

UNCTAD's World Investment Reports 1991–2015: 25 Years of Narratives Justifying and Balancing Foreign Investor Rights

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Abstract

This article examines an influential narrative of foreign investor rights and the international investment regime. It draws on twenty-five of the World Investment Reports (WIRs) issued by the United Nations Conference on Trade and Development (1991–2015). It argues that the justifications provided by these reports have contributed to shaping a global commodity conception of property. These WIRs describe foreign investor rights following a narrative of wealth maximisation by transnational corporations (TNCs), and focus on a TNC-assisted restructuring of host states and local communities. Since the mid-2000s, these reports have balanced this narrative because of the increasing consensus that international investment treaties unduly constrain regulatory space. Ultimately, however, this article shows that the recent WIRs promote an approach to public regulation that is not inconsistent with a global commodity conception of property.

Keywords

foreign direct investment – international investment law – multinational corporations – property – development

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[P]roperty needs a tale, a story, a post hoc explanation.¹

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1 Introduction: Foreign Investor Rights Need a Story

This article aims to provide an intellectual context for understanding foreign investor rights in international law and, particularly, in the international investment regime. I propose to do this by looking at the 25 World Investment Reports (WIRs) issued by the United Nations Conference on Trade and Development (UNCTAD) between 1991 and 2015.² The objective is not to explain the content of these WIRs, let alone UNCTAD's work during this period, but to focus on these reports as narratives that have served to justify and balance foreign investor rights. As narratives, the WIRs have contributed to shaping an influential story about the importance of attracting foreign direct investment (FDI), enabling transnational corporations (TNCs) and protecting foreign investor rights through international investment agreements (IIAs). As Fredriksson and Moran note, UNCTAD and the WIRs 'defined the mainstream in the policy area, and helped with consensus building.'³ Like in any controversial field, naturally, different interests have been involved in the production of the WIRs. But once these reports are published, they constitute narratives about the relationship between TNCs, states and local communities. Looking at these narratives allows us to explore 'the bundle of presuppositions,

1 Carol Rose, *Property and Persuasion: Essays on the History, Theory, and Rhetoric of Ownership* (Westview Press 1994) 38.

2 These reports are the result of an initiative promoted by Karl P Sauvant. The first two WIRs were published by the United Nation Centre on Transnational Corporations, which was later merged into UNCTAD. Previous literature about the WIRs include Torbjörn Fredriksson, 'Forty Years of UNCTAD Research on FDI' (2003) 12 *Transnatl Corp* 1; Tagi Sagafi-Nejad and John Dunning, *The UN and Transnational Corporations: From Code of Conduct to Global Compact* (Indiana University Press 2008); Theodore Moran, 'The United Nations and Transnational Corporations: A Review and a Perspective' (2009) 18 *Transnatl Corp* 91; Karl Sauvant, 'The Negotiations of the United Nations Code of Conduct on Transnational Corporations: Experience and Lessons Learned' (2015) 16(1) *JWIT* 11.

3 Fredriksson (n 2) 34, 10–1. Similarly, Moran (n 2) 97–9.

received wisdoms, and shared understanding against a background of which legal and political discourse takes place'.⁴

The WIRs's narratives provide us with a systemic view of the international investment regime that is arguably missing in the literature.⁵ This view can serve to justify, balance or criticise this regime. The WIRs focus primarily on the links between TNCs, FDI and development. These reports are not only about IIAs and investor-state dispute settlement (ISDS) – in fact, these topics gained preponderance only more recently. Fundamentally, the WIRs tell a story where transnational corporate activity (i.e. FDI) can be a catalyst for host country development. The protection of foreign investor rights is only one of the means to support this development strategy. In the 1990s, IIAs were publicised, promoted and justified as a key component of a 'TNC-assisted restructuring'.⁶ The premise was that countries should provide efficient actors – in this case TNCs – with the appropriate type of property rights.⁷ Enabling TNCs to mix their assets with local resources would maximise wealth and benefit host countries.

The WIRs conceive TNCs – and the institutions that facilitate FDI – as means to assist countries in restructuring their economies and meeting their development goals. FDI can provide an important source of capital, bridging the investment gap, and help countries to climb the value ladder. Crucially, this requires a 'market enabling role of government and ... functional regulatory regimes'.⁸ TNCs demand certainty to calculate their investment projects, and investment treaty standards – like indirect expropriation or fair and equitable treatment – describe the conduct that TNCs expect from states.⁹ This policy, however, is far from promoting a *laissez-faire* economic model. According to the WIRs, states have the responsibility not only to promote a business-friendly environment but also to maximise the benefits and minimise the costs of FDI.

4 Richard Delgado, 'Legal Storytelling: Storytelling for Oppositionists and Others: A Plea for Narrative' (1989) 87 Mich L Rev 2411, 2413. For a discussion of narrative analysis in international investment law, see Tai-Heng Cheng 'Developing Narratives in International Investment Law' (2011) 9 Santa Clara J Intl L 215.

5 See Martti Koskenniemi, 'It's Not the Cases, It's the System' (2017) 18(2) JWIT 343.

6 UNCTAD, *World Investment Report 1995: Transnational Corporations and Competitiveness* (United Nations 1995) 262.

7 Douglas North, *Structure and Change in Economic History* (WW Norton 1981) 21.

8 UNCTAD, *World Investment Report 1993: Transnational Corporations and Integrated International Production* (United Nations 1993) 216.

9 UNCTAD, *World Investment Report 1996: Investment, Trade and International Policy Arrangements* (United Nations 1996) 189–90; UNCTAD, *World Investment Report 1998: Trends and Determinants* (United Nations 1998) 117.

The WIRs have been influential in justifying and balancing foreign investor rights as a means to development. First, the early reports contributed to the diffusion of IIAs by highlighting the importance of TNCs and the increasing competition to attract FDI. This competition has been described as a main driver for the diffusion of IIAs.¹⁰ UNCTAD facilitated this process by organising several ‘BIT facilitation events’.¹¹ According to a 2005 study, it sponsored 9 rounds of negotiations that concluded with the signature of 160 IIAs.¹² Secondly, the most recent WIRs have promoted a review process of IIAs following the emerging consensus that these treaties unduly constrain regulatory space. The reports call for more balance and clarity in existing treaties, particularly to reduce the risk of ISDS, and many states have taken this policy advice seriously.

The narratives of the WIRs are suitable for the study I propose here because UNCTAD is active in policy advice, consensus building and technical cooperation.¹³ UNCTAD is part of the United Nations, and as such its activities are driven and monitored by a large number of states. Until 1993, most of UN’s work on TNCs was carried out by the United Nations Centre for Transnational Corporations (UNCTC). Historically, Global South countries relied on UNCTAD and the UNCTC to promote critical thinking about the international economy. UNCTC, for instance, dedicated most of its efforts to advance a binding code of conduct for TNCs. But this changed in the early 1990s when the United States promoted the closure of UNCTC transferring its activities to UNCTAD’s Division on Investment and Enterprise. While this meant the end of the code of conduct project, it is far from evident that UNCTAD’s later work on TNCs reproduced the views of the United States or a neoliberal model. The

10 Zachary Elkins, Andrew Guzman and Beth Simmons, ‘Competing for Capital: The Diffusion of Bilateral Investment Treaties, 1960–2000’ (2006) 60 *Intl Org* 811.

11 UNCTAD, *World Investment Report 2002: Transnational Corporations and Export Competitiveness* (United Nations 2002) 8.

12 ‘On the basis of this material it appears that this activity has been a full success both in terms of the numeric achievement of 160 BITs that resulted from the 9 rounds and in terms of the hands-on training and negotiation experience aspects highlighted in the trust fund project document,’ Olf Karsegard, Pedro Bravo and Hubert Blomet, ‘Final In-Depth Evaluation: UNCTAD Work Programme on Capacity Building in Developing Countries on issues in International Investment Agreements’ (July 2005) 10-1 <http://unctad.org/en/Docs/domepu200711_en.pdf> accessed 2 March 2017.

13 Matthias Finger and Bérangeère Magarinos-Ruchat, ‘The Transformation of International Public Organizations: The Case of UNCTAD’ in Dennis Dijkzeul and Yves Beigbeder (ed), *Rethinking International Organizations: Pathology and Promise* (Berghahn Books 2003) 140, 141.

literature on UNCTAD instead highlights the highly complex nature of this organisation, where different countries and experts pursue their agendas and some of the staff promote a WTO-like bureaucracy.¹⁴ This plurality of actors and interests suggests that the narratives in the WIRs are neither extreme nor radical. On the contrary, the way in which the WIRs see the relationship between TNCs, FDI and IIAs arguably integrates different interests representing a pragmatic middle-ground approach.

To analyse the narratives in the WIRs, this article relies on theoretical and socio-legal approaches to property. Traditionally, the legal analysis of foreign investor rights would imply looking at IIAs and investment awards. But this approach is not comprehensive unless we assume that investment arbitrators alone have been involved in the task of justifying transnational corporate rights and balancing these entitlements against public interest. If we conceive property as a social institution, property is a way in which people – not only adjudicators – describe proper life and the role of material resources to make this life possible.¹⁵ The narratives of property, in this way, serve both to describe and justify the social order. This view relates to the work of Rose and Macpherson, who claim that 'property needs a tale, a story, a post hoc explanation', or that property is controversial and, for this reason, it requires justifications.¹⁶

In approaching the narratives in the WIRs, this article is inspired by the work of Rose and Alexander on property as storytelling and property narratives.¹⁷ The premise of their work is that the outcome of takings cases is related to what the adjudicators – and their epistemic and political communities – are trying to achieve with a property system. The narratives of the WIRs, arguably, provide some of this background information. Rose and Alexander claim that there are two competing conceptions of property: property as *wealth* or *commodity* and property as *propriety*. As a commodity, property is a means for individuals to maximise wealth without public or private interference. As propriety, property is 'the material foundation for creating the proper social order, the private basis for the public good.'¹⁸ While a commodity

14 *ibid* 156, 159; Sagafi-Nejad and Dunning (n 2) 121, 124–5, 166–7; Fredriksson (n 2) 34–5; Moran (2) 97, 107.

