

# **Investment, Doha and the WTO**

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## INVESTMENT, DOHA AND THE WTO

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## 1. INTRODUCTION

The development of international investment agreements (IIAs) became a major public policy issue for the first time in 1997, when the OECD negotiations on a Multilateral Agreement on Investment (MAI) became public knowledge. Although negotiators claimed the then ongoing negotiations were not secret, it is also clear they received little publicity. Even other potentially affected government departments, environment ministries in particular, were unaware of the negotiation, and a timely attempt by the OECD Environment Committee to engage the negotiators was waved off.<sup>1</sup> Thus, when the “news” of these negotiations broke, or at least broke into the public consciousness, civil society groups and others became seriously concerned.

Fuelling the concerns were perceived abuses of the seemingly expansive investor rights and remedies found in the North American Free Trade Agreement (NAFTA), in its Chapter 11 on Investment. In two of the first uses of the Chapter 11 investor-state arbitration processes, environmental protection measures adopted by the federal government in Canada had been challenged. In one case the measure had been rolled back after the US investor commenced the challenge, and before a hearing on the merits of the case. In a second, the federal government’s denial of the complaint for over a month after it had been filed, and the secrecy that enveloped the investor-state arbitration process, both added fuel to the fire.<sup>2</sup> For environmental and other NGOs these cases were proof positive that the development of further investor rights agreements was a threat to the pursuit of environmental protection and to sustainable development. At the same time, perceived threats to culture and other social values from these agreements emerged across Europe and North America.

By 1998, the MAI negotiations were abandoned. Ministers at the OECD recognized the lack of social consensus needed for the attribution of expansive rights and remedies to foreign investors—rights that go beyond those of domestic investors. And the attribution of rights and binding legal remedies for foreign investors without commensurate legal responsibilities became a political liability.

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<sup>1</sup> In October, 1997, the Environment Division of the OECD Secretariat informally suggested a number of ideas for improving the environmental sensitivity of the MAI negotiations. These were rejected out-of-hand as an inappropriate intrusion of the Environment Division into the negotiations. See “What Would an MAI with High Environmental Content Look Like? OECD Internal Working Document, reprinted in Bridges, November 1997, No. 3

<sup>2</sup> The first cases was *Ethyl Corp. v. Canada*, was settled in July, 1997 after Canada lost an arbitral decision on the jurisdiction of the tribunal to hear the case. Canada withdrew the ban on a gasoline additive that Ethyl manufactured as part of the settlement, and paid Ethyl \$13MUS as part of the settlement. Two days later, the second case was filed, *S.D. Myers v. Canada*, arguing that a ban on the export of PCB wastes from Canada was a breach of a US investor’s rights. The filing of this case was kept hidden from the Canadian public for over a month until government officials were directly challenged about its existence. This case was subsequently lost by Canada under the arbitration process, but is now under review in a Canadian court. Both cases are summarized in Howard Mann, *Private Rights, Public Problems: A Guide to NAFTA’s controversial chapter on investor rights*, IISD/WWF-US, 2001. [www.iisd.org/trade/private\\_rights.htm](http://www.iisd.org/trade/private_rights.htm)

What has emerged since those days is much broader recognition of the true scope of the debate on IIAs. This scope now includes

- The purpose of IIAs;
- Their substantive content;
- The procedural and arbitral rules they embody; and
- The direction such agreements must take in the future.

At the same time, the public debate has also finally begun to identify and address the number of fora that are actively involved in the development of IIAs today. This includes bilateral negotiations that have yielded more than 2000 agreements since the 1950s, regional trade and economic integration negotiations such as NAFTA, Mercosur, the EU-ACP Cotonou Agreement, the Energy Charter Treaty, the proposed Free Trade Area of the Americas, and numerous bilateral trade agreements being negotiated with investment provisions. Following the Doha Ministerial meeting, the World Trade Organization (WTO), has again emerged as a potential negotiating body for an IIA.

This paper will focus on the prospects of a WTO investment agreement. However, it will do so by first informing the WTO-investment linkages with the experiences from other IIA negotiations and arbitrations.

## **2. INVESTMENT AND THE WTO: FROM THE URUGUAY ROUND TO THE DOHA MINISTERIAL STATEMENT**

Prior to the advent of the WTO, there were very limited connections between investment and trade law under the GATT. The original Havana Charter for an International Trade Organization did include some provisions on the treatment of foreign investment as part of a broader chapter on economic development. However, this part of the Charter never came into force. Although the GATT called for concluding bilateral agreements on investment as far back as 1955, it did not itself pursue more detailed investment negotiations until the Uruguay Round negotiations.

In the world trade context, special rules on investment first made an appearance through two agreements under the 1994 Agreement Establishing the World Trade Organization (the Uruguay Round results). These are the Agreement on Trade-Related Investment Measures (TRIMS) and the General Agreement on Trade in Services (GATS). The framework these create is limited, however, and shortly thereafter the prospect of expanding the WTO investment mandate was raised in the lead up to the first WTO Ministerial meeting, in Singapore in 1996. The results of Singapore saw further analysis of trade and investment linkages mandated through a Working Group on Investment and Trade (hereinafter, the Working Group), which continues to meet.<sup>3</sup>

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<sup>3</sup> Similar treatment was accorded trade facilitation, government procurement and competition policy – the so-called “Singapore Issues.”

With the collapse of the MAI negotiations, however, the pressure grew almost immediately for international investment negotiations to be taken up directly by the WTO. The thrust was to continue the broader economic integration process first initiated at the WTO with the inclusion of the Agreement on Trade Related Intellectual Property Rights (TRIPS). While the Working Group continued its study mandate, trade diplomats began the negotiators' dance over whether, and if so how, to include investment in any new negotiations. The eventual result was a purposefully ambiguous compromise in paragraphs 20-22 of the Doha Ministerial Statement (see Annex 2), which makes such negotiations conditional on an explicit consensus at the 2003 Cancun Ministerial Conference. Each of these stages of development of the WTO involvement with investment is briefly described below.

### ***2.1. The Existing WTO Obligations on Investment***

The two WTO Agreements that currently address investment are the TRIMs and the GATS, as noted above. The GATS incorporates rules on investment, but only in so far as it is necessary to address services that are provided by on-site investments, through a local presence (referred to as a "commercial presence" in the legal texts) in the foreign country. The TRIMs agreement, on the other hand, was intended as a first step towards a much more comprehensive agreement on investment.

This difference of approaches adopted in the GATS and TRIMs Agreements reflects differences in the relationship between investment rules and trade in services on the one hand, and trade in goods on the other. As trade in services often involves some form of investment, the investment rules of the GATS are there because they are needed.<sup>4</sup> The relationship between investment and trade in goods, however, is much more tenuous. Clearly foreign direct investment (FDI) and trade in goods are related: much FDI is undertaken to facilitate trade, or to replace trade. Yet the fact that they are related does not provide any clear conclusions: it means neither that trade and investment should be treated in essentially the same manner nor that investment negotiations must necessarily be conducted in the trade regime. Indeed, a simple assumption on either of these points would ignore the vastly different types of linkages between the local environment and ecosystem, labour, human welfare and human rights, and political, legal and administrative institutions that an investment into a community and country have, as compared to trade in a product. It has become increasingly obvious that investment agreements that fail to account for this full panoply of relationships run the risk of being inherently flawed from the beginning.

The word "investment" occurs but twice in the GATS: in Article XVI (on Market Access), in a provision prohibiting limitations, in sectors where market-access commitments are undertaken, on the participation of foreign capital in terms of aggregate foreign investment; and again in an annex on financial services. In other words, the investment provisions of the GATS are subsidiary to its service-trade liberalizing

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<sup>4</sup> This does not mean that the current negotiations on expanded GATS obligations is necessary or will necessarily yield a balanced result. The ongoing GATS negotiations are, however, somewhat beyond the scope of this paper.

provisions, and are designed to avoid hidden protectionism and to protect investments that are an integral part of services such as banking and transport. As such, it should be noted, these investment provisions are subject to Article XII (Restrictions to Safeguard the Balance of Payments) and Article XIV (General Exceptions), which have no equivalent in most investment agreements.

The investment implications of the GATS are largely derived from the key definition of Article I.2, which identifies the “modes” by which services can be supplied. Several of these imply a significant presence in the country where the service is provided, and provide the basic protections of the GATS to the investments that are an integral part of this presence. Consequently the investment provisions of GATS bear little or no resemblance to the provisions that are typically found in investment agreements and in the TRIMS agreement in particular.

The TRIMS Agreement is a fairly constrained document, resulting from the desire of some countries to go much further in the direction of a multilateral agreement on investment and the resistance of other countries to any agreement on investment within the framework of the WTO. It is not an independent agreement, such as GATS, or the Agreement on Trade-Related Intellectual Property Rights (TRIPS), but forms part of the GATT, like the Agreement on Agriculture. Its operative provisions are contained in a single sentence of Art 2.1: “Without prejudice to other rights and obligations under GATT 1994, no Member shall apply any TRIM that is inconsistent with the provisions of Article III or Article XI of GATT 1994.” These are, respectively, the provisions obliging states to provide national treatment for trade in goods, and the provisions prohibiting quantitative restrictions on imports or exports. The Agreement is notable for its lack of any reference to most-favoured nation treatment, and for the lack of a specific definition of either “investment” or “trade-related investment measure.” Rather, an Annex provides an illustrative list of TRIMS that are inconsistent with Article III or Article XI of the GATT. In the terminology of international investment agreements, the measures that are listed in the Annex are “performance requirements,” such as requirements that investors purchase inputs from domestic suppliers.

Based on these provisions, it has been argued that “investment is already in the WTO” and that the proposal to negotiate further on investment does not represent a major departure. However, if the proposed negotiations are to follow a more traditional model of investment agreements, as seen in the MAI negotiations, this argument is impossible to sustain in light of the limited provisions described above. Indeed, the limited investment provisions in the current WTO Agreements do not address the numerous issues that have proven controversial in other investment agreements such as the draft Multilateral Agreement on Investment (MAI) and NAFTA’s Chapter 11.

