THINKING ABOUT BITS AND BIT ARBITRATION:
THE LEGITIMACY CRISIS THAT NEVER WAS

Devashish Krishan*

I. Introduction

Louis Halle, an American diplomat and strategist of the 1950s, observed that policy is made not in reaction to the world but rather in reaction to an image of the world in the people making decisions. “In the degree that the image” warned Halle, “is false, actually and philosophically false, no technicians, however proficient, can make the policy that is based on it sound.”¹

Before 1990, the image of private foreign investment was a simple one, composed of a few multinational entities, fewer states, some “economic development agreements,” still less national investment codes and international policy statements, perhaps a score of arbitral awards, and a few hundred (barely used) bilateral investment treaties (BITs).²

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* Practicing lawyer, Freshfields Bruckhaus Deringer US LLP, New York. The views expressed in this paper are personal, of the author alone, and do not engage the personal or professional opinions of anybody else. I am grateful to Andrew Newcombe, Anthony Sinclair, Brooks Daly, Jan Paulsson, Jeffery Commission and Maximiliaan Rijkenberg for discussions and to Jan Paulsson, Jose Alvarez, Joshua Cooper Ramo and Stephen Schwebel for their inspired and illuminating writings.

¹ L. Halle, American Foreign Policy 318 (G. Allen, 1960) (Hereafter: “Halle, Foreign Policy”). See also, J. Ramo, The Age of the Unthinkable 13 (Little, Brown & Co, 2009). For insightful analyses of imagery in policy making in rule of law and arbitration matters, see, J. Paulsson, Enclaves of Justice, 4(5) TDM 2 (2007) (“Our model for global development of the rule of law may be flawed and counterproductive. It may be harmful to consider that the rule of law is the norm . . . It may be more realistic to think and act on the assumption that justice is a surprising anomaly . . . What we need is not legal analysis leading to ever more perfectly fraudulent texts, but an understanding of reality.”) (Hereafter: “Paulsson, Enclaves of Justice”); J. Paulsson, International Arbitration is not Arbitration, 6(1) TDM 1 (2009) (“You don’t think that international arbitration is arbitration because it has ‘arbitration’ in its name, do you? Do you think a sea elephant is an elephant?”); J. Paulsson, Arbitration in Three Dimensions, LSE Law, Society and Economy Working Papers 2/2010; E. Gaillard, Legal Theory of International Arbitration (Martinus Nijhoff, 2010).

² See, P. Kohona, Some Major Provisions in Modern Investment Protection Agreements, 1987 Third World Legal Stud 151, 152 (1987) (180 BITs concluded between OECD and developing countries as of 1984; further, south-south and socialist BITs were “a recent feature” and China signed numerous BITs because “the importance of ensuring a secure investment climate for foreign investors is recognised by China’s planners.”); P. Peters, Investment Risk and Trust: The Role of International Law, in, P. de Waart, et al., eds., International Law and Development
Then, the cold war ended and the world changed. Since 1990, a globalized space, full of multinationals, has emerged. Foreign investment became globalization’s seeping, and then sweeping, force. For the past two decades, the world has been moving every day closer towards ordering the global free flow of capital—during the 1990s, the world’s states signed three BITs a week and domestic laws changed as many times (93% favor foreign investment). This intensified in the 2000s. Today, the world’s BITs number more than three thousand, and BIT arbitration is a permanent fixture of the international investment regime.

So reality became perplexing: just how did it come to be that the entirety of the world’s states uniformly now embrace foreign investment into and out of their shores? This is an amazing development, and established scholars and practitioners marvel at the astonishing ascendancy of BITs and BIT arbitration. The pudding needed no proof.

Yet, in recent times, a torrent of academic publications on the subject has ensued. Roughly, in the past five years, western hemispheric English language legal scholarship has seen one new academic publication containing the term “bilateral investment treaties” published every second day. In this

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131, 132 (Martinus Nijhoff, 1988) (300 BITs concluded as of 1987, of which 190 signed since 1973, the eve of the NIEO movement.)

1 UNCTAD, World Investment Reports (UN, 2005, 2008, 2010) (number of multinational corporations rose from 7,250 in the late 1970s, to 60,000 with 500,000 foreign subsidiaries in 1999, to 82,000 along with 800,000 foreign affiliates employing more than 80 million workers in 2010); The Economist, The Non-Governmental Order: Will NGOs Democratize, or Merely Disrupt, Global Governance? (Dec. 11–17, 1999) (number of international non-governmental organizations (NGOs) rose from 6,000 in 1990 to 26,000 in 1996.)

4 World Bank, Poverty—Statistics and Indicators, available at http://go.worldbank.org/ JIO7WY61V0 (globally, living standards—poverty, infant mortality, life expectancy and adult literacy rates, social indicators, and average incomes—have improved dramatically since 1980; gender disparities remain.)

5 IMF Statistics Department, Foreign Direct Investment Trends and Statistics, Board of Directors Paper, (Oct. 28, 2003), at, http://www.imf.org/external/np/sta/fdi/eng/2003/102803.htm (“Recorded world inflows of FDI, which increased by an average of 13 percent a year during 1990–97, surged by an average of nearly 50 percent a year during 1998–2000… World FDI inflows reached a record US$1.5 trillion in 2000 before falling to US$0.7 trillion in 2001… Inflows of FDI into developing countries grew by an average of 23 percent a year during 1990–2000, but declined by 13 percent to US$215 billion in 2001.”) World FDI inflows reached $1.5 trillion again 2007 before contracting as a result of the global financial crisis. In 2009, inflows were $1.114 trillion and are expected to rise in the near future. For the first time in 2009, developing country FDI inflows peaked at 50% of the world’s total, see, UNCTAD, World Investment Report (UN, 2010).

6 This paper looks mainly at BITs and BIT arbitration, recognizing that the international investment regime consists more generally of actions of states (enactment of national and international laws and entering treaties), international arbitrators (deciding investor-state disputes), international organizations (the IMF, World Bank and the WTO), and private actors (foreign investors and NGOs).

7 I searched Heinonline, containing 58 million pages of legal history at http://heinonline.org, on October 1, 2010, for all content containing the phrase “bilateral investment treaties.”