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Investment Issues and their Interface with Service: The Road to Cancun

Pierre Sauvé and Maryse Robert

PECC Trade and Investment Issues in WTO and APEC Study Group on Services

Pacific Economic Cooperation Council
4 Nassim Road Singapore 258372 Tel: +65 67379822 Fax: +65 67379824 Email: info@pecc.org
www.pecc.org

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Pierre Sauvé
Groupe d'Economie Mondiale
Institut d'Etudes Politiques
Paris
pisauve@hotmail.com

and

Maryse Robert[1]
OAS Trade Unit
Washington, DC
mrobert@oas.org

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INTRODUCTION

The development of a multilateral investment agreement within the GATT/WTO framework has been discussed since the mid-1940s. While the last fifteen years have witnessed a phenomenal increase in the number of bilateral and regional investment agreements resulting into binding obligations, as well as the adoption of economic reforms promoting, protecting, and liberalizing foreign investment, the current multilateral regime remains rather limited in scope. It is primarily confined to performance requirements in the Agreement on Trade-Related Investment Measures (TRIMS), which covers goods only, and the provisions of the General Agreement on Trade in Services (GATS) through commercial presence and movement of natural persons as the third and fourth modes of supply of a service. In fact, the WTO framework suffers from a clear imbalance and lacks "modal neutrality." The globalization of the world economy and the internationalization of production provide firms with more choices. They can elect which "modality" --imports, foreign direct investment, temporary entry of natural persons, or licensing-- to use and combine to maximize their competitiveness. Whereas the WTO includes disciplines on trade in goods and services, and the market access component of investment in services, it has yet to cover investment in goods beyond the TRIMs Agreement.

The upcoming WTO Ministerial Conference in Cancun on 10-14 September will offer WTO Members an opportunity to assess whether to negotiate a more comprehensive set of investment disciplines. At the Fourth Session of the WTO Ministerial Conference, held at Doha in November 2001, WTO Members agreed to launch negotiations on foreign investment 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." In adopting this decision, Ministers recognized "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."[2]

This briefing note explores a number of issues likely to feature prominently in the development of investment rules in the context of Doha Development Agenda, after reviewing the early efforts to devise multilateral investment rules and the current state of play in Geneva.

EARLY EFFORTS TO DEVISE MULTILATERAL INVESTMENT RULES

The first attempt at designing multilateral rules on investment was made shortly after World War II during the negotiation of the Havana Charter leading to the establishment of the International Trade Organization (ITO). However, with the exception of Articles 11 and 12 in Chapter III of the Charter, these efforts were essentially timid because they addressed only restrictive business practices for goods and services, more specifically the regulation of international cartels (Chapter V). Although proposed by the United States, the issue of protecting foreign investors in

[2] Ministerial Declaration, adopted on 14 November 2001, doc. WT/MIN(01)/DEC/1, 20 November 2001, paragraph 20.

host countries was opposed by developing countries and thus never included in the Charter. In fact, concerns of U.S.-based multinationals related to nationalization, expropriation, and lack of prompt, adequate and effective compensation of foreign investment were not dealt with. The *Calvo doctrine*, which had been the tradition of most Latin American countries, was at the heart of these concerns. In solving disputes between foreign investors and the host State, foreign investors had to seek local remedies and were not entitled to the protection of their home State even if under customary international law they had the right to such protection after having expended these local remedies.

The only surviving chapter of the Havana Charter, which became the General Agreement on Tariffs and Trade (GATT), did not address investment issues *per se*, albeit a resolution on International Investment for Economic Development was adopted as early as 1955 asking GATT Contracting Parties to adopt conditions conducive to international investment activities. Suggestions to create a "GATT for Investment" in the 1970s remained without strong support.

