The global governance of FDI and the non-market strategies of TNCs: explaining the "backlash" against bilateral investment treaties[*]

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Abstract

This article seeks to explain recent decisions by countries to terminate their existing bilateral investment treaties (BITs) and revisit their commitment to future international investment agreements (IIAs). It argues that BITs, transnational corporations (TNCs), host States and international arbitration institutions form a decentralized system of global governance of foreign direct investment (FDI), based on insights from the fields of international political economy and international law, and that the non-market strategies of these TNCs have not only shaped the contours of this system but have also prompted host States to reform this system, from the perspective of a "political bargaining model". The article illustrates this argument through the case of South Africa, which terminated its BITs with several European countries as a response to cases of investor–State dispute settlement (ISDS) and has sought to redefine its engagement with this system of global governance as a result.

Keywords: Global governance, international investment agreements, bilateral investment treaties, non-market strategy, investor-state dispute settlement, globalization

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1. Introduction

In the current global political economy, populism, climate change and the global COVID-19 pandemic, among other phenomena, have fuelled a backlash against globalization and rendered the future of the liberal international order uncertain. It has been long understood that transnational corporations (TNCs) are an integral part of the "complex interdependence" (Keohane and Nye, 1989, p. 26) that shapes the international order. The recent sense that globalization may be "fracturing" and that the global project may be "dead" (Buckley, Doh and Benischke, 2017, p. 1057) has propelled a new interdisciplinary agenda for research in international business (IB) to better understand the manner in which TNCs, governments and societies interact. Specifically, in one area of IB research, attention has turned to the role that non-market strategies and non-market activities of TNCs play in navigating across the "strains and fissures" increasingly appearing in the system of global economic governance and indeed in "influencing the systems [of global governance] that are emerging" (Doh et al., 2015, pp. 257–258). In this regard, there is scope within current IB research to examine the manner in which the non-market strategies and activities of TNCs may be *contributing* to the backlash against globalization and precipitating a shift towards a less liberal international economic order, particularly within areas of global economic governance. Such areas are typically understood as including the governance of global trade, finance and development through multilateral institutions such as the World Trade Organization (WTO), the International Monetary Fund and the World Bank, respectively.

However, this typical image of global economic governance contains an important blind spot that covers the manner in which foreign direct investment (FDI) is governed globally and the manner in which TNCs participate and engage in this form of global governance. Until recently, the consensus has been that "no agreed upon international regime for FDI exist" (Kobrin, 2015, p. 269). The more than 3,000 bilateral investment treaties (BITs) and international investment agreements (IIAs) in force across the world have been considered as discrete and disparate entities within IB research, acting to establish rules for the behaviour of *individual* host States in order reduce the risks of investment from other *individual* home States. Arguably, the absence of a formal multilateral investment agreement and the absence of an accompanying multilateral organization for international investment akin to the WTO has contributed to this view. As Weiss and Wilkinson observe, contemporary scholarship has had a misplaced tendency to view global governance as "an alternative moniker for international organizations" (2014, p. 210) comprising States and a multilateral set of rules with which to govern. Such a tendency, they argue, has obscured the myriad forms that global governance can assume in the international economy.

This article makes two arguments. The first is that the 2,844 BITs across the world (at the time of this writing), along with international arbitration bodies such as the International Centre for the Settlement of Investment Disputes (ICSID), function as a form of global economic governance. The second is that the non-market activities of TNCs – in the form of suing host States for violations of these treaties through investor–State dispute settlement (ISDS) mechanisms – have provoked a *systemic* change in the global governance of FDI through a so-called backlash against it (Peinhardt and Wellhausen 2016; Langford and Behn 2018; Thompson et al., 2019). The article does so by drawing on recent research in the fields of international law, international political economy and IB, as well as original data from interviews and archival research. The argument that there exists a functioning form of global governance of FDI in the global political economy follows from the insights of Schill (2009), Salacuse (2010) and Alschner and Skougarevskiy (2016) in the field of international law. They show persuasively that BITs are not discrete, bilateral entities as once thought, but together form a global set of rules, norms and practices involved in the global governance of FDI. As Schill (2009, p. 15) puts it: "[U]nlike genuine bilateral treaties, that is treaties that are bilateral in form and substance, BITs do not stand isolated in governing the relation between the two contracting States [i.e. the home and host States] only; they rather develop multiple overlaps and structural interconnections that, it is argued, create a uniform and treaty-overarching regime for international investments".

Recently, however, the global governance of FDI has been undergoing a transformation through the efforts of a number of both developed and developing countries. In many instances, countries have sought to preserve greater public policy space and to protect their governments from further ISDS claims from foreign investors by terminating many of their existing BITs and, in some cases, attempting to replace them with renegotiated BITs (UNCTAD, 2020). This process arguably began in the early 2000s through changes in the United States Model BIT in 2004, as a result of arbitration cases against the United States, Canada and Mexico through the North American Free Trade Agreement. It then continued through to what many scholars considered a "legitimacy crisis" (Langford and Behn, 2018) in the late 2000s, which featured the beginnings of a backlash against this system from countries such as the Plurinational State of Bolivia, Ecuador, the Bolivarian Republic of Venezuela and South Africa as a result of ISDS events. More recently, this process of transformation has become more widespread, involving the terminations or renegotiations of at least 42 BITs in 2020, most of which have been the result of the termination of intra-European Union (EU) BITs, along with the termination of BITs by Australia, India, Italy and Poland India, Australia, Italy and Poland (UNCTAD, 2021).

This article proceeds as follows. First, section 2 sets out the concept of global governance from a critical international political economy perspective. This offers a framework for explaining how the current landscape of BITs together form a system of global economic governance in section 3, building on insights from the field of international law that have identified BITs as a form of international regime (Schill, 2009; Salacuse, 2010; Simmons, 2014; Bonnitcha, Skovgaard and Waibel, 2017). Next, section 4 explains how the system of global governance of FDI is a non-market environment for firms such as TNCs and how the non-market strategies of TNCs, such as ISDS in this context, act as a "buffering mechanism" (Mellahi et al., 2016, p. 155) that influence this non-market environment and secure rents in the host country of their investment. The non-market environment and strategies of firms associated with the global governance of FDI are explained in terms of a political bargaining model (PBM), proposed by Eden, Lenway and Schuler (2004), which advances the concepts in the obsolescing bargain model (OBM) developed by Raymond Vernon (1971) and offers a more dynamic perspective of relations between investors and host States in the contemporary global political economy.

