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IIA Insighter

A Parliamentarian's Guide to international investment agreements and their implications for domestic policy-making

Why Elected Officials Need to Pay Attention to International Investment Agreements

According to UN figures, foreign direct investment (FDI) flows topped $1.2 Trillion (US) in 2006, a remarkable 34% increase from the previous year. As companies expand beyond their own borders they must reckon with new languages, new cultures and new ways of doing business. Increasingly, they must also reckon with a growing universe of international agreements which set the rules for where investors may invest and what host governments may (and may not) do to such foreign investors.

In sharp contrast with world trade, much of which falls under the rubric of the World Trade Organization, foreign direct investment is governed by a baffling number of bilateral and regional agreements. Many of these agreements are negotiated with far less scrutiny or public debate than your typical trade agreement, but the consequences—for the governments which sign them—can be as momentous as the impacts from any trade agreements.

Many investment agreements are negotiated with far less scrutiny or public debate than your typical trade agreement, but the consequences—for the governments which sign them—can be as momentous

Just ask the Czech Republic.

In the late 1990s, a Dutch broadcasting company became embroiled in a dispute with Czech media regulators. The Dutch firm filed an arbitration against the Czech Republic under the terms of an obscure investment protection treaty signed by the Netherlands and the Czech Republic. When the dust cleared on this dispute, the Czech Republic was found to have violated its treaty obligations to protect Dutch investors, and was obliged to pay more than $350 Million (US) in compensation.

Thanks to this unfavourable ruling, the Czech public sector deficit nearly doubled. The Czech Parliament launched an inquiry to investigate the government's handling of the dispute with the Dutch broadcaster and to understand how these treaties impact upon domestic sovereignty. They found that the Czech Republic had quietly signed dozens of international treaties with foreign governments—all of which obliged the country to give higher levels of legal protection for foreign investors than was available under domestic law. These treaties were concluded with negligible political or public debate, and permitted foreign investors to exit the Czech Republic's court system to pursue their disputes before international arbitration panels. Recently, the country's Finance Ministry signaled that it might need to alter the terms of these agreements so as to reduce the country's vulnerability to certain types of lawsuits from foreign investors.

While not all governments have had such an expensive wake-up call, many are realizing that international investment agreements (IIAs) can reach well behind national borders, impacting upon how government bodies and agencies interact with foreign investors. While proponents of these agreements point to their usefulness in curbing arbitrary or capricious abuses against foreign investors, critics have warned that the treaties may undermine legitimate regulation and oversight by governments. At other times, the treaties might impose excessively high standards which are difficult for government officials and administrative agencies to live up to in practice—thus opening governments to lawsuits and demands for financial compensation from unhappy foreign investors.

What all sides can agree upon is that these long-ignored international agreements have

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Why Elected Officials Need to Pay Attention to International Investment Agreements

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teeth. As one arbitration tribunal cautioned in a recent legal ruling:

"Bilateral investment treaties are not mere statements of good will or declarations of benevolent intent toward the investors and investments of the two countries concerned. They are international legal instruments by which sovereign states make firm commitments under international law concerning the treatment they will accord to investors and investment from the other state."

Some investment agreements may oblige governments to open particular sectors or industries to foreign investment; and virtually all of these agreements set high legal standards which can be enforced by binding arbitration at the behest of foreign investors. Disputes arising under these agreements may relate to actions taken by state agencies, regulatory bodies, national or sub-national legislatures, and even the courts of the host country. Several high-profile disputes have obliged arbitrators to draw the line between legitimate regulation—in spheres such as health or environment—and illegitimate interferences against foreign investors.

It is incumbent upon parliamentarians to understand the commitments which their countries have made—often without extensive parliamentary consultation or oversight.

As foreign investors awaken to the rights and privileges granted by this network of international agreements, it is incumbent upon parliamentarians to understand the commitments which their countries have made—often without any parliamentary consultation or oversight. The publication you are reading has been designed by the International Institute for Sustainable Development to raise awareness about international investment agreements and their potential impact upon the actions of governments at the national and sub-national levels.

