote (Article 18 of the UN Charter ); and for the WTO it is established that the decisions are made by consensus (Article IX of the Agreement establishing the World Trade Organization).



## 2.1. The development of United Nation's Provisions on Foreign Investments

Developed countries have been the leaders in establishing the rules constituting a framework in which countries should relate to each other. Trade and investment are intertwined in this framework. The framework that developed countries established for the regulation of trade is the same one that made possible the creation of a framework for international investments, particularly characterized by the BIT regime.<sup>125</sup>

Regulations for foreign investment protection can already be found in the 19<sup>th</sup> century, when the international duty of states to give compensation in case of expropriation of foreign property was recognized. One of its main problems, however, was to determine how compensation would be made.<sup>126</sup>

In 1945, the United Nations was established. So was the Bretton Woods system, with the creation of new institutions that would govern the world economy, the International Monetary Fund, the World Bank and one component of it, the International Bank for Reconstruction and Development (IBRD). Two years later, in 1947, 23 countries agreed to establish the General Agreement on Trade and Tariffs (GATT). This institution was the result of the efforts, predominantly of the US, to reduce tariffs.<sup>127</sup>

The GATT and its correlation to the US law can be summarized in what Brand (2012) has written: "The General Agreement on Tariffs and Trade had its origins in a U.S. State Department publication of 1945 that included a "Proposal for Consideration by an International Conference on Trade and Employment."<sup>128</sup>

On November 1947, the UN conference on Trade and Employment took place. It was referred to as the Havana Convention which started with the participation of 50 countries. At this Convention, its members intended to create another institution that would support the world economy; this institution was the International Trade Organization (ITO).<sup>129</sup>

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<sup>125</sup> The explanation of how the framework for international investments is constituted by BITs is described in Chapter III.

<sup>126</sup> Explained in detail in Chapter III.

<sup>127</sup> The liberalization of economies and reductions of tariffs benefited the US the most after the World War II. "...low U.S. tariffs encouraged low foreign tariffs and thus indirectly stimulated increases in US exports, especially agricultural goods." Baldwin, R. and Krueger, A. *The Structure and Evolution of Recent US Trade Policy* University of Chicago Press. 1984. p. 8.

<sup>128</sup> Brand, R. *Fundamentals of International Business Transactions* Volume I. Center for International Legal Education. University of Pittsburgh School of Law. 2012. p. 172-173.

<sup>129</sup> "The plan was that the ITO would be the third pillar of the world economy together with the IMF and BIRD (agency of the World Bank)" Kononov, O. "International Investment Law: Is it time to change the Traditional BIT System?" *Czech Yearbook of International Law*. 2011; see also "The GATT years: From Havana to Marrakesh" at [http://www.wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/fact4\\_e.htm](http://www.wto.org/english/thewto_e/whatis_e/tif_e/fact4_e.htm) (last visited November 29, 2012)

The already existing GATT “formed the basis for the negotiation of a Charter for an International Trade Organization (ITO).”<sup>130</sup> In 1948, the ITO draft or Havana Charter was agreed by the participants; it contained rules dispersed in different agreements, *inter alia*, on trade, tariffs, employment, investment. However, because of the already negotiated tariff reductions, the US congress did not ratify the ITO and without their participation the initiative to create the ITO failed.<sup>131</sup>

In spite of the failure of the ITO, some elements of it were then transported to the GATT which became operative in 1948. At this time, there was a wave of newly independent countries and governments, which adopted measures that included expropriations. The regulation of foreign investments’ protection at this time was therefore critical.<sup>132</sup> In 1949, the International Chamber of Commerce (ICC) prepared a draft of an International Code of Fair Treatment of Foreign Investment, and in 1957, private parties (with the leadership of the Deutsche Bank) gathered to prepare a draft of International Convention for the Mutual Protection of Private Property Rights in Foreign Countries or Abs-Shawcross Convention.<sup>133</sup> I do not focus on these drafts because they did not consider developing countries’ interests and because for other reasons they were nevertheless not adopted.<sup>134</sup>

The UN, as the predominant multilateral organization at the time, supported the newly independent countries. In 1952, the UN General Assembly passed Resolution No. 626/1952 “Right to Exploit Freely Natural Wealth and Resources”, which recommended all states to respect the sovereignty of any state over its natural resources.<sup>135</sup> In 1955, however, the GATT enacted a resolution that “urged countries to conclude bilateral agreements to provide protection and security for foreign investment.”<sup>136</sup>

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<sup>130</sup> Brand, R. *Fundamentals of International Business Transactions* Volume I. Center for International Legal Education. University of Pittsburgh School of Law. 2012. p. 172-173.

<sup>131</sup> The US congress rejected its ratification. See Brand, R. *Fundamentals of International Business Transactions* Volume I. Center for International Legal Education. University of Pittsburgh School of Law. 2012. p. 172-173; also Hoekman, B. and Kosteci, M. *The Political Economy of the World Trading System* 2<sup>nd</sup> Edition. Oxford University Press. 2001 p. 38

<sup>132</sup> Newly constituted countries made expropriatory measures and in some cases without giving compensation. Explained in Chapter III.

<sup>133</sup> Abs, H. and Shawcross, H. (1960). "Draft Convention on Investments Abroad", in "The proposed convention to protect private foreign investment: a round table" *Journal of Public Law* (presently *Emory Law Journal*), Vol. 1, Spring 1960. UNCTAD. *International Investment Instruments: A Compendium*.

<sup>134</sup> See Sullivan, J. and Salacuse, N. “Do BITs Really Work?: An Evaluation of Bilateral Investment Treaties and Their Grand Bargain” 46 *Harv. Int'l L.J.* 67. 2005

<sup>135</sup> UN General Assembly Resolution No. 626 “Right to exploit Freely Natural Wealth and Resources” December 21, 1952.

<sup>136</sup> GATT 1955 Resolution for International Investment and Economic Development, available at [http://www.wto.org/english/tratop\\_e/invest\\_e/invest\\_info\\_e.htm](http://www.wto.org/english/tratop_e/invest_e/invest_info_e.htm); see also Kononov, O. “International Investment Law: Is it Time to Change the Traditional BIT System?” *Czech yearbook of International Law*. 2011.

In 1962, the UN enacted the UN Resolution No. 1803/62 “Permanent Sovereignty over Natural Resources” which established that the expropriation of foreign investments and the compensation thereof were going to be ruled by the law of the host country and international law. The expropriation provision stated:

*“Nationalization, expropriation or requisitioning shall be based on grounds or reasons of public utility, security or the national interest which are recognized as overriding purely individual or private interests, both domestic and foreign. In such cases the owner shall be paid appropriate compensation, in accordance with the rules in force in the State taking such measures in the exercise of its sovereignty and in accordance with international law. In any case where the question of compensation gives rise to a controversy, the national jurisdiction of the State taking such measures shall be exhausted. However, upon agreement by sovereign States and other parties concerned, settlement of the dispute should be made through arbitration or international adjudication.”<sup>137</sup> (my highlights)*

Developing countries were questioning the Bretton Woods system because they claimed it benefited only those who created them. Due to such an uprising of developing countries’ demands, the United Nations Commission for Trade and Development (UNCTAD) was created in 1964 to support developing countries.<sup>138</sup>

There were intellectual gatherings of developing countries’ representatives who stopped believing in the western liberal model when discussing these issues. These gatherings then became known as the Third World Forum which was a network created by official and non-official representatives of developing countries.<sup>139</sup>

Many developing countries shared the same ideas and it was these shared interests which resulted in the formation of a coalition at multilateral level to support developing countries interests.<sup>140</sup> In the first session of the UNCTAD, the biggest coalition of developing countries formed, it was called the ‘Group of 77’.<sup>141</sup> The strength of this coalition allowed developing countries to fight for including their views at the multilateral level and so it was that more UN resolutions that favoured developing countries interests on foreign investments were enacted.

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<sup>137</sup> UN General Assembly Resolution No. 1803 (XVII) of 14 December 1962, "Permanent Sovereignty over Natural Resources" Articles 3 and 4.

<sup>138</sup> History of the UNCTAD available at <http://unctad.org/en/Pages/About%20UNCTAD/A-Brief-History-of-UNCTAD.aspx> (last visited November 1, 2012). The first Secretary General of this Organization was Raul Prebisch, one of the predominant exponents of dependencies theories (mentioned in Chapter I).

<sup>139</sup> Cox, Robert “Ideologies and the New International Economic Order. Reflections on some recent Literature” International Organization Vol.33 No.2. 1979. p. 262-263

<sup>140</sup> *ibid*; also Narlikar, A. *International Trade and Developing Countries. Bargaining coalitions in the GATT & WTO* Routledge. 2003

<sup>141</sup> Establishment of the Group of 77, available at <http://www.g77.org/doc/> (last visited November 29, 2012)

In 1966, the UN Resolution No. 2158/66 “Permanent Sovereignty over Natural Resources” recognized the right of countries to participate in the administration of foreign enterprises and established a duty for foreign investors to train local personnel.<sup>142</sup>

The UN resolutions so far were in favour of the sovereignty of developing countries over their resources. They also contained provisions promoting the development of the host countries and determined that in case of compensation for expropriation or disputes the law of the host countries should be applied. It is in this sense that these resolutions gave many advantages to developing countries for the treatment of foreign investments. In 1967, however, there was a counter reaction by the OECD which attempted to create a draft on the Protection of Foreign Property.<sup>143</sup> This draft was not adopted; on the contrary, because of the strength of the coalition of developing countries, there were more UN resolutions favouring developing countries.

In 1973, the UN Resolution No. 3171/73 “Permanent Sovereignty over Natural Resources” supported developing countries by stating: “the application of the principle of nationalization carried out by States, as an expression of their sovereignty in order to safeguard their natural resources, implies that each State is entitled to determine the amount of possible compensation, and the mode of payment, and that any disputes which might arise should be settled in accordance with the national legislation of each state carrying out such measure”<sup>144</sup>

In 1974, the UN Resolution No. 3201 established a New International Economic Order to correct the inequalities between developed and developing countries.<sup>145</sup> Furthermore, also in 1974, the UN enacted Resolution No. 3281/74 “Charter of Economic Rights and Duties” which stated:

*“1. Every State has and shall freely exercise full permanent sovereignty, including possession, use and disposal, over all its wealth, natural resources and economic activities.*

*2. Each State has the right:*

*(a) To regulate and exercise authority over foreign investment within its national jurisdiction in accordance with its laws and regulations and in conformity with its national objectives and priorities. No State shall be compelled to grant preferential treatment to foreign investment;*

*(b) To regulate and supervise the activities of transnational corporations within its national jurisdiction and take measures to ensure that such activities comply with its laws, rules and regulations and conform with its economic and social policies. Transnational corporations shall not intervene in the internal affairs of a host State. Every State should, with full regard for its*

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<sup>142</sup> UN General Assembly Resolution No. 2158 (XXI) of November 25, 1966, “Permanent Sovereignty over Natural Resources”.

<sup>143</sup> Sullivan, J. and Salacuse, N. “Do BITs Really Work?: An Evaluation of Bilateral Investment Treaties and Their Grand Bargain” 46 Harv. Int'l L.J. 67. 2005

<sup>144</sup> UN General Assembly Resolution No. 3171 (XXVIII), of December 17, 1973, “Permanent Sovereignty over Natural Resources.”

<sup>145</sup> UN General Assembly Resolution No. 3201(S-VI) of May 1, 1974, “Establishment of a New International Economic Order.”

*sovereign rights, cooperate with other States in the exercise of the right set forth in this subparagraph;*

*(c) To nationalize, expropriate or transfer ownership of foreign property, in which case appropriate compensation should be paid by the State adopting such measures, taking into account its relevant laws and regulations and all circumstances that the State considers pertinent. In any case where the question of compensation gives rise to a controversy, it shall be settled under the domestic law of the nationalizing State and by its tribunals, unless it is freely and mutually agreed by all States concerned that other peaceful means be sought on the basis of the sovereign equality of States and in accordance with the principle of free choice of means.*<sup>146</sup>  
(my highlights)

These UN resolutions and their provisions favoured developing countries, as they not only included their interests; the resolutions were showing a consensus on the recognition of their sovereignty. The fact that the UN passed these resolutions was only possible through the coming together of developing countries, which, by acting together and maintaining their interests at the multilateral level, managed to have a consensus favourable to them at the international level.

This is the first evidence of developing countries' relative power at the multilateral level. In a setting that has the purpose of determining rules for the future framework for international investments, developing countries achieved to modify it in a degree that such a framework will also include developing countries' interests.

However, other developments and formalities have not allowed for these rules to be the framework for international investments. Although the UN General Assembly Resolutions could reflect state practice and thus reflect customary international law,<sup>147</sup> the UN General Assembly Resolutions are only recommendations and they can be used by its members to enter into treaties but they are not binding, their value is considered *de lege ferenda*.<sup>148</sup>

However, although states ought to pursue treaties deriving from the content of these resolutions, in Europe, there was a wave of Bilateral Investment Protection Agreements, which gave more protection to the home countries of where the investment was coming from, to the foreign investment per se and naturally, to the foreign investor. Germany was the first country to enter

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<sup>146</sup> UN General Assembly Resolution No. 3281(XXIX), of December 12, 1974 "Charter of Economic Rights and Duties of States" Article 2.

<sup>147</sup> Nicaragua case, ICJ Rep. 1986

<sup>148</sup> In an expropriation dispute submitted to the ICJ, Prof. Dupuy who acted as the Umpire, expressly mentioned these resolutions and stated that these resolutions did not reflect the view of the most important western countries. See *Texaco Overseas Petroleum Company v. The Government of the Libyan Arab Republic*, International Legal Materials, Vol. 17 No. 1 1978.

into force a BIT with Pakistan in 1959.<sup>149</sup> One has to consider though that the plausible cause was the way that other countries treated Germany after the World War II.<sup>150</sup>

On the other hand, the US that did not have the same excuse, only three years after the last UN Resolution, in 1977, started its Bilateral Investment Treaty program. With it, the US was determined to customize their interests (opposite to the recommendations of the UN resolutions) through bilateral investment treaties.<sup>151</sup>

## **2.2. The Attempt to Regulate Investments through the WTO and its Ministerial Conferences**

The second moment in history that attempted to regulate international investment at the multilateral level, which ought to include developing countries' interests, was sought at the World Trade Organization (WTO), "which has evolved from the General Agreement on Tariffs and Trade (GATT), and U.S. trade law."<sup>152</sup>

Weiss (2008) stated: "International trade and investment, considered complements not substitutes by economists, have for a considerable time coexisted side by side...sometimes in the same international agreement."<sup>153</sup> And indeed, investment rules have been around since the time of the GATT through the WTO.

In the Tokyo Round of the GATT (1973-1979) the US wanted to include investment in the agenda but it was unsuccessful.<sup>154</sup> However, in the 1986 Uruguay Round of the GATT the US tried to include in the negotiations an agreement on investments<sup>155</sup> and the Uruguay Round report stated that foreign investments were an important issue. The Declaration of the Uruguay Round in 1986 stated: "Following an examination of the operation of GATT Articles related to the *trade restrictive and distorting effects of investment measures*, negotiations should elaborate, as appropriate, *further provisions that may be necessary* to avoid such adverse effects on trade."<sup>156</sup> It was established that further provisions to avoid adverse effects on trade should be taken and this was something that all countries had to comply with.

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<sup>149</sup> Brand, R. *Fundamentals of International Business Transactions* Volume II. Center for International Legal Education. University of Pittsburgh School of Law. 2012. p. 720

<sup>150</sup> An example of this treatment towards Germany can be seen in the dispute between Germany and Poland submitted to the Permanent Court of Justice. Chorzow Factory case, PCIJ ser. A No 17. At 68.

<sup>151</sup> Vandeveld, K. "The BIT Program: A Fifteen-Year Appraisal" American Society of International Law Proceedings of the Annual Meeting. Vol. 86. 1992.

<sup>152</sup> Brand, R. *Fundamentals of International Business Transactions* Volume I. Center for International Legal Education. University of Pittsburgh School of Law. 2012. p. 158

<sup>153</sup> Weiss, F. "Trade and Investment" in the Oxford Handbook of International Investment Law. (Peter Muchlinski, Federico Ortino & Christoph Schreuer eds.) 2008.

<sup>154</sup> *ibid* p. 187

<sup>155</sup> *ibid*

<sup>156</sup> Punta del Este Ministerial Declaration of September 20, 1986. 25ILM 1623-27 (1986). Emphasis added.

In 1994, after the last Uruguay Round of the GATT, the WTO was established. This same year the members agreed on rules provided in three documents that are also relevant to investment rules: the General Agreement on Trade in Services (GATS), the Trade Related Aspects of Intellectual Property Rights (TRIPS) and the Trade Related to Investment Measures (TRIMS).<sup>157</sup>

The GATS introduced the regulation of investments insofar as it governs services supplied through a commercial presence, and therefore, it allows for foreign investment.<sup>158</sup> The TRIPS touches on investments insofar as it regulates the intangible assets of companies (intellectual property rights) and protects them; and the TRIMS prohibits governments to impose investment regulations that would restrict trade (for eg. requiring only domestic products for a particular project).

The Trade Related Investment Measures (TRIMs) is the agreement among all which touched the most on investment. There was a five year period given for its review and so during these years the general investment measures remained always a point to negotiate at the WTO Ministerial Conferences yet to come.<sup>159</sup> What is particularly relevant is that on the same round in which the WTO was created, so was the TRIMs and the TRIMs was proposed by the United States as a mechanism to solve the investment mechanism that distorts trade.<sup>160</sup>

However, conflicting scholarly views define the posture of developing countries regarding TRIMs: On the one hand, Kumar (2003) has stated that developing countries resisted the TRIMs: "...despite the resistance of developing countries, the final act of the Uruguay round included an Agreement on Trade Related Investment Measures (TRIMs)."<sup>161</sup> On the other hand, Hertel, Hoekman and Martin (2002), analyzing the subsequent negotiations rounds, had the view that developing countries fought to keep this multilateral agreement on investment measures. "Many developing countries have resisted the requirement to abolish TRIMs, arguing that they need such instruments to encourage industrialization"<sup>162</sup>

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<sup>157</sup> Other WTO Agreements that touch on investment are the Government Procurement Agreement (not mandatory to all its members) and the Subsidies and Countervailing Measures (SCM); see the discussion of these agreements in See Weiss, F. "Trade and Investment" in the Oxford Handbook of International Investment Law. (Peter Muchlinski, Federico Ortino & Christoph Schreuer eds.) 2008; see also Cancun Ministerial briefing notes at [http://www.wto.org/english/thewto\\_e/minist\\_e/min03\\_e/brief\\_e/brief07\\_e.htm](http://www.wto.org/english/thewto_e/minist_e/min03_e/brief_e/brief07_e.htm) (last visited November 29, 2012)

<sup>158</sup> See Vandeveld, K. "A Brief History of International Investment Agreements" University of California. Davis Journal of International Law and Policy. Vol.12. 2005–2006. p 176.

<sup>159</sup> See Hertel T., Hoekman, B. and Martin, W. "Developing Countries and a New Round of WTO Negotiations" The World Bank Research Observer, Vol. 17, No. 1. 2002. p. 127

<sup>160</sup> Business Guide to the World Trading System. Published jointly by the International Trade Centre UNCTAD/WTO and the Commonwealth Secretariat. 1999. Chapter 13. Available at <http://www.jurisint.org/pub/06/en/doc/C13.pdf> (last visited November 29, 2012)

<sup>161</sup> Kumar, N. "Investment on WTO Agenda. A Developing Country Perspective and Way Forward for Cancun Ministerial Conference" Economic and Political Weekly. 2003 p. 3178

<sup>162</sup> Hertel, T., Hoekman, B. and Martin, W. "Developing Countries and a New Round of WTO Negotiations" The World Bank Research Observer, Vol. 17, No. 1. 2002. p. 127

The TRIMS, although limited in applicability and not covering all the protections conceded by a bilateral investment treaty, is nevertheless a powerful instrument for countries to pursue interests.<sup>163</sup> As an example, there is the claim presented by the United States, the EU and Japan against Nigeria, India and Indonesia in 2011. Nigeria, India and Indonesia were in the process of implementing some developments in their countries stated a mandatory requirement of using local products.<sup>164</sup> The developed countries, pursuant to the TRIMS, submitted a claim against Nigeria, India and Indonesia to prevent them from using only local products. One important disposition of TRIMS is that there should not be a form of protectionism as to allow only national products for a certain activity.<sup>165</sup>

Nevertheless, the importance of the treatment of foreign investment by developed countries was put into evidence again, since only one year after the creation of TRIMS, in 1995, the OECD tried to make a Multilateral Agreement on Investment (MAI). The MAI covered issues beyond of what was agreed in TRIMS, which was an instrument between countries only, with limited protections for the investments and investors. However, it failed because of the OECD country members' lack of consensus on the matter.<sup>166</sup>

And so the WTO remains the multilateral forum which although it establishes a framework for trade, with the intention of regulating trade related aspects, other issues apart from trade are sought to be regulated. It intends to include investment through the regulation of 'investment trade related measures'.

The Ministerial Conferences of the WTO are in theory the forum where developed and developing countries come together to agree on a framework in which they are going to relate. The multilateral setting, in which the international trade regime was set, provided a type of global governance approach by which at least pursuant to formalities, countries can decide together on issues of world trade.<sup>167</sup>

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<sup>163</sup> See list of cases citing TRIMS: 29 cases available at [http://www.wto.org/english/tratop\\_e/dispu\\_e/dispu\\_agreements\\_index\\_e.htm?id=A25#selected\\_agreement](http://www.wto.org/english/tratop_e/dispu_e/dispu_agreements_index_e.htm?id=A25#selected_agreement) (last visited November 29, 2012)

<sup>164</sup> WTO: 2011 NEWS ITEMS "Investment measures questioned" Trade and investment. October 3, 2011. Available at [http://www.wto.org/english/news\\_e/news11\\_e/trim\\_03oct11\\_e.htm](http://www.wto.org/english/news_e/news11_e/trim_03oct11_e.htm) (last visited November 29, 2012)

<sup>165</sup> TRIMS, Article 2, available at [http://www.wto.org/english/docs\\_e/legal\\_e/18-trims.pdf](http://www.wto.org/english/docs_e/legal_e/18-trims.pdf) (last visited November 29, 2012)

<sup>166</sup> Kumar, N. "Investment on WTO Agenda. A Developing Country Perspective and Way Forward for Cancun Ministerial Conference" Economic and Political Weekly. 2003. p. 3178

<sup>167</sup> This is because the decisions are taken by consensus. Agreement establishing the World Trade Organization. Article IX. Available at [http://www.wto.org/english/docs\\_e/legal\\_e/04-wto.pdf](http://www.wto.org/english/docs_e/legal_e/04-wto.pdf) (last visited Oct 28, 2012).



Such a setting intends to reduce the asymmetries between states and pursues to have a more balanced relation of power when negotiating.<sup>168</sup> A description of the advantages of a multilateral regime is described by Blum (2008) in the following way: “The multilateral setting also compels every party to contract with every other party. This limits the ability of stronger powers to design discriminatory regimes that may favor some at the expense of others. The conjoining of efforts and resources also allows weaker states to participate more cost-effectively in multilateral negotiations, whereas in the bilateral setting they would have had to independently shoulder the burden of negotiating... Consequently, arrangements that are devised within a multilateral framework, as in the areas of international trade or the environment, are perceived as more equal and fair.”<sup>169</sup>

Although from a developed countries’ perspective, environment, health, labour and investment among others, are issues that should be considered as connected to trade in order to aim at freer trade which is the ultimate objective of the WTO, the regulation of investment at multilateral level was said to be a strategy protecting the developed countries’ interests.<sup>170</sup> On the other hand, for developing countries, jumping onto a framework defined by developed countries means to enter into commitments such as liberalizing their economies, reducing protectionism and opening their markets and to achieve these, they have to adapt their legislation respectively.

This is the context in which investments rules are attempted to be materialized at multilateral level. The area of investment, however, cannot be analyzed in isolation in this context, since for the agreement of investment provisions at WTO level, other issues that were intended to be incorporated in the negotiations played a major role for the decisions, or lack of them. Agricultural issues have been, for example, a main issue for developing countries, which in many opportunities have expressed, that because of not having concessions by developed countries in these areas, chose to not agree on any of the other issues proposed, like public procurement, trade facilitation, competition, investment, labour and environment.

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<sup>168</sup> Although Payne (2010) claimed marked asymmetries in the WTO, see Payne, A. “How many Gs are there in ‘global governance’ after the crisis? The perspectives of the ‘marginal majority’ of the world’s states” *International Affairs* 86: 3. 2010.

<sup>169</sup> Blum, G. “Bilateralism, Multilateralism, and the Architecture of International Law” *Harvard International Law Journal*. Vol 49. 2008. p. 341

<sup>170</sup> Kumar (2003) stated: “The attempt of developed countries to seek a multilateral regime on investment through multilateral trade negotiations is a part of their strategy to secure more favourable conditions for overseas operations of their enterprises that use FDI as a more of servicing foreign markets more than trade now.” Kumar, N. “Investment on WTO Agenda. A Developing Country Perspective and Way Forward for Cancun Ministerial Conference” *Economic and Political Weekly*. 2003. p. 3177

From the Uruguay round that created the WTO to the Cancun round, negotiations, which touched investment issues, have experienced problems of reaching an understanding and having a lack of consensus between developed and developing countries.<sup>171</sup>

It is important, however, to analyze what happened to the efforts of including investment rules in the WTO because it can enlighten us on why having a multilateral framework for international investments is still not possible. By analyzing the countries' statements at the WTO Ministerial Conferences, it can be pointed out that many other issues contributed to the lack of agreement. These events are worth discussing since they strengthen the claim developed in this thesis, namely, that there is relative and structural power in the investment regime, and that one weakens the other.

### **2.3. The Developing Countries' Positions at the WTO Ministerial Conferences**

In the following, I analyze both developed and developing countries' perspectives at the WTO Ministerial Conferences in which investment was sought to be regulated. All these WTO conferences have been polemic due to the incorporation of new issues in connection to trade to the agenda, *inter alia* the proposal to regulate investment.

Thus, the analysis includes the statement of the representatives of the US and EU on the one hand, and of South American countries on the other hand. This analysis is relevant for disclosing firstly, if developing countries made any propositions at such conferences or if they were there just giving an answer to the developed countries' proposals; secondly, if there were any shared interests among developing countries and thirdly, how these shared interests allow or turned to the formation of coalitions.

As a background, it is important to note that the Uruguay Round, which created the WTO, also included other agreements which were included as an Annex to the agreement establishing the WTO. These were: GATT 1994; Agreement on Agriculture; Agreement on the Application of Sanitary and Phytosanitary Measures; Agreement on Textiles and Clothing; Agreement on Technical Barriers to Trade; Agreement on Trade-Related Investment Measures; Agreement on the Implementation of Article VI of the GATT 1994; Agreement on the Implementation of Article VII of the GATT 1994; Agreement on Preshipment Inspection; Agreement on Rules of Origin; Agreement on Subsidies and Countervailing Measures; and the Agreement on Safeguards.

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<sup>171</sup> After the 2003 Cancun Ministerial Conference there were three more conferences, in 2005 in Hong Kong (Sixth Ministerial Conference) and in 2009 and 2011 in Geneva (Seventh and Eighth Ministerial Conferences). None of these conferences however discussed investment issues.

Among these, one very relevant for South American countries is the Agreement on Agriculture, naturally, because these countries have an important agricultural sector. This agreement was established for the purpose of reducing agricultural support and other forms of protectionism which creates an unfair trade practices for countries. The Agreement on Agriculture establishes: “[T]he above-mentioned long-term objective is to provide for substantial progressive reductions in agricultural support and protection sustained over an agreed period of time, resulting in correcting and preventing restrictions and distortions in world agricultural markets”<sup>172</sup>

This Agreement has become the justification for South American countries to reject the proposals presented by developed countries, as they have claimed that developed countries did not comply with the commitments therein. Developed countries on the other hand, have concentrated on including new issues which are related to trade to the agenda of the WTO Ministerial Conferences, and among these, the regulation of investment.<sup>173</sup>

#### **- 1996 WTO Ministerial Conference, Singapore.**

The first WTO ministerial meeting was at the 1996 Singapore Ministerial Conference. This was the first meeting in which some new issues connected to trade, proposed by developed countries, were included in the agenda. The issues were investment, trade facilitation- specially referring to freeing trade in IT products (proposed by EU and US) competition (proposed by EU) and government procurement (proposed by US). These issues- investment, trade facilitation, competition and public procurement- became also known as the Singapore issues. However, labour standards and environment issues were also discussed at this conference.<sup>174</sup>

At this conference, the EU encouraged the WTO to include other issues and investment was the “top priority.” The EU representative stated: “WTO must also pick up the new subjects like *investment and competition*...the arguments offered against negotiations in these subjects seem short-sighted and ultimately wrong.... Investment indeed seems to me the top priority for the WTO in the years ahead. Investment brings benefits to all... It is also an issue which is primarily for the WTO because it involves the development of an appropriate framework of binding rules.”<sup>175</sup> (my emphasis)

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<sup>172</sup> WTO Agreement on Agriculture’s preamble.

<sup>173</sup> Appendix I provides a synopsis of the responses of South American countries to the developed countries’ proposals.

<sup>174</sup> Falke (2005) has stated that only investment, trade facilitation, competition and public procurement were regarded as the Singapore issues because of the matter of urgency of their treatment. See Falke, A. “EU-USA Trade Relations in the Doha Development Round: market Access versus a Post-modern Trade Policy Agenda” *European Foreign Affairs Review* 10: Kluwer Law International. 2005. p. 341

<sup>175</sup> Commission of the European Communities. Statement by Sir Leon Brittan Q.C. Vice-President of the European Commission. Singapore, 1996. WT/MIN(96)/ST/2

The EU was, however, also already concerned with including issues like environmental issues and labour standards, and made the opening comment that they were willing to make the efforts and commit in order to allow market access to least developed countries.

The US, apart from mentioning also a concern on reducing tariffs of technological products, added that government procurement should be more transparent and in the WTO these standards of transparency as well as due process for it should be agreed. The US further proposed to reform the WTO Agreement on Agriculture. Furthermore, they expressed their concerns on implementing the TRIPS Agreement (intellectual property) and that the WTO should be concerned with the environment. The US, interestingly, said that the WTO should fulfill “the mandate for sustainable development which resulted from the Rio Summit”<sup>176</sup> (Note that the Kyoto Protocol resulted from the Rio Summit which was not ratified by the US).<sup>177</sup>

The US also expressed their support to the EU proposals on working with investment and competition and stressed their concern regarding the respect of labour standards and basic human rights. They proposed working with the International Labour Organization (ILO), but added a disclaimer<sup>178</sup> by stating: “We are not proposing an agreement on minimum wages, changes that could take away the comparative advantage of low-wage producers, or the use of protectionist measures to enforce labour standards. We are proposing that the concerns of working people - people who fear that trade liberalization will lead to distortion - be addressed in a modest work programme in the WTO.”<sup>179</sup>

On the other hand, developing countries indeed answered these proposals. South American developing countries said that there was a lack of commitments of the Uruguay Round agreements by the WTO members. Therefore, they raised their concerns by pointing out that all members should respect the commitments of the Uruguay Round in order to fulfill the objective of a freer trade.

Interestingly, developing countries also stated quite markedly that they have complied with the requirements discussed at the Uruguay Round and held to their commitments. They had opened up their markets and liberalized their economy, and had established the whole dispute settlement

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<sup>176</sup> United States’ Statement by the Honourable Charlene Barshefsky. Acting United States Trade Representative. Singapore, 1996. WT/MIN(96)/ST/5

<sup>177</sup> “Washington does not always practice what it preaches” already mentioned in the Washington Consensus. See Williamson, J. “What Washington Means by Policy Reform” Institute for International Economics. Chapter 2 from *Latin American Adjustment: How Much Has Happened?*. Edited by John Williamson. Published April 1990.

<sup>178</sup> Probably because the US has not ratified some of the basic ILO conventions. The US only ratified 2 out of 8 fundamental ILO Conventions, data available at [http://www.ilo.org/dyn/normlex/en/f?p=1000:11200:0::NO:11200:P11200\\_COUNTRY\\_ID:102871](http://www.ilo.org/dyn/normlex/en/f?p=1000:11200:0::NO:11200:P11200_COUNTRY_ID:102871) (last visited November 29, 2012)

<sup>179</sup> United States’ Statement by the Honourable Charlene Barshefsky. Acting United States Trade Representative. Singapore, 1996. WT/MIN(96)/ST/5

regime so as to fit the WTO regime. Therefore, South American developing countries stated that they expect the other members (mostly referring to developed countries), would do the same.<sup>180</sup>

Argentina, Bolivia, Brazil, Chile, Guyana, Ecuador, Paraguay, Uruguay, and Venezuela (9 out of 12 sovereign South American countries) complained about the lack of compliance by developed countries of the WTO Agreement and especially on the agricultural issues.

In terms of the answer given by South American countries to the new issues that were proposed, the perspectives on each of them varied. Bolivia did not seem to have any problems with investment issues, since they stated that they supported the Working Group. Furthermore, they did not object to environmental norms, which they saw as being part of a broader framework and something which all had to share responsibility for.

Regarding labour standards, however, Bolivia was against negotiating on labour standards because the WTO was not the appropriate organization for that and stated that they nevertheless had ratified many international labour conventions of the ILO which gave their juridical order advanced labour laws.

Ecuador referred to the 'new issues' as disguised forms of protectionisms proposed by developed countries: "...it is of fundamental importance that the commitments agreed should be respected and that there should be no disguised forms of protectionism, linked to labour standards or to environmental protection, for example."<sup>181</sup>

Ecuador questioned why in such a short time labour propositions were submitted which was a matter that affected developing countries and not developed countries and that the WTO's sole objective was freer trade. Ecuador, furthermore, mentioned the risk of ending up with a lack of consensus because of including these issues and said that the WTO was not the forum for discussing, for example, labour issues.

The inclusion of environmental protection was for Ecuador "a pretext to apply unjustified restriction within the markets of developed countries."<sup>182</sup> As for investment, Ecuador did see the necessity of having improved agreements. "Ecuador believes that special consideration should be given to the need to make progress in examining the relationship between integration schemes and multilateral rules and conclude improved and more suitable agreements in the areas of services, telecommunications and investment."<sup>183</sup>

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<sup>180</sup> These were expressed because of the lack of compliance of the Agreement on Agriculture by developed countries.

<sup>181</sup> Ecuador's Statement by H.E. Mr. Ruben Flores. Deputy-Minister of Foreign Trade. Singapore, 1996. WT/MIN(96)/ST/68

<sup>182</sup> *ibid*

<sup>183</sup> *ibid*

With regard to the new issues, Paraguay stated that they should be analyzed in the light of the interests of all WTO members, by mentioning: "... the raising of new issues in the WTO should be the result of a process which takes into account the interests of all its Members and does not favour the special interests of some of them. The terms of reference need to be adjusted in the light of the fundamental rule of balance and negotiations must take into account the need for transparency and fairness."<sup>184</sup>

As for Brazil and the 'new issues', it is very interesting to see that Brazil was in favour of most of them. Most importantly, although Brazil had not ratified any BITs with developed countries,<sup>185</sup> Brazil was in favour of creating a multilateral investment regime under the WTO. Brazil's representative stated: "We have already indicated our readiness to accept the creation of a working group within the WTO to address the issue of trade and investment. This working group should allow Members to fully understand all the implications of the relationship between trade and investment. **We shall be prepared to engage in full negotiations on an Agreement on Investments and we consider that these should be carried out within the framework of a truly multilateral organization such as the WTO.**"<sup>186</sup> (my emphasis)

Brazil suggested the creation of a Working Group for Public Procurement. Regarding labour, they said that they have ratified almost all ILO's Conventions and thus, the proposed labour standards were part of its legislation. Brazil claimed, as the other Latin American countries, that their legislation already contemplated all those labour standards that were discussed in the negotiations. Furthermore, that it was the ILO the competent authority to enforce those measures and not the WTO.

As one can see, the similarity of the claims by South American countries in this 1996 WTO conference, which introduced the new issues, is striking. First of all, there were common grounds on the statements referring to the fact that developing countries complied with their commitments to liberalize their markets and economies, because that ought to bring freer trade and eliminate trade barriers, and it was what was agreed at the Uruguay Round. Developing countries claimed that they expected developed countries to do the same, and this leads to the second point of claim that referred to agricultural issues. Nine out of twelve statements further expressed that developing countries have opened their markets, whereas developed countries did not eliminate their trade barriers and subsidies which was affecting the agricultural sector of all South American countries.

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<sup>184</sup> Paraguay's Statement by Mr. Ruben Melgarejo Lanzoni. Minister of Foreign Relations. Singapore, 1996. WT/MIN(96)/ST/75

<sup>185</sup> Brazil has only one BIT ratified with Paraguay, which entered into force in September 6, 1957; see OAS available at [http://www.sice.oas.org/ctyindex/BRZ/BRZBITs\\_e.asp](http://www.sice.oas.org/ctyindex/BRZ/BRZBITs_e.asp)

<sup>186</sup> Brazil's Statement by H.E. Mr. Luiz Felipe Lampreia. Minister for External Relations. Singapore, 1996. WT/MIN(96)/ST/8

Another point related to the new issues connected to trade, shared interests were also disclosed. Whereas some were in favour of discussing and further working on these issues, there were others who opposed to their treatment.

Regarding investment, the views were more varied. Some countries said that they already had the protection by BITs, others said that they needed improvement in this area, and others, like Brazil, the country which ratified no BITs with developed countries, pushed for having a multilateral investment agreement.

Regarding environmental issues, the opinions also varied. Bolivia, Brazil and Chile were in favour of it due to their importance, Ecuador rejected it, Peru said there should be further study and Paraguay, although it did not reject them, said that it was an issue that should be treated respecting all members' interests.<sup>187</sup>

Regarding labour however, the majority of the South American countries (7 countries) did not agree to include these issues in the negotiations. They claimed that the labour standards were already complied with in their countries because of the ratification of the ILO conventions.<sup>188</sup> Argentina, Peru and Uruguay did not mention them, Paraguay said this had to be discussed in the interest of developing countries and only Chile was in favour of it.

Other issues were also commented on, like the dispute settlement mechanism which South American countries expressed their agreement of further work on it because of its importance; and intellectual property, mentioned by Paraguay and public procurement, mentioned by Brazil, Chile and Suriname.

The Conference ended with the agreement of establishing working groups for the new issues for further discussion and analysis and to have cooperation with other international organizations like the ILO for the labour standards and the UNCTAD for investment issues. Most importantly for investment was that in this conference a Working Group on Trade and Investment was created with the task of coordinating the relationship between trade and investment. Although this group could have been the middle ground for negotiations, issues regarding trade and investment remained controversial in WTO negotiations.

#### **- 1999 WTO Ministerial Conference, Seattle.**

The second 1998 Ministerial Conference did not consider issues of investment. However, they were mentioned again in the third 1999 Ministerial Conference in Seattle. At the 1999 Conference, countries had to negotiate on issues that although they were not new - as the developing countries' statement disclosed- the negotiation of these issues expanded their reach to

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<sup>187</sup> Paraguay made this comment referring to all the new issues.

<sup>188</sup> The US, which proposed labour standard to be negotiated at WTO, has ratified very few ILO Conventions and thus their legislation lack of more fundamental labour standards than those of South American countries.

society. Society took interest in these issues (trade being connected to other issues affecting society) and expressed their concerns through NGOs. The 1999 WTO Ministerial Conference held a major social demonstration against the meeting held in Seattle because the issues treated in the meeting meant for them a negative impact on society and the environment.<sup>189</sup> Therefore, what also got involved in the multilateral level is more social concern.

Therefore, O'Brien, Goetz, Scholte and Williams (2000) speak of a 'contesting of global governance' because of the encounter between multilateral economic institutions and social groups.<sup>190</sup> On the other hand, Cox (1997) sees in this phenomenon that multilateralism tries to "reconstitute civil societies and political authorities on a global scale, building a system of global governance from the bottom up."<sup>191</sup> It is bottom up because actors other than the state and especially civil society participate at multilateral level.

However, after the developing countries had expressed their concerns in the last Ministerial Conference (Singapore), the EU addressed the developing countries' worries on protectionism and made reference to the importance of the demonstrations because, as they claimed, it reflected on the importance of the matters under discussion.

The concept of 'multi-functionality' in agriculture was raised in the meeting.<sup>192</sup> The European model of agriculture was a multi-functional model. This meant that one has to consider other issues connected to agriculture like preserving the landscape, rural labour, environmental protection, and food security. On the one hand, this was seen as the bridge that the EU needed to include these issues in the WTO forum, on the other, it was seen as a justification for keeping the agricultural subsidies in its economies.<sup>193</sup>

The EU made no comment on the issue of multi-functionality in their statement, rather, they expressed a strong position on the issues that they had proposed in Singapore. It was determined by their statement that they would be willing to reduce subsidies 'if' the new issues were accepted. The EU statement, furthermore, made the following remark: "In years to come, people will wonder why the world hesitated to start negotiations over investment, competition, and trade

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<sup>189</sup> The EU Statement of the Seattle Ministerial Conference referred to 50.000 to 100.000 demonstrators.

<sup>190</sup> O'Brien, R., Goetz, A., Scholte J. and Williams, M. "Contesting Global Governance" Cambridge Studies in International Relations No. 71. Cambridge University Press. 2000. p. 3

<sup>191</sup> Cox, R. *The New Realism: Perspectives on Multilateralism and World Order* Basingstoke: Macmillan/United Nations University Press. 1997. p. xxvii

<sup>192</sup> According to the WTO's Glossary, the term multifunctionality is the idea that agriculture has many functions in addition to producing food and fibre, e.g. environmental protection, landscape preservation, rural employment, food security, etc.

<sup>193</sup> See Potter, C. and Burney, J. "Agricultural multifunctionality in the WTO: legitimate non-trade concern or disguised protectionism?" *Journal of Rural Studies* 18. 2002



facilitation...if we do not start these negotiations here and now, it could be ten years before we really tackle these vital issues.”<sup>194</sup>

The issues concerning the environment and labour were again raised. The worries of developing countries were discussed and it was stated that these issues had the purpose of “not just to prevent the possibility of unfair protectionist sanctions, but to avoid even the suggestion that this could happen.”<sup>195</sup>

The EU proposal at this meeting also mentioned their intention towards benefiting developing countries in respect to aiding their development: “That is why we are calling for all the richer countries to offer duty free access to the least developed. That is why we are looking afresh at what we do by way of capacity building, technical assistance, and special and differential treatment.”<sup>196</sup>

The US, as the host of the meeting, made similar comments to that of the EU in the sense of readdressing the issues of Singapore, and in the same sense, they stated they were willing to reduce for example the agriculture trade barriers, if their terms were to be accepted. The US representative declared: “*If* we approve a Ministerial Declaration that meets these tests, we can: ...Aggressively reform agricultural trade by lowering trade barriers, substantially reducing trade-distorting subsidies and other measures.”<sup>197</sup> (my emphasis)

In their statement, the US promoted the use of biotechnology products, and the way they ought to be approved which would establish commitments on many countries which disapproved the use of these products.<sup>198</sup> It was further mentioned: “...and by helping us to ensure that farmers and ranchers can use biotechnology products approved through transparent, science-based, and timely regulatory processes, and consumers enjoy the benefit of safe and beneficial products.”<sup>199</sup>

The US also addressed, upon conditionality of accepting the agenda they proposed, the provision of technical assistance for least developed countries to use the WTO dispute settlement mechanism. With regard to the environment, the US mentioned their desire of improving environmental protection but it is interesting to note that the US referred to a solution for the environment which would be to stop an activity which they themselves created, like the agricultural subsidies (which had long been criticized by developing countries). The US

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<sup>194</sup> Commission of the European Community. Statement by Mr. Pascal Lamy. Commissioner for Trade. Seattle, 1999. WT/MIN(99)/ST/3

<sup>195</sup> Commission of the European Community. Statement by Mr. Pascal Lamy. Commissioner for Trade. Seattle, 1999. WT/MIN(99)/ST/3

<sup>196</sup> *ibid*

<sup>197</sup> United States’ Statement by the Honourable Daniel Glickman. Secretary of Agriculture. Seattle, 1999. WT/MIN(99)/ST/12

<sup>198</sup> Note that not only there was conditionality for accepting the new issues to get reduction of agricultural subsidies but in case of acceptance of these proposals there was an implicit approval of biotechnology in agriculture.

<sup>199</sup> United States’ Statement by the Honourable Daniel Glickman. Secretary of Agriculture. Seattle, 1999. WT/MIN(99)/ST/12

representative stated: “Ensure sustainable development, by opening trade areas such as environmental goods and services that improve environmental protection; and eliminating environmentally damaging subsidies such as agricultural export subsidies and fishery subsidies that contribute to overcapacity”<sup>200</sup> Last but not least, just as in Singapore, the US stated the necessity of creating a Working Group to study the relation between trade and labour standards.

These proposals, which acknowledged the answers given by the developing countries in the Singapore conferences, nevertheless reinstated the necessity of agreeing to the new issues, this time upon conditionality for developing countries (getting what they wanted, mainly reduction of subsidies in the agricultural sector, if they agreed to the proposals). The developing countries’ answers were the following:

Every South American country complained about the agricultural issues.<sup>201</sup> For example, Argentina, Bolivia and Ecuador made a strong complaint about the existing imbalance in the agriculture sector, due to developed countries.

Argentina’s representative spoke of a “protectionist obsession discernible in the proposals of some of the most prominent members of the OECD.”<sup>202</sup> Bolivia’s representative stated that “Bolivia is not prepared to accept greater liberalization commitments if their benefits are solely in the interests of other countries.”<sup>203</sup> Ecuador and Brazil, on the other hand, spoke of discrimination<sup>204</sup> and complained, as before, about the lack of reciprocity of developed countries. Ecuador’s representative claimed that: “...despite the substantial contribution to trade liberalization, the developing countries are still facing increasing marginalization and unequal redistribution of the benefits of increased world trade, since protectionist barriers and high tariffs persist, particularly in developed countries.”<sup>205</sup> Uruguay expressly mentioned that the agriculture issue was a deal breaker for them. In a similar vein Paraguay, Colombia, Chile, Peru, Guyana and Venezuela joined in the complaint.

The rejection of the multi-functionality concept was also expressly stated by half of the total of South American countries, the other half did not refer to it, none agreed with it. Argentina, Bolivia, Brazil and Uruguay viewed it as a protectionist measure, while Paraguay viewed it as against development.

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<sup>200</sup> *ibid*

<sup>201</sup> Only Suriname did not refer to it expressly in their statement.

<sup>202</sup> Argentina’s Statement by H.E. Mr. Guido Di Tella. Minister for Foreign Affairs, International Trade and Worship. Seattle, 1999. WT/MIN(99)/ST/153

<sup>203</sup> Bolivia’s Statement by H.E. Dr. Javier Murillo de la Rocha. Minister for Foreign Affairs and Worship. Seattle, 1999. WT/MIN(99)/ST/58

<sup>204</sup> In the case of Ecuador specifically they referred to the EU because of the ‘banana case’ In this case the WTO dispute settlement panel decided that it was indeed a restrictive measure of the EU to Ecuador and ordered them to stop with the infringing measures.

<sup>205</sup> Ecuador’s Statement by H.E. Mr. José Luis Ycaza Pazmiño. Minister of Foreign Trade, Industry, Fisheries and Tourism. Seattle, 1999. WT/MIN(99)/ST/35

In a similar vein, a majority was reflected in rejecting the treatment of the other issues such as labour (10 countries out of 12) and environment (8 countries against 3 with no reference to it). Interestingly, at this conference Ecuador seemed to be open for negotiation, including investment as long as the interests of developing countries were also taken into account.

South American countries shared the opinion that environmental issues and labour standards should be treated by the appropriate and competent international organizations.<sup>206</sup> Brazil's representative stated that "Environment and labour standards...are two of such new issues being brought to the trade agenda in a way that leaves much room for suspicion. We are not convinced of the need to make changes in the WTO Agreements to that effect."<sup>207</sup>

Great importance is given by Brazil to the framework in which countries operate. Brazil in this meeting stated the following: "If free and fair trade is the name of the game – and most of us think it should be – we still have much to do to improve the rules by which we play. We all know that the world is no level-playing-field, but it is imperative that, at the very least, all players can trust that there are rules which apply to all alike, rules which are not written to protect the strong from their own weaknesses and to prevent the weak from taking advantage of their own strengths."<sup>208</sup>

The 1999 Seattle meeting has been regarded as a failure, or rather a collapse. Although the collapse was due to difference of opinions between developed and developing countries, Hertel, Hoekman and Martin (2002) have claimed that "the November 1999 ministerial meeting in Seattle turned out to be a fiasco, failing to launch a round. Domestic politics in the United States played a key role in the failure to attain consensus on a broad negotiating agenda, greatly reducing the willingness of the U.S. administration to agree to put items on the table that were opposed by domestic lobbies."<sup>209</sup>

However, from the developed countries' perspective, it contained nothing more than the repetition of their proposal which they had made at the Singapore meeting. Both the US and the EU addressed the facts that developing countries were not happy about, namely the agriculture subsidies, but both the EU and the US made the statement to reduce the trade distortive measures in these areas 'if' all the other 'new issues' proposed by them would be agreed to. Rather than a negotiation, a condition for acceding to their terms was imposed.

There was no room for propositions of developing countries. The South American countries complained about the status quo, this time with more emphasis than in Singapore. Furthermore,

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<sup>206</sup> Brazil mentioned expressly this in this meeting but repeated it from the Singapore meeting.

<sup>207</sup> Brazil's Statement by H.E. Mr. Luiz Felipe Lampreia. Minister of Foreign Relations. Seattle, 1999. WT/MIN(99)/ST/5

<sup>208</sup> *ibid*

<sup>209</sup> Hertel, T., Hoekman, B. and Martin, W. "Developing Countries and a New Round of WTO Negotiations" *The World Bank Research Observer*, Vol. 17, No. 1. 2002. p. 114

the shared interests of South American countries on some points are also disclosed in this meeting.

Firstly, the claims expressed by developing countries regarding the agricultural issues were unanimous. When in the previous meeting the statements contained just a point, indicating more awareness, after three years of no action by the WTO, nor actions from developed countries with regard to the developing countries' claims on agriculture issues from the previous meeting, the developing countries statements took the form of accusations in this meeting.

Most South American countries agreed that the maintenance of subsidies and barriers in the agricultural sector was discriminatory to developing countries, and that it was breaching the Uruguay Round commitments. Bolivia, Ecuador and Paraguay mentioned once again the costs that their countries had to incur to comply with the commitments of the Uruguay Round, for which they saw no reciprocity.

Another shared interest was the claim by developing countries in regard to the 'multi-functionality' in the agricultural sector by developed countries and especially by the EU policies. Even though there was no mention of this in the developed countries' statement, since it was a domestic policy, most of the statements of South American countries used the WTO forum to complain about these policies, expressing that they were distortive to trade. Therefore, the South American countries rejected accepting the multi-functionality concept because according to them it was just another form of protectionism.

Interestingly, Ecuador was in favour of treating the new issues of environment, investment and the others, as long as they were discussed in the light of interests and asymmetries between developed and developing countries; this is similar to Paraguay's respective statement in Singapore. This was a change of view of Ecuador, since at the 1996 meeting they were against including environmental issues and at this meeting they were in favour of its treatment.

Argentina, Bolivia, Brazil, Chile, Peru and Venezuela were against including environmental issues (contrary to the 1996 meeting in which Brazil was in favour of discussing environmental issues). Furthermore, Brazil, Chile, Colombia, Guyana, Peru and Venezuela specifically mentioned being against including labour standards at this conference.

Once again, when relating to the WTO framework, Brazil mentioned the comparison of power asymmetries that could be transported in the framework due to the negotiations between developed and developing countries.

No agreement was reached in the Seattle meeting. The reason for the failure to come to an agreement was not only that the proposals of the developed countries were rejected. Developing countries perceived a lack of reciprocity and interpreted both the continuing agricultural subsidies of developed countries and their attempt to introduce the concept of multi-functionality as protectionist measures.

## **-2001 WTO Ministerial Conference, Doha.**

The Doha Ministerial Conference received the unresolved problems from the previous meetings. The investment issues were also pushed to this fourth 2001 Doha Ministerial Conference. This conference happened two months after the terrorist attack of September 11<sup>th</sup> and China was included as a new member of the WTO.

