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The Emerging Foreign Investment Regime in the Americas

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EXECUTIVE SUMMARY

Despite the setbacks encountered in the negotiation of multilateral foreign investment rules at the World Trade Organization and Free Trade Area of the Americas talks, there is still a framework of rules governing investment emerging in the Americas. Although incomplete and embryonic, the emerging foreign investment regime is defined by the existing multi-layered patchwork of primarily bilateral investment agreements and investment chapters of free trade agreements. But, the shift from negotiating investment rules in a regional or multilateral forum to a predominantly bilateral one is likely to have consequences for the character of that investment regime. This paper examines the nature of this emerging foreign investment regime in the Americas. It begins by discussing the state of the global and hemispheric negotiations on investment rules, and the position of two of the hemisphere's most important players, the United States and Brazil, on this issue. The nature of the investment regime desired by both players is then examined through an analysis of the bilateral investment agreements concluded by both with their Latin American partners.

RÉSUMÉ

Malgré les revers essuyés dans la négociation des règles multilatérales de l'investissement étranger à l'Organisation mondiale du commerce et dans les pourparlers de la Zone de libre-échange des Amériques, un cadre de réglementation de l'investissement ne s'en dessine pas moins dans les Amériques. Quoique incomplet et embryonnaire, le nouveau régime de l'investissement étranger est défini par une mosaïque d'accords sur l'investissement avant tout bilatéraux et par les chapitres des accords de libre-échange consacrés au sujet. Cependant, le passage de la négociation de règles d'investissement dans une instance régionale ou multilatérale à une instance principalement bilatérale aura probablement des conséquences pour les caractéristiques de ce régime d'investissement. Le présent document étudie la nature du régime de l'investissement étranger qui se dessine dans les Amériques. Il examine tout d'abord l'état des négociations mondiales et hémisphériques sur les règles de l'investissement ainsi que la position de deux des acteurs les plus importants de l'hémisphère, à savoir les États-Unis et le Brésil, sur ce sujet. La nature du régime de l'investissement souhaité par les deux acteurs est ensuite examinée dans une analyse des accords bilatéraux conclus par l'un et l'autre avec leurs partenaires latino-américains en matière d'investissement.

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RESUMEN

No obstante los fracasos sufridos en las negociaciones para establecer las normas de un acuerdo multilateral de inversiones extranjeras en el seno de la Organización Mundial de Comercio y las conversaciones del Área de Libre Comercio de las Américas, las inversiones en las Américas cuentan con un cuerpo de regulaciones. A pesar de estar todavía incompleto y en una fase incipiente, este nuevo régimen para las inversiones extranjeras se caracteriza por la variedad y multiplicidad de acuerdos de inversiones principalmente bilaterales y de apartados sobre inversión contenidos en acuerdos de libre comercio. Sin embargo, las negociaciones de normas para las inversiones en un marco preponderantemente bilateral, en lugar de en un contexto regional y multilateral, influirán seguramente en la naturaleza de dicho régimen. El presente trabajo aborda las características de este naciente régimen para las inversiones extranjeras en las Américas. Primeramente se analiza el estado actual de las negociaciones sobre normas para inversiones en el ámbito mundial y hemisférico y la posición sobre el tema de dos de los actores más importantes de la región: Estados Unidos y Brasil. Posteriormente se trata el régimen de inversiones que cada uno de estos dos factores propone mediante un análisis de los acuerdos de inversiones bilaterales que han establecido por separado con sus contrapartes latinoamericanas.