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Beginner's Guide to International Investment Agreements (IIAs)

International agreements which set rules for foreign direct investment flows tend to fall into one of two categories, purpose-built bilateral investment treaties (BITs) and more comprehensive preferential trade and investment agreements (PTIAs). BITs are far more common, with over 2500 such agreements in existence. These treaties are narrowly-tailored to provide a specific list of international law protections to foreign investments. By contrast, PTIAs, such as the North American Free Trade Agreement (NAFTA), cover a much wider range of issues, including trade in goods, intellectual property rights protection, liberalization of government procurement, and financial services. With the recent setbacks to the Doha Round of trade negotiations at the World Trade Organization (WTO), many governments are laying increasing emphasis upon negotiating comprehensive PTIAs on a bilateral or regional basis. For its part, certain of the WTO's agreements also cover certain aspects of investment; most notably, the General Agreement on Trade in Services (GATS) applies to cross-border investments in the services sectors.

Leaving the WTO agreements to one side, investment protection provisions contained in narrow BITs or wider PTIAs typically encompass a core of standard protections:

- *Non-Discrimination:* Governments agree not to discriminate against foreign investors or foreign investments, and to accord treatment that is equivalent to the treatment provided to domestic investors/investments, or investors/investments hailing from third countries.
- *Expropriation/Nationalization:* Governments set the terms whereby they may expropriate or nationalize foreign investments; typically, full

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News in Brief

(from Investment Treaty News)

http://www.iisd.org/investment/itn

South Africa hit by investment treaty lawsuit over racial advancement policies

The South African Government finds itself in the cross-hairs of an international lawsuit launched by a group of European mining companies. The companies take issue with elements of South Africa's Black Economic Empowerment policies (BEE) – including requirements to hire black or historically disadvantaged employees and to sell equity holdings to BEE shareholders.

The lawsuit has come as a surprise to many in South Africa, because it will proceed under investment treaties signed by South Africa with European Governments in the immediate post-Apartheid period. These treaties were designed to prevent nationalization of foreign investments, however the claimants in the recent lawsuit insist that the treaties also limit the range of government regulations which may be imposed upon foreign investors, including in relation to BEE.

A panel of three arbitrators is being convened to hear the dispute. At present, it remains unknown whether the companies and the government will jointly agree to allow the hearings to be opened to the public and the media. Most investment treaties permit either party to a dispute to veto any effort to open the arbitration proceedings to greater publicity.

Calls for parliamentary debate on US-Malaysia negotiations, as social policies to promote indigenous Malays remain contentious

As the South Africa Government finds itself defending a lawsuit from foreign investors over its Black Economic Empowerment policies, Malaysia continues to resist pressure from the US Government to dismantle its own preferences for ethnic Malays.

Since the 1970s, Malaysia has used affirmative action policies and preferential procurement and corporate ownership policies in an effort to boost the economic prospects of ethnic Malays and other indigenous peoples. Recently, these policies have come under fire as Malaysia and the US negotiate a free trade and investment agreement.

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Beginner's Guide to International Investment Agreements (IIAs)

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market-value compensation will be paid in such cases.

- *Free Transfers:* The ability to transfer money into and out of a country can be crucial to foreign investors, at the same time as governments will want to monitor such flows for balance of payments or other reasons. Investment agreements typically provide for the free transfer of funds related to foreign investments, and may or may not stipulate when governments may justifiably interfere with such transfers.
- *Minimum Standards of Treatment:* Governments may pledge to provide "protection and security" to foreign investments, or to treat them "fairly and equitably". Considerable debate exists as to what sort of concrete treatment is demanded by such promises.
- *Dispute Settlement:* The majority of investment agreements allow foreign investors to mount an international arbitration in case of dispute with their host government. Arbitral tribunals may be empowered to find the host country in breach of their international commitments, and award financial compensation to the affected investor.

A major concern with investment agreements is that they may fail to preserve sufficient latitude for governments to take measures to protect environment, health or, even at times, national security.