The Doha Round was called the Development Round because development was the central issue. Furthermore, a social problem concerning developing countries arose in this meeting, regarding the necessity of having access to medicine to handle AIDS in African countries, which was challenged and prevented because of the intellectual property protection contained in the WTO TRIPS Agreement.<sup>210</sup>

Considering these events, the results and considerations of developing countries from the last meetings, the developed countries proposed the following:

The EU statement mentioned the failure of the last meeting in Seattle and further stated that “[w]e advanced neither classical trade liberalization, nor the so-called Singapore issues.”<sup>211</sup> However, the EU stated that they had been very flexible and that it was time for others to show flexibility too.<sup>212</sup> The EU stated that this flexibility was on investment and competition and made a clarification on the rules on trade and environment. On agriculture however, they did not express such flexibility.

The EU also stated the need to discuss the TRIPS and Access to Medicines, a point relevant for developing countries, especially in Africa. Furthermore, they restated their commitment to the environment: “And consider the need to integrate sustainability into the work of each and every negotiating group, so that we can take trade, support for the environment, and – of course – development forward together.”<sup>213</sup>

The US made two important remarks in their statement. Firstly, they said that they are committed to opening their markets and secondly that they were open to liberalize agriculture. They further disclosed a fact of how much liberalizing the agriculture sector would benefit developing countries, when claiming: “Further liberalization of agriculture would provide a huge boost. And trade among developing nations offers untapped opportunities. The potential is enormous. Just last week, the World Bank explained that the elimination of trade barriers would lift 300 million people out of poverty.”<sup>214</sup>

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<sup>210</sup> [http://www.who.int/medicines/areas/policy/doha\\_declaration/en/index.html](http://www.who.int/medicines/areas/policy/doha_declaration/en/index.html)

<sup>211</sup> European Communities Commission. Statement by Mr Pascal Lamy, Commissioner for Trade. Doha, 2001. WT/MIN(01)/ST/4

<sup>212</sup> *ibid*

<sup>213</sup> *ibid*

<sup>214</sup> United States’ Statement by H.E. Mr. Robert B. Zoellick. United States Trade Representative. Doha, 2001. WT/MIN(01)/ST/3

Furthermore, an interesting aspect was that the US turned to group with the developing countries, as they stated that they shared the interest with developing countries on the agriculture issues: “The principal interest of the United States is to open markets for agriculture, industrial goods and services. Our agenda is similar to that of most developing countries. Nevertheless, we recognize that others are seeking a broader agenda. We are committed to work cooperatively with all countries – developed and developing – to see if we can address these issues.”<sup>215</sup>

On this meeting, the US complained about foreign subsidies and trade-distorting practices but just as the EU, they addressed the issue of medicine access and the TRIPS Agreement expressing that there was “confusion and misinformation about the flexibilities in the TRIPS Agreement.”<sup>216</sup>

However, the US, as a promoter of the TRIPS, restated their position on pharmaceutical patent protection. They mentioned that the TRIPS can be flexible in that there are compulsory licenses, and that they are willing to give extra time to developing countries to comply with the TRIPS.

Looking at the other side of the spectrum, the statement of South American developing countries were the following:

The vast majority of South American countries complained about the agricultural issues once more.<sup>217</sup> These countries claimed that subsidies were protectionist measures employed by developed countries against them.<sup>218</sup> The Paraguayan representative said: “It suffices to cite the OECD study which states that in the year 2000, its Member States recorded a total of US\$1 billion per day in agricultural subsidies and that, on account of the denial of access for our products to the markets of developed countries and given the aforementioned support to their agriculture, we are being unfairly displaced from international agricultural trade.”<sup>219</sup>

Paraguay stressed the “maintenance of special and differential treatment for developing countries.”<sup>220</sup> The same was true for Ecuador and Brazil which pointed out that it was necessary to acknowledge the asymmetries among the members’ relationships. “If we are to have any hope of establishing meaningful special and differential treatment for developing countries, we must bring to an end all exceptions in favour of developed countries.”<sup>221</sup> The lack of balance of the measures was also raised by Bolivia, Uruguay and the Brazilian representative stated: “Agriculture, of course, is the most glaring example of current imbalances and shortcomings.”<sup>222</sup>

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<sup>215</sup> *ibid*

<sup>216</sup> *ibid*

<sup>217</sup> Only Guyana did not mention an express complaint.

<sup>218</sup> Expressly mentioned in the statements of Argentina, Bolivia, Ecuador and Paraguay. Bolivia even reminded the members that they made a sacrifice by eliminating their coca leaf plantations and that if the agriculture issues were not agreed could be an event to make them continue with this policy.

<sup>219</sup> Paraguay’s Statement by H.E. Mr Luís Maria Ramírez Boettner. Ambassador, Permanent Representative to the WTO, Former Minister of Foreign Affairs. Doha 2001. WT/MIN(01)/ST/73

<sup>220</sup> *ibid*

<sup>221</sup> Brazil’s Statement by H.E. Mr Celso Lafer. Minister of Foreign Relations. Doha 2001. WT/MIN(01)/ST/12

<sup>222</sup> *ibid*

Equally important was the shared interests on the health issues and TRIPS.<sup>223</sup> The South American countries had an uncontested opinion that the TRIPS should be changed to do justice to developing countries.<sup>224</sup> In these South American representative's statements, the explicit mention of a coalition was not with regard to agricultural issues, as one might have thought, but with regard to intellectual property.<sup>225</sup> Brazil, which promoted the TRIPS agreement, stated there should be some limits to it when health is involved.<sup>226</sup> It was stated: "In the area of intellectual property, different readings of the TRIPS Agreement have given rise to tensions. To a certain extent, it is natural that conflicts of interest should reflect themselves in divergent interpretations of common rules. But the commercial exploitation of knowledge must not be valued more highly than human life. That is why we have been insisting, along with a broad coalition of likeminded countries, on the need to set out an authoritative statement on the TRIPS Agreement capable of clarifying its scope as far as public health is concerned."<sup>227</sup>

The topic on the environmental issues also continued to be rejected, specifically by Argentina which expressed that the proposals submitted by developed countries were seen to Argentina as restrictive to trade "rather than favouring it."<sup>228</sup> Bolivia stressed that they already have national laws protecting the environment and that the WTO is not the forum to discuss these issues. Once more, Bolivia's representative stated in this regard that they are "opposed to any attempt to utilize this issue for the purposes of market protection."<sup>229</sup>

On the other hand, Uruguay showed its flexibility on topics proposed by developed countries such as investment, competition, public procurement, etc. but claimed nevertheless, that the framework should be beneficial for its members, but that it was not the case for developing countries which did not benefit from it.<sup>230</sup> The representative from Uruguay stressed: "The time has come to correct these severe deficiencies and limitations; it is time to put the needs and

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<sup>223</sup> This mainly refers to pharmaceutical patents, those holding the patents could set the price of the medicines and this of course was a detriment for poor people in developing countries.

<sup>224</sup> Only four South American countries did not expressly refer to them in their statements. See Appendix I

<sup>225</sup> The coalition was formed by the following countries: African Group, Bangladesh, Barbados, Bolivia, Brazil, Cuba, Dominican Republic, Ecuador, Haiti, Honduras, India, Indonesia, Jamaica, Pakistan, Paraguay, Peru, Philippines, Sri Lanka, Thailand, and Venezuela. In Narlikar, A. "Bargaining over the Doha Development Agenda: Developing Countries in the WTO" Latin American Trade Network Working Paper No. 34. 2005.

<sup>226</sup> This mainly refers to pharmaceutical patents, those holding the patents could set the price of the medicines and this of course was a detriment for poor people in developing countries.

<sup>227</sup> Brazil's Statement by H.E. Mr Celso Lafer. Minister of Foreign Relations. Doha 2001. WT/MIN(01)/ST/12

<sup>228</sup> Argentina's Statement by H.E. Mr Alfredo Vicente Chiaradia. Ambassador, Foreign Trade Representative. Doha 2001. WT/MIN(01)/ST/16

<sup>229</sup> Bolivia's Statement by H.E. Mrs Ana María Solares Gaité. Vice-Minister for International Economic Relations and Integration. Doha 2001. WT/MIN(01)/ST/125

<sup>230</sup> Uruguay mentioned, however, that although they have been flexible on these issues there were others on which they were prudent because of endangering unilateral restrictions and question the role of the WTO.

interests of developing countries at the core of our work and to allow them to improve significantly their effective participation in the multilateral trading system.”<sup>231</sup>

This meeting also showed some reflection on overall structures forming the framework. Paraguay made an interesting comment stating that multilateral agreements should work together with bilateral agreements, because the latter ‘pave the way for multilateralism.’<sup>232</sup>

The 2001 Doha Development Round indeed treated issues of concern with development. One especially was the need of a statement with regard to the TRIPS and its limitation when public health is concerned, for example, as in the situation that was preventing developing countries in Africa to have access to medicine when fighting AIDS and other diseases.

As one can see, the South American countries all shared the same interest on this matter with other developing countries, especially African countries. They all stated that ‘public health’ should be considered a priority to any provisions of the TRIPS (although this was not agreed to by the US).

It is in this issue where the importance of coalitions comes to light. For the first time, in this Doha Ministerial Conference, a coalition among developing countries is expressly mentioned through Brazil’s statement.<sup>233</sup> Developing countries stated that intellectual property issues and their connection to health should be analyzed considering the interests of developing countries. This coalition achieved a statement from the WTO regarding the TRIPS and public health, which hardly would have been possible if the coalition had not been formed.<sup>234</sup>

The active participation of the developing countries also received attention. Hertel, Hoekman and Martin (2002) claimed in this regard: “...developing countries have demonstrated a willingness to participate actively and constructively in the WTO. This was reflected in the run-up to the Seattle ministerial and the role played in the process of defining a negotiating agenda. The inability (unwillingness) of the industrial countries to accept the necessary compromises helped scuttle the talks, but arguably helped set the stage for a more balanced agenda to be crafted at Doha.”<sup>235</sup>

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<sup>231</sup> Uruguay’s Statement by H.E. Mr Gonzalo Enrique Gonzalez Fernandez. Minister of Livestock, Agriculture and Fisheries. Doha 2001. WT/MIN(01)/ST/35

<sup>232</sup> Paraguay’s Statement by H.E. Mr Luís Maria Ramirez Boettner. Ambassador, Permanent Representative to the WTO, Former Minister of Foreign Affairs. Doha 2001. WT/MIN(01)/ST/73

<sup>233</sup> Brazil’s Statement by H.E. Mr Celso Lafer. Minister of Foreign Relations. Doha 2001. WT/MIN(01)/ST/12.

Quoted above.

<sup>234</sup> The WTO statement on the matter however, when comparing it to the Statement of the US, reflects exactly the interests of the US, even in that it considers a deadline extension that was proposed by the US. Available at [http://www.who.int/medicines/areas/policy/doha\\_declaration/en/index.html](http://www.who.int/medicines/areas/policy/doha_declaration/en/index.html) (last visited November 26, 2012); and United States’ Statement by H.E. Mr. Robert B. Zoellick. United States Trade Representative. Doha, 2001. WT/MIN(01)/ST/3

<sup>235</sup> Hertel T., Hoekman, B. and Martin, W. “Developing Countries and a New Round of WTO Negotiations” The World Bank Research Observer, Vol. 17, No. 1. 2002. p. 133-134



On the other issues, not much in the South American statements changed since the Singapore and Seattle meetings. With regard to investment in the Doha round, Kumar (2003) has stated that although the Working Group on Trade and Investment did not conclude their work, the developed countries sought to include investment issues in the Doha round.<sup>236</sup> As disclosed by the statements however, Uruguay showed its flexibility to investment, competition and public procurement while Ecuador was in favour of further working with the dispute settlement understanding, probably because of the great use that Ecuador had from it in the bananas case against the EU.<sup>237</sup>

What is peculiar though, is that the US said they were open for market access, reducing tariffs and subsidies and that “the principal interest of the United States is to open markets for agriculture, industrial goods and services.”<sup>238</sup> However, even after expressing the figures of how much this amendment would mean to reducing poverty, according to their statement, nothing concrete was promised: “We are committed to work cooperatively with all countries – developed and developing – to see if we can address these issues.”<sup>239</sup>

According to Falke (2005) this was a strategy of the US to reject the approach of the EU. The US did not support the European agricultural objectives.<sup>240</sup> In this strategy the US could stand against the EU with the other developing countries pursuing the objective of not including certain issues that the EU was proposing, and that did not benefit the US, in the framework.

On the other hand, the EU statement also claimed that they have been very flexible in the past years. This flexibility, however, could be questioned since they stated that they were flexible on the proposed Singapore issues but not on the agricultural policies of the EU, about which developing countries were complaining.

Developing countries had in this meeting once again mentioned the costs that their countries had to overcome to stay in the system. However, positive comments were also made; Uruguay favoured continuing with more liberalization and Ecuador said that their experience was good despite the costs. Argentina, on the other hand, stated that the rules should be equitable if they were to continue with trade liberalization. This fact is a hint that the claims were not against the system per se but more against the members’ action.

However, in Doha, South American countries strongly pointed out the problem regarding the agricultural issues, and again, there is evidence of a shared interest on this matter. Agreeing on

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<sup>236</sup> Kumar, N. “Investment on WTO Agenda. A Developing Country Perspective and Way Forward for Cancun Ministerial Conference” *Economic and Political Weekly*. 2003. p. 3178

<sup>237</sup> See “European Communities — Regime for the Importation, Sale and Distribution of Bananas”, available at [http://www.wto.org/english/tratop\\_e/dispu\\_e/cases\\_e/ds27\\_e.htm](http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds27_e.htm) (last visited November 26, 2012)

<sup>238</sup> United States’ Statement by H.E. Mr. Robert B. Zoellick. United States Trade Representative. Doha, 2001. WT/MIN(01)/ST/3

<sup>239</sup> *ibid*

<sup>240</sup> Falke, A. “EU-USA Trade Relations in the Doha Development Round: market Access versus a Post-modern Trade Policy Agenda” *European Foreign Affairs Review* 10: Kluwer Law International. 2005. p. 349

agriculture issues meant development for developing countries but although this was the development round, developed countries did not agree to eliminate agricultural subsidies which disfavour developing countries' market access. However, Francois, van Meijl, van Tongeren and Evenett (2005) mentioned that if developing countries had liberalized their economy in the way it was expressed in this round, even with the unwillingness of developed countries to make reforms in their agricultural policies, developing countries could still have benefited.<sup>241</sup>

Therefore, and because of the lack of agreement the Doha Round, this round has not been viewed as one with success. And again, blame was given to the lack of agreement between developed and developing countries. Kumar (2003) has pointed out that "...at Doha, the finalization for the draft Declaration was held up because of differences between the developed and developing countries on the investment issue, among others."<sup>242</sup> However, the work proposed in its agenda was meant to be continued in following meetings.

### **- 2003 WTO Ministerial Conference, Cancun.**

The fifth 2003 Cancun Ministerial Conference was supposed to work further on the agenda developed in the Doha Round. The investment issues, among others, came to the negotiation once again due to the EU push.<sup>243</sup>

The EU statement made a remark on the development agenda which was reflected in the active participation of developing countries. Regarding the access to medicine, the EU said that the WTO "can and will put people before markets."<sup>244</sup> The EU was aware of the power of the shared interests of developing countries and the strength that the coalitions were having, as they expressed: "we should avoid trying to re-create the confrontational north-south atmosphere of the 1970s and 1980s."<sup>245</sup> In spite of this, the EU in this meeting pushed the treatment of what they had been trying to get agreed to since Singapore.

The Cancun Round was also relevant for investment issues, because the Working Group on the Relationship between Trade and Investment had proposed in this conference the possibility of creating a Multilateral Investments Agreement (MIA) on the WTO context. It was stated in the Cancun briefing notes that "...members have made it clear that the agreement they are proposing

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<sup>241</sup> See Francois, J., van Meijl, H., van Tongeren, F. and Evenett, S. "Trade Liberalization in the Doha Development Round" *Economic Policy*, Vol. 20, No. 42. 2005.

<sup>242</sup> Kumar, N. "Investment on WTO Agenda. A Developing Country Perspective and Way Forward for Cancun Ministerial Conference" *Economic and Political Weekly*. 2003. p. 3177

<sup>243</sup> See Narlikar, A. and Wilkinson, R. "Collapse at the WTO: A Cancun Post Mortem" *Third World quarterly*, Vol. 25. No.3. 2004. p. 450

<sup>244</sup> European Communities Commission. Statement by Mr Pascal Lamy. Commissioner for Trade. Cancun, 2003. WT/MIN(03)/ST/5.

<sup>245</sup> *ibid*

to negotiate in the WTO bears no relationship to the OECD's Multilateral Agreement on Investment (MAI)— in the WTO, negotiations would start from a blank sheet of paper.”<sup>246</sup>

Blum (2008) states that this MIA proposal failed because of society's concerns: “The efforts to devise a Multilateral Investment Agreement through the September 2003 Cancun round of WTO negotiations have been foiled due to civil society's concerns about its effect on the environment, labor rights, and development.”<sup>247</sup> According to Weiss (2008) the developing countries opposed to it due to the fact that the existing agreements were already a burden to them. Furthermore, he claimed that the investment policies is a matter of governments; that BITs already gave protections and that UNCTAD should be the forum and not WTO because of the development factor. Weiss reached this conclusion when analyzing that the obligations seemed to be only for developing countries while developing countries wanted to develop their own industries and that investment measures did not guarantee the increase of investments.<sup>248</sup>

With regard to investment issues, the Cancun Ministerial meeting concluded the following: “We take note of the discussions that have taken place in the Working Group on the Relationship between Trade and Investment since the Fourth Ministerial Conference. The situation does not provide a basis for the commencement of negotiations in this area. Accordingly, we decide that further clarification of the issues be undertaken in the Working Group.”<sup>249</sup>

On the agriculture issues, the EU just repeated that they were willing to look at the agreement (although it was an agreement that was concluded only with the US).<sup>250</sup> Therefore, the main point, agriculture, was once again at the top of the claims that South American countries had.<sup>251</sup>

South American countries pointed out the asymmetry in the system caused especially by developed countries not opening their markets in the agricultural sector. The point on liberalization costs providing no benefit followed. The representative of Bolivia stated that “...despite our on-going adjustment efforts, despite all the sacrifices we have made, the Bolivian people are not living any better than they did before embracing the trade liberalization model...”<sup>252</sup>

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<sup>246</sup> Cancun briefing notes at [http://www.wto.org/english/thewto\\_e/minist\\_e/min03\\_e/brief\\_e/brief07\\_e.htm](http://www.wto.org/english/thewto_e/minist_e/min03_e/brief_e/brief07_e.htm) (last visited November 29, 2012)

<sup>247</sup>Blum, G. “Bilateralism, Multilateralism, and the Architecture of International Law” Harvard International Law Journal. Vol 49. 2008. p. 338

<sup>248</sup> In the summary provided by Weiss, F. “Trade and Investment” in the Oxford Handbook of International Investment Law. (Peter Muchlinski, Federico Ortino & Christoph Schreuer eds.) 2008. p. 189

<sup>249</sup> Draft Cancun Ministerial text at [http://www.wto.org/english/thewto\\_e/minist\\_e/min03\\_e/draft\\_decl\\_e.htm](http://www.wto.org/english/thewto_e/minist_e/min03_e/draft_decl_e.htm) (last visited November 29, 2012)

<sup>250</sup> European Communities Commission. Statement by Mr Pascal Lamy. Commissioner for Trade. Cancun, 2003. WT/MIN(03)/ST/5.

<sup>251</sup> Statements of the US, Argentina and Ecuador are not publicly available at the WTO web site.

<sup>252</sup> Bolivia's Statement by H.E. Dr Carlos Saavedra Bruno. Minister of Foreign Affairs and Worship. Cancun 2003. WT/MIN(03)/ST/83

Bolivia, Brazil, Chile, Colombia, Paraguay, Peru, Uruguay and Venezuela expressly complained about agricultural issues and *inter alia*, protectionist measures and lack of compliance of the rules on behalf of developed countries.<sup>253</sup>

Therefore, from what is disclosed in the statement of South American countries, the 2003 Cancun conference did not have further issues to be negotiated than those described in previous conferences but the South American countries' statements show that there is a lack of even mentioning issues other than the agricultural issues.<sup>254</sup>

Awareness of a collapse for lack of understanding was stated by Bolivia and on the topic of poverty caused by barriers to agriculture, Brazil and Uruguay joined Bolivia on agreeing on the statement. Uruguay and Paraguay expressly stated the need for development and differential treatment in case of the latter. According to Uruguay, the statement to include development issues into the negotiation among countries did not mean that it has to be a unilateral concession from developed countries to developing countries. Paraguay, however, referred to the WTO as a means for raising the standard of living of its people, and seeking this purpose Paraguay stated that it is engaged in strengthening the WTO, as long as discriminatory measures will be abolished.

Brazil's statement in the Cancun conference was strong. Brazil's representative stated: "None of the other issues in these negotiations remotely compares to the impact that the reform of agriculture can have on the alleviation of poverty and the promotion of development.... These nations, who account for more than half of humankind are united around the cause of agricultural reform."<sup>255</sup>

Furthermore, the representative of Brazil stated: "Yet, to call the Doha Work Programme a "development round" is not enough... Development goals and concerns must be effectively incorporated into the core of the WTO Agreements. They cannot be an afterthought in rules tailored to the needs of developed countries..."<sup>256</sup> Not agreeing to these issues was, according to Brazil, a cause that could provoke the weakness of the system which, they said, they certainly did not want.

The mention of a coalition on these issues was expressly stated, once again, by Brazil, referring to it as the G-21: "We, in the G-21, are organized for that purpose. We stand united, we will remain united. We sincerely hope that others will hear our message and, instead of confronting

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<sup>253</sup> Probably Argentina and Ecuador too, but their statements are not publicly available at the WTO web site. With them, the complaint would have shared the interests of all South American countries.

<sup>254</sup> Only Venezuela expressly complained about environmental and labour issues that were proposed.

<sup>255</sup> Brazil's Statement by H.E. Mr Celso Amorim. Minister of External Relations. Cancun 2003. WT/MIN(03)/ST/28

<sup>256</sup> *ibid*

us or trying to divide us, will join forces in our endeavour to inject new life into the multilateral trading system.”<sup>257</sup>

From the developing countries’ perspective, this G-21 coalition of developing countries was the most important thing which characterized the conference. The coalition made sure to not accept the developed countries’ proposals until the developing countries interests were also taken into account. This coalition was formed by: Argentina, Bolivia, Brazil, Chile, China, Cuba, Egypt, India, Indonesia, Mexico, Nigeria, Pakistan, Paraguay, Philippines, South Africa, Thailand, Tanzania, Venezuela and Zimbabwe.<sup>258</sup>

However, because the differences between developed countries and developing countries that could not be solved, the Cancun Meeting was referred to, again as past meetings, as a collapse. Narlikar and Wilkinson (2004) blamed the whole structure of the agenda setting for the failure of the Cancun Round. They mentioned for example how the facilitators changed a 4 hour meeting into a 2 hour meeting and use the rest of its time “in bilateral consultations, in which developing countries felt even more vulnerable.”<sup>259</sup> They described the Cancun Round as a ‘tug of war’: “...industrial states seeking to take the trade agenda forward by commencing negotiations on the Singapore issues and, on the other hand, developing members tenaciously pursuing market access into the notoriously protected agricultural markets of the North.”<sup>260</sup>

What is directly disclosed from the statements, however, is that the developed countries made no concessions in regard to the developing countries claims, and neither did the developing countries believe in the promise of developed countries to address these issues if they would accept the proposed package. After the 2003 Cancun Ministerial Conference issues concerning investments were no longer treated. In 2004 the investment issues were removed from the agenda.<sup>261</sup>

All the polemic of the aforementioned conferences can be summarized in the lack of a feeling of reciprocity by developing countries. While they had liberalized their economies, they saw developed countries as not doing the same, for they still did not eliminate their agricultural subsidies.

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<sup>257</sup> *ibid*

<sup>258</sup> “A group striving for agricultural reform created at the initiative of Brazil shortly before the 2003 Cancun Ministerial and consisting solely of DCs. The varying references to the group as G20, G20+ or even G22 has been due to the fact that a few countries have joined and others — such as Peru and Colombia — have left since September 2003.” Annex I ABC of WTO global coalition groupings available at [http://www.wto.org/english/res\\_e/booksp\\_e/casestudies\\_e/case27\\_e.htm#top](http://www.wto.org/english/res_e/booksp_e/casestudies_e/case27_e.htm#top) (last visited November 26, 2012)

<sup>259</sup> Narlikar, A. and Wilkinson, R. “Collapse at the WTO: A Cancun Post Mortem” *Third World quarterly*, Vol 25. No.3. 2004. p. 451

<sup>260</sup> *ibid* p. 453

<sup>261</sup> See Weiss, F. “Trade and Investment” in the *Oxford Handbook of International Investment Law*. (Peter Muchlinski, Federico Ortino & Christoph Schreuer eds.) 2008.

The new issues, although sometimes viewed positively by a country, which then changed its view in the next meeting, still were a proposal by developed countries which meant more costs to developing countries. With the lack of reciprocity experienced in the system, after a decade, as it has been seen, developing countries did not agree further and this meant not agreeing on a framework that does not comprehend developing countries interests.

#### **2.4. Relative Power of Developing Countries: Their Coalitions at the WTO.**

In the multilateral setting, when developing countries act in coalitions and alliances, they achieve a certain strength or power that makes them able to maintain their preferences under pressure from developed countries. Following Strange, I will call this their relative power: it enables developing countries to attempt and modify a proposed framework.

Relative power has manifested itself when developing countries achieved to halt negotiations at the multilateral level if this meant that their interests would not be considered. *A contrario sensu*, it is not a structural power because developing countries were not able to take negotiations further to establish new rules for the system in which actors would operate; instead, they were only able to slightly modify the existing rules, or keep them from being modified.

Developing countries were able to gain this power due to the formal structures of international organizations.<sup>262</sup> The fact that decisions are taken by consensus or majority at international organizations have given a great advantage to developing countries at the multilateral level in the sense that by having like-minded interests and by outnumbering developed countries, developing countries can include such interests in the framework in which actors would operate.

It is in this sense that the framework to be defined at multilateral level has to include the developing countries' interests. The like-minded interests shared by developing countries results in a form of power that they gain when acting in coalitions during the negotiations. It is a form of power because it counteracts the power of developed countries in the negotiations: it is the relative power which developing countries have gained when acting in coalitions in multilateral negotiations.<sup>263</sup>

The WTO has become the most recent multilateral forum where the regulation of foreign investments has been attempted. Such as it has happened in the past, again, developing countries had united to fight for the inclusion of their interests in the framework of the WTO. However, Rolland (2007) expressed that is still an unbalanced position because developing countries have

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<sup>262</sup> The UN General Assembly resolutions are passed by majority vote. Article 18 of the UN Charter; and the WTO decisions are made by consensus. Article IX of the Agreement establishing the World Trade Organization. Available at [http://www.wto.org/english/docs\\_e/legal\\_e/04-wto.pdf](http://www.wto.org/english/docs_e/legal_e/04-wto.pdf) (last visited Oct 28, 2012).

<sup>263</sup> Narlikar (2003) points to ideas of bargaining coalitions in WTO as negotiation. There is no mention of power. See Narlikar, A. *International trade and developing countries: bargaining coalitions in the GATT & WTO* (Routledge, London ; New York. 2003).

to act in coalitions to face developed countries in negotiations at the WTO, when the fact is that developing countries are 75% of WTO membership.<sup>264</sup>

At the WTO, Narlikar (2003) has claimed that an Informal Group of Developing Countries (IGDC) was present already since the Uruguay round but that its role changed after Singapore, in the sense that it has achieved important alterations in the WTO's framework.<sup>265</sup> Indeed, a framework with just developed countries' interests was no longer agreed to.

Developing countries sharing the same interests formed coalitions, for example, on agricultural issues, the WTO has categorized 4 developing countries coalitions: the Cairns group (wanting trade liberalization on agriculture); the G-10 (wanting to treat agriculture as a special matter because it has non-trade concerns); the G-20 (wanting to make more radical reforms) and the G-33 (wanting flexibility for developing countries to open their markets in agriculture).<sup>266</sup>

With regard to the trade related issues, or the new issues, this involved making an agreement on other areas apart from trade. Blum (2008) has stated that the aim to liberalize trade can conflict with the new issues whose connection to trade is intended: "regimes often conflict in their particular principles and institutions, their procedures and preferences, and their primary goals: trade liberalization versus environmental protection, development versus environmental protection, trade liberalization versus development, trade liberalization versus human rights, and liberal human rights versus communal human rights."<sup>267</sup>

South American countries had two problems with the 'new issues' proposed at the WTO. The first was that in spite of the concession that developing countries gave by opening and liberalizing their markets to accept a WTO framework, they did not get the same reciprocity from developed countries.<sup>268</sup> Furthermore, that agreeing to these 'trade related aspects' issues would involve yet more commitments and costs to them. The second problem was that some developing countries were skeptical that the WTO was the right forum to deal with these 'new issues', and that furthermore, they already had sufficient international legislation with regard to these issues.

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<sup>264</sup> Rolland, S. "What Legal Framework for Developing Country Coalitions in the WTO?" Proceedings of the Annual Meeting (American Society of International Law), Vol. 101. 2007. p. 245; Other scholars also argued in the same vein that developing countries should not need to recur to coalitions to act and negotiate considering they already form the majority of the WTO membership. In Hertel T., Hoekman, B. and Martin W. "Developing Countries and a New Round of WTO Negotiations" The World Bank Research Observer, Vol. 17, No. 1. 2002

<sup>265</sup> Narlikar, A. *International trade and developing countries: bargaining coalitions in the GATT & WTO* London, New York: Routledge. 2003. p. 178-179

<sup>266</sup> Groups in the WTO, available at [http://www.wto.org/english/tratop\\_e/dda\\_e/negotiating\\_groups\\_e.pdf](http://www.wto.org/english/tratop_e/dda_e/negotiating_groups_e.pdf) (last visited November 30, 2012)

<sup>267</sup> Blum, G. "Bilateralism, Multilateralism, and the Architecture of International Law" Harvard International Law Journal. Vol 49. 2008. p. 338

<sup>268</sup> Developing countries' argument was that developed countries did not open their agricultural markets nor eliminated agricultural subsidies, preventing developing countries to compete in an equal level in those developed countries.

Developing countries claimed that the International Labour Organisation (ILO) was the competent body for labour issues and not the WTO and in that way managed the exclusion of labour standards from the WTO forum, which was proposed by developed countries since Singapore. This is a success on behalf of the developing countries' coalition.

Narlikar (2003) also mentioned the Like-Minded Group (LMG) coalition formed to reject the inclusion of the 'new issues'. She claimed that this coalition achieved "some limited success in that the new issues were included only as part of a study program rather than actual negotiations."<sup>269</sup> During the Seattle and Doha rounds, Narlikar (2003) has categorized even more types of coalitions, namely, that of small and vulnerable economies; LCDs; the alliances with a developing country membership (the Development Box, G-24 on Services, and Friends of Geographical Indications); crossover and region based alliances.

On the Doha round, the G-24 coalition also made an important achievement with regard to the TRIPs Agreement and the interests of developing countries. The draft that this group prepared was the basis for the Guidelines and Procedures for the Negotiations adopted in Doha. This coalition included: Brazil, India, Philippines, Thailand in a leading role, and also Argentina, Bolivia, Colombia, Cuba, Dominican Republic, Ecuador, El Salvador, Honduras, India, Indonesia, Malaysia, Mexico, Nicaragua, Pakistan, Panama, Paraguay, Peru, Sri Lanka, Uruguay and Venezuela.<sup>270</sup>

Therefore, among South American countries, shared interests can already be seen since the beginning of the WTO rounds to later meetings, from Singapore to Cancun. The main shared interest has been the agricultural issues at the top of the list, followed by the non-reciprocity of commitments of the Uruguay Round, the rejection of the inclusion of the new issues or multi-functionality concept for being disguised protectionist measures, and on the need of have a statement from the WTO with regard to the TRIPs and public health that would be drafted in the light of developing countries interests.

The coalitions of developing countries were expressly mentioned in the South American statements given at the Doha and Cancun meetings, the latter mentioning the G-21 coalition.<sup>271</sup> And so, for the second time in the history, in the attempt to develop investment regulation at the multilateral level, there is another developing countries' coalition. Before it was the Group of 77 at UN multilateral level, now we have the G-21 at WTO multilateral level. In both cases,

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<sup>269</sup> Narlikar, A. *International trade and developing countries: bargaining coalitions in the GATT & WTO* London, New York: Routledge. 2003. p. 180

<sup>270</sup> *ibid* p. 187

<sup>271</sup> Note that Narlikar (2003) mentions a G-24 coalition. *ibid*.



developing countries interests halted building a framework considering only developed countries propositions.<sup>272</sup>

The relevance of relative power should nevertheless not be underestimated, even if it is obtained through coalitions because it has shown effects in the WTO ministerial conferences; thus, it is producing an effect on international relations.

With relative power and in this setting, it seems that it is no longer the case that developing countries have to stay in their role of “rule-takers” as Edward Kwakwa (2000) proposes when claiming that the developing countries’ task is to receive rules set by the more powerful states.<sup>273</sup>

In conclusion, this chapter has disclosed two moments in the development of the international investment framework at the multilateral level that have put into evidence the relative power of developing countries.

First, the multilateral setting was provided by the UN during the 1960s and 1970s. Developing countries, by acting in coalitions, supported each other’s acts and managed to get something out of the debates about foreign investment through UN resolutions. The coalition of developing countries (Group of 77) made the possibility of having foreign investment recommendations favourable for developing countries through the UN, in contrast to having rules which were solely on the interests of developed countries.

Secondly, a multilateral setting for establishing rules on foreign investments was given by the WTO. Section 2.3. has revealed the evolution and development of the issues proposed in the WTO conferences with the direct statement of South American developing countries. It highlights important features arising of such meetings, for example, that developed countries were firm in their propositions hoping that at some point developing countries would accept them as this can be reflected from the fact that in every conference the Singapore issues were proposed.

However, from the statement of the South American countries, it is also disclosed how developing countries shared the same interests. A peculiar fact results from this, namely that developing countries answered each of the developed countries’ proposals in the first meetings but ended up concentrating only on their interest regarding agriculture in the later meetings. The interests regarding agriculture were unanimous, and in spite of the fact that developing countries shared the same interests over many of the issues, it was the strong attachment to the interests of the unanimity that made them agree or jointly reject the other issues.

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<sup>272</sup> Developing countries have put their “foot down.” Narlikar, A., Wilkinson, R. “Collapse at the WTO: A Cancun Post Mortem” *Third World quarterly*, Vol 25. No.3. 2004. p. 457

<sup>273</sup> Kwakwa, E. “Regulating the International Economy: What Role for the State?” *In the Role of Law in International Politics: Essays in International Relations and International Law* 91, 103. Michael Byers ed, 2000, quoted in Blum, Gabriella, “Bilateralism, Multilateralism, and the Architecture of International Law” *Harvard International Law Journal*. Vol. 49. No. 2. 2008. p. 343

In this multilateral setting, developing countries again, by acting in coalitions, have been able to support their interests and decisions could not be adopted without considering their interests. This is the overall picture of developing countries' relative power at the multilateral level.

The following chapter describes the regulation of foreign investment at the bilateral level. It is of particular importance as it has tremendously affected the multilateral level. The awareness of the connection of the regulation of international investments in both settings reveals further consequences that will be detailed by the later chapters.

### **CHAPTER III: Investment at Bilateral Level.**

The current framework for international investments is given by Bilateral Investment Treaties (BITs) and their enforcement mechanism. However, the creation of such a framework, the established rules and who proposed the rules should be considered because it explains how the framework for international investment came about and what was intended with it.

Although Bilateral Investment Treaties state as their objectives to increase investment and the welfare of the parties of such a treaty, the framework for international investment was created to provide protection for foreign investors in host countries. This protection consisted in a compensation for investors that had invested in foreign countries when these countries expropriated their investment.

Since the work of this thesis refers to South American BITs, I limit the discussion of the examples in history to a South American context. The historical development is important because it can reveal what was lacking for certain parties involved in foreign investments. It can also reveal how the wording and concept of some elements that formed the BITs provisions derived from long historical dilemmas between developed and developing countries.

On the one hand, foreign investors, when investing in a host country, had no direct way to protect themselves when a newly established government or country, in which their investment had been made, decided to expropriate such investment. Therefore, foreign investors had to bear all kinds of risks, including political and social risks. Foreign investors had to deal with a hostile environment for investments, rigid domestic laws, burdensome domestic bureaucracy, local justice, and the discretionary power of the host state which could leave the foreign investor with no alternative, no recourse or hope of saving their investment when facing a unilateral amendment on investment policy coming from the host state. In case of disputes arising out of a foreign investment between an investor and a host country, before BITs existed, developed countries had to fight on behalf of their nationals. Diplomatic means were the mechanism used to resolve disputes. It was a state-to-state matter, and so the entire burden to resolve any kind of dispute was handed to the state of which the foreign investor was a national.

On the other hand, there were developing countries, which in many cases were newly established by having acquired independence or a new form of government. International law establishes the right of sovereignty and under this right they had the control over their natural resources and the right to regulate foreign investments pursuant to their laws and under their jurisdiction.

Considering these two perspectives, the building of the framework for international investments presented a dilemma. The two main points of the dilemma can be summarized in the different views of countries for the inclusion of rules regarding expropriations and the determination of

how compensation should be given, on the one hand; and the mechanism of dispute settlement which would detach disputes from domestic jurisdiction, on the other.

BITs have put a stop to this dilemma. The objective of the BITs is to provide foreign investors with a legal set of guarantees for their investments and to promote investments. Home countries have achieved these guarantees that give protection to the investments performed in a host country, and so foreign investors could feel reassured and confident when taking their economic force into foreign territory. At the same time, developing countries, the other party to the agreement, ought to profit from the increase in prosperity that these BITs would give them, as that is what was stated as the purpose of BITs.

Section 3.1. of this chapter highlights the historical developments that contributed to the framework for international investments. Section 3.2. will indicate what BITs are and Section 3.3. will discuss whether all BITs are uniform. The intention is to bring to light the regulation of foreign investments at the bilateral level.

### **3.1. The Historical Developments of International Investments.**

#### **- Gunboat Diplomacy**

In the 19<sup>th</sup> century, the protection of international investments was given through a gunboat diplomacy. When a foreign investor had a dispute with the country hosting its investment, the investor used the diplomatic protection of its state to try and solve such a dispute.<sup>274</sup> At this time, the management of disputes that arose from international investments was extraordinarily imbalanced and unfair because after using diplomatic means and if the dispute had not been solved, the more powerful countries threaten with the use of force or armed means. And in this setting, of course, a huge difference arose between the poor and less developed countries on the one hand, and developed and more powerful countries on the other.

Three examples in South American history demonstrated how dangerous foreign protection of investments was for South American countries because in these situations the power asymmetries between developed and developing countries were accentuated.

The first example is given by the blockage of Buenos Aires by the French Navy in 1840. The Argentinian government had extended the military service obligation to every foreigner with real estate in the country or to whoever had lived there for more than 2 years. France complained to Argentina about this law. France requested of Argentina the suspension of the military service

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<sup>274</sup> Interestingly, although the use of the local judiciary by the investors was sometimes an alternative, they just avoided this by directly asking their home state to intervene. In the case of *Underhill v. Hernandez*, in 1897, for example, the dispute concerned an investment in Venezuela but was submitted to the courts of the US in New York. *Underhill v Hernandez* (168 U.S. 250, 18 S. Ct. 83, 42 L. Ed. 456 (1897))

law for French nationals and further, France asked Argentina for their commitment to give them most favoured nation treatment guaranty<sup>275</sup> and indemnifications for the French citizens, without signing any treaty.

For this reason, and because Argentina refused to give France guarantees without a treaty, the French Navy blocked Buenos Aires. Although Grigera Naón (2005) claimed that this event marks one of the earliest use of arbitration in Latin America,<sup>276</sup> the use of force by a more developed country was evident. The newspaper “La Gazeta Mercantil” published the answer of the Argentinean President which reflected the concern with the asymmetries of such behaviour: “To claim, with a canon pointed to us, privileges that can only be granted through a treaty is something that this government -as insignificant as it may be- will never be subjected to.”<sup>277</sup>

The second example is the Triple Alliance War, a war in which Brazil, Argentina and Uruguay united to attack Paraguay in 1870. Although it might appear to have been a local conflict, some of the mediate causes were related to economic conflicts with a developed country, in this case, the British Empire.

Rosa Luxemburg, for example, pointed out the influences of the British Empire as promoter of conflicts around this time in South America.<sup>278</sup> In a similar vein, the historian John Cady gives a detailed account of the foreign intervention in the Rio de la Plata region around this time.<sup>279</sup>

The illustration of one episode between Paraguay and the British Empire might describe the tension. Paraguay had been exporting mate tea, tobacco, cotton and exemplars of wood to Europe. The products were widely accepted in Europe and the international commerce grew. Nevertheless, because of Paraguay being a landlocked country, the Rio de la Plata<sup>280</sup> navigation conditions were crucial for the good development of commerce.<sup>281</sup> The UK, seeking further protection for its citizens commercializing in the region, wanted to sign a treaty of Friendship, Navigation and Commerce with Paraguay.

The Paraguayan President, Marshal Francisco Solano Lopez, answered to Queen Victoria’s representative that the negotiation of a treaty would not be possible because a law providing the

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<sup>275</sup> The most favoured nation treatment consists in the obligation of a state to grant another state the same privileges granted to a third state on the same subject matter.

<sup>276</sup> Referring to state to state arbitration. Grigera Naón, H.A. “Arbitration and Latin America: Progress and Setbacks” *Arbitration International*. Vol 21, Issue 2. 2005. p. 127

<sup>277</sup> Author’s translation of *La Gazeta Mercantil* dated March 31, 1838. In Cady, J.F. *La intervención extranjera en el Río de la Plata, 1838-1850* Buenos Aires, Losada, 1943, Capítulo II, p. 54.

<sup>278</sup> Luxemburg, Rosa (1913) *The Accumulation of Capital* Translated by Agnes Schwarzschild with a new introduction by Tadeusz Kowalik. Routledge Classics. London New York. 2003. Section III, “International Loans”.

<sup>279</sup> Cady, J.F. *La intervención extranjera en el Río de la Plata, 1838-1850* Buenos Aires, Losada, 1943.

<sup>280</sup> Rio de la Plata is the river that connects to the Atlantic Ocean.

<sup>281</sup> Alberdi, J.B. *Historia de la Guerra del Paraguay* Ediciones de la Patria Grande. 1962. p. 116-127.

guarantees of protection for international commerce to all foreigners was already in force.<sup>282</sup> The answer by the letter dated December 29, 1852, attached the Decree that the Paraguayan President was referring to.

From a second letter from President Solano Lopez, the UK's answer to the aforementioned letter is revealed: It is disclosed that the UK disregarded the Paraguayan national law that President Solano Lopez was referring to and furthermore, the UK, in order to insist on its position of wanting a Friendship, Navigation and Commerce treaty with Paraguay, stated that they would only accept Paraguay's independence if Paraguay would sign the treaty with the UK. This letter also discloses the Paraguayan President's strong reaction to such conditionality expressing that there were and will not be any conditions to be fulfilled by Paraguay in order for the Queen to accept their independence. Solano Lopez, therefore, denied the ratification of the treaty simply because of the existence of a national law providing the same guarantees which had to be observed.<sup>283</sup>

A few years later, the British Minister in Buenos Aires, Edgard Thornton, was present and promoted the signature of an alliance treaty for a war against Paraguay.<sup>284</sup> The year following the signature of this treaty, the Triple Alliance War started. It was financed by the London Bank, the Baring Brothers House and the Rothschild Bank, all English financial institutions; until today regarded as the biggest war in South America. Some scholars have argued that the UK benefited the most from this war.<sup>285</sup>

A third example is what happened at the beginning of the 20<sup>th</sup> century, from which the term 'gun-boat diplomacy' originated. The government of Venezuela contracted some loans with Italian, German and British companies which at that time had investments in Venezuela. When

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<sup>282</sup> Decree related to the performance and industry incentive and improvement of the Republic, dated May 20, 1845. *El Paraguayo Independiente*. Vol. 20-22. 1845. Paraguay Portal Guarani, available at [http://www.portalguarani.com/detalles\\_museos\\_exposiciones.php?id=94&id\\_exposicion=313](http://www.portalguarani.com/detalles_museos_exposiciones.php?id=94&id_exposicion=313) (last visited January 28, 2013)

<sup>283</sup> Letter dated January 14, 1853 from the National Library in Rio de Janeiro. In Livieres Argaña, J. *Con la Rubrica del Mariscal. Documentos de Francisco Solano López*. Vol II. Talleres Graficos de la Escuela Tecnica Salesiana. 1970. p 88

<sup>284</sup> Treaty of Puntas del Rosario which formed the first alliance between Argentina and Brazil. In Pigna, F. "La Guerra de la Triple Alianza" Organización Internacional (1862-1880) *El Historiador*. Available at [http://www.elhistoriador.com.ar/articulos/organizacion\\_nacional/guerra\\_de\\_la\\_triple\\_alianza.php](http://www.elhistoriador.com.ar/articulos/organizacion_nacional/guerra_de_la_triple_alianza.php) (last visited November 1, 2013)

<sup>285</sup> For an account of the influence of the British Empire in South America at the time and the claim that the Triple Alliance war was financed by UK financial institutions, see Agüero Wagner, L. "Fuego y Cenizas de la Memoria" *La Republica*. 2000; Chiavenatto, J. *Genocidio Americano: A Guerra do Paraguai* Editora Brasiliense. San Pablo. Brasil. 1979; Galeano, E. "Open Veins of Latin America: Five Centuries of the Pillage of a Continent" Monthly Review Press. 1997; Galeano, E. "La Guerra de la Triple Alianza contra el Paraguay aniquiló la única experiencia exitosa de desarrollo independiente" Congreso Bolivariano de los Pueblos. Dated March 3, 2005; available at [www.congresobolivariano.com](http://www.congresobolivariano.com) (last visited March 20, 2013)

trying to collect these loans, disputes over the matter arose and not finding a solution, the governments of Italy, Great Britain and Germany organised a naval blockage of Venezuela.<sup>286</sup>

These three examples show how at this time, the use of armed intervention was a common behaviour to demonstrate power in interstate relations. It was also a common practice experienced by South American countries. Not surprisingly, doctrines developed against these differences and the injustice resulting from them. These doctrines are known as the Calvo and the Drago doctrine which were based on protectionist policies towards foreign investors.

### **- Calvo and Drago Doctrines**

Carlos Calvo was an Argentinean jurist who was sent on a special mission to Europe by the Paraguayan government, specifically to London and Paris in 1860.<sup>287</sup> Calvo's ideas are found in the book that he wrote while being in Europe in 1863, entitled "*Derecho Internacional y Práctico de Europa y America*". This work contained the idea that a foreign party cannot have more rights than the nationals of the country where relief is sought. Therefore, for settling the disputes between a foreign party and a national party, the foreign party should first recourse to the local jurisdiction and exhaust the remedies there, not use diplomatic protection for resolving the disputes in the first instance.

Grigera Naon (2005) summarises Calvo's main idea in the following way: "The general principle postulated by Carlos Calvo is that foreign aliens may not claim or enjoy rights, treatment or protection superior to or different from those afforded to nationals. A central and complementary part of the Calvo Doctrine is that, together with asserting the submission of foreign aliens to the laws and jurisdiction of the host country where they reside, it excludes the threat or use of force by their home country in support of their claims or grievances against the host country."<sup>288</sup>

It was naturally, however, for such a doctrine to arise given the gun boat diplomacy at the time. Referring to the Calvo clause, Grigera Naon expressed: "Its appearance as a reaction to imperialistic ambitions of the European powers in Latin America may be also considered part of the response of Latin American countries to so-called 'gun boat diplomacy', too often present in their relations with the USA. Clearly, the homeward trend incarnated in the clause, including its rejection of international arbitration as a means to resolving such claims, usually attributed to the Calvo Clause, goes hand in hand with political events affecting the evolution of international arbitration in the region."<sup>289</sup>

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<sup>286</sup> Figueroa, F. "Reflexiones sobre el bloqueo de las costas venezolanas en 1902" República Bolivariana de Venezuela/Centro Nacional de Historia, 2008.

<sup>287</sup> Encyclopaedia Britannica, Vol 4. Hazell Watson & Viney Limited. England.1962. p. 635

<sup>288</sup> Grigera Naón, H.A. "Arbitration and Latin America: Progress and Setbacks" Arbitration International. Vol 21, Issue 2. 2005 p. 134

<sup>289</sup> ibid p. 136

In a similar spirit, Luis Maria Drago, an Argentinean Foreign Affairs Minister in 1902, elaborated a doctrine. It originated right after the blockage of Venezuela by Italy, Great Britain and Germany for the purpose of collecting debts.

Drago's doctrine states that "for the common safety of the South American republics... the collection of pecuniary claims of citizens of any country against the government of any South American republic should not be effected by armed force."<sup>290</sup> Grigera Naón states: "According to Drago... a state decision not to pay public debt is an act of state, or act *iure imperii*, that is neither justiciable before nor subject to the jurisdiction of the local courts, nor may it give rise to a denial of justice or legitimise the diplomatic protection of the home state of the foreign claimant."<sup>291</sup>

While these two doctrines are considered as establishing the obligation of submitting the dispute to local courts, in Grigera Naón's view, neither excludes international arbitration since both adhere to means of peaceful resolution of disputes. Their insistence of using local courts came about because private persons or companies did not have legal personality to claim their rights at an international court. Therefore, pursuant to Grigera Naón, it was natural for Calvo and Drago to think first of exhausting remedies at local courts, so that only upon denial of justice the dispute could be elevated to an international level for states to resolve it; "but without justifying resorting to armed intervention *or other forms of coercion of the home state to seek or obtain redress for the private claims or impose its submission to international arbitration.*"<sup>292</sup> (my highlights)

Many countries in Latin American have indeed seen these doctrines as protecting their interests, and so it became state practice to include provisions obliging a foreign party to submit its dispute to local courts, referring to these types of clauses as Calvo clauses.

### **- Friendship Commerce and Navigation (FCN) Treaties**

In the nineteenth century, Friendship, Commerce and Navigation Treaties (FCNs) between developed countries and South American countries were common. Although, as mentioned above, there is evidence of the British Empire trying to sign an FCN with Paraguay, the earliest FCN with South American countries were with the United States.<sup>293</sup> Vandeveld (2005-2006),

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<sup>290</sup> Encyclopedia Britannica. Vol. 7. Hazell Watson & Viney Limited. England 1962.

<sup>291</sup> Grigera Naón, Horacio A. "Arbitration and Latin America: Progress and Setbacks" *Arbitration International*. Vol 21, Issue 2. 2005 p. 135

<sup>292</sup> *ibid* p. 135

<sup>293</sup> FCN Argentina-US dated 1854. available at [http://avalon.law.yale.edu/19th\\_century/argen02.asp](http://avalon.law.yale.edu/19th_century/argen02.asp) (last visited January 29, 2013); FNC Ecuador-US dated 1854, available at [http://memory.loc.gov/cgi-bin/query/h?ammem/rbpebib:@field\(NUMBER+@band\(rbpe+23202200\)\)](http://memory.loc.gov/cgi-bin/query/h?ammem/rbpebib:@field(NUMBER+@band(rbpe+23202200))) (last visited January 29, 2013); FCN Paraguay-US dated 1860. US Trade Compliance Center, available at



when describing the history of BITs, has categorized a colonial and a post-colonial era in the history of BITs.<sup>294</sup> He has described the colonial era as the one comprised by the existence of Friendship, Commerce and Navigation treaties (FCNs) which was categorized by just commercial provisions and no mechanism of enforcement, whereas the post-colonial era started after World War II but continued with new versions of FCNs which had provisions relating to property protection.<sup>295</sup>

These treaties are said to be the ‘forerunners’ of BITs because they already contained provisions on the right of compensation in case of expropriations, but their purpose were to facilitate trade rather than to regulate investments.<sup>296</sup>

When comparing an FCN to a BIT, Dolzer and Stevens (1995) write: “[D]eveloping countries were increasingly embarking on macro-economic policies... and rigid legal obligations allowing for unrestricted access of foreign investors to national markets were incompatible with such policies. As a result of these factors, the FNC was no longer viewed as the proper instrument of bilateral economic cooperation and the BIT emerged to become the preferred type of agreement for forging bilateral protection agreements on investments.”<sup>297</sup> Therefore, and especially after the next historical developments, FCN treaties did not provide for full foreign investment protection.