INTRODUCTION

Since the failure of the Organization for Economic Cooperation and Development's (OECD) Multilateral Agreement on Investment (MAI) in 1999, other ambitious plans to harmonize the framework of rules, or regime, which constitutes the international governance of foreign direct investment (FDI) have also met with obstacles. Following the World Trade Organization's (WTO) stalemated Cancún meeting of September 2003, attempts to begin negotiations on the most contentious of the Singapore Issues, namely multilateral rules on investment and intellectual property rights were all but abandoned. Shortly afterwards, at the Miami meeting of Foreign Ministers in November 2003, the negotiation of a comprehensive Free Trade Area of the Americas (FTAA) ran into a roadblock as the major players agreed to proceed on a minimum multilateral agreement while smaller groups of countries would be permitted to negotiate plurilateral deals with more far-reaching disciplines among themselves. This change in character of the FTAA negotiations effectively eliminated the possibility that strong investment disciplines like those found in the North American Free Trade Agreement (NAFTA), and opposed by major players such as Brazil, would eventually be included in any FTAA-lite.

Efforts to harmonize a framework for the international governance of foreign direct investment (FDI) continue despite the difficulties encountered at the multilateral level, but in the calendar year following the Miami debacle little progress has been made on this issue in either the WTO Doha Round or the FTAA talks. Many of the major players in the WTO, such as the United States and European Union seem increasingly willing to jettison all contentious Singapore Issues from the negotiating round in order to make progress in other areas.

But in the absence of a multilateral deal, there still exists a framework of rules governing investment. Although incomplete and embryonic, we may say that the emerging foreign investment regime is defined by the existing multi-layered patchwork of agreements and ongoing negotiations on investment. If the discussion is limited to the Americas, it is clear that the liberalization of foreign investment policy has occurred at several levels including national investment statutes; bilateral agreements (particularly bilateral investment treaties – BITs) and Free Trade Agreements with investment chapters; investment rules within sub-regional preferential trading agreements such as NAFTA, the South American Common Market (Mercosur), and the Andean Pact; regional agreements under negotiation such as the FTAA; and existing instruments of multilateral organizations such as the World Trade Organization, and the Multilateral Investment Guarantee Agency (MIGA) of the World Bank (OEA 1999; Robert 1999; Seid 2002).

In the Americas, with the abandonment of serious negotiations to complete the FTAA as originally envisaged by 2005, and the setbacks in the Doha "development" Round, the regional and multilateral attempts to establish a hemispheric regime to regulate foreign direct investment have been left in tatters. These setbacks for regional multilateralism in the Americas have been accompanied by a rise in the importance of bilateralism, particularly in terms of the negotiation of free trade agreements (Cosby 2004, 12; Mace 2004, 2). But this is also true in terms of

investment as bilateral investment treaties and the investment chapters of the new generation of FTAs, together with the investment provisions of sub-regional preferential trading agreements, now constitute the principal tools in the construction of the emerging foreign investment regime in the Americas.

The shift from negotiating investment rules in a regional or multilateral forum to a predominantly bilateral one is likely to have consequences for the character of that investment regime. While a multilateral negotiating forum would have required all participants to make concessions, including the undisputed regional power, the United States, bilateral investment treaties and FTAs are more likely to reflect the interests of the stronger of the two negotiating parties. This paper examines the nature of this emerging foreign investment regime in the Americas. It begins by discussing the state of the global and hemispheric negotiations on investment rules, and the position of two of the hemisphere's most important players, the United States and Brazil, on this issue. The nature of the investment regime desired by both players is then examined through an analysis of the bilateral investment agreements concluded by both with their Latin American partners.

FACE-OFF ON INVESTMENT: BRAZIL AND THE UNITED STATES

The United States and Brazil have found themselves on opposite sides of a face-off on investment and other sensitive trade issues such as agriculture at both the regional and global level. Although originally included in the Doha "development" Round launched in 2001 as one of the four Singapore issues (framework for foreign investment, competition policy, transparency in government procurement, and trade facilitation) to be tackled in the negotiations, investment (and competition policy) quickly became stumbling blocks to any progress.

The WTO trade talks at Cancún in September 2003 collapsed in face of intransigence over the Singapore issues and agriculture. A group of approximately twenty developing countries led by India and Brazil (later termed the G-20) refused to negotiate investment rules (seen as being demanded by the US, EU and Canada) in light of the failure of these countries, but particularly the US and EU to put their agricultural subsidies on the table. In fact it became clear that opening investment and agriculture was the fundamental *quid pro quo* blocking progress. A draft ministerial declaration by the Mexican Foreign Minister, Luis Ernesto Derbez, explicitly linked delaying the start of negotiations on these two issues in a failed attempt to save the Cancún meeting (INVEST-SD, 14/09/03).