Section 5 then examines the case of South Africa to show how the ISDS activities of a number of Italian investors caused South Africa to re-examine and ultimately terminate its BITs with a number of European countries. This case of backlash is based on an analysis of meeting transcripts of the South African Parliamentary Committee on Trade and Industry, provided by the Parliamentary Monitoring Group, a South African parliamentary monitoring organization (Mandelbaum, 2012) that records and publishes the proceedings of Parliamentary Committees of the South African government. The analysis is further supported by interviews conducted by the author with officials at UNCTAD and the WTO, with developing-country BIT negotiators and with international lawyers who have represented both TNCs multinational enterprises (MNEs) and States in international investment disputes.

Finally, by way of discussion and conclusion, section 6 explains how ISDS has evoked processes of systemic reform in the global governance of FDI by a number of developed and developing countries. These changes are not occurring BIT by BIT, but across countries, thereby changing the nature of the decentralized system of global governance, with implications for the way that we think about non-market strategies, power and inequality. Furthermore, reform of the system has involved a new generation of investment treaties oriented more towards the achievement of the United Nations Sustainable Development Goals through promoting greater space for development policy in host countries and promoting more responsible investor behaviour, than simply investment protection alone (UNCTAD, 2015; UNCTAD, 2016; Amaral and Jaller, 2020). This transformation of the global governance of FDI opens up avenues for further research on how systemic change may occur within decentralized forms of global governance and how such changes intersect with the non-market strategies of firms in this instance.

2. Recent advances in the concept of global governance

Scholars in the field of international law have made headway in terms of identifying that the nearly 3,000 BITs across the world are in essence a type of international regime (Schill, 2009; Salacuse, 2010; Simmons, 2014; Bonnitcha, Skovgaard and Waibel, 2017). The term emanates from the fields of international relations and international political economy and denotes the existence of an international institution that facilitates cooperation and constrains behaviour of international actors on a particular issue (Drezner, 2009; for an in-depth survey of regime theory, see also Haggard and Simmons, 1987). The transformation of an essentially *bilateral* mechanism for investment protection into one that is effectively *multilateral* in nature, which will be discussed in more detail in section 3, has come about through the convergence in the set of "implicit or explicit principles, norms, rules and decision-making procedures" – according to Krasner's (1982, p. 186) widely accepted definition – that are associated with the protection of investment through BITs and IIAs that comprise a regime.

However, the concept of an international regime, as Weiss and Wilkinson (2014) have rightly pointed out, tends to stop short of explaining the myriad ways in which a variety of actors, from States to non-governmental organizations to TNCs, interact to set the agenda and govern issues across the world – thereby prompting the need for a concept of *global governance* instead. The term "global governance", though, has been criticized since its introduction in the 1990s for its lack of clarity and precision (Finkelstein, 1995; Murphy, 2000;

Dingwerth and Patterberg, 2006; Weiss and Wilkinson, 2014; Payne and Phillips, 2014). Yet, as Payne argues (2005) that these critiques have together identified a common, core set of elements to more clearly define and identify instances of global governance. These mainly rest on James Rosenau's earliest formulations of the concept (Rosenau and Czempiel, 1992; Rosenau, 1995), which sees "global governance" as "systems of rule…in which the pursuit of goals through the exercise of control has transnational repercussions at all levels of human interaction" (1995, p. 13).

Starting with systems of rule through which control is exercised, global governance has an underlying institutional structure, which requires a set of globally established rules. It does not require, however, a formal organization to exercise control. Put differently, although organizations with formal rules and formal decision-making processes such as the WTO and the United Nations (UN) are clearly associated with global governance, they in no way exclude less formal, less centralized systems of rule and control from being instances of global governance as well (Weiss and Wilkinson, 2014). In this way, global governance deviates somewhat from the concept of a regime, as it seeks to explain the ways in which a range of different actors across the global political economy engage in shaping and administering systems of rule across the globe (Buzdugan and Payne, 2016).

Rosenau's definition is only a starting point for conceptualizing global governance, as more recent scholarship has sought to explain the role of structure in the formation and transformation of global governance systems. This scholarship emphasizes the role that ideas play in informing the norms and rules upon which global governance is based (Weiss and Wilkinson, 2014; Payne and Phillips, 2014). Weiss and Wilkinson (2014) for instance, call for a greater understanding of how ideas come to fundamentally define the values, aims and outcomes of the institutions of governance. Payne and Phillips (2014, p. 3) go further in emphasizing the importance of ideas within the concept of global governance: "ideology is, in short, a governance structure in itself … the 'constitution' which itself 'governs' world politics and development". From this point, Weiss and Wilkinson present a more current formulation of the concept of global governance, which embeds ideas into the institutional framework outlined earlier: "We understand global governance as the sum of the informal and formal ideas, values, norms, procedures, and institutions that help all actors – states, intergovernmental organizations IGOs, civil society, and TNCs – identify, understand, and address trans-boundary problems"

(2014, p. 211) . Conceptualizing global governance in this way not only assists in identifying and analysing the global governance of FDI, but also helps to explain the manner in which a number of both developed and developing countries are seeking to change it.

3. A broad brush explanation of the global governance of FDI

The global governance of FDI involves, inter alia, a complex web of BITs, IIAs, States, TNCs and international organizations. It is beyond the scope of this article to explain the complete evolution, interrelationships and dynamics of this system. However, a broad sketch is presented in order to make inroads into explaining the contours of the global governance of FDI and its link with the non-market environment of a TNC. This sketch examines the core elements of global governance, according to Weiss and Wilkinson (2014) and Payne and Phillips (2014) – the overarching ideas, norms, rules and procedures that frame the understanding of an issue area and its governance among the various actors involved.

3.1 Overarching ideas

At the core of this system of global governance lies the tension between the idea of the protection of foreign investment and the idea of national sovereignty of host States; or as Schill (2009, p. 7) puts it, the "opposing views on State sovereignty and societal self-determination versus the protection of property, in particular foreign property". In this regard, it is useful to chart out the shifts in ideas that have occurred since the early post-World War II period, as it assists in explain why the global governance of FDI arose, how it changed and what ideas are motivating the current move towards its transformation by developing countries especially. Boddewyn's (2016) excellent classification of three distinct eras in TNC–State relations since the post-war period provides a useful starting point in mapping these shifts: (1) a period of confrontation between international business actors and States in the years immediately following the end of World War II through the late 1970s; followed by (2) a period of accommodation of States to international business actors and activities from the start of the 1980s to 2000; to (3) the contemporary period of competition, in which MNEs or other investors, States and NGO vie for influence over and control of various dimensions of the global economy.