After the establishment of the United Nations, use of force was completely forbidden and was no longer an option for protecting investors’ investment in foreign countries. When states had disputes, they could use the International Court of Justice that was established for that purpose. In this regard, public international law states that there should be exhaustion of local remedies before submitting a dispute to the international plane.<sup>298</sup>

However, it is through treaties that these international rules are going to change. Kaushal (2009) pointed out how BITs took developing countries out of the gunboat diplomacy.<sup>299</sup> However,

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[http://tcc.export.gov/Trade\\_Agreements/All\\_Trade\\_Agreements/exp\\_005357.asp](http://tcc.export.gov/Trade_Agreements/All_Trade_Agreements/exp_005357.asp) (last visited December 4, 2012); FCN Bolivia-US dated 1862, available at [http://avalon.law.yale.edu/19th\\_century/bolivia01.asp](http://avalon.law.yale.edu/19th_century/bolivia01.asp) (last visited January 29, 2013).

<sup>294</sup> For Vandeveld, the post-colonial era of the history of BITs goes until the 1990s. See Vandeveld, K. “A Brief History of International Investment Agreements” University of California. Davis Journal of International Law and Policy .Vol.12. 2005–2006.

<sup>295</sup> *ibid.*

<sup>296</sup> See Vandeveld, K. “The BIT Program: A Fifteen-Year Appraisal” American Society of International Law Proceedings of the Annual Meeting. Vol. 86. 1992. p. 533.

<sup>297</sup> Dolzer, R. and Stevens, M. *Bilateral Investment Treaties* Kluwer Law International, The Hague, Netherlands. 1995. p. 11

<sup>298</sup> *Mavrommantis Palestine Concessions Case (Greece v. UK)*, Jurisdiction. (1924) P.C.I.J. Rep., Ser. A, No.2 See also Grigera Naón, H. A. “Arbitration and Latin America: Progress and Setbacks” *Arbitration International*. Vol 21, Issue 2. 2005 p. 136

<sup>299</sup> Kaushal, A. “Revisiting History: How the Past Matters” *Harvard International Law Journal*. Vol 50 Issue 2. 2009 p. 503 referring to Alvarez, J. and Khamsi, K. “The Argentine Crisis and Foreign Investors: A Glimpse into the

Alvarez and Khamisi pointed out that the gunboat diplomacy was replaced by a stronger means of protection, namely given by BITs in which they describe the dispute settlement clause as gunboat arbitration.<sup>300</sup>

### **- US Act of State Doctrine**

There were, however, some other events that would contribute to the framework for international investments. The countries' independences also played a major role because countries wanted to be considered sovereign and signing treaties was a sign of their autonomy. The newly independent countries had macro-economic policies and wanted to exploit their markets, but that also meant having protectionist measures against unrestricted access of foreign investors. Therefore, their independence was also accompanied by nationalizations.

US investors began to bring their claims to US courts because their investments had been expropriated and they did not get compensation nor relief from the country in which they had been investing. Through these claims, the US courts developed the Act of State Doctrine, which states: "Every sovereign state is bound to respect the independence of every other sovereign state, *and the courts of one country will not sit in judgment of the acts of the government of another, done within its own territory.*"<sup>301</sup> (my highlights)

The Act of State doctrine developed in the US courts at this time was not far from the notion that domestic courts should rule on disputes occurring in their territory and the acts of a sovereign could not be reviewed by a foreign court, just as it had been proposed by the Calvo doctrine.<sup>302</sup>

### **- International Rules on Expropriation.**

Customary international law is one of the sources of international law.<sup>303</sup> The state has control over its territory, it is its sovereignty right; hence, the host country has exclusive sovereignty over foreign investments. International law also declares that states also have responsibility over

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Heart of the Investment Regime" Yearbook of International Investment Law & Policy 379. Karl P. Sauvant, ed., 2009.

<sup>300</sup> Alvarez, J. and Khamisi, K. "The Argentine Crisis and Foreign Investors: A Glimpse into the Heart of the Investment Regime" Yearbook of International Investment Law & Policy 379. Karl P. Sauvant, ed., 2009. p. 73

<sup>301</sup> Chief Justice Fuller in *Underhill v Hernandez* (168 U.S. 250, 18 S. Ct. 83, 42 L. Ed. 456 (1897)), in Brand, R. *Fundamentals of International Business Transactions* Center for International Legal Education. University of Pittsburgh. Volume II. 2012. p. 527

<sup>302</sup> Another case that referred to the US Act of State doctrine is *Banco Nacional de Cuba v. Sabatino*. 376 U.S. 398 (1964), (further mentioned in this chapter). However, there was a contrary reaction of the US Congress to these court rulings, reason why the US Congress enacted the First Hickenlooper Amendment, 22 U.S.C. §2370(e)(1) and the Second Hickenlooper Amendment that obliged courts to take a case when there was an expropriation in violation of international law. In Brand, R. *Fundamentals of International Business Transactions* Center for International Legal Education. University of Pittsburgh. Volume II. 2012. p. 533

<sup>303</sup> It needs two elements: a) corpus: the rule has to be repeated and uniform and b) *opinio juris sive necessitatis*: the rule has to be recognized as a rule of law.

the injuries committed to aliens and if the act was a breach of international law, then there is a right to use diplomatic protection. However, the international rule is that diplomatic protection is allowed only after the alien has exhausted the local remedies.<sup>304</sup>

The earliest jurisprudence from an international claim regarding foreign investment was submitted to the Permanent Court of International Justice. It was the Chorzow Factory case which concerned a dispute between Germany and Poland. In 1928, Poland had expropriated property of German investors in violation of a treaty between Germany and Poland.<sup>305</sup>

The jurisprudence of this case shows the international law on expropriation and compensation thereof. One state is responsible when it commits an unlawful act to another state. The PCIJ stated: “It is a principle of international law that the reparation of a wrong may consist in an indemnity corresponding to the damage which the nationals of the injured State have suffered as a result of the act which is contrary to international law. This is even the most usual form of reparation; it is the form selected by Germany in this case and the admissibility of it has not been disputed. The reparation due by one State to another does not however change its character by reason of the fact that it takes the form of an indemnity for the calculation of which the damage suffered by a private person is taken as the measure. The rules of law governing the reparation are the rules of international law in force between the two States concerned, and not the law governing relations between the State which has committed a wrongful act and the individual who has suffered damage. Rights or interests of an individual the violation of which rights causes damage are always in a different plane to rights belonging to a State, which rights may also be infringed by the same act. The damage suffered by an individual is never therefore identical in kind with that which will be suffered by a State; it can only afford a convenient scale for the calculation of the reparation due to the State.”<sup>306</sup>

With this, in the early 20<sup>th</sup> century, an international tribunal had acknowledged compensation for expropriation in disputes concerning a state’s improper takings of property belonging to a national of another state. However, in terms of *how* the compensation should be made, it is worth mentioning that the international tribunal made the following important remarks.

The international tribunal stated that the rules of international responsibility of a state applied when repairing the unlawful act: For the reparation of an unlawful act, the principle of *restitutio in integrum* should be applied, i.e., giving the damaged party restitution in kind, and only when this is not possible, then the party should give a pecuniary compensation. The PCIJ stated: “reparation must, as far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been

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<sup>304</sup> Mavrommantis Palestine Concessions Case (Greece v. UK), Jurisdiction. (1924) P.C.I.J. Rep., Ser. A, No.2

<sup>305</sup> The ruling of the Chorzow Factory case was in 1928. See Chorzow Factory case, PCIJ ser. A No 17. At 68.

<sup>306</sup> Chorzow Factory case, PCIJ ser. A No 17. At 68. pa 68

committed. Restitution in kind, or, if this is not possible, payment of a sum corresponding to the value which a restitution in kind would bear.”<sup>307</sup>

For a ‘lawful’ expropriation, though, the tribunal stated that against the expropriation a “fair” compensation or a “just price” should be given.<sup>308</sup> The PCIJ stated: “The action of Poland which the Court has judged to be contrary to the Geneva Convention is not an expropriation - *to render which lawful only the payment of fair compensation* would have been wanting...”<sup>309</sup> Furthermore, it expressed that “...*if the Polish Government had had the right to expropriate*, and if its wrongful act consisted merely in not having paid to the two Companies the *just price of what was expropriated...*”<sup>310</sup> (my highlights)

International law at the time had already built parameters with which disputes concerning international investment between an alien and a state could be settled. However, new developments arose.

### - The Hull Principle

In 1938, due to a dispute between the governments of the US and Mexico, the Hull principle arose which states that compensation for expropriations should be prompt, adequate and effective. The Hull principle is contained in diplomatic notes of exchange between the US Secretary of State Hull and the Foreign Affairs Minister of Mexico, thus its name.

Some authors have used some extracts of these notes to argue that Mexico did not want to compensate for an expropriation of US citizens.<sup>311</sup> However, these extracts, which came from the letters of these two statesmen, were not analysed in chronological order. If one does so, then the notes reveal that what Mexico argued is that there is no international rule that says that compensation should be *prompt, adequate and effective*. Furthermore, there are parts that were omitted and are paramount to this part in history, since by them it is revealed that it was always Mexico’s intention to compensate.

Herein below is a more complete abstract from these notes and reproduced in a chronological order. On **July 21, 1938**, Secretary of State Hull complained about the agrarian expropriations to US citizens, which had not been paid by the Mexican government. Secretary of State Hull said

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<sup>307</sup> Chorzow Factory case, PCIJ ser. A No 17. At 68. pa 125

<sup>308</sup> See also Coussirat-Coustere, Vincent and Eisemann, Pierre Michel “Repertory of International Arbitral Jurisprudence”. Martinus Nijhoff Publishers and Kluwer Academic Publisher. Vol III. 1991. p 1274.

<sup>309</sup> Chorzow Factory case, PCIJ ser. A No 17. At 68. pa 123

<sup>310</sup> *ibid* pa 124

<sup>311</sup> Guzman, Andrew T. “Why LDCs sign treaties which hurt them: Explaining the Popularity of BITs” VA.J. INT’L L. 1998 ; Kaushal, A. “Revisiting History: How the Past Matters” Harvard International Law Journal. Vol 50 Issue 2. 2009 ; Brand, R. *Fundamentals of International Business Transactions* Center for International Legal Education. University of Pittsburgh. Volume II. 2012.

that what the government of Mexico had done was confiscation and in his note Hull states the following:

*“If it were permissible for a government to take the private property of the citizens of other countries and pay for it as and when, in the judgment of that government, its economic circumstances and its local legislation may perhaps permit, the safeguards which the constitutions of most countries and established international law have sought to provide would be illusory. Governments would be free to take property far beyond their ability or willingness to pay, and the owners thereof would be without recourse. We cannot question the right of a foreign government to treat its own nationals in this fashion if it so desires. This is a matter of domestic concern. But we cannot admit that a foreign government may take the property of American nationals in disregard of the rule of compensation under international law.*

*Nor can we admit that any government unilaterally and through its municipal legislation can, as in this instant case, nullify this universally accepted principle of international law, based as it is on reason, equity and justice....the single and hitherto solid foundation of respect on the part of governments and of peoples for each other's rights under international justice. The right of **prompt and just** compensation for expropriated property is a part of this structure. It is a principle to which the Government of the United States and most governments of the world have emphatically subscribed and which they have practiced and which must be maintained.”<sup>312</sup>*

In this same note, Secretary of State Hull proposes to submit the issue to arbitration. The issues was *“whether there has been compliance by the Government of Mexico with the rule of compensation as prescribed by international law”*<sup>313</sup>

The Mexican Minister replied on **August 3, 1938:**

*“My Government maintains . . . that there is in international law no rule universally accepted in theory nor carried out in practice, which makes obligatory the payment of **immediate** compensation nor even of **deferred** compensation, for expropriations of a general and impersonal character like those which Mexico has carried out for the purpose of redistribution of the land... The political, social, and economic stability and the peace of Mexico depend on the land being placed anew in the hands of the country people who work it; a transformation of the country, that is to say, **the future of the nation, could not be halted by the impossibility of paying immediately the value of the properties belonging to a small number of foreigners who seek only a lucrative end...** As has been stated above, there does not exist in international law any principle universally accepted by countries, nor by the writers of treatises on this subject, that would render obligatory the giving of adequate compensation for expropriations of a general and impersonal character. **Nevertheless Mexico admits, in obedience to her own laws,***

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<sup>312</sup> 3 Dig. Int'l L. 655 1942

<sup>313</sup> *ibid*

*that she is indeed under obligation to indemnify in an adequate manner; but the doctrine which she maintains on the subject, which is based on the most authoritative opinions of writers of treatises on international law, is that **the time and manner of such payment must be determined by her own laws.***<sup>314</sup>

The Government of Mexico declined arbitration. On **August 22, 1938**, Secretary of State Hull said:

*“The fundamental issues raised by this communication from the Mexican Government are therefore, first, whether or not universally recognized principles of the law of nations require, in the exercise of the admitted right of all sovereign nations to expropriate private property, that such expropriation be accompanied by provision on the part of such government for adequate, effective, and prompt payment for the properties seized; second, whether any government may nullify principles of international law through contradictory municipal legislation of its own; or, third, whether such Government is relieved of its obligations under universally recognized principles of international law merely because its financial or economic situation makes compliance therewith difficult...The Government of the United States merely adverts to a selfevident fact when it notes that the applicable precedents and recognized authorities on international law support its declaration that, under every rule of law and equity, **no government is entitled to expropriate private property, for whatever purpose, without provision for prompt, adequate, and effective payment therefor.** In addition, clauses appearing in the constitutions of almost all nations today, and in particular in the constitutions of the American republics, embody the principle of **just compensation.** These, in themselves, are declaratory of the like principle in the law of nations...The present Government of the United States has on repeated occasions made it clear that it would under no circumstances request special or privileged treatment for its nationals in the other American republics, nor support any claim of such nationals for treatment other than that which was just, reasonable, and strictly in harmony with the generally recognized principles of international law.”*<sup>315</sup>

On **September 1, 1938**, the government of Mexico replied:

*“This attitude of Mexico is not, as Your Excellency's Government affirms, either unusual or subversive. Numerous nations, in reorganizing their economy, have been under the necessity of modifying their legislation in such manner that the expropriation of individual interests nevertheless does not call for **immediate** compensation and, in many cases, not even subsequent compensation; because such acts were inspired by legitimate causes and the aspirations of social justice, they have not been considered unusual .or contrary to international law. As my Government stated to that of Your Excellency in my note of August 3, **it is indispensable, in***

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<sup>314</sup> *ibid*

<sup>315</sup> *ibid*

*speaking of expropriations, to distinguish between those which are the result of a modification of the juridical organization and which affect equally all the inhabitants of the country, and those others decreed in specific cases and which affect interests known in advance and individually determined.*"<sup>316</sup>

The dispute concluded when the two parties reached an agreement. The agreement consisted in a determination of the value of the properties by a Commission in Washington (with one representative of each country). Mexico had to pay \$ 1,000,000 for indemnities and \$1,000,000 annually thereafter for indemnities determined by the Commission.<sup>317</sup>

With this analysis, two main issues can be disclosed. Firstly, Secretary of State Hull starts by demanding a prompt and just compensation under international law (in Note of July 31, 1938). This was partly in accordance with Chorzow Factory case which established the 'just' compensation for expropriations.<sup>318</sup> Secondly, it was a disagreement about how and when to compensate. Although Mexico did try to claim that there are some expropriations which are legally effected without compensation, they did admit that they would indemnify (in Note of August 3, 1938).

Only in August 22, 1938, the Secretary of State Hull makes reference to international law supporting prompt, adequate and effective compensation. However, he gives an additional argument which seems contradictory, since he claimed that the constitutions of American states embody the 'just' compensation.

The Hull principle gave a new opinion on 'how' compensation should be paid because what international law ruled at the time was addressed by the Chorzow case, which referred only to a 'just' compensation. The applicability, however, of a 'prompt, adequate and effective' compensation versus a 'just' compensation differs radically. The main difference is that a 'just' compensation involves the payment of the value of the expropriation at a fair market value whereas a 'prompt, adequate and effective' compensation extends beyond the payment of the value of the expropriation and can include expected profits.<sup>319</sup>

Hull referred to 'just' compensations in his notes when claiming that just compensation was a principle embodied in the constitutions of states but he emphasized his opinion of 'prompt, adequate and effective compensation' in an exchange of diplomatic notes. However, diplomatic notes of exchange are not international law and so the debate remained between Latin American countries, which claimed that there was no international law rule for compensating promptly,

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<sup>316</sup> *ibid*

<sup>317</sup> *ibid*

<sup>318</sup> Chorzow Factory case, PCIJ ser. A No 17. At 68.

<sup>319</sup> Dawson, F.G. and Weston, B.H. "'Prompt, Adequate and Effective": A Universal Standard of Compensation?" Fordham Law Review, Vol 30, Issue 4. 1962.

adequately and effectively, and developed countries, which wanted to elevate the Hull principle to international law.

### **- Developed and Developing Countries' Debate on Expropriation and Compensation Regulations**

During the 1960s and 1970s one could see that the US went through an internal conflict of power when wanting to incorporate the Hull principle as a standard in cases of expropriation. In 1964, in the Sabattino case, a case brought to the US Supreme Court by an US investor, the latter claimed that the Cuban Government had expropriated its investment. The US Supreme Court sustained the traditional act of state doctrine and claimed that such measure should be disputed at the local courts.<sup>320</sup> The US Congress did not agree with this view and enacted the First Hickenlooper Amendment to the Foreign Assistance Act of 1962 that established economic sanctions on a state that expropriated property of a US citizen. It stated that in cases in which a US citizen is expropriated, there should be speedy compensation, in convertible foreign exchange, and equivalent to the full value thereof.<sup>321</sup> When comparing with the Hull principle, this amendment included the Hull language.<sup>322</sup>

At the international level, many of the already mentioned UN resolutions had passed, which gave right to the sovereignty of nations with respect to foreign investment.<sup>323</sup> At a more regional level, in South America, the Andean Common Market between Bolivia, Chile, Colombia, Ecuador and Peru enacted the Decision No. 24 of the year 1970 which stated: “not to grant for investors more favourable treatment than that granted to national investors”<sup>324</sup> and also “not to enact legislation that would enable foreign investors to seek dispute resolution outside the jurisdiction of the host state.”<sup>325</sup>

Two distinct positions on international investments were evidenced between developed countries and developing countries and both positions carried on elements from the historical developments. For developed countries a breach of a ‘minimum standard of protection’ for

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<sup>320</sup> Banco Nacional de Cuba v. Sabattino. 376 U.S. 398 (1964). US courts at this time did not compensate the US investors based on the sovereignty of the acts of the states that have expropriated. The court said that such disputes should be settled in local and not US courts.

<sup>321</sup> First Hickenlooper Amendment, 22 U.S.C. §2370(e)(1) in Brand, Ronald “Fundamentals of International Business Transactions” Center for International Legal Education. University of Pittsburgh. Volume II. 2012. p. 533

<sup>322</sup> There was also a Second Hickenlooper amendment that obliged courts to take a case when there was an expropriation in violation of international law.

<sup>323</sup> See for example Article 2 of the UN Charter of Economic Rights and Duties which reflects developing countries’ position with regard to what the customary law was, cited in Chapter II.

<sup>324</sup> Dolzer, R and Stevens, M. *Bilateral Investment Treaties* Kluwer Law International, The Hague, Netherlands. 1995. p. 9

<sup>325</sup> *ibid* p. 9



foreign investors was a breach of international law. Developing countries said as long as they treated foreign investors and nationals equally, there was no breach of international law.<sup>326</sup>

Furthermore, on the one hand, there were developed countries who wanted to protect their investors by having regulations on compensations for foreign investments that follow the Hull principle, added by ideas of detaching the disputes regarding investment from the domestic courts, and on the other hand, there were developing countries who accentuated their sovereignty and demanded that all concerning foreign investments be regulated by their national laws.

This debate, however, was settled with the agreement of a new kind of treaties relating to the treatment of foreign investments. These treaties are called: Bilateral Investment Treaties (BITs).

### **3.2. What are Bilateral Investment Treaties (BITs)?**

European countries were the first promoters of BITs. Germany was the first country to sign a BIT with Pakistan to secure their investments abroad, especially after what they have lost in the war.<sup>327</sup> As for the US, it was in the midst of the debates at the multilateral level that the US started the use of BITs, in 1977. While Germany sought the protection of their investments in a host country, the US was determined to customize the Hull principle through these treaties.<sup>328</sup>

Bilateral Investment Treaties (BITs), as the name signifies, are treaties which are signed by two states or countries, also known as the ‘contracting parties’. Ergo, the parties of BITs, as in all other treaties which form part of international law, are two sovereign states. They are called the host state (state where the investment is made) and the home state (state of nationality of foreign investors) respectively. In practice, the home state is the developed country and the host state is the developing country.

Although there is no rule about BITs having to be only between developed and developing countries, as developed countries or developing countries among themselves can sign such treaties as well,<sup>329</sup> the practice shows that all OECD countries have BITs, but all of them are with a developing country.<sup>330</sup>

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<sup>326</sup> See also the UN report that gives a good account on this issue in UNCTAD, *Bilateral Investment Treaties in the Mid-1990s*. U.N. Doc. UNCTAD/ITE/IIT/7 (1998)

<sup>327</sup> The first BIT was signed by Germany with Pakistan on November 25, 1959 and Germany with the Dominican Republic on December, 16 1959. Other European countries followed this initiative. See Vandeveld, K. “A Brief History of International Investment Agreements” University of California. Davis Journal of International Law and Policy .Vol.12. 2005–2006. p. 169

<sup>328</sup> Vandeveld, K. “The BIT Program: A Fifteen-Year Appraisal” American Society of International Law Proceedings of the Annual Meeting. Vol. 86. 1992; Vandeveld, K. “A Brief History of International Investment Agreements” University of California. Davis Journal of International Law and Policy .Vol.12. 2005–2006. p. 171

<sup>329</sup> See for example BITs of China with African countries.

<sup>330</sup> “Rich OECD countries do participate in BITs, but almost exclusively with developing countries” in Hallward-Driemeier, M. “Do Bilateral Investment Treaties attract FDI? Only a bit...and they could bite” World Bank DECRG

It is important to note that although the sole objective of BITs is to promote investments' protection, they do affect other economic factors as well, for example the increase of capital in the host country because of the increase of foreign direct investments,<sup>331</sup> at least it is an expression which can be found in the purpose of many treaties.<sup>332</sup>

The relevance of BITs and how they can affect countries is given by their place in the legal hierarchy. Firstly, BITs form part of international law because the statute of the International Court of Justice (ICJ) establishes, *inter alia*, that the sources of international law are international conventions, i.e. treaties.<sup>333</sup> For this reason, Dolzer and Stevens (1995) have stated: "BITs create international law obligations for each contracting party with respect to its treatment of investments from the other contracting party."<sup>334</sup>

Secondly, for most South American countries, BITs' provisions are also an international obligation pursuant to the internal juridical order because norms' hierarchy is an entrenched constitutional principle in many civil law countries and this principle establishes that the ranking of norms of each country starts with the constitution, then treaties and then the law.<sup>335</sup> The regulation of foreign investments can, therefore, have a better hierarchical protection in comparison to laws and policies of developing countries, thanks to the fact that they have the rank of a treaty. For this reason, for South American countries the duties and obligations regarding the investments that are contained in BITs have a higher ranking than national law, because they have been agreed upon in the form of a treaty.

BITs include substantive rights on the one hand, and formal or procedural rights on the other. Among the substantive obligations are:

(a) The definition of investment. The application of the treaty will depend on what is understood by 'investment'. BITs define "investment" very broadly so as to signify any form of capital introduced into the host state.

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2003. p. 8; See also the UNCTAD Country-Specific Lists of BITs (Investment Instruments Online); see also the discussion in Kaushal, A. "Revisiting History: How the Past Matters" *Harvard International Law Journal*. Vol 50 Issue 2. 2009. p. 497

<sup>331</sup> Kaushal (2009) has claimed: "BITs in particular are said to be uniquely positioned to promote and protect foreign direct investment through their assurances for investors' property rights." *ibid* p. 497

<sup>332</sup> The results of empirical studies on BITs and FDI increase are discussed in Chapter V.

<sup>333</sup> ICJ Statute. Article 38 (1).

<sup>334</sup> Dolzer, R. and Stevens, M. "Bilateral Investment Treaties" Kluwer Law International, The Hague, Netherlands. 1995. p. xi.

<sup>335</sup> Ranking established for example in the 1994 National Constitution of Argentina, Article 75(22); 2009 National Constitution of Bolivia, Article 410; 2008 National Constitution of Ecuador, Article 425; 1966 National Constitution of Uruguay, Article 6 does not establish a hierarchy but doctrine and jurisprudence establish treaties in the same rank as law. See Henderson, H. "Los tratados internacionales de derechos humanos en el orden interno: la importancia del principio *pro homine*" *Revista IIDH*. Vol 39. 2004 . p. 81.

(b) The treatment given by the host country to a foreign investment. Dolzer and Stevens call these treatments the common standards of BITs. The obligations regarding the treatment that the BITs of the case studies herein and the majority of BITs have are:

- National Treatment: One benefit that foreign investors can have is that BITs put them in an equal position to any national investor, eliminating any form of discrimination between a national and a foreign investor.
- Most Favoured Nation treatment: The treatment given to the contracting party should be no less favourable than any treatment given to other countries.
- Fair and Equitable treatment: This is a treatment that obliges host countries to restrict their domestic legislation if they are different from the standards provided under international law.<sup>336</sup>

The obligations stated in BITs provide favourable conditions and guarantees of fair and equitable treatment by the host states even in times of revolution, war or crisis, in which case the host state would have to compensate the investors for any kind of loss of their investments.<sup>337</sup>

(c) Expropriation and compensation rules. BITs state under which circumstances a host country would be able to expropriate and if it does so, BITs state the obligation to compensate prompt, adequately and effectively.<sup>338</sup>

(d) The right to submit disputes to international arbitration instead of to domestic jurisdiction.

The formal or procedural right is the mechanism provided to exercise and enforce the rights of the treaty. Therefore, the dispute settlement clauses of BITs are the most important provision in BITs that foreign investors have for enforcing the rights given to them and also enforcing the compliance of the obligations that host countries have in regard to their investments.

As any other clause in the treaty, the parties can freely choose the wording of the rights and obligations to be included in a dispute settlement clause of a BIT, as well as defining the mechanism to be used to resolve the dispute. The contracting parties in a BIT, foreseeing the possibility that disputes may arise and completely aware of it, include the relevant clauses which explain how the parties shall proceed in the event that a dispute arises.

The common mechanism provided in BITs for settlement of investment disputes is international arbitration, which parties freely agree upon. On the one hand, the advantage of international arbitration is the delocalisation of the disputes. In other words, the dispute is resolved on neutral

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<sup>336</sup> The fact that BITs do not often define what should be regarded as fair and equitable is problematic because different arbitrators have given a different interpretation for it. Other types of investment treaties, like the Free Trade Agreements (FTAs) have incorporated a definition of the fair and equitable treatment.

<sup>337</sup> These are called stabilization clauses.

<sup>338</sup> New versions of BITs, like the US 2012 BIT model, exclude compensation from some forms of indirect expropriation. See Chapter VI section 6.5.

grounds. This means that the dispute is taken out of the local courts and instead submitted to a completely neutral and unbiased international arbitration tribunal with normally three independent arbitrators deciding on the case. Considering that in a BIT the parties are of different countries, this is what seems fairest.

From the perspective of foreign investors, international arbitration is an advantage because it eliminates the fear that their claims could have little success against a host state in its own territory and whose own authority decides who the judges of these domestic courts are going to be. Then, the parties of an investment dispute should have more confidence with the fact that the resolution of the dispute by arbitrators, who are specialized on the subject matter, provides impartiality.

Another advantage of international arbitration that can be pointed out is the degree of expertise of the arbitrators on the subject matter of the dispute, i.e., foreign investment. In contrast to judges of domestic courts, who have the mandate to know the law - no matter how extensive-, international arbitrators can be people specialized on international investment law.<sup>339</sup> While domestic judges have jurisdiction to solve disputes of any nature, civil, commercial, family law, etc., which in developing countries normally causes a backlog for the amount of cases they have, arbitrators at international arbitration institutions can be jurists, academics or people specialized in international investment law.<sup>340</sup>

There is a differentiation however, in regard to the preference of international arbitration or domestic courts for settling the dispute. This is why the dispute settlement mechanism also can contemplate more than one stage; it can contain other requirements which parties have to comply before reaching the arbitration stage. This depends on the actors' perspective. The investors and the home countries prefer international arbitration whereas host countries prefer domestic courts.<sup>341</sup>

The mechanism for solving disputes in BITs is also different depending on the type of disputes. Most BITs contain two different articles which address the two types of disputes, and they do so because the mechanisms chosen to resolve one or the other type of disputes are quite different. Therefore, one has to point out that in most BITs, rules regarding dispute settlement are provided depending on whether the disputes are concerned with the interpretation and application of the treaty or with the investment.

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<sup>339</sup> This, however, may not always be the case as the parties can choose their arbitrators.

<sup>340</sup> However, these advantages have been extensively criticized and the arbitrators' independence has been questioned because each party decides who its arbitrator is going to be, and those two arbitrators choose a third independent one, this is the composition of the international arbitration tribunal.

<sup>341</sup> Allee, T. and Peinhardt, C. "Delegating Differences: Bilateral Investment Treaties and Bargaining Over Dispute Resolutions Provisions" *International Studies*, 54. 2010. p. 3

The first one, interpretation and application of the treaty, is a matter which only sovereign states can handle and therefore the disputes are normally solved by governments, which are the two parties of the treaty. On the other hand, the investment disputes are between one party of the treaty (the host state) and a foreign investor which can be a national or company of the home state.

Depending on the wording of the BIT, the disputes that are related to the investment per se, can be settled in local courts but there is also the possibility that if the dispute is not settled at the local courts, the case can be brought to international arbitration.

In BITs, the investment dispute settlement clause also contains another important feature. They establish a choice of international arbitration institutions for the parties. The parties decide which institution they wish to be the neutral actor to resolve a dispute arising from a BIT. In case of disputes, the investors can use the international arbitration bodies like the International Centre for Settlement of International Disputes (ICSID) or ad hoc arbitration that follows the rules of the United Nations Commission for International Trade Law (UNCITRAL).<sup>342</sup>

As part of any arbitration process, consent is required. As such, to have access to for example the ICSID, the parties must have ratified the 1965 Washington Convention which created the ICSID.<sup>343</sup> International arbitration bodies or institutions like ICSID, through these mechanisms, are the ones responsible for settling investment disputes. Likewise, the arbitral awards issued by these institutions need to be binding. This was also agreed in the New York Convention of 1958 that most countries have ratified.<sup>344</sup>

### **3.3. Are all BITs uniform?**

Due to the fact that the structure of BITs resembles similarities among one another, the substance of BITs has caused some debate with regard to their uniformity. According to Dolzer and Stevens, BITs have four substantive areas, namely: admission, treatment, expropriation of foreign investments and settlement of disputes. They have also found that there are standard elements and features that can be found in the preamble, in the definition of investment and in the criteria used to determine which nationals are covered under the treaty.<sup>345</sup>

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<sup>342</sup> The difference among the two types of arbitration institutions is discussed in section 4.5.

<sup>343</sup> The main international arbitration institution for resolving investment disputes is the International Centre for Settlement of Investment Disputes (ICSID) which was created by the International Convention on the Settlement of Investment Disputes Between States and Nationals of Other States - International Centre for Settlement Of Investment Disputes, Washington 1965. This is the only international arbitration institution which publicizes the awards. There are other international arbitration institutions for resolving disputes but their awards are not public.

<sup>344</sup> Further discussion on the impact of these conventions are discussed in Chapter VI.

<sup>345</sup> Dolzer, R and Stevens, M. *Bilateral Investment Treaties* Kluwer Law International, The Hague, Netherlands. 1995. p. 19

Regarding the common standards that the majority of BITs have, Dolzer and Stevens made the following remark: “The survey shows that the majority of BITs subscribe to common standards such as fair and equitable treatment, full protection and security, non-discrimination as well as national and most favoured nation (MFN) treatment.”<sup>346</sup>

The reason for finding standard terms could be that most capital-exporting countries had a model agreement with which they started the negotiations, but there are also cases in which the model treaty had some modifications that were desirable for the capital-importing countries. In spite of this, one can still find standard terms in BITs.<sup>347</sup>

Developing countries start their foreign investment negotiation with a BIT model drafted by a developed country. A BIT model is a BIT template prepared by the developed country which contemplates all the substantial clauses used when entering into negotiations for the signature of BITs. The parties can modify such a template according to their needs but practice shows that the main clauses have remained the same as in the model.<sup>348</sup>

Ibrahim Shihata, the 1995 Secretary General of the ICSID stated that BITs were uniform.<sup>349</sup> Guzman (1998), considering Dolzer’s and Stevens’ work, has stated the following: “Although the US treaty is, in principle, open to negotiation, BITs signed by the United State are usually very similar to the model treaty. (In fact, looking beyond United States treaties, BITs in place around the world are quite similar to one another)”<sup>350</sup>

However, there are some scholars, who have heavily criticized the claim that BITs were uniform and stated that on the contrary they were very different from one another. Allee and Peinhardt (2010) claimed the importance of considering that BITs are negotiated on a “treaty-by-treaty basis.” They disclosed a survey of BITs from the UNCTAD in 1998 which states that “...despite the apparent uniformity among many BIT provisions, there are many significant differences in the formulation of individual provisions.”<sup>351</sup>

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<sup>346</sup> *ibid* p. 49

<sup>347</sup> *ibid* p. 13-14

<sup>348</sup> See Chapter IV which discloses the results from a comparative analysis of BITs of South American countries.

<sup>349</sup> In the Preface of Dolzer, R. and Stevens, M. *Bilateral Investment Treaties* Martinus Nijhoff Publishers. Kluwer Law International. The Hague, The Netherlands. 1995.

<sup>350</sup> Guzman, A. “Why LDCs sign Treaties that hurt them: Explaining the Popularity of Bilateral Investment Treaties” *Virginia Journal of International Law*. Vol 38:639. 1998. Pg 654; In a similar vein, Vandeveld (2000) says that: “Regardless of which states negotiate BITs, provisions of these agreements are remarkably uniform. In general, the agreements protect investment by investors of one state in the territory of another state by articulating substantive rules governing the host state’s treatment of the investment and by establishing dispute resolution mechanism applicable to alleged violations of those rules” in Vandeveld, K. “The Economics of Bilateral Investment Treaties” *Harvard International Law Journal*. 2000. pp. 469- 470.

<sup>351</sup> Allee, T. and Peinhardt, C. “Delegating Differences: Bilateral Investment Treaties and Bargaining over Dispute Resolution Provisions” *International Studies Quarterly*. 2010 54, 1-26. p. 2

Allee and Peinhardt use these arguments to build up their theory of a variation, but they specifically refer to dispute settlement clauses. They claim that there is a bargaining on the dispute settlement clauses of BITs which entails a legal delegation of investor-state dispute to ICSID. Sornarajah (2000) also stated: “There is a fallacy promoted that these treaties are uniform”<sup>352</sup>; he too was referring to the dispute settlement clauses and the variations contained therein in different BITs.<sup>353</sup>

Therefore, the different opinions found in the literature regarding the BITs’ uniformity might be a problem of interpretation. Note that Dolzer and Stevens never said that BITs are uniform in the sense that they are identical to each other. On the contrary, in their book they have never stopped pointing out the variations and modifications that contracting parties do to the standard terms contained in BITs.

Standard terms are the essential substance of BITs. The provisions could be completely different from one BIT to the next but these essential substances will always remain. This essential substance is what forms the substantive areas of a BIT and accordingly they form the structure of BITs. The substantive areas of a BIT are the essential parts that form what is called and we know as a BIT. BITs may not be uniform, but they have a common core.<sup>354</sup>

The common core is the set of substantive topics that give BITs their structure. This is confirmed by the treaties herein analysed and in all of them we find the essential components, namely: preamble, investment definition, admission, treatment, expropriation, dispute settlement clauses.

Hallward-Dreimeier also state: “BITs vary across countries, but they generally share similar features of defining foreign investment and laying out various principles regarding treatment, transfer of funds, expropriation and mechanisms for dispute settlements.”<sup>355</sup>

This does not mean, however, that all is safe and sound. Dolzer and Stevens, when giving a statement on the similarity of certain provisions, in this case of the definitions of investment in different BITs, claimed: “This similarity does not, however, mean that there exists a universally binding concept of investment for all purposes. Rather accepting that the concept has no absolute

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<sup>352</sup> Sornarajah, M. *The Settlement of Foreign Investment Disputes* The Hague: Kluwer Law International. 2000. p. 218

<sup>353</sup> The difference of the dispute settlement clauses of the South American BITs are dealt with in Chapter IV.

<sup>354</sup> Chapter IV makes an empirical analysis of South American countries BITs. It is impossible not to note their standardization but they are not all identical (although some certain provisions are) and some of them are very different. For example, one can even find in some BITs provisions on human rights and environment (Belgium-Luxemborg-Colombia BIT; US-Uruguay BIT) and they differ considerably on their dispute settlement clauses.

<sup>355</sup> Hallward-Driemeier, M. “Do Bilateral Investment Treaties attract FDI? Only a bit...and they could bite” World Bank DECRG 2003 p. 4

meaning and may change in the future, most treaties, as noted above, have adopted a broad, open-ended definition that ensures a certain amount of flexibility in treaty's application."<sup>356</sup>

This is one of the reasons why BITs rules are not considered customary international law but have been regarded as *lex specialis*.<sup>357</sup> However, the flexibility given to the treaty's application is what in practice causes problems because arbitrators interpret treaties so differently and this provokes an uncertainty regarding what the rule on a particular matter is.

In conclusion, this chapter has shown that the current framework for international investments was the result of bilateral negotiations. The historical events, however, have shown that the formation of the rules for foreign investment until they were entrenched in BITs did not run smoothly.

The chapter also explained what BITs are and together with the examination of its structure supports the argument that BITs are not identical to one another but have a common core which refers to the main clauses that together give birth to BITs.

This analysis has been important because the next chapter makes a comparative analysis of South American BITs. The analysis of the differences, if any, can put the aim of BIT clauses to a test, which will ultimately serve as a contribution to the assessment of whether the relative power of developing countries gets weakened through BITs.

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<sup>356</sup> Dolzer, R and Stevens, M. *Bilateral Investment Treaties* Kluwer Law International, The Hague, Netherlands. 1995. p. 26

<sup>357</sup> Sornarajah, M. *The international law on foreign investment* Cambridge University Press. Cambridge. 2004.



## **CHAPTER IV: BITs in Practice: An Empirical and Comparative Analysis of BITs**

The countries' different opinions manifested during the intellectual debates on foreign investment at multilateral level were materialized through BITs. By focusing on an empirical analysis of BITs, this chapter analyses which rules, among the debated rules of foreign investment, became entrenched in these BITs. Furthermore, the effects that these provisions may have are also discussed.

As case studies I analyze BITs that South American countries have signed and entered into force with the United States, Germany, France, Spain and the United Kingdom. I specifically compare and contrast the clauses of these BITs in the following respects: the definition which refers to the scope of application, the objectives, the expropriation clauses and the dispute settlement clauses.

### **4.1. Scope of Application**

The connection between the treaty's provisions, the enforcement right and the submission of a dispute using the dispute settlement mechanism is very tight. The glue that allows all of them being connected is the existence of a foreign investment.

The definition of investment is one of the common standards that BITs share. These investments are the subject matter of the treaty to which a commitment of protection is given by developing countries in order for foreign investors of developed countries to be reassured of the security of investing in those countries.

Therefore, how BITs define investment will determine which activities could and will be governed by the BITs provisions. The definition of a foreign investment can limit the scope of application of BITs. Among the provisions of a BIT, there is a right to enforce all the obligations stated in the treaty and the relevant clause for it provides a mechanism which includes international arbitration. If a foreign investment does not exist then a BIT is not applicable and the international tribunal would have no jurisdiction to solve a dispute.

Pursuant to Article 25 of the ICSID Convention, ICSID has only jurisdiction to settle the dispute if it is considered "an investment" dispute. In ICSID, the tribunal is conducted by arbitrators through international arbitration and so the classic principles of arbitration apply. One in particular should be noted, that is, the principle of kompetenz-kompetenz. According to this principle the arbitrators can rule on their own jurisdiction, they are empowered to decide whether they have competence to decide on the case. Thus, when a dispute arises, arbitrators have to rule on the issue of jurisdiction, or in other words, to assess whether the subject matter of the dispute does indeed constitute an 'investment'.

Mortenson (2010) is of the opinion that the drafters of BITs, developed countries, negotiated a broad definition of investment from the start, while developing countries "pushed to strictly limit

ICSID review to narrow categories of economic activity.”<sup>358</sup> The intention was that by keeping such a broad definition and allowing any kind of foreign activity to be considered an investment, the right to submit the matter to be solved by ICSID’s tribunal gets also broader.<sup>359</sup> However, Mortenson also argued that an opt-out option remained available so that each country could, upon their choice, take out some elements from the definition of investment, and further claimed that even though arbitrators have taken a broad interpretation of what could constitute an investment, more recent cases have shown that they have had a very restrictive approach which could damage the international investment regime.<sup>360</sup>

Appendix III shows that in BITs, “investments” are normally defined very generally and broadly, for example, meaning every kind of asset in accordance with the law of the country where the investment is being made. In the South American countries BITs with the EU countries the wording is extremely similar. How they define investment can be summarized in that they include all kinds of movable and immovable assets of a foreign investor in the host country. The common list also extends to shares, stocks and any right connected to the property or that has economic value, like intellectual property rights and business concessions.<sup>361</sup>

It should be noted that in all South American countries BITs with the referred European countries it is also stated that the list of what is described as an investment is not exclusive to what it is expressly stated in the BIT. The phrase ‘not exclusively’ allows the parties to encompass all other kind of features as investment and escape the limitation to have a definite or express provision. The only exception which expressly excludes some types of activities is provided in the Spain-Colombia BIT.<sup>362</sup>

In regard to the US BITs with these South American countries, the provisions that relate to what is understood by investment are similar to the European countries. In the US BITs with South American countries, the common investment provision also includes any kind of assets, like tangible or intangible property (which will include movable and immovable assets), and their list to expands to rights related to the property like economic or intellectual property rights and concessions.

The difference in the US BITs compared to those BITs with the EU countries is that there are some variations in some of them. For example, only in the Argentina-US BIT it states that the list is without limitation of any other activities. This, however, can be compared to the wording of the Uruguay-US BIT, which states that the definition of investments extends to any type of

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<sup>358</sup> Mortenson, J. “The meaning of investment: ICSID’s travaux and the domain of international investment law” Harvard International Law Journal. Vol 51. No.1. 2010 p. 259

<sup>359</sup> Mortenson claims that more flexibility is given, also in the sense that different actors are considered, namely companies. In Mortenson, J. “The meaning of investment: ICSID’s travaux and the domain of international investment law” Harvard International Law Journal. Vol 51. No.1. 2010

<sup>360</sup> *ibid* p. 259

<sup>361</sup> *ibid*

<sup>362</sup> Note that the Spain-Colombia BIT is the latest BIT signed by a South American country. See Appendix II.

activities that would have the characteristics of an investment. Furthermore, although the wording is different in two other BITs (with Bolivia and Ecuador), the effect of having a broad definition remains the same. The Bolivia-US BIT states that the list of contractual rights that are protected by the BIT is only illustrative, and the Ecuador-US BIT state that all types, “such as social capital, debts and service and investment contracts” are included in the protections granted by the BIT.<sup>363</sup>

As can be seen, the comparative study of the definition of investment in these BITs shows how the definition of investment remains a very broad one. While the EU BITs, on the scope of application, state that they will include *inter alias*, property rights that allow any right connected to the property to be claimed as an investment, the US BITs extend their scope of application much more by stating that ‘any’ kind of investment controlled directly or ‘indirectly’ shall be considered an investment for the treaty.

This means that the scope of application is very extensive and not restrictive as Mortenson (2010) had claimed. Furthermore, the comparison of the BITs does not provide evidence that developing countries limit the definition of investment in accordance to their convenience. The effect can be related to the fact that there is a strong relation between broadening the concept of investment in BITs and the countries’ constitutionalism. In constitutions, property is protected, and if property is needed for public reasons, it can be expropriated with a due compensation.<sup>364</sup> Schneiderman (2000), when comparing the property regime of the constitution of South Africa and the Canada-South Africa BIT says that: “the prohibition against takings in the BIT is broader than that found in the South African Constitution. The BIT prohibits nationalization or expropriation or “measures having an effect equivalent to” nationalization or expropriation. The constitutional provision is narrower to the extent that it does not make reference to equivalent effects...”<sup>365</sup>

What comprehends investment expands in the treaty so that the investment will also include other aspects that may not be covered by the law of the country where the investment is being made. The more BITs extend the concept of investment as to include “any kind of assets” the higher the chance that foreign investors will have at the moment of trying to demand compensation for their investments.<sup>366</sup>

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<sup>363</sup> See Appendix III

<sup>364</sup> Allowed in many South American countries’ constitutions, for example, Argentina, Bolivia, Ecuador, Paraguay, Uruguay.

<sup>365</sup> Schneiderman, D. “Investment Rules and the New Constitutionalism”. Law and Social Inquiry, Vol 25, No. 3. 2000. p. 779

<sup>366</sup> Investors have claimed that cancellation of contracts amounted to their investments and therefore for such expropriation they claimed compensation. See for example how Schneiderman (2000) refers to how Lockheed Corporation, a US company that “took the view that cancellation of contracts for the privatization of an airport terminal ...amounted to a taking...” in Schneiderman, D. “Investment Rules and the New Constitutionalism”. Law and Social Inquiry, Vol 25, No. 3. 2000. p. 775 and 776

There are many examples of cases of submitted to ICSID in which the defendants (normally developing countries) have contested ICSID's jurisdiction but in the majority of cases, ICSID's tribunal has ruled in favour of their jurisdiction,<sup>367</sup> judging that the scope of application of the treaty entitles this jurisdiction.<sup>368</sup>

This is the reason why the broad definition of investment in BITs becomes extremely relevant. By having a broad definition, the protection given to their investors gets extended to a higher variety of activities. Furthermore, it gives leeway to the arbitral institutions to decide whether they have jurisdiction over the investment dispute that arises out of the BITs.

#### **4.2. Objective of BITs**

In a treaty, its purpose expresses the intention or spirit of the parties and it is normally contained in the preamble of the agreement. The Vienna Convention on the Law of Treaties expressly states that any treaty should be interpreted “in accordance with the ordinary meaning to be given to the terms of the treaty in their context *and in the light of its object and purpose*”<sup>369</sup> (my highlights)

Therefore, pursuant to international law, if there is something not clear in the treaty, after which a dispute has been submitted to an arbitration tribunal, the arbitrators have the obligation to look at the purpose of the treaty to interpret it.

Appendix IV compares the purposes of the South American countries' BITs. The resulting comparative analysis presents some remarks, which are the following.

The purposes contained in US BITs with South American countries can be summarized as: (i) To promote greater economic cooperation (ii) stimulate flow of capital and the economic development of the parties (iii) encouragement of reciprocal protection of investment (iv) improvement of living standards (v) fair and equitable treatment of investment.

In regard to the US BITs with Argentina, Bolivia, Ecuador and Uruguay the purposes are identical in some points and only a few differences are found in the BITs signed with Uruguay and Bolivia. The explanation could be that the US uses a model BIT to start negotiations. Thanks

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<sup>367</sup> CMS Gas Transmission Company v. The Argentine Republic, ICSID Case No. ARB/01/8; Siemens A.G v Argentine Republic (ICSID Case No. ARB/02/8); Azurix Corp. v. The Argentine Republic, ICSID Case No. ARB/01/12; Enron Corporation and Ponderosa Assets, L.P. v. Argentine Republic, ICSID Case No. ARB/01/3.

<sup>368</sup> Meg Kinnear, Secretary General of ICSID has pointed out based on data of the year 2012 that in 63% of the cases the ICSID uphold the claims and only in 26% they rejected it based on jurisdiction. Talk given by Meg Kinnear, Secretary-General, ICSID “The Present and Future Challenges of ICSID” at Vale Columbia Center on Sustainable International Investment. January 31, 2013

<sup>369</sup> Article 31 of the Vienna Convention on the Law of Treaties. 1969.

to the US Letter of Submittal to the Senate for the ratification of the BITs we know for example that in the US-Bolivia BIT, the 1994 US model BIT was used and in the US-Uruguay BIT, the 2004 US model BIT was used.<sup>370</sup>

It is worth noticing that some US BITs express in their purposes issues that go beyond the mere promotion of investments. For example, in Argentina, Bolivia and Ecuador's BITs the well-being of workers is mentioned.<sup>371</sup> The US-Uruguay BIT goes even further as the treaty includes not only the recognition of international labour rights but also that the treaty shall be consistent with health, safety, environment, and consumer protection.<sup>372</sup>

The US-Uruguay BIT also mentions among the purposes something that the other countries do not have, which is on the point of enforcement of BITs: it mentions international arbitration as a mechanism of solving disputes, but stating that this mechanism has to be treated respecting the domestic or national law.

In regard to the US-Bolivia BIT, it is also interesting to notice that provisions regarding health, safety and the environment are mentioned but with the peculiarity that there is a positive constraint of how the objectives are allowed to be pursued, namely, 'without' relaxing health, safety and environmental measures.<sup>373</sup>

On the other hand, among the statements regarding the purposes made in the BITs between the EU countries (France, UK, Spain and Germany) and the mentioned South American countries,<sup>374</sup> we can find the following.

In the South American countries BITs that were signed with France, the purposes that are stated are: (i) reinforce economic cooperation (ii) create favorable conditions for investments (iii) encouragement of investment and stimulation of capital and technology transfer in order to *increase economic development*.

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<sup>370</sup> Stated in the respective US Letters of Submittal to the Senate for ratification of the BITs.

<sup>371</sup> Note that the US ratified 2 out of 8 Fundamental International Labour Conventions, while Argentina, Bolivia, Ecuador and Uruguay have ratified 8 out of 8 of the Fundamental International Labour Conventions. See International Labour Organization. Ratification of ILO Conventions available at [www.ilo.org](http://www.ilo.org) (Last visited July 25, 2013)

<sup>372</sup> The US-Uruguay BIT has also specific clauses regarding the respect of the environment (Article 12) and labour (Article 13) in the text of the treaty. The explanation for the difference might reside in the fact that the US-Uruguay BIT was based on a 2004 model BIT and so a version which was later than the others US BITs with these countries.

<sup>373</sup> The freedom of citizens to act is regulated by two law principles which distinguish themselves depending on whether they are in the public or private sphere. In public-administrative law, the principle states that it is only permitted what is expressly established in the law; in contrary to the private law principle which states that all that is not forbidden is permitted. It is interesting to see how in this treaty, which is an international public law between the parties because it is handled by states, also private behavior is presupposed and therefore an express prohibition is included. This peculiarity though on the last point, is only found in the US-Bolivia BIT. The other countries do not have it.

<sup>374</sup> Appendix IV, emphasis added.

Peculiarly, Uruguay does not state a preamble in its BIT with France but in the text of the treaty it has commitments as to promote investments, to provide fair and equitable treatment, to give no less favourable treatment (MFN) and to provide protection and security to investments.

In the South American countries BITs with the United Kingdom, the purposes contained in the preamble of the South American countries BITs with the UK are identical. The purposes stated are: (i) create favourable conditions for greater investments (ii) encouragement and reciprocal protection of investments conducive to stimulation of individual business initiative and (iii) *increase the prosperity* of both states.

In the South American countries BITs with Spain, the purposes contained in these treaties of South American countries with Spain do not change among one another, i.e. that the BITs are signed to: (i) intensify the economic cooperation for the *mutual benefit* of both countries (ii) create favourable conditions for investments (iii) to stimulate initiatives in the field of investments. The only exception is that the Ecuador-Spain BIT does not state to have mutual benefit as a purpose in their BIT.<sup>375</sup>

The South American countries BITs signed with Germany also contain the exact identical purposes among one another, i.e. (i) to intensify economic cooperation between the two States (ii) to create favourable conditions for investments (iii) stimulate private business initiative, and (iv) *increase the prosperity* of the two nations. Only the Germany-Paraguay BIT does not expressly state as a purpose that both states intend to intensify their economic cooperation.

The common feature in the comparative analysis of the purposes contained in South American countries BITs with France, UK, Spain and Germany is that all these BITs expressly state that they are signed, *inter alias*, to increase economic development, prosperity or that it is done for the “mutual benefit” of the parties.

Therefore, what results from the comparative analysis of the purposes contained in South American countries’ BITs is that both the US and the European countries’ BITs state that BITs are signed to have a fair and equitable treatment of investment and also increase prosperity, the FDI, living standards or formulations alike.

