A "RE-VISIONED" FOREIGN DIRECT INVESTMENT APPROACH FROM AN EMERGING COUNTRY PERSPECTIVE: MOVING FROM A VICIOUS CIRCLE TO A VIRTUOUS CYCLE

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I. INTRODUCTION

This Critical Essay sets forth and expands upon remarks presented at the International Law Weekend 2010 in New York, New York, which constitutes the annual meeting of the American Branch of the International Law Association (ABILA). The presentation juxtaposed certain ideas in order to create a new framework of analysis in the process. This discussion is intended to explore the possibilities of uniting two disparate areas of international investment law, namely Bilateral Investment Treaties (BITs) and Sovereign Wealth Funds (SWFs) to serve a common purpose of supporting development objectives. By interfacing these two approaches, it may be possible to coordinate a policy agenda that supports development objectives from an emerging country perspective rather than simply from the standpoint of protecting a foreign investor.

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* This essay summarizes and expands the remarks made by the author at the 89th Annual Meeting of the American Branch of the International Law Association, "International Law and Institutions: Advancing Justice, Security and Prosperity," held in New York, NY from October 21–23, 2010. The author's remarks were made as part of a panel discussion held on October 22, 2010 entitled, "How Does International Development Law Coexist with Traditional Sovereignty over Economic Resources and Activities?" Dr. Rumu Sarkar is a former Adjunct Law Professor at the Georgetown University Law Center, and the Senior Legal Advisor to CALIBRE Systems, Inc., a defense consulting firm located in Alexandria, Virginia. She is the author of INTERNATIONAL DEVELOPMENT LAW: RULE OF LAW, HUMAN RIGHTS & GLOBAL FINANCE (Oxford Univ. Press, 2009).

Further, it may be possible to set policy objectives to support economic development in terms of the inflows of Foreign Direct Investment (FDI) made possible by BITs and the FDI outflows made by SWFs. In other words, it may be possible to create a dynamic between FDI inflows and outflows in ways that support and further development-related goals in the emerging country in question. Hopefully, this dynamic will help move the emerging economy away from a potentially "vicious circle" between inflows and outflows of FDI, and move it toward a "virtuous cycle" between the two. While a foreign investment regime has many components controlled by a number of different legal instruments and bilateral agreements, for purposes of this discussion, this essay shall only consider BITs in order to better focus on the underlying theme.

A BIT is simply an agreement between two countries, usually a developed "home" country and a developing "host" country. BITs govern several key aspects of both the promotion and protection of foreign investments made in the host country by the home country.[1] The plethora of BITs is overwhelming: by 2006, over 2,600 BITs had been signed with about seventy new ones being executed each year, according to the United Nations Conference on Trade and Development (UNCTAD).[2] In part, the proliferation of BITs is a reaction to the absence of a multilateral instrument that sets forth the parameters of FDI—this absence has created a vacuum. The failed OECD Multilateral Agreement on Investment (MAI) proposed and considered between 1995 and 1998 is one noteworthy example of this failed attempt.[3] This vacuum has been filled with an exponentially increasing number of bilateral investment treaties in lieu of a single multilateral one.

A BIT generally is composed of five basic provisions:

1) The scope of its application;
2) The conditions for the entry of new FDI;
3) The standards of treatment to be applied to foreign investors;
4) The protections against expropriation; and

1. Alec Johnson, *Rethinking Bilateral Investment Treaties in Sub-Saharan Africa*, 59 EMORY L.J. 919, 919 (2010).

2. *ITUC Briefing Note on Bilateral Investment Treaties*, http://gurn.c50-hosting.com/en/topics/bilateral-and-regional-trade-agreementes/bilateral-investment-treaties/background/tils-briefing-note-on-bilateral-investment-treaties (last visited Dec. 10, 2010).

3. *See* OECD, *Multilateral Agreement on Investment*, http://www.oecd.org/document/22/0,3343,en_2649_33783766_1894819_1_1_1_1,00.html (last visited Dec. 10, 2010).