The first period of confrontation saw a clash of two opposing viewpoints between capital-exporting countries, such as the United States, and capital-importing countries, many of which were newly independent former colonies. Throughout this period, the United States and other industrialized countries maintained the Hull rule. The rule was named after former United States Secretary of State Cordell Hull's riposte to Mexican expropriation efforts in 1938: "[U]nder 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" (Guzman, 1998, p. 645). At first, the developing countries' opposition to this rule centred on the stringency of "prompt, adequate and effective payment", but after a wave of independence in the 1960s, they now formed a two-thirds majority in the UN (Jacobson, 1962) and began to assert what was seen as a sovereign right to control any and all aspects of the economies within their territories (Guzman, 1998). As Vernon saw it (1971; 1977), the prevailing attitudes held by governments across the developing and the developed countries was one of caution or even, in some cases, hostility towards MNEs and inward investment.

During the second period of accommodation beginning in the 1980s, the ideological battle between sovereignty to expropriate foreign private property, on the one hand, and support for the protection of foreign property, one the other, swung in favour of the latter particularly as the power of the developing countries ebbed during the 1980s and the Soviet Union collapsed by the end of that decade (Boddewyn, 2016). As Boddewyn rightly points out, the ideas of neoliberalism structured the opening of markets across the world, "while MNEs came to be seen as the main drivers in the globalization of capitalism, regional integration (e.g., the European Union) and responsive corporate governance" (2016, p. 13). It is within this neoliberal ideological setting that the systems of rule of the contemporary global governance of FDI came into existence: governments throughout the world adopted to a great degree a more favourable set of policies on the attraction and protection of inward foreign investment (Dolzer and Stevens, 1995; Guzman, 1998; Ramamurti, 2001; Boddewyn, 2016). Concomitantly, there was an explosion in the number of BITs signed between countries – quintupling during the 1990s to reach 1,857 by the end of 1999 (UNCTAD, 2000) – enabled by a diffusion of neoliberal ideology (Simmons, Dobbin and Garrett, 2006).

Within this neoliberal ideational environment, the pressure to conform to "what had become a global standard or norm about the treatment of FDI by host countries" (Jandhyala, Heniszand Mansfield 2011, p. 1049) greatly explains not only the large number of similar BITs that developing countries signed in the 1990s but also why capital-poor developing countries signed BITs with each other . Thus, by the end of the 1990s, the global spread of mainly similar BITs provided States – particularly capital exporting countries – with a form of governance that achieved the broad aims of a multilateral institution such as the failed Multilateral Agreement on Investment in that era, but at a lower cost in terms of investment protection, as Bubb and Rose-Ackerman (2007) show persuasively through a game theoretic model.

Thus, the rapid increase in the number of BITs being signed from 1991 prompted Dolzer and Stevens at this early point to observe that BITs were evolving from an individual definition of "the legal framework for foreign investment in a particular host State" into an "emerging, normative framework found in the body of international BIT practice" (1995, p. xii), thereby laying the foundations of an emerging global governance system.

3.2 Norms, rules and decision-making procedures

The overarching ideas in section 3.1 have fed directly into the principles, norms, rules and decision-making procedures underpinning the global governance of FDI. Beginning with its core principles, Salacuse (2010) identified five main principles that explain the deliberate, uniform development of BITs across the world. The first four of these all relate to BITs (and IIAs) being necessary instruments for the attraction of foreign investment through its protection (Salacuse, 2010). As Poulsen (2015) persuasively shows, developing countries signed the earliest BITs in the late 1950s to the mid-1970s simply as a result of holding these principles to be true, without evidence to substantiate them. The fifth principle that Salacuse identifies relates to international enforcement mechanisms, such as ISDS, and international organizations such as the ICSID, housed within the World Bank, as necessary to protect, and therefore seen to attract, foreign investment by curtailing credible commitment problems. As St. John (2018) has outlined in empirical detail, the World Bank based its arguments for developing countries to join ICSID, and promoted the inclusion of ICSID within early BITs, through the argument that ICSID would lead to a more favourable "investment climate" to attract much-needed foreign investment.

This fifth principle has arguably been most influential in the process of norm-setting across the global governance of FDI, as ISDS has acted as the dominant mechanism by which accepted standards are generated, to which host States, foreign investors and adjudication bodies conform (Schill, 2009). Although the roots of these standards lie in the nearly identical language on the issue of the "treatment" of investors and their investments in host States, which appears in every BIT, this language is too vague for actors to have based their behaviours on it (Schill, 2009; Salacuse, 2010). For example, the terms fair and equitable treatment, full protection and security, most-favoured-nation treatment and'national treatment lack inherent, concrete meanings (Salacuse, 2010). Therefore, investor–State tribunals, which in most cases means ICSID (Peterson, 2005), as it has presided over 70 per cent of all known international investment proceedings (ICSID, 2017), act as norm-setting bodies, setting the standards which these norms embody through their power to interpret and make concrete such fundamental language (Schill, 2009). Put differently, it is through ISDS that norms develop around fair and equitable treatment, and so forth, as bodies such as ICSID in effect define the contours of this treaty language and shape behaviours related to it. Indeed as Reinisch (2008) has pointed out, although ICSID tribunals are not formally bound by earlier decisions,

> As a matter of practice, ICSID tribunals have started to routinely invoke previous decisions in order to support their reasoning. Empirical studies have demonstrated that with the increase of investment arbitration since the mid-1990s reliance on 'precedents' has considerably increased.