Although all the South American countries’ BITs with the US recognize as their objectives, *inter alias*, to promote improve living standards, economic development and stimulate FDI, it is interesting to note that even before their ratification the US Congress was informed that “the

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<sup>375</sup> Spain-Ecuador BIT has a request of termination. For current status see Appendix II.

existence of a BIT alone will not guarantee increased investment.”<sup>376</sup> Therefore, Alvarez and Khamsi have concluded that the “US BIT would not guarantee an increase in incoming FDI flows... US negotiators were quite clear that the US BIT was not designed to promote economic development or employment as such but was intended to achieve one clear purpose: to protect foreign investment.”<sup>377</sup>

Furthermore, another feature that can be extracted of this analysis of the South American BITs signed with the US and European countries is that while both the US and European BITs intend to protect investment declaring that these would increase the economic development of the parties, the European BITs concentrate on improving the investment climate, whereas the US BITs intend to protect investors further aiming to cover obligations that go beyond investment protection.<sup>378</sup> These are standards like health, labour according to international standards and environmental protection, which must be observed by the parties and can be held as mandatory by virtue of the treaty. Also, they have to be taken into account by arbitrators when deciding on investment disputes. The European countries BITs with South American countries do not include these labour, health and environmental standards.

These standards, however, have only been found in more recent BITs. The US-Bolivia BIT, which has entered into force in 2001 (with the 1994 US BIT model), already made reference to labour, health and environmental standards, but only in a restricted manner. It was only in the 2004 US BIT model that these standards were further elaborated and made permanent.

The above mentioned is mainly relevant to us in two regards: Firstly, the test of whether BITs fulfill their objective and secondly, the connection of these aspects to the halt of negotiations at the multilateral level. It can be seen that through BITs, it is possible to introduce standards that go beyond investment (environmental and labour issues), standards that were so difficult to agree to at the multilateral level.

#### **4.3. Expropriation provisions.**

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<sup>376</sup> In regard to the US-Argentina BIT. Hearing of the United States Senate, before the Committee on Foreign Relations, First Session, dated September 10, 1993 Statement of Hon, Daniel K. Tarullo, Assistant Secretary of State for Economic and Business Affairs. Available at: [Bilateral investment treaties with Argentina, Treaty doc. 103-2; Armenia, Treaty doc. 103-11; Bulgaria, Treaty doc. 103-3; Ecuador, Treaty doc. 103-15; Kazakhstan, Treaty doc. 103-12; Kyrgyzstan, Treaty doc. 103-13; Moldova, Treaty doc. 103-14; and Romania, Treaty doc. 102-36 : hearing before the Committee on Foreign Relations, United States Senate, One Hundred Third Congress, first session, September 10, 1993. \(Washington : U.S. G.P.O. : For sale by the U.S. G.P.O., Supt. of Docs., Congressional Sales Office, 1993\)](#) p. 22 (last visited Sep 17, 2012); see also Vandevelde, K. “United States Investment treaties: Policy and Practice” Deventer [Netherlands]. Boston. Kluwer Law and Taxation. 1992

<sup>377</sup> Alvarez, J. and Khamsi, K. “The Argentine Crisis and Foreign Investors: A Glimpse into the Heart of the Investment Regime” Yearbook of International Investment Law & Policy 379. Karl P. Sauvant, ed., 2009. pp. 411-412

<sup>378</sup> Note that the the US is not the pioneer to do this as BITs of Belgium-Luxemburg have always included provisions which observed health, environmental and human rights issues and Norway and Belgium have signed BITs in which environmental and labour standards are included.

Remembering the dilemma of introducing the Hull principle as the rule for the compensation of expropriation at the multilateral level, rejected by developing countries, this section analyses the express wording for the expropriation provisions stated in the South American countries' studied herein.

The comparative analysis of South American countries' BITs, detailed in Appendix V, show that in all South American countries' BITs that were signed with the US, the expropriation provisions include without exception that the payment for expropriations shall be upon payment of 'prompt, adequate and effective compensation'. Therefore, the BITs that South American countries signed with the US contain the Hull principle in full as the way to compensate for expropriations.

In what relates to the EU BITs with South American countries, the considerations are as follows:

In the BITs that France signed with South American countries, all except one contain the American Hull principle. While all the BITs with South American countries state that in case of expropriation there should be "payment of a prompt and adequate compensation...such compensation should be effectively realizable", the France-Paraguay BIT refers to a "just" compensation which was in accordance to international law and did not follow the Hull language. The reason lies in the fact that the France-Paraguay BIT was signed in the 1980, much earlier than when the US started the BIT program with South American countries after 1990. This fact also explains why all other BITs that were signed with France after the 1990s do contain the Hull principle.<sup>379</sup>

In regard to German BITs with these South American countries, the language does not follow the Hull principle but the effect of the provision is similar to the effect of the principle of compensating "prompt, adequate and effectively". The South American countries BITs signed with Germany state that "...compensation should be paid *without delay*...it shall be *effectively realizable and freely transmitted*..."<sup>380</sup> To do the payment of a compensation 'without delay' is to do it promptly; to make it 'effectively realizable and freely transferable' also means that in practice the payment should be adequate and effectively performed.

The UK BITs with South American countries also follow the US Hull principle of a prompt, adequate and effective compensation. The normal and common clause among the UK BITs states: "Investments of investors of either Contracting Party shall not be nationalised, expropriated or subjected to measures having effect equivalent to nationalisation or expropriation (hereinafter referred to as "expropriation") in the territory of the other Contracting

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<sup>379</sup> See Appendix II.

<sup>380</sup> See Appendix V, emphasis added.



Party except for a public purpose related to the internal needs of that Contracting Party on a non-discriminatory basis and against *prompt, adequate and effective compensation*”<sup>381</sup>

However, only the UK BIT with Bolivia has a language more similar to the German BITs, it states “Compensation... shall be made *without delay, be effectively realizable*, and be freely transferable.”<sup>382</sup> In the end, however, the provision has the same effect as that of the Hull principle. The different wording and language in the Bolivia-UK BIT might be explained by the fact that the first BIT that the UK signed with a South American country was with Bolivia, though it has also been entered into force in 1990.<sup>383</sup>

The Spain BITs with South American countries are more diverse. While the Spain BITs with Bolivia, Colombia, Uruguay and Venezuela use the Hull language, the BITs with Argentina, Chile, Ecuador, Paraguay and Peru state that the obligation to compensate is without delay but that it should be adequate (similar effect). However, apart from the Venezuela-Spain BIT, all the Spain BITs omit the requirement of the manner to compensate alleged by the Hull principle, i.e. that the payment having to be ‘effectively’.

All the South American countries’ BITs with the US and the European countries were entered into force after 1990 except that of France-Paraguay BIT. It is not a coincidence that the sole South American BIT that was signed before any liberal and reform processes on South American countries is the one that goes in accordance to international law and not the Hull principle.

The results of the comparative analysis of the expropriation provisions contained in these BITs, however, show that almost all of them include the Hull principle as the way of compensation in case of expropriations, a principle that was contrary to what these South American developing countries were arguing for at the multilateral level on this issue.

#### **4.4. Dispute Settlement Mechanism in BITs.**

All BITs have a clause determining the procedure to follow when a dispute arises. The dispute settlement clauses of BITs, in general determine the following stages:

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<sup>381</sup> Contained similarly in the BITs with Argentina, Chile, Ecuador, Guyana, Paraguay, Peru, Uruguay and Venezuela. See Appendix V, emphasis added.

<sup>382</sup> See Appendix V, emphasis added.

<sup>383</sup> See Appendix II.

<b>Stages</b>	
<b>a) Amicably</b>	<b>NON-JUDICIARY</b>
<b>b) Consultation and Negotiation</b>	
<b>c) Local Courts</b>	<b>JUDICIARY/LEGAL</b>
<b>d) International Arbitration</b>	

It is important to note that the first step is normally to solve the dispute using a non-judicial method (like resolving the dispute amicably, through consultation or negotiation). Only when that does not work, the legal method is used comprehending the stages of submitting the dispute to local courts and/or international arbitration. Thus, submitting the dispute to an international arbitration institution is not necessarily the first recourse in BITs.

However, depending on the type of dispute, the dispute settlement clauses will vary. This is why the settlement of disputes in BITs can be separated into two main categories. The first category comprehends disputes regarding the interpretation and application of the treaty in which the parties of the disputes are the parties of the treaty, i.e. only states. The second category comprehends disputes regarding the investment per se which involve one of the parties (the host state) and the foreign investor or company. Thus, this second category is what allows companies to directly sue the host state.

When the dispute reaches the stage of international arbitration, the international arbitration institution will analyse the dispute using elements of international law: the provisions of the treaty, customary international law, general principles of law, etc.<sup>384</sup> Thus, the international arbitration tribunal is very important as the main enforcer of BITs.

Although some BITs' dispute settlement clauses directly indicate the submission of the dispute to a specific international arbitration institution, others BITs allow the parties to have a choice among arbitration institutions. The most common are the International Centre for Settlement of Investment Disputes (ICSID) or ad hoc arbitration in accordance with the Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL).

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<sup>384</sup> Statute of the International Court of Justice. Article 38.

The differences among the two institutions, ICSID and UNCITRAL, are extensive and they can influence the party's choice. The UNCITRAL has just a guidance of the rules that should be observed by the parties during the arbitration. The whole mechanism lies within the parties' discretion, and they can even modify these rules when they agree.

The UNCITRAL rules allow the parties to constitute an ad hoc arbitration for "any" kind of dispute, including investment disputes, and to choose the arbitrators freely upon their convenience; therefore the costs of the arbitration can be reduced. However, the awards are not public as it is a commercial arbitration. UNCITRAL just provides the rules, the UNCITRAL as an organization is not involved in any counselling, neither legal advice nor interpretation of their rules, even upon the parties' request.

ICSID, on the other hand, has been created as a specialized institution for solving only "foreign investment" disputes. ICSID was created by a multilateral treaty and thus, its arbitration is treaty-based arbitration and its awards are public. Sornarajah (2012), when referring to the comparison among international arbitration institutions, states: "These are not specialist institutions like ICSID, which is dedicated to the arbitration of foreign investment disputes."<sup>385</sup>

ICSID has a much higher level of expertise, the whole body of the institution is already in place for the parties to use it: for example, ICSID provides with a list of experts that can be chosen to act as arbitrators. All of them are very qualified and prominent figures in law, commerce, industry or finance, and there is also the secretariat which facilitates all the administrative work.<sup>386</sup>

ICSID's disputes concern disputes that are between the investors and the contracting host country where the investment is made. For this reason Mortenson (2010) said that the ICSID was intended as "an adaptable vehicle with maximal flexibility for individual states to change their investment policies over time and maximum capacity to satisfy many states' preferences at any single point in time."<sup>387</sup> The caveat that should be given to Mortenson's claim, however, is to point out that the provisions of a BIT allow only the investor to bring an arbitration claim against the host state, and not vice versa.

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<sup>385</sup> Sornarajah, M. "The International Law on Foreign Investment" Cambridge University Press. 3<sup>rd</sup> Edition. 2012. p 286

<sup>386</sup> ICSID Convention, Article 14.

<sup>387</sup> Mortenson, J. "The meaning of investment: ICSID's travaux and the domain of international investment law" Harvard International Law Journal. Vol 51. No.1. 2010. p. 261

The arbitration institutions need jurisdiction to solve the dispute (the parties' consent). This consent is mainly expressed through BITs which have permitted all this mechanism for solving disputes.<sup>388</sup>

I will now provide an overview and a comparative analysis of the dispute settlement clauses of South American countries BITs that refer to the aforementioned two categories.

#### **a) Disputes regarding the Interpretation and Application of BITs.**

Regarding the dispute settlement mechanism for the interpretation and application of the treaty, the US BITs with South American countries differ in their mechanism as compared to EU BITs with the same countries. In most US BITs, the mechanism chosen for resolving these kinds of disputes is consultation, with a direct involvement of the sovereign parties. If the dispute persists, the US BITs establish arbitration as a possibility. The US BITs establish UNCITRAL as the arbitral institution to solve these disputes.<sup>389</sup>

The US-Uruguay BIT is different from the other South American BITs in the sense that it does not have such a distinct separation of disputes.<sup>390</sup> There are some provisions that establish that in case of interpretation both parties have to agree on what they think of as the right interpretation, and that agreement shall be binding for them. Then, there is one whole section and not just a couple of articles that determine the mechanism and procedure for solving the investment disputes.<sup>391</sup>

In EU BITs the position is quite different. When disputes are regarding the interpretation and application of the treaty, it is also stated that only governments shall handle the dispute through diplomatic means and if the dispute is not resolved then there is the obligation of using arbitration. However, no arbitration institution is chosen, instead the parties themselves establish the rules for their arbitration. The clause establishes that the arbitration shall be ad hoc and for appointment of the arbitrators even the President of the International Court of Justice can be summoned to do the appointment, if no agreement is reached.

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<sup>388</sup> From the cases submitted to ICSID, 63% of cases derived from BITs, 20% from contracts between the investor and the host state, and 4% from NAFTA for example. Basis of consent invoked to establish ICSID jurisdiction in cases registered under the ICSID Convention and additional facility rules (To June 30, 2012), available at <https://icsid.worldbank.org/ICSID/FrontServlet?requestType=ICSIDDocRH&actionVal=ShowDocument&icsidOverview=true&language=English> (last visited December 10, 2012)

<sup>389</sup> US-Argentina BIT, Article 6 and 8. US-Bolivia BIT, Article 8 and 10. US-Ecuador BIT, Article 5 and 7.

<sup>390</sup> For the US-Uruguay BIT, the 2004 US BIT model was used. This is a later model than the ones used with other South American BITs, this might explain the difference.

<sup>391</sup> US-Uruguay BIT, Section B, Article 23 and accordingly thereof. This seems to be more in the line of practice of the dispute settlement mechanism found in FTAs, by which for these kinds of disputes the parties maintain the control of them.

These dispositions can be found in Germany's BITs, Spain's BITs and UK's BITs.<sup>392</sup> France's BITs also state that disputes concerning interpretation and application of the treaty shall be solved through diplomatic means but if six months elapse and the dispute subsists, arbitration is the mechanism chosen for solving the disputes. The arbitration rules are established in the clause and in case of not having an agreement on the appointment on the arbitrators the Secretary General of the United Nations shall be summoned to make the appointment.<sup>393</sup>

In the France-Ecuador BIT, as well as in the UK-Ecuador BIT, negotiation and not diplomatic means is provided to solve the dispute, but it still ends up being only the states which have to solve the dispute. As the other EU BITs on this matter, the clause nevertheless remains similar to the others in the sense that arbitration shall be used if the dispute is not solved through negotiation.<sup>394</sup>

This type of mechanism is more in the direction of a typical dispute settlement using arbitration between two countries with the rules of international public law because it is derived from an international public law principle by which only states can handle treaties. No private parties are allowed and only states can solve their differences through a third impartial which is the arbitrator or arbitrators chosen by those same states.

## **b) Investment disputes of BITs.**

Since the investment disputes are the type of disputes that allow a foreign investor to sue the state, these are the ones detailed in Appendix VI. The following reveals the comparative analysis of both US and European countries' BITs with South American countries.

In regard to the investment dispute settlement clauses in US BITs, the only US BITs with a South American country that lists all the stages, namely solving the dispute amicably; by consultation or negotiation; local courts and international arbitration accordingly, is the US-Argentina BIT. However, at the stage when the dispute reaches the local courts, the deadline given to solve the dispute is only 6 months, which in practice, is rather a short time for solving a dispute. This is why the dispute is very likely to end up in arbitration.

In the US BITs with Bolivia and Ecuador, the chance to resolve the dispute amicably is mentioned. In the Bolivian case, if the dispute is not resolved amicably, the parties can choose to

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<sup>392</sup> See for example Germany-Argentina BIT (Article 9); Germany -Bolivia BIT (Article 10); Germany - Ecuador BIT (Article 9); Germany -Uruguay BIT (Article 10); Spain-Argentina BIT (Article 9); Spain -Bolivia BIT (Article 10); Spain -Ecuador BIT (Article 10); Spain -Uruguay BIT (Article 10); UK-Argentina BIT (Article 9) UK -Bolivia BIT (Article 9); UK -Uruguay BIT (Article 9); UK -Ecuador BIT (Article 9) This last one does not state diplomatic means, it establishes negotiations among government and then arbitration if the dispute subsists.

<sup>393</sup> France-Argentina BIT, Article 11. France -Bolivia BIT, Article 11. France -Uruguay BIT, Article 10.

<sup>394</sup> France -Ecuador BIT, Article 12. UK -Ecuador BIT, Article 9: does not state diplomatic means, it establishes negotiations among government and then arbitration if the dispute subsists.

submit the dispute at a local court “or” international arbitration. In the same event, for the Ecuadorian case, the dispute has to be first submitted to the local courts and if in 6 months it is not resolved, only then it can go to international arbitration.

The US-Uruguay BIT is different from the other South American BITs in the sense that it does not have such a distinct separation of disputes.<sup>395</sup> There are some provisions that establish that both parties have to agree on what they think of as the right interpretation, and that agreement shall be binding for them. Then, there is one whole section and not just a couple of articles that determine the mechanism and procedure for solving the investment disputes.<sup>396</sup>

For all the South American BITs with the US, once the dispute has reached the stage of international arbitration, the parties are given the choice of submitting the dispute either to ICSID or UNCITRAL.<sup>397</sup>

On the other hand, in regard to the investment dispute settlement in EU countries’ BITs, in the UK BITs with South American countries, the stage of submitting the dispute to local courts is completely excluded in the UK BITs with Bolivia, Chile, Ecuador and Venezuela. For Ecuador, Guyana, Paraguay, Peru and Venezuela the only mechanism is international arbitration and the institution determined to solve the dispute is ICSID. However, in the UK BITs with Argentina, Bolivia and Uruguay there is a choice between ICSID or UNCITRAL for the international arbitration institution.

Interestingly, in spite of such provisions, the UK BITs with Argentina, Uruguay and Venezuela state that when there is no agreement in regard to the arbitral institutions, the choice by default is UNCITRAL. The UK-Paraguay BIT has the provision that there can be an international claim if the award is not complied with.

Another peculiar fact is in regard to the UK-Uruguay BIT. It expressly states in its dispute settlement clause that even if there is a final decision by a local court on the matter, which manages to comply with the deadline, the foreign investor can nevertheless submit the dispute to international arbitration, if the investor thinks that the decision is unjust.

In regard to Spain BITs with South American countries, they establish that the parties have to comply with the stages of amicable settlement and local courts before reaching international arbitration. When the stage of international arbitration is reached, then there is a choice for

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<sup>395</sup> For the US-Uruguay BIT, the 2004 US BIT model was used. This is a later model than the ones used with other South American BITs, this might explain the difference.

<sup>396</sup> US-Uruguay BIT, Section B, Article 23 and accordingly thereof. This seems to be more in the line of practice of the dispute settlement mechanism found in FTAs, by which for these kinds of disputes the parties maintain the control of them.

<sup>397</sup> Since ICSID is public we can know how many cases are submitted to it, but the UNCITRAL cases, not all of them are publicly available.

submitting the dispute to either ICSID or UNCITRAL. For the Spain-Venezuela BIT the choice of UNCITRAL is only given if ICSID is not available or there is an express choice of the parties.

With the Spain-Uruguay BIT, again, an unjust decision from the local court allows the parties to submit the dispute to international arbitration. Likewise, it is interesting to note that in the Spain-Uruguay BIT the dispute settlement clause states that an international claim can be submitted when the award from the arbitral tribunal is not complied with.

In the South American countries BITs with France, the BITs with Paraguay and Ecuador only provide for one mechanism which is international arbitration at ICSID, no other choice or stage is provided. France's BITs with Bolivia and Venezuela also lacks the possibility of submitting the dispute to local courts. The mechanism provided if the dispute is not resolved amicably, is that then automatically it has to be submitted to international arbitration where the choice of submitting either to ICSID or UNCITRAL is given to Bolivia but no choice but that of ICSID is given to Venezuela. Again, as before, the France-Uruguay BIT allows the possibility of submitting an international claim when the arbitral award is not complied with.

In the South American countries BITs with Germany, the stages of resolving the dispute amicably, through local courts and international arbitration are provided in Germany's BITs with Argentina, Chile, Ecuador and Uruguay.

The Germany BITs with Argentina, Chile, Ecuador and Uruguay state, however, the conditionality of time to submit the dispute, which after the elapse of 18 months and if the dispute subsists it can be taken to international arbitration. Furthermore, the Germany-Uruguay BIT, as the other Uruguayan BITs, states that when the final decision of the local court is unjust, the parties can submit the dispute to international arbitration. Only in this BIT, neither the ICSID nor UNCITRAL are the arbitral institutions of choice, but instead the International Chamber of Commerce (ICC) with headquarters in Paris.

Germany completely excludes the possibility to submit the dispute to local courts in the BITs with Bolivia, Guyana, Paraguay and Venezuela. However, the majority of the South American countries BITs with Germany reflect ICSID as the choice of the arbitral institution to solve the dispute. The exception is given in the BIT with Argentina which has the choice of also using UNCITRAL. However, the default option if no agreement is reached among the parties, still remains ICSID.

#### **- The Difference in Dispute Settlement Clauses between US and EU BITs.**

In regard to the international arbitration institution, the typical investment dispute settlement clause between the US and South American BITs is similar to those of countries in Europe,

insofar as there is an option to submit the dispute to international arbitration institutions. Although in some cases an alternative is given for choosing other arbitration institutions, like for example the International Chamber of commerce (ICC),<sup>398</sup> we see that in the case studies herein, and upon the results of the comparative study the most common arbitration institutions in BITs of South American countries are: the International Centre for Settlement of Investment Disputes (ICSID) or to an ad hoc arbitration in accordance to the rules of the United Nations Commission on International Trade Law (UNCITRAL).

There could be cases where no agreement is reached in regard to the arbitration institution. In these cases, the provisions for choosing an institution in case of non-agreement vary considerably. In the UK BITs with Argentina and Uruguay, when there is no agreement, there is a preferred institution stated by the parties: UNCITRAL. It is expressly mentioned that the parties may agree in writing to modify the rules, a peculiarity that the UNCITRAL rules allows the parties to do. On the other hand, in the Spain BITs with Argentina and Uruguay, as well as in the Germany-Argentina BIT, when there is no agreement on which institution to use, the preferred institution is ICSID.

Regarding disputes concerning interpretation or application of the treaty, the EU countries' BITs establish their own arbitration mechanism but the US BITs establish a preference for UNCITRAL.<sup>399</sup>

The reason why parties may as default choose the UNCITRAL as the preferred institution, or in the case of the US when concerning the "interpretation and application" of the treaty, could be seen as self-interest of the state for the following reason: When the dispute involves the interpretation and application of the treaty, normally it is only sovereign states who handle the interpretation or application of a treaty. At this stage, private parties, like individual investors, companies, or other legal persons other than the States per se, are not involved in such a dispute.

The fact that states choose UNCITRAL for dealing with the treaty's structure, interpretation and execution, can be understood because the UNCITRAL Arbitration Rules have basic and standard rules for international arbitration and are therefore more general. They even provide the parties with the right to change the rules upon agreement. On the other hand when UNCITRAL rules are chosen to solve disputes concerning the "investment" by private parties, i.e. investors, the reason might be an economic interest. Commercial private parties such as transnational companies may prefer to remain anonymous in disputes to protect their commercial image in the public. Their stock value, reputation and clientele could be affected if they did not have a favourable decision.

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<sup>398</sup> This alternative is in the Spain-Paraguay BIT and in the Germany-Uruguay BIT.

<sup>399</sup> See for example Article 8, US-Argentina BIT.



However, the point lies in a grey area, as the publicity of ICSID may also work to a company's advantage. In cases submitted to ICSID, in which a favourable decision was awarded to the company, companies can use this fact to their benefit since they can achieve a better reputation.<sup>400</sup> Allee and Peinhardt (2010) have claimed that in practice companies prefer to have ICSID because they have less transaction costs when dealing with a dispute that arises from a foreign environment with different language, culture, etc.<sup>401</sup> Indeed, the centre and its facilities in regard to these difficulties do provide an advantage. The investor's decision to use ICSID can be based upon the institution's experience with the foreign disputes and their jurisprudence over time.<sup>402</sup>

In regard to the difference among the investment dispute settlement clauses between US and EU BITs, one of the differences can be found in the fact that some European countries' BITs express that when an arbitral award is not complied with, an international claim can be brought against that home country. The US BITs do not mention this possibility.

Another difference is that US BITs also have something that European countries' BITs do not have for solving investment disputes. The US BITs has an extra non-judiciary stage, that of "Consultations or Negotiations". This extra step, however, can be an advantage or disadvantage depending on the parties' perspective. From the claimant's perspective (the investor), having to deal with consultation and negotiations with the host state, when the relations with the host country are already not good, could be a burden. However, depending on the influence and power of the investor in the country, it might also work to the investor's benefit.

In the same vein, from the host country's perspective the advantage might be that the dispute can be settled before entering a costly arbitration procedure. However, the host country can also be vulnerable in the negotiation depending on the investor's influence in the country and its relation

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<sup>400</sup> See however, the comments about reputation effects on developing countries in Chapter VI and Allee, T. and Peinhardt, C. "Contingent Credibility: The Reputational Effects of Investment Treaty Disputes on Foreign Direct Investment" International Organization. Volume 65. Issue 3. 2011.

<sup>401</sup> See Allee, T. and Peinhardt, C. "Delegating Differences: Bilateral Investment Treaties and Bargaining Over Dispute Resolutions Provisions" International Studies, 54. 2010. p 3

<sup>402</sup> The fact that ICSID was created especially for solving foreign investment disputes and that its practice has shown to be favourable to the home country and their investors when solving such disputes, are factors that can be strong indicators that investors will keep using ICSID to solve foreign investments disputes. On this point, although the UNCTAD 2005 Report stated that "Of forty-one cases in which the award was publicly known, the state had won in nineteen, or forty-six percent" one could argue that it is favourable to investors in the sense that investors can submit to ICSID a dispute which consist on the revision of national policies of a host state that affected their investment, which will not be accepted under domestic law. Some of the jurisprudence reveals the broad interpretation on jurisdiction that ICSID has had regarding these issues. Furthermore, once the dispute is submitted, the state has to bear the costs. ICSID awards, when favourable for a state never fully compensates the expenses of the state, it can only exempt the state from liability, contrary to when an award is favourable for an investor, which involves payment of damages worth millions of dollars. UNCTAD/WEB/ITE/IIT/2005/1 (Aug. 30, 2005), available at [http://www.unctad.org/sections/dite\\_dir/docs/webiteit20051\\_en.pdf](http://www.unctad.org/sections/dite_dir/docs/webiteit20051_en.pdf)

to the home country. Although the developing country might not depend on the foreign investor, it might very well depend on the country of which the investor is a national.

In conclusion, this empirical and comparative analysis of South American BITs with the US and European countries reveal what the parties really agreed to. It shows the preferences and interests that were put into ink in BITs. However, the analysis of the BITs' structure and the literal meaning also sheds some light on their purpose and effect of the provisions on the parties.

What was agreed to be the scope of application of BITs shows how a broad definition of investment was taken. By including under the umbrella of investment all kinds of investment-related disputes it takes away sovereignty of developing countries because once the disputes are given the label of investment disputes, they are solved by an international arbitration institution and not the judiciary of the host country where the investment had been made. Mortenson argued that there was an option for developing countries to opt out of such a scheme. Then the question remains: why did they not do it?

The BITs preambles mention, as BITs purposes, that these treaties are signed to promote and increase the FDI and economic development. This could be said to be the parties' belief when taking such an action. However, although the treaty stated this objective, the US when submitting the US-Argentina BIT for its ratification knew the problematic that BITs alone will not increase FDI, they signed it under those terms anyhow. Furthermore, the purposes of BITs show that there are issues that go beyond investment like environmental and labour issues. Once in the BIT preamble, and due to international law, these standards become enforceable if an interpretation of the treaty is needed. These are the very same standards that were not agreed upon by developing countries at the multilateral level.

In the same vein, the expropriation provisions in the studied South American BITs have shown how developing countries have accepted the Hull principle, which was also so forcefully opposed at the multilateral level.

The comparative analysis of the dispute settlement clauses, especially those regarding to investment disputes in which the investors can directly sue the state, show that the agreement in many BITs is firstly to exhaust local remedies before submitting the dispute to international arbitration. However, the clauses also express some conditionalities by which the dispute is very likely to end up before an international arbitration institution. Furthermore, the dispute settlement clauses show that there are cases where there are safety measures for the claimant (investor) through the home state, for example, by adding the 'consultation and negotiation' stage in the case of the US and by allowing an international claim in certain cases by some European countries. Both scenarios accentuate the asymmetries between the parties.

Therefore, the utility of the results contained in this chapter relates to the assessment of theories regarding why developing countries have signed BITs. The results are evidence that in spite of the intellectual debates on foreign investment at multilateral level, through the bilateral way, it has been possible to create a framework that did not reflect the developing countries interests. Instead, what became the rules for the framework were the preferences of developed countries on the central issues that were debated. Again, the main question remains why? The next chapter illustrates the different theories that intended to answer this question but I also remark what is lacking in them.

## **CHAPTER V: Why have South American countries signed BITs?**

South American countries fought at multilateral level to make foreign investments be governed by their local laws and to make their local courts the ones with jurisdiction when disputes concerning foreign investment arose. However, South American countries signed BITs which contain provisions contrary to this. BITs contain clauses establishing that for compensations for expropriation, the Hull principle applies and that in case of disputes, the disputes pertaining to foreign investment will be detached from domestic courts. And so it is that under these assumptions the framework for international investments resulted from the signature of BITs which contained the developed countries preferred provisions in the debate about the rules of foreign investment.

These BITs, as treaties and the provisions contained in them, are part of international law which countries have to comply with. With the existence of bilateral investment treaties, governments of home countries have provided security and gave the necessary juridical protection to their investors when investing in a host country. For developing countries however, these BITs and the changes they had to implement to fit the framework, can be doubted to have contributed to their development: the reforms have not resulted an increase in foreign direct investments in developing countries, and indeed, BITs have created further costs for developing countries. Thus, the current framework is arguably extremely onerous for developing countries but they have agreed to it anyhow. The greatest question is: Why?

### **5.1. Governments' intention and reasons for entering BITs into force.**

Scholars who have paid attention to the history of foreign investments have discovered something they consider an immense paradox.<sup>403</sup> The alleged paradox consists in the fact that when international investments were being regulated at the multilateral level, developing countries fought to have provisions according to what was beneficial for them. While even international law was favoring their positions in the area of international investments,<sup>404</sup> when signing BITs, developing countries agreed to provisions which surpassed or contradicted what they had previously achieved at multilateral level.

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<sup>403</sup> Express mention of a paradox, after considering the history of BITs in Guzman, A.T. "Why LDCs sign treaties which hurt them: Explaining the Popularity of BITs" *Virginia Journal of International Law*. 1998 and Kaushal, A. "Revisiting History: How the Past Matters" *Harvard International Law Journal*. Vol 50 Issue 2. 2009.

<sup>404</sup> There was jurisprudence from international tribunals and UN resolutions which favoured developing countries because they established that compensation for expropriations should be fair or appropriate, in the case of the latter, and that foreign investment disputes should be submitted to local courts and decided upon local law. See Chapter II.

Kaushal (2009) said that it was a paradoxical behavior of developing countries to have a UN resolution -referring to the 1974 Charter- that gave developing countries full control over foreign investment in their territories, and in spite of this, give away this sovereignty through BITs.<sup>405</sup>

Sornarajah (1986), Salacuse and Sullivan (2005), Kaushal (2009) and Kononov (2011) have argued that possibly because of all the confusion of international laws and dispersed regulation of international investment, the contracting parties of BITs, through them, wanted to clarify these rules.<sup>406</sup>

However, those trying to explain the alleged paradox, on the one hand, leaned towards the argument that they were signed because of the expected mutual benefits and increase in FDI.<sup>407</sup> Another argument has been that this seemingly contradictory behavior is explained by the increased competition among developing countries for FDI from developed countries.<sup>408</sup> Herein below some considerations on both arguments.

### **- Benefits?**

The main answer given in the scholarship as for why countries sign BITs is that BITs entail a benefit for the contracting parties. It has been argued that because of the desire of developing countries to attract foreign investors, they have liberalized their markets in order to increase their FDI.<sup>409</sup> Ergo, that is expressly established as one of the purposes in all BITs.<sup>410</sup> Other purposes stated in South American BITs are: to have mutual benefit,<sup>411</sup> to increase cooperation and

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<sup>405</sup> Kaushal, A. "Revisiting History: How the Past Matters" *Harvard International Law Journal*. Vol 50 Issue 2. 2009.

<sup>406</sup> See Sornarajah, M. "State Responsibility and Bilateral Investment Treaties" *Journal of World Trade Law*. Vol.20. 1986; Salacuse, J. and Sullivan, N. "Do BITs Really Work?: An Evaluation of Bilateral Investment Treaties and Their Grand Bargain" 46 *Harvard International Law Journal* 67 2005. p 76; Kaushal, A. "Revisiting History: How the Past Matters" *Harvard International Law Journal*. Vol 50 Issue 2. 2009; and Kononov, O. "International Investment Law. Is it Time to Change the Traditional BIT System?" *Czech Yearbook of International Law*. 2011.

<sup>407</sup> See Dolzer, R. "New Foundations of the law of Alien Property" 75 *American Journal of International Law* 1981. p.567 and Vandeveld, K. "The Economics of Bilateral Investment Treaties" 41 *Harvard International Law Journal* 469 2000. p.484; see also as example US BITs with Argentina, Bolivia, Ecuador and Uruguay which mention in their preamble or established as the purposes for the bilateral investment relationship, inter alia, to have mutual benefit; to increase economic development; to increase prosperity in both countries, and even to improve the living standards of both parties, in Appendix IV.

<sup>408</sup> See Guzman, A.T. "Why LDCs sign treaties which hurt them: Explaining the Popularity of BITs" *Virginia Journal of International Law*. 1998; see also Elkins, Z., Guzman, A.T. and Simmons, B. "Competing for Capital: The Diffusion of Bilateral Investment Treaties, 1960-2000" *International Organization* 60, 2006.

<sup>409</sup> See for example UNCTAD, *Bilateral Investment Treaties in the Mid-1990s*. U.N. Doc. UNCTAD/ITE/IIT/7 (1998) p.145; Vandeveld, K. "A Brief History of International Investment Agreements" *University of California. Davis Journal of International Law and Policy* .Vol.12. 2005–2006; Salacuse, J. and Sullivan, N. "Do BITs Really Work?: An Evaluation of Bilateral Investment Treaties and Their Grand Bargain" 46 *Harvard International Law Journal* 67 2005; and Neumayer, E. and Spess, L. "Do Bilateral Investment Treaties increase foreign direct investment in developing countries" *World Development* 33 (10) 2005.

<sup>410</sup> In US and French BITs with South American countries it states as purpose "To stimulate flow of capital"; in BITs of Spain, UK and Germany it states as purpose "To stimulate the individual private business initiative in this field."

<sup>411</sup> BITs with Spain. See Appendix IV.

economic development,<sup>412</sup> to increase prosperity in both countries,<sup>413</sup> and even to improve the living standards of both parties.<sup>414</sup>

Before the establishment of BITs, it was thought that developing countries would immensely benefit from BITs. Dolzer (1981) in particular has claimed that developing countries enjoy special benefits with BITs.<sup>415</sup> This might arise from seeing developing countries as countries of a weak economic standing point, struggling with their democratic institutions, political and financial instability, social crisis, corruption and poverty, issues that would amount to consider them the places least likely to be chosen for a foreign investment.

Kaushal (2009) argues that the grand bargain of BITs is “the promise of protection in exchange for the prospect of more investment.”<sup>416</sup> As we have seen the purposes of BITs are in accordance with this belief. Schneiderman (2000) has mentioned that developed countries considered important to secure FDIs in agreements because FDIs were a reason not only to overcome trade restrictions to have access to natural resources but that it was also a way for firms to get into the markets and benefit from them.<sup>417</sup>

Vandevelde (2000) also addressed the theoretical debate on the issue. In his work, he analyzed the issue from a micro and macro-economic perspective. In the micro-economic perspective, he claims that under the liberal model, the investor keeps the control of their foreign investment, so FDI does not involve movement of capital but only a shift in control. Under the interventionist model, the state keeps control by having, for example, trade restrictions, so that companies would establish themselves locally or by giving investment incentives.<sup>418</sup>

In the macro-economic perspective, the liberal model establishes that when capital flows freely, the productivity would be at its maximum. The interventionist model requires state intervention to allocate the distribution of wealth of foreign investments, and this affects developing countries. “For developing countries, the real goal is often development, not merely increased productivity, and liberalism promises only the latter.”<sup>419</sup>

However, departing from the theoretical debate and arguably, more importantly for the subject, there have been empirical studies focusing on proving an answer to whether BITs increase the FDI of developing countries or not. I will discuss them in a chronological order.

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<sup>412</sup> BITs with the US, France and Germany. See Appendix IV.

<sup>413</sup> UK and Germany BITs. See Appendix IV.

<sup>414</sup> US BITs with Argentina, Bolivia, Ecuador and Uruguay. See Appendix IV.

<sup>415</sup> Dolzer, R. “New Foundations of the law of Alien Property” 75 AM J.INT’L 1981. p. 567

<sup>416</sup> Kaushal, A. “Revisiting History: How the Past Matters” Harvard International Law Journal. Vol 50 Issue 2. 2009.

<sup>417</sup> See discussion with quote of Schwanen (1996) in Schneiderman, D. “Investment Rules and the New Constitutionalism”. Law and Social Inquiry, Vol 25, No. 3. 2000. p. 759

<sup>418</sup> Vandevelde, K. “The Economics of Bilateral Investment Treaties” 41 Harv. Int’l L. J. 469 2000. p. 469

<sup>419</sup> *ibid* p. 484

The 1988 UNCTAD Report stated that there was no “direct linkage between the adoption of those treaties and the flow of investment to developing countries.”<sup>420</sup> The 1998 UNCTAD Report concluded that it is “unreasonable to expect that any individual factor, let alone a BIT, could be isolated and “credited” with a decisive impact on the size or increase of FDI flows.”<sup>421</sup>

The 1998 UNCTAD Report used an empirical study of 200 BITs between developed countries and developing countries and countries in transition, the report indicated that there is “*a very weak association between the signing of BITs and absolute or relative changes in FDI flows....When the other independent variables are added to the analysis they become important as FDI determinants (market size is especially important), and BITs lose almost all significance. The overall conclusion is that BITs appear to play, at best, a minor and secondary role in influencing increases in FDI flows...Thus, it would be misleading to suggest that the greater the number of BITs a host country concludes, the higher FDI flows it can expect.*”<sup>422</sup>(my highlights)

In 2003, the World Bank also made a study on this issue and concluded that FDIs are not increased by BITs. The World Bank report refers to Hallward-Driemeier’s (2003) empirical study. Hallward-Driemeier’s study focused on the FDI outflows from 20 OECD countries into 31 developing countries during the years 1980 until 2000 also because “the vast majority of FDI inflows into developing countries originate from OECD countries.”<sup>423</sup>

Her variables included the World Bank’s World Development Indicators: size of the host country, GDP per capita, host country macro-economic stability, among others. In her study she added to the latter, what she calls two dummy variables. The first “to capture the effects of the enormous political and economic changes in Eastern Europe and the former Soviet Union in the 1990s relative to the 1980s”<sup>424</sup> and the other dummy used was to include NAFTA. Although the latter was not a BIT, it made Mexico an investment destination.

The findings showed that BITs do not attract FDI. Furthermore, she also made the same point that the UNCTAD report had made, namely that the FDI flows went only into developed countries: “It should be noted that the rights secured in a BIT are reciprocal; investors from country A investing in B are the same as those given to investors from country B investing in

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<sup>420</sup> UNCTAD, Transnational Corporations in World Development: Trends and Prospects, U.N. Doc. ST/CTC/89 (1988) p. 336. Available at <http://unctc.unctad.org/aspx/allDocsYear.aspx> (last visited February 13, 2013)

<sup>421</sup> UNCTAD, Bilateral Investment Treaties in the Mid-1990s. U.N. Doc. UNCTAD/ITE/IIT/7 (1998) p.141

<sup>422</sup> UNCTAD, Bilateral Investment Treaties in the Mid-1990s. U.N. Doc. UNCTAD/ITE/IIT/7 (1998) p. 141 and 142; see also the mention of this report in Kaushal, A. “Revisiting History: How the Past Matters” Harvard International Law Journal. Vol 50 Issue 2. 2009. p. 509 and in Hallward-Driemeier, M. “Do Bilateral Investment Treaties attract FDI? Only a bit...and they could bite” World Bank DECRG 2003.

<sup>423</sup> Hallward-Driemeier, M. “Do Bilateral Investment Treaties attract FDI? Only a bit...and they could bite” World Bank DECRG 2003 p. 12

<sup>424</sup> *ibid* p. 13

country A. However, in practice there is usually tremendous asymmetry as almost all the FDI flows covered by BITs are in fact in one direction.”<sup>425</sup>

Hallward-Driemeier concluded that BITs did not increase developing countries’ FDIs, and therefore, developing countries have had no benefits with BITs. She concluded: “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.”<sup>426</sup>

In 2004, Egger and Pfaffermayr, using the outward FDI of OECD countries into both OECD and non OECD economies, concluded that ratified BITs had an impact on FDIs.<sup>427</sup> In 2005 there were three more empirical studies on FDIs and BITs. Tobin and Rose-Ackermann (2005) in their study concluded that they found very weak positive relationship between BITs and FDI.<sup>428</sup> Salacuse and Sullivan (2005) found positive results but only for US BITs<sup>429</sup> and Neumayer and Spess (2005) also arrived at a contrary opinion and claimed a positive influence on FDI for developing countries, claiming that the reason why developing countries sign BITs is to attract foreign direct investment.<sup>430</sup>

Neumayer and Spess’ conclusion states that signing BITs sends out a signal to investors. The signal is that the developing country takes the protection of foreign investment seriously.<sup>431</sup> Furthermore, they state: “Countries with a higher cumulative number of BITs, richer countries with fast-growing economies and larger populations receive more FDI. So do countries that are more intensive in natural resource extraction, that are members of the WTO and have a higher number of trade agreements with developed countries.”<sup>432</sup>

Neumayer and Spess praised the fact that in 2003 the FDI level rose to 31% in the countries that they have analyzed. The problem lies in considering whether such increase was indeed caused by BITs. Their research design treats absolute FDI, outflows and inflows of FDIs. They consider the elements of institutional quality such as political constraints, socio-economic conditions (ethnic

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<sup>425</sup> *ibid* p. 8

<sup>426</sup> *ibid* p. 22

<sup>427</sup> Egger, P. and Pfaffermayr, M. “The impact of bilateral investment treaties on foreign direct investment” *Journal of Comparative Economics* 32. 2004. p. 790

<sup>428</sup> Tobin, J. Rose-Ackerman, S. “Foreign Direct Investment and the Business Environment in Developing countries: the impact of Bilateral Investment Treaties” Yale Law School Center for Law, Economics and Public Policy Research Paper No. 293. 2005

<sup>429</sup> Salacuse, J.W. and Sullivan, N. “Do BITs Really Work?: An Evaluation of Bilateral Investment Treaties and Their Grand Bargain” *Harvard International Law Journal*, 46, 67-130. 2005

<sup>430</sup> Neumayer, E. and Spess, L. “Do Bilateral Investment Treaties increase foreign direct investment in developing countries” *World Development* 33 (10) 2005 p. 3

<sup>431</sup> *ibid* p. 12

<sup>432</sup> *ibid* p. 21



tensions, military and religious influence in politics); and they used an International Country Risk Guide and an Investment Profile Index that discloses the levels of risk in the country.

In contrast to the study of Hallward-Dreimeyer (2003) which analysed 31 developing countries and 537 country pairs, Neumayer and Spess (2005) have used a specification model which includes the analysis of BITs between the period of 1970 and 2001, which included 119 countries, and therefore claimed that it is a sample much broader than those used in the other studies.

Swenson (2005) commented on these empirical studies: "While Salacuse and Sullivan, and Neumayer and Spess find evidence that BITs appeared to facilitate subsequent foreign investment flows, work based on a smaller set of host countries conducted by Hallward-Diremeier and Tobin and Rose-Ackerman comes to the opposite conclusion."<sup>433</sup>

Swenson then embarked on the task of using more developing countries, and found that when a country signs a BIT the FDI flows rises immediately. She claimed that it is likely that this is a reassurance for investors who are more likely to invest in countries with BITs. She herself, however, mentions two problems in her analysis, one of which is the timing and the other is the partner identification.

In her argument she claims that investors may invest after signing BITs but others may not, considering the lack of provisions needed for the protection of their investment. Referring to the study of Tobin and Rose Ackerman, she says that the FDI flow would also depend on the partner, a BIT with the US would have more FDI than one with Belgium for example because the US has a bigger part of overall foreign investments.<sup>434</sup>

In 2006 there was another empirical study. Sokchea (2006) made a study considering BITs from 1984 to 2002. She found positive results in stating that BITs did increase the FDI of developing countries. This study, however, only analyzed 10 Asian countries.<sup>435</sup> In the same year, Elkin, Guzman and Simmons, referring to Neumayer and Spess' study, stated that it cannot be predicted that BITs increase FDI.<sup>436</sup>

Desbordes and Vicard (2007) made an empirical study to determine the FDI return for the investor. Seeking to achieve an empirical study comprehending interstate political relations, bilateral investment treaties and FDI they analyzed the impact of FDI with 30 OECD countries and 62 OECD and non-OECD countries during 1991-2000.

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<sup>433</sup> Swenson, D. "Why do developing countries sign BITs?" *Journal of International Law and Policy* Vol 12:131. 2005. p. 146

<sup>434</sup> *ibid* p. 146-148

<sup>435</sup> See Sokchea, K. "Bilateral Investment Treaties, Political Risk, and Foreign Direct Investment" *International University of Japan. International Development Program*. 2006

<sup>436</sup> Elkins, Z., Guzman, A. Simmons, B. "Competing for Capital: The Diffusion of Bilateral Investment Treaties, 1960-2000" *International Organization* 60, Fall 2006 p. 827

They concluded that BIT is a signal for institutional credibility and that it raises FDI but that nevertheless the quality of the institutions and relations are important factors that can alter it. Desbordes and Vicard state: "...the entry into force of a BIT increases bilateral FDI stocks by 16%, on average, a lower impact than the one found in previous studies. The magnitude of this effect nevertheless significantly differs according to the quality of both host country domestic institutions and interstate political relations."<sup>437</sup>

Büthe and Milner (2008) started their study with the premise that indeed FDI have increased thanks to transnational companies (TNC) investments, but that it varies. They try to explain this variation, analysing the political factors and the FDI flows into 122 developing countries. They consider not just BITs but also Preferential Trade Agreements and the inclusion of a country in the WTO. They conclude that these agreements may indeed increase FDIs because they have also political effects showing the commitment of a country to a liberal market and in that way the international political institutions have an effect on FDIs.

Yackee (2008), on the other hand, also includes in his model other agreements apart from BITs. Yackee included the NAFTA and Friendship, Navigation and Commerce treaties because they contained similar investor-disputes clauses such as BITs. He made a model including weak and strong treaties which depended on the investor dispute clause. Yackee points out that the former study of Neumayer and Spess did not use the lagged dependent variable (LDV)<sup>438</sup> and "its omission would bias model results."<sup>439</sup> He concluded that "the baseline results provide little support for the notion that BITs promote investments..."<sup>440</sup>

Yackee's study also showed the result of a statistic made to find out whether investors know about BITs and whether they are a determinant factor for them to invest in a country. The statistics showed negative results, and furthermore that most investors are unaware of the international legal protection they have.<sup>441</sup> This is important because it conflicts for example with the findings of Swenson (2005).

In 2010 Tobin and Rose-Ackerman made another study and they reached a different conclusion from that of their previous study. Tobin and Rose-Ackerman (2010) arrive at the position that BITs do increase FDI but that the FDI of some countries may naturally fall because of the

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<sup>437</sup> Desbordes, R. and Vicard, V. "Foreign Direct Investment and Bilateral Investment Treaties, an International Political Perspective" CES Working Paper 2007. p. 18

<sup>438</sup> The Dictionary of Statistics defines LDV as "A variable constructed from a time-series dependent variable, where the values in the new (lagged) variable are the values on the original variable held back by one or more time points." In Vogt, Paul "Dictionary of Statistics and Methodology. A Non-technical guide for the Social Sciences" 2<sup>nd</sup> Ed. Sage Publications. 2009. p. 199

<sup>439</sup> Yackee, J. "Bilateral Investment Treaties, Credible Commitment, and the Rule of (International) Law: Do BITs Promote Foreign Direct Investment?" Law & Society Review, Vol. 42, No. 4. 2008. p. 818

<sup>440</sup> *ibid* p. 819

<sup>441</sup> See also a later study in Yackee, Jason W. "Do Bilateral Investment Treaties Promote Foreign Direct Investment? Some Hints from Alternative Evidence" Virginia Journal of International Law Association. 2010

competition that exist among developing countries who have BITs. Their analysis covered the period of 1984-2007 and included 97 countries.

They further claimed, taking into consideration the institutions of developing countries, that BITs are not the problem, it is developing countries' institutions which do not provide a good investment environment and BITs cannot be a substitute for weak investment environments.<sup>442</sup>

On the other hand, Haftel (2010) in his empirical studies concludes that "BITs have the expected positive effect on FDI inflows, but only to the extent that they are in force."<sup>443</sup> However, his analysis only comprehended the FDI coming from American investments into developing countries.

Finally, the 2011 UNCTAD Report, regarding international investment agreements (IIA) in general, concluded: "These findings began a number of questions with regard to the effectiveness of IIAs in terms of generating investment flows and promoting development gains (UNCTAD, 2009B). For example, the existence of considerable FDI stocks in the absence of post-establishment treaty coverage suggests that for some investment relationships, IIAs fall short of being a determining factor for investment."<sup>444</sup>

As one can see, at an empirical level, the results are inconclusive.<sup>445</sup> The studies are divided between those who found a positive influence of FDI because of BITs and those who did not. All of the international organizations studies, however, showed a negative result or showed no connection between increase in FDI and BITs.

The UN studies provided the information that in all its analysis the result is negative, i.e. that BITs do not increase FDI of developing countries or that there is no direct linkage between BITs and FDI. The World Bank report (Hallward-Driemeier study) established the information that BITs have not increased FDI to signatory developing countries. BITs do not increase flows of investment to developing countries and even more, although rights and duties should be reciprocal in BITs, in practice there is a huge asymmetry because FDI are only in one direction.<sup>446</sup>

The different results of Tobin and Rose-Ackerman could be explained because in their later study they considered two new factors for justifying that there was a positive influence between BITs and FDI. The first one is the effectiveness of domestic institutions; this however, would

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<sup>442</sup> Tobin, J., Rose-Ackerman, S. "When BITs have some bite: The political-economic environment for bilateral investment treaties" *Rev. Int. Organ* (2011) 6:1-32. 2010

<sup>443</sup> Haftel, Y. "Ratification counts: US investment treaties and FDI flows into developing countries". *Review of International Political Economy*. Volume 17. Issue 2. 2010

<sup>444</sup> UNCTAD World Investment Report. 2011. p. 102. At [http://unctad.org/en/docs/wir2011\\_embargoed\\_en.pdf](http://unctad.org/en/docs/wir2011_embargoed_en.pdf) (last visited February 13, 2013)

<sup>445</sup> The claim only refers to studies that go up to the year 2012.

<sup>446</sup> Hallward-Driemeier, M. "Do Bilateral Investment Treaties attract FDI? Only a bit...and they could bite" *World Bank DECRG* 2003. p. 8

only work where there is “an interaction with features of the political and economic environment of host countries.”<sup>447</sup> The second one is the coverage of BITs; the latter being affected by the competition among countries. They considered many variables (for eg. from market size, trade openness to political stability, inter alias)

Although Tobin and Rose-Ackerman found positive results in their latest study regarding the effects of BITs with FDI flows, contrary to their previous study, the UN and Hallward-Driemeier studies, in the findings also show that the FDI inflows fall, so in other words, the fact remains that there is not so much FDI, the difference lies in that the reason for them is the competition among countries.

However, the most recent UNCTAD Report of 2011 again sustained the affirmations of the original UN studies performed in the 1990s, which did not find that BITs had an influence on FDI.