## ***2.2. The Singapore Ministerial Mandate and the Investment Working Group***

The Singapore Ministerial mandate initiated a process of expanded, more broadly based WTO work on the relationship between trade and investment. The Working Group could decide for itself what issues it deemed appropriate for discussion, and these might range

as widely as how investment replaces trade; how it may promote trade; investment and trade as supply chain issues; performance requirements issues, and so on.

At the time of the Singapore Ministerial, it proved impossible to go further than this on investment. Most developing countries were unready or unwilling to negotiate on new issues after the 1994 Marrakesh Agreement, pending full implementation of existing agreements. The inclusion of investment along with the other three “Singapore issues” (competition policy, government procurement and trade facilitation) for specific study and analysis became the compromise, without prejudice to any further decision on negotiations.

The scope of study was decided on the basis of a Working Group recommendation to the WTO General Council in 1998. The agenda developed at that time included the investment-trade relationship; implications for development and growth; various aspects of the economic relationship between investment and trade; a stocktaking and analysis of existing agreements regarding trade and investment (bilateral, regional, WTO provisions); and a set of miscellaneous issues that included analysis of the advantages and disadvantages of entering into bilateral, regional and multilateral rules on investment, including from a development perspective.

The 2001 Report of the Working Group on the fulfillment of this mandate shows precious little by way of solid results.<sup>5</sup> There was ample discussion, but little of it was directed at consensus building or at finding common approaches to issues raised. A key reason for this is obvious: there remained serious disagreement as to how far the WTO should go on investment issues, making forward-looking agreement on individual issues a risky proposition for those not wanting to see an active negotiating agenda for the WTO.

### ***2.3. The Doha Ministerial: A Mandate to Negotiate?***

Paragraphs 20-22 of the Doha Ministerial Statement are set out in Annex 2 of this paper. They constitute the bulk of the mandate for the WTO’s work on investment in the Doha Work Programme. Paragraph 15, on Services, references other negotiating mandates relating to the GATS, and paragraph 6 of the Decision on Implementation also includes some references to issues and decisions under TRIMS. However, only paragraphs 20-22 are considered in detail here, as they are the core of the Doha Work Programme investment mandate.

There are two critical questions: Does the Doha Ministerial contain a mandate to negotiate an investment agreement? If so, what is its intended scope?

The short answer to the first question is that Doha itself contains a conditional mandate to negotiate on investment, with the condition being agreement on the modalities of the negotiation at the next Ministerial meeting, now scheduled for Cancun, Mexico in

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<sup>5</sup> Report (2001) of the Working Group on The Relationship Between Trade and Investment to the General Council, WT/WGTI/5, 8 October 2001.

September, 2003. While paragraph 20 is unclear on this condition, it is confirmed by the subsequent statement of the Chair of the Doha negotiations.<sup>6</sup> What happens if there is no express consensus on modalities, and how this might impact other areas of negotiation, is not clear. What is clear is that there will be great pressure from the EU and the United States to keep investment on the agenda post-Cancun, and therefore to have an agreement on modalities.

The nature and scope of the modalities debate is, however, also unclear. All parties have agreed on one of the most salient modalities issue: the inclusion of pre-establishment rights only on a positive list basis. This is already set out in paragraph 22 of Doha. Paragraph 22 also specifies that the objective is “long-term cross-border investment,” presumably a phrase designed to exclude short-term portfolio investment. Other issues, such as scheduling which provisions should be negotiated first, would not normally become so contentious as to halt a negotiation where consensus on going forward truly exists. Two explanations therefore appear to arise now: first, there are other issues that impact the modalities debate, such as the modalities for the inclusion of post-establishment rights. And second, the modalities question may be providing cover for other substantive or strategic issues, including the continuing deep concern for entering into this negotiation by developing countries.

If a negotiation does go ahead based on the Doha mandate, what is its intended scope? In the absence of final agreement on modalities, this remains uncertain. But some guidance does arise from the range of issues addressed expressly in Doha and in the subsequent investment discussions in the Working Group.

What is most fundamental is that the negotiations, if they take place, will not be limited to trade-related issues as is the TRIMS Agreement. They will, rather, address a broader range of purely investment-related issues, as do the bilateral and regional investment agreements. This is evident on the face of Doha, para. 20: “Recognizing the case for a multilateral framework to secure transparent, stable and predictable conditions for long-term cross-border investment, particularly foreign direct investment, that will contribute to the expansion of trade...”

Two things may be noted here. One is the unrestricted nature of developing a multilateral framework to secure predictable investment conditions on a long-term basis. This is the most traditional of investment agreement purposes. The second is the Doha justification for negotiating such an agreement in the WTO: that it will contribute to the expansion of trade. The expansion of trade thus provides a justification for entering into an area that that will have much more profound impacts than those arising out of the trade-investment relationship addressed by the TRIMS Agreement. Indeed, as already noted, the impacts

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<sup>6</sup> The Ministerial Chairman stated: *Let me say that with respect to the reference to an ‘explicit consensus’ being needed, in these paragraphs, for a decision to be taken at the Fifth Session of the Ministerial Conference, my understanding is that, at that session, a decision would indeed need to be taken by explicit consensus, before negotiations on trade and investment and trade and competition policy, transparency in government procurement, and trade facilitation could proceed.* The full text is found at [http://www.wto.org/english/thewto\\_e/minist\\_e/min01\\_e/min01\\_chair\\_speaking\\_e.htm](http://www.wto.org/english/thewto_e/minist_e/min01_e/min01_chair_speaking_e.htm)



of foreign direct investment reach into literally every aspect of daily life in a host community and a host state. Identifying one small aspect of the relationship between investment and society as the justification for negotiating rules that will cover all aspects of it seems an inadequate explanation.

Paragraph 22 sets out several specific elements for inclusion in the negotiations, by way of reference to further work by the Working Group until the next Ministerial meeting. These include several classic elements of any IIA:

- Non-discrimination;
- Modalities for pre-establishment commitments based on a positive list approach;
- Exceptions and balance of payments safeguards; and
- Consultations and dispute settlement between members.

However, paragraph 22 adds elements not seen in most recent bilateral and regional agreements, consistent with the development linkages set out in Singapore. This includes development provisions as a specified element, and a broader requirement that the results “reflect in a balanced manner the interests of home and host countries, and take due account of the development policies and objectives of host governments as well as their right to regulate in the public interest.” Special considerations for least developed countries are also called for. Thus, paragraph 22 calls for a broader agenda than a traditional IIA to be reflected in any potential negotiation. What is absent, however, is any reference to the linkage of an IIA to sustainable development, as opposed to simply development.

Several WTO Members have responded to this broader range of issues, but views continue to diverge as to what a final agreement should look like.<sup>7</sup> In addition, new concepts have been added, though they may fit under the existing identified lists. In particular, a paper submitted by China, Cuba, India, Kenya, Pakistan and Zimbabwe in November 2002 raises a number of issues concerning corporate social responsibility and the conduct of transnational corporations.<sup>8</sup> This would seem to indicate that the negotiating field is not a closed one, but that new items may arise during the negotiating process. For example, while an investor-state dispute resolution mechanism is not included in the Doha Ministerial Statement, it might be brought forward during the actual negotiations. Other issues are being raised indirectly in the debate about implementation of TRIMs, where many of the same developing countries as well as Brazil argue for a very narrow interpretation of the Agreement.

In considering questions of scope, and more fundamental questions of the justification of the negotiations, it will be useful to first review the history and implications of the existing IIAs, a task to which the next section of this paper is devoted.

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<sup>7</sup> Over 40 written submissions are highlighted on the WTO’s website in the investment section.

<sup>8</sup> WT/WGTI/W/152, 19 November 2002

### 3. BILATERAL AND REGIONAL INTERNATIONAL AGREEMENTS ON INVESTMENT

Apart from the limited provisions of GATS and TRIMS, to the extent that global FDI is regulated at the international level it is under a patchwork of bilateral and regional agreements. On occasion, investment rules are embedded in the context of broader free-trade agreements (such as the NAFTA) or sectoral agreements (such as the Energy Charter Treaty), however the preponderance of international investment rules are contained in the more than 2100 existing bilateral investment treaties (BITs). This section will begin by looking at NAFTA's well-studied investment protection provisions, and then will turn to examine the experience of the BITs.

#### 3.1. *NAFTA's Chapter 11*

The best known case law to date comes from NAFTA's Chapter 11 on investor protection. Here we have the benefit of several years of careful analysis, and many submissions and rulings that have, one way or another, been made public<sup>9</sup>. As such, it is worth reviewing that experience as a special case of the issues raised by regional and bilateral investment agreements. The comments below begin with the dispute settlement process and then continue with the substance of NAFTA's Chapter 11.

NAFTA Chapter 11's dispute settlement mechanism allows for private parties (investors) to directly initiate arbitration with host states, in what is known as an investor-state dispute mechanism. This procedure contrasts to the process of trade law disputes, for example in the WTO, which are strictly state-to-state. Though it seems unlikely that the WTO negotiators will in the end utilize a process that involves non-state actors, it is worth reviewing the characteristics and flaws of the NAFTA dispute settlement system for its lessons about the essential characteristics of an ideal system.

Chapter 11 allows parties to arbitrate cases under any of three pre-existing arbitration mechanisms: the International Centre for the Settlement of Investment Disputes (ICSID), the ICSID Additional Facility, and the United Nations Commission for International Trade Law (UNCITRAL).

Until recently investment arbitration was considered to be a private commercial matter between two disputants, and it is towards this conception that the present institutions are still geared. However, the majority of the cases to date have had implications that go far beyond the commercial, to impact such public policy objectives as the environment, health and safety, in which more than the two disputants will share a legitimate interest.<sup>10</sup> The two Tribunals approached to date

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<sup>9</sup> For a detailed analysis of the NAFTA Chapter 11 cases as of March 2001, see Howard Mann, Private Rights, Public Problems: A Guide to NAFTA's Controversial Chapter on Investor Protection, supra, n. 2.