It is rare that bilateral investment agreements will oblige governments to open up previously-closed sectors or industries to foreign ownership or participation; instead they give assurances and legal undertakings to those foreigners investing in sectors of the host economy which are already open to foreign investment. By contrast, PTIAs often include market access provisions which liberalize sectors of an economy to foreign investors. The important distinction, thus, is whether agreements provide foreigners with the right to "establish" new investments in another country.

A major concern with investment agreements is that most do not provide meaningful exceptions to the above obligations, and therefore may fail to preserve sufficient latitude for governments to take measures to protect environment, health or, even at times, national security. However, the true implications of a given international agreement are difficult to define in the abstract.

Friction between these treaty undertakings and domestic policies can give rise to disputes which may be resolved outside of the domestic courts of the host country.

Friction between these treaty undertakings and domestic policies can give rise to disputes which may be resolved outside of the domestic courts of the host country. International arbitrations between foreign investors and their host governments are increasing in number, and these disputes are attracting the attention of academics, NGOs and politicians as government policies—in areas as diverse as taxation, health, environment, and energy—are scrutinized by international arbitrators. Arbitrators are called to interpret the vague obligations in these treaties and to pass judgment on the conduct of host governments. This new type of international oversight demands that governments are attuned not only to these agreements, but their ongoing legal uses by foreign investors.

Resources for further reading

IISD, *Investment and Sustainable Development: A Guide to the Use and Potential of International Investment Agreements*, IISD, 2004, available on-line at: http://www.iisd.org/publications/pub.aspx?id=627

UNCTAD, *Developments in international investment agreements in 2005*, International Investment Agreements (IIA) MONITOR No. 2 (2006), (UNCTAD/WEB/ITE/IIA/2006/7), available on-line at: http://www.unctad.org/en/docs/webiteiia20067_en.pdf

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Calls for parliamentary debate on US-Malaysia negotiations, as social policies to promote indigenous Malays remain contentious

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US negotiators have pushed Malaysia to remove investment and procurement policies which favour local interests over US business interests, and to pledge not to reintroduce those policies in future.

The issue has been one of the most controversial in the wide-ranging US-Malaysia talks. Recently, negotiators missed a March 31st deadline for the conclusion of negotiations, meaning that any resulting agreement might not benefit from the "hands-off" review and approval which the US Congress has granted to other recent US Free Trade Agreements.

Meanwhile, a Malaysian parliamentarian, Datuk Markiman Kobiran (BN-Hulu Langat) has called upon Malaysian Government to table the US-Malaysia negotiation documents in the Malaysian parliament. Markiman is calling for a parliamentary debate and for broader efforts to inform ordinary Malaysians about the potential implications of a US-Malaysia economic pact.

American investor in Ukraine's radio sector sues over alleged treaty breaches

A US investor has filed notice against the Ukraine, alleging violations of an investment protection treaty in place between the United States and the Ukraine.

At the crux of the claim is a dispute with government regulators as to the handling of numerous broadcast licensing and trademark applications by Mr. Joseph Charles Lemire's Ukrainian-based commercial radio enterprises. Mr. Lemire also objects to the terms of a 2006 Broadcasting Law which obliges radio stations to play 50% Ukrainian music, and which forbids foreigners from being the "founder" of radio companies.

Legal observers note that the dispute could raise delicate questions about cultural and media policy, including whether foreign investors may claim damages for any losses arising out of a government's decision to impose domestic content rules in the broadcasting sector. The claim was registered at the International Centre for Settlement of Investment Disputes in Washington D.C. in December of 2006. An arbitration tribunal is now being set up to hear the dispute.

http://www.worldbank.org/icsid

When investors use the UN arbitration rules to sue governments: What parliamentarians need to know

Fiona Marshall*

*(Fiona Marshall is a Geneva-based consultant to IISD's Trade and Investment Program)

In July 2006, the United Nations Commission on International Trade Law (UNCITRAL) announced that it was to commence revision of its Arbitration Rules. The announcement marks the first revision of the UNCITRAL Arbitration Rules since their adoption in 1976. Given the Rules' broad public policy implications, IISD and other non-governmental organizations are following the revision process closely.