For this reason Supnik (2009) writes: “Signing BITs “may help legitimize a developing country in the international arena and, thus, attract increased levels of foreign direct investment. There is no definite proof, however, that the existence of a BIT increases investment flows.”<sup>448</sup>

The most significant argument for a direct proportionality between BITs and FDI, however, is what in practice is happening in South America. The latest UNCTAD Chart on FDI flows, direction inward, shows Brazil at the top of the list with the highest FDI in Latin America. They received 4.8506 US\$ billion dollars in 2010 in the form of FDIs and yet it has not signed one single BIT with developed countries.<sup>449</sup>

In this same line of thought, it is worth mentioning that Yackee (2010) performed an empirical analysis on companies’ legal counsels to assess the awareness of a BIT protection. His results showed that BITs are neither taken into account by companies for their decisions to invest in a developing country nor by political risk insurers.<sup>450</sup>

The results of analysis like the aforementioned are important because they suggest rather strongly that in the end developing countries do not get the claimed benefits from a BIT. These issues are worth noticing because there could be a misrepresentation to developing companies

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<sup>447</sup> Tobin, J, Rose-Ackerman, S “When BITs have some bite: The political-economic environment for bilateral investment treaties” Rev. Int. Organ (2011) 6:1-32. 2010. p. 9

<sup>448</sup> Supnik, K. “Making Amends: Amending the ICSID Convention to Reconcile competing interests in International Investment Law” Duke law Journal Vol 59. 2009 Pg 350 analysing Ryan, C “Meeting expectations: Assessing the Long-Term Legitimacy and Stability of International Investment Law” 29 U.P.A. J. Int’l L. 2008 and Franck, S. “Foreign Direct Investment, Investment Treaty Arbitration, and the Rule of Law, 19 Pac Mc George Global Bus & Dev. L.J. 2007.

<sup>449</sup> UNCTAD Inward foreign direct investment flow. Available at <http://unctadstat.unctad.org/TableViewer/tableView.aspx> (last visited February 13, 2013)

<sup>450</sup> Yackee, J.W. “Do Bilateral Investment Treaties Promote Foreign Direct Investment? Some Hints from Alternative Evidence” Virginia Journal of International Law Association. 2010.

when signing BITs because of false beliefs induced by one of the parties so that the other signs the treaty. And indeed, these studies already have consequences: One of the justifications of Ecuador when denouncing and terminating some of their BITs was that FDI increase was not significant and said that these treaties are an evident failure with regard to their purpose to attract investments.<sup>451</sup>

### **- Competition?**

Guzman (1998) argues that the explanation of the alleged paradox of developing countries signing less beneficial rules through BITs than those they had at the multilateral level, can be found in a theory of competition. Developing countries accepted certain actions (like the provisions of BITs) at bilateral level, when acting alone and in competition with their peers, but when in a group, developing countries contested the issues that were in a BIT. Guzman (1998), in his article entitled “Why LDCs (least developed countries) sign treaties which hurt them: Explaining the Popularity of BITs” says that developing countries are in the prisoner’s dilemma.

The logic to reach his conclusion is that facing the nationalization of many foreign investments, the application of the Hull principle (prompt, adequate and effective compensation for expropriations) was mainly opposed by developing countries who believed in their domestic adjudicative to solve any problem arising from foreign investments according to their laws, and their judiciary to be the ones to decide how compensation for expropriations should be made.

The contradiction comes when facing this situation, developing countries nevertheless signed BITs, which not only extended the protection to foreign investors beyond of what international law had provided until then but also included the Hull principle.

According to Guzman developing countries were in a prisoner’s dilemma because while it is good for developing countries to reject the Hull principle as a group, individually they are better off if they leave the group by signing BITs because then they would be ahead in the competition among themselves.<sup>452</sup>

In the same vein, Elkins, Guzman and Simmons (2006) argue that BITs are signed because developing countries compete with each other for foreign direct investment. They claim that BITs are nothing more than a phenomenon that emerged from the international competition among developing countries.

Furthermore, they argue that BITs are an initiative from developing countries in the sense that they sign BITs because for them is a “take it or leave it” deal: They choose to do it because of

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<sup>451</sup> Minutes of the Ecuadorian Parliament. No. 179 regarding the termination of the Ecuador -Germany BIT and the UK-Ecuador BIT.

<sup>452</sup> Guzman, A.T. “Why LDCs sign treaties which hurt them: Explaining the Popularity of BITs” VA.J. INT’L L. 1998 p. 667

the fear of being left behind in the competition race with other host countries (developing countries), and so they accept the terms of the BITs as they are.<sup>453</sup>

To prove their theory, the authors made an empirical study which showed that there were clusters which are the high peak when countries signed BITs. Elkins, Guzman and Simmons write that if theories of power were right, according to which developed countries determine the agenda, then the empirical results should show only developed countries clusters. In their findings however, developed countries signed BITs in stretched periods of time and the clusters were found among developing countries.

However, this empirical analysis can be criticized in the following ways: Firstly, by trying to explain their empirical evidence using mathematics, they attempt to make the issue be explained under a natural science rationale whereas political science is a social science, dynamic and constantly changing through time. Susan Strange when commenting on how difficult is to achieve a real theory in social science, writes: “Natural science aspires to predict...Social science can never confidently predict because the irrational factors involved in human relations are too numerous, and the permutations and combinations of them are even more numerous.”<sup>454</sup>

Secondly, when Elkins, Guzman and Simmons analyze the empirical data, they consider two alternative diffusion mechanisms (policy diffusion towards BITs considering learning and coercion). The learning diffusion mechanism is that host countries sign BITs because of the benefits, and they refer specifically to the increase of FDI. On this point they write: “Our model does not assume that policymakers have Herculean powers of observation or analysis; nor does it treat them as remedial statisticians. We assume simply that policy makers assess the success of countries in attracting investment over recent years given the countries’ level of development and their number of treaties in force during this time.”<sup>455</sup>

As has been pointed out above, the empirical analysis on the increase of FDI is inconclusive and therefore the connection between BITs and increase in FDI cannot be taken as an assumption. Elkins, Guzman and Simmons are just taking an assumption that investments come to the country based on the level of development of the developing country and the number of treaties in force. They say if their theory is correct then these treaties are going to be prevalent in developing countries which are most competitive.<sup>456</sup>

Thirdly, Elkins, Guzman and Simmons used for their analysis a US prototype BIT model and not real BITs with developing countries. A model is just a template, a standardized BIT which has not been signed and the variations contained in each signed BIT are very important. One has to

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<sup>453</sup> Elkins, Z., Guzman, A. and Simmons, B. “Competing for Capital: The Diffusion of Bilateral Investment Treaties, 1960-2000” *International Organization* 60, Fall 2006 p. 819-822

<sup>454</sup> Strange, S. *States and Markets* Pinter Publishers Limited. London. 1988 p. 11

<sup>455</sup> Elkins, Z., Guzman, A. and Simmons, B. “Competing for Capital: The Diffusion of Bilateral Investment Treaties, 1960-2000” *International Organization* 60, Fall 2006 p. 832 and 833

<sup>456</sup> *ibid* p. 826

look at them to make the assessment of which provisions were developing countries agreeing to. Furthermore, for the events in time, they used only the signature dates of BITs and not their ratifications and it is only the latter which makes them enter into force.<sup>457</sup>

Furthermore, these scholars completely omitted the development of the framework for international investments, from which is revealed, for example in the case of the US, the start of a particular BIT program in South America.<sup>458</sup>

With regard to the role of coercion diffusion mechanism that Elkins, Guzman and Simmons use in their argument, it refers to the International Monetary Fund (IMF) credits, which made them state that: “It *may* be that potential hosts *are coerced* or at least strongly encouraged to enter into BITs.”<sup>459</sup> Even though, coercion seems to be only a remote possibility for Elkins, Guzman and Simmons; they do not discuss these thoughts in the context of theories of power.

This might be the reason why by following Guzman’s prisoner’s dilemma theory, Elkins, Guzman and Simmons could only reach the conclusion that developing countries can collectively resist to BITs but when acting alone they accept their propositions because they think they are going to be better off: “Collectively, they might be better off resisting the demands of investors (avoiding the sovereignty costs described above) but individually it is rational to sign in hopes of stimulating capital inflows.”<sup>460</sup>

However, this leaves a loophole for explaining the BIT regime as they themselves say that their competition theory cannot explain the current events in the international investment framework, such as the fact of developing countries signing BITs among themselves.<sup>461</sup>

## 5.2. The loopholes

In conclusion, neither of these theories provides sufficient explanation for the developments and challenges of the BIT regime for the following reasons.

BITs promised benefits, to increase FDI and with it to increase the economic prosperity of developing countries.<sup>462</sup> The results of empirical studies on the increase of FDI in developing countries through BITs have been inconclusive, so the fact that there is actually increase of FDI is contested.

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<sup>457</sup> For example Brazil has not ratified any BITs with developed countries even though Brazil has signed BITs with the UK, France and Germany.

<sup>458</sup> See Chapter III and VI.

<sup>459</sup> Elkins, Z., Guzman, A. and Simmons, B. “Competing for Capital: The Diffusion of Bilateral Investment Treaties, 1960-2000” *International Organization* 60, Fall 2006 p. 833. Emphasis added.

<sup>460</sup> *ibid* p. 825

<sup>461</sup> *ibid* p. 819

<sup>462</sup> See the purposes contained in the case studies herein in Chapter III.

The praxis, however, with Brazil's example, suggests that there is no direct connection between BITs and FDI increase. Let us compare two other South American neighboring countries of Brazil. Paraguay has 26 BITs in force and is at the bottom of the FDI ranking, their FDI in 2009 was established as 108 Million dollars. Bolivia has only 15 BITs, half the BITs compared to Paraguay and had FDIs in 2009 of 2244 Million dollars, 20 times more FDI than Paraguay.<sup>463</sup>

Likewise, the competition theory, which says that BITs are going to be prevalent in the most competitive countries and that with the treaties in force the level of development will raise, is also ruled out by the case of Brazil. In South America, Brazil is at the top of the scale in terms of FDIs in comparison to other countries in the region, and yet Brazil has no bilateral investment treaties in force with developed countries.<sup>464</sup>

Furthermore, these theories are insufficient to answer not only the seemingly paradoxical behavior of developing countries, but these theories can neither explain some of the challenges that the BIT regime is going through, like: why have the attempts of regulating foreign investment at the multilateral level failed, why are developing countries reacting against the regime, and why is the international investment framework once again changing?

Therefore, what is lacking in the literature on international investment is an explanation for the alleged paradox that would include the particularities of Brazil, for example, but furthermore, there is also the need for explaining the other challenging questions surrounding the international investment framework. In particular: why are developing countries reacting against the regime, why is the framework evolving and why have the multilateral attempts to regulate investment at the multilateral level failed?

In the next chapter I will argue that the way to answer these questions is by appeal to a specific theory of power, namely, understanding power as a holistic phenomenon in the context of Strange's theory of structural and relative power.

The next chapter unveils the indicators of structural power in the framework for international investment, from its establishment to the events provoking the current challenges that the framework faces.

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<sup>463</sup> Source: IMF 2011, <http://cds.imf.org/CrossCountryOutward.aspx> Table 6.1-o. Outward Direct Investment Positions, Total, by Each Reporting Economy in All Other Economies, as of end-2009 (as reported by Investing Economy)

<sup>464</sup> Brazil has a BIT with Paraguay. It is the first BIT recorded in South America: the General Treaty of Commerce and Investments between Brazil and Paraguay, signed on October 27, 1956 and entered into force on September 6, 1957. Dates provided by the database of the Organization of American States, available at [http://www.sice.oas.org/ctyindex/BRZ/BRZBITs\\_e.asp](http://www.sice.oas.org/ctyindex/BRZ/BRZBITs_e.asp) (last visited October 25, 2012).



## **CHAPTER VI: Indicators of Structural Power in the BIT regime**

The South American region is particularly relevant as a case study for finding structural power in the framework of international investments for two reasons: Firstly, because what has been thought of as a paradox, i.e. developing countries achieving favourable international investment rules at the multilateral level and then signing BITs that contained less favourable international investment rules, can easily be spotted in South American countries' seemingly contradictory behaviour: the adoption of the Hull principle and international arbitration while rejecting the Calvo doctrine which was born in this region. Secondly, because South American countries have been the first ones to start reacting against the BIT regime.

This chapter points out the indicators that support the claim that the framework for international investments was defined by structural power. The first indicator is given when analysing how the framework for international investment developed and under which rules it was established. The second indicator lies in how the control of the financial dimension played a role in defining the rules for international investments. The third indicator arises from the ex post costs that developing countries have pursuant to the institutions established in such a framework. The fourth indicator pertains to a greater sovereignty cost that has affected only developing countries so far. Finally, the fifth indicator is revealed from the reasons behind the new changes of the framework for international investments.

These indicators should not be referred to in isolation. All indicators are connected to one another, and that is why they result in a holistic phenomenon of power that can suffice for explanations of what happens in the BIT regime.

### **6.1. The Formation of a Framework for International Investments.**

Dolzer and Stevens claim that after World War II developing countries relied on private foreign capital and through BITs foreign investments could be protected.<sup>465</sup> However, during the period after the World War II and before BITs existed, there were international investment rules. There was customary international law in favour of developing countries and there was a period where UN resolutions were in favour of sovereignty, where regional pacts still conserved the Calvo clause.<sup>466</sup> All this benefited developing countries.

However, there were efforts by developed countries to define a framework with different rules. The Bretton Woods agreement after World War II created the International Monetary Fund and the World Bank. These institutions, together with other financial institutions, played a role in the

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<sup>465</sup> Dolzer, R. and Stevens, M. *Bilateral Investment Treaties* Kluwer Law International, The Hague, Netherlands. 1995. pp. 11- 12

<sup>466</sup> See Chapter II; and on the discussion of the developed and developing countries' debate on expropriation and compensation regulations, in section 3.1.

development of an international investment framework.<sup>467</sup> On this, Simmons, Dobbin and Garrett (2006) write: “[T]he hegemonic United States—often acting through the Bretton Woods international economic institutions it helped create after World War II—has used a combination of carrots (political and military support, as well as preferential access to US markets) and sticks (from strings attached to financial assistance to threats of military coercion) to impose its vision for political and economic liberalism on the rest of the world.”<sup>468</sup>

While rules at the multilateral level were benefiting developing countries, it was pointed out in the GATT Ministerial Declaration of 1986 that: “Following an examination of the operation of GATT Articles related to the trade restrictive and distorting effects of *investment* measures, negotiations should elaborate, as appropriate, *further provisions that may be necessary to avoid such adverse effects on trade.*”<sup>469</sup> It was said that the rules on foreign investment were ‘restrictive and distortive’, but for whom? Since the rules were in favour of developing countries, the reference of them being restrictive and distortive, had to be from a developed countries’ perspective as it will become evident in the following.

Therefore, among the purposes established in the Uruguay Round, one consisted in: to “halt and reverse protectionism and to remove distortions to trade.”<sup>470</sup> Developed countries, from whose perspective the investment measures were distorting and restrictive, took indeed further measures. In the same round, the 1986 Uruguay Round of the then GATT, the elaboration of an Agreement on trade related to investment measures (TRIMS) was proposed.<sup>471</sup>

The 1980s were characterized by the Latin American debt crisis.<sup>472</sup> Latin American countries needed capital and foreign investments were supposed to facilitate capital for them. Two years after the Uruguay Round, in 1988, the Multilateral Investment Guarantee Agency (MIGA), member of the World Bank, was founded to promote foreign direct investment in developing countries with a mandate to procure agreements on the promotion of foreign investments. Article 23 (b) (iii) of the MIGA Convention establishes that “The Agency also shall: ...promote and

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<sup>467</sup> The World Bank had the International Bank for Reconstruction and Development (IBRD) which was created with this agreement and its task was to lend money to developing countries. The other institutions that form the group of the World Bank were created later, in 1950 the International Finance Corporation (IFC), the International Development Association (IDA) in 1960, the ICSID in 1965 and lastly the Multilateral Investment Guarantee Agency (MIGA) in 1988.

<sup>468</sup> Simmons, B., Dobbin, F. and Garrett, G. “Introduction: the international diffusion of liberalism.” *International Organization* 60, No. 4. 2006. p. 782

<sup>469</sup> Punta del Este Ministerial Declaration of September 20, 1986. 25ILM 1623-27 (1986). Emphasis added.

<sup>470</sup> Punta del Este Ministerial Declaration of September 20, 1986. 25ILM 1623-27 (1986) Also mentioned in Dolzer, R. and Stevens, M. “Bilateral Investment Treaties” Kluwer Law International, The Hague, Netherlands. 1995. p. 80

<sup>471</sup> Other agreements that touch on investment issues were also agreed and adopted. These have been described in Chapter II.

<sup>472</sup> See Pastor, M. (Jr) “Latin America, the Debt Crisis, and the International Monetary Fund: Beyond the IMF?” *Latin American Perspectives*, Vol. 16, No. 1, Latin America's Debt and the World Economic System. 1989.

facilitate the conclusion of agreements, among its members, on the promotion and protection of investments.”<sup>473</sup>

In 1989, with the Washington consensus a wave of neoliberalism came about. The Washington Consensus starts by stating: “No statement about how to deal with the debt crisis in Latin America would be complete *without a call for the debtors to fulfill their part of the proposed bargain by "setting their houses in order," "undertaking policy reforms," or "submitting to strong conditionality."*”<sup>474</sup>

The Washington Consensus proposed liberalization of trade policies and openness to foreign investment. Criticizing Latin American countries, it was said in regard to foreign investments: “liberalization of foreign financial flows is not regarded as a high priority. In contrast, a restrictive attitude limiting the entry of foreign direct investment (FDI) is regarded as foolish. ...The main motivation for restricting FDI is economic nationalism, which Washington disapproves of, at least when practiced by countries other than the United States.”<sup>475</sup>

In 1990, President George Bush senior initiated what was called “Enterprise for the Americas Initiative”, which created ‘Framework Agreements’ that required openness and liberalization of the developing countries’ markets to create, among other things, an investor-friendly environment.

Baldwin (1993) states: “...President Bush’s Enterprise for the Americas Initiative boomed in 1991 with 26 countries signing so called Framework Agreements (these require the countries to make unilateral concessions on trade and investment to the US in exchange for the promise of closer US relations leading eventually to an FTA).”<sup>476</sup>

These agreements resulted in developing countries having to make structural changes to fit to the trade and investment scheme of developed countries. In South America, the Framework Agreement was signed in 1991 by the United States and Argentina, Brazil, Paraguay, and Uruguay (the founding countries of the MERCOSUR).

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<sup>473</sup> Convention establishing the Multilateral Investment Guarantee Agency, available at [http://www.miga.org/documents/miga\\_convention\\_november\\_2010.pdf](http://www.miga.org/documents/miga_convention_november_2010.pdf) (last visited February 15, 2013)

<sup>474</sup> Washington Consensus: Williamson, J. “What Washington Means by Policy Reform” Institute for International Economics. Chapter 2 from *Latin American Adjustment: How Much Has Happened?*. Edited by John Williamson. Published April 1990. Emphasis added.

<sup>475</sup> Washington Consensus: Williamson, J. “What Washington Means by Policy Reform” Institute for International Economics. Chapter 2 from *Latin American Adjustment: How Much Has Happened?*. Edited by John Williamson. Published April 1990.

<sup>476</sup> Baldwin, R. “A Domino Theory of Regionalism” NBER Working Paper Series No. 4465. National Bureau of Economic Research, Cambridge Massachusetts. 1993. p 3

The Framework Agreement created a Council to monitor trade and investment: “The objectives of this council, established by this framework agreement, are to monitor trade and investment relations, identify opportunities for expanding trade and investment through liberalization and other appropriate means, and negotiate implementing agreements. It will also seek to consult on specific trade and investment matters of interest to both parties and identify and work to remove impediments to trade and investment flows.”<sup>477</sup>

The US, in particular, had the objective to establish a framework in which developing countries had to liberalize their markets. This became clear in the 1991 Dispatch of the US Department of State: “Completion of a framework agreement with a country or group of countries establishes a channel to *explore various trade liberalization options and promotes the EAI [Enterprise for the Americas Initiative] vision.*”<sup>478</sup>

Suddenly, in the 1990s, Bilateral Investment Treaties (BITs) started to boom in South America.<sup>479</sup> Policies in those developing countries started to change; they liberalized their markets and provided an investment climate favourable for foreign investors. The UNCTAD World Investment Report 2000 stated that “[o]ver the period 1991-1999, 94 per cent of the 1,035 policy changes favoured investors.”<sup>480</sup>

Simmons, Dobbin and Garrett (2006) worked on documenting the diffusion of liberal policies. The following graphic shows when Latin America started to open for liberalization:

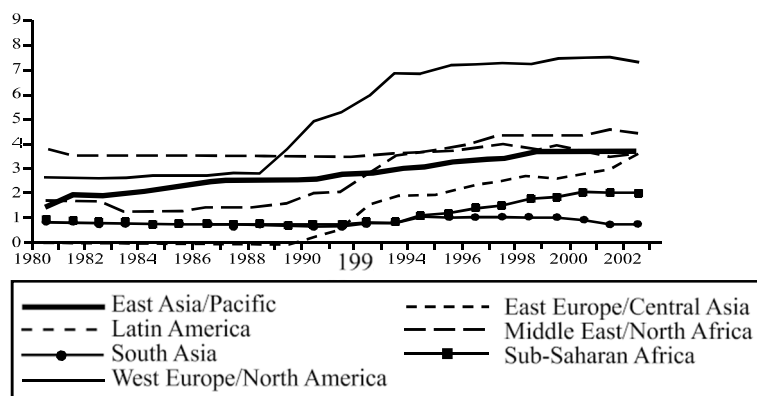


FIGURE 4. Regional variations in financial openness<sup>481</sup>

<sup>477</sup> US Department of State Dispatch, Vol 2, No 25, June 24, 1991. The White House, Office of the Press Secretary Marlin Fitzwater. Washington, DC.

<sup>478</sup> *ibid.* Emphasis added.

<sup>479</sup> See Appendix II.

<sup>480</sup> UNCTAD World Investment Report 2000. Sales No. E.00.II.D.20 (New York and Geneva:United Nations.2000) p. 6; see also chart in UNCTAD World Investment Report 2005, Sales No. E.05.II.D.10 (New York and Geneva: United Nations 2005) p. 26

<sup>481</sup> Simmons, B., Dobbin, F. and Garrett, G. “Introduction: the international diffusion of liberalism.” *International Organization* 60, No. 4. 2006. p. 786

For Latin America, the graphic shows the increase of liberal policies around the 1990s, exactly the time when the BITs started to boom in South America and with it, all the regime which supported it.

The UNCTAD report of 2005 stated that there was a huge amount of changes, especially towards liberal investment regimes.<sup>482</sup> Developing countries agreed to liberalize their market because they had the promise that by doing it, they would attract foreign investments and increase their prosperity.<sup>483</sup> Facing their financial crisis, this was something appealing.

Dolzer and Stevens claim that “the confidence and interest of foreign investors in developing countries in the 1990s may principally be attributed to an improvement in the investment climate brought about by a range of economic policy reforms which in many cases have led to better economic performances.”<sup>484</sup> However, as the empirical studies have shown in Chapter V, there is no link between the increase of foreign investment and BITs, which were arguably signed in order to improve the investment climate.

In 1992, the World Bank issued the “Guidelines on the treatment of Foreign Direct Investment”. In regard to this guideline Dolzer and Schreuer (2012) write that: “It recognizes ‘that a greater flow of foreign direct investment brings substantial benefits to bear on the world economy and on the economies of developing countries in particular, in terms of improving the long term efficiency of the host country through greater competition, transfer of capital, technology and managerial skills and enhancement of market access and in terms of the expansion of international trade.’”<sup>485</sup>

Signing BITs was part of the liberalization process. However, the BITs by themselves could not have worked; they needed an enforcement system. Thus, further to embracing the liberalization concept, there were further requirements, in particular agreement to *the framework* that would support the BITs regime, which included many more treaties giving strength to the international arbitration system.

Hence, parallel to BITs booming, South American countries ratified international arbitration conventions and treaties that were key to the BIT regime. The 1965 Convention,<sup>486</sup> which created

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<sup>482</sup> UNCTAD, World Investment Report 2005, UNCTAD/WIR/2005

<sup>483</sup> See developing countries’ statements in Section 2.3. and discussion of benefits in Chapter V.

<sup>484</sup> Dolzer, R and Stevens, M. *Bilateral Investment Treaties* Kluwer Law International, The Hague, Netherlands. 1995. p. xi

<sup>485</sup> See Dolzer, R. and Schreuer, C. *Principles of International Investment Law* Oxford University Press. 2012; and World Bank group, Guidelines on Treatment of Foreign Direct Investment. Legal framework for the treatment of foreign investment, Vol 2 Guidelines 1992. p. 35-44.

<sup>486</sup> Convention on the Settlement of Investment Disputes between States and Nationals of other States (as amended 2006), available at: <http://icsid.worldbank.org/ICSID/ICSID/RulesMain.jsp> (last visited Dec 22, 2011) [hereinafter ICSID Convention].

the ICSID, was only ratified by South American countries around the 1990s.<sup>487</sup> The ICSID Convention created a body, an international arbitration center that would conduct the arbitral proceedings of such disputes: ICSID. This institution is dependent of the World Bank. The decision, however, to have ICSID in the investment dispute settlement clauses of BITs, as the chosen arbitration institution to solve investment disputes, has been theoretically analyzed by scholars as a bargain,<sup>488</sup> although there are elements that also point towards structural power in which the aims of the powerful party prevailed.

The same is true for the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. Developed countries signed this convention much earlier than South American developing countries.<sup>489</sup>

All these developments lead to the framework that has been legitimized through BITs, and BITs changed the multilateral rules on foreign investments in what pertains to the main areas of it: compensation for expropriations and dispute settlement.

On the rules for determining the compensation that should be given to foreign investors in case of expropriations, BITs established the Hull principle, that expropriations should be prompt, effective and adequate. This gives more to the investor than if the rule of international law of fair compensation applied by which the expropriatory state should pay the fair market price of the expropriation and not the full prompt, effective and adequate that includes for example, the loss of expected profit and rights.<sup>490</sup>

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<sup>487</sup> While the convention was ratified by the US in 1966, by France and the UK in 1967, by Germany in 1969 and by Spain in 1994, South American countries on the other hand, only ratified this treaty around the 1990's, Paraguay in 1983, Ecuador in 1986, Bolivia in 1995, Argentina in 1994 and Uruguay only in 2000. List available at <https://icsid.worldbank.org/ICSID/FrontServlet?requestType=ICSIDDocRH&actionVal=Contractingstates&ReqFrom=Main> (last visited August 2012).

<sup>488</sup> Mortenson (2010) implicitly refers to a bargain. She claims that “the purpose of ICSID was to create a reliable forum that would empower states to strike a deal with potential sources of foreign capital: in exchange for foreigners’ investment of energy, capital, and effort, host governments would create a legally secure environment in which to operate” In Mortenson, J. “The meaning of investment: ICSID’s travaux and the domain of international investment law” Harvard International Law Journal. Vol 51. No.1. 2010 p. 318; By the same token, Allee and Peinhardt (2010) also claimed that having ICSID as the arbitration body for investment disputes has been the result of a relative bargaining power. Although they claim that the relative bargaining power comes about due to the asymmetries, they claim that developed countries have a superior bargaining power. However, one can see a constraint in the choice as they write: “[A]lthough host governments are often hostile toward ICSID clauses, particularly when sovereignty costs are high, *they are more likely to consent to such clauses when they are heavily constrained by their dependence on the global economy.*” Allee, T. and Peinhardt, C. “Delegating Differences: Bilateral Investment Treaties and Bargaining Over Dispute Resolutions Provisions” International Studies, 54 2010. Emphasis added.

<sup>489</sup> While the Convention was ratified by France in 1959, by Germany in 1961, by the US in 1970, by the UK in 1975 and by Spain in 1977, South American countries only signed it around the 1990s with the exception of Ecuador who ratified it on 1962. Uruguay signed it in 1983, Argentina in 1989, Bolivia in 1995 and Paraguay in 1998. List available at [http://www.uncitral.org/uncitral/en/uncitral\\_texts/arbitration/NYConvention\\_status.html](http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html) (last visited August 2012).

<sup>490</sup> See Chapter III, “The Hull Principle”.

Regarding the rules determining the dispute settlement mechanism for foreign investment disputes, BITs established that such disputes were neither subject to local courts nor using the host state's laws, as the multilateral level rules had established,<sup>491</sup> but to submit such disputes to an international arbitration institution.

For this reason, it was pointed out by Shan (2007) referring to Calvo clauses: "In the mid 1990s, the "imminent death" of this doctrine was again declared due to changing attitudes in Latin American states towards foreign investments...Calvo has converged with investment treaties on the national treatment standard requirement, and has been greatly eroded and largely discarded on the exclusive national jurisdiction and national law requirements."<sup>492</sup>

Developed countries were keen on these modifications in the legislation of developing countries. For example, the US Assistant Secretary of State for Economic and Business Affairs stated, when submitting the US-Argentina BIT<sup>493</sup> to the US Senate: "One item of particular interest in the Argentina BIT is that, like many Latin American countries, Argentina has long subscribed to the so-called Calvo Doctrine which requires that foreign investors submit disputes arising in a country to that country's local courts. This treaty contains an absolute right to international arbitration of investment disputes and thereby removes U.S. investors from the restrictive operation of the Calvo Doctrine. Such a precedent with Argentina has already helped pave the way for similar agreements with other Latin American countries."<sup>494</sup>

Referring to this statement, Alvarez and Khamsi (2009) have drawn attention to how the US praised the inclusion of international arbitration in the US-Argentina BIT, because for the US, the agreement to this BIT "marked the repudiation of the Calvo Doctrine by the country that had given birth to it."<sup>495</sup>

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<sup>491</sup> The UN Resolution No.1803 of 1962 gave the permanent sovereignty over natural resources to the newly constituted states and declared that anything concerning expropriations and compensation was going to be decided by the host state. Developing countries really fought for a New International Economic Order. In 1974, the Charter of Economic Rights and Duties of States was created and also stated that the appropriate compensation for nationalization would be settled according to domestic law and that any dispute should be settled locally.

<sup>492</sup> Shan, W. "Is Calvo dead?" *The American Journal of Comparative Law*, Vol. 55, No. 1. 2007. p. 123

<sup>493</sup> Treaty between the United States of America and the Argentine Republic concerning the reciprocal encouragement and protection of investment, November 14, 1991, and entered into force on October 20, 1994 [hereinafter US-Argentina BIT], available at

[http://www.sice.oas.org/Investment/BITSbyCountry/BITS/US\\_Argentina\\_e.asp](http://www.sice.oas.org/Investment/BITSbyCountry/BITS/US_Argentina_e.asp) (last visited Oct 19, 2012).

<sup>494</sup> Statement of Hon. Daniel K. Tarullo, Assistant Secretary of State for Economic and Business Affairs.

United States. Congress. Senate. Committee on Foreign Relations, available at: [Bilateral investment treaties with Argentina, Treaty doc. 103-2; Armenia, Treaty doc. 103-11; Bulgaria, Treaty doc. 103-3; Ecuador, Treaty doc. 103-15; Kazakhstan, Treaty doc. 103-12; Kyrgyzstan, Treaty doc. 103-13; Moldova, Treaty doc. 103-14; and Romania, Treaty doc. 102-36 : hearing before the Committee on Foreign Relations, United States Senate, One Hundred Third Congress, first session, September 10, 1993. \(Washington : U.S. G.P.O. : For sale by the U.S. G.P.O., Supt. of Docs., Congressional Sales Office, 1993\) p. 5 \(last visited Sep 17, 2012\)](#)

<sup>495</sup> Alvarez, J. and Khamsi, K. "The Argentine Crisis and Foreign Investors: A Glimpse into the Heart of the Investment Regime" *Yearbook of International Investment Law & Policy* 379. Karl P. Sauvant, ed., 2009. p 415

However, we have seen that in the BITs that were herein analyzed, some BITs have as a step the submission of the dispute to domestic courts before reaching the stage of international arbitration. This indicates that South American states are keen to maintain the investment disputes in their jurisdiction if possible, and therefore, rightfully agree with such a provision that had the submission of the dispute to local courts as a pre-stage. However, in most BITs, these same clauses allowing for the submission of the dispute to local courts have a condition of time (deadline) or an event which upon fulfilment, directs the dispute to international arbitration: If eighteen months have elapsed or if after the decision of the court the disputes subsist, or even if the party seeking relief has an unjust court decision, then such a party can submit the dispute to international arbitration.<sup>496</sup>

Therefore, the deadlines and conditions included in the clauses limit considerably the circumstances under which the disputes can be handled by domestic courts. Developing countries' judges are likely to be overloaded with work, due to an inadequate system, and the lack of specialized courts to address foreign investment claims may be factors which delay the process in developing countries.<sup>497</sup> With regard to the condition of submitting the dispute to international arbitration when there is an unjust court decision, this is there to protect investors and it is founded in the prevention of arbitrary and discriminatory treatment of the local judiciary. However, the assessment of an allegedly unjust court decision will be done by the party that the court decision disfavours, and this might encourage the possibility of misusing the system, when the party which lost, in bad faith, uses the next stage (arbitration) as another attempt to try better luck.

Some other South American BITs have dispute settlement clauses that state that the dispute has to be submitted to local courts "or" international arbitration.<sup>498</sup> This alternative is crucial because by introducing the word "or", choice is given to the claimant for submitting the dispute "either" to local courts "or" international arbitration. In this case, and considering that foreign investors are likely to be the ones submitting the complaints, a direct path is given to them for circumventing local courts completely and submit the dispute to international arbitration, with which they can obtain a binding award from a tribunal of arbitrators (one of which being appointed by them).

And so, even in those South American BITs, which indicate as a pre-stage that the dispute will be resolved in domestic courts and those with the choice "or" in them, will in all likelihood end

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<sup>496</sup> See Appendix VI.

<sup>497</sup> See for example the study of the World Bank "Doing Business" which in the "Enforcing Contracts" Section compares the judicial system of Latin American countries to other countries. The ranking Latin America is much lower than other countries, available at <http://www.doingbusiness.org/data/exploretopics/enforcing-contracts> (last visited Feb 15, 2012)

<sup>498</sup> See Appendix IV.



up in international arbitration.<sup>499</sup> This is a strong reason for developed countries to comfortably sign BITs with developing South American countries, even if submission of the dispute to local courts is determined as a pre-stage.<sup>500</sup>

The developments described in this section are the reasons why the formation of the framework for international investment is an indicator of structural power. The institutions created to promote liberalization touched on the topic of investment and there are clear targeted plans, like with Bush's program of the 'Framework Agreements' that included the fact that developing countries ought to give concessions on investment issues, after which BITs started to boom in South America. Following this, there were the ratification of international arbitration conventions and the establishment of ICSID, which cannot be referred to as being a bargain because one of the parties is heavily constrained or dependant on the other party, allowing for the outcome to be determined by the powerful party.

Structural power confers the party holding it the power to 'shape frameworks'. The analysis of this particular framework as well as the developments in it showed us that no matter what the substantial rules are, those of convenience for a party with structural power are more likely to be determined by this party as the rules of the game. For example, the US wanted and tried to influence structures, on more than one occasion, U.S. Department of State made the following statement regarding BITs: "The BITs help advance U.S. values and ideas. They do so by promoting U.S. investments, *spreading U.S. legal concepts*, and lending support to economic reforms and reformers in newly emerging democracies."<sup>501</sup> Furthermore, it was stated: "...how these treaties can advance certain U.S. interests and encourage reform-minded countries to *adopt and maintain market-oriented policies*."<sup>502</sup> The way it could be achieved is through structural power.<sup>503</sup>

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<sup>499</sup> ICSID retained jurisdiction in spite of fork in the road clauses in CMS Gas Transmission Company v. The Argentine Republic, ICSID Case No. ARB/01/8 and Azurix Corp. v. The Argentine Republic, ICSID Case No. ARB/01/12; and due to MFN clauses in Emilio Agustin Maffezini vs Spain (ICSID Case No. ARB/97/7) and Siemens A.G v Argentine Republic (ICSID Case No. ARB/02/8).

<sup>500</sup> The lack of intention by developing countries can be reflected in the fact that they were confident of a pre-stage dispute settlement that included the submission of their disputes to domestic courts, although, as it has been mentioned, the effect is different, noting developing countries' unwillingness towards ICSID. Gilpin (2001) stated that "FDI impinges directly on national economies and can infringe on national values and economic independence. For this reason, states, especially less developed countries (LDCs), are reluctant to surrender jurisdiction in these matters to an international body." Gilpin, R. *Global Political Economy* Princeton University Press. 2001 p. 301

<sup>501</sup> Statement of Eugene J. Mcallister, Assistant Secretary for Economic and Business Affairs, US Department of State. United States. Congress. Senate. Committee on Foreign Relations, available at: [Bilateral investment treaties with the Czech and Slovak Federal Republic, the Peoples' Republic of the Congo, the Russian Federation, Sri Lanka, and Tunisia, and two protocols to treaties with Finland and Ireland : hearing before the Committee on Foreign Relations, United States Senate, One Hundred Second Congress, second session, August 4, 1992. \(Washington : U.S. G.P.O. : For sale by the U.S. G.P.O., Supt. of Docs., Congressional Sales Office, 1992\)](#) p. 3 (last visited Oct 24, 2012)

<sup>502</sup> United States. Congress. Committee on Foreign Relations, available at: [Bilateral investment treaties with Argentina, Treat doc. 103-2; Armenia, Treaty doc. 103-11; Bulgaria, Treaty doc. 103-3; Ecuador, Treat doc. 103-15; Kazakhstan, Treaty doc. 103-12; Kyrgyzstan, Treaty doc. 103-13; Moldova, Treaty doc. 103-14; and Romania,](#)

A political scientist would not analyze the institutions or the bodies per se but he/she would focus on other less formal but more substantial questions like determining whose authority these institutions are reflecting. If international regimes are the reflection of national interests, then also from a political science perspective, it is the powerful players who are able to determine the rules. As Susan Strange said: “[M]any international regimes have not so much been the result of a coming-together of equals, but the end-result of a strategy developed by a dominant state, or sometimes by a small group or dominant states.”<sup>504</sup> And so it is that the framework for international investments that we have today did not evolve from a multilateral consensus among all members of the international community nor taking into account the interests of developing countries, but rather from the strategies and preferences of the developed countries, achievable through structural power in the framework.

## **6.2. The Control in the Financial Dimension.**

Analyzing the connection between international financial institutions and the repercussion on developing countries is not a novelty in the literature. What is a novelty is the lens of structural power used to view this phenomenon.

The factor of coercion is often mentioned to explain why developing countries agree to rules that do not benefit them. Simmons, Dobbin and Garret said that “One prominent explanation for the spread of economic and political liberalism involves a distinctly antiliberal mechanism: coercion. Powerful countries can explicitly or implicitly influence the probability that weaker nations adopt the policy they prefer by manipulating the opportunities and constraints encountered by target countries...”<sup>505</sup> By the same token, Alvarez (1992), speaking directly about BITs and referring to the attitude of developing countries towards BITs, pointed out that they had “...a IMF gun pointed at their heads...”<sup>506</sup>

There is no denial of the strong connection of international financial institutions in the establishment of the BIT regime, but coercion might not be the right word for it as there was always a choice for developing countries and so developing countries have willingly accepted the terms. Rather, a better explanation might be provided if we consider the financial element as a structural factor of the framework.

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*Treaty doc. 102-36 : hearing before the Committee on Foreign Relations, United States Senate, One Hundred Third Congress, first session, September 10, 1993. (Washington : U.S. G.P.O. : For sale by the U.S. G.P.O., Supt. of Docs., Congressional Sales Office, 1993) p 3* (last visited Aug 6, 2012). Emphasis added.

<sup>503</sup> See also the connections with the other sections in this chapter.

<sup>504</sup> Strange, S. *The Retreat of the State* Cambridge Studies in International Relations. Vol. 49. Cambridge University Press. 1996. p. xiv

<sup>505</sup> Simmons, B., Dobbin, F. and Garrett, G. “Introduction: the International Diffusion of Liberalism.” *International Organization* 60, No. 4. 2006. p. 790

<sup>506</sup> Alvarez, J. “The development and Expansion of Bilateral Investment Treaties: Remarks” 86 *American Society of International Law Proceedings*. 1992. p. 552.

Strange's concept of structural power has a financial dimension to it: the control over credits. The structural power characterized in this dimension limits the choice of the financially weaker party in such a way that what is proposed will be agreed to. This situation explains why the developing countries had proceeded in the way proposed by developed countries.

Is this what happened in the signing of BITs by South American countries? We will see that the international financial institutions like the International Monetary Fund (IMF), the Inter-American Development Bank and the World Bank (WB) and its agencies like the International Bank for Reconstruction and Development (IBRD) and the Multilateral Investment Guarantee Agency (MIGA), all played a role in the decision of developing countries to agreeing to the BIT framework.

The international financial institutions, created by the US through the Bretton Woods system, helped developing countries financially.<sup>507</sup> However, the loans provided had conditions with which developing countries had to comply in order to receive such loans.<sup>508</sup> This is a strong tool for developed countries, and specially the US, to persuade developing countries to change their policies to stop the adverse effects that -from the perspective of the US- investments were having on trade.<sup>509</sup>

The International Monetary Fund (IMF), a lending institution for developing countries, had stabilization programs in which "greater hospitality for foreign private investment"<sup>510</sup> was required.<sup>511</sup>

In an analysis of the conditions imposed by the IMF, Kalderimis (2003) established a correlation between these conditions and investments. He claimed that the IMF wants liberalization of foreign investments, and that meant measures were needed to be accepted by developing countries, inter alia, not to restrict investments, to give them national treatment and to be willing to privatize.<sup>512</sup>

Kalderimis concentrated on giving reasons for why the IMF has no jurisdiction to prescribe investment terms as conditions for receiving funds and he further claimed that, by doing this, the

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<sup>507</sup> Simmons et al. (2006) refer to how the United States used the Bretton Woods institutions and their financial assistance "to impose its vision for political and economic liberalism on the rest of the world." Simmons, B., Dobbin, F. and Garrett, G. "Introduction: the International Diffusion of Liberalism." *International Organization* 60, No. 4. 2006. p. 782

<sup>508</sup> To see the conditions that specifically touch on investments, see Kalderimis, D. "IMF Conditionality as Investment Regulation: A Theoretical Analysis" Berkeley Electronic Press bepress Legal Series Paper 4. 2003 and Kaushal, A. "Revisiting History: How the Past Matters" *Harvard International Law Journal*. Vol 50 Issue 2. 2009.

<sup>509</sup> See Punta del Este Ministerial Declaration of September 20, 1986. 25ILM 1623-27 (1986).

<sup>510</sup> Kaushal, A. "Revisiting History: How the Past Matters" *Harvard International Law Journal*. Vol 50 Issue 2. 2009. p. 504

<sup>511</sup> In Elkins, Z., Guzman, A.T. and Simmons, B. "Competing for Capital: The Diffusion of Bilateral Investment Treaties, 1960-2000" *International Organization* 60, 2006.

<sup>512</sup> Kalderimis, D. "IMF Conditionality as Investment Regulation: A Theoretical Analysis" Berkeley Electronic Press bepress Legal Series Paper 4. 2003. pp. 10- 11

IMF is acting illegitimately.<sup>513</sup> He stated, however, that the conditionality that the IMF can impose is not mandatory; it is just an influence on its debtors, indicating that it is an indirect way in which funding is given in exchange of a certain conduct.<sup>514</sup>

However, Kalderimis himself clarifies that the need might be crucial for these actors: “The word “needed” should be emphasized. IMF funding is much more crucial to debtor countries than federal funding is to U.S. states. States can tax their citizens to make-up budget shortfalls. Not so indigent debtor countries – this is precisely why they need IMF assistance.”<sup>515</sup>

In regard to the Inter-American Development Bank, when the Framework Agreements were created, they administered a US\$ 1.5 billion multilateral investment fund. This was offered to developing countries in exchange of being part of the Framework Agreements (which intended to liberalize investments, i.e. signing BITs), becoming in that way the bait for the Enterprise of the Americas program.<sup>516</sup>

The World Bank can play a similar role. As Kaushal (2003) points out: “There are important intersections between the IMF and World Bank on the one hand and foreign investment on the other. The forceful and far-reaching nature of conditionality is such that the loan becomes a policy tool.”<sup>517</sup>

The World Bank consists of five institutions, three of which relate to the promotion of foreign investments. The Articles of Agreement of the IBRD<sup>518</sup> states that the purposes of the Bank is, inter alia, “To promote private foreign investment by means of guarantees or participations in loans and other investments made by private investors; and when private capital is not available on reasonable terms, to supplement private investment by providing, on suitable conditions, finance.”<sup>519</sup>

The MIGA, offers insurance for foreign investments but as described before, it was created to promote foreign investments agreements.<sup>520</sup> ICSID is also an agency of the World Bank and the

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<sup>513</sup> *ibid* pp 21- 22

<sup>514</sup> Other problems that have been addressed are the undemocratic international regime of the IMF because member states have a say in proportion to their quota and their quota is based on their wealth, and the veto powers of the US and the EU. See discussion in Kalderimis, D. “IMF Conditionality as Investment Regulation: A Theoretical Analysis” Berkeley Electronic Press bepress Legal Series Paper 4. 2003. p. 35

<sup>515</sup> *ibid* p 32

<sup>516</sup> The Enterprise for the Americas Initiative: Description and Up-date October 1992. News report of the Development Group for Alternative Policies Inc. Washington DC.

<sup>517</sup> Kaushal, A. “Revisiting History: How the Past Matters” Harvard International Law Journal. Vol 50 Issue 2. 2009.. p. 505

<sup>518</sup> International Bank for Reconstruction and Development, now World Bank, unchanged Articles of Agreement.

<sup>519</sup> IBRD Articles of Agreement. Article 1 available at

<http://web.worldbank.org/WBSITE/EXTERNAL/EXTABOUTUS/ORGANIZATION/BODEXT/0..contentMDK:20049563~menuPK:64020045~pagePK:64020054~piPK:64020408~theSitePK:278036~isCURL:Y~isCURL:Y.00.html> (last visited July 29 2013)

<sup>520</sup> Convention establishing the Multilateral Investment Guarantee Agency, available at

[http://www.miga.org/documents/miga\\_convention\\_november\\_2010.pdf](http://www.miga.org/documents/miga_convention_november_2010.pdf) (last visited February 15, 2013)

main international arbitration institution to solve investment disputes. This dependency has also been criticized, as ICSID has to sometimes solved disputes that are directly in connection to the loans of the World Bank.<sup>521</sup>

South American countries, desiring and 'in need' of continuing obtaining loans from international financial institutions, and relying on the promises made, changed national policies to attract foreign direct investment that would lead to an increase in prosperity. Kaushal (2009) pointed out that "...a financially troubled developing country without other recourse is not strong enough to refuse the terms of the loan."<sup>522</sup>

The multilateral scheme of investments, and its failure, also proves the relevance of the conditionality factor as an indicator of structural power. There was more than one attempt to create a complete multilateral investment agreement.<sup>523</sup> For example, the Multilateral Agreement on Investments (MAI) from the OECD countries was proposed in 1995,<sup>524</sup> and then the Multilateral Investment Agreement (MIA) was proposed at the 2003 WTO Ministerial Conference. All such attempts have failed so far.

The reasons for this, apart from the lack of agreement among members, might lie in the fact that developing countries were not conditioned to receiving credits upon the acceptance of these agreements, in the way they were in the case of BITs. Kalderimis (2003), referring to the MIA, has pointed out: "It is more conceivable that a struggling developing country would not sign a new investment treaty than it is that such a country would refuse IMF funding."<sup>525</sup>

These conditionalities affected the behavior of developing countries with regards to agreeing to the rules of developed countries, but it is thanks to the structural setting because the strong conditional factor and the dependency on credit reduce the choice of developing countries to the point that they accept the terms of a loan. Allee and Peinhardt (2010), although analyzing the acceptance of ICSID, have conducted an empirical study on the effects on conditionalities for accepting terms and found out that "host regimes that are highly dependent upon the global economy are almost certain to include ICSID in their BITs."<sup>526</sup>

Furthermore, viewing conditionality under these terms is another argument for the lack of developing countries' bargaining position. Factors like hardship in the relationship, especially when one of the parties knows that the other party's only means to alleviate such hardship is

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<sup>521</sup> Further discussed in section 6.3.

<sup>522</sup> Kaushal, A. "Revisiting History: How the Past Matters" Harvard International Law Journal. Vol 50 Issue 2. 2009. p. 506

<sup>523</sup> See Miller, Arthur S. "Protection of Private Foreign Investment by Multilateral Convention" The American Journal of International Law, Vol. 53, No. 2 1959.

<sup>524</sup> Elaborated by OECD countries without participation of developing countries.

<sup>525</sup> Kalderimis, D. "IMF Conditionality as Investment Regulation: A Theoretical Analysis" Berkeley Electronic Press bepress Legal Series Paper 4. 2003. p 39

<sup>526</sup> Allee, T. and Peinhardt, C. "Delegating Differences: Bilateral Investment Treaties and Bargaining Over Dispute Resolutions Provisions" International Studies, 54 2010. p.20

their reliance in said party, predicts the outcome: the acceptance of such conditions. This, however, does not amount to the bargaining of said issue but to an acceptance based on a relationship that contains structural power.

Developing countries agreed to the BIT regime because with the conditions to get loans from international financial institutions, their choice gets limited by the structural setting and power in the framework.

As Susan Strange said, structural power limits the range of choices so much that the outcome can be determined. With the loans conditionality and the requirement to have an investor friendly environment in order to get loans, the South American countries' possibility of choice was so reduced and limited that they could not choose anything else but to accept the requirements and conditions that were contained in a framework with structural power.

### **6.3. The Costs of ICSID for Developing Countries.**

Developing countries always wanted to have the disputes concerning investments that were performed in their territory to be resolved locally. From a practical perspective, this would involve no costs and it could enforce the trust on the local judiciary system. To have a setting under such circumstances was, however, a disadvantage for developed countries and their investors which were asked to trust in a foreign judicial system.<sup>527</sup>

However, as the liberalization process has shown, developing countries accepted and contributed to creating the BIT regime, which involved the constitution of an international arbitration institution: ICSID.<sup>528</sup>

ICSID, as part of the BIT regime, was created as a specialized international arbitration tribunal for resolving investor-state disputes. Mortenson (2010) stated “the underlying purpose of the ICSID Convention: to promote economic development by increasing the flow of foreign investment into interested host countries.”<sup>529</sup>

However, the focus of the analysis should not be directed to the creation or purpose of ICSID. The focus should be directed to its practice. This *ex post facto* analysis reveals which were the costs that this choice has had for developing countries and whether it was really something that was intended by developing countries.

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<sup>527</sup> This results from the debates surrounding the UN resolutions, mentioned in Chapter II.

<sup>528</sup> ICSID was agreed and created by a multilateral convention. The adherence to this and other international arbitration conventions was part of the liberalization process required for developing countries wishing to host more foreign investments.

<sup>529</sup> Mortenson, J. “The meaning of investment: ICSID’s travaux and the domain of international investment law” Harvard International Law Journal. Vol 51. No.1. 2010. p. 304

ICSID's practice has been criticized in numerous ways. The theoretical discussions of problems that have been identified with ICSID include its high financial costs, the unpredictability of its decisions, their partiality and conditionality, and the bad reputation it gives to countries. Interestingly, it is developing countries that are primarily affected by all these problems.

As with most international arbitration tribunals, the first criticism of ICSID regards its financial costs. In comparison to the submission of disputes to the courts of host countries, whose costs are going to be based on their national currency, the submission of disputes to ICSID are expensive. When submitting a dispute to ICSID, the administrative fee for requesting arbitration is US\$25,000; for any complementary decision, US\$10,000; annual fee for constituting the Tribunal, US\$32,000; Appointment of arbitrators, US\$10,000, and the Arbitrator's fee is US\$ 3000 per day. These costs do not include the arbitrator's travel costs, translations, etc.<sup>530</sup>

It is also important to consider which parties will be paying such costs and under which circumstances. When submitting a dispute, pursuant to a BIT, the parties are foreign investor-which are normally transnational companies (TNCs) on the one hand, and developing countries, which are always the respondents in such disputes. From a developing country's perspective, the problem is that they not only have to take money from their treasury to defend themselves, money that might well be useful for other needs of the country, but even more money has to be added to have a good representation. Supnik (2009) has said in this regard: "[D]eveloping host states facing ICSID claims often lack sufficient resources to adequately represent themselves in proceedings. Developing states must pay expensive legal fees to elite Western law firms to obtain representation comparable in calibre to that of private investors."<sup>531</sup>

Indirectly, this gives companies a better position than developing countries, because the mere idea of having to defend a costly dispute might limit the possible actions of developing countries. Picciotto (2011) has pointed out: "The effect is to destabilize the legitimacy of national laws...The threat of such a claim, which could lead to an award which may run to hundreds of millions of dollars as well as the cost of defending it, gives foreign investors a powerful weapon especially against poor states."<sup>532</sup> Furthermore, Hallward-Driemeier (2003) stated in her conclusion that there is a speculation regarding 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."<sup>533</sup>

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<sup>530</sup> ICSID Schedule of Fees effective as of January 1, 2012 available at <https://icsid.worldbank.org/ICSID/FrontServlet?requestType=ICSIDDocRH&actionVal=scheduledFees&reqFrom=Main> (last visited Jan 15, 2012)

<sup>531</sup> Supnik, K. "Making Amends: Amending the ICSID Convention to reconcile competing interests in International Investment Law" *Duke Law Journal*. Vol 59 Issue 2. 2009. p. 366.