15 Neal Milner, 'Ownership Rights and Rites of Ownership' (1993) 18 L & Soc Inquiry 227, 251.

16 Rose (n 1); CB Macpherson, 'The Meaning of Property' in CB Macpherson (ed), *Property, Mainstream and Critical Positions* (University of Toronto Press 1978) 1, 11. See also Nicholas Blomley, 'Landscapes of Property' (1998) 32 L & Socy Rev 567.

17 Rose (n 1) 9, 50–1. Gregory Alexander, *Commodity & Propriety: Competing Visions of Property in American Legal Thought, 1776–1970* (Chicago University Press 2008).

18 *ibid* 1.

understanding of property highlights the distinction between the private and the public domain, property as propriety underscores the relational character of property. This conception of property is concerned with how society should be structured, as opposed to striking the right balance between property and regulation.¹⁹

A commodity conception of foreign investors rights would promote the role of TNCs as wealth-maximising actors. This would put pressure on local communities to adjust to the expectations of TNCs.²⁰ In this narrative, however, this adjusting process is not a way to benefit TNCs but to maximise and benefit from economic growth. It is crucial, for this reason, to strike the right regulatory balance. A propriety conception, on the other hand, would start from the premise that different communities have different preferences, maximising wealth may be one of them, and TNCs would be expected to engage with each community and respect their preferences. Fundamentally, progressive property scholars highlight that private property creates obligations on property owners to respect those local preferences.²¹

The WIRs reveal a global narrative of property as commodity, which has been balanced in the recent years with a discourse in favour of public regulation. The reports show a strong continuity with the importance of attracting FDI to maximise wealth and promote development. As the WIRs explain, this requires a large number of policy and legal changes – not just signing IIAs. Since the first WIR, in 1991, the policy premise of the reports has been to implement these changes while maximising the benefits and minimising the costs of FDI. But *how* this is done has changed throughout the years. The WIRs before mid-2000s promoted market supervision regulation (e.g. competition laws) but were cautious about encouraging public regulation to deal with environmental or human rights challenges. The more recent reports highlight the need of public regulation to ensure sustainability. Fundamentally, this shows a shift in emphasis, as the focus of the discussion moved from implementing a TNC-assisted restructuring to the challenges of this process – and, increasingly, IIAs and ISDS as obstacles to public regulation.

In most cases, however, regulation and sustainability do not seem to address community preferences (or vulnerabilities) but market failures and negative externalities. The recent WIRs promote public regulation and the reorienta-

19 *ibid* 1–3.

20 Jeremy Waldron, *The Rule of Law and the Measure of Property* (CUP 2012) 105–6. See also Nicolás Perrone, ‘The International Investment Regime and Local Populations: Are the Weakest Voices Unheard?’ (2016) 7 TLT 383.

21 Gregory Alexander, Eduardo Peñalver, Joseph Singer and Laura Underkuffler, ‘A Statement of Progressive Property’ (2009) 94 Cornell L Rev. 743.

tion of IIAs but in the shadow of a global commodity conception of foreign investor rights. Facilitating FDI requires states (and communities), as the reports recognise, to catch up with global markets and the needs of TNCs in many areas and sectors. This narrative is in permanent tension with local preferences, despite references to a global community that demands more market choices, corporate social responsibility (CSR), and means to climb the global value ladder.²² The approach taken by the WIRs, in this way, promotes the sustainability of a global commodity conception of property. The consequences of this social arrangement – such as the asymmetric bargaining power between TNCs and states – are made ‘all too sustainable.’²³

This article examines the policy discussions and recommendations in the WIRs as evidence of how these reports conceive a TNC-assisted restructuring of host states and local communities. It organises the 25 WIRs (1991–2015) in three periods, each representing the moment of implementation (1991–2003), consolidation (2004–2011) and reorientation (2012–2015) of TNC-assisted restructuring. Each section looks at the narratives related to 1) the relationship between FDI and development, 2) the legal and regulatory framework for TNCs and states, and 3) the importance and problems of IIAs and ISDS. They include in-text references to facilitate the discussion of the WIRs. This organisation aims to show both the continuity between the reports – they build upon each other – as well as the gradual shift in favour of balancing foreign investor rights. This article concludes by highlighting that IIAs and ISDS still operate within a global commodity conception of foreign investor rights. This vision is reflected in the kind of social order that is possible, and in the relationship between TNCs, host states and local communities.

2 Implementing TNC-Assisted Restructuring (1991–2003)

The 1991–2003 WIRs played a fundamental role in advocating TNC-assisted restructuring. These reports describe the worldwide implementation of investor-friendly measures, while promoting these policies and making specific recommendations to maximise the benefits and minimise the costs of FDI.

22 UNCTAD, *World Investment Report 1999: Foreign Direct Investment and the Challenge of Development* (United Nations 1999) 150, 346–7; UNCTAD, *World Investment Report 2015: Reforming International Investment Governance* (United Nations 2015) 127–8.

23 David Kennedy, *A World of Struggle: How Power, Law, and Expertise Shape Global Political Economy* (Princeton University Press 2016) 15–6, 93. See also David Schneiderman, *Resisting Economic Globalization: Critical Theory and International Investment Law* (Palgrave 2013) 56.

The reports classify these measures into three generations. The first generation consists of measures related to FDI liberalisation, facilitation and protection. The second generation shows many governments going ‘further and actively seek[ing] to attract FDI by ‘marketing’ their countries.’ This attitude responds to the increasing competition for FDI, a recurrent topic in the early WIRs. The third generation takes the ‘general enabling framework for FDI and a proactive approach towards attracting FDI as a starting point.’ In this investor-friendly context, governments target foreign investors according to the country’s development priorities (WIR 2001: 123–4).

These three generations of measures are inspired by the 1990s Washington consensus on development thinking. Private actors are the most efficient wealth-maximisers, and governments should facilitate private activities. Following these premises, TNC-assisted restructuring is far from suggesting an absent state. The WIRs highlight that states have fundamental responsibilities in this model. Governments need to set up the institutions capable of attracting, enabling and protecting FDI, while promoting measures to increase the development impact of these investments. UNCTAD was sceptical that FDI inflows would increase once an enabling framework was in place, noting that ‘the success of proactive efforts depends on the quality of the basic economic FDI determinants’ (WIR 2001: 123–4; WIR 1998: 89–98).

The analysis of the 1991–2003 WIRs consists of four sections. The first introduces a new global economy in which TNCs are catalytic agents of development, but where there is fierce competition for FDI. The second section examines the government responsibilities in this new global economy. It shows how host countries had to adapt to transnational corporate needs, while also focusing on the risks of liberalisation. The third and fourth sections look at the importance and problems of IIAs and ISDS.

2.1 *Foreign Investment and Development: Opportunities and Increasing Competition in a Global Economy*

As the WIRs explain, ‘[t]wenty years ago or so, many governments saw TNCs as part of the ‘development problem’. Today, TNCs are seen as part of the ‘solution’ (WIR 1999: 154–6). In the 1990s, countries realised that TNCs are ‘agents of development’ changing their strategies toward foreign investment (WIR 1992: 100). The reports agree with this view describing TNCs as ‘catalytic agents in the development’ of countries (WIR 1991: 90–1; WIR 1996: 129; WIR 1997:124; WIR 2003: 85–6). TNCs ‘are major organisers of economic activity,’ and they bring into host countries technology and organisation skills, while also promoting a business-enabling environment (WIR 1994: 163, 167; WIR 1992: 190–2; WIR 2003: 165–6). By mixing their ‘proprietary assets’ with

the location-specific assets provided by countries, TNCs can promote the competitiveness of a country (WIR 1995: 137).

In this new context, the advice to countries was to work on their investment potential. In the early 1990s, the WIRs underscore that countries should adapt to a new scale for their policies – a regional and world scale – as TNCs have been doing (WIR 1991: 85–6; WIR 1992: 4–5). These reports identify a change of economic paradigm where FDI is part of an integral process of trade, finance, technology, services, and labour movement. '[T]he liberalisation of international markets' leads to an 'integrated international production system,' which goal is 'to pursue greater economic efficiency' (WIR 1994: 286). This same goal also justified privatisations as a solution to 'the disappointing performance of many public sector enterprises' in Eastern Europe and Latin America. The main rationale for privatisations was 'pragmatic, namely, the need to improve the provision of goods and services' (WIR 1992: 86).

In this vein, FDI is more than an instrument to join global value chains (GVCs) and improve public utilities, it is constitutive of a new model of development that the liberalisation of capital movements constitutes in the first place (WIR 1998: 97–9; 1999: 150–2). TNCs have a crucial role in 'the establishment of a market economy' by disseminating private forms of ownership and entrepreneurship (WIR 1994: 104–5, 111, WIR 1997: 102). The WIRs also highlight that privatisations entail 'a degree of transformation of the economic culture' (WIR 1992: 89–90) and that TNCs are necessary for developing countries 'to become insiders in a global network' (WIR 1993: 216; WIR 1994: 29–30). These transformations, ultimately, will give rise to a 'global corporate citizenship,' which 'societal boundaries ... in the twenty-first century will be the global community' (WIR 1999: 370).