Common principles and shared norms have influenced the detailed rules involved in the global governance of FDI. Whereas on a case-by-case basis, studies have shown that the specific rights and obligations within BITs differ according to the nature of relations between each home and host state, they nonetheless differ within a largely uniform set of parameters found across the BITs landscape (Manger, 2013; Chaisse and Bellak, 2015; Alschner and Skougarevskiy, 2016). Chaisse and Bellak (2015) found 11 key points of similarity present across these agreements. These include rules related to the duration of the agreement, which is typically 10 years; the restrictions on direct and indirect expropriation of investors' assets by host States; and, controversially, access by investors to international dispute settlement, which grants investors the right to sue host States in international forums for violations of their investment agreement. This latter rule, which is present in nearly all BITs (OECD, 2012), is unique in international law and places investors on equal footing with States with regard to their power to raise disputes (Simmons, 2014). Furthermore, as most BITs grant ICSID the jurisdiction consent to arbitrate in the event that an investor raises a dispute (Reed, Paulsson and Blackaby, 2011), most BITs are then inextricably linked to the inherently multilateral rules of the ICSID Convention, which grants any investor from any home state access to the same rules guiding investor-State arbitration. As Schill (2009, p. 258) observes, this “reflects the fundamental concept, inherent in the idea of a uniform international economic order for the global economy, to establish equal rules in order to enable equal competition among investors from different home States, which, in turn, enables investments to be used as efficiently as possible”.

Finally, the decision-making procedures guide the actual act of governance by actors in the global governance of FDI. With regard to ISDS, nearly 90 per cent of all investment treaties (Gaukrodger and Gordon, 2012) between States allow for, or even encourage, both parties to settle disagreements amicably and by diplomatic means (Salacuse, 2010), as discussed later in the case study of a dispute between a number of Italian investors and the South African Government. Furthermore, as stated earlier, in the event of a dispute, a nearly universal feature of investment treaty rules allows foreign investors to invoke the procedure of international arbitration. This procedure has had the significant effect of both reinforcing the principles of the FDI regime and, through the de facto reliance on precedence of past arbitration tribunal decisions (Reinisch 2008; Reed, 2010), acting as a mechanism for change in the regime – both in terms of how rules across the BITs landscape are interpreted and in terms of how host States react to these decisions by altering current and future rules for accepting international investment.

4. The global governance of FDI and the non-market strategies of international investors

TNCs, host States and international organizations such as ICSID interact in the global governance of FDI, as outlined above. Yet, to better understand the motivations and actions of TNCs, it is useful to draw on the important contributions made to the IB literature on non-market environments and non-market activities. The so-called “non-market” literature in IB and related fields has sought to explain the behaviours of firms that are outside the traditional “market” realm of analysis (location choice, entry mode and so forth).

Baron (1995) established an early conceptual foundation for non-market environments and strategies, arguing that non-market environments consist of a range of public actors and institutions that firms engage with through non-market strategies to enhance overall firm performance. However, as Boddewyn (2003) has rightly pointed out, the distinction between market and non-market is manifestly artificial, as they are inherently intertwined. More recently, Doh, Lawton and Rajwani (2012) have shown that institutional perspectives, delineated by Hotho and Pedersen's (2012) categories of institutional IB research, may be used to bring together, and indeed inform, various strands of research on non-market environments and non-market strategy. Therefore, from an institutional perspective, non-market strategies and activities may be considered as couched within their respective social environments, informed and often constrained by their formal and informal rules, beliefs and norms (Doh, Lawton and Rajwani, 2012). It follows, therefore, that the global governance of FDI, with its associated ideas, principles, norms, rules and decision-making procedures, may be considered a non-market environment within which the non-market strategies and activities of MNEs involve interactions with, inter alia, host-country governments and international investment dispute settlement bodies such as ICSID.

The non-market strategies and activities focused on in the remainder of this article relate to ISDS between TNCs and host countries. From the perspective of the firm, such activities fit within an initiative to protect property rights (Bach and Allen, 2010), and such litigation, therefore, is part of a firm's non-market strategy to protect its rents within the host country (Baron, 1995). However, from the perspective of a number of developing host-country governments, the potential losses associated with ISDS have been viewed as a constraint on public policy space and such arbitration and their awards as excessive and unjust forms of rent-seeking behaviour.

4.1 Non-market strategies, ISDS and the PBM

From the standpoint of non-market strategy, why and how do firms engage in ISDS, and what role do BITs (and other IIAs) play in the process? For four decades, Vernon's (1971) OBM (obsolescing bargain model) has been the dominant paradigm influencing our understanding of the relationship between foreign investors and host-country governments. The OBM suggests that host-country governments, particularly in developing countries, acquire greater bargaining leverage after a foreign investor commits resources to the host country –

leverage which can be used to renegotiate the terms of the investment with the foreign investor or engage in the expropriation of those resources outright. As Vernon (1971, p. 54) put it:

> Both parties, foreign investor and national government, approach these agreements [to invest] with a long-term perspective…Yet, almost from the moment that the signatures have dried on the document, powerful forces go to work that quickly render the agreements obsolete in the eyes of the government.

Within the context of the OBM, BITs may be considered an institutional innovation that seeks to address this credible commitment problem and provide foreign investors with the power (vis-á-vis host States) to enforce their investment agreements with host States (Simmons, 2014).

Therefore, according to the logic of the OBM, the non-market strategies and activities of foreign investors entering into bargains with host States are situated within an institutional environment defined by BITs. Indeed, Ramamurti (2001) sought to update the OBM by introducing a two-tiered model of investor-state bargaining, in which investor–State bargains at a "Tier 2" level, occur within a higher "Tier 1" level of multilateral trade agreements and bilateral investment agreements. At this Tier 1 level, Ramamurti focused particularly on the influence of BITs as instruments to secure sets of rights to international investors in host States, thereby arguing that they "remov[e] from the negotiation agenda most of the issues on which MNCs and host governments used to haggle earlier" (Ramamurti, 2001, p. 30) – facilitating "traditional" Tier 2 level bargains.

However, Ramamurti's two-level model depicts BITs at the Tier 1 level as discrete, independent agreements with respect to any particular investor–State bargain, rather than a global institutional environment for the governance of FDI – arguing that bilateral investment agreements are in place, "since there is no 'GATT for FDI'" (Ramamurti, 2001, p. 28). While acknowledging the utility of Ramamurti's two-tiered model, Eden, Lenway and Schuler (2005) recognize that at the Tier 1 level, investment agreements have achieved "regulatory convergence" and that therefore, there exists an "investment regime" at this global level, echoing the findings from the field of international law, discussed earlier. More importantly, though, Eden et al. (2005) argue that this investment regime has offered "more protection, and bargaining leverage, to multinationals". Put differently, the power of TNCs is asymmetrical with regard to host States due to BITs and other IIAs. BITs and IIAs, according to Simmons (2014, p. 33), "[give] investors the right to sue, but [do] not give States a similar right" and thus, TNCs have been accorded "extraordinary agenda-setting power in future law development" in the global governance of FDI. Therefore, Eden et al. (2005) argue that the political calculus underpinning the OBM has changed dramatically since it was introduced: the more distributed nature of TNC operations through global value chains, the greater number of investors and the greater number of locations to invest, have, among other factors, altered the bargaining dynamics between investors and host States beyond the capability of the OBM to explain them.