<sup>10</sup> See Howard Mann and Konrad von Moltke, "Protecting Investor Rights and the Public Good: Assessing NAFTA's Chapter 11." Background paper to the ILSD Tri-national policy workshops, Mexico City, March 13; Ottawa, March 18; Washington, April 11. Winnipeg: IISD, 2002. ([http://www.iisd.org/trade/ilsdworkshop/pdf/background\\_en.pdf](http://www.iisd.org/trade/ilsdworkshop/pdf/background_en.pdf))

on this question have agreed, one stating that “There is an undoubtedly public interest in this arbitration.”<sup>11</sup>

Rulings in such cases amount to a balancing of competing public policy objectives, with final results that impact on the public welfare. In one pending case, for example, the right of the investor to import its product must be balanced against the right of the public to limit its exposure to suspected carcinogens.<sup>12</sup> This type of balancing is done on a regular basis by a number of institutions in all three NAFTA Parties, including the judiciary and various governmental bodies. There is, however, a striking contrast in the attributes of these well-developed institutions and the commercial-model arbitration conducted under Chapter 11. The former are carefully constructed so as to operate with legitimacy, accountability and transparency; qualities that are – except for some transparency provisions in the case of ICSID – utterly lacking in the latter.

As to legitimacy, the Chapter 11 dispute process is lacking in several respects. First, the selection process has each litigant choosing one of the three arbitrators, and potentially collaborating on the choice of the third – a situation that invites biased choice. Second, and in a directly related vein, the arbitrating panelists themselves are not drawn from a permanent roster of arbitrators, but are generally drawn from the international commercial arbitration bar. This is especially the case for the third arbitrator selected as President of the panel. As a result, arbitrators can be deciding cases on one file, and arbitrating on behalf of clients in other files facing similar legal issues. Decisions they make as arbitrators may impact the positions of their own clients, or of colleagues in their firms or through other contacts. The point here is not that the arbitrators lack personal integrity, but rather that the system for selecting arbitrators is inherently flawed when issues of public and private rights are involved. The old maxim that justice must be blind is clearly not at play here.

As regards accountability, the investor-state dispute process allows only a very limited form of review, and the standard for review in such cases is much higher than that set for domestic appeals. In the end it is not an appeal process; the review cannot rule on simple errors of fact or law, or substitute a decision for the one made by the tribunal. The widely-acknowledged value of the WTO’s permanent Appellate Body in giving consistency and predictability to the process should be seen as instructive.

Moreover, both legitimacy and accountability are impossible where there is no transparency. On this score, even Chapter 11’s strongest supporters agree that change would be beneficial. As befits a purely commercial dispute mechanism, there is no provision for mandatory public access to the litigation documents. ICSID cases must at least be notified in a public registry available on the ICSID web site,<sup>13</sup> but UNCITRAL

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<sup>11</sup> *Methanex Corp. vs. the United States of America*. Decision of the Tribunal on Petitions from Third Persons to Intervene as “Amici Curiae,” 15 January 2001, Para. 49.

<sup>12</sup> *Crompton Corp. v. Canada*, Amended Notice of Intent to Submit a Claim to Arbitration, September 2002. The case concerns the use of lindane, a suspected carcinogen, in pesticides. Although the actual arbitration has not been fully commenced, Crompton continues to have discussions with the Canadian government under threat of the arbitration.

<sup>13</sup> <http://www.worldbank.org/icsid/cases/cases.htm>

lacks even this basic requirement. There is an obligation on the NAFTA Secretariat to keep a public register of notices of intent to arbitrate, but compliance with this obligation has been patchy at best.<sup>14</sup> However, there is no requirement to make public the actual notice of arbitration that formally commences the investor-state arbitration process.

While there is now much better access to the legal documents in Chapter 11 cases than was the case even two years ago (Canada and the US have begun posting rulings and submissions to their web sites, and Mexico has very recently released a number of Chapter 11 documents in cases against it), there is still no guarantee of such access, and ongoing Mexican cases remain less open than the Canadian and US cases are.<sup>15</sup> In addition, while there are instances where Tribunals have allowed for observers to the hearings, publication of tribunal minutes and “amicus curiae” submissions by non-parties, there is no requirement for any of these features of transparent and accountable judicial processes to be replicated in any other cases.<sup>16</sup>

It should be emphasized that these are not criticisms of the right to an investor-state process *per se*. The history of investment protection shows that it is probably best not left up to governments, who may respond only to bigger players, and whose decisions whether to proceed with any given claim will always be tied up in the politics of the moment.<sup>17</sup> But it is an indictment of an inadequate process for the balancing of private rights and public goods in the investment context. While a WTO system of investment dispute settlement would likely look much different from the NAFTA’s, it too would be called on to perform such a balancing, and therefore would need to respect the same necessary principles: transparency, accountability and legitimacy.

NAFTA’s substantive provisions also provide some lessons for negotiators of an investment agreement in the WTO. These provisions include:

- Compensation in the event of a direct or indirect expropriation (Article 1110)
- National treatment obligations (Article 1102)
- Most-favoured nation obligations (Article 1103)
- Prohibition of performance requirements (Article 1106)
- Obligations for minimum international standards of treatment (Article 1105)

The specifics of each of these provisions are examined in more detail below, but as background it is worth first elaborating on the *scope and coverage* of the obligations. The definitions of both investment and covered measures are broad. The measures

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<sup>14</sup> The NAFTA secretariat web site at <http://www.nafta-sec-alena.org/english/index.htm> has no such listing. The individual country sections of Canada, Mexico and the United States vary in their degree of information provided.

<sup>15</sup> Government web sites in Canada and the United States provide extensive documentation today. In addition, private sites carry different degrees of documentation. One of the more extensive is [www.naftalaw.org](http://www.naftalaw.org)

<sup>16</sup> In the *Methanex* and *UPS* cases the Tribunals have ruled that they have the authority to grant friends of the court standing, but in neither case has a final ruling on this issue been rendered.

<sup>17</sup> See Kenneth Vandavelde, *United States Investment Treaties: Policy and Practice*. Boston: Law and Taxation Publishers, 1992:23-25.

covered by Chapter 11 include “any law, regulation, procedure, requirement or practice.”<sup>18</sup> This includes most conceivable acts of government (at all levels from federal to municipal), from lawmaking to zoning codes, and even extending to cover the final actions of the courts. The reach of NAFTA Chapter 11 is underscored by the existence of one specific exception (covering Central Bank operations) and the absence of any general exceptions, such as apply under GATS, TRIMS, or most other sections of NAFTA.

Investment is also broadly defined, including anything from establishing an enterprise to a debt security or loan to an enterprise.<sup>19</sup> The breadth of the definition has also been extended by at least two rulings under Chapter 11 that have held that a company’s *market share* is an investment asset that can be protected.<sup>20</sup> In effect this approach has the potential to bring a wide range of *trade* measures under the purview of NAFTA’s *investment* law, as most trade measures will affect market share. This would greatly extend the reach of the provisions, and would grant more access to the direct investor-state process than was presumably intended by the drafters.

### ***Expropriation***

Article 1110 stipulates that any expropriation must be:

- a) For a public purpose
- b) Non-discriminatory (that is, not targeted at a specific company or nationality)
- c) In accordance with the due process of law; and
- d) Compensated by the expropriating government.

It also notes that its strictures cover both direct and indirect expropriation but, importantly, fails to define these terms. This is not so problematic with the former: direct expropriation is easy to identify, and there is a significant body of international law to guide arbitrators in addressing it. As well, international law governing investor protection long ago recognized the concept of creeping expropriation, whereby a series of individual acts might, when looked at together, deprive an investor of its property.

But indirect expropriation is much more difficult, and has become especially difficult as it relates to regulatory measures that limit what an investor may or may not do with its investment. Environmental and human health protection measures are especially susceptible to being considered “regulatory expropriation” under some views of the law. (We note here that this issue is addressed in the WTO context under the language of “the right to regulate”. This indicates the importance attached by states to this issue.)

The key question in the NAFTA context is this: if a NAFTA government measure is undertaken for a clear public welfare purpose (such as health and safety, environment, public morals or order, etc.), and is non-discriminatory, but has the effect of harming a NAFTA foreign investor, can that measure be held to be an indirect or regulatory

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<sup>18</sup> NAFTA, Article 201.

<sup>19</sup> NAFTA, Article 1139.

<sup>20</sup> S.D. Myers v. Canada, Partial Award, November 13, 2000, para. 232; Pope & Talbot v. Canada, Interim Award, June 2000, para. 96-98.

expropriation for which the government must pay compensation? The concern is obvious: most people would agree that taxpayers should not be paying investors to alter behaviour that is contrary to the public interest. A secondary concern is that regulators who are held liable for their impacts on investors will not regulate to the extent that they should (the *regulatory chill* argument).

To date, the tribunals that have considered the question have held that regulations can indeed constitute expropriation, though in most cases it has also been noted that this would not usually be the case. However, with one recent exception, neither in the rulings to date nor in the NAFTA text do we find any attempt to “carve out” *bona fide* public welfare regulations from the scope of a possible finding of expropriation. Rather, the focus tends more toward the degree of impact of a regulation on a business rather than a concept that *bona fide* regulations are not, by definition, expropriative measures.<sup>21</sup> The famous decision of the *Metalclad* tribunal, for example, ruled that “The Tribunal need not decide or consider the motivation or intent of the adoption of the Ecological Decree.”<sup>22</sup> The more recent decision in *Feldman v. Mexico* does take the approach that the first issue to consider is whether an act is a *bona fide* regulatory act or an expropriative act, and argues that if it is the former, then no issue of compensation even arises. It also makes clear the view that regulations may, validly under international investment law, deprive an investor of a significant or even all of its business if it falls within the non-expropriative act category.<sup>23</sup> This decision may mark a new direction in NAFTA cases, and a quite useful from a public policy perspective.

Given the concerns in the case law, which remain despite the Feldman decision, what might allay these concerns? First and most obvious: a clear statement that legitimate regulations cannot be held to constitute expropriation. Failing that, we might look for some delineation that would exempt *bona fide* public welfare regulations from Article 1110 and its equivalent provisions in other agreements. This could involve either defining the scope of such regulations or giving guidance as to their characteristics. And failing that, we might hope to see at least some signs that the Tribunals were considering the purpose of regulations, as opposed to simply looking at the extent to which they affected investors, as seen in the Feldman decision.

