

Introduction

The law of foreign investment is at a crossroads, in the wake of a dramatic surge of investment treaty arbitration cases (Figure 1) and an unprecedented global financial crisis leading to a sharp decrease in global investment flows (Figure 2). Scholars and government officials from both developed and developing worlds have been debating whether and to what extent the previously neo-liberalist approach represented by liberal bilateral investment treaties (BITs) should be reformed to fit the new reality of the current world. This study presents an updated account of the status quo of the legal protection of foreign investment in the world, on the basis of a comparative study of reports on the subject from 22 representative jurisdictions, taking into account other relevant recent studies, such as those conducted by the UNCTAD and OECD.

The main purpose of this report is to identify major differences, similarities and trends in the law of foreign investment protection in different jurisdictions, and make suggestions for future actions to be taken at global and/or jurisdictional levels. The surveyed laws cover both domestic law and applicable international treaties. Wherever possible, it also investigates how they have been implemented and interpreted in practice.

This report is primarily based on 22 original jurisdictional reports¹ produced by leading scholars from the corresponding jurisdictions, comprising Argentina, Australia, Canada,

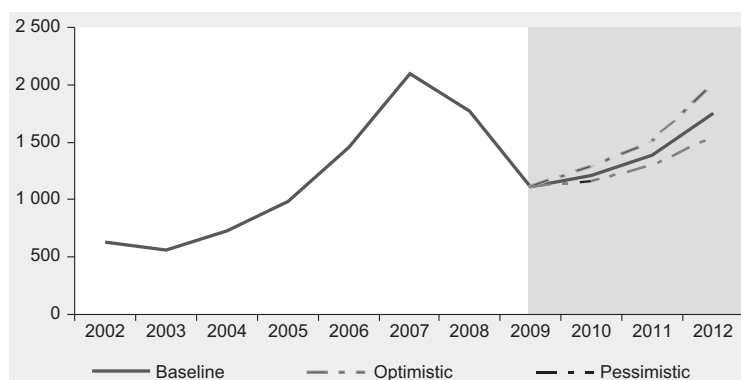


Figure 1: Global FDI Flows 2002–09, with Predictions for 2010–12 (US\$ billion)
Source: UNCTAD, *World Investment Report 2010*

¹ The commonly used term is 'national report'. However, the term 'jurisdictional report' is used here as it is more appropriate to also cover the report of Macau, which is not a 'National Report'.

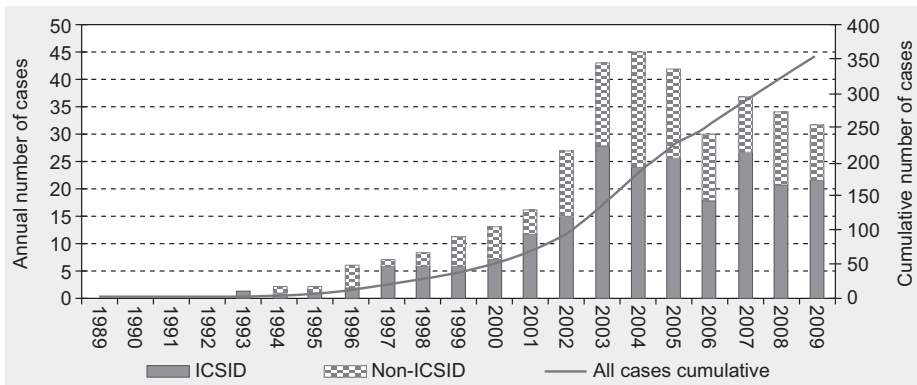


Figure 2: Known Investment Treaty Arbitration Cases (Cumulative and new cases) 1989–2009
 Source: UNCTAD, *World Investment Report 2010*

China, Croatia, Czech Republic, Ethiopia, France, Germany, Greece, Italy, Japan, South Korea, Macau, Peru, Portugal, Russia, Singapore, Slovenia, Turkey, the UK and the US.² They cover all of the five continents, and three major categories of economies namely developed, developing and the transition economies. They not only include 7 of the top 10 foreign direct investment (FDI) recipients in the world, but also 8 of the top 10 capital exporting countries (Figure 3). Six of the reported economies are also among the top ten signatories of BITs up to end 2008 (Figure 4). It can therefore be said that, to a considerable extent, this study illustrates the status quo of legal protection of foreign investment in the world.