The WIRs note that governments recognise the transformative role of FDI, and compete to attract these flows. This competition can be a positive mechanism to diffuse a FDI-friendly regime for development (WIR 1998: 95–6; WIR 1999: 150–2, 154–6; WIR 2000: 146–8; WIR 2001: 122–4; WIR 2003: 85–6). Countries that compete 'can move up the value-added ladder' (WIR 1999: 151). The WIRs remind countries of the strength of this competition (WIR 1995: 301; WIR 1997: 101–2, 210–1; WIR 1998: 81–3, 95–9). At first, countries were competing by providing a friendly 'regulatory framework for FDI,' creating 'a new national approach towards FDI' (WIR 1993: 214–5). IIAs played a fundamental role in this process because these treaties further encouraged the convergence of national laws in key issues. This convergence led to a point, however, where FDI-friendly regulatory changes were not helpful to attract FDI flows anymore. Countries had to adopt a more proactive attitude (WIR 1993: 214–5; WIR 1998: 102–3).

At the same time, the WIRs recognise that FDI is not enough to guarantee development. The 1999 report notes that ‘an investment (including FDI)-friendly policy framework is also a development-friendly policy framework’ (WIR 1999: 155). But while this report claims that ‘there is a considerable overlap between the objectives of host countries and TNCs’ (WIR 1999: 155; WIR 1993: 214–5; WIR 1996: 131), it also highlights that the overlap is incomplete (WIR 1999: 154–6). Some countries had too high expectations regarding the benefits of FDI, when in reality ‘FDI plays in most instances only a complementary and at best a catalytic role’ (WIR 1999: 152). TNCs ‘offer the potential for accessing’ assets such as technology (WIR 1999: 317), but opening up to TNCs may not be enough to reap the benefits and minimise the costs of FDI (WIR 2001: 131–2; WIR 2002: 152–3). ‘The groundwork for making markets work well ... has to be laid down by the host country government’ (WIR 2003: 86; WIR 2001: 5–6).

2.2 *Government Primary Responsibilities: Facilitate TNC Plans, Be Cautious About Public Regulation*

From the first WIR in 1991, these reports suggest that the role of states is to pursue development, and therefore governments should not disregard FDI flows. ‘Development is the fundamental objective of developing country governments and of the international community as a whole’ (WIR 1998: 75; WIR 1996: 158–9). The WIRs note that the ‘primary responsibility’ of host countries is ‘to make their investment climate congenial to transnational corporations’ (WIR 1991: 90). ‘[M]ore attention needs to be given to policies that are in line with market forces’ (WIR 2001: 165). In this new global economy, the role of governments is to match ‘the specific functional needs of corporate investors’ with ‘specific locational products’ (WIR 2001: 124; WIR 1998: 97–9). The 2001 WIR explains that:

[w]hile many countries promote FDI, the most successful ones do this in a business-like manner, with effective image building, low transaction costs for investors, careful targeting, direct interaction with investors and good support and follow-up services (WIR 2001: 5).

This new role for states does not mean an absent state. The state has different but fundamental functions in the new global economy. The WIRs reject *laissez-faire* and remind states – according to neo-institutional thinking – of their fundamental role in setting up the basic economic institutions (WIR 1999: 324–8). The reports explain that this transformation does not aim to weaken the state but to redefine its functions (WIR 1994: 311). The state has to work in

tandem with the new means to reach economic development, essentially FDI. In a number of occasions, the early WIRs highlight the contrast this represents with the past. During the 1960s and 1970s, the goal of governments was to control the activity of TNCs steering FDI to fulfil state development goals. In the 1990s, there is a fundamental policy shift as governments move away from direct and indirect forms of state control (WIR 1992: 100; WIR 1996: 191; WIR 1997: 75–7, 210–1; WIR 1999: 324–8; WIR 2003: 85–6).

According to the WIRs, governments are responsible to 'catch up with the market' (WIR 1996: 129). They need to be 'restructured according to modern organizational and management practices' (WIR 1993: 216) What is needed is a 'market enabling role of governments' or a 'national enabling framework' (WIR 1993: 216). The 1996 report notes that the international order is overwhelmed by global economic reality, but that many states were lagging behind this new reality (WIR 1996: 129, 163–6). There is a need to reduce distortions and establish positive standards, redefining rights and obligations as well as strengthening the stability, predictability and transparency of the legal order (WIR 1994: 311). Governments should entice TNCs to do what they would like to see done, 'as opposed [to] unilaterally seeking to impose their objectives on them' (WIR 1999: 154–6; WIR 1995: 154).

2.2.1 Enabling TNCs: A Transactional Model for Foreign Investment Relations

Catching up with the market, with the reality of TNCs and GVCs, requires states to undergo a profound transformation. This transformation affects not only the structure of states but also their relationship with TNCs. According to the narrative of the WIRs, this relationship is no longer defined by public control, but rather by a transactional model. The 1991–2003 WIRs describe FDI as the result of a transaction, a deal, a bargain between TNCs and host states (WIR 1992: 4–5, 190–2, 295–7; WIR 1997: 159–204; WIR 1999: 154–6, 177; WIR 2000: 170). TNCs offer a bundle of assets, such as technology, and host countries offer a package of location-specific assets. The WIRs normalise this transactional model, in which many TNCs can bargain for property rights and shop around looking for the best match for their business expectations.

Many of the policy suggestions in the WIRs are consistent with a transactional paradigm. The first reports note that state reliance on TNCs to restructure and develop the economy requires good negotiation skills (WIR 1992, 190–2; WIR 1999: 177, 324–8). States are often providing commitments and incentives to attract FDI (WIR 1998: 102–3). This is because either there is increasing competition for FDI or host state institutions are not trustworthy. The general applicable framework, as a result, sometimes needs to be 'augmented'

and even ‘overshadowed’ by contractual provisions (WIR 1999: 177, 324–8). According to the reports, these contractual provisions are more common in countries that lack a record of successful dealing with foreign investors. It is particularly interesting, in this regard, that even in areas such as natural resources and infrastructure – where the local resources are immobile – the WIRs focus on state incentives and how to deal with the anti-competitive nature of market-power inducements. They do not discuss the potential benefits that states can make from corporate competition (WIR 1997: 159–63, 210–1). The reports justify this approach because TNCs operate more comfortably in this transactional model as a result of their institutional capacity (WIR 1999: 324–8; WIR 2004: 189).

The WIRs also highlight that sometimes governments are so anxious competing for FDI that ‘may not be fully aware of the consequences of their decisions’ (WIR 1997: 204, 186–9, 210–1). Since policy is no longer enough to attract FDI, states need to make commitments to increase corporate profit or reduce political risk. The early reports warn of the dangers of an incentive war, which would represent a zero-sum game for states (WIR 1992: 295–7; WIR 1997: 101–2; WIR 1998: 102–3; WIR 1999: 186). They note that there is a need for international cooperation to limit incentives (WIR 1994: 335; WIR 1995: 301; WIR 1998: 81–3).²⁴

2.2.2 The Trade-Offs: Regulating FDI and TNCs

The early WIRs note that there are trade-offs in the implementation of a TNC-assisted restructuring of the economy. The 1994 report recommends states to take liberalisation of FDI with care. ‘The liberalisation process ... involves difficult choices between desirable outcomes and trade-offs between objectives’ (WIR 1994: 311). Some state action may be advisable if it responds to reaping the benefits of FDI or curbing negative externalities or market failures. In relation to FDI benefits, the same report highlights that ‘passive reliance on market forces may not be the best strategy’ (WIR 1994: 76, 111).

The WIRs acknowledge that FDI not always leads to development, but it partially blames host states for this. States need to implement active policies to turn FDI into development (WIR 2002: 152–3; WIR 2003: 207). This requires expanding the FDI policy list from attracting and protecting FDI to the active

24 The competition for foreign investment has been a long-time preoccupation for the United Nations. In 1973, the group of experts on TNCs noted that ‘[t]he most urgent point at issue among the developing countries is that of competition among themselves for foreign investment.’ Sagafi-Nejad and Dunning (n 2) 97.

promotion of domestic linkages (WIR 2001: 5–6, 131–2; WIR 2003: 85–6). The 2003 report goes further suggesting that states should have some development-oriented regulatory flexibility to maximise the contribution of FDI (WIR 2003: 145, 171–2; WIR 1998: 74).

In relation to market failures, the WIRs remind governments that they have ‘a major role to play in improving social welfare by correcting the distortions in the price/market system arising from the externalities’ (WIR 1992: 225–6). The reports do not challenge the importance of public regulation, but promote a neoliberal approach to it. They reject politics as an appropriate criterion to regulate. Politics only focuses on short-term costs, disregarding long-term benefits (WIR 1999: 136–7; WIR 2000: 159–60). The criterion governing FDI policy should be efficiency and the rule of law as opposed to politics and the rule of power (WIR 1997: 124, 231–3; WIR 2000: 159–60; WIR 2003: 95–6). Regulation is justified only in cases of market failures (WIR 1997: 231–3; WIR 1999: 316–8; WIR 2003: 107). The WIRs indicate that FDI activity is normally positive as long as governments promote market supervision regulation, such as competition laws, controlling TNCs from abusing their market power (WIR 1994: 286–8; WIR 1995: 218–9; WIR 1997: 124; WIR 1998: 94–5; WIR 2004: 191–4).

Against this background, the reports are cautions about public regulation. They note that if states do not have the administrative capabilities, ‘it may be better to minimize market interventions and simply reduce obstacles in the way of FDI, minimize business costs and leave resource allocations to the market’ (WIR 1999: 325, 174–6). This does not mean that the WIRs do not focus on other strategies to minimise the costs associated to FDI. The 1994 and 1999 WIRs, for instance, introduce and develop the idea of global CSR (WIR 1999: 345–6, 351, 360, 366). But this does not change the cautious approach to public regulation. The 2003 WIR highlights that:

[e]ven where market failures lead freer FDI to be harmful, there may be a case for restricting it only if a host government has the capacity to design and mount effective interventions that result in a socially or economically better result. The cost of government failure must not outweigh market failure; if it does, the economy is worse off (WIR 2003: 104).