5) Investment dispute resolution usually by means of providing for international arbitration.[4]

The terms and conditions of a BIT represent a bargain between the two contracting states insofar as the host country promises to protect the FDI made by the home country. In exchange for the new (*i.e.*, greenfield) or increased FDI, the host country implicitly agrees to a diminution of its sovereign authority by agreeing to protect the foreign investment against state expropriation and regulatory takings, and by delegating judicial authority to adjudicate disputes concerning the investment to international arbitral bodies.[5]

This generally means that the host state, at the request of the investor, must submit investment disputes, including the interpretation and application of the BIT, to binding third party international arbitration.[6] Further, most BITs also contain a provision that where the home state pays compensation to one of its investors for losses covered under an investment insurance program, the home state is subrogated to the rights of the investor against the host state for the recovery of compensation for any losses.[7]

Why would a developing or an emerging country agree to a diminution in its sovereign power by entering into a BIT? The answer is both contextual and complex but, in general, many developing countries do not have adequate domestic income and savings levels to support their in-country investment needs. Therefore, such countries must source their capital needs from external sources of financing. Many lower income developing countries are, in fact, heavily dependent on official development assistance (from multilateral institutions such as the World Bank and bilateral donors such as the U.S., U.K., Canada, and many others). Private investment in the form of FDI is also sought after by emerging countries in hopes that such capital investments will bring about greater economic growth and prosperity.[8] For example, an influx of foreign capital may help fund new technologies and physical infrastructure (*e.g.*, roads, bridges, dams, telecommunications networks, airports, seaports, schools, hospitals) as well as enlarge the existing human resource base by increasing vocational training and by encouraging technology transfers. The FDI may

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4. Johnson, *supra* note 1, at 928–29; *see also* Kenneth Vandevelde, *Investment Liberalization and Economic Development: The Role of Bilateral Investment Treaties*, 36 COLUM. J. TRANSNAT'L L. 501, 506–07 (1998).

5. Johnson, *supra* note 1, at 924–25.

6. Vandevelde, *supra* note 4, at 508.

7. *Id.* at 509.

8. Johnson, *supra* note 1, at 927.

also enhance capital market growth by encouraging secondary trading of shares in local stock markets.[9]

Whether entering into a BIT actually increases FDI overall is a different matter. The academic literature seems to concur that there is no positive correlation between signing a BIT and increased FDI flows.[10] "Surprisingly, many analyses exploring the economic effects of BIT signing has generally come to the rather discouraging conclusion that BIT treaties are not associated with large increases in foreign investment."[11] Indeed, "BITs do not appear to increase foreign investment flows, or to improve the characteristics of the local investment environment in signatory countries."[12]

This is somewhat ironic and perhaps even disturbing since increasing FDI appears to be the *raison d'être* of entering into a BIT. It begs the question of whether entering into a BIT is in the best interest of the emerging country in question, especially at the price of relinquishing certain sovereign rights that it may have otherwise exercised. The focus of BITs to date has really been on the protection of foreign investor rights rather than on the needs of the emerging country. As such, BITs tend to be

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9. Deborah Swenson, *Why Do Developing Countries Sign BITs*?, 12 U.C. DAVIS J. INT'L L & POL'Y 131, 131–32 (2005).

10. Vandevelde, *supra* note 4, at 524.

> It is unlikely that any causal connection between the conclusion of BITs and increased foreign investment flows could ever be established using statistical correlations. Because any impact that BITs have on investment flows may not be immediate and because the majority of BITs are recent, insufficient time may have elapsed to accurately measure the impact of BITs. Assuming that a correlation between BITs and investment flows could be identified, the correlation may be negative, since states that are having the greatest difficulty attracting foreign investment may have the greatest incentive to conclude BITs. Even if a positive correlation were found, there still would be serious difficulties in demonstrating the direction of causation. First, the number of variables that must be controlled is enormous, including presence of natural resources, availability of inexpensive labor. status of physical infrastructure, level of education of the work force, size of the market, proximity to other markets, and political stability, to name a few. Second, even if one could control for [sic] all the variable and demonstrate a statistically significant positive correlation between the number of BITs and investment inflows, one still could not be certain which variables were dependent and which independent.

Id. at 524–25. *See also* Johnson, *supra* note 1, at 926.

11. Deborah L. Swenson, *Bilateral Investment Treaties and International Integration*, 4 (University of California, Preliminary Draft, 2008), *available at* http://www.econ.ucdavis.edu/faculty/dswenson/BITsIntegration08.pdf (last visited Mar. 24, 2011).

12. *Id.* at 4–5.

asymmetrical and unbalanced in nature, a point that will be addressed later in the discussion.