But in the year since Cancún, a consensus has begun to emerge that investment may just be too hot to handle in the context of the Doha Round. Significant opposition from major developing countries including India, China and Brazil to negotiating on the contentious Singapore issues, including investment, has continued. Such countries have tended to view disciplines on investment as unnecessarily restrictive of their ability to enact development and industrial policies.

... the US and EU maintain significant differences in the investment rules they promote globally through bilateral investment treaties

The countries seen as *demandeurs* of investment disciplines have also begun to change their position regarding the inclusion of investment in the Doha Round. On the one hand, the US and EU maintain significant differences in the investment rules they promote globally through bilateral investment treaties. For example, INVEST-SD reports that the EU position has been to not include portfolio investment or investor-state dispute settlement in the negotiations (both promoted by the US), but instead endorse, "transparency, non-discrimination, selected pre-establishment commitments, balance of payments safeguards, protection for the right to regulate in the public interest, and clarification as to the relationship with other bilateral and regional agreements." (INVEST-SD, 15/08/03). These problems at the WTO have been mirrored in the FTAA negotiations. At the Miami ministerial meeting of November 2003, "A paper circulated by Brazil and its Mercosur partners... in advance of the Miami meetings signalled its unwillingness to go beyond those substantive investment disciplines" contained in TRIMs and GATS as well as a rejection of the investor-state dispute settlement mechanism enshrined in NAFTA (INVEST-SD, 24/11/03).

Both the EU and the US seem prepared to abandon investment in the Doha round. In an open letter to WTO members, the US indicated that progress in

negotiations required that investment be dropped. In the US case, it has been suggested that the US, faced with the possibility that any WTO deal could be weaker than existing rules and would most certainly be weaker than the rules promoted through its BIT program, has opted to pursue stricter disciplines at the bilateral and multilateral levels (INVEST-SD, 16/01/04). The investment news bulletin produced by Canada's International Institute on Sustainable Development (IISD) summed up the problematic: "recent developments at the WTO and in the ongoing negotiations on a Free Trade Area of the Americas appear to underscore a lack of political will to carry forward ambitious and inclusive negotiations on investment at the multilateral or regional level" (INVEST-SD, 28/11/03), and "as a vacuum-of sorts continues to persist at the multilateral level, many governments are expected to accelerate the negotiation of bilateral rules on investment" (INVEST-SD, 14/08/04), both through BITs and the investment provisions of bilateral FTAs.

Brazil's efforts to launch a South American Community in December 2004 based on Mercosur-Andean Community free trade deals, and to promote free trade among the fractious members of the G-20 coalition that contributed to the stalemate at the WTO Cancún meeting of September 2003, point to a trade strategy that, as the Economist noted, seemed to prioritize "south-south co-operation as a substitute for freer trade with rich countries" (*Economist,* 05/02/04). It is also widely recognized that Brazil's alliance building, among particularly middle-income developing countries, is part of an effort to wield more clout on the global stage as the representative for the South American region.

Brazil's position on investment, namely that "it must enjoy the flexibility to opt out of commitments which go beyond existing WTO disciplines in areas like foreign investment, services, intellectual property rights (IPR) protection, and government procurement" (INVEST-SD, 14/11/030) has been explicitly made by foreign minister Celso Amorin in terms of Brazil's developmental needs (Vigevani and Passini, 2004, 2-3). He has also indicated that Brazil's major negotiating efforts would be at the WTO, as it was in this forum, that major issues related to the elimination of agricultural subsidies and other trade distortions (anti-dumping rules) would best be resolved (BBC Monitoring, 09/11/04), essentially ending any illusion that investment disciplines could first be established in the FTAA. Brazil is in particularly strong and also unique position in the Americas because it has not ratified any of the BITs it has negotiated, nor has it acceded to the 1965 International Centre for Settlement of Investment Disputes (ICSID), a standard set of rules for dispute-settlement between investors and governments (INVEST-SD, 7/11/03).