2.3 *The Role of IIAs: Permanent or Temporary?*

According to the WIRs, IIAs should be examined in the context of TNC-assisted restructuring. In this context, IIAs fulfil three key functions: 1) they establish and lock-in this model; 2) they promote the necessary domestic policy reforms; and 3) they give a positive signal to global markets.

First, IIAs serve to establish and lock-in the TNC-assisted restructuring of the economy. These treaties clarify ‘the rights and obligations of the parties involved in international investment relations’ (WIR 1999: 326). Through IIAs, states provide foreign investors with fair and equitable treatment, protection against expropriation and ISDS, all means to establish a friendly investment climate and enforce foreign investor rights. In essence, the treaties help governments to resist the temptation of short-term politics. The reports note that governments were conscious of this when signing IIAs and accepting ISDS (WIR 1993: 214–5; WIR 1998: 117–8; WIR 2001: 5–6; WIR 2003: 115–7). They were seeking:

to bind themselves with respect to actions and measures that they do not wish to take, with the twin purpose of creating a favourable investment climate that will attract FDI and make it more difficult for such measures to be taken in the future (WIR 1996: 194).

Second, IIAs set the framework for domestic policymaking (WIR 1999: 326–8; WIR 2000: 146–8; WIR 2003: 39). Liberalisation was not enough to consolidate the economic transformation (WIR 1994: 286–8, 291–3; WIR 1996: 182–4). National treatment and non-discrimination are not the main standards of IIAs. The focus was put on standards that describe ‘the conduct that is expected’ from states (WIR 1996: 189; WIR 1998: 117–8; WIR 1999: 174–6). This is ‘far more than mere equality of treatment’ (WIR 1996: 183). The 1996 report highlights that:

[i]nvestment-protection provisions go beyond liberalization measures. In a way, they move along another plane. Although they are primarily directed at possible measures of host governments, they may best be understood as efforts to counteract the perceived uncertainties of current international economic relations. Through legal commitments, they seek to establish a degree of stability, transparency and predictability that circumstances do not provide (WIR 1996: 194).

Third, IIAs give a positive signal to TNCs reducing the perception of risk (WIR 1994: 311; WIR 1996: 147; WIR 1999: 117–8). The premise that IIAs serve to attract FDI has been subject to intense debate, and studies provide different conclusions. The WIRs remain cautious about this (WIR 1998: 90, 117–8; WIR 2003: 89–91, 171–2). IIAs give a positive signal to markets as foreign investors ‘appear to regard BITs as part of a good investment framework’ (WIR 2003: 91). But this

would not mean that these treaties attract FDI by themselves. '[T]he regulatory framework for FDI – at whatever level – is at best enabling. Whether FDI actually flows depends mainly on the economic determinants in host countries' (WIR 2003: 171; WIR 1996: 166; WIR 2001: 122–4).

While the WIRs reveal a positive view about IIAs in the 1990s, it turns out that these treaties were meant to be temporary according to the 1996 report. This WIR describes investment protection as a 'development-exception category' or a 'special development provision' (WIR 1996: 194). Temporary measures that would no longer be necessary when 'the international norms of protection will have been 'internalized' in the law of all countries concerned' (WIR 1996: 194).

2.4 *Early Thoughts on IIAs: Too Much TNC Control?*

In the 1991–2003 period, the WIRs promote a positive relationship between IIAs, FDI, and development. When they recognise some problems, by the end of the 1990s, these are related to foreign investor rights and IIAs. Discussing the *Ethyl v Canada* dispute, the 1998 report remarks that the debate is moving 'away from narrow technical issues and towards a wide-ranging discussion of regulation and globalization' (WIR 1998: 60–1). This WIR recognises that a TNC-assisted restructuring creates 'more 'space' for [foreign investors]' (WIR 1998: 97). The liberalization of FDI and IIAs 'allow firms greater freedom in making international location decisions and in choosing the mode for serving each market and meeting functional needs' (WIR 2001: 6, 5–6). These increasing rights and privileges that TNCs enjoy over domestic resources, the WIRs admit, can provide foreign investors with an '[e]xcessive influence on economic affairs and decision making, with possible negative effects on industrial development and national security' (WIR 2003: 88, 104; WIR 2004: 124, 191–4).

The WIRs note that excessive TNC control puts countries in a difficult dilemma. 'Treaty-based controls over the scope and legal requirements of a valid taking of foreign-owned property are assumed to have been good for investment conditions' (WIR 2003: 112–3). The problem is that foreign investor rights and ISDS sometimes impose 'too much control over the sovereign discretion to limit the enjoyment of private property in the public interest' (2003: 112–3; 1999: 134). This can create moral hazard, regulatory chill, and limit states measures necessary to turn FDI into development (WIR 2003: 112, 111–3, 145). According to the 2003 report, '[t]he tension is obvious. Too much policy space reduces the value of international obligations. Too stringent obligations overly constrain the national policy space. Finding a development-oriented balance is the challenge' (WIR 2003: 171).

The WIRs suggest increasing international cooperation to face this challenge, but they also admit that this will not be easy because most international cooperation until 2003 focused on signing IIAs (WIR 2003: 172; see also WIR 1996: 163–165; WIR 2002: 8). The challenge includes an emerging global demand for development with a ‘human face’ (WIR 1999: 369–370); ‘the ever increasing and changing conception of property rights and, in particular, of the social function of property;’ (WIR 2003: 111) and ‘whether the rules of expropriation or other standards of protection ... are the best way to offer some protection to investors while preserving the right to regulate’ (WIR 2003: 112).

2.5 *Epilogue Part 2*

The first thirteen WIRs shaped a narrative of TNCs and FDI that, in many ways, promoted a global commodity conception of foreign investor rights. First, the WIRs allocate TNCs, states and local communities clear roles and functions. From the three, the most important are TNCs as catalytic agents of development. This is not surprising as the WIRs discuss and promote a TNC-assisted restructuring. In the narrative of the early reports, TNCs are capable of triggering an economic, cultural and social transformation. These reports, however, are ambivalent about whether this transformation is inevitable – i.e. something countries need to catch up with – or it is the outcome of a series of policy choices.²⁵

Secondly, a TNC-assisted development model transforms states in a crucial manner. On the one hand, states have the task to establish a market-enabling environment to face the fierce competition for FDI.²⁶ As they become facilitators of FDI, this new role changes their relationship with TNCs. This relationship is now framed in transaction terms. TNCs have increasing ability to bargain for property rights, i.e. to ask states and local communities to adjust to their corporate expectations, and states also need to negotiate with TNCs different ways to maximise the benefits of FDI. For all these reasons, the reports note that governments need to be good negotiators because the risks of excessive incentives are serious. On the other hand, states have to regulate FDI because TNCs are not fully development-friendly. The WIRs highlight that regulation should be the result of a rational-economic process to increase the

25 See Fredriksson (n 2) 15–9; Sauvant (n 2) 59.

26 ‘The message conveyed underlined the importance of domestic enterprise development and the need to “work with the market” and create the necessary conditions, coupled with proactive government intervention, to induce TNCs to forge local linkages and establish export platforms with a high local value added.’ Fredriksson (n 2) 25. Similarly, Moran (n 2) 103–4.

development impact of FDI; governments should be cautious and avoid interfering with markets. As an alternative, the 1994 and 1999 reports introduce CSR.

Lastly, the WIRs describe IIAs as congenial to a market-enabling environment. These treaties limit any state attempt to undo reforms, giving a positive signal to markets. But it turns out that the transformation promoted in the 1990s was not as successful as some anticipated. In the following years, as a result, the approach to public regulation would gradually change, and the emphasis would shift to the need to strike the right balance between foreign investor rights and public regulation. Particularly in the 2003 report, IIAs and ISDS begin to be described as serious obstacles to striking this regulatory balance.

3 Consolidating TNC-Assisted Restructuring (2004–2011)

The 2004–2011 WIRs highlight the importance of FDI and discuss some problems in specific sectors. These reports move the focus from a macro to a sectoral analysis. The early WIRs referred to topics such as TNCs and employment, TNCs and competitiveness, and TNCs and development. In contrast, the 2004–2011 WIRs deal with FDI in specific sectors: such as services, research and technology, extractive industries, infrastructure, agriculture, and low carbon. All these reports follow a similar structure. First, they focus on the potential benefits of TNC participation and on a country's effort to attract FDI. Second, they review and analyse the various contractual and policy options for states to maximise the benefits and minimise the costs of FDI, including the role of IIAs and the implications of increasing ISDS cases.

The underlying narrative of these WIRs is that FDI in the covered sectors can promote development. In each sector, however, there are some reasons for concern that make FDI more or less desirable depending on the sector and country conditions. The reports recognise these problems and call for more public regulation, better government bargaining with TNCs, and state efforts to reap the benefits of FDI.²⁷

This narrative does not oppose the fundamental claims made in the 1991–2003 WIRs. There is however a less cautious approach towards public regulation as a way to deal with the risks and costs of FDI. This view is strengthened by the 2008 global economic crisis, but faces the chilling effects of IIAs and ISDS. Against this background, the WIRs show mixed opinions about IIAs. On the one hand, they appear as tools necessary to limit protectionism and overregulation, an objective which enjoys increasing approval as developing

²⁷ *ibid* 105–10.

countries raise their exports of capital (WIR 2006: 228–9). On the other hand, the reports seem concerned about the rising number of ISDS cases and the excessive costs of protection. By the end of this period, the WIRs make a case for the reorientation of IIAs, but remain optimistic about their potential to facilitate FDI.

The first section of part 3 deals with the sectoral findings of the WIRs. The second section examines the increasing importance of public regulation as a counterweight to many of the problems identified by the reports. The third section looks at investment bargains in the context of the transactional paradigm of TNC-host state relations. The fourth section explores the role of IIAs and the increasing backlash against the international investment regime.