<sup>532</sup> Picciotto, S. "International Transformations of the Capitalist State" *Antipode* Vol 43 No. 1. 2011 p. 96

<sup>533</sup> Hallward-Driemeier, M. "Do Bilateral Investment Treaties attract FDI? Only a bit...and they could bite" *World Bank DECRG* 2003 p. 22

Parties to a BIT and its system have to bear in mind that the ultimate purpose of such treaties is allegedly to encourage development and economic growth in developing countries.<sup>534</sup> There is a dilemma though because having an international arbitration tribunal such as ICSID brings more balance to solving disputes between a foreign investor and a state, when the legal institutions of such a state are full of corruption and exercising discretionary powers. However, this might not always be the case, and if the purpose is development, more aid, and not only financial aid should be provided to these areas for developing countries to develop. An easy and formal contribution to the host country would be if foreign investors paid the corresponding judicial taxes when submitting their disputes. This would help the judiciary as a whole, something that does not happen when submitting a dispute to ICSID.

The second criticism of ICSID concerns its operation as a deciding tribunal. Kaushal (2009) has stated that ICSID's awards are "unpredictable, contradictory, intrusive on the national regulatory sphere and extremely generous to foreign corporations."<sup>535</sup>

These comments derive from some substantial matters in ICSID's decisions. In the cases submitted to ICSID, if we just consider the treatment that for example the most favoured nation (MFN) clauses<sup>536</sup> were given, it is clear that there was some controversy in its application and interpretation.<sup>537</sup>

The cases *Siemens* (2004) and *Wintershall* (2008) are good examples that reflect the problem. Both cases concerned German investors against the Argentine Republic. Both tried to get over submitting the dispute to local courts by invoking the MFN clause. In both cases, the Argentine Republic objected to the jurisdiction of the ICSID Tribunal, claiming that the submission to local courts was imperative.<sup>538</sup> The ICSID, however, ruled in favour of the German party in one case and not in favour of the German party in the other case.

In *Siemens vs Argentina*<sup>539</sup> it was ruled by ICSID that the MFN clause of the Chile-Argentina BIT can be applied by Siemens<sup>540</sup> and they accepted the jurisdiction of ICSID for the case.<sup>541</sup>

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<sup>534</sup> See Appendix IV.

<sup>535</sup> Kaushal, A. "Revisiting History: How the Past Matters" Harvard International Law Journal. Vol 50 Issue 2. 2009. p. 510.

<sup>536</sup> The "most favoured nation" principle is applied when for the same kind of relation indicated in the same kind of treaty, one country has an advantage, more preference or is placed in a more favourable situation as comparison to other countries. Then, the country that is less favourable treated can claim the "most favoured nation" principle and automatically the party can benefit from the rights entitled to other countries under those same circumstances.

<sup>537</sup> Sornarajah, M. *The International Law on Foreign investment* Cambridge University Press. 3<sup>rd</sup> Edition. 2012. p 205; Hoekman, B. and Kostecki, M. *The political economy of the world trading system: from GATT to WTO* Oxford; New York : Oxford University Press, 1995. p. 252

<sup>538</sup> For both cases the same German-Argentina BIT was applied and its dispute resolution clause states that the dispute has to be resolve amicably, when not, it has to be submitted to the local courts and only when the local courts do not render a decision in the term of 18 months, the dispute can be submitted to the ICSID.

<sup>539</sup> *Siemens A.G v Argentine Republic* (ICSID Case No. ARB/02/8)



The reasoning of this decision lied in the tribunal considering the Vienna Treaty, whose respective article states that treaties are to be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.<sup>542</sup>

In this case the tribunal stated that its guidance will be by the “purpose” of the Treaty, and as it was expressed in the German-Argentinean BIT’s title and preamble, that it is a treaty “to protect” and “to promote” investments.

A contrario sensu, in the case **Wintershall vs Argentina**<sup>543</sup> the ICSID Tribunal ruled that the MFN cannot be applied because in the German-Argentina BIT, arbitration to ICSID was conditioned to first submitting the dispute to local courts.

While in *Siemens* the reasoning of the tribunal for the decision was based on the provision of the Vienna Convention on interpretation of treaties, of which the tribunal interpreted the “purpose” approach, in the *Wintershall* case the Tribunal read the same provision but they interpreted it using the “textual” approach.

Therefore, the tribunal stated in *Wintershall* that the acceptance by a State of the jurisdiction of an international tribunal always requires to be expressed by positive conduct and that the right to access to arbitration was conditioned by the German-Argentina BIT “*simply because it was the will of the contracting states*” and therefore another BIT (in this case the Argentina-US BIT) could not be used to invoke the MFN for this matter.

What is strikingly different is that while in *Siemens* the tribunal stated that the purpose of the treaty was important and the application of MFN of other treaties was available as to give more favourable treatment to *Siemens*, and so it was stated that *Siemens* could have direct access to international arbitration, in *Wintershall* the tribunal’s arbitrators said: “*That an investor could choose at will to omit the second step is simply not provided for nor even envisaged by the Argentina-Germany BIT – because (Argentina’s) the Host State’s “consent” (standing offer) is premised on there being first submitted to the courts of competent jurisdiction in the Host State the entire dispute for resolution in local courts...Besides, it is a general principle of international law that international courts and tribunals can exercise jurisdiction over a State only with its*

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<sup>540</sup> This treaty allowed the party to access directly to international arbitration. The Tribunal further stated that because such a treaty existed, and similar provisions were found in other treaties that Argentina had signed, namely that with the US and Spain, then the submission of disputes to local courts was not a sensitive subject for Argentina.

<sup>541</sup> Note that in this case Siemens and Argentina had a special contract which also established the submission of disputes to local courts, but for ICSID, and using the MFN principle, the treaty prevailed.

<sup>542</sup> Vienna Convention on the Law of Treaties. Article 31. 1969.

<sup>543</sup> Wintershall Aktiengesellschaft v Argentine Republic (ICSID Case No. ARB/04/14)

*consent. The principle is often described as a corollary to the sovereignty and independence of the State*”<sup>544</sup>

The tribunal stated that because *Wintershall* did not comply with the dispute settlement clause in the German-Argentina Treaty insofar as to submitting the dispute to local courts and then to the international tribunal, “*they had no competence to entertain the claim and proceed with the merits.*”<sup>545</sup>

If we put ourselves in *Wintershall’s* position, it is evidently an unequal treatment in comparison to what was awarded to *Siemens* who got a more favourable treatment by the international tribunal when they allowed *Siemens* to use the MFN principle.<sup>546</sup> These two cases are really a big contradiction for the application of the MFN and both could happen under the same treaty, which in these cases was the Germany-Argentina BIT.

The effect of these MFN interpretations is quite remarkable. Firstly, claiming the MFN clauses in the cases allows the claimant, an investor, to do treaty shopping in the sense that the investor does not need to rely on the BIT that was signed with its home country as the investor can choose a provision that is established in another treaty. Secondly, because the MFN principle can be applied to any provision of the treaty, there is a possibility of ending up with what has been called ‘a Frankenstein treaty’ because the rulings of the tribunal hint at the possibility of using different clauses from all the BITs of the country that better suits the claimant.

However, it was not only the interpretation of the MFN clauses that was contradictory in some of the ICSID’s decisions. Some other examples of how ICSID retained jurisdiction happened under the interpretation given to fork in the road clauses. Fork in the road clauses are the clauses by which the submission of the dispute to local courts is said to waive the right to access international arbitration.

In *CMS vs Argentina*,<sup>547</sup> derived from an US-Argentina BIT in 2004, in respect of the jurisdiction of the Tribunal, there was in addition to the BIT a specific contract (a License of *CMS* and subject matter of the investment), which stated that they had to settle disputes before the local courts. The tribunal said this is not a waiver to the Tribunal’s jurisdiction because a breach of a contract is not equal to a breach of a treaty.<sup>548</sup>

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<sup>544</sup> *Wintershall Aktiengesellschaft v Argentine Republic* (ICSID Case No. ARB/04/14). p 98

<sup>545</sup> *Wintershall Aktiengesellschaft v Argentine Republic* (ICSID Case No. ARB/04/14). p 91

<sup>546</sup> In a later award against Peru, the tribunal also allowed the party to use the dispute settlement mechanism of a different treaty, in *Tza Yap Shum v Peru*, ICSID Case No. ARB/07/6 (Decision on Jurisdiction and Competence, June 19, 2009)

<sup>547</sup> *CMS Gas Transmission Company v. The Argentine Republic*, ICSID Case No. ARB/01/8

<sup>548</sup> The award was partially annulled as far as it provided that “The Respondent breached its obligations... to observe the obligations entered into with regard to the investment guaranteed in Article II(2)(c) of the Treaty.” It was not

Furthermore, in **Azurix vs. Argentina**,<sup>549</sup> derived from a US-Argentina BIT, the respondent challenged the jurisdiction of the ICSID because the contract of Azurix specifically provided that the disputes should be submitted to the local courts, waiver of other fora. However, the Tribunal ruled in this case that the party's submission to local courts was no waiver because an obligation under the BIT towards the investment was breached and that gave them jurisdiction.

And again, a decision of the ICSID Tribunal, which is opposite to the aforementioned, was given in the case **Compañía de Aguas del Aconquija and Vivendi vs Argentina**,<sup>550</sup> which derived from a France-Argentina BIT. In a way similar to the *Wintershall* case, the French-Argentina BIT had the same provision as the US-Argentina BIT, which states the option of submitting the dispute to either ICSID international arbitration or UNICTRAL.

The Tribunal stated in *Wintershall* that the MFN of the US-Argentina BIT could not be applied because it was a different arbitration system, though they allowed the international jurisdiction in *Siemens*, but in this case, *Compañía de Aguas and Vivendi*, the reasoning of the Tribunal was different. They said that the dispute must be submitted to local courts because the treaty expressly stated that there was a fork in the road clause in the treaty.

The tribunal in the *Compañía de Aguas and Vivendi* case stated that any claim against the Argentine Republic could only arise if claimants were denied access to courts, if they were treated unfairly or if the judgment of those courts were unfair or denied rights guaranteed to French investors under the BIT.<sup>551</sup> This decision was, however, later annulled and as in the previous cases the Tribunal sustained that a breach of a contract can amount to the breach of a treaty.<sup>552</sup>

As it can be seen, in the cases submitted to ICSID, the arbitrators, using their kompetenz-kompetenz have resolved in favour of their jurisdiction, either using the MFN principle<sup>553</sup> or in spite of fork in the road clauses.<sup>554</sup> However, all this happened in spite of the dispute settlement

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modified on the amount of compensation that Argentina had to give. Decision of the *ad hoc* Committee on the Application for Annulment of the Argentine Republic (September 25, 2007).

<sup>549</sup> Azurix Corp. v. The Argentine Republic, ICSID Case No. ARB/01/12

<sup>550</sup> Compañía de Aguas del Aconquija S.A. and Vivendi Universal v. Argentine Republic, ICSID Case No. ARB/97/3

<sup>551</sup> *ibid.* Pa. 80

<sup>552</sup> Decision on Annulment of July 3, 2002 in 130 *Journal du droit international* 195. 2003.

<sup>553</sup> Another famous case supporting jurisdiction due to MFN is Emilio Agustin Maffezini vs Spain (ICSID Case No. ARB/97/7).

<sup>554</sup> In *Siemens A.G v Argentine Republic* (ICSID Case No. ARB/02/8); *CMS Gas Transmission Company v. The Argentine Republic* (ICSID Case No. ARB/01/8) and, *Azurix Corp. v. The Argentine Republic* (ICSID Case No. ARB/01/12)

wording of South American countries' BITs and especially Argentinean ones which contain a special provision requiring that disputes first go to local courts.<sup>555</sup>

Thirdly, there is the criticism that ICSID is partial. Although ICSID is supposed to be an autonomous institution that was established through an international convention, it was formed by the World Bank, and it is one of the five agencies that forms the World Bank group.

ICSID's authority has been criticized because the president of the World Bank appoints the Secretary General of the ICSID, and the World Bank's president in turn is elected by the US president.<sup>556</sup> Van Harten (2008) has in this context stated: "At ICSID, the role of the US Administration is one or two steps removed from this quasi-colonial set-up in that the US Administration nominates the World Bank President – subject to appointment by a process in which 11 major capital-exporters hold a majority of the votes- who will then either exercise appointing authority or in turn select the ICSID Secretary General to do so."<sup>557</sup>

The ICSID Tribunal decides on cases that are connected to loans of the very institution to which they belong. In *CMS vs Argentina*,<sup>558</sup> the investor submitting the dispute to ICSID received the main investing loan from the International Finance Corporation, a member of the World Bank group. The one benefiting from the investor's compensation in such a case was the World Bank's agency that lent the investor the money. The Argentine government complained about this, but the arbitrators disregarded it just by denying any interference among the institutions.<sup>559</sup>

The fourth criticism derives from conditionalities. If developing countries are constrained by receiving loans from the World Bank, and the ICSID is an agency of the World Bank, the choice to accept the ICSID Convention is not really a choice at all.

Allee and Peinhardt (2010) have used the theory of relative bargaining power to explain how in the dispute settlement clauses a delegation to the ICSID takes place. Both parties, home and host countries, could equally use and have this relative bargaining power. They made an empirical study considering the conditionality factor and came to the result that "power matters as an explanation for international arbitration....Those developing countries that are at the mercy of international economic actors who supply them with export markets and much-needed capital are most likely to succumb to international dispute resolution clauses in their BITs. Coupled with the finding about the importance of relative bargaining power, we conclude that for many of the

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<sup>555</sup> Shown in Appendix VI.

<sup>556</sup> It is not a formal procedure that the US President elects the World Bank president by himself; but a longstanding 'deal' between the US and the EU that the former chooses the WB President and the latter the IMF President. See further information available at <http://www.unelections.org/?q=/node/72> (last visited December 8, 2013).

<sup>557</sup> Van Harten, G. "A case for an International Investment Court". Inaugural Conference, Geneva, July 15-17. 2008. p.18.

<sup>558</sup> *CMS Gas Transmission Company v. The Argentine Republic*, (ICSID Case No. ARB/01/8)

<sup>559</sup> *CMS Gas Transmission Company v. The Argentine Republic*, (ICSID Case No. ARB/01/8) pa 102.

world's weakest and most dependent countries, *the inclusion of ICSID clauses within BITs is not so much a choice as it is a requirement.*"<sup>560</sup>

The connection of the ICSID to the World Bank, the principal institution to provide credit to developing countries, is an issue that both developed and developing countries take into account. It can be security for the first and a risk for future credits for the latter.<sup>561</sup>

The reason for establishing ICSID was supposed to be that it was going to be a neutral body, in contrast to the judiciary of the host country. However, as we have seen, its neutrality is questioned, and that affects the view of this institution as an impartial one.

Fifthly, it was argued that ICSID could give bad reputation to developing countries through ICSID's cases. Allee and Peinhardt (2011) stated that ICSID can even produce FDI losses for the country because of the bad reputation that countries breaching a BIT have and when they lose the cases submitted to ICSID, i.e. when it is affirmed that indeed the country acted in violation of the investor's right. They stated: "[G]overnments suffer notable losses of FDI when they are taken before ICSID, and suffer even greater losses when they lose an ICSID dispute."<sup>562</sup> Allee and Peinhardt reached this conclusion after empirically examining the loss of inward FDI for governments that were challenged at ICSID.

This bad reputation that host countries being sued at ICSID can obtain is possibly due to the lack of confidentiality of ICSID's disputes, which in turn can operate in two ways. One is that it can provoke a hesitation for future investors and also for the global community in regard to the country being sued.<sup>563</sup> And the other is that ICSID can be used by foreign investors who want to disclose the country's problem: "When investors attempt to discern a state's reputation for upholding its BIT commitments, ICSID is the venue to which they will look."<sup>564</sup>

All these criticisms of ICSID can be summarized in ICSID's practice, through the investment disputes. It mainly affects developing countries which are the main respondents in investment disputes brought to ICSID. This outline just contributes to show what ICSID's practice has meant for developing countries, leading to the questioning of their lack of intention for these consequences to come about. However, this also suggests that it has been part of the structural

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<sup>560</sup> Allee, T. and Peinhardt, C. "Delegating Differences: Bilateral Investment Treaties and Bargaining Over Dispute Resolutions Provisions" *International Studies*, 54 2010. p. 23. Emphasis added.

<sup>561</sup> As it has been said by Franck, it gives institutional gravitas over states in need of financing. Franck, S. "Foreign Direct Investment, Investment Treaty Arbitration, and the Rule of Law." *Pacific Mc George Global Business & Development Law Journal* 19. 2007.

<sup>562</sup> Allee, Todd and Peinhardt, Clint "Contingent Credibility: The Reputational Effects of Investment Treaty Disputes on Foreign Direct Investment" *International Organization*. Vol. 65. Issue 3. 2011

<sup>563</sup> *ibid* p. 3

<sup>564</sup> *ibid* p. 8

power which helped built the framework for international investment and in which the developed countries' preference of including ICSID as institution had prevailed.<sup>565</sup>

#### **6.4. Developing Countries' Sovereignty Costs.**

Early conceptions of sovereignty defined it as a state having control over a territory and can do its will. It was complemented by the idea that sovereignty had limitations not only of divine or natural character, as it was initially conceptualized, but that there was a limitation in the people. However, the people willingly could delegate the power to its government.<sup>566</sup>

Therefore, it is not new that with every international treaty that is being signed, states have sovereignty costs. This is because states through treaties assume obligations that they have to comply with. This, however, is performed through an intended action of the state towards the welfare of its people.

The BIT regime also presents sovereignty costs. Kaushal (2009) concluded that BITs were a bargain which consisted in developing countries giving their sovereignty for the promise of foreign investment.<sup>567</sup> In a similar vein, Elkins, Guzman and Simmons (2006) stated that developing countries are trading sovereignty for credibility.<sup>568</sup>

What differs, however, is that with the BIT regime the sovereignty costs of developing countries were not intended. Furthermore, the costs go beyond the normal sovereignty costs associated with signing a treaty: the restriction to legislate.<sup>569</sup> The right to legislate is an inalienable right of the state in order to pursue the welfare of its people.

The BITs set obligations that the host country must observe with a foreign investor in relation to the investment in its territory. If something in the territory of the host is done even for reasons of

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<sup>565</sup> Note that it is a developed countries' preference in the sense that it does not affect them (the US for example has not lost in any case submitted to ICSID)

<sup>566</sup> For a full account on the history and development of the concept of sovereignty see Schuman, F. *International Politics. The Destiny of the Western State System* Chapter II. Fourth Edition. McGraw-Hill Book Company Inc. New York. 1948

<sup>567</sup> Kaushal, A. "Revisiting History: How the Past Matters" *Harvard International Law Journal*. Vol 50 Issue 2. 2009. p. 491

<sup>568</sup> Elkins, Z., Guzman, A.T. and Simmons, B. "Competing for Capital: The Diffusion of Bilateral Investment Treaties, 1960-2000" *International Organization* 60, 2006. p. 4

<sup>569</sup> Another sovereignty cost attached to BITs is the detachment of investment disputes from domestic territory. BITs have made possible the detachment of the disputes from domestic jurisdiction and take them to an international arbitration body. Developing countries have, therefore, lost sovereignty when negotiating towards a system which went beyond the Calvo doctrine but to the benefit of developed countries. Kaushal (2009) criticized the fact that by internationalizing the dispute, the national legal system is not supported. He stated: "The ability to internationalize the dispute may preclude BITs from fostering national legal development because foreign investors can rely on a BIT enclave instead of supporting national institutions. The fact that foreign investors do not need to rely on local institutions for recourse may mean that they lose interest in developing good governance mechanism at the local level." Kaushal, A. "Revisiting History: How the Past Matters" *Harvard International Law Journal*. Vol 50 Issue 2. 2009. pp. 516- 517 It should be considered that some BITs expressly state that their aim is to increase development. See Appendix IV.

public interest or emergency national actions are taken which nevertheless affect the investment, the host country will be breaching the obligations of the treaty. This also means that it will be breaching international law, for which the investor could demand to be compensated.

The problem arises when there is a dispute that concerns public interests.<sup>570</sup> The arbitration tribunal would analyze and review (approving or denying) these interests in the scope of a BIT and many BITs do not have the obligation towards the community, ecological, or health interests, which are a matter of priority for states. Supnik (2009) already pointed out that the ICSID convention should be amended so as to include these matters.<sup>571</sup>

Although South American BITs do not include in their text these obligations, some of them do express them in their preambles and as pointed out in section 4.2., according to the Vienna Convention of the Law of Treaties, the preamble has to be taken into account when interpreting the treaty. However, the enforcement of BITs and the awards given by international arbitration institutions, like ICSID, have not always followed this approach.

Some of the cases submitted to ICSID have shown that ICSID examines the countries' policies and decides upon the matter. The arbitration tribunal can judge the actions of a sovereign country, even if the latter is acting legitimately through its constitutional powers.

I will discuss the **Tecmed vs Mexico** case,<sup>572</sup> the cases during the Argentinean crisis, and, as a more recent example, the still pending case of **Philip Morris vs Uruguay**.<sup>573</sup> In these examples, there was no recognition of the public interest over the interests of the foreign investor and it remains to be seen if the case with Uruguay, which is still pending, will have the same fate.

A Spanish company, Tecmed, had a waste plant in a Mexican city called Hermosillo. It operated with a license granted by the government of Mexico. Around 1997 a citizenship movement worked against this waste disposal plant because it was worried about the health and environmental consequences of having a waste plant in the middle of its community.

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<sup>570</sup> The problematic in disputes that concern public interests is that it has to be judged whether the action of the host country pertains to indirect expropriation (mostly expropriations through regulations) or to a legitimate non compensable regulation.

<sup>571</sup> Including these activities under ICSID's jurisdiction would escape the purpose of the creation of ICSID as a specialized institution for foreign investments. However, Supnik concludes that one can amend the bilateral system into making it agree with a multilateral system, by amending the ICSID convention as to include environmental, labour and health issues. This could create according to Supnik a global responsibility. However, she was aware that by including even more activities under the jurisdiction of ICSID, more costly lawsuits might get triggered and this will not be desirable for developing countries. Supnik, K. "Making Amends: Amending the ICSID Convention to reconcile competing interests in International Investment Law" *Duke Law Journal*. Vol 59 Issue 2. 2009.

<sup>572</sup> *Tecnicas Medio Ambientales Tecmed SA vs Mexico*. ICSID Case No. ARB(AF)/00/2.

<sup>573</sup> *Philip Morris Brand Sarl, Philip Morris Products S.A. v. Oriental Republic of Uruguay*. ICSID Case No. ARB/10/7. Decision pending. For the same reason, Australia was also sued by the same company.

Consequently, in 1998, the renewal of the license was denied and the closure of the plant was ordered.

The Spanish company said this was an act of expropriation by the Mexican government, which supported a social movement that wanted the closure of the plant. The Spanish company, Tecmed, sued the government of Mexico for breaching the investment treaty between Mexico and Spain.

The case was submitted to arbitration at ICSID. In its defense, Mexico adopted the position of its citizens toward the waste plant. They were concerned about the waste plant because of its location and because of general health issues, since the waste plant had to transport and store highly toxic waste.

Mexico, a sovereign state, had to justify itself to a foreign investor and to the tribunal for actions that it pursued in the public interest and for having prioritized the health of its citizens. The Arbitral Award stated: “The respondent highlights the adverse attitude of the society towards the waste plant because of its location and of the negative and critic opinion that the society has manifested in relation to the compliance of the tasks of transport and storage of dangerous toxic waste by Cytrar, originated in what was the recycling and recuperation plant of Alto Pacífico de Mexico SA, located in Tijuana, Low California, *what accentuated the importance to require strict compliance of the conditions of the new authorization from INE to Cytrar dated November 19<sup>th</sup> 1997.*”<sup>574</sup> (my emphasis)

The respondent, Mexico, stated that the denegation of such authorization, i.e. to continue with the license, was a measure of control in a sector highly regulated that involved the public interest very closely.<sup>575</sup> The arbitral tribunal of ICSID decided that the fair and equitable treatment owed by the government of Mexico to the Spanish investor was breached; that the “non-renewal” of the license was indeed an expropriation of the Spanish investment committed by the government of Mexico. Mexico was judged to have breached the investment treaty with Spain, and as a consequence, Mexico had to pay damages which amounted to US\$ 5.533.017. The economic interest of the foreign investor had prevailed over those of the community.

The second example concerns the disputes submitted by investors due to Argentina’s crisis in 2001. Argentina, as part of its privatization program, had privatized gas companies. A regulator created for this purpose by law, was supposed to control the business fairly and reasonably. The investors or licensees could calculate their tariffs in US dollars and charge in pesos. Already in 1990, Argentina was having economic problems and the calculation in dollars of the tariff became immensely onerous for the consumers. In the year 2000, the government met with the investors and asked for a postponement of the tariff based on the dollar calculation. In 2001

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<sup>574</sup> Tecnicas Medio Ambientales Tecmed SA vs Mexico. ICSID Case No. ARB(AF)/00/2. p. 173. Author’s translation.

<sup>575</sup> Tecnicas Medio Ambientales Tecmed SA vs Mexico. ICSID Case No. ARB(AF)/00/2. p. 172



Argentina had an economic crisis, the citizens started to withdraw their savings from the bank. In 2002, Argentina then enacted the Emergency Law, together with the Corralito decree, which restricted bank withdrawals. The Emergency Law stated the pesification policy by which all assets (even those in dollars) were converted into peso at a non-market exchange rate. It also terminated the right of investors in the public utilities sector to calculate their tariffs in dollars.

From the foreign investors' perspective, these laws had a negative impact on their investments in the country. Many companies sued Argentina for these actions; I will refer as an exemplary case only to four companies of the gas sector which sued Argentina at ICSID pursuant to the US-Argentina BIT.<sup>576</sup> In all these cases, as a defense, Argentina claimed a 'state of necessity', which is a right of sovereign states to act in a certain way in circumstances calling for emergency actions, by which said sovereign state can be excluded from liability. Thus, ICSID's ruling was relevant because if a state of necessity was legitimate then it will have the consequence of exempting the host country's liability for its action.

The necessity exemption is used when a country fails to comply with an international obligation because of going through a stage in which its acts cannot be otherwise than those taken because they are determined by special circumstances.

The International Law Commission "Articles on State Responsibility", in its Article 25 states regarding the State of Necessity: "Necessity may not be invoked by a State as a ground for precluding the wrongfulness of an act not in conformity with an international obligation of that State *unless* that act: *a) is the only way for the State to safeguard an essential interest against a grave and imminent peril; and b) does not seriously impair an essential interest of the State or States towards which the obligation exists or of the international community as a whole...*".<sup>577</sup>

Although the situation was the same in all cases, and the same treaty was used to present a claim (the US-Argentina BIT), ICSID reasoned very differently regarding allowing necessity to be a factor that could exempt liability to Argentina. Therefore, the cases had very different outcomes.

In **CMS vs Argentina**<sup>578</sup> the ICSID had jurisdiction through the US-Argentina BIT. The tribunal in 2005 ruled that Argentina was not completely exempted from liability but the compensation which Argentina had to pay was decided based on the fact that there was a crisis.

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<sup>576</sup> CMS Gas Transmission Company v. The Argentine Republic, (ICSID Case No. ARB/01/8); Sempra Energy International vs Argentine Republic (ICSID Case No. ARB/02/16); LG&E Energy Corp. v. Argentine Republic, (ICSID Case No. Arb/02/1); and Enron Corp, Ponderosa Assets, L.P. v. Argentine Republic (ICSID Case No. Arb/01/3).

<sup>577</sup> Responsibility of States for Internationally Wrongful Acts 2001. Text adopted by the Commission at its fifty-third session, in 2001, and submitted to the General Assembly as a part of the Commission's report covering the work of that session. International Law Commission, 2001, vol. II (Part Two). Emphasis added.

<sup>578</sup> CMS Gas Transmission Company v. The Argentine Republic, ICSID Case No. ARB/01/8

The tribunal viewed the crisis as a “changing reality” and it was stated in the award “*Justice, however, is not as blind as it is often thought and this Tribunal acknowledges that changing realities had an impact on the operation of the industry, and the governing legal and contractual arrangements.*”<sup>579</sup>

The tribunal reasoning was that the measures adopted by Argentina breached the standard of “fair and equitable treatment” stated in the Treaty and although Argentina had not acted wrongly, they had to compensate the claimant for it.<sup>580</sup>

However, the ICSID tribunal had a different outcome in the case **LG&E vs Argentina**.<sup>581</sup> In an award rendered in 2006 it was judged that because of the crisis during the period 2001-2003, Argentina was completely excluded from liability. Argentina was in a state of necessity, because of which it was exempted from the payment of compensation for damages incurred during that period.

Although here too, the tribunal’s reasoning stated that Argentina violated the fair and equitable treatment, it excluded its liability, arguing that “*the Tribunal nevertheless recognizes the economic hardships that occurred during this period, and certain political and social realities that at the time may have influenced the Government’s response to the growing economic difficulties.*”<sup>582</sup>

The tribunal ruled that liability should be excluded for breaches of the Treaty because the crisis affected the public order and Argentina’s security interests. However, the tribunal did consider the crisis period but ruled that after the crisis the relations should be restored or Argentina should compensate for not doing so. If that were to be the case, the tribunal stated that there should be a different arbitration.

In **Enron vs Argentina**, Argentina also claimed state of necessity but the tribunal said that the crisis did not amount to it. “*The Tribunal has no doubt that there was a severe crisis and that in such context it was unlikely that business could have continued as usual. Yet, the argument that such a situation compromised the very existence of the State and its independence so as to qualify as involving an essential interest of the State is not convincing.*”<sup>583</sup>

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<sup>579</sup> *ibid* pa. 154

<sup>580</sup> The award was partially annulled (“as far as it provided that “The Respondent breached its obligations... to observe the obligations entered into with regard to the investment guaranteed in Article II(2)(c) of the Treaty.” It was not modified on the amount of compensation that Argentina had to give. Decision of the *ad hoc* Committee on the Application for Annulment of the Argentine Republic (September 25, 2007).

<sup>581</sup> LG&E Energy Corp. LG&E Capital Copr. And LG&E International Inc vs Argentine Republic (ICSID Case No. ARB/02/1)

<sup>582</sup> *ibid* pa. 139. Emphasis added.

<sup>583</sup> Enron Corporation Ponderosa Assets LP vs Argentine Republic (ICSID Case No. ARB/01/3) 2007. p 97. Emphasis added.

In **Sempra vs Argentina**<sup>584</sup> (just as in the *CMS* and *Enron* case) and again with the same Argentina crisis which excluded liability of the Argentine Republic in the *LG&E* case aforementioned, the ICSID arbitrators concluded that the crisis was not sufficient to exclude Argentina's liability. Indeed, the tribunal ruled that there was no state of necessity and that Argentina -as in the other cases- had breached the equitable and fair treatment clause and, therefore, had to pay compensation. One of the reasons for the decision in *Sempra vs Argentina* was that the measures adopted did not affect the independence of the country and that the government allegedly had control to not make things worse.

These different outcomes in cases against Argentina resulting from its economic crisis provide us with interesting issues: On the one hand, changing realities and how these can affect the governmental actions, and on the other hand, again the uncertainty and lack of uniformity in the ruling over state of necessity and its exclusion of liability.<sup>585</sup>

In three of the four cases the ICSID Tribunal did not observe the principle of international law of an exclusion of liability in case of necessity. Furthermore, they judged on matters that are exclusively matters of sovereigns, such as the decision of what can or cannot affect the independence of the country. The crisis had an *erga omnes* effect, i.e. it affected all the citizens and not only foreign investors. The tribunal, however, decided that Argentina should pay damages to the foreign investors, a situation that could be seen as intrusive, as Kaushal (2009) stated, on the national regulatory sphere of the state.<sup>586</sup>

The decisions of the awards materialized in the duty of Argentina to compensate foreign investors millions of dollars because of Argentina's crisis and because of the reaction of the government to the crisis did not favour the foreign investors. Alvarez and Khamsi (2009) make an important point about the arbitrators' powers when deciding these disputes, when they write: "Many are astounded by the idea that three individuals, two of whom are party-appointed, in a case brought by a single foreign investor, who is not entitled even to be considered part of the greater democratic polity of a host state such as Argentina, can question how that government chooses to respond to a serious crisis..."<sup>587</sup>

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<sup>584</sup> *Sempra Energy International vs Argentine Republic* (ICSID Case No. ARB/02/16) (2007)

<sup>585</sup> Necessity was also raised as a defence by Argentina in two other cases: In *Continental Casualty Company v. Argentine Republic* (ICSID Case No. ARB/03/9) and in *National Grid v Argentina*. The tribunal upheld the necessity claim in the first case and not in the second which was performed under UNCITRAL rules. available at <http://italaw.com/documents/NGvArgentina.pdf> ). Sornarajah pointed out that "It is difficult to reconcile these awards." in Sornarajah, M. *The International Law on Foreign Investment* 3<sup>rd</sup> Edition. Cambridge University Press. 2010. p 464

<sup>586</sup> Kaushal, A. "Revisiting History: How the Past Matters" *Harvard International Law Journal*. Vol 50 Issue 2. 2009.

<sup>587</sup> Alvarez, J. and Khamsi, K. "The Argentine Crisis and Foreign Investors: A Glimpse into the Heart of the Investment Regime" *Yearbook of International Investment Law & Policy* 379. Karl P. Sauvant, ed., 2009. p.383

For Kaushal (2009) ICSID is empowering foreign investors that are only pursuing their own economic interests and are not sensitive to other concerns. He also mentions that this would not have been the case under state-to-state procedures.<sup>588</sup>

The fact remains that Argentina's BIT contributed to the financial catastrophe they had after these cases. This is peculiar, given that its BITs were supposed to do the opposite. The US-Argentina BIT was signed with the purpose of: "[d]esiring to *promote greater economic cooperation* between them.... Recognizing that agreement... *will stimulate the flow of private capital and the economic development of the Parties.*"<sup>589</sup> Alvarez and Khamsi commented: "Some deride those rulings as callous, one-sided failures to recognize the dire needs of the Argentine people during a financial collapse of catastrophic proportions."<sup>590</sup> Having international arbitration awards that oblige a host country to pay millions when its own country is in crisis does not contribute to one of the main objectives of BITs, i.e, increase the wealth, development or prosperity of the signatory countries. On this point Sornarajah (2010) stated that "the issue arises as to why the foreign investor should not suffer the circumstances of necessity in the same way as the citizens of the state. The risk in the situation was voluntarily assumed by the foreign investor. Necessity in customary international law was designed to apply to an entirely different situation of an obligation directly owed to another sovereign state."<sup>591</sup>

The claims against Argentina for its financial crisis and the measures it took have not stopped. Some cases are still pending. Overall, however, the costs for Argentina are of the order of magnitude of billions of dollars plus interests.<sup>592</sup>

The third example, a more recent one, is a pending claim against Uruguay. Uruguay's government enacted laws, decrees and regulations regarding public health, aimed at reducing smoking. This was done pursuant to a multilateral effort of the World Health Organization (WHO), and because of this, Uruguay has now a claim pending at ICSID.

In 2010, a foreign investor, a tobacco company with headquarters in Switzerland (Phillips Morris), sued Uruguay and submitted a claim to ICSID.<sup>593</sup> Uruguay had enacted national laws

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<sup>588</sup> "It also highlights the consequence of empowering foreign investors to pursue their economic interests to the exclusion of other concerns. Under state-to-state procedures, the investor's home state likely would have considered the internal and geopolitical consequences of potential sovereign bankruptcy before endorsing the claim, whereas foreign investors need not consider such consequences" See Kaushal, A. "Revisiting History: How the Past Matters" Harvard International Law Journal. Vol 50 Issue 2. 2009. p. 524

<sup>589</sup> Extracts from the US-Argentina BIT.

<sup>590</sup> Alvarez, J. and Khamsi, K. "The Argentine Crisis and Foreign Investors: A Glimpse into the Heart of the Investment Regime" Yearbook of International Investment Law & Policy 379. Karl P. Sauvant, ed., 2009. p.4

<sup>591</sup> Sornarajah, M. *The International Law on Foreign Investment* 3<sup>rd</sup> Edition. Cambridge University Press. 2010. p 465

<sup>592</sup> Nine claims have been decided: CMS, LG&E, Sempra, Enron, Continental Casualty, Metalpar, Wintershall, BG, and National Grid. In only two Argentina won. 34 cases are pending at ICSID and one arbitration is under UNCITRAL (Anglian Water Group-AWG). Information provided by Peterson, L. "Round-Up: Where things stand with Argentina and its many investment treaty arbitrations" Investment Arbitration Reporter, December 17, 2008. Available at [http://www.iareporter.com/articles/20090929\\_15](http://www.iareporter.com/articles/20090929_15) (last visited February 19, 2013)

which applied the provisions of the Framework Convention for Tobacco Control (FCTC) of the World Health Organization, an international convention that Uruguay had ratified together with many countries in the world.<sup>594</sup> Pursuant to this convention, it was an obligation of the signatory countries to implement the provisions contained therein.

Article 11 of the FTCT provides rules for cigarette packaging which the parties to the Convention must comply with within a period of three years. The rules provided restrictions for cigarette packaging regarding terms such as “low tar,” “light,” “ultra-light,” or “mild”, for being misleading and deceptive, and also regarding the health warnings which should cover 50% or more of the package.<sup>595</sup>

Uruguay and many countries in South America adopted these regulations through their national laws.<sup>596</sup> Uruguay, by Law No. 18256 of 2008, Decree N° 287/09, and Ministerial Order N° 466/09 and the Resolution of the Public Health Ministry N° 514/09, took measures regarding tobacco control in accordance to the FCTC.

Philip Morris main strategy in suing Uruguay was to invoke the constitutional right of intellectual property. A trademark is an intellectual property asset and, therefore, subject to legal protection. Since the protection of property is in the constitution, it is a protection that is above national laws and regulations.<sup>597</sup> While they submitted an unconstitutional claim which is currently pending in the Supreme Court of Uruguay, Philip Morris also claimed that these measures damaged its trademark, and as its intellectual property, it was therefore claimed to be subject to protection in the Swiss-Uruguay BIT.<sup>598</sup>

As a consequence, Philip Morris also made use of the right conferred to investors in the BIT to submit a claim before ICSID, claiming that the Uruguayan government had expropriated their investment.

The claim stated that because of the Uruguayan regulations that determined certain conditions for single cigarette packaging, which had to contain pictograms and health warning covering

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<sup>593</sup> Philip Morris Brand Sarl, Philip Morris Products S.A. v. Oriental Republic of Uruguay. ICSID Case No. ARB/10/7. Although the case is not yet public since there is still no award, the media had publicized the reasons for this claim.

<sup>594</sup> The FCTC has 168 Signatories countries, list available at: [http://www.who.int/fctc/signatories\\_parties/en/index.html](http://www.who.int/fctc/signatories_parties/en/index.html) (last visited April 18, 2012)

<sup>595</sup> Summary of the provision of Article 11 of the WHO Framework Convention on Tobacco Control (FCTC).

<sup>596</sup> Argentina and Paraguay also enacted laws and Health Ministry Resolutions that were in accordance with the FCTC.

<sup>597</sup> South American countries’ juridical order follow Kelsen’s pyramid model, i.e. the hierarchy of the juridical order is the Constitution at the peak, then treaties in second order and then laws.

<sup>598</sup> Treaty between Swiss Confederation and the Oriental Republic of Uruguay concerning the reciprocal encouragement and protection of investment, October 7, 1988, and entered into force on April 22, 1991 [hereinafter Swiss-Uruguay BIT], available at [http://www.sice.oas.org/Investment/BITSbyCountry/BITS/URU\\_Switzerland\\_f.pdf](http://www.sice.oas.org/Investment/BITSbyCountry/BITS/URU_Switzerland_f.pdf) (last visited Oct 19, 2012).

80% of the package, Philip Morris incur losses because it had to take some of their products off the market.<sup>599</sup>

Philip Morris claimed that this was an expropriation of its trademark. Philip Morris stated that its investments in the country had been expropriated because, they claimed, the single packaging presentation requirement is a breach of the prohibition of unreasonable measures under the treaty.<sup>600</sup>

The decision of the tribunal is still pending. It will have to face a challenge; ultimately, the decision between the economic interests of the foreign investor and those of the public interest. The growing social concern about these issues might also account for greater expectations regarding the decision.<sup>601</sup>

All these cases concerning public interests have shown that the sovereignty costs could not have been intended by developing countries. Further evidence of this claim is given by the reaction that South American developing countries are adopting against the framework for international investments, as I will outline now.

Brazil, for example, has not ratified any BITs with developed countries<sup>602</sup> because parliamentarians oppose them due to their implications.<sup>603</sup> The Investment Arbitration Reporter of 2008 stated the reason or worries for Brazil which prevent them to ratify BITs: “The development is notable in that Brazil has long refrained from entering into meaningful international treaty commitments in relation to foreign investment protection, due to concerns expressed by parliamentarians as to the constitutional and domestic legal implications of such agreements.”<sup>604</sup> The main problem for Brazil with BITs was in regard to their sovereignty costs.

More South American countries have also taken radical actions against ICSID. Bolivia, with the government of Evo Morales, denounced the ICSID Convention on April 29, 2007, and the

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<sup>599</sup> The complaint about the Uruguayan measures included the regulation that the term “light” should not be used because it erroneously suggested less danger. Psetizki, V. “Tabacalera Philips Morris demanda a Uruguay” BBC Article, March 12, 2010, available at [http://www.bbc.co.uk/mundo/economia/2010/03/100312\\_uruguay\\_tabacaleras\\_philip\\_morris\\_demanda\\_estado\\_jp.s.html](http://www.bbc.co.uk/mundo/economia/2010/03/100312_uruguay_tabacaleras_philip_morris_demanda_estado_jp.s.html) (last visited August 8, 2012)

<sup>600</sup> Request for Arbitration, FTR Holdings S.A. (Switzerland) v. Oriental Republic of Uruguay, ICSID case no. ARB/10/7 (February 19, 2010).

<sup>601</sup> It was said when considering public opinion: “For some, international arbitrations...are ill-suited to settling matters involving fundamental issues of public policy” in: Alvarez, Jose and Khamsi, K. “The Argentine Crisis and Foreign Investors: A Glimpse into the Heart of the Investment Regime” Yearbook of International Investment Law & Policy 379. Karl P. Sauvant, ed., 2009.p.6

<sup>602</sup> Brazil has ratified only one BIT with Paraguay which entered into force in 1957.

<sup>603</sup> Peterson, L. and Simoes e Silva, A. Investment Arbitration Reporter 1 (9) 2008.

<sup>604</sup> *ibid*

country was officially excluded from the affiliation to ICSID on November 3, 2007.<sup>605</sup> More recently, Bolivia terminated its BIT with the United States, on June 10, 2012.<sup>606</sup>

Ecuador denounced ICSID in July 2009.<sup>607</sup> In the same year, the President of the country asked for the termination of 13 BITs.<sup>608</sup> On September 14, 2010, Ecuador terminated the BITs with the UK and Germany and on March 2011, the BIT with France.<sup>609</sup> A request for termination of the BITs with the US and Spain is pending at the Ecuadorian Congress.<sup>610</sup>

The speaker of the Ecuadorian Government on this matter, Pedro Páez, stated that the decisions of the arbitral ICSID tribunal have an element of bribery for their country, and made the comparison to the gun-boat diplomacy of hundreds of years ago and the pressures upon public debt. He also stated that foreign investments are a myth because of which the country gave away sovereignty to receive investments, and that has proven to be false. He further said: "ICSID works as a tool for exploitation, pressure and destabilization of our countries."<sup>611</sup>

Linda Machuca, the Vice-President of the International Relations Commission of the Assembly, when asked in an interview by the BBC about the reason of Ecuador's decision towards terminating BITs, stated: "*we are defending the sovereignty of our jurisdiction. We want to acknowledge the possibility that our State has to settle dispute at an instance in which it has confidence. In the case of ICSID our data reveal that its awards have been mainly favourable to the foreign companies*".<sup>612</sup> Furthermore, in the same interview, the former Foreign Affairs Minister, Manuel Chiriboga, stated that foreign investment will be in danger if Ecuador does not find instances and mechanism for dispute settlement.

The justification for the termination of these treaties was that they were against the Ecuadorian Constitution. The National Constitution of Ecuador states that the government cannot give away

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<sup>605</sup> Peterson, Luke. "Ecuador Announces that It Wants Out of U.S. Investment Treaty" Investment Treaty News. International Institute for Sustainable Development. Winnipeg, Man., Can. 2007.

<sup>606</sup> Organization of American States web site, available at [http://www.sice.oas.org/ctyindex/USA/USABITs\\_e.asp](http://www.sice.oas.org/ctyindex/USA/USABITs_e.asp) (last visited Jun 3, 2012)

<sup>607</sup> Ecuador's Official Registry No. 632. July 13, 2009; see also 2011 Investment Climate Statement Report. US Bureau of Economic, Energy and Business Affairs. March 2011, available at <http://www.state.gov/e/eb/rls/othr/ics/2011/157270.htm> (last visited October 26, 2012)

<sup>608</sup> Mena Erazo, P. "Ecuador pone fin a los tratados bilaterales de inversión".BBC News report. September 16, 2010.

<sup>609</sup> Ecuador's Legislative Brief No. 179 submitted by the "Comisión de Soberanía, Integración, Relaciones Internacionales, y Seguridad Integral de la Asamblea Nacional" discussed in the sessions dated September 9 and 14, 2010.

<sup>610</sup> Ecuador's Legislative Brief No. 179 submitted by the "Comisión de Soberanía, Integración, Relaciones Internacionales, y Seguridad Integral de la Asamblea Nacional" discussed in the sessions dated September 9 and 14, 2010; see also UNCTAD *Denunciation of the ICSID Convention and BITS: Impact on the Investor-State Claims*. IIA Issue note No. 2. December, 2010.

<sup>611</sup> Author's translation from the report by Carlos Juliá of the IV Americas Social Forum, on August 12, 2010, published at <http://www.bilaterals.org/spip.php?article17879>

<sup>612</sup> Interview by Mena Erazo, Paul. BBC News report. September 16, 2010.

sovereignty when signing international treaties and based on that article Ecuador denounced the treaties.<sup>613</sup>

In 2012, Venezuela also denounced the ICSID Convention.<sup>614</sup> The Energy and Oil Minister, Rafael Ramirez, reportedly stated: "We will pull out of ICSID. It is not a mechanism to settle differences and for that reason we will get out of it."<sup>615</sup> Shortly after the statement was published, Venezuela finally denounced the ICSID Convention and left it on January 24, 2012.

Argentina has not paid any of the awards that were ruled by ICSID,<sup>616</sup> and since March 2012, Argentina has a draft of law in Congress which states the termination of the ICSID Convention.<sup>617</sup>

As one can see, two forms of reactions are emerging from the South American countries against the BIT regime. One is the rejection of an international arbitration institution, which is ICSID, and the other is the rejection of the BITs in general. In some cases, both the BITs and ICSID are rejected at the same time.

While this could prima facie show that there is now more awareness by South American countries that the disputes settlement clauses of BITs have 'teeth',<sup>618</sup> especially through the BITs enforcement, the reactions of developing South American countries against the regime shows that it was never their intention to incur these sovereignty costs. Vandeveld (2005-2006) already predicted that "developing countries may come to see the agreements as poor bargains in which states surrender portions of their sovereignty and subject themselves to costly arbitration with investors, without having gained appreciable new investment as a result."<sup>619</sup>

To summarize, all the decisions of the cases described in this section, which concerned environmental issues, economic crisis and health issues, have been decided by the ICSID

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<sup>613</sup> Article 422. 2008 National Constitution of Ecuador. In an unconstitutionality action, cases are resolved on individual basis and the Supreme Court has to rule on each of them, that is why some of the requests for termination of other BITs are still pending.

<sup>614</sup> Ripinsky, S. "Venezuela's withdrawal from ICSID: What it does and does not achieve" Investment Treaty News. International Institute for Sustainable Development. April 13, 2012.

<sup>615</sup> Digital news reported by Agencia Venezolana de Noticias (AVN) on January 15, 2012.

<sup>616</sup> Just the claim from US companies involved in the Gas sector amounted to Argentina having to pay US\$ 133,2 million to CMS, US\$ 106,2 million to Enron, US\$ 128.250.462 to Sempra and US\$ 57,4 to LG&E. A total of US\$ 425.050.462, an amount which Argentina was sentenced to paid by ICSID. Alvarez and Khamsi stated quite lightly facing this fact: "The damage awards, three of which exceeded \$100 million have been among the highest ever rendered by an ICSID tribunal" Alvarez, J. and Khamsi, K. "The Argentine Crisis and Foreign Investors: A Glimpse into the Heart of the Investment Regime" Yearbook of International Investment Law & Policy 379. Karl P. Sauvant, ed., 2009. p 380

<sup>617</sup> Argentina's Draft of Law. File No. 1311-D-2012. H. Camara de Diputados de la Nacion. March 21, 2012.

<sup>618</sup> Allee, T. and Peinhardt, C. "Contingent Credibility: The Reputational Effects of Investment Treaty Disputes on Foreign Direct Investment" International Organization. Volume 65. Issue 3. 2011. p 21

<sup>619</sup> Vandeveld, K. "A Brief History of International Investment Agreements" University of California at Davis Journal of International Law and Policy .Vol.12. 2005-2006. p. 186



tribunal in the light of a BIT. The BIT's enforcement affects developing countries because BITs allow foreign investors to sue developing countries for enacting any kind of public laws, regulation or policies, even if these regulations are prioritizing public interests like the protection of the environment, health, etc. and even if foreign investors are only expected to be subject to the same policies as local investors. Furthermore, it subjects the developing countries' policies to be reviewed and judged on by an international arbitration tribunal.

This is an important restriction of the sovereign right of states to create and apply their laws with a scope that would govern all activities and the welfare of its citizens in their territory. It is in this sense that this becomes an indicator of structural power because although this restriction came with the developing countries' agreement to the framework, developing countries never intended to be restricted in such a way that their sovereign actions would have to be reviewed by an arbitration tribunal.

### **6.5. The International Investment Framework's New Changes.**

Our world is not static. There is a continuous change because of the dynamic nature of relationships. The international investment framework was once governed by customary international law. BITs changed that and BITs provided specific rules that governed international investments. Not surprisingly, the rules that have been established for the current international investment framework are once again changing.

The actors that are bringing about these changes are evenly spread in the BIT regime. There are changes coming out from the EU wanting to participate as a unitary actor and not by its member states; the US is introducing some changes in its rules for foreign investments; there are some changes proposed by international organizations but there are also changes that are being proposed by developing countries. Then, the question that is worth asking is: why are the rules for the international investment framework once again changing? Before I try to give an answer to this question, I will first give a description of the changes.

The changes include accepting a new supranational actor like the EU; ICSID's amendment for allowing public participation; a return to Calvo type doctrines for international investments; amendments in newest versions of BIT models concerning expropriation and MFN clauses, binding interpretations; and finally, the inclusion of obligations to invest in a sustainable manner.

The significant change on the European level was the one brought about by the Treaty of Lisbon,<sup>620</sup> which entered into force in 2009. By this treaty, FDI has been included in the

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<sup>620</sup>The Treaty of Lisbon, signed on December 13, 2007 entered into force on December 1, 2009, introduced amendments to the Treaty of the European Union and the Treaty on the Functioning of the European Union. These treaties are now all consolidated in the Official Journal of the European Union C 83, 30.03.2010.

Common Commercial Policy of the EU.<sup>621</sup> Initially there was a lack of clarity about the respective competences of member states and the EU on this matter. The reason was that the treaty extends the competence of the EU only on FDI matters and it expressly states that the “exercise of the competences conferred by this Article in the field of the common commercial policy shall not affect the delimitation of competences between the Union and the Member States...”<sup>622</sup>

The EU Commission, however, has made its position clear in that this part of the treaty should be extensively interpreted.<sup>623</sup> On the other hand, member states of the EU have been reluctant to accept this position and continue to keep their competences to sign BITs.<sup>624</sup> However, the debate was cleared with the enactment of the European Parliament and Council Regulation No. 1219/2012, which entered into force in January of 2013.<sup>625</sup> This regulation clearly expresses the competence of member states towards either existing or future BITs, by which BITs signed after 2009 will need to be reviewed by the EU Commission and those in process to be sign must be submitted to the Commission in order to make sure they comply with EU law.<sup>626</sup> With this change the EU as a regional block will evidently be a strong actor in the framework of international investments.<sup>627</sup>

The US has also introduced important changes to the international investment framework. The first one concerns an issue that was once so fearfully debated at multilateral level: the Calvo doctrine.