Since the debacles in Cancún and Miami, the United States has pursued a global strategy which has been termed "competitive liberalization" (USTR 2004, 1). The idea is to increase the pressure on those countries resistant to signing up to the US approach on trade and investment by signing bilateral deals with neighbouring countries. This approach increases the risk to developing countries such as Brazil who refuse to negotiate with the US at the multilateral level, as they, but not their competitors, find themselves marginalized from US markets. Since "competitive liberalization" was adopted, the US, in the Western Hemisphere alone has concluded free trade agreements with state-of-the-art investment disciplines with Chile, Costa Rica, Dominican Republic, El Salvador, Honduras, Guatemala and Nicaragua, and has ongoing FTA negotiations with Bolivia Colombia, Ecuador, Panama and Peru, and a BIT negotiation with Uruguay. "Taken together, the United States is on track to gain the benefits of free trade with more than two-thirds of the Western Hemisphere through sub-regional and bilateral FTAs" (USTR 2004, 4; INVEST-SD 5/03/04). It should be noted, however, that the majority of these agreements have not yet been submitted to Congress for approval.

The idea is to increase the pressure on those countries resistant to signing up to the US approach...

In the Americas, faced with the collapse of the single undertaking at the Miami ministerial and with it far-reaching disciplines on investment, which United States Trade Representative (USTR) Robert Zoellick had once described as achieving "the highest standard – in effect extending the North American Free Trade Agreement" (Zoellick, 08/12/03) the US has attempted to establish international precedents and drive home its definition of investment rules through bilateral deals. It is widely recognized that the US has been using agreements with smaller developing countries to consolidate norms and rules, and most importantly establish precedents, that it wishes to see adopted at the multilateral level (Vigevani and Passini 2004, 2).

Thus, USTR Robert Zoellick, while at the November 2004 APEC meeting in Santiago, Chile, indicated that the Mercosur countries "risk being isolated as a group while the United States clinches one-on-one regional free trade agreements with a host of other Latin American countries" (AP, 19/11/04). Observing this panorama of bilateral negotiations, the IISD concludes, "By pursuing negotiations with so many individual players in the hemisphere, the United States would appear to be in a strong position – should the FTAA fail – to achieve most of its objectives on investment through a multitude of sub-regional negotiations" (INVEST-SD, 14/11/030).

THE STATE OF THE ART OF BILATERAL INVESTMENT TREATIES

In light of the current stalemate in the negotiation of a hemispheric free trade agreement and the Doha Round of WTO negotiations, does this mean that the possibility of constructing a framework for investment at the international level is as dead as the OECD's ill-fated Multilateral Agreement on Investment (MAI)? The answer is that it is not only the multilateral negotiations on investment rules that are at issue. If the current negotiations remain stalemated for the foreseeable future, this does not necessarily mean that those opposing such a framework have won an important victory against the implacable expansion of international capital. Rather, it means that in the absence of new rules, the old ones continue to stand. And in the absence of a multilaterally negotiated framework on investment, this framework will be predominantly defined by hundreds of "strands" of bilateral deals on trade and investment, which together constitute a web.

... BITs are primarily about protecting investors... (and) now constitute the foundation of the emerging hemispheric investment regime

An existing multilevel system of regional governance of foreign direct investment already exists which includes the investment provisions of Chapter 11 of the North American Free Trade Agreement, the G-3 comprising Colombia, Mexico and Venezuela, Mercosur (the Colonia and Buenos Aires Protocols), the Andean Community (Decision 291), the Caribbean Community (Protocol 2), among various bilateral investment treaties, and domestic investment regimes; while at the international level, foreign investment is regulated by the WTO conventions on Trade-Related Investment Measures (TRIMs) and General Agreement on Trade in Services (GATS), Trade-Related Aspects of Intellectual Property Rights (TRIPS) and the Agreement on Subsidies and Countervailing Measures (ASCM) (Robert 1999, 389-398).