These UN-sponsored arbitration rules are being used in a growing number of international arbitrations brought by private business interests against sovereign governments.

These UN-sponsored arbitration rules are being used in a growing number of international arbitrations brought by private business interests against sovereign governments. Although typically confidential, such arbitrations frequently harbour significant policy and financial consequences for governments. Governments may face considerable damages claims if they adopt tax, land-planning, natural resources, labour, health and safety or various other laws that have a negative impact upon foreign investors. For this reason, parliamentarians are advised to take particular interest in the rules of procedure that govern such international legal proceedings.

As part of the revision of the UNCITRAL rules, fundamental issues—including whether the existence of these arbitration proceedings should be publicly disclosed and whether the hearings and documents should be open to the public, the media and elected representatives—are to be decided by governments, perhaps as soon as the next UNCITRAL meeting in September 2007.

UNCITRAL was established in 1966 with a mandate to further the progressive harmonization and unification of the law of international trade.iIt is composed of sixty member states each elected by the UN General Assembly for six-year terms.

The UNCITRAL Arbitration Rules are most commonly used to settle commercial disputes between private parties (e.g., regarding an alleged breach of contract or sales agreement). However, of more significance for parliamentarians is the increasing use of the Rules in arbitrations where a foreign investor is suing a sovereign government under a trade or investment agreement.

The lack of transparency surrounding many of these so-called investor-state lawsuits is problematic, as important public and financial interests may be at stake in such cases.

Currently, when an investor initiates arbitration proceedings against a government, the very existence of the proceedings may remain a secret to citizens and their elected representatives alike. Sometimes a single government department will handle the defence of the lawsuit, without disclosing the existence of the claim—or details of its policy and financial implications—to other parts of the government, much less parliamentarians. The proceedings themselves are conducted in-camera, and some foreign investors have sought orders preventing the government from freely discussing the case or disclosing documents even to its own citizens, thus thwarting governments seeking to uphold principles of transparency and public participation.

The striking lack of transparency surrounding investor-state arbitrations conducted under the UNCITRAL Rules has further implications for government policy-makers. Because the Rules prevent tribunal awards being published without the consent of both parties, many legal decisions are not in the public domain. Policy-makers thus cannot check whether a public policy measure similar to the one they wish to propose—e.g., a new tax or a new environmental regulation—has previously been challenged by an investor in a bilateral investment treaty arbitration, nor if it was, how the case was decided. Remarkably, governments may expose themselves to potential international lawsuits brought by foreign investors, without being able to fully apprise themselves of how earlier such lawsuits have been arbitrated and resolved.

Because investor-state arbitrations can have wide-ranging public implications, a third party such as a non-governmental organization may occasionally ask the tribunal to be allowed to submit a legal submission as a non-disputing party in the case. To the extent that the government conduct that the investor alleges to be wrongful was done in the interests of public welfare and sustainable development, non-disputing parties will often support the government's actions. However, the UNCITRAL Rules currently do not explicitly allow for the tribunal to hear submissions from non-disputing parties. IISD believes that the important public interests at stake in investor-state arbitrations means that the Rules should be revised to expressly allow non-disputing parties to be heard.

When an investor initiates arbitration against a government, the very existence of the proceedings may remain a secret to citizens and their elected representatives alike.

The body tasked with revising the UNCITRAL Rules, operates largely as a technical expert body with considerable input from prominent commercial lawyers. Government officials participating in the Working Group tend to be commercial specialists, rather than experts in public law. IISD believes that in light of the growing use of the UNCITRAL Rules in high-stakes investor-state arbitrations, governments should ensure that their delegations to this Working Group include public law specialists, particularly those well-versed in human rights and sustainable development. It is critically important

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When investors use the UN arbitration rules to sue governments: What parliamentarians need to know

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that in the future the Rules not be used to allow important legal and policy rulings to be made behind closed doors.