The 1980s offered new opportunities. Trade-related investment measures were first brought into GATT discussions by the United States at a meeting of the Consultative Group of Eighteen in 1981. Quoting a study prepared by the International Monetary Fund (IMF) and the World Bank on the trade-distorting effects of performance requirements, the United States called for the compilation by the GATT Secretariat of an inventory of performance requirements, an idea that received very little support. More detailed proposals made in 1982 and 1985 had the same fate. However, in 1982 the United States challenged Canada over performance requirements imposed by Canada's Foreign Investment Review Agency (FIRA) on local subsidiaries of foreign-based firms. A GATT panel later ruled that FIRA's local-content requirements violated GATT Article III (4), the national treatment provision. Developing countries found comfort in that the panel also noted that countries could in principle invoke GATT Article XVIII:C (on government assistance to promote economic development) to justify local-content requirements. Following the panel ruling, the United States renewed its efforts to address trade-related investment measures. In preparing the final declaration launching the Uruguay Round, proposals encompassing a wide variety of investment issues ranging from performance requirements to the right of establishment were put forward by the United States, Japan, and the European Community. The United States aimed at addressing these issues on a comprehensive basis. Although initially opposed by most developing countries, some investment issues were later included in the 1986 Punta del Este Ministerial Declaration, which launched the Uruguay Round of Multilateral Trade Negotiations.

In 1995, shortly after the end of the Uruguay Round, negotiations on a Multilateral Agreement on Investment (MAI) were launched at the Organization for Economic Cooperation and Development (OECD). The MAI aimed to be a free-standing international treaty open to non-member countries, with high standards of liberalization, investment protection and effective dispute settlement procedures. The 1997 deadline to complete the negotiations was extended to the 1998 Ministerial Meeting held in Paris on 27-28 April. The negotiations ended in failure in the Fall of 1998, after the French government had announced that it was pulling out of these negotiations. For some analysts, the reasons for this failure lie in the numerous issues, which remained to be resolved (exceptions, culture, the coverage of sub-national levels of government, extra-territorial measures, labor and environment, and definitions) when the talks broke down. Others highlight that a coalition of non-governmental organizations (NGOs) had campaigned against the Agreement and successfully used the Internet to convey the idea that the MAI was a bad deal aimed at benefiting multilateral corporations. Finally, others, closer to the negotiations, have suggested that the MAI failed because the Agreement did not generate the benefits necessary to motivate the body politic and the business sector "to bite the bullet" and push for the conclusion of the negotiations.

CURRENT STATE OF PLAY IN GENEVA

At their First Ministerial Conference in Singapore in 1996 WTO Members decided to establish a Working Group on the Relationship between Trade and Investment (WGTI) so as to deepen their understanding of the challenges arising at this policy interface. Since then, Asian countries have been among the main protagonists of a lively, ongoing and still far from settled policy debate, with some countries in the region actively supporting moves toward WTO negotiations in the area, while others remain among the most sceptical and, in some cases, fiercely opposed to such an approach.

At the Doha Ministerial meeting in 2001, WTO Members decided to step up work on trade and investment. Paragraph 22 of the Doha Ministerial Declaration instructed the WGTI to focus on the clarification of seven issues: (i) scope and definition, (ii) transparency; (iii) non-discrimination; (iv) modalities for pre-establishment based on a GATS-type positive list approach; (v) development provisions, (vi) exceptions and balance-of-payments safeguards; and (vii) consultation and the settlement of disputes.[3]

In WGTI discussions to date, some Members have argued that this list is not a closed one and should, for instance, allow for discussions of performance requirements, investment incentives or investment protection. Paragraph 22 also requires that the "special development, trade and financial needs of developing countries and least-developed countries should be taken into account as an integral part of any framework, which should enable members to undertake commitments and obligations commensurate with their individual needs and circumstances."