The United Nations Conference on Trade and Development has reported on an astounding rise in the use of BITs during the 1990s and a general liberalization of domestic foreign investment regimes marking a global liberalization of the environment in which foreign capital operates. By 2003, at least 2265 BITs covering services had been concluded between a total of 175 countries, reflecting both the increased interest of signing BITs between developing countries, and the rapid increase in BITs recorded in the latter part of the 1990s (UNCTAD 2004, 221). In 1999 alone, 20 BITs were concluded in Latin America and the Caribbean (UNCTAD 2000a, 8).

Latin America arrived at the BIT trend relatively late, beginning in the late 1980s, but the total climbed to 300 by 1999, a total of 366 if the Caribbean countries are included. However, only 61 of this total were signed among countries of the region. Interestingly the United States has been, historically, far from the most active promoter of BITs, Germany tops the list with 124 concluded, while the US finds itself in the 26th spot, after several other countries of the Western Hemisphere, Argentina (16th), Cuba (23rd) and Chile (24th) (UNCTAD 2000b, 18).

The reason behind signing BITs, as demonstrated by the emphasis of these treaties on investment security and dispute settlement, has been "in order to secure additional and higher standards of legal protection and guarantees for the investments of its firms than those offered under national laws" (UNCTAD 2000b, 1). Although the purpose of BITs is to ensure a liberal operating environment for foreign investment, some authors have underlined that they are at the core, mercantile rather than liberal documents, illustrated by their focus on investment security (Vandervelde 1998, 633). The argument that BITs are primarily about protecting investors has been supported by recent studies which have showed them to have little if any impact on FDI flows (Halward-Driemeier 2003, 11; Walter 2002). But BITs, together with the investment chapters of recent trade deals such as NAFTA, US-Chile and US-Central America, now constitute the foundation of the emerging hemispheric investment regime.

THE TROUBLE WITH BITS: THE UNCTAD CHALLENGE

Although BITs are signed primarily for their demonstration effect, signalling to potential investors that the developing country is willing and legally obliged to protect foreign investment, they are also controversial. The OECD's Multilateral Agreement on Investment failed in part in 1999, due to fears that it would restrict the space for policymaking and regulation. The International Institute for Sustainable Development's work on the implications of the investor-state dispute settlement provisions of NAFTA's Chapter 11, has also drawn attention to the way in which investment agreements can limit legitimate governmental authority over environmental and health and safety regulations (Cosby 2004, 5). The dilemma between protecting investors and permitting sufficient policy space is intensified for developing countries, which in the case of many of the largest and most successful such as Brazil, China, and India, state interventionism has been, historically, a central element of the economic development model (Evans, 1995).

The United Nations Commission on Trade and Development (UNCTAD) has developed the concept of "flexibility for development" as a way to balance the need to protect investors' rights with the need that developing countries have for policy autonomy. This idea, and the booklet which bears its name from the "Pink Series" of publications, is the cornerstone of UNCTAD's intellectual contribution to the debate on international investment agreements (Wilkie 2001, 142). UNCTAD defines "flexibility" as "the ability of IIAs to be adapted to the particular conditions prevailing in developing countries and to the realities of the economic asymmetries between these countries and developed countries" (UNCTAD 2000c, 1). It must of course be acknowledged that the alleged need for flexibility in International Investment Agreements (IIAs) is itself contested: some recent work on multinational corporations has emphasized instead that liberal investment conditions, not the maintenance of a space for policy autonomy, are the best guarantee that FDI will have the greatest spillover and developmental effect on the host economy (Graham 1996; Moran 1998).