The UNCITRAL Working Group on Arbitration commenced its review of the first draft of the revised UNCITRAL rules in February 2007. At that time, several participants, including IISD, asked that the revised UNCITRAL Rules include provisions so as to ensure that, when governments are sued using these rules, the existence of such cases will be a matter of public record, and that the proceedings will be open to public scrutiny and participation. The UNCITRAL Working Group noted this concern but, so as not to hold up progress, agreed to revisit the issue once a review of the first draft text of the revised rules is completed—something which is likely to occur at the upcoming September 2007 session in Vienna.

Parliamentarians may wish to express their views on the importance of revising the UNCITRAL Rules in order to address the cloak of secrecy under which governments may be sued by foreign business interests.

The UNCITRAL Rules have not been revised since they were adopted more than thirty years ago and it is possible that it may be a similar period before they are revised again. Parliamentarians may wish to express their views on the importance of revising the UNCITRAL Rules in order to address the cloak of secrecy under which governments may be sued by foreign business interests. Concerned parliamentarians should contact the relevant ministry of their government as soon as possible. As both UNCITRAL member and non-member countries are entitled to fully participate in session of the Working Group, all governments interested to do so, may have a voice in this important process.

Further Reading:

IISD paper on UNCITRAL revisions: http://www.iisd.org/pdf/2007/investment_revising_uncitral_arbitration.pdf.

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European Parliamentarians divided on ACP-EU negotiations and place of investment rules

With a growing chorus of voices, European parliamentarians, developing country government officials, and civil society groups have expressed concern that a set of economic negotiations being spearheaded by the European Union's executive branch are headed down the wrong path.

The furor is related to a so-called Economic Partnership Agreement (EPA) between the EU and 75 of its former colonies in Africa, the Caribbean and the Pacific (ACP). For some time now, ACP governments have enjoyed preferential access to the EU market—owing to their historical relationship with Europe. However, this special treatment will come into conflict with WTO rules in 2008. As such, the EU and ACP governments have set an end-2007 deadline for the negotiation of a new economic agreement, one that could make greater demands on ACP governments to open up their markets to the EU.

With the WTO's Doha Trade Round mired in the mud, the EU-ACP negotiations are currently the most ambitious trade negotiations in the world. But, with the clock ticking before the current deal expires, negotiations over a new agreement are intensifying—as are the anxieties that the EU's former colonies could end up signing a deal that binds them to opening up their markets to EU investors.

Investment proves contentious

Among the concerns is that the EU is pushing for the new agreement to open up new markets for European investors—and to keep them legally propped over the long term—something which developing countries had earlier rejected as part of the multilateral trade negotiations at the World Trade Organization (WTO).

The European Commission, which negotiates on behalf of the EU, has been consistent in its position: opening up new sectors to foreign investment will be good for EU investors and the development prospects of poor countries.

"To attract investors you need clear rules; legal security and transparent frameworks," said Peter Mandelson, the EC's trade commissioner, in a speech to the European Parliament. "There is no question of forcing the ACP to accept rules they don't want. But it is vital to be clear-eyed about this."

Nonetheless, many ACP governments are wary about signing a deal which commits them to opening their markets to foreign investors—and which might hinder future policy changes or reversals.

Nonetheless, many ACP governments are wary about signing a deal which commits them to opening their markets to foreign investors—and which might hinder future policy changes or reversals.

While the Pacific and Caribbean groupings have been discussing investment within the EPA negotiations, the African group has outright rejected the possibility of negotiating new commitments on investment. A 2006 joint statement from African Union trade ministers meeting in Nairobi, Kenya affirmed this regional desire to keep investment off the table.

More generally, there is a sense amongst the ACP group that more study and analysis is needed before binding international rules should be agreed.

More study needed on impacts on developing countries?

The ACP is currently working on a comprehensive study of the potential costs and benefits connected with further liberalizing investment flows and guaranteeing standards of treatment, said an official with the Brussels-based ACP Secretariat, a body that coordinates negotiations with the EU. "We need to asses the economic impact."

At this stage, securing an agreement on financial support aimed at promoting investment is the primary goal for ACP countries, said this official.

For its part, the EC remains hopeful that some regional groups will agree to negotiate investment rules.