3.1 *A Sectoral Approach to TNC-Assisted Restructuring*

The 2004–2011 WIRs continue underscoring the importance of FDI for development, and look at the correlation between FDI and development in a series of sectoral analyses. The reports highlight the benefits of attracting FDI, including local facilities, jobs, human resource training, salary increases, integration to GVCs, and technology transfers (WIR 2004: 124; WIR 2006: 183). They also focus on the challenges. At heart, this is ‘how to maximize the development benefits of TNC participation ..., while minimizing the costs’ (WIR 2009: 191, 190–2; WIR 2006: 220; WIR 2010: 157–8).

In relation to the service sector, the 2004 report notes that ‘TNCs in services are now seen to transfer new technology, if “technology” is defined broadly to include organizational, managerial, information processing and other skills and knowledge’ (WIR 2004: 124). But foreign involvement in some areas, like water, electricity and media, may create problems for governments and local communities. These are not arguments against liberalising services. The answer is not to remain closed but to open gradually and enforce market supervision (WIR 2004: 186–7). Similarly, the 2005 report remarks the importance of FDI in research and development, recommending countries to promote FDI in this sector actively. ‘One of the main reasons why developing countries promote inward FDI is indeed to link up to the global technology and innovation networks led by [TNCs]’ (WIR 2005: 99). This WIR, however, also warns states against excessive competition, over-generous incentives, and lowering regulatory standards (WIR 2005: 191–3).

When analysing the extractive sector, the WIRs examine the experience of developing countries in the 1990s. The 2007 report notes that TNCs can provide ‘capital and foreign exchange, technical and managerial capabilities, and access to markets and distribution channels’ (WIR 2007: 129). At the same time, it explains that countries ‘that had previously nationalized the mining industry

had to convince foreign companies that new investments would not meet the same fate' (WIR 2007: 161). In the 1990s, this led to overgenerous incentives and regulatory conditions, which were 'introduced without the necessary safeguards for securing long-term development objectives' (WIR 2007: 162).

The analysis of FDI in infrastructure concludes with similar reservations. The 2008 WIR underscores that infrastructure is key to promote economic development, in particular, as it serves to attract FDI (WIR 2008: 88–9; 141–3). The same report, on the other hand, notes that the privatisation of some services, like water provision, may create problems (WIR 2008: 88–9, 141–3). This includes the impossibility of interrupting the service in case of non-payment. The 2008 WIR concludes that 'the questions surrounding investment by private companies (including TNCs) in infrastructure activities are more far-reaching than in most other industries, and touch on the economic, social and political spheres' (WIR 2008: 89, 149–50).

The 2009 WIR provides mixed views regarding FDI in agriculture. It discourages large-land acquisitions because they may create social tensions, but promotes contractual arrangements between TNCs and local producers. This WIR suggests that '[t]his mode of TNC involvement can significantly contribute to raising agricultural production and productivity, and to economic development in general' (WIR 2009: 191, 190–2; 172–6). While admitting tensions regarding water and domestic food supply, the 2009 report notes that TNCs can play an important role improving the productivity of local farmers by transferring technology, monitoring agricultural production, and integrating local farmers in GVCs (WIR 2009: 169–70, 171–6, 190–2).

The 2010 and 2011 WIRs focus on FDI in the low carbon economy and non-equity forms, providing a quite optimistic view in these less traditional sectors. These reports suggest that TNCs can make a major contribution to the transition to a low carbon economy (WIR 2010: 100), and that non equity-forms of FDI can be fundamental for development (WIR 2011: 165–9). The advantage of non-equity forms is that the legal title of the assets remains in the hands of the host state or the local community. This could minimise the loss of control identified in the previous WIRs (WIR 2011: 171–2; WIR 2008: 25).

3.2 *An Investor-Friendly and Sound Regulatory Environment*

In view of this sectoral diagnosis, the narrative of the WIRs focuses on building an investor-friendly and a sound regulatory environment (WIR 2004: 191–4). On the one hand, the WIRs underscore the importance 'to develop and maintain a governance framework based on the rule of law, and supporting institutions that provide an environment in which companies have incentives to invest in productive activities' (WIR 2007: 158, 157–8). This requires promoting

and protecting foreign investor rights, a contractual culture, the consistency and constancy of policies, management control, and the ability to predetermine tax liability and environment regulations (WIR 2007: 124–5). The 2008 WIR explains that '[c]lear, transparent and well-enforced rules of conduct, grounded in law, are important for reducing the risk of political or popular backlashes against projects' (WIR 2008: 150–2).

On the other hand, the WIRs integrate this TNC-friendly view of regulation with some of the sectoral findings. They suggest a conception of public regulation that combines a market-enabling environment with economically efficient regulatory systems (WIR 2008: 150). Countries are required to 'integrate their specific policies [including FDI policies] into an overall development strategy, specifying the role they can play in national economic development' (WIR 2007: 158). The WIRs make several suggestions in this respect. In the context of agriculture, for instance, FDI requires first formalising land titles to protect local landowners (WIR 2009: 190). The approach is similar in infrastructure, where the report notes that '[i]f potentially competitive segments are not unbundled or if the service provider is protected from competitive pressures, it is difficult to create the necessary incentives for cost control, pricing and enhanced performance and, ultimately, investments' (WIR 2008: 91–2).

The WIRs highlight that implementing economically efficient regulatory systems should be states' first priority. 'A strong regulatory agency can be a useful counterweight to political opportunism as well as to opportunistic investors' (WIR 2008: 151, 150–2). In some sectors, the reports recommend creating these agencies first, and only later liberalise FDI flows. 'Unless credible regulatory bodies can be established, most developing countries are likely to be better off keeping their utilities in the public domain, in particular the profitable ones' (WIR 2008: 151). Although the WIRs do not change their narrative about the benefits of integrating into the global economy, the global economic crisis of 2008 strengthened the case for public regulation (WIR 2009: 35–6). In this regard, UNCTAD is convinced that when it comes to FDI

a win-win situation can emerge if the institutional arrangements are carefully designed, and if the legislative framework and investment contracts ensure a fair sharing of the benefits between host countries and foreign investors (WIR 2009: 191, 189–91).

3.3 *A Fair Transactional Paradigm: Striking Equitable Investment Bargains*

The WIRs of this period note that countries can reach a better balance in FDI matters by improving their bargaining capacity with TNCs. For the reports, 'arrangements reflect an ongoing process through which governments seek to

find the appropriate balance between the rights and obligations of the State on the one hand, and TNCs on the other' (WIR 2007: 159, 156–62). Investment bargains can enable countries to 'maximize the contribution of FDI to sustainable agricultural and rural development' (WIR 2009: 172). But this faces two problems. First, the existing competition to attract FDI hinders the ability of states to reach fairer deals. Second, this requires improving state capacity to negotiate given that TNCs often have more information and knowledge than governments.

The WIRs remark that there are contracts behind privatisations, concessions and renegotiations, and states have to pay attention to the specific commitments they provide to TNCs, guaranteeing 'consistency, coherence and efficiency' (WIR 2004: 189; WIR 2009: 172–6; WIR 2011: 171–2). In relation to the extractive and infrastructure sectors, the reports note that the 'effect of a given contract [i.e. of an investment] is determined by its content, which is based on negotiations between the State ... and the investor' (WIR 2007: 159; WIR 2008: 159). Many TNCs contract for property and specific control rights to account for their concrete needs in each project. 'Indeed, TNCs may have an interest in negotiating a contractual arrangement that shifts as much of the risks as possible to the host country government' (WIR 2008: 160).

For the 2007 WIR, '[a]ll this implies the need for considerable negotiating skills on the part of governments to ensure a satisfactory outcome' (WIR 2007: 159). But this is a challenge in the extractive, infrastructure and other sectors as TNCs often have better information and more market power than states. These firms have 'better quality and up-to-date maps, as well as satellite images and other remote sensing techniques, and sophisticated computer hardware and software for environmental data gathering, analysis and display' (WIR 2007: 159). Similarly, 'TNCs in infrastructure are often large relative to the size of developing-economy enterprises and can wield considerable power, potentially of a monopolistic nature' (WIR 2008: 143). In addition, these firms add 'an extra layer of complexity to the regulatory regime and to the burden of the regulatory authorities' (WIR 2008: 143). For instance, they often have the greatest experts because the best public servants migrate to the private sector. The situation, in this way, can be very asymmetrical giving rise to a 'reverse obsolescing bargain' (WIR 2008: 143, 143–4, 159–61).

3.4 *The Role of IIAs: A Sectoral and a General Assessment*

3.4.1 Enabling and Promoting FDI: Some Caution from a Sectoral Perspective

The 2004–2011 WIRs approach IIAs from a sectoral and a general perspective. The 2007–2009 reports recognise that IIAs can promote FDI in extractive industries, infrastructure and agriculture by adding an important element to the

relationship between foreign investors and host countries (WIR 2007: 159, 161; WIR 2008: 162–4; WIR 2009: 189). In the low carbon sector IIAs and ISDS can serve to ‘enforcing the enabling framework that had influenced a particular investment decision’ (WIR 2010: 136). The 2010 WIR recommends countries to harness ‘the potential of IIAs to ensure positive climate change related effects’ (WIR 2010: 137).

While recognising the promotional effects of IIAs, the WIRs makes some reservations when focusing on specific sectors. They warn about the undesired effects of IIAs on public regulation. The reports point out that infrastructure and agriculture are socially sensitive sectors, and are associated with higher chances of state involvement. It recommends states, therefore, ‘to ensure that the IIAs they enter into leave them with sufficient autonomy to regulate infrastructure projects in the public interest’ (WIR 2008: 162; WIR 2009: 189).

