

Sornarajah, M.

**Research Report**

## Starting anew in international investment law

Columbia FDI Perspectives, No. 74

**Provided in Cooperation with:**

Columbia Center on Sustainable Investment (CCSI) - A joint center of Columbia Law School and the Earth Institute, Columbia University

*Suggested Citation:* Sornarajah, M. (2012) : Starting anew in international investment law, Columbia FDI Perspectives, No. 74, Columbia University, Vale Columbia Center on Sustainable International Investment (VCC), New York, NY

This Version is available at:

<https://hdl.handle.net/10419/253908>

**Standard-Nutzungsbedingungen:**

Die Dokumente auf EconStor dürfen zu eigenen wissenschaftlichen Zwecken und zum Privatgebrauch gespeichert und kopiert werden.

Sie dürfen die Dokumente nicht für öffentliche oder kommerzielle Zwecke vervielfältigen, öffentlich ausstellen, öffentlich zugänglich machen, vertreiben oder anderweitig nutzen.

Sofern die Verfasser die Dokumente unter Open-Content-Lizenzen (insbesondere CC-Lizenzen) zur Verfügung gestellt haben sollten, gelten abweichend von diesen Nutzungsbedingungen die in der dort genannten Lizenz gewährten Nutzungsrechte.

**Terms of use:**

*Documents in EconStor may be saved and copied for your personal and scholarly purposes.*

*You are not to copy documents for public or commercial purposes, to exhibit the documents publicly, to make them publicly available on the internet, or to distribute or otherwise use the documents in public.*

*If the documents have been made available under an Open Content Licence (especially Creative Commons Licences), you may exercise further usage rights as specified in the indicated licence.*



## Columbia FDI Perspectives

Perspectives on topical foreign direct investment issues by  
the Vale Columbia Center on Sustainable International Investment

No. 74 July 16, 2012

Editor-in-Chief: Karl P. Sauvant (Karl.Sauvant@law.columbia.edu)

Managing Editor: Jennifer Reimer (jreimer01@gmail.com)

### Starting anew in international investment law

by

M Sornarajah\*

The legitimacy of investment arbitration becomes increasingly questioned, with liberal states like Australia moving away from the regime. Defenders seek to ensure the survival of this regime of asymmetric investment protection, using a variety of techniques. The conservation of the gains of property protection has resulted in novel arguments relating to the existence of a global administrative law and standards of global governance.<sup>1</sup> These arguments seek to preserve an approach associated with the failure of market fundamentalism and global economic crises. As long as the inequity contained in regulatory restraints of the system affected only the powerless states, it operated with vigor; but with powerful states feeling the effects of regulatory restraints of investment treaties, there has been movement away from the earlier premises of the established regime.

The idea that international investment agreements (IIAs) had brought about a standard of governance began to recede when the United States, the proponent of strong standards of investment protection, began to retreat, in its own model treaty, by providing that regulatory expropriations are not compensable “except in rare circumstances;”<sup>2</sup> the fair and equitable standard is nothing more than the customary international minimum standard; national security preclusion is a matter for subjective assessment; and measures taken to promote health and welfare of society are justifiable. The US policy and its newer treaty provisions (e.g. in the US-Peru Trade Promotion Agreement) states that the standards of protection are the same in domestic law as well as in its treaties; this is an espousal of the consistently rejected Calvo doctrine. The US Model Treaty (2012) confirms these trends.<sup>3</sup> The uncertainties

---

\* M. Sornarajah (lawsorna@nus.edu.sg) is CJ Koh Professor of Law at the National University of Singapore. The author wishes to thank David Schneiderman and two anonymous reviewers for their helpful peer reviews. **The views expressed by the author of this *Perspective* do not necessarily reflect the opinions of Columbia University or its partners and supporters. *Columbia FDI Perspectives* (ISSN 2158-3579) is a peer-reviewed series.**

<sup>1</sup> See generally, Stephan Schill, ed., *International Investment Law and Comparative Public Law* (New York: OUP, 2010).

<sup>2</sup> 2004 US Model BIT, annex B, section 4(b), available at: <http://www.state.gov/documents/organization/117601.pdf>.

<sup>3</sup> The text is at <http://www.ustr.gov/sites/default/files/BIT%20text%20for%20ACIEP%20Meeting.pdf>.

introduced into US treaties have made the outcome of arbitration less predictable for foreign investors.