As do the jurisdictional reports, this general report follows the questionnaire designed by the general reporter for this study. It intends to cover the most important aspects concerning the protection of foreign investment, ranging from admission regimes to post-admission standards of treatment, from protection against expropriation and guarantee of free transfer to settlement of investment disputes. It starts with a comparison of the overall legal framework for foreign investment and concludes with an outlook at the future regime on international investment.

The study has identified three main themes of recent development in foreign investment protection, namely harmonisation, balancing and socialisation. It concludes that the paradigm of international investment law has been shifting from a north–south divide to a private–public debate, and that the future development of international investment law will most likely lead to a multilateral investment agreement (MIA) effectuating a balanced liberal investment regime.

² Jurisdictional Reporters are approved by the International Academy of Comparative Law (IACL) upon nominations by either the corresponding national committee of the IACL or the general reporter.

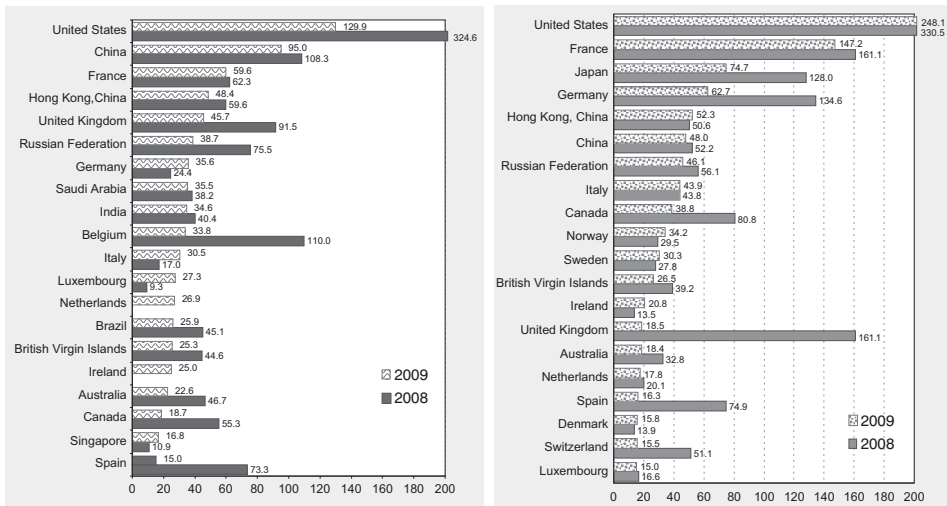


Figure 3: Top 20 FDI Importers and Exporters 2008–09 (billion US\$)
 Source: UNCTAD: *World Investment Report 2010*

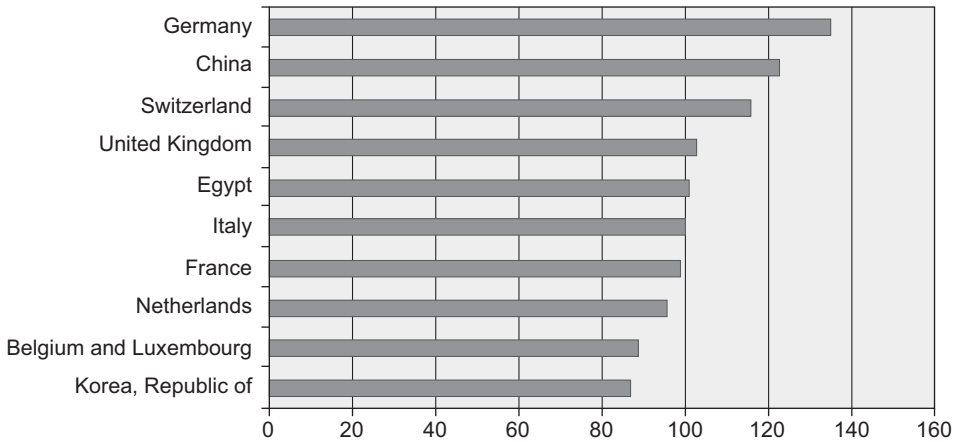


Figure 4: Top Ten Signatories of BITs by 2008
 Source: UNCTAD (www.unctad.org/iia)