Therefore, Eden et al. (2005) have introduced the PBM (political bargaining model) to account for these shifts in the global political economy, and to incorporate recent insights from the fields of IB and international management to explain the more complex and dynamic set of bargains that investors and host States enter into over time (Eden et al., 2005). Several relevant elements of the model are worth drawing out briefly. First, the PBM conceptualizes bargains by investors and host States occurring iteratively over time and involving more actors than simply investor-host State pairs. It recognizes that "the real world is much more likely to be characterized by negotiations among multiple MNEs, domestics firms, and the government over a particular policy issue" (Eden et al., 2005, p. 267). Next, the PBM is designed to accommodate a broader range of policy issues between investors and host States than is the OBM with its narrow focus on the initial investment into the host country and the subsequent obsolescence of the bargain surrounding it. In this way, the PBM is non-market-oriented at its core, seeking to explain why and how "MNEs and nation-States engage in political bargaining over a government policy that affects either MNE directly or the industry of which it is a part" (Eden et al., 2005, p. 266). Finally, the PBM recognizes the political, institutional and economic constraints that both investors and host States may place on the other party to exert power to realize their objectives. As Eden et al. explain, actual bargaining power stems from, inter alia, "the ability of either party to limit the behaviour of the other party directly through economic or political coercion" (2005, p. 267). Yet, in this respect, the PBM also contains some elements which begin to accommodate an understanding of how States and foreign investors may achieve mutually beneficial results in their iterative bargains (as discussed in section 6). As Eden et al. (2005, p. 267) write:

> The final outcome of the policy negotiations should tip in favour of the party with the strongest actual bargaining power. The "winner" in the negotiations is defined by comparing the final outcome to the goals of each party; the one whose goals are most closely achieved is the winner. *Both parties win if they believe the policy outcome will be ultimately beneficial for them* [emphasis added].

In applying a number of these core tenets of the PBM, we can first focus on the political and institutional constraints imposed on host States through BITs at the global Tier 1 level, particularly with regard to the language on ISDS. The Organisation for Economic Co-operation and Development (OECD) (2012) found that 93 per cent of BITs contained language on ISDS in general, with specific variations across BITs. For instance, differences exist from treaty to treaty with regard to the degree of access to ISDS accorded to investors and the ability of investors to access international arbitration forums (OECD, 2012). Yet, interestingly and importantly, Allee and Peinhardt in a wide-scale study found that there was no correspondence between the "strongest enforcement provisions" within BITs, in terms of ISDS, and "host States with the greatest commitment problems" (2014, p. 74) – contradicting the predictions of the OBM. Instead, Allee and Peinhardt found that variations in enforcement provisions, including ISDS, were strongly associated with the *power differentials* between home and host States – as the PBM, instead, would suggest. As they explain, "States that have significant leverage over the treaty partner are more likely to get all of the features they and their investors desire included in the treaty: preconsent to international arbitration, a greater number of venues through which investors can pursue grievances, and at least one institutionalized arbitration option—all of which enhance overall treaty enforceability" (Allee and Peinhardt, 2014, pp. 72–73).

Allee and Peinhardt (2014) attribute these inequalities to home States possessing greater bargaining power (in terms of, for instance, the size of their economies and their share of the world's largest MNEs) over host States, which is used to secure greater ISDS provisions for their investors, regardless of the level of credibility of the host States. Simmons (2014), using Allee and Peinhardt's data set, goes further to find that the timing of the negotiation and signing of a BIT, in terms of economic downturns, matters significantly for whether the host State accepts greater degrees of ISDS enforcement provisions. As she states, the "results support the general tendency for developing countries with strong positive growth to maintain somewhat greater national control over how investment disputes will be settled. Downturns in the business cycle, by contrast, are consistently associated with much greater delegation to international tribunals in the event of a dispute" (Simmons, 2014, p. 27).

In an interview with the lead IIA negotiator of a so-called "Next 11" developing country (for a discussion of this group, see O'Neill, 2005), the negotiator highlighted the systemic inequalities across BITs brought about by power differentials between home and host States as the greatest issue facing the global governance of FDI (Interview 1, 2012). The negotiator stated that the country that he represented had signed a number of "bad deals" under political and economic pressure from large home States such as the United States and Germany, and their large MNEs, which had subsequently exposed this country to large ICSID tribunal awards against it.

5. ISDS, South Africa and the developing-country challenge to the global governance of FDI

This section examines how the non-market strategy of several Italian investors in South Africa set in motion both the South African Government's termination of a number of its BITs and a reconsideration of its stance towards the regulation of inward FDI through its recent Protection of Investment Act. The case is useful for two reasons. First, it illustrates the non-market strategy employed by a number of predominantly Italian investors in the mining sector in first seeking to protect rents associated with their investments through ISDS, then reneging on this process to protect long-term access to minerals associated with its resource-seeking investments. Second, it offers insight into the intersections of this strategy with the global governance of FDI, illustrating not only how the structure of the global governance of FDI influenced the strategy of these investors but also how this strategy influenced the South African Government to re-evaluate its BITs, contributing to a cascading effect across a number of developing countries in altering the fabric of the global governance of FDI.