Although the US during the 1970s rejected the Calvo doctrine that sustains that national and foreign investors should be subject to the same treatment, in 2012 the US administration declared

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<sup>621</sup> Treaty of Lisbon. Official Journal of the European Union C 83, 30.03.2010. Article 206.

<sup>622</sup> *ibid* Article 207 (6).

<sup>623</sup> Reinisch, A. “The EU on the Investment Path – Quo Vadis Europe? The Future of EU BITs and Other Investment Agreements” 2013. Available at SSRN: <http://ssrn.com/abstract=2236192> or <http://dx.doi.org/10.2139/ssrn.2236192>

<sup>624</sup> Article 207 (4) expresses that there should be unanimity in the Council which represent the members states; also confirmed by the ECJ Opinion 2/92 which stated that the Community has not established express or implied competence in the investment area.

<sup>625</sup> Regulation (EU) No 1219/2012 of the European Parliament and of the Council of 12 December 2012 establishing transitional arrangements for bilateral investment agreements between Member States and third countries.

<sup>626</sup> Extra EU-Bits signed before December 2009: in force until replaced by new treaties between EU and the third party; Extra EU-BITs signed after December 2009: need to be reviewed by the Commission to ensure their compliance with EC law. Countries can still sign and enter into negotiations but such talks need to be approved and supervised by the Commission. See further Turner, P. and Nitsch, C. “EU reveals the future of BITs between European States and the rest of the world” Freshfields Bruckhaus Deringer. Litigation special. 2013

<sup>627</sup> International Investment Tribunals have decided that BITs are subject to international law and no EU law but the regulation intends to work towards harmonize EU law with current BITs provisions. By EC law, all international treaties signed by the members should be in accordance to EU law and the main problem with BITs and EU law is that while the first confers free capital flow the latter restricts it. For discussion on the EU topic see Reinisch, A. “The EU on the Investment Path – Quo Vadis Europe? The Future of EU BITs and Other Investment Agreements” 2013. Available at SSRN: <http://ssrn.com/abstract=2236192> or <http://dx.doi.org/10.2139/ssrn.2236192>

its intention to operate in the foreign investment area in the following way: “...the principal negotiating objectives of the United States regarding foreign investment are to reduce or eliminate artificial or trade-distorting barriers to foreign investment, *while ensuring that foreign investors in the United States are not accorded greater substantive rights with respect to investment protections than United States investors in the United States, and to secure for investors important rights comparable to those that would be available under United States legal principles and practice...*”.<sup>628</sup> The US Trade Act of 2002 is in line with the Calvo doctrine.

Furthermore, the US introduced changes in their BIT models. The first change can be found in that the US excluded certain activities from the expropriations clauses. The US expressly states in the latest US 2012 BIT Model that the state’s environmental, safety and public health regulations have been expressly excluded from the concept of expropriations.<sup>629</sup> These changes in the framework amount to dramatically diminishing the sovereignty costs as compared to those that developing countries had when facing their restriction to legislate.<sup>630</sup>

The second change in the 2012 US Model BIT is that the US excluded the application of MFN in the dispute settlement mechanism.<sup>631</sup> This change will restrict investors in their capacity to do treaty shopping when submitting a claim and assure the host state of assuming the obligations they committed to with the party in question.<sup>632</sup>

However, another change introduced by the US in their BITs is the restriction of the international arbitration tribunal’s capacity to interpret.<sup>633</sup> While the 2004 US model BIT states that the parties (and not the tribunal) shall decide on the interpretation of annexes contained in the BITs and that their agreement shall be binding,<sup>634</sup> the 2012 US model BIT extends this regulation for any interpretation of the treaty.<sup>635</sup>

This might go away from achieving a more balanced framework as it enforces the asymmetries between the parties in which a relationship characterized by structural power will limit the choice

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<sup>628</sup> US Trade Act of 2002. Section 2102 (3) Emphasis added.

<sup>629</sup> 2012 US Model BIT, Annex B para 4(b)

<sup>630</sup> Referring to sovereignty costs, as it has been described in the previous section.

<sup>631</sup> 2012 US Model BIT, Article 3 (1)

<sup>632</sup> Overcoming the problem of MFN interpretation mentioned in section 6.3. Also some later ICSID cases have been departing from applying the MFN principle to dispute settlement cases. See for example *Salini Costruttori SpA and Italstrade SpA v The Hashemite Kingdom of Jordan* ICSID Case No.ARB/02/13, decision of November 15, 2004 and *Plama Consortium Ltd v Republic of Bulgaria* ICSID Case No.ARB/03/24, decision of February 8, 2005. Also a counter argument in Radi, Y. “The Application of the Most-Favoured-Nation Clause to the Dispute Settlement Provisions of Bilateral Investment Treaties: Domesticating the ‘Trojan Horse’” *The European Journal of International Law* Vol. 18 no. 4. 2007

<sup>633</sup> Already mentioned in the 2004 US model BIT and later reinforced in the 2012 US model BIT.

<sup>634</sup> See US-Uruguay BIT. Article 31

<sup>635</sup> 2012 US Model BIT, Article 30 pa 3. A practice entrenched in Free Trade Agreements.

considerably, becoming the binding interpretation a reflection of the developed countries interests.<sup>636</sup>

In regard to changes coming from international organizations, facing the complaints about the restriction of society's participation in the dispute settlement process of international arbitration institutions, ICSID changed its arbitration rules in 2006. The ICSID's Arbitration rules were amended by introducing the permission to submit written *amicus curiae* reports and allowing the attendance of non-parties at hearings.<sup>637</sup> In this way, ICSID remedied this complaint.

Another positive change is the one seeking to introduce obligations to foreign investors to make their investments in host countries in a sustainable manner. The inclusion of these provisions would involve an obligation for companies to respect environmental, labour and health regulations. In this regard, the International Bar Association (IBA) has developed a Model Mining Development Agreement in which mining companies are obliged to make their investment in a sustainable way.<sup>638</sup> In 2012, the UNCTAD has launched an Investment Policy Framework for sustainable development and conducts regular courses for developing countries on these issues.<sup>639</sup> Newer versions of BIT models also comprehend these changes, like the International Institute for Sustainable Development (IISD) BIT model, which also obliges companies to invest in a sustainable way.<sup>640</sup>

In regard to developing countries, they too are making new proposals for a new investment regime. In the case of Ecuador, the Congress is working for creating a "Production Code" in which the dispute settlement mechanism for investments will still remain arbitration but at a regional arbitration tribunal.<sup>641</sup> There have been regional efforts in South America, to use for example the Arbitration Centre of the Union of South American Nations (UNASUR) and its

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<sup>636</sup> This practice of having binding interpretation for the parties might have derived from FTAs which contain an investment chapter that is a BIT. This is though not always the case as, on the other hand, pursuant to the practice of BITs enforcement, provisions related to investment were improved in FTAs, like the 'fair and equitable' provision that in BITs is not defined and has caused problems in international arbitration tribunals. The FTAs define this provision as to avoid these problems. It might also be considered as a way to circumvent the Vienna Convention on the Law of Treaties.

<sup>637</sup> Amicus curiae refer to 'friends of the court' and it allows NGOs or other groups of society to submit reports that can be used by the tribunal when deciding a case. The amendment was done in the ICSID Arbitration Rules. Chapter IV, Rule 37 (2) and Rule 32 (2).

<sup>638</sup> Schulte, K. "Model Mining Development Agreement. Civil Society consultation" Canada. 2010.

<sup>639</sup> UNCTAD News. 2012, available at

[http://unctad.org/en/pages/newsdetails.aspx?OriginalVersionID=130&Sitemap\\_x0020\\_Taxonomy=Investment%20and%20Enterprise](http://unctad.org/en/pages/newsdetails.aspx?OriginalVersionID=130&Sitemap_x0020_Taxonomy=Investment%20and%20Enterprise); (last visited December 6, 2012)

<sup>640</sup> Mann, H., Peterson, L., von Moltke, K. and Cosbey, A. "IISD Model International Agreement on Investment for Sustainable Development" International Institute for Sustainable Development. 2005

<sup>641</sup> BBC report by Paul Mena dated September 16, 2010.

dispute settlement to solve disputes concerning foreign investments, instead of international arbitration institutions.<sup>642</sup>

However, there is a common cause that provokes these changes independently of the actor that it comes from. This helps explain the question of why these changes are happening: The worries about the effects of the BIT regime over sovereign costs are what have provoked this change.<sup>643</sup>

Now emerging markets are becoming relevant players and the traditional roles of developed countries in the framework might change accordingly: developed countries might end up being the respondents in international investment disputes. In the case of the EU, what affects one European country will have consequences for the whole union.

The changes introduced by the US also aim to prevent having sovereignty restrictions, such as those that developing countries have been having. The 2012 US model BIT completely excludes these restrictions by expressly stating that regulations regarding public health, safety and environment do not constitute indirect expropriations.<sup>644</sup> The same can be said of changes towards Calvo clause-like provisions. What developed countries saw as a signal of a form of protectionism by South American states (the requirement to submit a dispute to local courts) is the policy that they are now adopting themselves because Calvo type provisions mainly benefit the defendants.<sup>645</sup> The change that also benefits the defendant is the restriction of the use of MFN in dispute settlement clauses. The effect of it is that if the parties in their treaty had not provided for the submission of disputes to international arbitration, then a treaty of a different country cannot be used to submit the dispute to international arbitration.

The changes proposed by international organizations and developing countries are also concerned with sovereignty worries. To establish obligations for investors that did not exist before or creating alternative dispute settlement mechanism could be a way to prevent further sovereignty restrictions in host countries.

Therefore, with these changes, actors are seeking to prevent any restriction to their acts as sovereigns. On the one hand, the costs that the current regime has given in terms to sovereignty to developing countries and on the other hand, the vulnerability of being on the respondent side, with the risk of having these same sovereignty costs, is what leads developed countries in particular to take precautionary measures and modify the rules of the framework.

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<sup>642</sup> Fiezzoni, S. "The Challenge of UNASUR Member Countries to Replace ICSID Arbitration" Beijing Law Review. Vol. 2. 2011

<sup>643</sup> It also shows that although BITs were always supposed to be reciprocal, in practice it seems that was never really the intention.

<sup>644</sup> 2012 US Model BIT, Annex B para 4(b).

<sup>645</sup> See Shan, W. "From "North-South Divide" to "Private-Public Debate": Revival of the Calvo Doctrine and the Changing Landscape in International Investment Law" 27 Northwestern Journal of International Law & Business. Vol. 63. 2007.

Unfortunately, what has been decided for past cases will remain '*res judicata*', but the hope is that, for future cases, the tribunal will be aware of the impacts of these restrictions, the value of what is at stake, and consider the purposes of the BITs to make decisions on cases sensitive to issues of a state's sovereignty.

In conclusion, this chapter has shown the indicators that amount to the existence of structural power in the BIT regime. Firstly, the surrounding factors of the development and establishment of the rules for the international investment regime; secondly, the role that the conditionalities of financial aid played for developing countries; thirdly, the implications and costs for developing countries of the practice of the institutions established in the framework, like in the case of the ICSID; fourthly, the sovereignty cost that such a regime implies for developing countries, which were never intended by developing countries; and fifthly, that there is a manifest change of the current framework for international investment with a strong hint that it is directed once again towards developed countries' convenience. Thus, again those with structural power continue to define the framework for international investments.

All these indicators and the relationship among them provide the dim frame that holds the picture. This is why the indicators are picked up from the context of the agreement to the framework, from the conditionalities to these agreements, and from the chain reaction that appears only after the practice of the institutions of the regime, which end up being a trigger to once again modify the framework.

Structural power is manifested in this context because all the different dimensions of the relationship play a role in an outcome aimed for, and these factors will have the effect of limiting the choices and agreeing on particular interests that precede those of the other party.

## CONCLUSION

Bilateral Investment Treaties (BITs) are more than just a traditional international agreement between two states because of the consequences that can derive from them. Although states have been the primary actors operating at international level, BITs, through their dispute settlement clause, have given a very important right to particular non-state actors, namely, foreign investors (i.e. companies).

Before BITs, the only way foreign investors could bring forward a claim against a host state was through diplomatic protection of their home states. BITs, apart from bestowing foreign investors with greater rights than those they had enjoyed under international law, have given foreign investors the right to directly sue sovereign states. The international arbitration mechanism contained in the dispute settlement clauses of BITs, which resulted from a state-state negotiation, is what has allowed companies to act sovereignly facing the host state on matters regarding their investments. In this sense, BITs have opened a doorway for companies to act at the international level in a *pari passu* level as states.

Referring to this phenomenon Kaushal (2009) stated that the arrival of BITs collapsed the existing structure of the international legal and economic architecture with regard to two distinctions, namely the international/national and public/private distinctions.<sup>646</sup>

According to Kaushal, the distinction of international/national collapsed due to BITs because foreign investments had been subject to domestic law, and regulated, for example, by concession agreements. However, with BITs the relationship was internationalized.<sup>647</sup> Kaushal (2009) writes: “[F]oreign investors were endowed with international personality while the state’s sovereign power to act in its national interest was seriously restricted.”<sup>648</sup> Furthermore, Kaushal argues that the private/public distinction collapsed due to BITs because public rights were now enforced by private actors in a private tribunal.

Picciotto (2011) also suggested that the two distinguished levels of international and national law were losing their hierarchical order. Now we even have privatized justice because with BITs, foreign investors can challenge states’ decisions using an international arbitration mechanism which enforce their private rights. Picciotto states that “[t]he effect is to destabilize the legitimacy of national laws...The threat of such a claim, which could lead to an award which may run to hundreds of millions of dollars as well as the cost of defending it, gives foreign investors a powerful weapon especially against poor states.”<sup>649</sup> It is not in vane that Alvarez and

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<sup>646</sup> Kaushal, A. “Revisiting History: How the Past Matters” Harvard International Law Journal. Vol 50 Issue 2. 2009 p 515

<sup>647</sup> See disagreement about the theory of internationalisation of a state contract, in Sornarajah, M. *The International Law on Foreign investment* Cambridge University Press. 3<sup>rd</sup> Edition. 2012.

<sup>648</sup> Kaushal, A. “Revisiting History: How the Past Matters” Harvard International Law Journal. Vol 50 Issue 2. 2009 p 515

<sup>649</sup> Picciotto, S. “International Transformations of the Capitalist State” Antipode vol 43 No. 1. 2011 p. 96

Khamsi (2009) have pointed out that: “Most international investment agreements thereby empower foreign investors from the state parties –who are effectively the third party beneficiaries of these inter-state compacts- to assume the role of private enforcers of the investment rights contained in such agreements.”<sup>650</sup>

While Kaushal and Picciotto only refer to the consequences and see the collapse or blurring of the ‘law’ in this regard, the effect of the phenomena refers to the involvement of companies in a *pari passu* type of relationship to states, which has been possible due to BITs. Accordingly, foreign investors have gained more actorness.<sup>651</sup>

Companies can now delocalize their claims from the host state’s jurisdiction and settle such claims privately. They have managed, as Kaushal (2009) pointed out, to bring states into a dispute settlement mechanism where states would be treated as if they were private actors. This is because states as sovereigns have certain immunities and prerogatives in international law, in contrast to private investors. However, the practice of the international tribunal has shown that in international investment disputes states are prevented from using state-prerogatives, because pursuant to the BIT, there is an obligation of an equal treatment between the state and the private investor. This is what happened for example in four ICSID cases submitted as a consequence of Argentina’s economic crisis. Argentina claimed the international principle of “state of necessity”, which is an international principle of law that sovereign states can allege to be exempted from liabilities for certain actions which they needed to take for the best interest of their people. Although the ICSID Tribunal analyzed it, they did not consider it applicable in these cases, making Argentina liable for not complying with its investment guarantees given to the investor. Moreover, by having the right to sue states, companies have also the power to claim and ask an international arbitration tribunal to revise the host state’s national policies that are not in accordance with their investment interests.

There are two explanations of why this has been happening. On the one hand, there is the idea that there are corporate pressures behind all these changes and therefore, corporations are the ones creating international norms.<sup>652</sup> On the other hand, following a more positivistic approach, there is the idea that because it is states themselves that are committing these changes, there is a change in the nature of states.

Susan Strange (1995, 1996) already mentioned two ways in which there are changes happening that concerned the concept of the state. Firstly, by stating that the authority of the state has not remained in the state itself, it goes elsewhere (referring to deregulations). She compares the state

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<sup>650</sup> Alvarez, J and Khamsi, K “The Argentine Crisis and Foreign Investors: A Glimpse into the Heart of the Investment Regime” Yearbook of International Investment Law & Policy 379. Karl P. Sauvant, ed., 2009. p 381

<sup>651</sup> Not only BITs but other International Investment Agreements (IIAs) are also allowing this.

<sup>652</sup> McCorquodale, R. “Pluralism, global law and human rights: Strengthening corporate accountability for human rights violations” Global Constitutionalism. Cambridge University Press. 2013.



to a 'hollow tree'. Secondly, the same idea is expressed when concerning power; for Susan Strange the state retreats its power from world politics.<sup>653</sup>

The era of globalization has affected states. States are moving towards a regulation comprehending a mixture of public and private policies. Activities that were before only regulated by the state are now privatized, and by delegation of activities, the states mix the public and private spheres. For Picciotto (2011) the state is transforming itself, seeing the merge of public and private spheres of law as what she calls a transformation of the capitalist state, which involves "new types of formalized regulation, the fragmentation of the public sphere, the decentering of the state and the emergence of multi-level governance."<sup>654</sup> Picciotto sees gaps in the states' regulation which are filled by companies's soft law, for example code of conducts.<sup>655</sup>

According to Picciotto, while the state is supposed to regulate less, there are now global regulatory networks which affect both spheres: public and private. Many assets that were state owned get privatized, and the state delegates activities that were traditionally reserved to the state to private enterprises, for example waste disposals. On the other hand, the economic activity gets more public and this, Picciotto claims, is because of the regulation which governs enterprises or the market.<sup>656</sup> Picciotto stated: "Trying to deal with these differences has generated an exponential growth of networks of regulatory cooperation, coordination and harmonization. These are no longer primarily of an international character, but also supranational and infranational, frequently by-passing central government. They also reflect and reinforce changing public-private forms, since these regulatory networks are very often neither clearly state nor private but of a hybrid nature."<sup>657</sup>

Zumbansen (2011) has also been aware of the complex task of the state with regulation and governance. He refers, though, primarily to market regulation.<sup>658</sup> The state does not act alone when regulating, but it is involved in a complex collaboration with other actors, involving the market. Zumbansen also speaks of the need of analyzing the regulatory landscape of markets without the public/private, national/international distinctions. Emerging from this is corporate

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<sup>653</sup> Strange, S. *The Retreat of the State* Cambridge Studies in International Relations. Vol. 49. Cambridge University Press. 1996; Strange, S. "The Defective State" *Daedalus*, Vol. 124, No. 2, What Future for the State? 1995.

<sup>654</sup> Picciotto, S. "International Transformations of the Capitalist State" *Antipode*. 2010. Abstract.

<sup>655</sup> Picciotto claims that the retreat of the state left many gaps in the regulation area which were filled by corporate institutions, thus giving the state a new role as compared to those described in the classical theories. She claims that there is a privatization of regulation, the soft law, for example with code of conducts, guidelines, etc. This change, in how public and private interact, is a shift, as she calls it, towards networked international coordination and distinguishes the post liberal from the classical liberal system. In Picciotto, S. "International Transformations of the Capitalist State" *Antipode* vol 43 No. 1. 2011 p. 95.

<sup>656</sup> *ibid* p. 88

<sup>657</sup> *ibid* p. 88

<sup>658</sup> Zumbansen, P. "Neither 'Public' nor 'Private', 'National' nor 'International': Transnational Corporate Governance from a Legal Pluralist Perspective. *Journal of Law and Society*. Volume 38. No. 1. 2011. p.56

governance which has an autonomous set of rules. Corporate law becomes a mixture of public and private law, of state and non-state norms or principles and rules that go beyond boundaries and are therefore “transnational”.<sup>659</sup>

In the same vein, Behrens (2009) referred to a new type of state, the competitive transnational state, characterized by “transnationalizing parallel to their internationalisation.”<sup>660</sup> These states create institutional conditions on weaker states by imposing their norms on them. Behrens (2009) stated: “[T]he transnational competitive state, as a political actor, imposes its national norms and regulations on other political systems.”<sup>661</sup>

Strange and Picciotto, when claiming that the state is decentering, put emphasis on the fact that the state is retreating. Schneiderman, considering the fact that the state itself is the one who creates this system, claims the opposite, and Zumbansen thinks that states did not entirely retreat because it is thanks to the state’s regulation that markets can be more liberal and act with more freedom.<sup>662</sup>

Schneiderman writes that as part of the liberalization process, states are deregulating their activities, by taking key elements of the economy away from politicians and democracy.<sup>663</sup> The BIT regime fits into this scheme of the state that decenters itself and delegates activity. This is an indication that by accepting transnationalism countries are giving away part of their own power to control and regulate.

In any event, what is remarkable from the considerations above is that the role of companies in the BIT regime is preponderant. Thus, not only states, but also companies, are holders of the structural power that has defined the framework for international investments.

Structural power confers the ability to define frameworks according to Strange, and it manifests in four structures, which are: production, security, finance and knowledge. The structural power over security was what made some countries have power in international trade. Susan Strange claimed that “the nuclear protection given to the allies by US missiles and nuclear weapons was translated into structural power over the rules of the international trading system.”<sup>664</sup> The structural power in the production and knowledge structures result from the increasing power of

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<sup>659</sup> *ibid*

<sup>660</sup> Behrens, M. “The Emergence of the Transnational Cocompetitive State” *Bergische Schriften Der Politikwissenschaft*. No. 1. 2009. p 6

<sup>661</sup> *ibid*

<sup>662</sup> Schneiderman, D. “Investment Rules and the New Constitutionalism”. *Law and Social Inquiry*, Vol 25, No. 3. 2000.; Zumbansen, P. “Neither ‘Public’ nor ‘Private’, ‘National’ nor ‘International’: Transnational Corporate Governance from a Legal Pluralist Perspective” *Journal of Law and Society*. Vol 38. No. 1. 2011

<sup>663</sup> Schneiderman, D. “Investment Rules and the New Constitutionalism”. *Law and Social Inquiry*, Vol 25, No. 3. 2000.

<sup>664</sup> Strange S. *The Retreat of the State* Cambridge Studies in International Relations. Vol. 49. Cambridge University Press. 1996. p. 25-26

companies, an awareness pointed out by Susan Strange when claiming that ‘Markets and Authorities’ should have been the title for her book “State and Markets” because firms are more and more dictating state development policies and that is evidence of them exercising power.<sup>665</sup> And finally, the structural power in the financial dimension is controlled by those who give credits, which can condition the actors that are receiving it.

Therefore, actors that have control on these dimensions have structural power, or in other words, their preferences can be preceded over the preferences of other actors and thus, define the framework in which actors relate to each other. Structural power confers those holding it the advantage of setting the rules of the game.

The findings of Chapter VI show elements of structural power in connection to what is described above. These come about with how the rules were settled with the formation of the international investment framework, the financial conditionalities that were tied to the agreement to the framework, the chain reaction resulting from the enforcement of BITs in which investors brought disputes against host states, and how the framework can continue to change upon particular interests.

In the BIT regime, the preferences of the developed countries (home states) and through them companies (investors) prevailed as the rules for the framework. The theory of structural power applied to the BIT regime also overcomes what the proponents of the competition theory could not achieved when saying that their theory could not explain why developing countries sign BITs among themselves.<sup>666</sup> Developing countries could also have structural power because it all depends on the actors’ relationship. Structural power is a feature of relationships and that is why, for example, the emerging markets<sup>667</sup> can have a type of structural power that is put into evidence when relating to other developing countries.<sup>668</sup>

In the international investment framework, however, structural power has been manifest during both the formation and the maturity of the international investment regime, defined by BITs. So the analysis of the international investment framework or BIT regime through the lens of structural power is relevant and meaningful because the very same historical facts, which for some resulted in a paradox, explain why developing countries have agreed to the framework; why developing countries are reacting against the regime; why the international investment regime is once again evolving; and finally why the multilateral attempts to regulate investments failed.

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<sup>665</sup> Strange, S. *The Retreat of the State* Cambridge Studies in International Relations. Vol. 49. Cambridge University Press. 1996. Preface. p. x

<sup>666</sup> Mentioned in Chapter V, section 5.1.

<sup>667</sup> It could be said that these are developing countries that hold control on just one or two structures.

<sup>668</sup> For example, BITs that are signed between China and African countries.

### **a) Why developing countries agreed to the framework for international investments.**

In section 6.1., “The Formation of the Framework”, I have shown how the framework got established and under which provisions. I have also shown that the rules were the reflection of those that developed countries wanted and that these rules became established in spite of the existence of different multilateral rules that favoured developing countries. We have seen that the liberalization policies that developed countries proposed form part of the grounds in which developing countries have shown openness and have agreed to these policies, especially the US liberalization policies. This was of paramount importance for changing the rules of foreign investment and for accepting the current BIT regime. Although the BITs regime was masked with the promise of increasing FDI, what really resulted from the treaties were rules for delocalizing disputes from their domestic courts and the Hull principle as the principle for compensation of expropriations which were norms of another legal system and preferred by certain actors as the entrenched rules.

Section 6.2., “Control in the Financial Dimension”, couples the description of the development of the framework to the constraint in another dimension, namely the financial dimension through the conditionalities for receiving credits. The international financial institutions, mainly created by the Bretton Woods system, had conditionalities imposed on developing countries for receiving credits, inter alia, accepting and entering BITs into force. The choice of the country that receives the credit gets limited so that the country accepts whatever conditions are imposed in order to receive the credit.

The existence of structural power in the BIT regime explains why developing countries have agreed to the current framework for international investments in spite of the costs for them; costs that derive from the very same framework which was created by those bearing structural power and which have determined the rules of the game.

### **b) Why developing countries are reacting against the BIT regime.**

In section 6.3., “The Costs of ICSID for Developing Countries”, and in section 6.4., “Developing Countries’ Sovereignty Costs”, I have shown the importance of the enforcement of BITs. This enforcement produces a chain reaction that directly affects developing countries. Through BITs, foreign investors are suing developing countries for their public policies that are not in accordance with their investment interests.

Using the theory of structural power, the structures of production and knowledge explain why actors other-than-state, namely companies, play a significant role in the BIT regime. “Change in the production structure”, says Susan Strange, “deals out a new hand of cards from a reshuffled

pack”.<sup>669</sup> The BIT regime has extended power to these non-state actors, which also become authorities in the system.<sup>670</sup>

The decisions of the international arbitration tribunals in investment disputes cases have affected the sovereignty of developing countries, like for example, when restricting their sovereign right to legislate. These sovereignty costs go beyond other agreeable costs upon mere expectations of receiving more investments. The reaction of developing countries against the BIT regime puts into evidence that developing countries did not intend to have these costs. These costs, however, come from the framework that they have entered into because of structural power.

### **c) Why the international investment framework is evolving.**

In the analysis, section 6.5., “The International Investment Framework’s New Changes”, has shown that the framework is experiencing new changes. These changes are pertaining to having yet different rules in the framework but only because of worries caused by sovereignty restrictions that so far only developing countries have been experiencing under the current framework.

With the rise of the emerging markets, the balance of the established framework gets tipped over, as developed countries can end up being respondents in international investment cases and be subject to the sovereignty restrictions. The continuum of a framework by changing certain rules due to particular interests of certain parties, and because such rules would benefit them, evidence again the capacity to define frameworks which is achievable through structural power.

### **d) Why the attempts to regulate investment in the multilateral level have failed.**

Section 6.1., “The Development of the framework”, section 6.2., “Control in the Financial Dimension”, and section 6.5., “The International Investment Framework’s New Changes”, show that the rules that have been established in a framework, in this case, the international investment framework, are the reflection of certain interests.

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<sup>669</sup> In Strange, S. *States and Markets* Pinter Publishers Limited. London. 1988. p.89

<sup>670</sup> Nowadays, TNCs, and not the state, are the owners of the know-how and technology. The fact can be critically assessed in the BIT regime as one of the aims of BITs was to increase the development of the parties, however, knowledge is not passing to developing countries because BITs protect the intellectual property rights of TNCs which are also considered, pursuant to many BITs, a foreign investment. Though Gilpin (2001) says that the blame of all should not all lie in TNCs since in the end because of the fears of developing countries is that more protection was sought for TNCs investing in those countries: “If an LDC is to join this league of small but very successful countries, it must have an honest and competent government, invest heavily in education at all levels, respect international property rights, encourage entrepreneurship, support a diversified and excellent national program of R&D, and pursue sound macroeconomic policies. A nation that is unwilling to assume these crucial responsibilities is quite unlikely to succeed in the global economy and risks domination by foreign firms.” In Gilpin, R. *Global Political Economy* Princeton University Press. 2001. p. 304

To have interests that take precedence over another actor's interests is part of what comprehends the definition of structural power. Only when operating bilaterally, in this case through BITs, developed countries have managed to have their interests established.<sup>671</sup> As the analysis in Chapter II has shown, this has not been the case for the multilateral level where they encounter another type of power, relative power, in the coalitions formed by developing countries, which can prevent them to have their interests established into the framework.

Therefore, the alleged paradox can be rejected and answers can be given to all the challenging questions involving the international investment framework when considering the role of structural power. However, there is also a relative power of developing countries at the multilateral level.

One may think that both systems, the bilateral and the multilateral, are supposed to go hand in hand to achieve a better flow of international relations among countries. "Bilateralism and multilateralism are but two strata in the more complex geology of international law"<sup>672</sup>; "they compose the architecture of international lawmaking"<sup>673</sup> or as the Paraguayan representative stated in the 2001 WTO Ministerial Conference, bilateral agreements "amongst similar countries pave the way for multilateralism."<sup>674</sup> Multilateralism and bilateralism are the ways in which the framework for actors to operate is provided.

However, these two powers, the structural power at the bilateral level and the relative power at the multilateral level, clash, allowing for the biggest consequence of BITs at the international level: by establishing a preference to operate bilaterally, in the aim to regulate international investments, BITs weaken the relative power of developing countries.

There are two moments in history which showed how developing countries had relative power and these very same two moments in history showed how structural power weakens relative power. The way that developed countries achieved their objectives which were halted at multilateral level, is through bilateral relationships. For matters of foreign investments, in these two moments in history, BITs were at the center of the stage.

At the UN multilateral level, the UN Resolutions reflected the developing countries interests, i.e. that compensation for expropriations were established to be according to the local law of the host state and that in case of disputes, they shall be solved in the courts of the host state. These paramount achievements of an intended framework were thanks to the coalitions of developing countries at a multilateral level.

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<sup>671</sup> And through developed countries, companies can also reassure their interests in the framework.

<sup>672</sup> Joseph Weiler's metaphor in Blum, G. "Bilateralism, Multilateralism, and the Architecture of International Law" Harvard International Law Journal. Vol 49. 2008. p. 369

<sup>673</sup> *ibid* p. 377

<sup>674</sup> Paraguay's Statement by H.E. Mr Luís Maria Ramírez Boettner. Ambassador, Permanent Representative to the WTO, Former Minister of Foreign Affairs. Doha 2001. WT/MIN(01)/ST/73

However, BITs were signed by developing countries in which the agreed regulations for foreign investment stated that compensation shall be according to the Hull principle and that the disputes are going to be detached from the courts of the host state.

The reaction of developed countries when facing the developing countries' coalitions at the UN was to operate by bilateral negotiations and conclude treaties. Since the UN General Assembly resolutions' value was that they "may have a role in the formation of legal norms, even though they are not formally binding upon states"<sup>675</sup> developed countries could use the international law framework that they created to establish a framework with their preferences, because one of the sources of international law are treaties.<sup>676</sup> In that way, developed countries -and behind them corporate interests- did not only overcome the coalitions, they could legally establish the framework for international investments they preferred. This explains the first booming of South American BITs, around the 1990s, which reflected the developed countries' interests.

However, South American countries continued to sign BITs even until the year 2007. Why? For a second time, something similar to what had happened at the UN, happened at the WTO. The WTO has been a more recent multilateral forum in which attempts for regulating foreign investments were pursued. At the 1996 Singapore, 1999 Seattle, the 2001 Doha and the 2003 Cancun WTO Ministerial Conferences, it was developing countries which mainly opposed the industrialized countries propositions of multilateral developments in the area. Developing countries could opposed unilateral decisions and propose their own interests only because they did it as a coalition or alliance among many developing countries. These propositions, however, were in return not accepted by the developed countries and so the negotiations did not reach an agreement. This is what was known as the deadlock at the WTO.

However, while developing countries were able to reject propositions at the multilateral level, they did not do the same at a bilateral level. All the inclusion of investment regulations that were opposed by developing countries at the WTO, were put into force when developing countries signed BITs.

The following table shows the above in a graphical manner. It shows how at the WTO Ministerial Conferences, South American countries rejected, for example, investment, labour and environmental issues. Although some countries changed their opinion in later WTO Ministerial Conferences, the table shows specifically at which of the WTO Ministerial Conferences which South American country rejected mainly investment issues.

Furthermore, the table shows the year in which these South American countries signed BITs with the core regulation of investments and in some of them, the inclusion of labour and

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<sup>675</sup>Brand, R. *Fundamentals of International Business Transactions* Volume II. Center for International Legal Education. University of Pittsburgh School of Law. 2012. p 659

<sup>676</sup> The ICJ statute states that the sources of international law are international conventions, international custom general accepted as law, general principles of law; as subsidiary means for determination: judicial decisions and teachings of most highly qualified publicists. ICJ, Articles 38 to 59.

environmental regulations connected to the regulation of investments in the BITs. Combining the two factors, we see that there are cases in which at the same time that the South American countries rejected the investment issues at the multilateral level, the respective South American country was signing a BIT, agreeing to the very same provisions.

WTO			
Country	Rejected	When	BITs after WTO (order per year of signature)
Ecuador	Investment (examine multilateral rules and have improved agreements)	Singapore 1996	1996; 1997x2; 1999
Bolivia	Investment; Labour; Environmental issues	Seattle 1999; Doha 2001; Cancun 2003	1996; 2001(US); 2002
Uruguay	Investment; Labour; Environmental issues	Cancun 2003	1997x2; 2006 (US)
Chile	-Lack of implementation of TRIMS -Investment; Labour; Environmental issues	Singapore 1996; Seattle 1999; Doha 2001	1997; 2000 ; 2002 (EU-FTA); 2003 (US-FTA)
Venezuela	Further studies on investments	Singapore 1996; Seattle 1999	1996; 1997; 1998; 2004
Paraguay	Without agriculture no agreement on investment	Seattle 1999 Doha 2001 Cancun 2003	1996; 1998
Colombia	Further study	Singapore 1996 Doha 2001	2007
Argentina	All issues	All conferences	Already had BITs

For example, Bolivia, Uruguay and Chile were not in favour or opposed to developed countries' propositions, which included among the so-called new issues investments. The three countries then signed a BIT containing these issues (when signing BITs with the US or FTAs in the case of Chile). Ecuador specifically rejected investment issues in 1996 and on the same year they signed a BIT. Developed countries also wanted to include agricultural practices which considered environmental protection, landscape preservation, rural employment, food security, etc. It was also a concept that for example Uruguay opposed. However, the very same provisions that Uruguay had opposed at the WTO ministerial conferences were then accepted in the BIT that they signed with the US using a 2004 US BIT model.<sup>677</sup>

<sup>677</sup> At the 1996 WTO Ministerial Conference, developed countries proposed the negotiation of the so-called "new issues" which inter alia included investment. Uruguay said in this meeting that it was not a priority for them. At the 1999 Seattle WTO Ministerial Conference, developed countries continued to propose investment. Uruguay opposed to everything unless the agricultural issues were agreed upon. Uruguay also opposed the idea of multi-functionality in agriculture which introduces in agricultural practices environmental protection, landscape preservation, rural employment, food security, etc. At the 2001 WTO Ministerial Conference, Uruguay said that they are flexible



After noticing the resistance of the developing countries with the formation of the G-21 developing countries' coalition at the WTO Cancun Ministerial Conference, in September 2003, an article of the BBC the stated the following: "The big question now was whether the alliance could remain united, or whether the US would pick countries off one by one."<sup>678</sup>

And indeed, after the collapse at the 2003 Cancun WTO Ministerial Conference,<sup>679</sup> the US administration stated its intension to operate bilaterally.<sup>680</sup> Therefore, once again, facing the coalitions at the WTO, developed countries are having the same reaction that they once had against developing countries' coalitions at the UN. Facing the lack of agreement at the WTO, developed countries have decided to operate bilaterally to negotiate the issues connected to trade (the new issues, *inter alias* investment). In this way, developed countries have achieved their objectives halted at the multilateral level. In the bilateral setting, the outcome becomes more predictable. This explains why although there is no longer a boom of BITs, such as it has happened in the past, BITs nevertheless continued to be signed.

In 2011, the Director General of the WTO said that "multilateralism is going through a patchy period"<sup>681</sup>; and indeed, developed countries have kept working on new versions for BIT models, renouncing continuing efforts for strengthening multilateral relationships on these issues. This suggests that this path remains open to them. In a joint statement issued by the Office of the United States Trade Representative and U.S. Department of State, it was declared:

"...International investment is a significant driver of America's economic growth, job creation, and exports. The 2012 U.S. model BIT text will help achieve several important goals of the Obama Administration *ensuring that U.S. companies benefit* from a level playing field in foreign markets, *providing effective mechanisms for enforcing the international obligations of our economic partners*, and creating stronger labor and environmental protections.

The 2012 model BIT also supports our strategic international commitment to a robust economic agenda. *It will play a critical role in ensuring that American firms can rely on strong legal protections* when competing for the 95 percent of the world's consumers who live outside the

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towards the new issues. In 2005, Uruguay not only agreed on foreign investment protection with the US by signing the Uruguay-US BIT, it also agreed to treatment in relation to environmental protection and labour standards.

<sup>678</sup>Story from BBC News on the Cancun conference. Published on September 12, 2003, available at <http://news.bbc.co.uk/2/hi/business/3102108.stm> (last visited November 30, 2012)

<sup>679</sup> Referred to as a collapse because there was no agreement on the negotiation. The coalition of developing countries did not yield to the rejection of the inclusion of their interests in the system.

<sup>680</sup> Narlikar, A., Wilkinson, R. "Collapse at the WTO: A Cancun Post Mortem" Third World quarterly, Vol 25. No.3. 2004. p. 458

<sup>681</sup> Director General Pascal Lamy's Speech at the Deutsch Bank in Berlin on October 6<sup>th</sup> 2011, available at [http://www.wto.org/english/news\\_e/sppl\\_e/sppl208\\_e.htm](http://www.wto.org/english/news_e/sppl_e/sppl208_e.htm), (last visited Nov 29, 2011).

United States, as well as in promoting good governance, the rule of law, and transparency around the world...”<sup>682</sup>

So updated versions of BITs are being used, which incorporate the issues that failed to be accepted at multilateral level. It seems, as if the resistance of developing countries to critical issues regarding investment and trade does not exist when dealing bilaterally.

This is because the effectiveness of operating bilaterally lies in structural power, which provides the assurance to one party that the other party will be left with no alternative but to agree to the other party’s proposal. Developing countries, which did not accept the developed countries’ proposals at the multilateral level, did accept the same proposals at the bilateral level. They do so because their choice gets so limited because of the structural power that developed countries have which manifests in all the aspects summarized in Chapter VI. This cannot be balanced through their relative power because this is a power which they only have at multilateral level and when acting in coalitions.

In other words, structural power results in a way that the action of those affected by it will make a tele-targeted decision because it limits their choice so much that their counterpart can be sure of the only possible decision, the outcome.

A characteristic of structural power is that no party needs to be aware of it, the way it manifests is by restricting the choices. This however, does not mean that there is a lack of choice. Developing countries do have a choice. The alternative for developing countries is to not play nor be involved in the game, as practiced by Brazil, who can be less dependent in one of the dimensions and this tips the balance in its relationship with other actors.<sup>683</sup>

However, developing countries that are not in a position comparable to Brazil might run risks for not following the rules of the game. Blockage, sanctions, retaliation, and to the extreme, war, are many examples of what can happen to those unwilling to stay in the game. Although Strange said that an actor with structural power over the security does not need to use military power because with its structural power the actor can limit the range of choices that others have, examples of these risks are also manifested in the BIT regime. In the case of Argentina, for example, it was subjected to a sanction from the US because it refused to comply with awards favourable to US investors.<sup>684</sup> Argentina refuses to do so because the awards have not been submitted to their jurisdiction for enforcement. The US, by petition of the involved corporations,

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<sup>682</sup> Joint Statement of the Office of the US Trade Representative and US Department of State. Available at <http://www.ustr.gov/about-us/press-office/press-releases/2012/april/united-states-concludes-review-model-bilateral-inves> (last visited November 2013). Emphasis added.

<sup>683</sup> If the emerging country has also structural power in one dimension, then it can circumvent the existing rules. Brazil did not sign any international arbitration convention nor BITs with developed countries and yet it is the country with the highest FDI in South America.

<sup>684</sup> The cases that refer to this are mainly those that were brought against Argentina during the financial crisis of the year 2000 and that made Argentina pay as compensation to the US investors. Argentina, however, has not yet paid its awards.

has suspended Argentina from enjoying the benefits of the US Generalized System of Preferences (GSP), a suspension imposed for the first time on a country.<sup>685</sup>

In matters concerning investments, the existence of an alternative path with bilateralism explains why decisions were not reached at the WTO Ministerial Conferences, from both the developed and developing countries' perspective: On the one hand, developed countries did not need to make any concessions when knowing that they can have their interests agreed upon when acting in a consciously asymmetrical power relation. On the other hand, developing countries used the justification of the existing bilateral investment treaties to deny further agreement on investments at multilateral level. In the Cancun briefing notes, it was stated: "At the same time, many developing countries have made it clear that they consider that the Working Group had not completed its analysis and study of the subject. They argue that the existing bilateral investment treaties already provide adequate legal protection to investors, and question whether a WTO agreement would indeed increase investment flows. They have expressed concern that a multilateral agreement would add obligations to developing countries while limiting their ability to align investment inflows with national development objectives."<sup>686</sup>

It is easier and more effective for developed countries to make use of their powerful status, knowing the outcomes can then be determined by their preferences. To achieve their interests on investment issues, developed countries can apply their structural power through BITs and in that way they pass through their preferences which were halted at multilateral level.

Involving foreign investors in this way in the investment regime puts developing countries at even more of a disadvantage in at least two ways. Developing countries will now have to deal and succumb to not just one but now two powerful actors, developed states and foreign investors. Due to companies' involvement and use of the ICSID as the dispute settlement institution, developing countries lose an important multilateral agreement's protection and right, namely to use the WTO dispute settlement mechanism for investment disputes. In this jurisdiction developing countries have relative power, with which they can fight the disparities.<sup>687</sup> Maybe the choice of the BIT regime and consequently ICSID is a very rational and conscious choice of the two powerful sets of actors in the investment regime because by evading the WTO dispute settlement mechanism where developing countries have relative power, their structural power remains at its peak with the BIT regime.

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<sup>685</sup> UNCTAD World Investment Report 2012. Sales no.: E.12.II.D.3 (New York: United Nations 2012) p. 87 and US Trade Representative Ron Kirk Comments on Presidential Actions Related to the Generalized System of Preferences available at <http://www.ustr.gov/about-us/press-office/press-releases/2012/march/us-trade-representative-ron-kirk-comments-presidenti> (last visited Mar 11, 2012)

<sup>686</sup> Cancun Ministerial briefing notes at [http://www.wto.org/english/thewto\\_e/minist\\_e/min03\\_e/brief\\_e/brief07\\_e.htm](http://www.wto.org/english/thewto_e/minist_e/min03_e/brief_e/brief07_e.htm) (last visited November 30, 2012)

<sup>687</sup> There is the success of the Ecuador's banana's case at the WTO; See also Dieter, H. "Bilateral Free Trade Agreements" Journal of Australian Political Economy. Edition 58 December 2006.

Thus, the huge accomplishment of developing countries at multilateral level comes to ashes at the moment that developing countries face developed countries' structural power bilaterally,<sup>688</sup> in whichever setting. Narlikar and Wilkinson (2004), claim these actions speak against the main purpose of multilateralism because “[s]uch bilaterals actually change the nature of the Ministerial forum and tip the balance even further away from multilateralism.”<sup>689</sup> So rightly Narkilar and Wilkinson (2004) concluded that “Although developing countries were able to find some comfort in the formation of large coalitions, they are unlikely to be similarly comforted outside the WTO.”<sup>690</sup>

In conclusion, in both circumstances, first at the UN and then at the WTO, the shared interests of developing countries, united by coalitions, attempted to modify the framework for investments to include in it developing countries' interests. However, in both circumstances, the use of developed countries of an alternative path of bilateralism made it possible for them to overcome these attempts. The fact that it first happened at the UN and then decades later, at the WTO, highlights Vico's thought of history being characterized by “*corsi e recorsi*”<sup>691</sup> because it has cycles that repeat throughout time.

In the change of setting- from a multilateral to a bilateral- there is a shift of power, from relative to structural power in which the latter prevails. With this shift, developed countries' preferences override the preference of developing countries in the area of international investments.

This is how structural power weakens the relative power of developing countries at multilateral level. The issues which could not be agreed upon at multilateral level -because the provisions were not in the best interest of developing countries- are negotiated and agreed upon at bilateral level. This is why, as this work has shown, the international investment framework, defined by BITs, weakens the relative power of developing countries.

Strange has claimed: “Law can institutionalize and legitimize both power derived from coercive force, or power derived from unequal wealth.”<sup>692</sup> This is exactly what has happened in the regulations for international investments. Interests of particular parties are reflected in the framework for international investments that we have today, which is characterized by bilateral investment treaties.

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<sup>688</sup> Consider also the structural power of developed countries in the financial dimension.

<sup>689</sup> Narlikar, A., Wilkinson, R. “Collapse at the WTO: A Cancun Post Mortem” Third World quarterly, Vol 25. No.3. 2004. p. 451

<sup>690</sup> *ibid* p. 458

<sup>691</sup> Vico, G. (1668-1744) “Principj di scienza nuova d'intorno alla comune natura delle nazioni : concordanze e indici di frequenza dell'edizione Napoli 1744” by Veneziani, Marco. Firenze: L.S. Olschki. 1997.

<sup>692</sup> Strange, S. *States and Markets* Pinter Publishers Limited. London. 1988. p. 37

## Appendix I. Responses of South American Countries to the Developed Countries' Proposals at the WTO

<b>SINGAPORE, 1996</b>								
<b>EU and US:</b> Investment, Trade facilitation (IT products), Environmental and Labour Standards								
<b>EU:</b> Competition.								
<b>US:</b> Government Procurement. Sustainable development (Kyoto protocol)								
	Agriculture & Lack of Reciprocity (complaints)	Investment	Competition	Trade Facilitation	Public Procurement	Environment	Labour	
Argentina	O							
Bolivia	O	Y				Y	X	
Ecuador	O	Y-	X	X	X	X	X	
Uruguay	O							
Paraguay	O	Y-	Y-	Y-	Y-	Y-	Y-	
Brazil	O	Y	Y	Y	Y	Y	X	
Guyana	O					X	X	
Venezuela	O	-O	-O	O	O		X	
Chile	O				Y	Y	Y	
Colombia		-	-			X	X	
Suriname		Y	Y		Y		X	
Peru		Y	Y			-Y		
<b>Results: AGREEMENT TO ESTABLISH WORKING GROUPS, ONE FOR INVESTMENTS</b>								
<b>SEATTLE, 1999</b>								
<b>EU and US:</b> Singapore issues								
<b>EU:</b> - Reference to protectionism and demonstrations reflecting the importance of the issues negotiated - Multi-functionality: preserving landscape, rural labour, environmental protection and food security.								
<b>US:</b> - Reduce agriculture trade barriers if their terms were accepted. - Biotechnology. - Technical Assistance for LDC if their agenda was accepted								
	Agriculture & Lack of Reciprocity (complaints)	Investment	Competition	Trade Facilitation	Public Procurement	Environment	Labour	Multi-Functionality
Argentina	O					X	x	X
Bolivia	O					x	x	X
Ecuador	O	Y-	Y	Y		Y		
Uruguay	O					x	x	X
Paraguay	O					x	x	X
Brazil	O					X	X	x
Colombia	O						X	X
Chile	O					X	X	
Peru	O					X	X	
Guyana	O						X	
Suriname								
Venezuela	O	-			Y	X	X	
<b>Results: COLLAPSE</b>								
<b>DOHA, 2001</b>								
<b>EU:</b> - Mentioned lack of success on environment, trade liberalization, Singapore issues labour standards - Flexibility on investment, competition, and environment but not on agriculture - TRIPS and access to Medicine - sustainability								
<b>US:</b> -Open their market and liberalize agriculture (lifting 300 million people out of poverty) - TRIPS and access to Medicine: restating patent protection and said that compulsory licenses could be use, only willing to give extra time to developing countries to comply with TRIPS								

	TRIPS & health	Agriculture & Lack of Reciprocity (complaints)	Investment	Competition	Trade Facilitation	Public Procurement	Environment	Labour	Multi-Functionality
Argentina	O	O					X		
Bolivia	O	O					X		
Ecuador	O	O							
Uruguay		O	Y	Y	Y	Y			
Paraguay	O	O							
Brazil	O	O							
Chile		O					X		
Colombia		O	-						
Guyana	O								
Peru		O							
Venezuela	O	O			X	Y	X	X	
<b>Results: LACK OF AGREEMENT</b>									
<b>CANCUN, 2003</b>									
<b>EU:</b> Singapore issues - That they are willing to look at the Agriculture Agreement (but only with the US) <b>US:</b> Not publicly available									
	Agriculture & Lack of Reciprocity (complaints)	Investment	Competition	Trade Facilitation	Public Procurement	Environment	Labour	Multi-Functionality	
Argentina									
Bolivia	O								
Ecuador									
Uruguay	O								
Paraguay	O								
Brazil	O								
Chile	O	**							
Colombia	O								
Guyana									
Peru	O								
Venezuela	O					O	O		
<b>Results: NO CONSENSUS</b>									

**Source:** WTO Ministerial Conferences at Singapore, Seattle, Doha and Cancun. Available at [http://www.wto.org/english/thewto\\_e/minist\\_e/minist\\_e.htm](http://www.wto.org/english/thewto_e/minist_e/minist_e.htm) Suriname Statement in Doha and Cancun Ministerial Conferences is not publicly available.

**Note:**

**O...** means that South American countries did complain.

**X...** means that South American countries were against including the issues.

**x...** means that by rejecting multi-functionality it is implicit that South American rejected the labour and environmental issues (although these were not mentioned).

**Y...** means that South American countries were in favour of including the issues.

**Y-** ...means to consider them in the light of interests of developing countries.

**-** ...means that South American countries proposed further studies on the area and with another forum.

**\*\*** means that they have concluded bilateral agreements because WTO negotiation process was slow.

The spaces left in blank means that nothing was said by South American countries in regard to these issues.