BITs are, however, important legal instruments in ensuring "investment neutrality" in two ways. First, BITs ensure that investors may establish investments in the territory of the other investor on a co-equal basis. In other words, there are no barriers to outward or inward investment flows, thus guaranteeing the free movement of investment capital on a cross-border basis.[13] Second, the host state is prohibited from discriminating against investments on the basis of national origin with regard to the ownership or control of such investments.[14] Most BITs grant Most Favored Nation (MFN) status to the home state investment and investors. In essence, therefore, BITs grant favorable treatment for foreign investment on the basis of access, security, dispute resolution, and transparency.[15] While these measures are aimed at creating and preserving investment neutrality, entering into BIT also signals something more fundamental, as discussed below.

II. USING TRANSNATIONAL CAPITAL FLOWS TO SUPPORT DEVELOPMENT OBJECTIVES

A. Bilateral Investment Treaties as a Form of Economic Liberalism

Entering into a BIT tends to signal a willingness to enter into an internationally accepted investment framework that centers on protecting foreign investments made in the host country. While merely signing a BIT does not necessarily mean that systemic and overarching legal and other market reforms are forthcoming, it at least provides concrete evidence that the host government has considered foreign investment issues and has committed to undertake (or refrain from) certain legal actions in relation thereto.

In fact, entering into a BIT is a "shortcut" that provides foreign access to captive emerging markets while hedging against the risks implicit in such markets such as the likelihood of state expropriations, regulatory takings or "creeping expropriation," imposing export or currency controls, or having to deal with a potentially weak, biased, inefficient or corrupt judicial system.[16] By providing substantive safeguards against these risks, and by providing off-shore arbitration with respect to disputes arising from the foreign investment, the market value of the investment is protected, at least

13. Vandevelde, *supra* note 4, at 510–11.

14. *Id.* at 511.

15. *Id.* at 514.

16. *Id.*

in theory, thus allowing sufficient time in which the foreign investor may expropriate (or in the best case scenario, reinvest) any profits made from the venture.

Thus, a BIT may be regarded as an example of a bilateral instrument of economic liberalization where the private property and contract rights of the foreign investor are provided special protections. The host state agrees, in effect, to protect the foreign investment from public interference, protects against any discrimination against the nationality of the foreign investors thereby promoting investment neutrality, and helps to facilitate the market by encouraging unimpeded cross-border investment flows.[17]

More importantly, however, in this context, by signing a BIT, these legal commitments are raised to the level of international law. By agreeing to a free-standing, clear set of rules to govern foreign investment, the host country substitutes its own domestic laws for a set of agreed upon independent rules that are enforceable through international arbitration before neutral and independent international arbitral bodies.[18] In other words, this substitutes a domestic regime for what is, in effect, an international one, thereby sidestepping weak domestic laws and inefficient judicial institutions that may not be able to adequately protect the foreign investment.

Two separate issues stem from the above: first, entering into a BIT signals an initiation into a liberal economic regime where the relation of the state to the market is predicated on certain predetermined assumptions; and second, while BITs may be an initiation into economic liberalism, concluding a BIT does not actually establish an economically liberal regime.[19] While BITs may be designed to address market imperfections, it does not address the underlying causes of such imperfections such as, the lack of contract enforceability, weak and non-transparent financial markets, inefficient judicial and enforcement mechanisms, and systemic corruption. Generally speaking, many more steps may need to be taken by the host country in order to create consistent and continued climate of economic liberalism, and the failure to do so may ultimately render the BIT ineffective in the long-term.[20]

As a self-proclaimed instrument of economic liberalism, BITs do, indeed, tend to support the underlying philosophy of economic liberalism.[21] By limiting the state's power to interfere with private property and contract

17. *Id.* at 505–06.

18. Johnson, *supra* note 1, at 925.

19. Vandevelde, *supra* note 4, at 514.

20. *Id.* at 516.