..."flexibility for development" balances investors' rights with the policy autonomy needed by developing countries

Regardless of whether one believes that "flexibility" should be promoted in IIAs, the concept does encapsulate the long-standing debate in state-multinational corporation relations that has existed since at least Raymond Vernon's 1971 classic, *Sovereignty at Bay*: that there is an inherent tension between the interests of the national state and those of the multi-*national* enterprise. The question of more or less "flexibility" is thus a new way of conceptualizing the choice between a more statist and interventionist development policy that seeks to channel foreign investment into national priorities, and a more liberal one where market forces determine the rhythm of economic development.

In this respect, asking whether the bilateral investment agreements signed in the Americas have been more or less "flexible for development" is also a way of comparing the character of the emerging hemispheric investment regime (is it more state-interventionist, or more liberal), without necessarily pronouncing a judgment on which approach is better. This paper uses the *Flexibility for Development Index (FFDI)* developed by the author from UNCTAD's conceptual work to compare BITs signed by the US and other countries of the Americas, with those signed between Brazil and its Latin American partners (Haslam, forthcoming 2005).

Table 1: BIT Dyads Used in Study

Country Dyad	Date Signed	Country-Dyad	Date Signed
US-Panama	1982	US-Nicaragua	1995
US-Grenada	1986	US-Honduras	1995
US-Argentina	1991	US-Bolivia	1998
US-Ecuador	1993	US-El Salvador	1999
US-Trinidad &Tobago	1994	Brazil-Chile	1994
US-Jamaica	1994	Brazil-Venezuela	1995

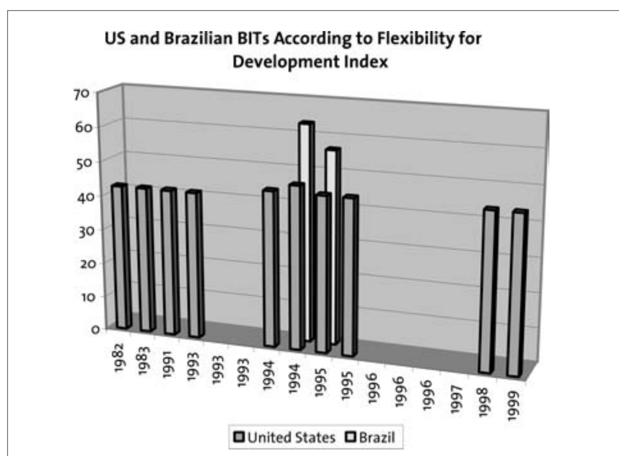
By scoring 12 BITs signed by Brazil and the United States (10 involving the US, and 2 involving Brazil) on the Flexibility for Development Index, it is possible to empirically compare whether the two countries have different visions of the role of the state and foreign investor in economic development. It is worth noting however, that none of the BITs signed by Brazil with

any country, including those outside the Americas, have been ratified due to local concerns over their constitutionality (i.e., do they grant foreign investors more rights than those enjoyed by local investors). For this reason, their relevance as a policy tool may well be questioned. Despite the failure to ratify, these BITs do show that Brazil has been promoting internationally a different conception of investor rights than that promoted by the United States. In the context of their face-off over investment at the WTO and FTAA negotiations, it is important to understand the differences between their two positions.

BRAZILIAN AND US BITS – NEVER THE TWAIN SHALL MEET?

There is considerable evidence that the United States has used its BIT program in order to diffuse and establish a particularly American conception of investment rights around the globe. The US inaugurated both its global and hemispheric BIT program in the early 1980s as a response to the assertiveness of developing countries in the United Nations over their right to expropriate foreign firms, and some of its early agreements in the Americas were signed with a number of client regimes, Panama in 1982, Haiti in 1983, and Grenada in 1986 (Robert 1999, 400; Vandevelde 1998; 628). UNCTAD writes "Sometimes, model BITs have been prepared by individual countries that reflect their positions and expectations on international FDI rules and standards" (UNCTAD 2000b, 21). The USTR's recent "competitive liberalization" drive is another reflection of this tendency.

... the United States has used its BIT program in order to diffuse a particularly American conception of investment rights...