## Appendix II. Chronology of BITs in South America

Treaty for the reciprocal promotion and protection of investments. (BIT)	Signature date*	Entry into force*	Obs.
Paraguay-France	Sep 30,1978	Dec 1, 1980	
Bolivia-UK	May 24, 1988	Feb 16, 1990	
Guyana-UK	Oct 27, 1989	April 11, 1990	
Uruguay-Germany	4 May 1987**	June 29, 1990	
Bolivia-Germany	Mar 23, 1987	Nov 9, 1990	
Paraguay-UK	Jun4, 1981	April 23, 1992	
Argentina-Spain	Oct 3, 1991	Sep 28, 1992	
Argentina-UK	Dec 11, 1990	Feb 19, 1993	
Argentina-France	Jul 3, 1991	Mar 3, 1993	
Argentina-Germany	Apr 9, 1991	Nov 8, 1993	
Guyana-Germany	Dec 6, 1989	Mar 8, 1994	
Peru-UK	Oct 4, 1993	April 21, 1994	
Chile-Spain	Oct 2, 1991	April 27,1994	
Uruguay-Spain	April 7, 1992	May 6, 1994	
Argentina-US	Nov 14, 1991	Oct 20, 1994	
Chile-France	Jul 14, 1992	Dec 5, 1994	
Ecuador-UK	May 10, 1994	Aug 24, 1995	Terminated by Ecuador's National Assembly (Sep, 2010)***
Ecuador-France	Sep 7, 1994	June 10, 1996	Terminated by Ecuador's National Assembly (March 2011)***
Brazil-UK	Jul 19, 1994	--	
Brazil-France	Mar 21, 1995	--	
Brazil-Germany	Sep 21, 1995	--	
Peru-France	Oct 6, 1993	May 30, 1996**	
Peru-Spain	Nov 17,1994	Feb 16, 1996	
Venezuela-UK	Mar 15, 1995	Aug 1, 1996	

Bolivia-France	Oct 25, 1989	Oct 12, 1996**	
Paraguay-Spain	Oct 11, 1993	Nov 22, 1996	
Peru-Germany	Jan 30, 1995	May 1, 1997**	
Ecuador-US	Aug 27, 1993	May 11, 1997	Request of termination by Ecuador's National Assembly (Sep, 2009)***
Ecuador-Spain	June 26, 1996	June 18, 1997	Request of termination by Ecuador's National Assembly (Sep 2009)***
Chile-UK	April 24, 1995	Jun 23, 1997	
Uruguay-France	Oct 14, 1993	Jul 9, 1997	
Uruguay-UK	Oct 21, 1991	Aug 1, 1997**	
Venezuela-Spain	Nov 2, 1995	Sep 10, 1997	
Paraguay-Germany	Aug 11, 1993	Jul 3, 1998	
Venezuela-Germany	May 14, 1996	Oct 16, 1998**	
Ecuador-Germany	Mar 21, 1996	Feb 12, 1999	Terminated by Ecuador's National Assembly (Sep, 2010)***
Chile-Germany	April 14, 1997	Nov 17, 2000	
Bolivia-US	April 17, 1998	June 6, 2001	Terminated on June 10 <sup>th</sup> 2012*
Bolivia-Spain	Oct 29, 2001	Jul 9, 2002	
Venezuela-France	Jul 2, 2001	April 30, 2004**	
Uruguay-US	Nov 4, 2005**	Nov 1, 2006**	
Colombia-Spain	Mar 31, 2005	Sep 22, 2007	

**Source:** (\*) Dates provided by the database of the Organization of American States, available at [http://www.sice.oas.org/countries\\_e.asp](http://www.sice.oas.org/countries_e.asp) (last visited October 25, 2012).

(\*\*) Dates provided by the database of the UNCTAD, available at [http://unctad.org/en/Pages/DIAE/International%20Investment%20Agreements%20\(IIA\)/Country-specific-Lists-of-BITs.aspx](http://unctad.org/en/Pages/DIAE/International%20Investment%20Agreements%20(IIA)/Country-specific-Lists-of-BITs.aspx) (last visited October 25, 2012).

(\*\*\*) 2011 Investment Climate Statement Report. US Bureau of Economic, Energy and Business Affairs. March 2011, available at <http://www.state.gov/e/eb/rls/othr/ics/2011/157270.htm> (last visited Oct 26, 2012); Ecuador's Legislative Brief No. 179 submitted by the "Comisión de Soberanía, Integración, Relaciones Internacionales, y Seguridad Integral de la Asamblea Nacional" Sessions dated September 9 and 14, 2010; Observatorio CIADI. "Ecuador derogó tratados de inversión que reconocían a CIADI". March 17, 2011, available at <http://observatoriociadi.info/2011/03/17/ecuador-derogo-tratados-de-inversion-que-reconocian-al-ciadi/> (last visited Oct 26, 2012); "Ecuador denuncia tratados de inversión con países América latina y Rumania" *El Universo*. January 29, 2008.

**Note 1:** This list includes South American countries BITs with the US, Germany, France, United Kingdom and Spain.

**Note 2:** The first BIT recorded in South America is one between two South American countries. It is the General Treaty of Commerce and Investments between Brazil and Paraguay [hereinafter Paraguay-Brazil BIT], signed on October 27, 1956 and entered into force on September 6, 1957. Dates provided by the database of the Organization of American States, available at [http://www.sice.oas.org/ctyindex/BRZ/BRZBITs\\_e.asp](http://www.sice.oas.org/ctyindex/BRZ/BRZBITs_e.asp) (last visited October 25, 2012).



### Appendix III. Definition of Investment in South American BITs.

1. Definition of Investment in South American countries BITs with France, Germany, UK and Spain.				
France BITs with:	Germany BITs with:	UK BITs with:	Spain BITs with:	
Argentina Bolivia Chile Ecuador <sup>693</sup> Paraguay Uruguay Venezuela	Argentina, Bolivia Chile Guyana Ecuador Paraguay Uruguay Venezuela	Argentina Bolivia Chile Guyana Ecuador Paraguay Peru Uruguay Venezuela	Argentina Bolivia Chile Colombia Ecuador Paraguay Peru Uruguay Venezuela	-Movable and immovable property and property rights; -Shares, stocks and debentures in either territory, - Obligations with economic value -Intellectual property rights and - Business concessions
			Colombia	Expressly excludes: -Credit operation that do not comply with the domestic law -Public debt -Pecuniary claims derived from sale and service contracts
2. Definition of Investment in South American countries BITs with the US.				
US BITs with: Argentina Bolivia <sup>694</sup> Ecuador <sup>695</sup> Uruguay	-Every kind of investment in the territory of one Party, owned or controlled directly or indirectly by nationals or companies of the other Party, such as equity, debt, and service and investment contracts:			
	-Tangible and intangible property.			
	-A company or shares of stock or other interests.			
	-A claim to money or a claim to performance having economic value.			
	-Intellectual property.			
	-Any right conferred by law or contract, and any licenses and permits pursuant to law. (So basically, also concessions)			
The differences among these BITs are in the following:				
US-Argentina BIT	- It states “without limitation”			
US-Bolivia BIT	- It also states “contractual rights” and that the list is illustrative and not exhaustive.			
US-Ecuador BIT	- It adds to the definition of investment “such as social capital, debts and service and investment contracts”			
US-Uruguay BIT	- It makes the distinction that the activities should have the characteristics of an investment.			

<sup>693</sup> France-Ecuador BIT has been terminated.

<sup>694</sup> US-Bolivia BIT has been terminated.

<sup>695</sup> US-Ecuador BIT has a request for termination at the Ecuadorian Congress.

**Appendix IV. Purposes contained in South American BITs.**

<b>With the US</b>	
- Promote greater economic cooperation.	Argentina Bolivia <sup>696</sup> Ecuador <sup>697</sup> Uruguay
- Stimulate the flow of private capital and <b>the economic development of the Parties.</b>	Argentina Bolivia Ecuador Uruguay
- Encouragement of reciprocal protection of investment.	Argentina Bolivia Ecuador Uruguay
- Stable framework for investment and maximum effective use of economic resources and <b>improvement of living standards.</b>	Argentina Bolivia Ecuador Uruguay
- <b>Fair and equitable treatment of investment.</b>  Bolivia and Uruguay contain this purpose but not only as a goal but as obligation and that is why is not stated in the preamble, it is rather on the text of the BIT.	Argentina Ecuador Bolivia: Article II.3 Uruguay: Article 5.1
-Recognizing that the development of economic and business ties can contribute to the <b>well-being of workers in both Parties</b> and promote respect for <b>internationally recognized worker rights.</b>  The Uruguayan BIT also includes this in its preamble but much more extensive to other issues, namely: <i>“Desiring to achieve these objectives in a manner consistent with the <b>protection of health, safety, and the environment, and the promotion of consumer protection and internationally recognized labor rights</b>”</i>	Argentina Bolivia Ecuador
-To achieve the objectives <b>without</b> relaxing health, safety and environmental measures of general application.	Bolivia
- Recognizing the importance of providing effective means of asserting claims and enforcing rights with respect to investment under national law as well as through international arbitration.	Uruguay
<b>With France</b>	
-Reinforce the economic cooperation	Argentina Bolivia Chile Ecuador <sup>698</sup> Paraguay Venezuela
-Create favorable conditions for investments	Argentina

<sup>696</sup> US-Bolivia BIT has been terminated.

<sup>697</sup> US-Ecuador BIT has a request for termination at the Ecuadorian Congress.

<sup>698</sup> France-Ecuador BIT has been terminated.

	Bolivia Chile Ecuador Paraguay Venezuela
-Encouragement of investment and stimulation of capital and technology transfer in order to <b>increase economic development</b>	Argentina Bolivia Chile Ecuador Paraguay Venezuela
<b>With UK:</b>	
- Create favourable conditions for greater investments	Argentina Bolivia Chile Ecuador Guyana Paraguay Uruguay Venezuela
- Encouragement and reciprocal protection of investments conducive to stimulation of individual business initiative	Argentina Bolivia Chile Ecuador Guyana Paraguay Uruguay Venezuela
- <b>Increase the prosperity</b> of both states	Argentina Bolivia Chile Ecuador Guyana Paraguay Uruguay Venezuela
<b>With Spain</b>	
- Intensify the economic cooperation for the <b>mutual benefit</b> of both countries	Argentina Bolivia Chile Colombia Paraguay Peru Uruguay Venezuela
- Create favourable conditions for investments	Argentina Bolivia Chile Colombia Ecuador <sup>699</sup>

<sup>699</sup> Spain-Ecuador BIT has a request for termination at the Ecuadorian Congress.

	Paraguay Peru Uruguay Venezuela
-Recognizing that the promotion and protection of investments under this Agreement will stimulate initiatives in this field.	Argentina Bolivia Chile Colombia Ecuador Paraguay Peru Uruguay Venezuela
<b>With Germany:</b>	
- Intensify economic cooperation between the two States	Argentina Bolivia Chile Ecuador <sup>700</sup> Guyana Uruguay Venezuela
- Create favourable conditions for investments	Argentina Bolivia Chile Ecuador Guyana Paraguay Uruguay Venezuela
- Stimulate private business initiative	Argentina Bolivia Chile Ecuador Guyana Paraguay Uruguay Venezuela
- <b>Increase the prosperity</b> of the two nations	Argentina Bolivia Chile Ecuador Guyana Paraguay Uruguay Venezuela

**Source:** BITs texts submitted to the Organization of American States, available at [http://www.sice.oas.org/countries\\_e.asp](http://www.sice.oas.org/countries_e.asp) (last visited October 25, 2012.)

**Note 1:** This list includes South American countries BITs with the US, Germany, France, United Kingdom and Spain.

<sup>700</sup> Germany-Ecuador BIT has been terminated.

## Appendix V. Expropriation Provisions in South American BITs

US BITs	Expropriation provision
With Argentina	Investments shall not be expropriated or nationalized either directly or indirectly through measures tantamount to expropriation or nationalization ('expropriation-) except for a public purpose; in a non-discriminatory manner; <b>upon payment of prompt, adequate and effective compensation</b> (Art. IV (1))
With Bolivia	Neither Party shall expropriate or nationalize a covered investment either directly or indirectly through measures tantamount to expropriation or nationalization ("expropriation") except for a public purpose; in a non discriminatory manner; <b>upon payment of prompt, adequate and effective compensation.</b> (Art 3.1)
With Ecuador	Investments shall not be expropriated or nationalized either directly or indirectly through measures tantamount ot expropriation or nationalization ("expropriation" except: for a public purpose; in a nondiscriminatory manner, <b>upon payment of prompt, adequate and effective compensation.</b> (Art 3.1.)
With Uruguay	Neither Party may expropriate or nationalize a covered investment either directly or indirectly through measures equivalent to expropriation or nationalization ("expropriation"), except: (a) for a public purpose; (b) in a non-discriminatory manner; (c) <b>on payment of prompt, adequate, and effective compensation.</b> (Art 6.1.)
France	Expropriation provision
With Argentina	...payment of a <b>prompt and adequate</b> compensation ...such compensation be <b>effectively</b> realizable... (Art 5.2.)
With Bolivia	...payment of a <b>prompt and adequate</b> compensation ...such compensation be <b>effectively</b> realizable... (Art.5.2.)
With Chile	... <b>prompt and adequate</b> compensation... <b>effectively</b> realizable... (Art. 5.2.)
With Ecuador	...payment of a <b>prompt and adequate</b> compensation ...such compensation be <b>effectively</b> realizable... (Art 6.1.)
With Paraguay	<b>Just</b> compensation... <b>effectively</b> realizable and freely transferable (Art 5)
With Uruguay	Any measure of expropriation shall award <b>prompt and adequate</b> payment of a compensation...this compensation shall be <b>effectively</b> realizable... (Art 5.2.)
With Venezuela	...payment of a <b>prompt and adequate compensation</b> ...such compensation shall be <b>effectively realizable, paid without delay and freely transferable...</b> (Art 5.1.)
Germany	Expropriation provision
With Argentina	Compensation shall correspond to the value of the expropriated investment before the public date of expropriation...compensation should be paid <b>without delay</b> ...it shall be <b>effectively realizable</b> and freely transmitted... (Art 4.2.)
With Bolivia	Compensation shall be equivalent to the value of the investment expropriated immediately before the date of actual impending expropriation, nationalization or comparable measure was publicly announced. The compensation shall be paid <b>without delay</b> and shall carry the usual bank interest until the time of payment; <b>it shall be actually realizable</b> and freely transferable.... (Art 4.2.)
With Chile	Compensation shall be equivalent to the value of the investment expropriated immediately before the date of actual impending expropriation, nationalization or comparable measure was publicly announced. The compensation shall be paid <b>without delay</b> and shall carry the usual bank interest until the time of

	payment; <b>it shall be effectively realizable</b> and freely transferable (Art. 4.2.)
With Ecuador	Compensation shall be equivalent to the value of the investment expropriated immediately before the date of actual impending expropriation, nationalization or comparable measure was publicly announced. The compensation shall be paid <b>without delay</b> and shall carry the usual bank interest until the time of payment; <b>it shall be effectively realizable</b> and freely transferable (Art. 4.2.)
With Guyana	Compensation shall be equivalent to the value of the investment expropriated immediately before the date of actual on which the actual or proposed expropriation, nationalization or comparable measure has become publicly known. The compensation shall be paid <b>without delay</b> and shall carry the usual bank interest until the time of payment; <b>it shall be effectively realizable</b> and freely transferable (Art. 4.2.)
With Paraguay	Compensation shall be equivalent to the value of the investment expropriated immediately before the date of actual on which the actual or proposed expropriation, nationalization or comparable measure has become publicly known. The compensation shall be paid <b>without delay</b> and shall carry the usual bank interest until the time of payment; <b>it shall be effectively realizable</b> and freely transferable (Art. 4.2.).
With Uruguay	Compensation shall be equivalent to the value of the investment expropriated immediately before the date of actual impending expropriation, nationalization or comparable measure was publicly announced. The compensation shall be paid <b>without delay</b> and shall carry the usual bank interest until the time of payment; <b>it shall be effectively realizable</b> and freely transferable (Art. 4.2.)
With Venezuela	Compensation shall be equivalent to the value of the investment expropriated immediately before the date of actual on which the actual or proposed expropriation, nationalization or comparable measure has become publicly known. The compensation shall be paid <b>without delay</b> and shall carry the usual bank interest until the time of payment; <b>it shall be effectively realizable</b> and transferable in exchangeable currency (Art. 4.1.).
<b>UK</b>	<b>Expropriation provision</b>
With Argentina	(I) Investments of investors of either Contracting Party shall not be nationalised, expropriated or subjected to measures having effect equivalent to nationalisation or expropriation (hereinafter referred to as " expropriation ") in the territory of the other Contracting Party except for a public purpose related to the internal needs of that Contracting Party on a non-discriminatory basis and against <b>prompt, adequate and effective compensation</b> . (Art 5.1.)
With Bolivia	Compensation... shall be made <b>without delay, be effectively realizable</b> , and be freely transferable (Art 5.1.)
With Chile	(I) Investments of investors or companies of either Contracting Party shall not be nationalised, expropriated or subjected to measures having effect equivalent to nationalisation or expropriation (hereinafter referred to as " expropriation ") in the territory of the other Contracting Party unless the measures are taken for a public purpose related to the internal needs of that Contracting Party in a non discriminatory manner, by authorization of a formal law and against <b>prompt, adequate and effective compensation</b> . (Art 4.1.)
With Ecuador	(I) Investments of investors or companies of either Contracting Party shall not be nationalised, expropriated or subjected to measures having effect equivalent to nationalisation or expropriation (hereinafter referred to as " expropriation ") in the territory of the other Contracting Party except for a public purpose related to the internal needs of that Contracting Party and against <b>prompt, adequate and effective compensation</b> . (Art 5.1.)
With Guyana	(I) Investments of investors or companies of either Contracting Party shall not be nationalised, expropriated or subjected to measures having effect equivalent to nationalisation or expropriation (hereinafter referred to as " expropriation ") in the territory of the other Contracting Party except for a public purpose related to the internal needs of that Contracting Party on a non-discriminatory basis and against <b>prompt, adequate and effective compensation</b> . (Art 5.1.)

With Paraguay	against <b>prompt, adequate and effective compensation</b> . (Art 5.1.)
Peru	(I) Investment made in the territory of one Contracting Party by nationals and companies of the other Contracting Party shall not be expropriated, nationalised or subjected to other measures having effect equivalent to expropriation or nationalization (hereinafter referred to as expropriation) except for reasons of public necessity and for a public purpose or in a social interest related to the internal needs of that Party on a non-discriminatory basis and, in such cases, they shall be subject to <b>prompt, adequate and effective</b> compensation. (Art. 6)
With Uruguay	(I) Investments of investors or companies of either Contracting Party shall not be nationalised, expropriated or subjected to measures having effect equivalent to nationalisation or expropriation (hereinafter referred to as " expropriation ") in the territory of the other Contracting Party except for a public purpose related to the internal needs of that Contracting Party on a non-discriminatory basis and against <b>prompt, adequate and effective compensation</b> . (Art 5.1.)
With Venezuela	against <b>prompt, adequate and effective compensation</b> . (Art 5.1.)
<b>Spain</b>	<b>Expropriation provision</b>
With Argentina	...shall pay to the investor... <b>without delay, an adequate</b> compensation... (Art 5)
With Bolivia	<b>Prompt, adequate and effective</b> compensation (Art 5.1.)
With Chile	...shall pay to the investor... <b>without delay, an adequate</b> compensation... (Art 5)
With Colombia	<b>Prompt, adequate and effective</b> compensation (Art 4.1.)
With Ecuador	...shall pay to the investor... <b>without delay, an adequate</b> compensation... (Art 5)
With Paraguay	...shall pay to the investor... <b>without delay, an adequate</b> compensation... (Art 5)
With Peru	..shall pay to the investor... <b>without unjustified delay, an adequate</b> compensation, in convertible currency and freely transferable... (Art 5)
With Uruguay	...appropriate provision is made for <b>effective and adequate compensation</b> . The amount of the indemnity, including interest thereon, shall be determined in freely convertible currency and shall <b>be paid without delay</b> to the investor affected by the measure. (Art. 7.)
With Venezuela	<b>Prompt, adequate and effective</b> compensation (Art 5.1.)

Source: BITs texts submitted to the Organization of American States, available at [http://www.sice.oas.org/countries\\_e.asp](http://www.sice.oas.org/countries_e.asp) (last visited October 25, 2012.)

**Note 1:** This list includes South American countries BITs with the US, Germany, France, United Kingdom and Spain.

**Note 2:** Author's translation into English of BIT texts in Spanish.

**Appendix VI. Investment Dispute Settlement Clauses in South American BITs**

USA	Amicably	Consultation or Negotiation	Local Courts/Local Jurisdiction	International Arbitration	ICSID	UNICTRAL
Argentina	X	X	X (6 months)	X	X	(OR) X
Bolivia	X		X (OR)	X	X	(OR) X
Ecuador	X		X (6 months)	X	X	(OR) X
Uruguay		X		X	X	(OR) X
UK	Amicably	Local Courts/Local Jurisdiction	International Arbitration	ICSID	UNICTRAL	Other particularities
Argentina	X	X (18 months)	X	X (OR)	X	3 months with no agreement: UNCITRAL
Bolivia	X		X	X (OR)	X	
Chile	X (consultations)		X	X		
Ecuador			X	X		
Guyana		X (3 months)	X	X		
Paraguay		X (3 months)	X	X		Award not complied: International claim
Peru	X	X (3 months)	X	X		
Uruguay	X	X (18 months; unjust decision)	X	X (OR)	X	3 months with no agreement: UNCITRAL
Venezuela	X		X	X		When ICSID is not available or per express agreement of parties, then UNCITRAL
Spain	Amicably	Local Courts/Local Jurisdiction	International Arbitration	ICSID	UNICTRAL	Other particularities
Argentina	X	X (18 months)	X	X (OR)	X	When no agreement: ICSID
Bolivia	X	X (OR)	X	X (OR)	X	
Chile	X	X (OR)	X	X (OR)	X	
Colombia	X	X (OR)	X	X (OR)	X	When dispute is about an administrative (public) act must exhaust local remedy when required by law
Ecuador	X		X	X (OR)	X	
Paraguay	X	X (OR)	X	X (OR)	X	ICC
Peru	X	X (OR)	X	X (OR)	X	
Uruguay	X	X (18 months; unjust decision)	X	X (OR)	X	When no agreement: ICSID Award not complied: International claim
Venezuela	X	X (OR)	X	X		When ICSID is not available or per express agreement of parties, then UNCITRAL
France	Amicably	Local Courts/Local Jurisdiction	International Arbitration	ICSID	UNICTRAL	Other particularities
Argentina	X	X (OR)	X	X (OR)	X	



Bolivia	X		X	X (OR) X		
Chile	X	X (OR)	X	X		
Ecuador			X	X		
Paraguay			X	X		
Uruguay	X	X (OR)	X	X (OR) X	Award not complied: International claim	
Venezuela	X		X	X		
Germany	Amicably	Local Courts/Local Jurisdiction	International Arbitration	ICSID	UNICTRAL	Other particularities
Argentina	X	X (18 months or disp. subsistence)	X	X (OR) X	No agreement: ICSID	
Bolivia	X		X	X		
Chile	X	X (18 months; decision breaches the treaty or common agreement)	X	X		
Ecuador	X	X (18 months or court negligence)	X	X		
Guyana	X		X	X		
Paraguay	X		X	X		
Uruguay	X	X (18 months; unjust decision)	X		ICC	
Venezuela	X		X	X		

Source: BITs texts submitted to the Organization of American States, available at [http://www.sice.oas.org/countries\\_e.asp](http://www.sice.oas.org/countries_e.asp)  
(last visited October 25, 2012.)

Note 1: This list includes South American countries BITs with the US, Germany, France, United Kingdom and Spain.

## Appendix VII. List of South American Countries' BITs

<b>WITH THE US:</b>
1. Treaty between the United States of America and the Argentine Republic concerning the reciprocal encouragement and protection of investment, November 14, 1991, and entered into force on October 20, 1994 [hereinafter US-Argentina BIT], available at <a href="http://www.sice.oas.org/Investment/BITSbyCountry/BITS/US_Argentina_e.asp">http://www.sice.oas.org/Investment/BITSbyCountry/BITS/US_Argentina_e.asp</a> (last visited Oct 19, 2012).
2. Treaty between the United States of America and the Republic of Bolivia concerning the reciprocal encouragement and protection of investment, April 17, 1998, and entered into force on July 6, 2001 [hereinafter US-Bolivia BIT], available at <a href="http://www.sice.oas.org/Investment/BITSbyCountry/BITS/US_Bolivia_e.asp">http://www.sice.oas.org/Investment/BITSbyCountry/BITS/US_Bolivia_e.asp</a> (last visited Oct 19, 2012). <b>Currently terminated.</b>
3. Treaty between the United States of America and the Republic of Ecuador concerning the reciprocal encouragement and protection of investment, August 27, 1993, and entered into force on May 11, 1997 [hereinafter US-Ecuador BIT], available at <a href="http://www.sice.oas.org/Investment/BITSbyCountry/BITS/US_Ecuador_e.asp">http://www.sice.oas.org/Investment/BITSbyCountry/BITS/US_Ecuador_e.asp</a> (last visited Oct 19, 2012). <b>Request for termination.</b>
4. Treaty between the United States of America and the Republic of Uruguay concerning the reciprocal encouragement and protection of investment, November 4, 2005, and entered into force on November 1, 2006 [hereinafter US-Uruguay BIT], available at <a href="http://www.sice.oas.org/Investment/BITSbyCountry/BITS/URU_US_e.asp">http://www.sice.oas.org/Investment/BITSbyCountry/BITS/URU_US_e.asp</a> (last visited Oct 19, 2012).
<b>WITH FRANCE:</b>
1. Treaty between the Republic of France and the Argentine Republic concerning the reciprocal encouragement and protection of investment, July 3, 1991, and entered into force on March 3, 1993 [hereinafter France-Argentina BIT], available at <a href="http://www.sice.oas.org/Investment/BITSbyCountry/BITS/ARG_France_f.pdf">http://www.sice.oas.org/Investment/BITSbyCountry/BITS/ARG_France_f.pdf</a> (last visited Oct 19, 2012).
2. Treaty between the Republic of France and the Republic of Bolivia concerning the reciprocal encouragement and protection of investment, October 25, 1989, and entered into force on October 12, 1996 [hereinafter France-Bolivia BIT], available at <a href="http://www.sice.oas.org/Investment/BITSbyCountry/BITS/BOL_France_f.pdf">http://www.sice.oas.org/Investment/BITSbyCountry/BITS/BOL_France_f.pdf</a> (last visited Oct 19, 2012).
3. Treaty between the Republic of France and the Republic of Chile concerning the reciprocal encouragement and protection of investment, July 14, 1992, and entered into force on December 5, 1994 [hereinafter France-Chile BIT], available at <a href="http://www.sice.oas.org/Investment/BITSbyCountry/BITS/CHI_France_s.pdf">http://www.sice.oas.org/Investment/BITSbyCountry/BITS/CHI_France_s.pdf</a> (last visited Oct 19, 2012).
4. Treaty between the Republic of France and the Republic of Ecuador concerning the reciprocal encouragement and protection of investment, September 7, 1994, and entered into force on June 10, 1996 [hereinafter France-Ecuador BIT], available at <a href="http://www.sice.oas.org/Investment/BITSbyCountry/BITS/ECU_France_f.pdf">http://www.sice.oas.org/Investment/BITSbyCountry/BITS/ECU_France_f.pdf</a> (last visited Oct 19, 2012). <b>Currently terminated.</b>
5. Treaty between the Republic of France and the Republic of Paraguay concerning the reciprocal encouragement and protection of investment, November 30, 1978, and entered into force on December 1, 1980 [hereinafter France-Paraguay BIT], available at <a href="http://www.sice.oas.org/Investment/BITSbyCountry/BITS/PAR_France_f.pdf">http://www.sice.oas.org/Investment/BITSbyCountry/BITS/PAR_France_f.pdf</a> (last visited Oct 19, 2012).
6. Treaty between the Republic of France and the Republic of Peru concerning the reciprocal encouragement and protection of investment, October 6, 1993, and entered into force on May 30, 1996 [hereinafter France-Peru BIT], available at <a href="http://www.sice.oas.org/Investment/BITSbyCountry/BITS/PER_France_s.pdf">http://www.sice.oas.org/Investment/BITSbyCountry/BITS/PER_France_s.pdf</a> (last visited Oct 19, 2012).

7. Treaty between the Republic of France and the Republic of Uruguay concerning the reciprocal encouragement and protection of investment, October 14, 1993, and entered into force on July 9, 1997 [hereinafter France-Uruguay BIT], available at <a href="http://www.sice.oas.org/Investment/BITSbyCountry/BITS/URU_France_s.pdf">http://www.sice.oas.org/Investment/BITSbyCountry/BITS/URU_France_s.pdf</a> (last visited Oct 19, 2012).
8. Treaty between the Republic of France and the Bolivarian Republic of Venezuela concerning the reciprocal encouragement and protection of investment, Jul 2, 2001, and entered into force on April 30, 2004 [hereinafter France-Venezuela BIT]
<b>WITH GERMANY</b>
1. Treaty between Germany and the Argentine Republic concerning the reciprocal encouragement and protection of investment, April 9, 1991, and entered into force on November 8, 1993 [hereinafter Germany-Argentina BIT].
2. Treaty between Germany and the Republic of Bolivia concerning the reciprocal encouragement and protection of investment, March 23, 1987, and entered into force on November 9, 1990 [hereinafter Germany-Bolivia BIT], available at <a href="http://www.sice.oas.org/Investment/BITSbyCountry/BITS/BOL_Germany.pdf">http://www.sice.oas.org/Investment/BITSbyCountry/BITS/BOL_Germany.pdf</a> (last visited Oct 19, 2012).
3. Treaty between Germany and the Republic of Chile concerning the reciprocal encouragement and protection of investment, April 14, 1997 and entered into force on Nov 17, 2000 [hereinafter Germany-Chile BIT], available at <a href="http://www.sice.oas.org/Investment/BITSbyCountry/BITS/CHI_Germany_s.pdf">http://www.sice.oas.org/Investment/BITSbyCountry/BITS/CHI_Germany_s.pdf</a> (last visited Oct 19, 2012).
4. Treaty between Germany and the Republic of Ecuador concerning the reciprocal encouragement and protection of investment, March 21, 1996, and entered into force on February 12, 1999 [hereinafter Germany-Ecuador BIT], available at <a href="http://www.sice.oas.org/Investment/BITSbyCountry/BITS/ECU_Germany_ger.pdf">http://www.sice.oas.org/Investment/BITSbyCountry/BITS/ECU_Germany_ger.pdf</a> (last visited Oct 19, 2012). <b>Currently terminated.</b>
5. Treaty Between The Cooperative Republic of Guyana and the Federal Republic of Germany Concerning the Encouragement and Reciprocal Protection of Investments Dec 6, 1989 and entered into force on Mar 8, 1994 [hereinafter Germany-Guyana BIT], available at <a href="http://www.sice.oas.org/ctyindex/GUY/GUYBITS_e.asp">http://www.sice.oas.org/ctyindex/GUY/GUYBITS_e.asp</a> (last visited Oct 19, 2012).
6. Treaty between Germany and the Republic of Paraguay concerning the reciprocal encouragement and protection of investment, August 11, 1993, and entered into force on July 3, 1998 [hereinafter Germany-Paraguay BIT], available at <a href="http://unctad.org/sections/dite/ia/docs/bits/germany_paraguay_esp.pdf">http://unctad.org/sections/dite/ia/docs/bits/germany_paraguay_esp.pdf</a> (last visited Oct 19, 2012).
7. Treaty between Germany and the Republic of Peru concerning the reciprocal encouragement and protection of investment, January 30, 1995, and entered into force on May 1, 1997 [hereinafter Germany-Peru BIT], available at <a href="http://www.sice.oas.org/Investment/BITSbyCountry/BITS/PER_Germany_s.pdf">http://www.sice.oas.org/Investment/BITSbyCountry/BITS/PER_Germany_s.pdf</a> (last visited Oct 19, 2012).
8. Treaty between Germany and the Republic of Uruguay concerning the reciprocal encouragement and protection of investment, May 4, 1987, and entered into force on June 29, 1990 [hereinafter Germany-Uruguay BIT], available at <a href="http://unctad.org/sections/dite/ia/docs/bits/uruguay_germany_sp.pdf">http://unctad.org/sections/dite/ia/docs/bits/uruguay_germany_sp.pdf</a> (last visited Oct 19, 2012).
9. Treaty between Germany and the Bolivarian Republic of Venezuela concerning the reciprocal encouragement and protection of investment, May 14, 1996 and entered into force on Oct 16, 1998 [hereinafter Germany-Venezuela BIT]
<b>WITH UK</b>
1. Treaty between the United Kingdom and the Argentine Republic concerning the reciprocal encouragement and protection of investment, December 11, 1990, and entered into force on February 19, 1993 [hereinafter UK-Argentina BIT], available at <a href="http://www.sice.oas.org/Investment/BITSbyCountry/BITS/ARG_UK_1993.pdf">http://www.sice.oas.org/Investment/BITSbyCountry/BITS/ARG_UK_1993.pdf</a> (last visited Oct 19, 2012).

<p>2. Treaty between the United Kingdom and the Republic of Bolivia concerning the reciprocal encouragement and protection of investment, May 24, 1988, and entered into force on February 16, 1990 [hereinafter UK-Bolivia BIT], available at <a href="http://www.sice.oas.org/Investment/BITSbyCountry/BITS/BOL_UK_1986.pdf">http://www.sice.oas.org/Investment/BITSbyCountry/BITS/BOL_UK_1986.pdf</a> (last visited Oct 19, 2012).</p>
<p>3. Treaty between the United Kingdom and the Republic of Chile concerning the reciprocal encouragement and protection of investment, April 24, 1995, and entered into force on Jun 23, 1997 [hereinafter UK-Chile BIT], available at <a href="http://www.sice.oas.org/Investment/BITSbyCountry/BITS/CHI_UK_1997.pdf">http://www.sice.oas.org/Investment/BITSbyCountry/BITS/CHI_UK_1997.pdf</a> (last visited Oct 19, 2012).</p>
<p>4. Treaty between the United Kingdom and the Republic of Ecuador concerning the reciprocal encouragement and protection of investment, May 10, 1994, and entered into force on August 24, 1995 [hereinafter UK-Ecuador BIT], available at <a href="http://www.sice.oas.org/Investment/BITSbyCountry/BITS/ECU_UK_1996.pdf">http://www.sice.oas.org/Investment/BITSbyCountry/BITS/ECU_UK_1996.pdf</a> (last visited Oct 19, 2012). <b>Currently terminated.</b></p>
<p>5. Treaty Between the United Kingdom and The Cooperative Republic of Guyana Concerning the Encouragement and Reciprocal Protection of Investments Oct 27, 1989 and entered into force on April 11, 1990 [hereinafter UK-Guyana BIT], available at <a href="http://www.sice.oas.org/Investment/BITSbyCountry/BITS/GUY_UK_1990.pdf">http://www.sice.oas.org/Investment/BITSbyCountry/BITS/GUY_UK_1990.pdf</a> (last visited Oct 19, 2012).</p>
<p>6. Treaty between the United Kingdom and the Republic of Paraguay concerning the reciprocal encouragement and protection of investment, June 4, 1981, and entered into force on April 23, 1992 [hereinafter UK-Paraguay BIT], available at <a href="http://www.sice.oas.org/Investment/BITSbyCountry/BITS/PAR_UK_1981.pdf">http://www.sice.oas.org/Investment/BITSbyCountry/BITS/PAR_UK_1981.pdf</a> (last visited Oct 19, 2012).</p>
<p>7. Treaty between the United Kingdom and the Republic of Peru concerning the reciprocal encouragement and protection of investment, Oct 4, 1993 and entered into force on April 21, 1994 [hereinafter UK-Peru BIT], available at <a href="http://www.sice.oas.org/Investment/BITSbyCountry/BITS/PER_UK_1993.pdf">http://www.sice.oas.org/Investment/BITSbyCountry/BITS/PER_UK_1993.pdf</a> (last visited Oct 19, 2012).</p>
<p>8. Treaty between the United Kingdom and the Republic of Uruguay concerning the reciprocal encouragement and protection of investment, October 21, 1991, and entered into force on August 1, 1997 [hereinafter UK-Uruguay BIT], available at <a href="http://www.sice.oas.org/Investment/BITSbyCountry/BITS/URU_UK_1991.pdf">http://www.sice.oas.org/Investment/BITSbyCountry/BITS/URU_UK_1991.pdf</a> (last visited Oct 19, 2012).</p>
<p>9. Treaty between the United Kingdom and the Bolivarian Republic of Venezuela concerning the reciprocal encouragement and protection of investment, Mar 15, 1995 and entered into force on Aug 1, 1996 [hereinafter UK-Venezuela BIT], available at <a href="http://www.sice.oas.org/Investment/BITSbyCountry/BITS/VEN_UK_1991.pdf">http://www.sice.oas.org/Investment/BITSbyCountry/BITS/VEN_UK_1991.pdf</a> (last visited Oct 19, 2012).</p>
<p><b>WITH SPAIN</b></p>
<p>1. Treaty between Spain and the Argentine Republic concerning the reciprocal encouragement and protection of investment, October 3, 1991, and entered into force on September 28, 1992 [hereinafter Spain-Argentina BIT], available at <a href="http://www.sice.oas.org/Investment/BITSbyCountry/BITS/ARG_Spain_s.pdf">http://www.sice.oas.org/Investment/BITSbyCountry/BITS/ARG_Spain_s.pdf</a> (last visited Oct 19, 2012).</p>
<p>2. Treaty between Spain and the Republic of Bolivia concerning the reciprocal encouragement and protection of investment, October 29, 2001, and entered into force on July 9, 2002 [hereinafter Spain-Bolivia BIT], available at <a href="http://www.sice.oas.org/Investment/BITSbyCountry/BITS/BOL_Spain_s.pdf">http://www.sice.oas.org/Investment/BITSbyCountry/BITS/BOL_Spain_s.pdf</a> (last visited Oct 19, 2012).</p>
<p>3. Treaty between Spain and the Republic of Chile concerning the reciprocal encouragement and protection of investment, Oct 2, 1991, and entered into force on April 27, 1994 [hereinafter Spain-Chile BIT], available at <a href="http://www.sice.oas.org/Investment/BITSbyCountry/BITS/CHI_Spain_s.pdf">http://www.sice.oas.org/Investment/BITSbyCountry/BITS/CHI_Spain_s.pdf</a> (last visited Oct 19, 2012).</p>
<p>4. Treaty between Spain and the Republic of Colombia concerning the reciprocal encouragement and protection of investment, Mar 31, 2005, and entered into force on Sep 22, 2007 [hereinafter Spain-Colombia BIT], available at <a href="http://www.sice.oas.org/Investment/BITSbyCountry/BITS/COL_Spain_s.pdf">http://www.sice.oas.org/Investment/BITSbyCountry/BITS/COL_Spain_s.pdf</a> (last visited Oct 19, 2012).</p>

<p>5. Treaty between Spain and the Republic of Ecuador concerning the reciprocal encouragement and protection of investment, June 26, 1996, and entered into force on June 18, 1997 [hereinafter Spain-Ecuador BIT], available at <a href="http://www.sice.oas.org/Investment/BITSbyCountry/BITS/ECU_Spain_s.pdf">http://www.sice.oas.org/Investment/BITSbyCountry/BITS/ECU_Spain_s.pdf</a> (last visited Oct 19, 2012). Request for Termination</p>
<p>6. Treaty between Spain and the Republic of Paraguay concerning the reciprocal encouragement and protection of investment, October 11, 1993, and entered into force on November 22, 1996 [hereinafter Spain-Paraguay BIT], available at <a href="http://www.sice.oas.org/Investment/BITSbyCountry/BITS/PAR_Spain_s.pdf">http://www.sice.oas.org/Investment/BITSbyCountry/BITS/PAR_Spain_s.pdf</a> (last visited Oct 19, 2012).</p>
<p>7. Treaty between Spain and the Republic of Peru concerning the reciprocal encouragement and protection of investment, Nov 17,1994, and entered into force on Feb 16, 1996 [hereinafter Spain-Peru BIT], available at <a href="http://www.sice.oas.org/Investment/BITSbyCountry/BITS/PER_Spain_s.pdf">http://www.sice.oas.org/Investment/BITSbyCountry/BITS/PER_Spain_s.pdf</a> (last visited Oct 19, 2012).</p>
<p>8. Treaty between Spain and the Republic of Uruguay concerning the reciprocal encouragement and protection of investment, April 7, 1992, and entered into force on May 6, 1994 [hereinafter Spain-Uruguay BIT], available at <a href="http://www.sice.oas.org/Investment/BITSbyCountry/BITS/URU_Spain.pdf">http://www.sice.oas.org/Investment/BITSbyCountry/BITS/URU_Spain.pdf</a> (last visited Oct 19, 2012).</p>
<p>9. Treaty between Spain and the Bolivarian Republic of Venezuela concerning the reciprocal encouragement and protection of investment, Nov 2, 1995, and entered into force on Sep 10, 1997 [hereinafter Spain-Venezuela BIT], available at <a href="http://www.sice.oas.org/Investment/BITSbyCountry/BITS/VEN_Spain_s.pdf">http://www.sice.oas.org/Investment/BITSbyCountry/BITS/VEN_Spain_s.pdf</a> (last visited Oct 19, 2012).</p>

**Note: A Total of 39 BITs (including 4 Terminated and 2 under Request for Termination)**

## Appendix VIII. List of Countries' Statements at the WTO

<b>Singapore 1996</b>
Commission of the European Communities. Statement by Sir Leon Brittan Q.C. Vice-President of the European Commission. Singapore, 1996. WT/MIN(96)/ST/2
United States' Statement by the Honourable Charlene Barshefsky. Acting United States Trade Representative. Singapore, 1996. WT/MIN(96)/ST/5
Argentina's Statement by H.E. Mr. G.J. Campbell, Minister of International Economic Relations. Singapore, 1996. WT/MIN (96)/ST/4.
Bolivia's Statement by Mr. Victor Rico Frontaura. Minister of International Economic Relations. Singapore. 1996. WT/MIN(96)/ST/38
Brazil's Statement by H.E. Mr. Luiz Felipe Lampreia. Minister for External Relations. Singapore, 1996. WT/MIN(96)/ST/8
Chile's Statement by H.E. Mr. Alvaro Garcia, Minister of Economic Affairs, Singapore, 1996. WT/MIN(96)/ST/36
Colombia's Statement by H.E. Dr. Felipe Jaramillo, Vice-Minister of Foreign Trade. Singapore, 1996. WT/MIN(96)/ST/23
Ecuador's Statement by H.E. Mr. Ruben Flores. Deputy-Minister of Foreign Trade. Singapore, 1996. WT/MIN(96)/ST/68
Guyana's Statement by H.E. Michael Shree Chan, Senior Minister of Trade, Tourism and Industry. Singapore, 1996. WT/MIN(96)/ST/56
Paraguay's Statement by Mr. Ruben Melgarejo Lanzoni. Minister of Foreign Relations. Singapore, 1996. WT/MIN(96)/ST/75
Peru's Statement by Mrs. Lilliana Canale, Special Presidential Envoy. Singapore, 1996. WT/MIN(96)/ST/106
Suriname's Statement by H.E. Mr. Ewald C. Leeflang, Ambassador, Permanent Representative of Suriname to the WTO. Singapore, 1996. WT/MIN(96)/ST/88
Uruguay's Statement by H.E. Mr. Alvaro Ramos. Minister of Foreign Affairs. Singapore, 1996. WT/MIN(96)/ST/17
Venezuela's Statement by H.E. Mr. Werner Corrales Leal, Permanent Representative to the United Nations and Other International Organizations. Singapore 1996. WT/MIN(96)/ST/100
<b>Seattle 1999</b>
Commission of the European Community. Statement by Mr. Pascal Lamy. Commissioner for Trade. Seattle, 1999. WT/MIN(99)/ST/3
United States' Statement by the Honourable Daniel Glickman. Secretary of Agriculture. Seattle, 1999. WT/MIN(99)/ST/12
Argentina's Statement by H.E. Mr. Guido Di Tella. Minister for Foreign Affairs, International Trade and Worship. Seattle, 1999. WT/MIN(99)/ST/153

Bolivia's Statement by H.E. Dr. Javier Murillo de la Rocha. Minister for Foreign Affairs and Worship. Seattle, 1999. WT/MIN(99)/ST/58

Brazil's Statement by H.E. Mr. Luiz Felipe Lampreia. Minister of Foreign Relations. Seattle, 1999. WT/MIN(99)/ST/5

Chile's Statement by H.E. Mr. Juan Gabriel Valdés. Minister for Foreign Affairs. Seattle, 1999. WT/MIN(99)/ST/51

Colombia's Statement by H.E. Mrs. Marta Lucía Ramírez de Rincón. Minister of Foreign Trade. Seattle 1999. WT/MIN(99)/ST/137

Ecuador's Statement by H.E. Mr. José Luis Ycaza Pazmiño. Minister of Foreign Trade, Industry, Fisheries and Tourism. Seattle, 1999. WT/MIN(99)/ST/35

Guyana's Statement by the Honourable Clement J . Rohee, M.P. Minister of Foreign Affairs. Seattle, 1999. WT/MIN(99)/ST/111

Paraguay's Statement by H.E. Dr. Guillermo Caballero Vargas. Minister, Economic Advisor of the Presidency. Seattle 1999. WT/MIN(99)/ST/49

Peru's Statement by H.E. Mr. Juan Carlos Hurtado Miller. Minister for Industry, Tourism, Integration and International Trade Negotiations. Seattle, 1999. WT/MIN(99)/ST/91

Suriname's Statement by H.E. Mr. Erroll G. Snijders. Minister of Foreign Affairs. Seattle, 1999. WT/MIN(99)/ST/126

Uruguay's Statement by H.E. Dr. Didier Opertti, Minister of Foreign Affairs. Seattle, 1999. WT/MIN(99)/ST/47

Venezuela's Statement by H.E. Dr. Juan de Jesús Montilla Saldivia. Minister of Production and Trade. Seattle, 1999. WT/MIN(99)/ST/56

#### **Doha 2001**

European Communities Commission. Statement by Mr Pascal Lamy, Commissioner for Trade. Doha, 2001. WT/MIN(01)/ST/4

United States' Statement by H.E. Mr. Robert B. Zoellick. United States Trade Representative. Doha, 2001. WT/MIN(01)/ST/3

Argentina's Statement by H.E. Mr Alfredo Vicente Chiaradia. Ambassador, Foreign Trade Representative. Doha 2001. WT/MIN(01)/ST/16

Bolivia's Statement by H.E. Mrs Ana María Solares Gaité. Vice-Minister for International Economic Relations and Integration. Doha 2001. WT/MIN(01)/ST/125

Brazil's Statement by H.E. Mr Celso Lafer. Minister of Foreign Relations. Doha 2001. WT/MIN(01)/ST/12

Chile's Statement by H.E. Mr. Heraldo Muñoz, Under-Secretary of Foreign Relations. Doha, 2001. WT/MIN(01)/ST/48

Colombia's Statement by H.E. Mrs Marta Lucía Ramirez de Rincón, Minister of Foreign Trade. Doha, 2001. WT/MIN(01)/ST/91

Ecuador's Statement by H.E. Mr Richard Howard Moss Ferreira. Minister of Foreign Trade, Industry and Fisheries and Competitiveness. Doha 2001 WT/MIN(01)/ST/46

Guyana's Statement by the Honourable Clement James Rohee, MP. Minister of Foreign Trade and International Cooperation. Doha, 2001. WT/MIN(01)/ST/87

Paraguay's Statement by H.E. Mr Luís Maria Ramírez Boettner. Ambassador, Permanent Representative to the WTO, Former Minister of Foreign Affairs. Doha 2001. WT/MIN(01)/ST/73

Peru's Statement by H.E. Mr Jorge Voto-Bernales, Ambassador, Permanent Representative to the WTO. Doha, 2001. WT/MIN(01)/ST/130

Uruguay's Statement by H.E. Mr Gonzalo Enrique Gonzalez Fernandez. Minister of Livestock, Agriculture and Fisheries. Doha 2001. WT/MIN(01)/ST/35

Venezuela's Statement by H.E. Dr Luisa Romero Bermudez, Minister of Production and Commerce. Doha, 2001. WT/MIN(01)/ST/128

### **Cancun 2003**

European Communities Commission. Statement by Mr Pascal Lamy. Commissioner for Trade. Cancun, 2003. WT/MIN(03)/ST/5.

Bolivia's Statement by H.E. Dr Carlos Saavedra Bruno. Minister of Foreign Affairs and Worship. Cancun 2003. WT/MIN(03)/ST/83

Brazil's Statement by H.E. Mr Celso Amorim. Minister of External Relations. Cancun 2003. WT/MIN(03)/ST/28

Chile's Statement by H.E. Mrs Maria Soledad Alvear, Minister for Foreign Affairs. Cancun 2003. WT/MIN(03)/ST/47

Colombia's Statement by H.E. Mr Jorge Humberto Botero, Minister of Commerce, Industry and Tourism. Cancun 2003. WT/MIN(03)/ST/60

Guyana's Statement by the Honourable Clement James Rohee, MP. Minister of Foreign Trade and International Cooperation. Cancun 2003. WT/MIN(03)/ST/37

Paraguay's Statement by H.E. Mrs. Leila Rachid de Cowles. Minister for Foreign Relations. Cancun 2003. WT/MIN(03)/ST/54

Peru's Statement by H.E. Mr Jorge Voto-Benales, Ambassador, Head of Delegation. Cancun 2003. WT/MIN(03)/ST/97

Uruguay's Statement by H.E. Dr Didier Opertti Badan. Minister for Foreign Affairs. Cancun 2003. WT/MIN(03)/ST/25

Venezuela's Statement by H.E. Mr Ramón Rosales Linares, Minister of Production and Trade. Cancun 2003. WT/MIN(03)/ST/48



### **Appendix IX. List of International Conventions**

- United Nations Charter.
- Agreement establishing the World Trade Organization.1994.
- Vienna Convention on the Law of Treaties. 1969.
- Fundamental International Labour Conventions: - Forced Labour Convention, 1930. - Freedom of Association and Protection of the Right to Organise Convention. 1984. - Right to Organise and Collective Bargaining Convention. 1949. - Equal Remuneration Convention. 1951. - Abolition of Forced Labour Convention. 1957. - Discrimination (Employment and Occupation) Convention. 1958. - Minimum Age Convention. 1973. - Worst Forms of Child Labour Convention. 1999.
- Convention establishing the Multilateral Investment Guarantee Agency. 1988.
- Convention on the Settlement of Investment Disputes between States and Nationals of other States.1965 (as amended 2006).
- New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards.1958.
- World Health Organization Framework Convention on Tobacco Control (FCTC). 2003-2005.
- Treaty of Lisbon. 2009.

### **Appendix X. List of UN Resolutions**

- UN General Assembly Resolution No. 626 of 21 December, 1952, "Right to exploit Freely Natural Wealth and Resources"
- UN General Assembly Resolution No. 1803 (XVII) of 14 December 1962, "Permanent Sovereignty over Natural Resources"
- UN General Assembly Resolution No. 2158 (XXI) of 25 November, 1966, "Permanent Sovereignty over Natural Resources"
- UN General Assembly Resolution No. 3171 (XXVIII), of 17 December, 1973, "Permanent Sovereignty over Natural Resources"
- UN General Assembly Resolution No. 3201(S-VI) of 1 May, 1974,"Establishment of a New International Economic Order"
- UN General Assembly Resolution No. 3281(XXIX), of 12 December, 1974 "Charter of Economic Rights and Duties of States"

## Appendix XI. List of Cases

<b>International Centre for Settlement of Investment Disputes (ICSID)</b>
<ul style="list-style-type: none"><li>- Emilio Agustin Maffezini vs Spain (ICSID Case No. ARB/97/7)</li><li>- Siemens A.G v Argentine Republic (ICSID Case No. ARB/02/8);</li><li>- Wintershall Aktiengesellschaft v Argentine Republic (ICSID Case No. ARB/04/14);</li><li>- Azurix Corp. v. The Argentine Republic, ICSID Case No. ARB/01/12;</li><li>- CMS Gas Transmission Company v. The Argentine Republic, ICSID Case No. ARB/01/8;</li><li>- Enron Corporation and Ponderosa Assets, L.P. v. Argentine Republic, ICSID Case No. ARB/01/3,</li><li>- LG&amp;E Energy Corp. LG&amp;E Capital Copr. And LG&amp;E International Inc vs Argentine Republic (ICSID Case No. ARB/02/1)</li><li>- Sempra Energy International vs Argentine Republic (ICSID Case No. ARB/02/16)</li><li>- Compañía de Aguas del Aconquija S.A. and Vivendi Universal v. Argentine Republic, ICSID Case No. ARB/97/3.</li><li>- Continental Casualty Company v. Argentine Republic (ICSID Case No. ARB/03/9)</li><li>- Tecnicas Medio Ambientales Tecmed SA vs Mexico. ICSID Case No. ARB(AF)/00/2.</li><li>- Philip Morris Brand Sarl, Philip Morris Products S.A. v. Oriental Republic of Uruguay. ICSID Case No. ARB/10/7.</li><li>- Salini Costruttori SpA and Italstrade SpA v The Hashemite Kingdom of Jordan ICSID Case No.ARB/02/13, decision of November 15, 2004</li><li>- Plama Consortium Ltd v Republic of Bulgaria ICSID Case No. ARB/03/24, decision of February 8, 2005</li><li>- Tza Yap Shum v Peru, ICSID Case No. ARB/07/6</li></ul>
<b>Permanent Court of International Justice (PCIJ)</b>
Mavrommantis Palestine Concessions Case (Greece v. UK), Jurisdiction. (1924) P.C.I.J. Rep., Ser. A, No.2 Chorzow Factory case, PCIJ ser. A No 17. At 68
<b>International Court of Justice (ICJ)</b>
Texaco Overseas Petroleum Company v. The Government of the Libyan Arab Republic, International Legal Materials, Vol. 17 No. 1 1978
<b>US Cases</b>
Underhill v Hernandez (168 U.S. 250, 18 S. Ct. 83, 42 L. Ed. 456 (1897)) Banco Nacional de Cuba v. Sabattino. 376 U.S. 398 (1964)

## Appendix XII. Other Materials

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