21. *Id.* 503–04.

rights, BITs support a basic tenant of liberal economic theory that the free market, rather than the state, most efficiently allocates resources, and therefore, the state's interference with free market forces should be limited in substantive ways. Further, the contractual bargain made between private parties should be protected by and not interfered with by the state. Finally, economic liberalism supports the belief that the state should intervene in prescribed ways only where required in order to correct market failures, and should do so in a manner that facilitates rather than impedes market forces.[22]

This view of state power and its limits is fully consistent with the *laissez-faire* approach historically taken by most advanced nations. In fact, this view of the state's powers and its appropriate roles may be perceived as a view from without, that is to say, from the viewpoint of a foreign investor from an advanced nation where this approach is implicitly understood, if not actively supported. The views of emerging countries may not necessarily be in full accord with approach as shall be discussed later with respect to the underlying philosophy that may motivate SWFs.

Of course, BITs are bilateral instruments that are only a small part of a foreign investment regime.[23] Simply signing a BIT does not establish a liberal economic regime—in order to create an enabling investment environment, a new legal framework of domestic laws (*e.g.*, contract, tax, employment, environmental, intellectual property) may need to be legislated, and domestic institutions may need to be created or strengthened (*e.g.*, stock markets, securities and commodities regulatory institutions, environmental agencies, central bank, courts). Additionally, education and public outreach measures may need to be undertaken so that the parameters of the new regime are disseminated and understood by lawyers, judges, and the public, including the investing public.

More importantly, however, the host country must move quickly and efficiently to correct market distortions on its own in order to create a Rule of Law-based economic and legal environment. Simply entering into BITs with interested home countries will not be sufficient to achieve real economic growth. For example, in Africa where FDI tends to be concentrated in extractive industries, many countries are extremely vulnerable to rises and falls in commodity prices, thus leading to extreme fluctuations in FDI inflows and outflows.[24] If systemic problems in the underlying economic and legal framework are not addressed by the host

22. *Id.* at 504–06.

23. *Id.* at 515.

24. Johnson, *supra* note 1, at 920.

country, it may continue to be vulnerable to boom and bust cycles, thus making sustainable economic development all the more illusory.

Entering into a BIT may be viewed as an opportunity to create a new or revitalized investment regime by the host country. The foreign investor should also view this opportunity as one in which to partner with the host country in initiating systemic and sustainable change. However, there is a broader opportunity that seems to be missing from this equation. While BITs are ostensibly entered into by host countries in order to source new avenues of FDI to promote economic development and encourage capital growth, BITs are generally not explicitly tied to overall development objectives of the host country. Of course, the host country in question must also define its development objectives as a political prerogative—this is something that no other country or multilateral institution can do for it.

> However, because BITs and the whole discourse surrounding them have become focused on foreign investment, they tend to ignore important domestic considerations to the detriment of home and host countries alike. While there exists a healthy debate over the value of BITs to developing countries, most studies—both by supporters who argue that BITs positively impact FDI, and detractors, who claim that they do not—center on foreign investment alone. . . . [It is argued] that BITs that ignore important domestic issues forego real opportunities to promote a host country's sustainable economic development.[25]

By moving away from a foreign investor-centered debate and moving toward a host country-centered discussion, it may be more advantageous for both home and host countries to become true partners in development, and create overall sustainable investment and trade opportunities into the future. Although BITs are not now specifically designed to support host country development objectives, BITs may be reengineered to do so in the future. In fact, there is already evidence that a movement in this direction is already taking place.

B. Reengineering BITs in the Future to Support Development Goals

Changing the nature of BITs and the underlying motivation for entering into one is an uphill battle. BITs, as a positivist instrument of economic liberalism, implicitly resist the idea of imposing government controls, restrictions, or performance-based criteria that modifies or interferes with free market choices. The protection of international investments and investors will remain a paramount consideration; however,

25. *Id.* at 929.

a more nuanced approach has been adopted fairly recently that changes the parameters of BITs in significant ways. These changes may ultimately support development objectives that could be shared by the home and the host country alike.

Norway's former draft model BIT[26] provides an illustrative example of a new emerging trend in more effectively balancing investor rights with state rights to both regulate and protect human health, safety, international labor rights, and the environment. In June 2009, Norway shelved its consideration of a new draft model BIT proposed in December 2007, and released for public comment on December 19, 2007. Nevertheless, certain of its provisions dealing with corporate social responsibility, human rights, and sustainable development are very useful in this context.[27] The Preamble reaffirmed Norway's commitment to democracy, the rule of law, human rights, and fundamental freedoms in accordance with their duties under the United Nations Charter and the Universal Declaration of Human Rights.[28] It also notes the support of the signatory parties to both prevent and fight corruption, including bribery in international trade and investment.[29]

Article 24 of the model draft BIT (and now abandoned) states in essence that nothing in the BIT shall prevent the Parties from adopting or enforcing measures to protect the environment, support human rights, control corruption, and support sustainable development generally.[30] This model BIT takes into account the needs of both developed and developing countries, including the fair consideration of measures that protect the host country.