3.4.2 Balancing Is Needed in the IIAs World

The emerging controversy around ISDS in the mid-2000s eclipsed these sectoral recommendations. The 2004–2011 WIRs begin by noting that IIAs and ISDS can serve to facilitate FDI. They have a positive impact on the regulatory framework ‘as they can help mitigate perceived levels of risks’ (WIR 2004: 194; WIR 2008: 88–9; WIR 2009: 189). They may not attract FDI flows directly, as the previous WIRs explain, but they have ‘an indirect investment promotional effect ... that stems primarily from the protection that they offer to foreign investors’ (WIR 2010: 136). IIAs prompt states to bring national laws in conformity with treaty standards and inform and train local authorities (WIR 2006: 30). Similarly, the threat of arbitration means that states need to be ‘sensitive to actions that could trigger litigation’ (WIR 2005: 31).

At the same time, the 2008 WIR notes that countries ratified IIAs with a view of attracting FDI, but ‘there is some concern that improved protection and certainty for foreign investors has come at the price of too much of a reduction in the government’s regulatory flexibility’ (WIR 2008: 168; WIR 2005: 30–1; WIR 2006: 25–30; WIR 2010: 136). The WIRs observe that arbitrators have mainly focused ‘on the rights of the foreign investors’ (WIR 2008: 168–9), creating situations of moral hazard and regulatory chill (WIR 2010: 83–90, 136–8, 157–8). The 2006 report mentions, in this regard, that the increasing number of disputes involving developed countries ‘might reinforce the already existing trend in some countries (e.g. Canada, United States) to refine the text of individual BIT articles and to review their BIT dispute settlement provisions’ (WIR 2006: 229).

The 2004–2011 WIRs acknowledge an ongoing ‘discussion on what should be the proper counterweight to investors’ rights in IIAs’ (WIR 2007: 19; WIR 2008:

162–4; WIR 2010: 83–90, 157–8). This discussion sparked a new treaty-drafting trend focused on clarifications, general exceptions, prudential carve-outs and CSR (WIR 2005: 26–8; WIR 2006: 25–30; WIR 2009: 189–90; WIR 2010: 82–90; WIR 2011: 100–3).

For the 2011 WIR, 'achieving a balance between the sovereign right to regulate an industry, and the need to avoid investment protectionism, remains a major policy challenge' (WIR 2011: 110, 107). The WIRs of this period end with an optimistic view about this challenge. In the wake of the 2008 global economic crisis, they admit that IIAs have an important task in limiting protectionism, but also note that they should allow for emergency measures in response to the crisis (WIR 2009: 35–6). The 2010 WIR welcomes 'certain innovative features aimed at rebalancing the agreements between the rights and obligations of investors and host countries' (WIR 2010: 82). This report is positive about the possibility of reaching 'a globally shared view on the way forward for the IIA universe' (WIR 2010: 90). The 2011 report is also optimistic describing the moment as a 'period of reflection on the future orientation of the IIA regime to make it work better for sustainable development' (WIR 2011: 100).

3.5 *Epilogue Part 3*

The WIRs of this period consolidate the TNC-assisted restructuring of the 1990s, while making a clearer case in favour of public regulation to deal with public challenges, such as economic crises, human rights and the environment. These WIRs engage with a series of problems and conclude that more public regulation can be the counterweight to foreign investor rights. This shift implies a more active role of the state to strike the right regulatory balance, maximising the benefits and minimising the costs of FDI. The costs, however, are still described as negative externalities and market failures.²⁸

In this context, it is not a surprise that the WIRs focus on the dual nature of IIAs. The reports confirm that IIAs can serve to facilitate FDI as it was suggested in the 1990s. They are positive about the role of these treaties in promoting FDI in several sectors, such as the low carbon economy.²⁹ But the consolidation of TNC-assisted restructuring comes with the conclusion that more public regulation is needed (market supervision rules are not enough), and, for this reason, IIAs and ISDS become a matter of increasing concern. The growing number of disputes against developed states indicates that the

²⁸ See Moran (n 2) 97.

²⁹ Many countries did attract FDI in the low carbon economy, and a good number of those investments ended up in ISDS cases after Spain, Italy and the Czech Republic had to phase out the incentives due to financial constraints.

problem is serious. This has triggered a process to modernise IIAs, which the reports approve and promote.

The WIRs, however, identify other challenges for achieving a more balanced approach, like regulatory capture and investor opportunism. In particular, they recommend states to strengthen their bargaining skills. The reports recognise that the contribution of FDI in most sectors depends on the initial bargain – a point made in the early WIRs. Governments should therefore improve their bargaining capacity. But this suggestion is not easy to implement because countries face increasing competition for FDI, and TNCs sometimes have more information, knowledge, and market power than states. This bargaining asymmetry can cause a ‘reverse’ obsolescing bargain, which means that those who may become prisoners after the establishment of a foreign investment are host countries and not TNCs.

Crucially, the reform narrative in these WIRs does not address these issues directly. It does not tackle the indeterminacy of the allocation of risks after the establishment of foreign investment. The policy options pay little attention to TNCs’ bargaining power and local vulnerabilities, and there is little in this toolkit to cope with state and local ‘overdependence’ on FDI.³⁰ It turns out that the narrative of this period shows both the continuity of a commodity conception of foreign investor rights as well as an increasing consensus for a kind of public regulation that is consistent with this conception of property.³¹ This regulation needs to be informed by a rational economic analysis, as opposed to the threats to propriety or local community values.³² The expectation that TNCs should adjust to local preferences needs to be disregarded because, otherwise, this could affect the TNC-assisted restructuring.

4 Reorienting TNC-Assisted Restructuring (2012–2015)

The 2012–2015 WIRs make an effort to reorient foreign investment policies by adding sustainability to the notion of development. This follows the debate

30 See Sanjaya Lall, ‘Reinventing Industrial Strategy: The Role of Government Policy in Building Industrial Competitiveness’ (2004) No 28 G-24 Discussion Paper Series - United Nations Conference on Trade and Development, 27; Ha-Joon Chang, ‘Regulation of Foreign Investment in Historical Perspective’ (2004) 16:3 EJDR 687, 712.

31 Sauvants notes that since the 1970s the debate is not whether or not to regulate, but what should be the type of regulation and regulatory framework to govern foreign investment. Sauvants (n 2) 15–8, 26. Similarly, Schneiderman (n 23) 95.

32 These threats are the result of TNCs becoming ‘directly involved in the production process and the social fabric of their host countries.’ Sauvants (n 2) 64–5.

around the Sustainable Development Goals (SDGs) in the United Nations.³³ The idea of development in the early WIRs is closely related to TNC-assisted restructuring. The WIRs insist in maximising the development contribution of FDI, i.e. building productive capacity, technology transfer, human resource development, while minimising the costs. The 2012–2015 WIRs innovate in this respect by clarifying that the goal is not to achieve any development but sustainable and inclusive development. UNCTAD's Investment Policy Framework for Sustainable Development (IPFSD) is a proposal for a new generation of investment policies, with the purpose of encouraging FDI that promotes sustainable development. Although the WIRs do not explore in detail the notions of sustainability and inclusiveness, they note that sustainability refers to the environment and the rights of future generations, while inclusive growth requires growth for everybody (WIR 2012: 101–02, 108).

In this context, the WIRs of this period do two things. First, they renovate the commitment to TNC-assisted restructuring. The 2013 and 2014 WIRs re-examine two key topics of the 1990s. The 2013 report focuses again on GVCs and their fundamental importance for most developing countries. It emphasises the increasing connection between FDI and trade, recommending countries to engage in comprehensive trade and investment negotiations. The 2014 report focuses on FDI contribution to SDGs. It presents 'an action plan to bridge the SDG investment gap' (WIR 2015: 213). Second, the WIRs introduce a proposal to reform the international investment regime. The 2015 WIR makes a comprehensive proposal that 'advances UNCTAD's earlier work on this matter, in particular its Investment Policy Framework (WIR12), the reform paths for investment dispute settlement (WIR13) and the reform paths for IIA reform (WIR14)' (WIR 2015: 171). The 2015 report also puts forward some suggestions for coherent international tax and investment policies (WIR 2015: 206–7).

The first section of part 4 deals with the WIRs' renovated efforts to emphasise the role of FDI in sustainable development, in particular, for climbing the value ladder and bridging the investment gap. The second section analyses the attempt to balance foreign investor rights and sustainable development. The third section focuses on the proposals to reform IIAs and ISDS.

4.1 *FDI for SDGs: Climbing the Value Ladder and Bridging the Investment Gap*

Large part of the 2012–2015 WIRs focus again on the relationship between FDI and development, with special attention to promoting SDGs. The 2015 WIR

33 See UNCTAD, *Investment Policy Framework* (2015) <http://investmentpolicyhub.unctad.org/Upload/Documents/FINAL_WEB_POLICY_FRAMEWORK_30_NOV_2015.pdf> accessed 19 April 2017.

concludes by noting that FDI ‘plays an important role in financing for development and in supporting progress towards the Sustainable Development Goals’ (WIR 2015: 213). This focus on FDI and development resembles the early 1990s WIRs, but the narrative of this period is based on UNCTAD’s IPFSD. This policy framework is based on three key premises: 1) FDI can promote growth, jobs and development; 2) countries should pursue an inclusive growth and sustainable development agenda; 3) governments are in a difficult position to promote responsible investment and, at the same time, address ‘shortcomings of investment policy that may hamper policy effectiveness and risk causing uncertainty for investors’ (WIR 2012: 102).

Although previous WIRs referred to sustainability, this issue has become a crucial element of UNCTAD’s recent recommendations. Countries attract FDI to achieve sustainable development, and, for this reason, the WIRs promote policies to target, attract and enable FDI that can facilitate this goal. The reports describe a new generation of FDI policies, illustrating this trend with the promotion of low carbon FDI and the increasing use of CSR (WIR 2012: 100–1). According to the 2012 WIR, governments are ‘pursuing a broader and more intricate development policy agenda within a framework that seeks to maintain a generally favourable investment climate’ (WIR 2012: 161).