Major controversies within the WGTI have revolved around a number of key issues, such as the breadth of the definition of "investment" and "investors," and the (potentially far-reaching) implications thereof; the extent of transparency obligations, notably in respect of prior notification requirements; the degree and form of technical

[3] Moreover, paragraph 22 of the Doha Ministerial Declaration states that "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."

assistance required to help developing countries overcome a widely-perceived analytical deficit in this area; the operational modalities of development provisions governing the trade and investment interface in a possible WTO investment framework; the desirability of replicating a GATS-like approach to scheduling liberalization commitments, notably in respect of pre-establishment rights, as well as the links between FDI and technology transfer.[4]

While the debate on these and other issues is far from closed, it is important to recall that much progress in understanding the complex policy and rule-making challenges arising at the trade and investment interface has been achieved in the multiplicity of bilateral and regional agreements concluded since the WGTI was established in 1996. To a certain degree, it is probably difficult to sustain the argument that a decision on whether or not to launch formal negotiations on investment in Cancun could be held back on substantive grounds. For the most part, the core elements of a possible investment compact in the WTO are well known to member countries, the key challenge being to determine whether a political will exists to move forward on investment in the light of progress elsewhere in the Doha Agenda and, just as importantly, to assess whether what is on the table on trade and investment implies genuine, value-adding, forward movement.

THE ROAD TO CANCUN

As with trade reform, most of the benefit from new sound investment policies comes from unilateral reforms of domestic policies. However, developing countries may be able to obtain additional benefits from collaborative collective actions. These can take several forms. Participating in international agreements can help lock-in reforms, strengthen their credibility, and give investors an additional positive signal. Participating in international negotiations may simultaneously strengthen the hand of domestic reformers by holding out the prospect of tangible external results of new market access in exchange for good domestic policies, and elicit reciprocal reforms among partners that create new market access opportunities.

WTO Ministers provided one example of potential collaboration when they decided in Doha, Qatar in November 2001 to consider launching negotiations on a multilateral framework covering foreign investment. Its purpose was "to secure transparent, stable and predictable conditions for long-term cross border investment" that will expand trade. Two questions therefore face the international community and developing countries in particular: What types of new multilateral initiatives on investment policy can promote more – and more productive -- investment and hence more rapid development? And, more specifically, which issues are best tackled through voluntary initiatives and which are best handled through legally-binding and enforceable commitments, such as those found in the WTO and in regional arrangements? An overall purpose of coordinating investment policy is to expand the flow of investment around the world, minimize distortions that hurt neighbors, and

[4] For an excellent summary of the state of play on the Singapore Issues, see the International Center for Trade and Sustainable Development (ICTSD) and the International Institute for Sustainable Development (IISD)'s Doha Round Briefing Series: Developments Since the Fourth WTO Ministerial Meeting, Vol. 1, No. 6 (February 2003). For a look at member country proposals and other documents on trade and investment at the WTO, see http://docsonline.wto.org/ under WT/WGTI/*

help improve economic performance. Coordination might contribute to achieving these goals through four channels: (i) liberalizing investment flows to permit enhanced access and competition; (ii) protecting investors' rights to ensure incentives to invest; (iii) curbing policies that may distort investment flows and trade at the expense of neighbors; and (iv) enhancing governance by reducing bribery and increasing corporate social responsibility.

First, as with trade policy, unilateral reforms to liberalize foreign direct investment are likely to have the greatest and most direct benefit to the reforming country. Second, participation in collective agreements may indeed have benefits, but these benefits would be substantially greater than unilateral reforms if they are accompanied by expanded reciprocal market access in areas of importance to developing countries. Third, available research suggests that international agreements to protect investor rights cannot be predicted to expand markedly the flow of investment to new signatory countries. Much protection is already afforded to home country investors through bilateral investment treaties (BITs), which are enabling in character but do not by themselves contribute to expanding flows of investment to developing countries. For this reason, expectations of significantly enhanced FDI inflows resulting from a new set of multilateral disciplines on investment protection should be tempered. Fourth, international agreements to curb "beggar-thy-neighbor" trade-distorting investment policies can also benefit developing countries. One area deserving particular attention relates to heightened competition among countries to lure foreign investment. Information on the extent of investment incentives is generally inadequate to assess their effects, and so a high priority for international collaboration is to compile such information more systematically. Finally, collective actions to discourage improper corporate practices, such as bribery, and improve corporate social responsibility are already the subject of a broad range of cooperative international initiatives, and these can entail substantial benefits. Doubts may arise however as to whether the WTO is the most appropriate forum in which to tackle governance- and best practice-related issues.