Article 32 supports corporate social responsibility by specifically encouraging Norwegian investors to "conduct their investment activities in compliance with the OECD Guidelines for Multinational Enterprises and to participate in the United Nations Global Compact."[31] While Norway's draft

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26. Damon Vis-Dunbar, *Norway Shelves its Draft Model Bilateral Investment Treaty*, INVESTMENT TREATY NEWS (June 8, 2009), *available at* http://www.iisd.org/itn/2009/06/08/norway-shelves-its-proposed-model-bilateral-investment-treaty/ (last visited Dec. 11, 2010).

27. *Id.*

28. American Society of International Law, *International Law In Brief: Draft Model Norwegian Bilateral Investment Treaty* (Dec. 19, 2007), *available at* http://www.asil.org/ilib080421.cfm (last visited Dec. 11, 2010).

29. *Id.*

30. Agreement Between the Kingdom of Norway and [. . .] for the Promotion and Protection of Investment (Draft Version 191207), art. 24, *available at* http://www.asil.org/ilib080421.cfm (follow "Click here" hyperlink below Treaties, Agreements, and Related Documents) (last visited Mar. 24, 2011).

31. *Id.* art. 32.

model BIT was abandoned due to stakeholder concerns voiced by Non-Government Organizations and private businesses who felt that the model BIT did not include sufficient protections for investors, it can be argued that it was a step in the right direction.

Indeed, the 2004 U.S. draft model BIT demonstrates a promising new direction. The Department of State and the Office of the United States Trade Representative (USTR) were the lead agencies in an interagency effort to update the U.S. model bilateral investment treaty.[32] Article 10 of the model treaty sets forth new provisions on transparency that provide, in essence, that each party designate contact points, and that it notify the other party of any contemplated changes that may affect the operation of the BIT, and that it publish in advance any such measures, and provide the other party a reasonable amount of time in which to comment on such proposed changes.[33]

Further, Article 12(2) provides that:

> Nothing in this Treaty shall be construed to prevent a Party from adopting, maintaining, or enforcing any measure otherwise consistent with this Treaty that it considers appropriate to ensure that investment activity in its territory is undertaken in a manner sensitive to environmental concerns.[34]

Similarly, Article 13(1) provides that:

> The Parties recognize that it is inappropriate to encourage investment by weakening or reducing the protections afforded in domestic labor laws. Accordingly, each Party shall strive to ensure that it does not waive or otherwise derogate from, or offer to waive or otherwise derogate from, such laws in a manner that weakens or reduces adherence to the internationally recognized labor rights. . . .[35]

While the 2004 U.S. draft model BIT may lack the breadth of the 2007 Norway model BIT, there is a strong recognition that BITs are now a two-

32. U.S. State Department Press Statement, *Update of U.S. Model Bilateral Investment Treaty ("BIT")*, BILATERALS.ORG (Feb. 5, 2004), http://www.bilaterals.org/spip.php?article137 (last visited Dec. 11, 2010).

33. Treaty Between the Government of the United States of America and the Government of [Country] Concerning the Encouragement and Reciprocal Protection of Investment, art. 10, 2004 Model BIT, http://ustraderep.gov/assets/Trade_Sectors/Investment/Model_BIT/asset_upload_file847_6897.pdf (last visited Dec. 14, 2010).

34. *Id.* art. 12.

35. *Id.* art. 13.

way street, and that the parties' reciprocal legal obligations include being cognizant of the environmental and social needs of the host country. Thus, BITs can and have been reengineered to support development objectives of the host country, and should be viewed as a dynamic and powerful bilateral instrument in furthering those goals as mutually reinforcing obligations of the parties.

C. Sovereign Wealth Funds as a Co-Vehicle to Support a Development Agenda

The above discussion explained how BITs constitute a part of a liberal economic regime that essentially curtails the power of the host state to interfere with or impede private contractual and property relations. However, this view of the state, previously characterized as a view from without (*i.e.*, a view of an advanced investor nation looking at a host country), may not be shared in principle by emerging countries. The view from within, so to speak, may be based on a widely different set of philosophic assumptions.