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European Parliamentarians divided on ACP-EU negotiations and place of investment rules

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In a proposal submitted to the Pacific Island countries, the EC has suggested a deal which would commit governments to open up economic sectors to EU investors. Each party to the agreement would list sectors in which they would grant the other parties "national treatment", i.e., the same standard of treatment as domestic investors are afforded when it comes to establishing or acquiring investments in that country.

On this so-called "positive list" approach to investment liberalization, governments list only those sectors which they will keep open to foreign investors; rather than a "negative list" which would see all sectors opened, save for those individual sectors which are excluded by name.

"I don't think (investment liberalization in an EPA) necessarily affects policy space in a major way because of all the exceptions that you can put into the agreement," says Dirk Willem te Velde of the Overseas Development Institute.

However, whether governments can strategically open or shield domestic industries depends on their domestic capacity to analyze the risks and benefits. And, as Mr. Willem points out, the African groupings have warned that they lack that capacity and expertise.

Although many developing countries are increasingly open to foreign investment—and indeed actively solicit foreign capital—a perceived danger of an EPA is that it would bind developing countries over the longer term, taking away some of their ability to change policy at a later juncture, either because of the changing priorities of a new government or lessons learned from experimenting with foreign investment in key strategic sectors.

Parliamentarians exert pressure

Parliamentarians, particularly in Europe, have played an increasingly vocal role in this debate over the pros and cons of including an investment chapter in an ACP-EU EPA.

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Who's Who: A guide to organizations and resources specializing in international investment agreements

Non-Governmental Organizations

IISD

A Canadian policy research institute, the IISD produces briefings and analysis on a range of trade and investment issues. The Institute has published a citizen's guide to investment agreements, a draft model investment agreement, and an ongoing reporting service on investment law and policy developments. IISD has advised governments on investment negotiations and was one of the first organizations to intervene as an *amicus curiae* in an investor-state arbitration.

http://www.iisd.org/investment

CIEL

A U.S.-headquartered non-governmental organization, the CIEL is an active participant in debates around the regulation of international trade and investment. The organization has published a range of briefing notes and research papers which examine the interplay between trade or investment agreements and environmental issues.

http://www.ciel.org

The South Centre

An intergovernmental organization based in Geneva, the South Centre was established as a think-tank for developing countries, so as to raise their capacity to deal with complex international trade and investment negotiations. Through its briefing papers and periodic workshops, the Centre educates and trains southern government officials.

http://www.southcentre.org

Forum on Democracy & Trade

The Forum is a network of U.S. public officials from state and local governments with an interest in how international trade and investment agreements impact upon domestic policymaking.

http://www.forumdemocracy.net/

Web Resources

Bilaterals.org

A Web-based collective opposed to the growth of bilateral and regional trade and investment agreements. The group's Web site aggregates news reports from around the world, offering a rich trove of media coverage of new and ongoing trade and investment negotiations

Investment Treaty Arbitration website

A Web site maintained by Prof. Andrew Newcombe of the University of Victoria, Canada, offers free access to any investment arbitration rulings which have entered the public domain.

http://ita.law.uvic.ca

Investmentclaims.com

A Web site offering free public access to investment arbitration rulings which are in the public domain; the site is managed by two practicing arbitration lawyers.

http://www.investmentclaims.com

Inter-Governmental Organizations

UNCTAD

The UN Conference on Trade and Development conducts research and analysis of international investment agreements, and publishes regular data on the growth of such agreements. Each year, UNCTAD publishes the World Investment Report which focuses on the impact of foreign investment on developing countries.

http://www.unctad.org

WTO

Although member-governments of the World Trade Organization rejected a proposal to negotiate a multilateral agreement on investment, certain WTO agreements do apply to certain foreign investments, most notably, the Agreement on Trade-Related Investment

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Who's Who **(continued from page 6)**

Measures (TRIMs) and the General Agreement on Trade in Services (GATS).

http://www.wto.ortg

OECD

A think-tank for developed economies, the Paris-based OECD conducts research on trade and investment issues, and has worked to develop further international rules governing foreign investment. The OECD's proposed Multilateral Agreement on Investment (MAI) came to particular public attention in the late 1990s when some governments and many non-governmental groups raised concerns about that agreement's potential implications for health, environment, education, culture and human rights.