The investors, Finstone and RED Graniti, together the largest producers of natural stone and granite in South Africa, sought to protect their mineral rents in the face of sweeping changes enacted by the South African Government to redistribute land and minerals to "historically disadvantaged South Africans (HDSAs) within a broad-based Black Economic Empowerment" (BEE) strategy, in order to redress economic inequalities brought forth by the preceding apartheid regime. As part of this strategy, the South African Government had enacted the Broad-Based Socio-Economic Empowerment Charter for the South African Mining and Minerals

Industry (the Mining Charter) in 2004, within the Mineral and Petroleum Resources Development Act (MPRDA). The Mining Charter granted legal authority over all mineral resources to the South African State, to which the holders of "old order rights" under the previous regime, could acquire "new order rights" only if "they divested a considerable percentage of their shareholdings to HDSA" (26 per cent of HDSA ownership within 10 years) and included HDSA employees with 40 per cent of the firm's management, among a broader set of HDSA employee rights (Poulsen, 2015, p. 165). These "new order rights" also differed significantly from "old order rights" in that they were time limited — thereby introducing an additional level of risk to foreign investors in the mining sector (for an examination of the Mining Charter within South Africa's BEE strategy, see Ponte, Roberts and van Sittert, 2007).

Finstone and RED Graniti sought to challenge the South African Government through diplomatic channels at first. This non-market activity was enabled by the Italy–South Africa BIT (1997), in which Article 9(1) advocated a first attempt at resolving disputes through friendly diplomacy. The Italian embassy sent an aide memoire, a diplomatic memorandum, to the South African Government stating in no uncertain terms that "the [MPRDA] Act has a significant and deleterious effect on Italian investors'investors's investments in the South African mining industry" (Embassy of Italy, 2005). The aide memoire further stated the areas that might have breached the Italy–South Africa BIT, listing several counts of possible expropriation associated with the Charter and the Act, particularly the replacement of the property held under "older order rights" with property of lesser value (considering the transfer of assets to HDSAs) under the new order rights without full compensation, as stipulated in the BIT (Embassy of Italy, 2005).

The Italian Government failed to reach a compromise with the Government of South Africa, and in the following year, the investors filed for arbitration with ICSID (Foresti v. South Africa, ICSID Case No. ARB(AF)/07/1), claiming damages of US$350 million due to alleged discrimination and lack of compensation. Although the investors withdrew the claim in 2010 in the face of public pressure and because it reached a satisfactory agreement with the South African Government (ICSID, 2010), the claim was alarming to the South African Government not only for its remarkable amount but more importantly because its possible success "had [the] potential to open the floodgates for similar claims questioning the redistributive efforts of the post-apartheid regime" (Poulsen, 2015, p. 167). The Foresti claim acted as an important impetus for the South

African Government to review its BITs and formulate a new inward investment policy in order to guard against any further claims, based manifestly on its desired autonomy to enact and implement social development policies such as the BEE strategy.

5.1 South Africa's reaction to the Foresti case

At a global Tier 1 level, the South African Government – specifically, the Department of Trade and Industry (DTI) – had been cautiously observing the increasing submission rate and substantial size of ISDS claims against developing countries (for example, Argentina following the financial crises of the late- 1990s and early 2000s (Parliamentary Monitoring Group, 2009; for detail on claims resulting from measures to stem the effects of financial crisis in Argentina, see Lavopa, 2015). As such, it began a process of reviewing BITs in 2002 to examine the vulnerability of South Africa to expropriation claims, the immediacy of which was compounded in the late 2000s by "the impacts of BITs [having] become a reality" as a result of the Italian investors challenging the MPRDA (Parliamentary Monitoring Group, 2009). One of the key impetuses for this review, according to testimony by Xavier Carim, former Deputy Director General of Trade and Industry of South Africa and its former Ambassador to the WTO, and by Sureiya Adam, a DTI official, to the South African Parliamentary Committee on Trade and Industry (Parliamentary Monitoring Group, 2009), was to determine the level of vulnerability of the South African Government to ISDS claims through its signed BITs and the reasons such BITs had been signed in the 1990s. In the words of Xavier Carim:

> South Africa was particularly concerned with investor-state dispute provisions that open the door for narrow commercial interests to subject matters of vital national interest to unpredictable international arbitration outcomes and that may constitute a direct challenge to constitutional and democratic policymaking (Carim, 2015, p. 4).

The results of the internal review showed that the South African Government had signed BITs with countries such as the United Kingdom and Italy in the 1990s under a position of relative weakness, and had therefore signed BITs that granted rights to investors which were over and above what the South African Government was prepared to accept during a period of greater economic strength, as explained by Allee and Peinhardt (2014) and Simmons (2014) earlier. As the transcript of Adam's testimony states, during the 1990s the BITs signed by South Africa "were often concluded as part of state visits. There had been no clear policy…The outside world perceived Africa as being a risky environment for investment and a BIT was regarded as a mitigating factor" (Parliamentary Monitoring Group, 2009, p. 2). Mr. Carim added that

> developing countries were forced to sign these agreements, guaranteeing compensation in the event of expropriation…One of the factors was that BITs arose at the request of European countries. They wished to have investment protection in case their assets were nationalized. South Africa had understood this and accepted the concept of the BIT as an effort to re-enter the global economy. It had been presented as an unproblematic situation. Some bad treaties had been couched as friendship agreements (Parliamentary Monitoring Group, 2009, p. 3).

Indeed, in the published review of its BITs in 2009, the South African Government concluded that "the Executive entered into agreements that were heavily stacked in favour of investors without the necessary safeguards to preserve flexibility in a number of critical policy areas", such as BEE (Republic of South Africa, 2009). Furthermore, it criticized the ISDS provisions that had been included within its existing BITs, arguing that "existing dispute settlement institutions were not designed to address complex issues of public policy that now routinely come into play in investor-state disputes", and thus advocating a future policy of supporting "proper deference to domestic dispute settlement procedures" over international ones (Republic of South Africa, 2009, pp. 45-46). Subsequently, according to Xolelwa Mlumbi-Peter, the acting Deputy Director General of DTI in 2015, the South African Government proceeded on the basis of these arguments to terminate its BITs with Austria, Belgium and Luxembourg, Denmark, France, Germany, the Netherlands, Spain, Switzerland and the United Kingdom by the end of 2014 (for specific termination dates, see UNCTAD, 2018), and develop a new legal framework through the passing of the Protection of Investment Act in 2015 (Republic of South Africa, 2015), which would henceforth regulate inward FDI (Parliamentary Monitoring Group, 2015a).