When it comes to GVCs, the 2013 WIR reminds the reader of the 1993 report, and notes that ‘since around 2000, global trade and FDI have both grown exponentially, significantly outpacing global GDP growth, reflecting the rapid expansion of international production in TNC-coordinated networks’ (WIR 2013: 122). The main message of the 2013 WIR is that – except for a few large emerging economies – engaging with GVCs is no longer a choice. ‘[T]he key question for most countries is how to incorporate GVCs in development strategy’ (WIR 2013: 175, 172). The report remarks that ‘[t]he optimal policy outcome is higher GVC participation and higher domestic value added creation’ (WIR 2013: 169; 122–3, 164, 167).

The 2013 WIR dedicates several paragraphs to the attraction of GVC-FDI. It highlights that ‘TNC’s decisions on where to locate and with whom to partner are decisions on where to invest and from where to trade’ (WIR 2013: 140). Like in the 1990s, the key is to provide TNCs with a conducive investment environment, including congenial industrial policies, infrastructure, productive capacities, and trade and investment policies (WIR 2013: 176–80). In relation to the latter, it is worth noting that this WIR encourages countries to focus on a trade and investment agenda (WIR 2013: 180).

The 2013 WIR is also specific about the risks associated with GVCs and the need of public regulation. These include social, environmental, tax-avoidance and labour risks (WIR 2013: 122, 157–63, 176). Fundamentally, the report warns

against the risk that '[l]ocal firms may find themselves locked into low value added activities despite having successfully gone through product and process upgrading, because functional upgrading is more difficult to achieve' (WIR 2013: 169). To avoid this, the report says, it is necessary to coordinate a joint effort of the private and public sector, where states are mainly responsible for infrastructure, education and the right investment environment (WIR 2013: 146, 167, 176).

The WIR 2014 is dedicated to FDI and SDGs. It begins by noting that FDI can bridge the investment gap to reach SDGs, but that this requires tackling the constraints faced by foreign investors. These include entry barriers and an unwelcoming investment climate (WIR 2014: 165–7). The main problem relates to:

[i]nadequate risk-return ratios for SDG investment. Risks related to SDG investment projects can occur at the country and policy level (e.g. legal protection for investment); at the market or sector level (e.g. uncertain demand); and at the project (financial) level (WIR 2014: 165).

To tackle these risks, the 2014 WIR recommends states to take promotional measures (WIR 2014: 165). These measures should include establishing a 'sound overall policy climate, conducive to attracting investment while safeguarding public interests, especially in sensitive sectors' (WIR 2014: 166–7, 152). Private-public partnerships and investment insurance can play an important role in this respect (WIR 2014: 167–8). Similarly, the report is optimistic about the role of future IIAs in the promotion of SDG-related FDI: 'IIAs could do more and also promote investment in SDGs in a proactive manner' (WIR 2014: 181, 176, 186).

4.2 *The Attempt to Strike a Balance: The IPFSD*

The 2012–2015 WIRs promote a new role for states with the objective to turn FDI into a contribution for sustainable development. The 2012 report provides countries with guidance on how to face this challenge, without falling in the temptation of protectionism and over-regulation. It begins by underscoring a different context. 'Governments have become decidedly less reticent in regulating and steering the economy' (WIR 2012: 100; WIR 2013: 92; WIR 2015: 127–8). This is the result of

the recognition that liberalization, if it is to generate sustainable development outcomes, has to be accompanied – if not preceded – by the establishment of proper regulatory and institutional frameworks. The key

policy challenge is to strike the right balance between regulation and openness (WIR 2012: 101; WIR 2013: 92).

According to the WIRs, this can be seen at two levels. First, there are increasing efforts to ‘integrate domestic companies into GVCs’ (WIR 2012: 100). Governments focus on the quality – and not only on the quantity – of investment. Second, states aim to promote sustainable development, targeting environmental and social objectives (WIR 2013: 92). This new policy trend ‘reflects, in part, a renewed realism about the economic and social costs of unregulated market forces’ (WIR 2012: 100). These new policies, the reports note, have become part of the ‘mainstream’ (WIR 2012: 102). Societies are asking for TNCs that respect CSR standards, and for FDI that is ‘not harmful for the environment, ... brings social benefits, promotes gender equality, and ... helps them to move up the global value chain’ (WIR 2015: 127).

The new policy context, however, poses some challenges for FDI governance. It ‘gives rise to concerns that an accumulation of regulatory activities may gradually increase the risk of over-regulation or investment protectionism that hinders inward and outward FDI’ (WIR 2012: 100). UNCTAD responds to this challenge with a new investment policy agenda: the IPFSD. The IPFSD ‘provides a point of reference and a common language for debate and cooperation on national and international investment policies’ (WIR 2012: 162, 161–2). The main characteristic of the IPFSD is that it promotes a reorientation of – and not a rupture with – existing policies. FDI remains a fundamental means to economic growth, but this growth now needs to be sustainable and inclusive (WIR 2012: 107–8).

To achieve this goal, the IPFSD aims to strike a balance between ‘investment regulation and corporate governance’ and ‘openness, protection and promotion’ (WIR 2012: 110). But the unresolved tension between these goals underlies this policy framework. The IPFSD advances the rule of law for everybody, clarifying that institutions should ensure a ‘predictable, efficient and transparent procedures for investors’ (WIR 2012: 107). It calls for ‘flexibility to adapt to changing circumstances, while recognizing that a favourable investment climate requires stability and predictability’ (WIR 2012: 108). It also invites countries to revise policies that do not promote sustainable development, but warns of the limitations imposed by the competition to attract FDI (WIR 2012: 108).

4.3 *IAs and ISDS: The Main Obstacles to Striking the Right Balance?*

4.3.1 An Increasing Need for Reform

Although the IPFSD takes a rather comprehensive approach to FDI governance, the 2013–2015 WIRs focus essentially on IAs and ISDS. The importance

of host state-TNC bargaining in many areas and sectors is not addressed directly. By the end of the 2000s, UNCTAD had listed a number of issues related to foreign investment protection, but still seemed optimistic about the reorientation of the treaties. The 2013–2015 WIRs show more concern about the effects of IIAs and ISDS, and are more explicit about the need for reform. This reform should aim at making IIAs coherent with sustainable development. The focus on IIAs and development is not new, but the new challenge is sustainability.

The WIRs do not promote a radical revision of IIAs. They continue to highlight the importance of IIAs for TNC-assisted restructuring. According to the 2012 report, 'IIAs complement national rules and regulations by offering additional assurances to foreign investors concerning the protection of their investments' (WIR 2012: 133). The 2015 WIR similarly concludes that 'IIAs can help improve countries' regulatory and institutional frameworks, including by adding an international dimension to them and, by promoting the rule of law and enhancing good governance' (WIR 2015: 125, 125–6).

For the WIRs, however, foreign investment protection has been excessive in some cases, while IIAs have been underused as a promotional tool (WIR 2013: 107; WIR 2014: 126–32; WIR 2015: 126). The 2012 report recognises that the 'strength of IIAs in granting protection to foreign investors has become increasingly evident,' but notes that 'ISDS claims can be used by foreign investors in unanticipated ways' challenging measures adopted in the public interest (WIR 2012: 136). Similarly, this report notes that investment protection is particularly needed by 'developing countries with the most unfavourable risk ratings,' but also admits that generally these countries are 'also most in need of flexibility (or policy space) for specific development policies' (WIR 2012: 133–4). To these problems, the WIRs add that IIAs are being underused as an 'an instrument for sustainable development objectives' (WIR 2015: 126).

The WIRs highlight that this call for reform is shared by most countries. For the first time in twenty-five years, the 2015 report looks at the history of the IIAs in some detail, although it does not engage with the neo-colonial origin of this regime. The reason for this historical account is to emphasise the importance of regulation and the current period of reorientation in the treaties (WIR 2015: 121–5). The WIRs recognise that 'the IIA regime is going through a period of reflection, review and revision' (WIR 2015: 120; WIR 2014: 126). This is a result of new state attitudes towards sustainable development and ISDS risks, which implies the increasing dissatisfaction with the protection of foreign investment at the expense of public goals. The WIRs note, in this respect, that 'countries with sound and credible domestic legal systems and stable investment climates' are reaching similar opinions regarding IIAs and ISDS (WIR 2012: 134, 86–8; WIR 2015: 120).

This positive context for the reorientation of the international investment regime, the WIRs explains, faces some limitations. Most importantly, it is counterbalanced by the need of many countries to attract FDI, which results in a 'wait and see' approach (WIR 2014: 126, 126–32). These limitations also respond to the complexities of the legal issues before investment tribunals. ISDS 'exposes host States to additional legal and financial risks, often unforeseen at point of entering into the IIA and in circumstances beyond clear-cut infringements on private property' (WIR 2015: 128). At the same time, the reports recognise that investment disputes are increasingly complex, 'raising difficult legal questions about the borderline between permitted regulatory activities of the State and illegal interference with investor rights for which compensation has to be paid' (WIR 2015: 124; WIR 2012: 136).

4.3.2 Systemic or Limited Reform?

The WIRs make some specific recommendations regarding reform. The 2014 report identifies four modes of state engagement with the international investment regime: 1) maintaining the status quo, 2) disengaging from the regime, 3) introducing selective adjustments, and 4) undertaking systematic reform (WIR 2014: 126–32). Building on previous work, the 2015 WIR presents a proposal focused on five goals. These goals are 'safeguarding the right to regulate for pursuing sustainable development objectives, reforming investment dispute settlement, promoting and facilitating investment, ensuring responsible investment, and enhancing systemic consistency' (WIR 2015: 120, 164–6, 171). According to the reports, these specific goals can be achieved by clarifying treaties, including general exceptions and carve outs, reforming ISDS, minimising the existing treaty fragmentation, and by incorporating CSR standards (WIR 2012: 107–10, 135–6; WIR 2013: 102–3, 107; WIR 2014: 126–32; WIR 2015: 136–45).