http://www.oecd.org/investment

ICSID

The International Centre for Settlement of Investment Disputes is a World Bank agency dedicated to handling disputes between foreign investors and their host governments. The Centre administers arbitrations and conciliations, with the vast majority of its cases related to alleged violations by governments of international investment agreements.

http://www.worldbank.org/icsid

UNCITRAL

The signature arbitration rules of the United Nations Commission for International Trade Law offer a popular alternative to arbitration under the ICSID rules. Although the UNCITRAL has responsibility for drafting its arbitration rules, and revising them periodically, the body does not administer arbitrations in the manner of ICSID. As a consequence, usage of the UNCITRAL rules to resolve investment treaty disputes is a difficult phenomenon to measure.

http://www.uncitral.org

European Parliamentarians divided on ACP-EU negotiations and place of investment rules

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"The European Parliament's influence is often seen as marginal, but actually they have been quite outspoken," said Davina Makhan, who edits the ACP-EU-Trade.org newsletter.

A group of EU parliamentarians have castigated the EU's executive branch in a recent letter to the Financial Times newspaper. "The Commission has sought to widen the EPA agenda to cover negotiations on services, intellectual property and the "Singapore issues," such as competition policy and investment, and is pressing for EU interests in these areas. All ACP countries must have a clear right to choose whether to extend the negotiations beyond trade in goods: the additional issues must be taken off the table if ACP countries wish."

However, the politically diverse European Parliament is far from unified.

Astrid Lulling, Vice-Chairwoman of the ACP-EU joint parliamentary assembly says, "I think that (EU Trade Commissioner) Mandelson is right. Clear rules on investment would benefit the investment climate in ACP countries and attract foreign capital."

But not all of her colleagues share that view. "The European Parliament is divided," admits Ms. Lulling.

Ultimately, EU parliamentarians—and their national counterparts—hold considerable influence. Any international trade deal that included investment provisions would fall outside of the European Commission's exclusive area of legal competence. As such, any deal would require the majority assent of the European Parliament, as well as ratification by the national parliaments of European members.

Already parliamentarians from Europe and a range of developing countries have fired a shot across the bow of the European Commission. In a resolution adopted in November of 2006 by an ACP-EU joint parliamentary assembly, parliamentarians asked that the EC respect the position of those countries who do not want to negotiate investment rules.

However, there are few signals that parliamentarians in the ACP countries are fully aware of the risks and benefits of including investment provisions in an EPA. Indeed, one person who works for a non-governmental organization involved in raising the capacity of ACP parliamentarians notes that many are unaware of whether an EPA would even require parliamentary assent in their country.

How much time parliamentarians will have to bring themselves up to speed is uncertain. Pacific and Caribbean groupings have entered into negotiations with the EC on investment, while the other negotiating groups have not. Should these latter groups stand firm, negotiators are considering opting for an 'EPA lite'; that is, an agreement on trade in goods, but not investment and services. It is expected that the EC might then look to expand the EPA to include investment and services at a later date.

But doubts are growing as to whether an EPA lite is even feasible in the remaining time. If not, then there are several scenarios, says Christophe Bellmann of the International Center for Trade and Sustainable Development. These include allowing the ACP trade preferences to come to end without replacing them with an EPA, or asking WTO members to permit a time-extension.

Most likely, however, is that the European Union allows the deadline to pass and the trade preferences to exist illegally, said Mr. Bellmann. Although the EU would expose itself to a potential challenge by other WTO members, the WTO's dispute resolution mechanism is notoriously time consuming, giving the EU and ACP governments some time to come to an agreement. The EU would also gain some leverage in the negotiations, having put itself at risk in order to come to a deal. This, says Mr. Bellmann, is the most likely scenario.

In any case, pressure from the European Commission is expected to mount in the coming months, as the EC seeks to convince the skeptics that an Economic Partnership Agreement should impose specific legal obligations in relation to foreign investments in the ACP countries.