### ***National Treatment***

Article 1102 obliges Parties to “accord to investments of investors of another Party treatment that is no less favourable than that it accords, in like circumstances, to those of

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<sup>21</sup> These cases are summarized in Howard Mann and Julie Soloway, *Untangling the Expropriation and Regulation Relationship: Is There a Way Forward?*, report to the Ad Hoc Expert Group on Investment Rules, Department of Foreign Affairs and International Trade, Canada, <http://www.dfait-macsi.gc.ca/tna-nac/regulation-en.asp>. The most recent case to address this issue is *ADF Group v. United States of America*, Arb. No. ARB(AF)00-1, January 9, 2003.

<sup>22</sup> *Metalclad Corporation v. Mexico*, Case No. ARB(AF)97/1, August 30, 2000, para. 110.

<sup>23</sup> This is a very concise summary of key parts of *Marvin Feldman v. Mexico*, Case No. Arb(AF)99/1, ICSID, December 16, 2002, section H of the decision, paras. 89-153. This is the first NAFTA Chapter 11 case to extensively explore this issue and raise or rely upon the “carve out” approach, though it did not accept the notion of a full carve-out based only on the form of a measure as a regulation.

its own investors.” The main cause for concern here is the difficulty in determining whether circumstances are “like.” Clearly the text does not mean “identical,” but neither does it give any guidance on how to determine whether circumstances are sufficiently similar as to trigger this obligation.

For example, if several existing firms are already polluting to the maximum allowed in a certain ecosystem, would a refusal to permit a foreign investor to open another plant in the same area amount to a breach of national treatment? Certainly the foreign investor is not being treated as well as the existing domestic firms.

The rulings to date have been mixed, and have left us not much closer to an agreed understanding of how to determine like circumstances. In one earlier case, for example, processors of hazardous waste were found to be in like circumstances to resellers of hazardous waste, while in an analogous later case producers of cigarettes were found not to be in like circumstances to resellers of cigarettes.<sup>24</sup> Additionally, whether there can be legitimate policy reasons for distinguishing between domestic and foreign investors in some circumstances, or whether any distinction is automatically a breach of the non-discrimination requirement is also an important issue that is raised but not resolved in the cases.<sup>25</sup>

A second feature of NAFTA’s national treatment provisions is the extension of rules generally applied after an investment was made (“Post-establishment”) to applying national treatment to the making of an investment (“pre-establishment”). While NAFTA permitted exceptions to be made, and each party availed itself of this opportunity,<sup>26</sup> the general principle of the freedom of foreign NAFTA investors to make investments into the territory of another party is established here. This right to invest, while it was seen in a limited number of pre-NAFTA investment treaties, reached a new breadth in the NAFTA context. This approach to pre-establishment rights is intimately linked with the ability of governments to establish and implement domestic development strategies.

### ***Most-Favoured-Nation Treatment***

Article 1103 states that Parties shall accord to investors and investments of other Parties: “treatment no less favourable than it accords, in like circumstances, to investors of any other Party or of a non-Party ....” There is, of course, the same problem here as in Article 1102: what constitutes like circumstances? But another concern may turn out to be more significant.

Article 1103 may provide a way to import into NAFTA the most favourable treatment found in any of the bilateral treaties signed by the defendant in a Chapter 11 dispute.

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<sup>24</sup> See *S.D. Meyers v. Canada* for the first example, and *Feldman v. Mexico* for the second, strikingly analogous example.

<sup>25</sup> The most recent decision on this issue is again the *ADF Group v. United States*, case, *supra*. It does begin to suggest that policy elements can be a factor in determining whether foreign and domestic investors are in “like circumstances”, though does so by implication only. *Feldman*, however, does so quite directly, paras. 170-188.

<sup>26</sup> See Annex I of NAFTA for these exceptions.

That is, if a Party is obliged under NAFTA to provide a certain standard of protection, but a higher standard exists in a treaty signed by that Party with a non-NAFTA country, does the most-favoured nation obligation mean that the higher standard prevails? An example illustrates the power of this possibility. The US and Zaire (now the Democratic Republic of Congo) signed a bilateral investment treaty that could be argued as setting a very low threshold for finding regulatory expropriation, protecting against any measures that cause, “the impairment of [the investment’s] management, control or economic value.” Such a standard would arguably be unacceptable to the NAFTA Parties, and was arguably not part of the accord they thought they were signing.

Should this US-Zaire standard be accorded to Mexican and Canadian investors in the US by means of Chapter 11 MFN obligations? This possibility is more than speculative. At least one bilateral investment treaty dispute (*Maffezini vs. the Kingdom of Spain*<sup>27</sup>) has found in favour of such a use of a bilateral treaty’s MFN provisions, as it relates to procedural matters.<sup>28</sup> Similar Arguments have also been made in some NAFTA cases, but without conclusive rulings.<sup>29</sup>

This argument was considered in one of the cases—*Pope & Talbot*: “The Tribunal’s view is well known – the Commission’s interpretation would, because of Article 1103, ... produce the absurd result of relief denied under 1105 but restored under 1103.”<sup>30</sup> The Tribunal was suggesting here that the Commission’s interpretive statement produces an absurd result, *based on acceptance of the argument that, by reference to existing BITs, Article 1103 can “restore” the protections that the FTC’s interpretation has allegedly removed*. However, it did not actually make a definitive ruling on this point.

The above description points to the need to carefully consider the relationship between different treaties when they are drafted. If the inclusion of an MFN provision along the lines of Article 1103 of NAFTA results in the risk of a reading in of investor rights and remedies negotiated in another context, and the potential expansion of any rights, obligations and remedies negotiated in the WTO context, including possible pre-establishment rights, this would raise very significant concerns from both a legal and policy perspective.

### ***Performance Requirements***

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<sup>27</sup> ICSID Case No. ARB/97/7, Decision on Jurisdiction, 25 January 2000; 40 ILM 1129 (2001).

<sup>28</sup> The tribunal granted the investor procedural rights greater than those in the treaty under which the dispute arose. There is some uncertainty as to whether a similar ruling would have been rendered on *substantive* rights.

<sup>29</sup> See, e.g., *Pope & Talbot v. Canada*: “The Tribunal’s view is well known – the Commission’s interpretation would, because of Article 1103, ... produce the absurd result of relief denied under 1105 but restored under 1103.”<sup>29</sup> The Tribunal was suggesting here that the Commission’s interpretive statement produces an absurd result, *based on acceptance of the argument that, by reference to existing BITs, Article 1103 can “restore” the protections that the FTC’s interpretation has allegedly removed*. However, it did not actually make a definitive ruling on this point.

<sup>30</sup> Letter to the investor and defendant from The Hon. Lord Dervaird, Chair, *Pope & Talbot* Tribunal, dated Sept. 17 2001.



Article 1106 of NAFTA prohibits host countries imposing certain types of requirements on investors as a condition of entry and establishment. Among the requirements proscribed are demands to export a certain percentage of sales, demands to purchase locally for certain inputs and demands to transfer certain technologies to the host country.

The concerns that arise from this type of prohibition are twofold. First, many developing countries have expressed the view that this approach prohibits them from adopting the very types of tools that developed countries have used to promote their own development.<sup>31</sup> Thus, a direct relationship with setting and implementing domestic development goals and strategies is implicated by performance requirement prohibitions.

Second, there is a connection to certain types of regulatory measures. It has been argued in several cases now (though no ruling has yet been issued) that an import ban constitutes a performance requirement by forcing an investor to use only domestic sourced materials in its production processes or services. This was part of the claim in the Ethyl Corp. v. Canada claim that Canada settled out of court. It is now part of the claim against Canada in the Crompton v. Canada case, where Canada banned the import of lindane-based seed treatments for canola on environment and health grounds. Crompton US, the manufacturer, plans to argue that the ban forces its Canadian subsidiary to buy local substitutes, and thus is in effect a local purchasing requirement.<sup>32</sup> This approach was also part of the ADF claim against the United States. In that case, no ruling on whether such an import prohibition constituted a breach of Chapter 11 was made as the prohibition was made under a law that was exempted from the Chapter 11 obligations.<sup>33</sup> (Under a special provision, each NAFTA party has a list of exemptions in Annex I of NAFTA.)

It is clear that Article 1106 on performance requirements was not intended to provide a remedy for public protection measures that limit imports or exports. However, this issue continues to arise in various cases. It is equally clear that prohibitions on performance requirements are intended to curtail the same types of development policies used by western countries over the entire 20<sup>th</sup> century. Thus, both the environmental and developmental pillars of sustainable development face challenges from this type of article.

### ***Minimum Standard of Treatment***

Article 1105 requires that investors shall receive treatment “in accordance with international law, including fair and equitable treatment . . . .” The text leaves this requirement undefined, and before it was specifically ruled out by a Free Trade Commission (FTC) interpretive note dated July 2001, at least one case seemed to suggest it to mean that investors could claim for treatment spelled out in *any* international law, including the WTO and non-Chapter 11 parts of NAFTA. The interpretive statement issued by the NAFTA Free Trade Commission in July, 2001 narrows this scope of

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<sup>31</sup> See Kicking Away the Ladder: Policies and Institutions for Economic Development in Historical Perspective by Ha-Joon Chang (2002) (Anthem Press: London).

<sup>32</sup> Crompton Corp v. Government of Canada, Notice of Intent to Submit a Claim to Arbitration, Nov 6, 2001.

<sup>33</sup> ADF Group v. United States, *supra*.

interpretation considerably, asserting that the Parties meant to commit to treatment in accordance with *customary* international law.<sup>34</sup> While the first Tribunal to review this statement sought to minimize its importance, subsequent Tribunals have respected its status and its scope, limiting their rulings to an identification and application of customary international law in this area.<sup>35</sup>

Still, this does not leave matters completely resolved, as there is no clear-cut consensus on what constitutes customary international law in this area. But it has at least narrowed the scope for bringing into Chapter 11 a wide variety of law that is not specified anywhere in its text.

### ***Lessons from NAFTA***

It has been argued above that the provisions of Chapter 11 are being interpreted, or risk being interpreted, in ways that are overly broad. This problem, of course, is compounded by the expansive definitions of investments and measures, giving a wide scope to extremely effective investor protections.