The Act is notable for setting out the features of a new set of relationships with foreign investors based on the Government's concerns following the experiences of other developing countries with ISDS and its own experience with the Foresti claim. Specifically, the Act in its Preamble explicitly calls for the "responsibility of the government to provide a sound legislative framework for the protection of all investments, including foreign investments, pursuant to constitutional obligations" while also "[recognizing] the obligation to take measures to protect or advance persons, or categories of persons, historically disadvantaged in the Republic due to discrimination" and "[reaffirming] the government's right to regulate in the public interest in accordance with the law"' (Republic of South Africa, 2015, p. 2). With regard to ISDS, therefore, South Africa has, through the Act, asserted a greater degree of autonomy by directing investor disputes to the domestic legal system and then, if there is no resolution, to international arbitration but only if it is consented to by the South African Government (Republic of South Africa, 2015). Even if such arbitration is consented to, the Act states that "arbitration will be conducted between the Republic and the home state of the applicable investor" (Republic of South Africa, 2015, p. 12), rather than the foreign investor itself, which is a notable divergence from the international norm of foreign investors engaging with host governments in international arbitration.

At the bill stage of the South African Protection of Investment Act (the Promotion and Protection of Investment Bill), non-governmental bodies such as the European Chamber of Commerce in South Africa had been brought forth to public hearings in the Parliament in order for the government to understand their views and concerns. At one hearing in 2015, the representative for the European Chamber stated that "some [European] firms are already reconsidering investment. Most are waiting to see the impact of this and other bills" (Parliamentary Monitoring Group, 2015b, p. 4). Nonetheless, the passing of the bill into the Act confirmed the DTI's view that "[t]he South African government recognised that it has an investment protection legal framework in place that matches world standards and that the risks posed by BITs vastly outweigh their purported benefits" (Green, 2012, p. 2). Put differently, the South African Government had not attributed increases in inward FDI, the market activities of foreign firms, to increased investment protection and found the negative consequences of such protections, through the non-market activities of foreign firms, too costly economically, socially and politically to sustain. Thus, the changes occurring to the principles, norms, rules and decision-making procedures of the global governance of FDI are likely to have an impact on not only the market-oriented strategies of foreign investors but also their non-market strategies, particularly as countries such as South Africa are seeking greater autonomy over investors to pursue development objectives and greater autonomy over dispute settlement over international organizations such as ICSID.

5.2 Developing- and developed-country challenges to the global governance of FDI and the changing norm of investment protection

South Africa is not alone in taking such measures in its efforts to redefine the relationship between foreign investors and the powers of the State to pursue domestic policy objectives, in the face of previous ISDS claims. In the cases of Argentina (Lavopa, 2015), Ecuador (Aráuz Galarza, 2015), India (Dhar, 2015) and Indonesia (Jailani, 2015), for example, there has been a near unanimous call for such a redefinition, granting less power to foreign investors to raise ISDS claims. According to Abdulkadir Jailani, the Director for Treaties of Economic, Social and Cultural Affairs, in the Indonesian Ministry of Foreign Affairs, the Indonesian Government went through a very similar process of reviewing existing BITs to that of South Africa, under nearly identical conditions: it "was mainly triggered by the increased exposure to investor claims in international arbitration" (Jailani, 2015, p. 5). Furthermore, the review led to nearly identical outcomes, "such as IIA discontinuation, reassessment of existing provisions and the development of a new IIA model" (Jailani, 2015, p. 5).

Indeed, such redefinitions are emblematic of a global shift towards greater regulation in the norms associated with the global governance of FDI. According to the 2017 UNCTAD *World Investment Report* (UNCTAD, 2017, pp. 119–122), "sustainable development-oriented IIA reform has entered the mainstream of international investment policymaking", with strong evidence that a new generation of BITs have emerged which "refer to the protection of health and safety, labour rights, environment or sustainable development" in their preambles and create policy space for host governments to pursue the "protection of human, animal or plant life, or health; or the conservation of exhaustible natural resources". Johnson, Sachs and Coleman (2016, p. 16) point to the more than 50 countries and regions which have sought to revise their BITs or IIAs in order to assess "whether these agreements are either necessary for or effective in attracting investment, and how the risks for and impacts on domestic policy space can be better addressed". Furthermore, the Group of Twenty (G20), which includes countries such as Argentina, India, Indonesia and South Africa along with leading developed countries, has recently adopted the Guiding Principles for Global Investment Policymaking, based on UNCTAD's Investment Policy Framework for Sustainable Development (IPFSD), calling for governments to "reaffirm the right to regulate investment for legitimate public policy purposes" (UNCTAD, 2017, p. 118).

More recently, UNCTAD tracked developments in ISDS reform in 2018 and found that nearly all IIAs signed in that year contained at least one reform to ISDS (UNCTAD, 2019). At one extreme, IIAs omitted ISDS altogether, but more frequently, they included elements to circumscribe the power of investors and international tribunals by, for instance, limiting the scope of issues under which ISDS may be invoked, increasing the use of local remedies prior to invoking ISDS claims and increasing the participation of State entities in ISDS tribunals (UNCTAD, 2019). Finally, on a different tack, a group of 105 States in the WTO are currently developing a multilateral agreement on investment facilitation for development, which excludes investment protection and ISDS altogether. The effort, launched at the 11th Ministerial Conference in December 2017 in Buenos Aires, seeks instead to promote global flows of inward FDI through a multilateral framework which aims to "improve the transparency and predictability of investment measures; streamline and speed up administrative procedures and requirements; and enhance international cooperation, information sharing, the exchange of best practices, and relations with relevant stakeholders, including dispute prevention" (WTO, 2017, p. 1). While at the moment it is unclear how such a framework may intersect with the current global system of governance of FDI involving BITs and IIAs, preliminary analysis shows that a significant degree of overlap may exist in areas such as most-favoured nation and fair and equitable treatment provisions (Bernasconi-Osterwalder et al., 2020, p. 49), raising important questions regarding how such a multilateral framework may change the manner in which FDI is governed globally if it is adopted and ratified by all WTO members.