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Disputes Related to International Investment Agreements Raising Sensitive Issues

Public health regulation

In 1994, a Canadian parliamentary committee held hearings on a proposal to require plain (generic) packaging of cigarettes, as part of an overall tobacco-reduction strategy. In response, a former top US Government trade negotiator drafted a legal opinion on behalf of the Philip Morris and RJ Reynolds tobacco companies which stated that a plain-packaging measure would deprive owners of their entitlements under NAFTA and the WTO. Canadian officials were warned that US tobacco companies could invoke their rights under the investment chapter of NAFTA to sue for "massive compensation" as a result of the "expropriation" of their trademarks. The plain-packaging initiative was never followed through with by the Canadian Government.

Canadian officials were warned that US tobacco companies could invoke their rights under the investment chapter of NAFTA to sue for "massive compensation" if a plain packaging regulation expropriated their trademark.

Environmental Regulation

In 1996, the US-based Metalclad Corporation stirred controversy when it argued that the failure of Mexican authorities to issue the necessary permits for a hazardous waste facility had led to an expropriation of Metalclad's investment. To the consternation of environmental groups, a tribunal awarded the company some $16 Million (US) in 2000 after finding that Mexico had violated the investment protections in the North American Free Trade Agreement.

Of particular concern was the test used by the tribunal to determine if an expropriation had occurred contrary to the treaty; the arbitrators insisted that the purpose of the government interference was irrelevant (for example whether it pursued an important public interest such as environmental protection), and that the impact on the foreign investor was to be the main consideration.

While Metalclad case was still being heard, the Canadian firm Methanex announced plans to sue the United States over a California ban on the gasoline additive MTBE. Methanex produces methanol, a key ingredient in MTBE, and claimed upwards of $1 Billion (US) in damages under the investment provisions of the North American Free Trade Agreement.

In 2005, a tribunal rejected Methanex's claim, and held that the California measures were legitimate non-discriminatory government regulations, based on extensive scientific study, and could not be held to be have violated the investment protections contained in the North American Free Trade Agreement. The tribunal took a notably different approach than in the earlier Metalclad v. Mexico case; insisting that the purpose of a government measure was relevant to the determination of whether it amounted to an expropriation for which financial compensation must be paid.

However, there has been criticism of the Methanex outcome in some investor circles, including from individuals who sometimes are called upon to arbitrate investor-state disputes. On this view, the case was wrongly decided, and governments should not enjoy wide latitude to introduce public interest regulations unless they are willing to compensate affected foreign investors for the impact of those regulations.

Water Regulation

Following a short-lived stint running a newly privatized water services concession in the Bolivian town of Cochabamba, Aguas del Tunari (AdT) turned to arbitration in 2002 alleging that its investment had been expropriated as a result of citizen protests which drove the company out of the country. The dispute attracted widespread media notoriety, and was a public relations disaster for the US-based Bechtel Corporation, the majority owner of Aguas del Tunari. In early 2006, the government and AdT announced that they would abandon their arbitration, with neither side admitting wrongdoing.

Meanwhile, governments in other parts of Latin America and Africa are facing arbitrations brought by foreign investors in the water and sewage services sector. Indeed, a number of major privatizations of water services have since given rise to disputes over the actions of government regulatory agencies, leading to these cases being taken to international arbitration tribunals. Currently, more than half a dozen such arbitrations are quietly being arbitrated behind closed doors.

Insurance regulation

When a provincial government in Canada announced that it was exploring a public automotive insurance regime, to replace the highly unpopular and expensive patchwork of private insurers, financial services companies were vocal in opposing such proposals. The companies warned that such government initiatives would expropriate existing private insurance businesses contrary to investment treaty commitments of the Canadian Government.

Auto insurers might sue under international trade and investment agreements arguing that a public insurance scheme amounts to an expropriation of private insurance plans.

A Canadian law firm which prepared a legal brief for four eastern Canadian provinces, warned that foreign investors might argue that "the replacement of private automobile insurance with a public insurance system" amounts to an expropriation—provided that the public scheme deprived private operators of the use or expected economic benefit of their investments.