Against this background, the WIRs are not entirely satisfied with the negotiations during this period. To a positive evaluation of the treaty-drafting trend in 2013 (WIR 2013: 102), the 2014 report opposes a less optimistic view because 'IIA reform efforts have ... been relatively modest' (WIR 2014: 126). WIRs were optimistic because the negotiation of FTAs created opportunities 'to rationalize the regime and create a more coherent, manageable and development-oriented set of investment policies' (WIR 2013: 105). But the reports observe that countries are creating a multiplication of treaty layers 'even more complex and prone to overlap and inconsistency' (WIR 2013: 105; WIR 2014: 121–3). These WIRs conclude that the only solution is to increase multilateral cooperation and work towards common shared values and goals about business and development (WIR 2013: 107; WIR 2014: 130; WIR 2015: 120, 170).

Nevertheless, the WIRs are ambivalent about promoting a systemic reform. The reports consider every alternative, including terminating IIAs, but are rather cautious when it comes to concrete policy advice. The WIRs justify this position because countries could give a negative signal to TNCs. In the current context where countries need to 'demonstrate their continued, constructive engagement with the investment regime', the 2014 report notes that 'introducing selective adjustments in new agreements may appear as an appealing – if not the most realistic – option for reducing the mounting pressure on IIAs' (WIR 2014: 129, 130). The 2015 report explains that ideally countries should engage in a reform according to the IPFSD, but this option may 'be perceived as reducing the protective value of the agreements and offering a less attractive investment climate' (WIR 2015: 131). Similarly, this report welcomes renegotiations with treaty parties, but warns that 'treaty denunciation done without consulting the other contracting party risks negatively affecting foreign relations' (WIR 2015: 130). The WIRs recommend, in short, to engage in '[l]imited, i.e. selective, adjustments' (WIR 2015: 130).

These selective adjustments mainly refer to the ISDS and the IIAs. In relation to ISDS, the 2013 WIR recognises that '[t]he ISDS mechanism was designed to depoliticize investment disputes and create a forum that would offer investors a fair hearing before an independent, neutral and qualified tribunal' (WIR 2013: 111). However, there are serious concerns regarding its legitimacy, transparency, consistency, erroneous awards, arbitrator impartiality, and high costs. This report proposes five paths for reforming the ISDS. They include 1) promoting ADR mechanisms; 2) tailoring the system through IIAs; 3) limiting investors access to ISDS, 4) the establishment of an appeal facility; and 5) the creation of a permanent court (WIR 2013: 111–2).

Regarding the content of IIAs, the WIRs envision a reform where 'flexibility mechanisms do not erode a principal objective of IIAs – their potential investment-enhancing effect' (WIR 2012: 136; WIR 2015: 125–6). 'IIA reform needs to ensure that countries retain their right to regulate for pursuing public policy interests, including sustainable development objectives' (WIR 2015: 128). At the same time, the reform of MFN, FET, indirect expropriation, the incorporation of exceptions and CSR should not increase 'investors' perception of country risk and susceptibility to opportunistic regulatory behaviour' (WIR 2015 139, 136–45; WIR 2012: 135–6). While the concrete balance depends on each country's 'preferences and policies' (WIR 2015: 131), the 2015 reports suggest that:

[c]are needs to be taken that individual reform steps or the cumulative effects of a whole reform package do not deprive the IIA of its investment

protection function, but rather achieve a balance between the foreign investors' adequate protection and the host countries' need to preserve sufficient regulatory space (WIR 2015: 131).

4.4 *Epilogue Part 4*

The reformist approach of the 2012–2015 WIRs is inspired by the need for sound public regulation. This view became dominant after the 2008 global economic crisis. I suggested earlier that this reorientation is consistent with a global commodity conception of property. At first glance, the 2012–2015 WIRs could be pointing in a different direction. They appear to swing between a justification for economically efficient regulation and a shift in the nature of development. Sustainability and inclusive growth are key concepts in the IPFSD, although inclusive growth disappears in the next reports. These two concepts, in any case, do not point in any clear direction. Sustainability can be used as a justification for regulating FDI negative externalities or for promoting a model shaped according to local preferences. The 2012–2015 WIRs suggest the former. They do not propose to rethink the notion of development but to 'ensure the continued effectiveness' of TNC-assisted restructuring in light of the disenchantment with IIAs and ISDS (See in particular WIR 2015: 213).

The IPFSD promotes a new role for states in the global economy but the fundamental question is which role. The most important change refers to the state steering role of the economy. This role was discouraged in the 1990s but reappears in 2010s WIRs. When we look at the WIRs more closely, however, this steering role should serve mainly to target FDI, create linkages, climb the value ladder, and address negative externalities. This is not very different from the 1990s policy advice. A GVC-development path is controlled by TNCs, and climbing the value ladder – as the WIRs note – depends on TNC decisions and the right public policies. The reports note that relying on GVCs for development is no longer an alternative for many developing countries: they 'may not have a choice' (WIR 2013: xi, xxiv).³⁴ This does not mean that the WIRs discourage states from regulating and minimising the costs of GVCs. The 2015 report, for instance, highlights the need to deal with tax avoidance (WIR 2015: 176). It turns out, however, that the main risk for countries and local communities is to be unable to catch up with the global market and remain stranded at the lower ends of GVCs.

34 This view dominates the current policy debate on development. See Deborah Elms and Patrick Low (eds), *Global Value Chains in a Changing World* (WTO 2013); Angel Gurría, 'OECD-G20 Global Forum on International Investment: Opening Remarks' (5 October 2015) <www.oecd.org/investment/oecd-g20-global-forum-on-international-investment-opening-remarks.htm> accessed 2 March 2017.

The narrative regarding FDI and SDGs is similar. Countries should turn to FDI to reach SDGs, and therefore governments need to deal with entry barriers and an unwelcoming investment climate. They should be proactive to attract FDI, lowering risks and making projects more attractive for investors. The promotion of SDGs requires building infrastructure not only for the community but also for the economy. This infrastructure is necessary to promote the engagement with GVCs, reinforcing the overdependence on FDI. It is not entirely clear, in this context, how states and local communities could improve their bargaining power to reflect their own vision of sustainable development.

Again, the main counterweight to the problems related to FDI and TNCs is regulation, increasingly public regulation and other measures to tackle tax avoidance. But the crucial question is which kind of regulation is compatible with the TNC-assisted restructuring of host states and local communities. The increasing importance of public regulation explains why the WIRs describe IIAs and ISDS as a serious concern. But here the reports are ambivalent. The IPFSD recommends a comprehensive reform, and the WIRs list a series of policy options. Ultimately, however, the reform narrative in the reports only suggests marginal changes. The WIRs recommend countries to implement change in a limited and selective manner, as opposed to considering ways to promote local preferences. According to the reports, drastic changes may give a negative signal to TNCs and reduce FDI flows.³⁵

5 Conclusions: 25 Years After

The narrative of the WIRs revolves around development. But it is the kind of development that TNCs are willing to provide to individuals, local communities and countries. According to the WIRs' narrative, TNCs are the cause and consequence of a global economy of GVCs. TNCs own key proprietary assets, such as capital, technology and management skills, which they can mix with the locational advantages of host countries to maximise wealth. Countries need to attract FDI and work hard to reap the benefits. In this tale, the missing question is whose expectations count in a TNC-assisted restructuring of the economy. In recommending countries to climb the value ladder and rely on FDI to bridge the investment gap, the WIRs tell states and people to organise around the expectations of TNCs. This result occludes propriety and a social order based on local preferences. And public regulation cannot balance this.

IIAs and ISDS reflect the importance of TNCs in this narrative. TNCs have a fundamental role in a world where countries and people need to climb the

35 The narrative of tax policies shows a similar tension (see WIR 2015: 177–8, 207–8).

value ladder and bridge the investment gap. Because of this key role, it seems unreasonable to congratulate or blame investment arbitrators solely for their interpretation of foreign investor rights. Investment awards often privilege the expectations of foreign investors because the realisation of these expectations allegedly promotes development. This is no different from what the courts of many countries were doing when privileging the rights of industrial, railway or construction companies over other property owners in the 19th and early 20th centuries. That profound economic transformation also exceeded the agency of a number of judges.³⁶

The resulting global commodity conception of foreign investor rights has provided TNCs with the opportunity to shape state and local structures according to their business plans. This has strong implications in relational terms. The need to attract FDI prompts a transactional paradigm between TNCs and states, which many TNCs use to bargain for favourable regulatory conditions and incentives. In view of this problem, the WIRs recommend states to increase international cooperation and their bargaining capabilities, but this is difficult in the shadow of the strong competition for investment, asymmetric information, and the IIAs and ISDS. The UN has voiced its concerns about TNC bargaining power at least since 1973 – many WIRs have done so too. But most reform proposals, including those in 2012–2015 WIRs, do not tackle directly the fairness of investment bargains or the need to respect local preferences and obtain free, prior and informed consent from local communities.

Instead, the WIRs focus on public regulation as the counterweight to the undesirable effects of FDI. The WIRs and UNCTAD have done a remarkable job creating awareness for the need to reform IIAs, highlighting that ISDS can block measures needed to curb negative externalities and market failures. The reports have contributed to this debate enabling many states to consider alternatives. As I suggested above, this has balanced but not transformed the commodity conception of foreign investor rights. The analysis suggests that when the WIRs refer to sustainability, they also refer to the protection of TNC-assisted restructuring from host states and local communities. Within a global commodity conception of property, IIAs and ISDS need to be reoriented. Otherwise, a crisis of this regime could trigger a severe backlash against the TNC-assisted restructuring they have served to establish, consolidate and protect.

36 See Morton Horwitz, *The Transformation of American Law, 1780–1860* (Harvard University Press 1977) 31–139; Alexander (n 17) 247–76; Stefano Rodotà, *El Terrible Derecho: Estudios Sobre La Propiedad Privada* (Civitas 1986) 141–67.