For example, restraining the power of the state in protecting the rights of the individual may be a viewpoint that is not necessarily shared by the host state. Instead, the state may be viewed as the fountainhead of all rights enjoyed by individuals.[36] In other words, a liberal economic regime may not necessarily be the desired outcome of establishing a new investment climate from the perspective of an emerging economy—it may simply be the by-product of it.[37]

While BITs create part of the legal framework governing the inflow of FDI into a host country, SWFs are one means by which outflows of FDI are made by the host country.[38] SWFs are a state-owned investment fund

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36. For a fuller discussion of the philosophic underpinnings of emerging countries, *see* RUMU SARKAR, INTERNATIONAL DEVELOPMENT LAW: RULE OF LAW, HUMAN RIGHTS & GLOBAL FINANCE 33–73 (Oxford Univ. Press, 2009).

37. Kenneth Vandevelde states rather empathically that:

> [L]iberalization may not be essential to economic development. The recent history with planned economies and import substitutions development policies suggests, however, that states that choose an illiberal path have encountered enormous difficulties with economic development beyond a certain point. In short, states seeking to develop economically may have little alternative as a practical matter but to embrace the kinds of policies that a BIT requires.

Vandevelde, *supra* note 4, at 526.

38. UNCTAD reports that SWFs invested USD $10.5 billion or 27% of their total FDI in developing countries, mainly in Asia, with limited investments in Africa and Latin America. Over the past two decades, SWFs have invested 73% of their assets in developed countries, principally in the form of Foreign Portfolio Investment (FPI) in the financial services sector of developed countries. Press

composed of financial assets such as, stocks, bonds, real estate, or other financial instruments funded by foreign exchange assets. These assets may include a balance of payments surpluses, fiscal surpluses, and/or receipts resulting from commodity exports.[39] While emerging countries with SWFs are a small subset of developing countries overall, they do include places such as Nigeria, Mauritania, Trinidad & Tobago, Indonesia, Vietnam, East Timor, and Botswana.[40]

SWFs often suffer from the same type of bias as BITs—they are not seen from the perspective of the originating country but from the perspective of advanced nations. This view is imbalanced insofar as it does not take into account the needs and objectives of the country originating the SWF. In some ways, BITs represent the viewpoint of advanced investor nations looking at emerging economies whereas SWFs represent the views of emerging countries looking at advanced nations. Perhaps both may be viewed as two sides of the same coin.

Ian Bremmer argues provocatively that, "the free-market tide has now receded. In its place has come state capitalism, a system in which the state functions as the leading economic actor and uses markets primarily for political gain."[41] This may not be strictly the case since most SWFs are generally composed of excess foreign currency reserves that are designed to hedge against extreme volatility in foreign exchange and commodities markets, to provide for liquidity in times of capital constraints faced by emerging economies without having to resort to the International Monetary Fund for immediate cash infusions, and to create a diversified portfolio of assets for use by future generations.[42]

Release, United Nations Conference on Trade and Development, Sovereign Wealth Funds Beginning to Play Major Role in Foreign Direct Investment through Mergers and Acquisitions, UNCTAD/PRESS/PR/2008/037/Rev.1 (Sept. 24, 2008), *available at* http://www.unctad.org/templates/webflyer.asp?docid=10478&intItemID=4697&lang=1 (last visited on Apr. 1, 2011). For a discussion distinguishing FDI from FPI, *see* Levin Institute, State University of New York, What are the Different Kinds of Foreign Investment? (2010), http://www.globalization101.org/index.php?file=issue&pass1=subs&id=55 (last visited on Apr. 1, 2011).

39. Rumu Sarkar, *Sovereign Wealth Funds as a Development Tool for ASEAN Nations: From Social Wealth to Social Responsibility*, 41 GEO. J. INT'L L. 621, 622 (2010).

40. Sovereign Wealth Fund Institute, *Sovereign Wealth Fund Rankings*, http://www.swfinstitute.org/fund-rankings/ (last visited Dec. 11, 2010).

41. Ian Bremmer, *State Capitalism Comes of Age: The End of the Free Market?*, 2 (Foreign Affairs, Essay, May/June 2009), *available at* http://www.panzertruppen.org/2010/economia/mh002.pdf (last visited Dec.11, 2010).