Overall, US BITs had the lower score, between 43 and 47 on the Index while the Brazilian BITs scored higher at 56 and 63. At first glance, therefore, US BITs contain fewer of the elements identified by UNCTAD as providing developing countries with the flexibility needed to pursue public policies for the purpose of economic development. But in fact, it is worth noting that the comparative rankings of these two countries also reveal a great deal of convergence in the text of BITs.

According to Maryse Robert, BITs usually include six key elements: scope of application (which defines the permitted investments and investors, as well as the entry into force of the agreement); admission (defines whether "national treatment" or "most-favoured nation" apply before or after entrance of the investment; treatment (establishes the principle for state policy towards the investment – such as "fair and equitable treatment"); transfers (repatriation of loans, profits, interest, capital and access to foreign exchange); expropriation (specifies the compensation and conditions under which expropriation is permitted); and dispute settlement (specifies the procedures under which disputes are negotiated, and whether cases can be brought forward by investors or states) (Robert 1999, 401-407).

Among these substantive provisions, for example, a clear international consensus has emerged around the definition of investment, time period for BITs, most-favoured nation treatment, standard of investment security, unrestricted transfers, expropriation requirements, compensation standard, and the rules for dispute settlement mechanisms. The principal areas of divergence, which account for most of the variation in the Index scores, are whether national treatment is granted in both the pre and post-establishment phase, or post-establishment only, and whether performance requirements are limited or banned.

In general, US BITs require both pre and post-establishment most-favoured nation (MFN) and national treatment (NT) – thus preventing signatories from screening FDI prior to entry, or requiring certain concessions from the firm as a condition for entry. Nonetheless, US BITs contain an extensive list of general exceptions from MFN and NT treatment. For

example in the US-Bolivia BIT, the US reserves the right to deviate from national treatment in the following matters: "atomic energy; customhouse brokers; licenses for broadcast, common carrier, or aeronautical radio stations; COMSAT; subsidies or grants, including government supported loans, guarantees and insurance; state and local measures exempt from Article 1102 of the North American Free Trade Agreement pursuant to Article 1108 thereof; and landing of submarine cables" and from most-favoured nation treatment in "fisheries; air and maritime transport, and related activities; banking, securities, and other non-insurance financial services; and one-way satellite transmissions of direct-to-home (DTH) and direct broadcast satellite (DBS) television services and of digital audio services" (Annex, Articles 1, 2). Some of these exceptions are the result of other international conventions signed by the US, and the list is fairly standard regardless of the partner, reflecting the depth and diversity of the US economy.

The United States' BIT partners also benefited from some structural flexibility of these BITs, enjoying their own general and sectoral exceptions, although fewer than the US. Typically, the US's Latin American partners retained the right to grant some preferential treatment to small producers for developmental purposes in sectors like small-scale fishing or micro-credit and subsidies. In some cases joint ventures between national and foreign firms in certain sectors were permitted (Bolivia); and special consideration was obtained for ongoing privatization programmes (Ecuador and Argentina). In one case (Jamaica) the country obtained safeguard protection that limited unrestricted transfers in order to protect foreign reserve levels – an element that has been discarded in the most recent investment rules contained in FTAs signed with Central America and Singapore. Although US BITs have evolved since the early 1980s, some of these early ones grant considerable flexibility. Panama in particular, the US's first BIT partner in the Americas has an atypically long list of general exceptions to NT including "representation of foreign firms; distribution and sale of imported products; retail trade; state companies; private utility companies; exploitation of natural resources."

...pursuing increased policy autonomy, the US changed its model BIT in February 2004...

Another characteristic of US BITs is that they prohibit performance requirements. The US-Nicaragua BIT for example states "Neither Party shall mandate or enforce, as a condition for the establishment, acquisition, expansion, management, conduct or operation of a covered investment, any requirement (including any commitment or undertaking in connection with the receipt of a governmental permission or authorization)" in terms of local content, import restrictions, export requirements, limits on sales, transfer of technology, or research and development (Art. VI (1)).