It needs to be asked: what is wrong with giving broad, effective protection to investors? Investment, after all, can be an engine of sustainable development. And the growth it brings can, if managed appropriately, bring real welfare benefits.

The most critical issue, it may be suggested, is one of balance. The concern expressed by many with NAFTA's Chapter 11 is that there seems to be real potential to shift the balance unduly in favour of investor protection and away from the public good. Further, it appears inappropriate to many for the balancing of public policy priorities such as health and safety, the environment and economic growth and to be conducted outside of government and in a process with few of the safeguards that help ensure the legitimacy, transparency and accountability of the balancing of private rights and public welfare.

### **3.2. *The Bilateral Investment Treaties (BITs)***

It was noted above that there are over 2100 BITs in existence—a web of agreements that forms the preponderance of international investment rules. These treaties began to be negotiated in the late 1950s, on two grounds: that they would provide greater protection and certainty for foreign investors; and that such protection, and the treaties more generally, would stimulate enhanced flows of FDI for the signatory countries. Over time, little evidence has emerged to support this latter claim, and international organizations are beginning to express skepticism about the appropriateness of this long-standing rationale.<sup>36</sup>

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<sup>34</sup> Notes of Interpretation of Certain Chapter 11 Provisions, <http://www.dfait-maeci.gc.ca/tna-nac/NAFTA-Interpr-en.asp>

<sup>35</sup> The latest cases on this issue are *ADF Group v. United States*, and *Loewen Group Inc. and Raymond L. Loewen v. United States of America*, Case No. Arb(AF)/98/3, ICSID, June 26, 2003..

<sup>36</sup> See for example, World Bank, *Global Economic Prospects and the Developing Countries 2002*, and Eswar Prasad et al., “Effects of Financial Globalization on Developing Countries: Some Empirical Evidence.” IMF, March 17, 2003.

In terms of their protective functions for foreign investors, the treaties have differed in their scope and content over time and place. However it became increasingly standard by the 1980s for bilateral and regional treaties to incorporate most of the following protections:

- Relative standards of treatment, or non-discrimination (most-favoured nation treatment (MFN) and national treatment);
- Absolute standards of treatment (including reference to international standards, fair & equitable treatment and full protection & security);
- Guarantees against expropriation without compensation; and
- Dispute settlement (state-to-state and investor-to-state arbitration).

Other common features include provisions on the transfer of funds or personnel, and some minimal safeguards against losses due to conflict or war. As noted above, the NAFTA extended certain provisions to the pre-establishment phase of an investment and to proscribe certain forms of performance requirements. This has now been followed in a certain number of post-NAFTA BITS.

While arbitrations under Chapter 11 of NAFTA were first threatened one year after it came into force and were actually begun three years afterwards, arbitration disputes under BITS remained something of a dead letter for several decades. The first formal recorded case occurred only in 1987, when a Hong Kong investor used a UK BIT to arbitrate against the Government of Sri Lanka for losses arising out of a conflict between government security forces and rebel groups.<sup>37</sup>

Since that time the number of these BITs and investor arbitrations launched pursuant to them have both proliferated. Indeed, the 1990s saw a remarkable five-fold increase in the number of BITS: by the end of that decade, the number had jumped from 385 to 1857.

In this same decade, investors began to awaken to the existence of these agreements, with the International Center for the Settlement of Investment Disputes (ICSID)<sup>38</sup> seeing a steady increase in its caseload throughout the 1990s (see Table 1). ICSID had been designed to supervise the arbitration or conciliation of disputes arising under investment contracts or national investment laws. But many BITs also began to incorporate generic consents to ICSID arbitration, allowing for the development of what one commentator has termed “arbitration without privity,” i.e. allowing investors to bring claims against host governments, even where they had not entered into an individual arbitration agreement with that government.<sup>39</sup> Indeed, in recent years, this arbitration under investment treaties has come to account for the bulk of ICSID’s caseload.<sup>40</sup>

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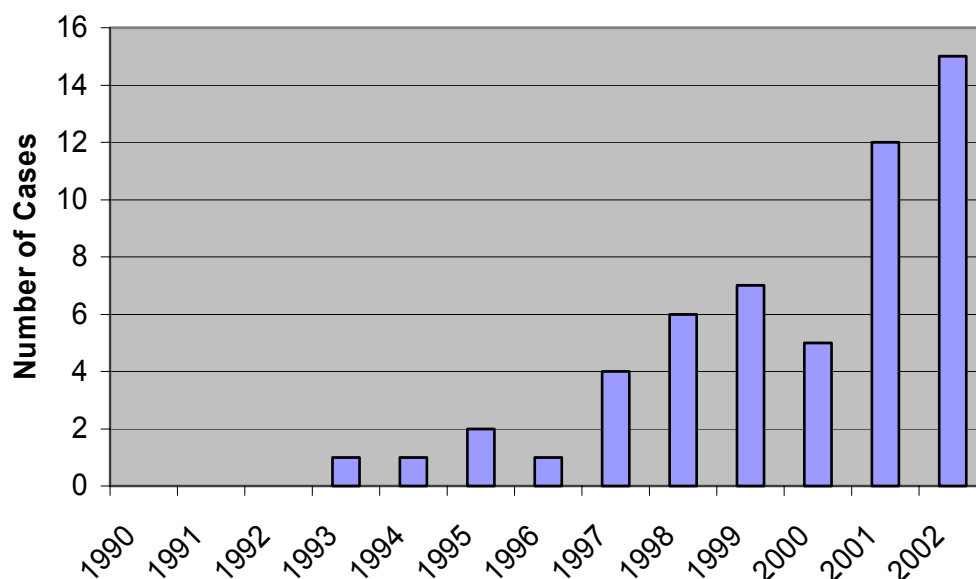
<sup>37</sup> There is, of course, the possibility that earlier unrecorded arbitrations or informal usage of the treaties (i.e. threatened arbitration) had occurred.

<sup>38</sup> There also exists an ICSID Additional Facility designed to accommodate countries not party to ICSID.

<sup>39</sup> Jan Paulsson, “Arbitration Without Privity”, 10 ICSID Review: Foreign Investment Law Journal (1995)

<sup>40</sup> In 2000, 2001, and 2002, the number of BITS cases at ICSID was respectively: 5 of 12, 12 of 14, and 15 of 19.

**Table 1: ICSID BITs Arbitrations**



While ICSID is the most commonly referenced arbitral institution in investment treaties, many BITs also incorporated other arbitral avenues, in order to accommodate those instances where one or both parties did not hail from an ICSID Convention signatory state. Most prominent among these are the 1976 UNCITRAL arbitration rules. As already noted in relation to Chapter 11's dispute settlement processes, these had been designed for use in international commercial arbitration, and their use in modern investment treaties has had certain unforeseen consequences.

The lack of transparency in the UNCITRAL and ICSID arbitration rules, including the public notification of the commencement of investor-state arbitrations, has already been alluded to in the Chapter 11 discussion. Further complicating matters for the BITs is the fact that there are several *other* sets of arbitral rules that have also been adopted in certain BITs. These include the arbitration rules of the Stockholm Chamber of Commerce, the International Chamber of Commerce, and so-called classical *ad hoc* arbitrations that occur outside of any institutional structure, under rules agreed by the two parties to the dispute. Information about arbitrations under these rules is just as elusive, as none of these avenues require that cases arbitrated under them be publicly registered. This lack of transparency is of particular concern in light of the subject matter of some of those arbitrations that are publicly known.

Under the more transparent ICSID system, recent BITs arbitrations mirror those under the NAFTA, insofar as they challenge a broad range of public purpose regulations. Recent BITs cases have seen investors challenge government regulation or decision-making concerning several privatized water & sewage concessions, post-privatization measures in the energy, telecommunications and television sectors, various tax measures

imposed upon foreign investors, emergency measures put in place during the Argentine financial crisis, and the non-renewal by Mexico of a waste management permit.<sup>41</sup> Another BITs case has been decried by debt-relief campaigners for jeopardizing the application of Guyana for relief under the International Monetary Fund's Highly-Indebted Poor Countries (HIPC) program, and was recently abandoned by the investor.<sup>42</sup>

These cases entail various potential implications for a broad range of developmental, environmental and other public policy-making objectives. However, because many of the details about cases remain unknown, it can be presumed that many of the implications for public policy are not yet known. At this point, however, they share one common feature: none of them are open to public scrutiny, unless both parties expressly consent. In one recent case, an arbitral tribunal drew a line under this point, by indicating to prospective interveners that it lacked the power to join them to the proceedings, to disclose legal documents or to open proceedings to the public.<sup>43</sup> While the general subject-matter of these arbitrations can be ascertained from the few facts that are made public under ICSID rules, their precise details and developments cannot. What's more, it remains unclear how many other cases that may implicate sensitive matters of public interest have been, or are being, arbitrated without any public record whatsoever under the ICC, SCC UNCITRAL or other ad-hoc rules.

The difficulty in coming to grips with the full body of investor-state arbitration under these bilateral treaties casts doubt on the suggestions by some analysts that, in acceding to these investment treaties, developing countries are "fully cognizant with the obligations resulting therefrom, and that they are ready to assume these obligations – both in law and in fact."<sup>44</sup> Such a claim seems overly optimistic given that the broad rights and guarantees spelled out in these treaties can only be elucidated through actual interpretation by arbitral tribunals. The claims seem more tenuous yet in the context of arbitral proceedings that are not in fact a matter of public record and from which, therefore, little can be learned.