An important element of the upcoming Cancun Ministerial will be whether WTO Members can reach agreement on the negotiating modalities required to launch a formal set of negotiations on investment at the WTO. Much useful work has been pursued in the WTO Working Group on the Relationship between Trade and Investment since its inception in 1996. Such work has for the most part been rooted in the considerable range of investment rule-making activity that has taken place around the world at the bilateral and regional levels. This work accelerated since the Doha Ministerial, with more focused attention devoted to seven core elements of a possible multilateral framework on investment (MFI).

Recent experience - the failed MAI experiment, the public policy controversies arising under Chapter 11 of the NAFTA, evolving jurisprudence under BITs - has revealed the complexity of devising binding disciplines for investment. It bears noting that the bulk of such policy controversy has arisen in the field of investment protection, a subject matter that does not feature on the menu of post-Doha discussions. It also bears noting that the most important developments in investment rule-making have been in the field of investment protection. For instance, the recently concluded US-Chile Free Trade Agreement (FTA) (signed on 6 June 2003) and US-Singapore FTA (signed on 6 May 2003) clarify the concept of indirect expropriation and reaffirm the right of states to regulate. They clearly state that the determination of whether an action or series of actions by a Party, in a specific fact situation, constitutes an indirect expropriation, requires a case-by-case, fact-based inquiry that considers, among other factors: a) the economic impact of the government action, although the fact that an action or series of actions by a Party has an adverse effect on the economic value of an investment, standing alone, does not establish that an indirect expropriation has occurred; b) the extent to which the government action interferes with distinct, reasonable investment-backed expectations; and c) the character of the government action. Except in rare circumstances, non-discriminatory regulatory actions by a Party that are designed and applied to protect legitimate public welfare objectives, such as health, safety, and the environment, do not constitute indirect expropriations.

The cumulative experience and skills in negotiation and implementation acquired over the past decade by officials in a large number of key WTO countries suggests that reaching agreement on forward movement in Cancun (without any certainty as regards the ultimate destination) is likely to rest more on political grounds, and notably be a function of the substantive contents of negotiating bargains on offers in other key areas of the Doha Development Agenda, than on more purely technical grounds.

The challenge, accordingly, is to figure out what it is Ministers should be seeking agreement on in the investment field when they meet in Cancun.

The formulation and design of investment disciplines cannot likely be determined in the abstract. They will, rather, tend to proceed from past practice and reflect the level of ambition built into the rule-making journey under consideration. Three possible scenarios are explored below.

Getting to Yes: The Complexities of Generic Rules on Investment

An agreement on a generic non-discriminatory regime for investment under the WTO extending, subject to permissible reservations, to all areas covered by WTO rules (i.e. goods, services and intellectual property) would constitute a significant achievement. Such an outcome is certainly what Paragraph 22 of the Doha Development Agenda seems to be pointing towards, with doses of variable geometry being envisaged with regard to the definition of investment (limited to foreign direct investment or broadened to other types of assets); disciplines on pre- and post-establishment; and flexible, GATS-like modalities in respect of national treatment and market access commitments. Incorporating a generic set of investment rules into the WTO framework would, however, entail significant systemic consequences, in that it would significantly expand the scope of WTO coverage to a range of "inside the border" measures.