These developments are beginning to be replicated in the treaty practices of other states. In this context of change, it is futile to argue that the old neo-liberal system of investment protection can be kept alive through constitutional or public law principles. When the US and Canada, two states sharing a language and culture, cannot agree on the domestic public law standards of property, it would be futile to search for a common universal standard of public law on a subject that attracts many ideological, cultural and even religious divisions. International law must not, as in the past, become the means by which hegemonic states impose principles on the basis of a pretense such as a higher standard of civilization or better standards of governance.

It is best to start anew in the context of the developments that have taken place, such as the recognition of competing interests of the sustainable use of resources, the pursuance of social interest in the health and welfare of communities, human rights considerations in the conduct of business, and corporate social responsibility. The existing regime suffers from inconsistent awards, allegations of bias against the limited number of arbitrators who are called upon and the efforts of law firms to develop strategies of litigation that states hardly contemplated when negotiating investment treaties.

A truly justice-centered regime that shows concern for the interests of the poor is better than a regime that is geared to promote the narrow interests of the rich. The new regime should not restrict the regulatory space of governments to take measures for the advancement of its people, their environmental and human rights interests and their economic development. A regime must be constructed that gives rights to foreign investors while respecting the needs of the people of the host state of which the foreign investor has, by consent, become a part. The past, prior to the neo-liberal approach, had solutions. In fact, the early treaty regime was in itself such a solution. It could be improved, with states retaining greater control over the interpretation of treaties rather than abdicating that function to arbitrators. There were contractual solutions that, due to greater access to information, can be more transparent than before. Diplomatic protection still remains a possibility. A system of dispute settlement with adequate controls over the interpretation of treaties by the state parties and manned by designated government lawyers could be devised to deal with egregious instances of denial of justice to foreign investors by domestic courts. Foreign investors may be given standing to plead before such a system through a nominated body of lawyers. Contract-based systems in which the rights of foreign investors could be specified are preferable. The parties could then negotiate their own protection subject to rules of transparency and devise their own methods of dispute settlement, subject to constraints in local laws and to the primacy of local courts to first deal with the dispute.

The Osgood Hall Public Statement on International Investment Law makes a good beginning for this venture.<sup>4</sup>

---

<sup>4</sup> Public statement on the international investment regime, available at: <http://www.osgoode.yorku.ca/public-statement/documents/Public%20Statement%20%28June%202011%29.pdf>.

*The material in this Perspective may be reprinted if accompanied by the following acknowledgment: "M. Sornarajah, 'Starting anew in international investment law,' Columbia FDI Perspectives, No. 74, July 16, 2012. Reprinted with permission from the Vale Columbia Center on Sustainable International Investment (www.vcc.columbia.edu)." A copy should kindly be sent to the Vale Columbia Center at vcc@law.columbia.edu.*

For further information please contact: Vale Columbia Center on Sustainable International Investment, Jennifer Reimer, jreimer01@gmail.com or jreimer@lyhplaw.com.

The Vale Columbia Center on Sustainable International Investment (VCC – www.vcc.columbia.edu), led by Lisa Sachs, is a joint center of Columbia Law School and The Earth Institute at Columbia University. It seeks to be a leader on issues related to foreign direct investment (FDI) in the global economy. VCC focuses on the analysis and teaching of the implications of FDI for public policy and international investment law.

### **Most recent Columbia FDI Perspectives**

- No. 73, Lorenzo Cotula, "Law at two speeds: Legal frameworks regulating foreign investment in the global South," June 29, 2012.
- No. 72, Torfinn Harding and Beata Javorcik, "Roll out the red carpet and they will come: Investment promotion and FDI inflows," June 18, 2012.
- No. 71, Thomas Jost, "Much ado about nothing? State-controlled entities and the change in German investment law," June 4, 2012.
- No. 70, Terutomo Ozawa, "FDI, catch-up growth stages and stage-focused strategies," May 28, 2012.
- No. 69, Karl P. Sauvant, "The times they are a-changin' -- again -- in the relationships between governments and multinational enterprises: From control, to liberalization to rebalancing," May 21, 2012.
- No. 68, Sophie Meunier et al., "Economic patriotism: Dealing with Chinese direct investment in the United States," May 14, 2012.
- No. 67, Paul Antony Barbour et al., "The Arab Spring: How soon will foreign investors return?," May 7, 2012.
- No. 66, Kalman Kalotay, "Does it matter who invests in your country?," April 30, 2012.
- No. 65, Mark Feldman, "The standing of state-controlled entities under the ICSID Convention: Two key considerations," April 16, 2012.
- No. 64, Karl P. Sauvant and Jonathan Strauss, "State-controlled entities control nearly US\$ 2 trillion in foreign assets," April 2, 2012.

**All previous *FDI Perspectives* are available at <http://www.vcc.columbia.edu/content/fdi-perspectives>.**