True, a handful of awards handed down in the cases to date have received wide circulation. While it is unclear how many other awards remain confidential, those in circulation offer some initial indication of how certain treaty provisions might be interpreted. However, because most *known* BITs cases were launched in the last five years, many are still pending as of this writing. It is in these cases that arbitrators will put flesh on open-ended concepts which have been replicated across countless treaties,

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<sup>41</sup> For a brief review that highlights the known existing BITS cases see Luke Eric Peterson, "Research Note: Emerging Bilateral Investment treaty Arbitration and Sustainable Development", IISD, INVEST SD News Bulletin, April 2003, at [http://www.iisd.org/pdf/2003/investment\\_investsd\\_note\\_2003.pdf](http://www.iisd.org/pdf/2003/investment_investsd_note_2003.pdf)

<sup>42</sup> Booker PLC vs. Guyana. See: "Public Outcry Leads to Abandonment of Investment Treaty Arbitration Against Guyana", Luke Eric Peterson, INVEST-SD Bulletin, March 28, 2003, [www.iisd.org](http://www.iisd.org)

<sup>43</sup> See the letter from the President of the ICSID Tribunal overseeing the case of Aguas del Tunari v. Bolivia, to prospective interveners in that case: [www.earthjustice.org/news/documents/2-03/ICSIDResponse.pdf](http://www.earthjustice.org/news/documents/2-03/ICSIDResponse.pdf)

<sup>44</sup> Patrick Juillard, "Bilateral Investment treaties in the context of International Law", Keynote speech, OECD Regional conference on BITS, May 28-29 2001, Dubrovnik, Croatia

including strictures on “full protection & security” “national treatment” and the requirement of compensation for measures “tantamount to expropriation”. In light of the stakes, it seems essential that these proceedings be opened to public scrutiny, and monitored for their implications for host state sovereignty.

International organizations such as UNCTAD, which long championed these treaties to the developing world, have been slower to monitor actual usage of these treaties. Some discussion of the cases has taken place in the specialized journals devoted to ICSID and investment arbitration. For the most part, however, the experience of the BITs arbitrations—and hence the concrete meaning of standard investment treaty provisions—has not been brought to bear upon the debate over the negotiation of *new* investment treaties, at the bilateral, regional and multilateral level. This gap is significant for those interested in the future directions of the WTO negotiations on investment.

Also of interest is the relationship between any multilateral agreement and the many existing bilaterals and regionals. The possibilities in this area are explored more fully below, in section 5.7.

#### **4. CAN DOHA DELIVER?**

In light of the experience surveyed above, it is worth asking the fundamental question: can Doha deliver an international investment agreement that fosters sustainable development? At a more modest level, the answer is clearly yes; modalities could be agreed, and an investment agreement negotiated. But the question may be moot, as it is not clear that there is any consensus on whether Doha *should* deliver. Neither is there agreement on *what* it should deliver, agreement on the Doha Declaration text notwithstanding. Some states continue to argue for a traditional investor-oriented structure, modeled on Chapter 11 of NAFTA and the BITs. Others wish to see development, corporate social responsibility and community concerns placed at the core of an agreement. Masking all of the substantive debate is the requirement for an express consensus on modalities for the negotiations at Cancun before a negotiation is formally launched.

##### ***The modalities issue***

It was suggested in Section 2.3 that the modalities debate may be acting as a cover for the larger question of whether a negotiation on investment should go forward. The Working Group’s December 2002 report to the General Council reveals the broad dialogue on the issues assigned to it for further study under paragraph 20-22 of Doha.<sup>45</sup> And it reveals little effort at convergence among the views expressed.

The modalities issue is specifically associated only with the question of whether to adopt a positive list or negative list approach to investment liberalization commitments. A

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<sup>45</sup> Report (2002) Of The Working Group On The Relationship Between Trade And Investment To The General Council, WT/WGTI/6, 9 December 2002.

positive list is the approach in the GATS, and requires members to state what sectors will be covered by an IIA. A negative list means all sectors are covered except those that are excluded by a negative list of exceptions. This issue seems to be partly resolved by reference to the GATS model in the Doha Declaration, but only for pre-establishment rights as opposed to both pre- and post-establishment rights. Consequently, the language of modalities has taken on a broader meaning, concerning the scope of the potential negotiations as a whole. In short, a good deal of the shape of the final product is being addressed under the rubric of modalities.<sup>46</sup>

### ***Should Doha deliver?***

Negotiating an investment agreement inside the Doha work program presents some unique challenges. In addition to the issues described in the next section below on defining the purpose and scope of an agreement, challenges arise from an institutional perspective and from a practical perspective.

From the institutional perspective, the range of host country needs surveyed below—including legal, administrative and regulatory capacity—suggests that an agreement addressing them may be beyond the capacity of the WTO. The WTO’s current efforts for capacity building have not gone much beyond basic training for negotiators and strengthening countries’ ability to implement WTO agreements. Yet, investment capacity building requires a commitment to a broad concept of domestic institution building to ensure sustainable development is achieved. There is no evidence the WTO has the will or capacity to cast itself in such a role.

From a practical perspective, history suggests that negotiating a comprehensive IIA should be a particularly focused activity. We have seen what happens when negotiations on new issues, such as IPRs, are brought to the WTO. Almost ten years after its conclusion, there is vast disagreement on the contents and propriety of TRIPS, and it is a rallying cry for both governments and civil society in raising concerns about tackling any or all of the Singapore issues in the WTO.

Another practical concern is that despite commitments in the WTO to capacity building, few developing countries have the capacity to devote the needed resources to an investment negotiation, in light of other pressures inside the Doha Work Programme. Yet, the negotiations on investment are critical to setting a basis for future development—arguably more so than the trade aspects of the negotiations, which inevitably will take priority within the WTO structures and strictures. In acknowledgement of this problem, the Doha mandate specifically calls for technical assistance in the area of investment, but the ability to deliver adequately on this commitment *during* the negotiating period is limited, at best.

Finally, much study remains to be done on key issues for an appropriate negotiating agenda. Given the inherent difficulties with repairing flaws in concluded trade agreements, and the critical role investment agreements have now assumed in

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<sup>46</sup> WT/WGTI/6, p. 20.

international commercial activities, it is folly to force what might be the first multilateral IIA into a time line determined by arbitrary political factors. A multilateral IIA will have enormous consequences, not least in the developing countries that will have the most difficulties in following the negotiations, and should not be rushed

Cogent reasons exist for not negotiating an IIA within the Doha Work Program, backed up by the experience of developing countries in relation to TRIPS and other unanticipated negative results of rushed and forced negotiations. Defining an IIA as simply one of four Singapore issues ignores its importance as part of the global international law architecture for sustainable development. It is not about technical issues, but about whether future investments and investors must work for goals that reach beyond the merely commercial, to include the panoply of public interest issues impacted by their activities. The WTO has yet to demonstrate that it is the right forum to address such a broad global challenge.

## **5. WHAT TYPES OF INTERNATIONAL INVESTMENT AGREEMENTS ARE NEEDED?**

The previous section argued that, depending on the type of multilateral investment agreement we are seeking, the WTO might not be the appropriate venue for its negotiation. Specifically, it asked whether an agreement that sought to foster sustainable development should be located within the WTO structure. In this concluding section, the paper explores the potential scope for an IIA that has as its goal the promotion of sustainable development, describing its objectives, and exploring what it might entail for obligations on the host state, the home state and the investor, as well as asking what characteristics might best be embodied in its dispute settlement mechanism.

### ***5.1. The fundamentals: IIAs and attracting investment***

While most investment agreements do not specify their purpose clearly, we have already noted that the primary purposes attributed to them are twofold: to promote the protection of investors and their property and to promote investment in developing countries by establishing such protections. The unspoken deal is that the host state (usually a developing country) promises certain protections for investors from the home state in the expectation that this will reduce sovereign risks associated with investing in the host country, render risks more calculable for private investors and thus create incentives for more investment from the home country and a consequent increase in the available capital stock of the host country.

Given these underlying presumptions, the ultimate test of the success of an investment agreement as a tool of economic policy is an increase of investment in the developing country in particular. The empirical evidence in this regard is now striking: the evidence does not show that existing investment agreements have fostered notable amounts of investment or growth in developing countries. It has already been noted that leading international organizations that have long been major proponents of IIAs have now recognized they have failed to achieve this central aim.



Rather than depending in a singular or even a major way on investment agreements, it appears that attracting foreign investment depends on a combination of factors: an accessible market for the goods and services that are to be produced; traditional advantages in terms of the production of these goods, such as access to inputs, availability and price of labor relative to its productivity, communications and transport infrastructure; transparent rules governing investment and investments once made; and domestic institutions to implement them in a fair and equitable manner. The promotion of foreign direct investment consequently requires a combination of traditional economic and reputational factors (i.e. factors, often intangible, that characterize the reputation of a country as welcoming or wary of foreign investment).

Among the reasons for the apparent failure of investment agreements to increase flows of foreign direct investment is their narrow focus on a single aspect of the reputational agenda of investment: strengthening the rights of foreign investors within the institutional system of the host country. This not only fails to address the reputational issues in an adequate manner, but much more critically it leaves wholly unaddressed the full range of economic and social factors that drive investment growth in reality. It does nothing to address the quality and structure of domestic institutions, weak education systems, poor labour skills, weak infrastructures and so on. Moreover, through their lack of deference to host country institutions and through resort to a dispute settlement system that does not meet the criteria of transparency and legitimacy required from host country institutions, most IIAs actually risk undermining attempts by host countries to improve their institutional infrastructure. Unless IIAs move to address the entire range of issues relating to foreign direct investment, they may create obstacles to domestic responses aimed at improving the conditions for attracting and managing foreign investment.

The elements of a sound IIA are becoming clearer, though we have far to go, and we have not yet begun to elaborate the specific means of achieving the desired outcomes. Several of these elements are described below. In addition, the tables set out in Annex 1 provide a summary of a possible approach to achieving many of the elements described below.

## **5.2. Objectives**

The first element of any IIA negotiation today must be a clear articulation of its goals. The recognition by the World Bank, IMF and others of the failure of the existing strategy—if you build an IIA, investment will come—indicates the dilemma. The only one of two rationales now operative is the protection of foreign investors and their property as a private property issue. Yet even here the rationale weakens considerably for a global agreement: do foreign investors need special protections and alternatives to domestic judicial processes in all developed countries? The question of course carries a large measure of discrimination towards developing countries, where the rationale for many BITS has specifically been to ensure that corrupt administrative and judicial processes can be avoided through international dispute settlement processes. In addition, while private property has importance, and its recognition in international law is evident,

this does not seem a sufficient reason for the development of thousands of bilateral IIAs, nor of a global IIA by the WTO.<sup>47</sup>

IISD strongly believes that new investments, including foreign direct investments, are critical to the pursuit of sustainable development. Without new investments, the existing stock of unsustainable industrial and energy practices cannot be displaced. Moreover, without new investments that are consciously oriented towards sustainability, the chances of moving global industrial, resource harvesting and energy activity to a sustainable basis are remote. Finally, without foreign direct investment, poor countries with low rates of domestic savings will be hard pressed to foster the kind of economic growth that they need.