42. Sarkar, *supra* note 39, at 625; *see also* Efram Chalamish, *OECD Global Forum on International Investment: Protectionism and Sovereign Investment Post Global Recession*, 3 (Dec. 7–8, 2009), *available at* http://www.oecd.org/dataoecd/31/22/44231385.pdf (last visited Dec. 11, 2010). In fact:

Bremmer also states that:

> A third wave of state capitalism was marked by the rise of SWFs, which by 2005 had begun to challenge Western dominance of global capital flows. These capital reserves were generated by the huge increase in exports from emerging market countries. . . . A fourth wave of state capitalism has now arrived, hastened by the recent global economic slowdown. But this time, the governments of the world's wealthiest countries, and not just those of emerging-market countries, are the ones intervening in their economies. In the United States, lawmakers have intervened in the economy despite the public's historic mistrust of government and its faith in private enterprise. Australia, Japan, and other free-market heavyweights have followed suit.[43]

This argument may point to an implicit tension between the philosophies underlying the market capitalism approach of BITs and the state capitalist oriented approach of SWFs. Whereas BITs are designed to protect foreign investors' interest, SWFs are designed to maximize foreign investments made by emerging countries.

As Efram Chalamish explains:

> It is important to note that SWFs have been criticized by their own home states as well for being over-diversified and investing extensively in the West, especially in Western financial institutions. Most of these financial investments have generated significant losses during the 2008 financial crisis to many SWFs and, indirectly, to the governments of their home countries. Many of these investments are perceived as outside of the core investment strategy of most SWFs and many local conservative voices have called for investing conservatively and mainly in the geographical region of the respective fund.[44]

> [d]uring the financial crisis, France launched a Euro 20 billion SWF in 2009 with the ostensible aim of protecting national strategic companies from 'foreign predators'—the very accusation leveled at sovereign funds from Asia and the Middle East. This is despite the fact that the objective condition for establishing a SWF—higher current account surpluses and strong basic commodity exports—are missing in France.

Kalvajit Singh, *Fixing Global Finance: A Developing Country Perspective on Global Financial Reforms*, 47 (2010), *available at* http://www.madhyam.org.in/admin/tender/FGF2510.pdf (last visited Dec. 15, 2010).

43. Bremmer, *supra* note 41, at 6.

44. Chalamish, *supra* note 42, at 4.

While the scope, impact, and political implications of SWFs fall outside the scope of this critical essay, FDI flows, both inflows regulated by BITs and outflows of FDI made *vis-à-vis* SWFs may be used to support development objectives. In other words, the FDI invested through BITs, and the profits generated by portfolio earnings of SWFs, may both be used to support development goals of the emerging country. This approach may be viewed as an opportunity to create a development-based "virtuous cycle."

Specifically, a percentage of SWF-generated profits or dividends could be set aside to support pre-defined and well-defined development objectives in the host country. Such public expenditures of profits could go to support physical infrastructure in terms of roads, airports, seaports, telecommunications, as well as social infrastructure in terms of schools, hospitals, and social welfare programs. In other words, a small percentage of the profits generated by SWFs may be used to dovetail with and financially bolster FDI-supported projects in the host country. This dynamic should both encourage the free flow of cross-border capital and create legal conditions for investor neutrality. This mutuality of obligation among the parties, including foreign investors, may actually help deepen and strengthen global capital markets.

Additionally, new BITs are constantly being negotiated and executed, and may be re-tooled along the lines discussed above to reflect the new development-based priorities of the host country. This undertaking should, in principle, be supported by the home country (foreign investor) with the long-term perspective of creating better and more stable global trade and capital markets. Thus, both BITs and SWFs may be seen as co-vehicles for supporting the development objectives of the host country, despite their different philosophic underpinnings. It is also a means for an emerging country to avoid the vicious circle of "boom and bust" foreign exchange earnings and expenditures, and move toward the "virtuous cycle" of creating development-based opportunities and sustainable economic growth.

III. CONCLUSION

In sum, policy coordination between FDI inflows and outflows, viewed from the perspective and needs of emerging countries, may better support development objectives, facilitate more efficient cross-border investment flows, and create a stronger global foreign investment regime in the future.