From a "flexibility for development" standpoint, exceptions from the pre and post-establishment NT and MFN, although not as development-friendly as permitting only post-establishment rights, constitute an important element of flexibility. It is curious nonetheless, that it is the United States, which is most concerned over this issue, not the developing country. This suggests, that it is not development concerns which are influencing the choice of exceptions, but rather the US pursuit of traditional policy autonomy. Indeed for this reason, and largely as a result of its experience with Chapter 11 cases, the US changed its model BIT in February 2004 to include a greater degree of transparency in disputes arising from the investor-state mechanism in the investment treaties it negotiates, and put limits on the definition of "regulatory takings", a doctrine which had already been applied in recently negotiated free trade agreements, which in the Americas, included Chile and the Central American Free Trade Agreement (Cosby 2004, 5, 13).

When examining the two BITs signed by Brazil with its hemispheric partners it was expected, due to the state-interventionist development model pursued by Brazil since the early 1960s, and the fact that it had never pursued the wide-ranging and aggressive economic liberalization experiments seen elsewhere in the region (such as in Argentina and Chile), that its BITs would reflect a different approach to the role of the state and the private sector in development.

First of all, a number of fairly minor differences can be seen between those BITs with the US as a partner, and those with Brazil. Brazilian BITs are even less likely to

make reference to economic development in the preamble and therefore do not seek to assert the developmental role of FDI inflows in these treaties. This pattern is also seen in other Latin American BITs such as those signed by Venezuela. The provisions of BITs signed among Latin American countries are in general less detailed than US BITs although it is unclear whether this translates into greater flexibility. Although in most intra-Latin America BITs there tend to be few exceptions to the NT and MFN provisions appended to the agreement, although an exception for preferential trading arrangements and bilateral taxation treaties is *de rigeur*, Brazil does claims a relatively long list of exceptions (Brazil-Chile, Protocol, Art 3 (3)) – suggesting that the issue for Brazil, like the United States, is maintaining its policy-making space.

Latin American BITs also share with US-signed BITs a broad asset-based definition of investment that includes "portfolio" investment (or shares in companies) – a contentious issue in global negotiations on investment rules. In some cases, Latin American BITs go further, Venezuela includes "goodwill" and "know-how" as protected investments in some agreements (Venezuela-Barbados). Another contentious issue at the international level, "intellectual property rights" is accepted as a protected investment in all Latin American BITs examined here, even the Brazilian ones. However, it is unclear what weight this carries without specific definitions of intellectual property rights or reference to WTO disciplines (which are cited in US BITs).

As noted above, the principal differences between BITs signed between Latin American partners, and those involving the US as a partner is that the former agreements do not extend national treatment to the pre-investment phase; and performance requirements are not explicitly banned. In combination, these two differences permit countries to both screen investment and make demands regarding performance as a condition for granting entry. This is in fact the fundamental issue that permits host-multinational corporation bargaining – and traditionally, one of the principal ways countries have tried to harness the private sector to national development goals.

...there are competing visions of this (investment) regime, with most Latin American countries promoting a version that leaves them more flexibility for development

CONCLUSION

In the event of the failure of a multilaterally negotiated investment accord at either the regional (FTAA) or multilateral (WTO) level, the emerging hemispheric investment regime will be product of the web of bilateral investment treaties and investment chapters in FTAs that span the Americas. As currently defined, there are competing visions of this regime, with most Latin American countries promoting a version that leaves them more flexibility for development. However, the United States' vision, which puts the emphasis on pre and post-establishment most-favoured nation and national treatment, unrestricted capital transfers (even during currency crises), abolition of performance requirements, and a NAFTA-style investor-state dispute settlement mechanism is gaining currency. With the stalemate of multilateral negotiations which might have caused the US to modify its approach, or accept some kind of special and differential treatment for developing countries, the US is now pressing forward with the negotiation of bilateral deals across the Americas which will establish in international law, its perspective on regulating foreign direct investment.

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