It is the view of the IISD that a new investment agreement must consciously take on the challenge of promoting a shift toward sustainable development. The articulation of such an objective then leads to other elements that will help refocus IIAs so that they address all aspects of the investment-society relationship, as opposed to simply privileging the private property/foreign investor status. To do this, IISD believes that the assignment of special rights to foreign investors must be accompanied by the acceptance of responsibilities by host and home states, and by the investors, to act in a manner consistent with the pursuit of sustainable development. In short, a reconception of IIAs as instruments for the promotion of sustainable development – including a necessary emphasis on development per se – requires a new balancing of the rights and obligations between investors, host states and home states.

Promoting sustainable development through an agreement on sustainable investments should not be seen as foreign to the WTO, or to any body addressing international investment issues. The WTO Appellate Body, noting the inclusion of sustainable development as a core feature of the preamble to the 1994 Agreement establishing the WTO, stated that the full use of the world's resources was no longer an appropriate goal for the world trading system in the 1990s.<sup>48</sup> Neither can the mere promotion of investment to spur growth in trade be considered appropriate for the WTO in the year 2003.

In short, the goal of an IIA should be redefined to be the promotion of sustainable investment and sustainable development. Several specific elements to achieve this are fleshed out under the headings that follow and in the summary tables of Annex 1.

### **5.3. *Investor rights and obligations***

Foreign investment cannot be compelled: it can only be attracted by sound strategies that ensure a fair return on the invested capital. Despite the absence of any empirical

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<sup>47</sup> One might note here that to the extent a right to property has been recognized in international human rights instruments, it has been introduced in a manner which ensures that its reach will be balanced against other important societal interests, a distinguishing feature from the uni-dimensional structures of IIAs.

<sup>48</sup> *United States—Import Prohibition of Shrimp and Shrimp Products, Report of the Appellate Body, WT/DS58/Ab/R, 12 October 1998, para. 152.*

evidence, part of the process for achieving this may continue to rest with the articulation of specific international rights like national treatment and minimum international standards of treatment. In other words, many of the elements of traditional IIAs could be carried forward in the development of the rights and obligations of foreign investors. It is however, important to play closer attention to the scope of these rights. Much of this would come in the process of balancing them against the rights and obligations of the other actors – the home states and host states.

At the same time, it should be recognized that investors do become economic citizens of the host state. They acquire extensive rights through private contracts, host state legislation, and international investment agreements. The first and most obvious obligation is to respect the laws and regulations of the host state. Beyond this most basic obligation, a common floor of pre-and post-establishment obligations or duties can be foreseen. Areas of minimum or floor standards could include environmental impact assessments of proposed investments, anti-corruption obligations, and full investor disclosure requirements. In a post-establishment context, Slide 3 in Annex 1 sets out a series of potential elements for which further consideration could be given.

The MAI negotiations postulated the adoption of the OECD Code of Conduct for Multinational Corporations as a non-binding annex to the Agreement. Many observers are concerned, understandably, with the provision of legal rights but only voluntary obligations. This is one element that requires further exploration both from a conceptual international law basis and from an enforceability basis. Suggesting further exploration is needed should not be taken, however, to imply that either the conceptual or practical issues are insurmountable. For example, if access to the investor-state dispute settlement process were conditioned on certain obligations being met, a means of self enforcement could be generated.

In addition, one might note that setting out certain floor obligations would address a continuing concern of the reduction of national standards, or foregoing of higher standards, in order to attract or maintain investments. A common floor would ease such pressures. It would also help address the problem of host states with weak administrative institutions and legal infrastructures for managing investments.

Finally, introducing the idea of common minimum standards in certain areas, does not suggest that the IIA itself must create each of these standards. Indeed, the example of trade law here referencing outside standard setting bodies in critical areas of technical and phytosanitary standards provides an example to emulate. Thus, it is possible to envisage a well structured IIA setting out minimum standards for performance in areas such as environmental assessments pre-investment, environmental management post-investment, human and labour rights, and anti-corruption standards for foreign investors by reference to other, existing instruments.

An additional element included in Slide 3 is a stronger recognition of liability of the investor for decision-making associated with the conduct of its investment. Liability within the home state is a particular issue for further study in this regard.

#### **5.4. Host state rights and obligations**

IAs have generally (with limited exceptions) shied away from articulating host state rights in the text of the agreements. Slide 4 of Annex 1 suggests this is not necessary. Indeed, the articulation of such rights would act as an interpretational balance to investor rights, without denying them.

The setting out of certain rights of host states does not mean that each host state will act on them in the same way. Indeed, the intent is to provide a legal platform to make decisions most conducive to national development and sustainability strategies, recognizing the diversity of local and national conditions. For example, clearly articulating the right of a host state to enact *bona fide* regulations in the public interest does not require any particular type or scope of regulation to be enacted. It simply preserves the legal and policy space for host states to make appropriate decisions.

Also necessary may be institutions for basic screening of investments to ensure that they accord with national, host state, priorities. (The extent to which such screening should be prohibited under investment rules is the subject of much debate today. One emerging view is that allowing the right for this to take place leaves it to an appropriate combination of the host state and the market to determine how the right will be exercised.)

Host state rights can be balanced against a set of obligations as well. Here one begins to see opportunities for additional interactions between rights and obligations of the three different actors. For example, an obligation not to reduce standards to attract investment fits with the general corporate social responsibility requirements of foreign investors. Thus, building on the hortatory language in NAFTA, IAs might incorporate host state obligations against the reduction of environmental standards for the purpose of attracting investments. As well, both host states and home states should share the obligation to prevent corruption in a foreign investment context.

A key responsibility of host states should be to establish and maintain institutions of good governance: that is, institutions capable of balancing private rights and public goods in a legitimate, transparent and accountable manner. This may be a longer term objective for many developing countries, especially least developed countries. At the same time, articulating such a vision allows greater opportunities for international support for this aspect of development and growth.

#### **5.5. Home state obligations.**

Few investment agreements today include any provisions for home state obligations. Arguably, however, all states—home states and host states alike—have an obligation to ensure that investors and investments respect the essential norms of sustainable development. To this end, home states could support the development of the requisite institutions in developing countries through the articulation of minimum standards of conduct for their capital exporters. Regulating corporate and individual conduct abroad

is not new in national or international law systems. However, developing countries may rightly fear the investment constraining impacts of such an approach. One answer to this concern is to work toward these types of standards at the international level, which would address these fears while helping ensure that minimum standards of conduct are enforceable. These standards might include the rule of law (including contract law, property law, occupational health and safety), rules for accounting and corporate reporting, and institutions for environmental management (environmental impact assessment rules, a viable regulatory framework, adequate environmental monitoring). As well, provisions could be made to ensure that host states can obtain necessary information concerning past practices of potential investors in their home state.

### ***5.6. Dispute settlement and enforcement***

From a public welfare perspective, the current dispute settlement model has emerged as the Achilles Heel of investment agreements. The use of the commercial arbitration model for investor-state disputes, where there is a need to balance between private rights and public goods, is clearly inappropriate. As argued above, the dispute settlement mechanisms of the typical investment agreement display shortcomings of transparency, legitimacy and accountability.

State-state dispute settlement, utilizing or modeled on the WTO process, has been proposed as a solution to the fundamental shortcomings of investor-state dispute settlement through the institutions of arbitration. Unfortunately state-state dispute settlement is unlikely to prove sufficient in the context of foreign direct investment. The Mercosur agreement incorporates one form of state-state dispute settlement for investment, but it has been inoperative. The problem is that disputes are not between a host state and a home state but typically between an investor and the host state. In most instances, the specific circumstances of the investment are central to the dispute. Where the dispute is between a class of investors and the host state these typically come from several different home states. As well, history shows that state-to-state mechanisms are distorted by politics and influence, according better treatment to large players than to small and medium-sized enterprises, and ever subject to the political dynamics of the moment. In other words there are convincing arguments in favor of establishing investor-state dispute settlement, but irrefutable arguments against using existing models.

Investment agreements need not be about liberalizing capital flows; these are largely, and increasingly, unconstrained. They should be about ensuring fair and equitable treatment of investors, and the proper balancing of private rights and public goods in a world of increasingly liberalized capital flows. The exhaustion of local remedies should be reconsidered as a pre-requisite in this regard, returning to previous approaches in this area. This seems especially appropriate for countries where worries about corruption in the judicial system are absent, a goal that should be held out for all countries participating in IIAs. Only afterwards should recourse to international tribunals be pursued. Such additional recourse to a dispute settlement procedure must meet basic standards of legitimacy, accountability and transparency throughout the dispute settlement process, from initiation of a complaint to publication of all decisions. Judicial models exist in international law, in particular the European Court of Justice, the International Court of

Justice, the International Criminal Court, the European Court of Human Rights and the Law of the Sea Tribunal. While the United States has thus far not been willing to participate in the creation of this global institutional framework, it has hinted at a more court-like approach to investor-state dispute resolution in its most two recent free trade agreements that contain investment provisions. The Chile and Singapore Free Trade Agreements with the United States both include greater requirements for transparency in the procedures, though they maintain the current appointment process for arbitrators.<sup>49</sup> However, both Agreements allow for a possible appellate mechanism to be introduced at some time, suggesting more thinking on this is to come from the US and their interlocutors. Thus, it is possible to foresee a multilateral tribunal and/or an appellate process geared specifically to issues of foreign investment agreements and customary international law standards.

### **5.7. *Liability.***

Investment is about the relationship between risk and return. While it is appropriate to reduce risks associated with insufficiently developed institutional arrangements in host countries, it is equally important to ensure that commercial risks, including risks associated with legitimately changing conditions of investment, are fully borne by the investor. Such conditions include changing scientific understanding and changing public perception, leading to tightening of regulations. If the investor is not subject to these types of risk, the problem of moral hazard virtually ensures the misallocation of capital and the disregard of the principles of sustainable development. This speaks to both the issue of investors assuming the costs of increased regulatory stringency on public welfare issues, as well as to issues of civil liability.