Yet, much as the Doha agenda on investment represents a credible option for WTO members to consider, it is not altogether devoid of problems. For one, its focus on an agenda of generic rule-making on investment appears to assume a degree of architectural overhaul that WTO Members have not yet begun to address in earnest, let alone reached consensus on. Given the complex legal issues and policy sensitivities involved, it is open to question whether such consensus could be achieved before the WTO's Fifth Ministerial Meeting. It is, indeed, quite unclear how *existing*

WTO disciplines would relate to and cohere with any *de novo* set of investment rules. Would the TRIMs Agreement be incorporated by reference? Would its scope automatically be deemed to extend to investment measures affecting trade in services and trade in IPRs? Would the TRIMs Agreement's scope of prohibited measures be modified, expanded, clarified?

Similarly, how would the treatment of commercial presence in the GATS co-exist alongside a potentially generic set of *de novo* investment disciplines? In particular, how would the definition of commercial presence contained in the GATS (focusing on both matters of pre- and post-establishment) cohere with the adoption of a possibly narrower definition in a new WTO investment instrument?

Much as with NAFTA, the launch of negotiations on investment disciplines in the WTO could provide an opportunity for crafting a separate agreement on the movement of people (alongside generic rules on movement of investment and cross-border trade in services). By giving greater prominence to labor mobility issues, such a revamped architecture of rules would offer greater scope for addressing an issue area where developing countries enjoy strong comparative advantages and offensive negotiating interests. Here again, however, the architectural and negotiating implications of such changes will likely require considerable attention. Indeed, are WTO members prepared to contemplate a GATS covering solely cross-border trade in services, with investment (commercial presence) in services treated alongside in a generic manner? Could a case be made in such circumstances to also treat labor mobility issues (mode 4 of GATS) in a generic fashion, thereby affirming the equivalence - which is well rooted in economic theory if not in political preference - between movements of capital and labor within the trading system? Would a stand-alone WTO agreement on labor movement increase the likelihood of meaningful commitments of benefit to developing countries? All are questions WTO Members will need to confront and find satisfactory answers in both political and policy terms before a decision to launch a generic rule-making journey on investment can be made.

A Modest Approach: A GATS-centric Approach to Investment Regime Liberalization

Given these complexities and in light of the preponderance of services to investment liberalization, rooting the investment liberalization agenda in *existing* WTO agreements – namely GATS - rather than on new rule-making initiatives may be a more promising approach. Developing countries, in particular might find this attractive, both because they have by now become familiar with the GATS and its *modus operandi* and the fact that the Agreement is arguably the most development-friendly set of disciplines agreed to in the Uruguay Round (OECD, 2002).

From a development point of view, particular attention would need to be paid under a GATS-centric approach to improving the investment climate in host countries by encouraging WTO members to commit (or to pre-commit in a progressive manner) to liberalizing entry conditions in the key enabling sectors of finance, telecommunications, transportation (maritime and air), professional services and energy, given their impact on economy-wide performance. All are sectors where developing countries generally made fewer commitments than their developed country counterparts in the first round of GATS negotiations.

In many instances, the GATS commitments of developing countries were scheduled at a level below the statutory or regulatory *status quo*, i.e. at a level below that already afforded to established foreign operators. Such practices are not likely on balance to send - or be perceived as sending - a reassuring signal to foreign investors. There is, accordingly, much that the current set of negotiations can do to strengthen the investment protection and liberalization properties of the GATS.

A services-centric push on investment at the WTO can usefully tackle two core issues: making existing rules more "investor-friendly," and achieving a higher degree of investment regime liberalization than was possible in the first round of services negotiations.

The Most Likely Features of a Multilateral Framework on Investment

The broad parameters of possible investment disciplines have begun to emerge. While still evolving, one can still speculate that an MFI may likely feature the following core elements:

1. An exclusive focus on investment in primary and manufacturing industries, thus complementing existing investment disciplines for services under modes 3 and 4 of the GATS. While incoherent, the resulting dual architecture (separate investment rules for goods and services) would match the outcome recently secured in the EU-Chile FTA.

2. A GATS-like hybrid approach to investment regime liberalization (i.e. positive commitments subject to negative reservations preserving existing non-conforming measures in scheduled sectors).