In sum, the efforts by a number developing countries, but also some developed countries, to reconfigure the global governance of FDI, by either withdrawing from existing treaties or attempting to rewrite the rules of future ones, are indicative of what Oetzel and Doh (2009, p. 115) argued with regard to the role of MNEs in development: "should policy makers begin to believe that MNEs are not generating benefits in the host country, their attitudes toward FDI could (and many already have) become decidedly pessimistic, leading to increased barriers to entry and greater host country regulation on FDI". The ISDS process and the size of the compensation claimed and awards by organizations such as ICSID has indeed been perceived by a number of developing countries as unjust, unequal and counterproductive to development agendas and efforts, especially as the total number of ISDS up to January 2020 has surpassed 1,000, with developing countries comprising the majority of respondent States (UNCTAD, 2020). As the Group of 77 developing countries and China stated at a recent meeting of the United Nations Commission on International Trade Law (UNCITRAL):

> A discussion on the concerns relating to the existing ISDS system and possible reforms are of central importance to the developing states that adopt such regime, given the impact of ISDS on the development process. Many of the group's members are already actively taking part in this process through, inter alia, refining the existing ISDS system, revising or in some cases terminating existing bilateral treaties, developing new models for future agreements, and engaging in multilateral processes (Group of 77, 2018, p.1).

It is clear from this statement and from the actions of a number of developing countries, as well as some developed ones, to reform BITs and IIAs, that a new set of overarching ideas and norms are developing which are altering the fabric of the global governance of FDI. These ideas and norms have shifted as a result of the interaction of host States, TNCs and international organizations such as ICSID through the non-market activities associated with ISDS.

6. Conclusion

On the surface and seen through the older lenses of the OBM and the credible commitment problem, ISDS is a rational, non-market strategy employed by TNCs to protect their investments in host countries that have breached their treaty obligations. However, delving more deeply into the structure of the global governance of FDI shows that such non-market strategies are related to a set of unequal power relationships between TNCs and host States, which are embedded within its institutional dimensions. In particular, the power of TNCs to sue host States for alleged breaches of BIT and IIA obligations, which is unique in international law (Simmons, 2014), and to shape future norms and rules through the process of ISDS have been considered excessive by a growing number of developing countries. This inequality of power is compounded by the relatively weak position that many countries were in when they signed BITs, resulting in more stringent treaty language included in such agreements. Therefore, non-market strategies and activities associated with ISDS are not 'value free', as the non-market environment in which they are embedded is infused with political and institutional inequalities.

The developing country backlash against the global governance of FDI is emblematic of a broader set of political, institutional and economic inequalities that these countries have experienced throughout the course of the process of globalization. Yet, in nearly all cases among developing countries, there has not been a wholesale rejection of the global governance of FDI. Rather, the apparent backlash may instead be characterized, in terms of the overarching ideas of this system of global governance, as a "swing of the pendulum toward greater regulation, rather than protectionism", in the view of one senior UNCTAD official (Interview 2, 2012). Indeed, as withdrawal from BITs and significant changes to new IIAs, which include greater autonomy to pursue domestic development objectives, have cascaded across countries, they have resulted in a requisite change in the principles, norms, rules and decision-making procedures that constitute the global governance of FDI. The intention behind such reform initiatives on the part of the developing and also the developed countries is, at its root, to be able to exert more institutional power over their foreign investors through more equal political relations, and recapture greater domestic policy space to satisfy developmental objectives (UNCTAD, 2020).

Therefore, with regard to the non-market literature there is an opportunity to revisit both the OBM and the PBM, as well as the broader literature on non-market strategy, to address questions of power and unequal relations between TNCs and political organizations such as host States. TNC-host State investment relations were considered conflictual in Vernon's original formulations of the OBM – with the assumption that a host State would experience a rise in bargaining power once its foreign investors had committed resources to it. Since that period, the global governance of FDI and ISDS have significantly reversed that dynamic. However, in either case, non-market strategies and activities associated with ISDS between TNCs and host States are often guided by the zero-sum framing of the OBM, leaving little strategic room for TNCs and host States to achieve mutually beneficial outcomes. This need not be the case. A shift in the global governance of FDI towards a greater degree of institutional equanimity between host States and their foreign investors may act to introduce a more favourable political balance in the iterative bargains between both parties and other related actors, as the PBM theorizes (Eden et al. 2005).

The current system of global governance of FDI is undergoing transformation, and among the developing countries in particular, the benefits of bargains negotiated with TNCs within that system have been considered one-sided and exploitative (Economist, 2014, p. 1). In this regard, such inequalities in the global governance of FDI between capital-exporting States and capital-importing States mimics a range of inequalities inherent in the global governance of trade and finance, whereby developing countries have historically lacked political power to shape the rules more towards their interests and objectives (Buzdugan and Payne, 2016). These historical inequalities have thus acted to undermine the legitimacy of global governance in these cases, resulting in a number of stalemates such as the lack of conclusion of the Doha Round of trade negotiations in the WTO (Buzdugan and Payne, 2016).

The global governance of FDI, in contrast, has proven to be more flexible to change than other forms of global economic governance, owing to its decentralized structure. The confluence of ideas, actors and institutions involved in this system have driven *system-wide* reforms of the global governance of FDI that extends beyond issues associated with ISDS. The contemporary wave of reforms also involves a new generation of BITs and IIAs designed to promote sustainable development through the introduction of new sets of principles that seek to influence norms, policies and procedures in the global governance of inward foreign investment. These principles and their associated policies and procedures, such as those found within UNCTAD's IPFSD, have sought to balance investment protection with greater legitimate policy space for social and environmental regulation on the part of host States, and with greater responsibility for the achievement of sustainable development outcomes on the part of foreign investors (UNCTAD, 2015). Although these principles are increasingly being adopted in new IIAs and model BITs across the developed and developing countries alike (UNCTAD 2016), the majority of the nearly 3,000 BITs across the world do not reflect them, and scope remains for further transformation. For instance, Amaral and Jaller (2020) find that as of 2020, only six signed BITs of the nearly 3,000 and six model BITs out of 80 contain language on gender in the text of the agreements, leaving much progress to be made on promoting gender equality through investment treaties (UNCTAD, 2021).

Given the extent to which these transformative processes are occurring, fertile ground exists for further research into the evolving structure of the global governance of FDI and the degree to which new norms have been adopted, resisted and/or innovated by TNCs within this non-market environment. Furthermore, given the recent movements in the WTO towards a multilateral agreement on investment facilitation for development at the global Tier 1 level, as discussed in section 5.2, and the rise of so-called megaregional IIAs, such as the recently- signed Sustainable Investment Protocol of the African Continental Free Trade Area, the United States–Mexico–Canada Agreement and the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (UNCTAD, 2021), questions exist as to if and how regional and global processes of governance may overlap or intersect with the decentralized form of global governance of FDI as explained in this article, and whether such processes will act to reinforce, reverse or transform it.

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