As regards the latter, among the risks that ought to be incurred by investors is liability for damage caused within the host country, damages due to company-supported breaches of human rights, negative human health impacts arising from an investment, etc. Host country citizens and jurisdictions often find themselves severely limited in their ability to recover damages from foreign investors who have a limited legal presence in their own country, and may even have decamped after the damage was done. This requires a careful review of the rules of (international) jurisdiction and liability—obviously in connection with (international) guarantees of due process. Processes to ensure that liability is associated with the centres of effective decision-making are essential in this regard.

### **5.8. *Relationship to other IIAs***

It remains unclear how existing investment treaties would be reconciled with any future multilateral agreement. One option might be for states to decommission or phase-out their existing investment agreements in deference to the multilateral rules. Given the patchwork nature of the existing IIA regime, there is an inherent attractiveness to this option, although the US and other states have indicated an intention to guard these existing bilateral and regional treaties jealously, given the advantages they provide their investors. The United States, for example, with some 40 such agreements, has fought a

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<sup>49</sup> Singapore-United States free Trade Agreement, <http://www.ustr.gov/new/fta/Singapore/final.htm>; Chile-United States Free Trade Agreement, <http://www.ustr.gov/new/fta/Chile/final/index.htm>

rear-guard action against a suggestion by the European Commission that candidates for membership in the European Union might have to renounce their bilateral investment treaties with the US, due to potential conflicts between those treaties and the EU treaties - again a hint from Europe that there are unanticipated problems with IIAs that do not properly integrate domestic institutions of host countries.

A second option is to amend rather than negate the existing treaties so as to preserve most of their protections. Depending on whether the amendments reflect a renewed premise, and sufficiently adapt to the requirements of the multilateral regime, this would be a potential approach. Of course, the prospect of some 173 countries re-opening and amending over 2100 agreements is not simple, or even probable.

WTO discussions have tended so far to focus on the relationship of an investment agreement to other WTO agreements. This, however, is no longer sufficient, given international crosswalks between investment agreements through the national treatment and most-favoured nation provisions. While the jury is still out on how broadly an MFN provision should be read, there is a risk that investors will be able to claim the best collection of rights and remedies available in all the host country's existing agreements, as opposed to the specific protections negotiated by their home states, or a set of balanced rights and obligations that might be contained in a future multilateral IIA, at the WTO or elsewhere. Of course, this eventuality could be guarded against if negotiators included a clause which expressly forbade it.

There is also the possibility that a multilateral agreement could serve to create obligations on members to ratchet up certain aspects of their existing agreements to the floor set in the agreement. This is similar to what was done in the TRIPS Agreement, where minimum standards of IPR protection are set out, but may be enhanced by subsequent bilateral intellectual property rights agreement. Minimum standards in the multilateral agreement might include investor and home state obligations, as well as host state obligations. They could also include minimum democratic principles and processes relating to the dispute settlement mechanisms.

Whatever type of approach may be adopted, the most pressing need at this time is for greater attention to the questions raised here. Reliance on the basic rules of the Vienna Convention on the Law of Treaties in a complex and intermingled world such as this is not a preferred route. Rather, it is preferable that negotiators squarely address the issues. This was also the conclusion of the WTO Working Group on the Relationship between Trade and Investment in 2002.<sup>50</sup>

## **5.9. Conclusions**

This section has argued that if the objective of a multilateral investment agreement is sustainable development, it will need to evolve beyond the architecture found in the previous models, to a focus on domestic capacity, and to include obligations on, and

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<sup>50</sup> WT/WTI/6, page 27.

rights of, the investors and home states. As well, a more open and legitimate model of dispute settlement will be needed.

Although the Doha Declaration includes issues not previously recognized for inclusion in investment agreements, the needs described above amount to a monumental challenge for the WTO, even as an institution whose objectives notably include sustainable development. If the WTO is chosen as the route for negotiating a multilateral agreement on investment, the organization will be hard pressed to produce a result that departs fundamentally from precedents found in the TRIMs, GATS, the BITs and the failed MAI. And yet, such a departure appears to be necessary.



## ANNEX 1: Options for a Different Conception of International Investment Agreements

### Slide 1: Defining a Purpose and Objective

#### Defining a purpose and objective

1. Investment Agreement for Sustainable Development
  - Not new to international law or WTO:
    - In keeping with WTO preamble
    - Appellate Body decisions on relation of concept of sustainable development to WTO rights and obligations
2. Investment rights and obligations must address the full relationship between an investment and the host state/community

### Slide 2: Three sets of rights and obligations

<b>Actor</b>	<b>Pre-establishment rights</b>	<b>Post-establishment rights</b>
Foreign investor	-rights -obligations	-rights -obligations
Host state	-rights -obligations	-rights -obligations
Home state	-rights -obligations	-rights -obligations

### Slide 3: Foreign Investor Sample Rights and Obligations

Foreign Investor	Pre-establishment	Post-establishment
Rights	<ul style="list-style-type: none"> <li>• Scope of right of establishment</li> <li>• National treatment</li> <li>• MFN ??</li> <li>• Min. standards of treatment/Transparency</li> <li>• Performance requirements?</li> <li>• Others ??</li> </ul>	<ul style="list-style-type: none"> <li>• National Treatment</li> <li>• MFN ??</li> <li>• Minimum standards of treatment/Transparency</li> <li>• Performance requirements?</li> <li>• Expropriation</li> <li>• Repatriation, staffing</li> <li>• Others ??</li> </ul>
Obligations -common minimum floor	<ul style="list-style-type: none"> <li>• Minimum standards in:               <ul style="list-style-type: none"> <li>-Env't impact assessment</li> <li>-Anti-corruption</li> </ul> </li> <li>-Full disclosure of purposes, history</li> </ul>	<ul style="list-style-type: none"> <li>• Minimum standards in:               <ul style="list-style-type: none"> <li>-Environmental management</li> <li>-International env't standards                   <ul style="list-style-type: none"> <li>-Anti-corruption</li> <li>-Corporate accountability</li> </ul> </li> <li>-Compliance w/national laws                   <ul style="list-style-type: none"> <li>-Basic human rights</li> <li>-Core labour standards</li> </ul> </li> </ul> </li> <li>• Liability of the investor and investment</li> </ul>

### Slide 4: Host State Rights and Obligations

Host State	Pre-establishment	Post-establishment
Rights	<ul style="list-style-type: none"> <li>• Maintain development priorities</li> <li>• Performance requirements (market disciplines)</li> <li>• To establish high environmental/human health standards</li> </ul>	<ul style="list-style-type: none"> <li>• -Maintain development priorities as agreed, under law</li> <li>• Right to regulate in public interest (public welfare, environment, etc.)</li> </ul>
Obligations	<ul style="list-style-type: none"> <li>• -Establish transparent legal and administrative processes</li> <li>• -Anti-corruption</li> <li>• Not to reduce environmental standards to attract investment</li> <li>• Prevent subversion of MEA's, int'l labour standards</li> </ul>	<ul style="list-style-type: none"> <li>• Not to reduce standards to maintain investment</li> <li>• Non-discrimination, pay for expropriated property, due process, etc.</li> <li>• Prevent subversion of MEAs, int'l labour standards</li> </ul>

## Slide 5: Home State Rights and Obligations

Home state	Pre-establishment	Post-establishment
Rights	<ul style="list-style-type: none"> <li>• Promote agreed terms</li> </ul>	<ul style="list-style-type: none"> <li>• Assist investors</li> <li>• Subrogation of rights</li> <li>• State-state disputes</li> </ul>
Obligations	<ul style="list-style-type: none"> <li>• Respect for basic norms of sustainable development</li> <li>• Anti-corruption obligations</li> <li>• Assist host states in institutional development</li> </ul>	<ul style="list-style-type: none"> <li>• -Respect for basic norms of sustainable development</li> <li>• -Ensure impediments to liability of investor are removed</li> <li>• -Anti-corruption obligations</li> </ul>

## Slide 6: Dispute Settlement

# Dispute Resolution

- Exhaustion of local remedies
  - Stronger support to domestic institution building
- State-state
- Investor-state
  - Based on balanced substantive law
- Principles
  - Transparency
    - Open to public at all phases; amicus
  - Accountability
    - In choice of arbitrators
    - Appellate process
  - Legitimacy: comes from all of above

## **ANNEX 2: Doha Ministerial Statement, Paras 20-22**

### **Relationship between trade and investment**

20. Recognizing the case for a multilateral framework to secure transparent, stable and predictable conditions for long-term cross-border investment, particularly foreign direct investment, that will contribute to the expansion of trade, and the need for enhanced technical assistance and capacity-building in this area as referred to in paragraph 21, we agree that negotiations will take place after the Fifth Session of the Ministerial Conference on the basis of a decision to be taken, by explicit consensus, at that Session on modalities of negotiations.

21. We recognize the needs of developing and least-developed countries for enhanced support for technical assistance and capacity building in this area, including policy analysis and development so that they may better evaluate the implications of closer multilateral cooperation for their development policies and objectives, and human and institutional development. To this end, we shall work in cooperation with other relevant intergovernmental organisations, including UNCTAD, and through appropriate regional and bilateral channels, to provide strengthened and adequately resourced assistance to respond to these needs.

22. In the period until the Fifth Session, further work in the Working Group on the Relationship Between Trade and Investment will focus on the clarification of: scope and definition; transparency; non-discrimination; modalities for pre-establishment commitments based on a GATS-type, positive list approach; development provisions; exceptions and balance-of-payments safeguards; consultation and the settlement of disputes between Members. Any framework should reflect in a balanced manner the interests of home and host countries, and take due account of the development policies and objectives of host governments as well as their right to regulate in the public interest. The special development, trade and financial needs of developing and least-developed countries should be taken into account as an integral part of any framework, which should enable Members to undertake obligations and commitments commensurate with their individual needs and circumstances. Due regard should be paid to other relevant WTO provisions. Account should be taken, as appropriate, of existing bilateral and regional arrangements on investment.