3. Key disciplines to include: (i) transparency[5]; (ii) national treatment; (iii) market access; (iv) MFN (subject to reservations to protect existing and future BITs and investment provisions in regional trade agreements (RTAs) a la GATS Article V); (v) domestic regulation and the right to regulate for a public purpose; (vi) exceptions (general and balance of payments-specific); (vii) movement of key personnel (intra-company transferees); and (viii) development provisions (including up-front pledges from OECD countries for greater capacity-building funding/training on best-practice investment policy-making).

4. State-to-state dispute settlement under existing DSU provisions.

5. No changes to either the GATS or the TRIMs Agreements arising directly from the negotiation of an MFI.

6. No disciplines on investment protection (left to BITs or to RTAs), nor on the distorting effects of investment incentives (the incidence of which

[5] One could however imagine a best endeavors clause and/or a financial services understanding formula-type outcome on additional prior consultation disciplines and possibly also on issues such as a broader definition of investment, including portfolio investment; pre-establishment commitments; investment protection, etc.

tends to occur mostly at the regional level and more rarely involves bidding activity along North-South lines).[6] Meanwhile, the absence of disciplines on investment protection would largely obviate the need for investor-state arbitration in a WTO setting.

7. Key unresolved issues on which it is still hard to speculate include the definition of covered investments and investors (narrow or broad?; FDI only or other types of assets, including portfolio investment?) as well as the treatment of possible commitments on pre-establishment matters.

Given the clear importance all WTO Members attach to enhancing domestic investment climates and the strongly liberalizing trend observed in domestic investment regimes in recent years, a WTO MFI would largely be about the terms of payment for locking in and giving greater permanency to the virtue practiced on the investment policy front in recent years, providing developing countries with negotiating leverage they tend collectively to underestimate but also to seek an outcome that adds value over existing arrangements and is coherent (i.e. reflective of how trade and investment interact with one another in a globalizing environment).

CONCLUSION

Consideration of a broader range of issues than those currently under discussion in Geneva might prove useful in securing a bigger and better overall bargain for the WTO membership as a whole. In particular, it could help developing countries achieve genuine progress in an area of significant export interest (movement of natural persons) in return for consolidating investment policy reforms that have been strongly liberalizing in recent years, with little evidence of policy reversal.

To contribute to such a discussion, policy makers will need to devote greater attention to issues that have to date largely been cast aside in Geneva and in national capitals. These include:

- What should a multilateral framework of investment disciplines tackle in a WTO setting? What is best left to bilateral or regional settings as well as to non-binding and/or non-enforceable policy initiatives?

- What architecture of rules is most likely to add value to existing disciplines while being pro-development?

- What scope exists for crafting a set of disciplines that would affirm the equivalence (in both economic and juridical terms) between the movement of capital (investment) and the movement of labor?

- Could such a negotiating secure reciprocal gains for all WTO members? What complexities would need to be overcome in achieving such an outcome?

- Should the TRIMs Agreement and elements of the Agreement on Subsidies and Countervailing Duties be collapsed into an integrated MFI?

[6] An attempt at securing greater transparency on the sectoral incidence and on the trade, investment and overall economic effects of incentive programs would be most useful in informing future policy- and rule-making initiatives.

- What scope exists for embedding greater doses of variable geometry into a WTO MFI, e.g. as between investment protection and liberalization; pre- and post-establishment; narrow vs. broad definitions of investment; developed and developing countries?

- Are current negotiating proposals up to the task? Are overall coherence in rule-design and levels of ambition at risk of being sacrificed on grounds of political expediency?

- Is it desirable to have separate investment rules for goods and services? Is there a constituency for such rules outside of bureaucratic circles?

- How significant is the market access (entry) agenda in manufacturing?

- Can multilateral rules match the level of protection afforded to investors in bilateral and regional investment agreements?

- Should a WTO MFI feature recourse to investor-state arbitration?

- Can Cancun survive without a resolution of these matters?