TRADE AND ENVIRONMENT

A RESOURCE BOOK

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Investment

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"In view of the negligible success at the multilateral level, many have sought to hedge their bets by pursuing so-called bilateral investment treaties or investment rules in the context of wider bilateral or regional free trade agreements."

Over the last 20 years, the attitude of developing countries to foreign direct investment (FDI) has undergone a sea-change; with most countries liberalizing their rules on foreign participation in their economies and actively seeking foreign investment. While foreign investment can bring with it a host of benefits—employment, tax revenues, technology transfer, skills and know-how—it can also have negative consequences for sustainable development, particularly where domestic regulatory capacity is weak, ineffective or corrupt.

In terms of some of the key environmental impacts of enhanced FDI, there may be *scale effects*, arising from the sheer increase of economic activity and its attendant draw upon natural resources and generation of various externalities. Likewise, there may be discernible *technology effects*, depending on the nature of technologies brought in. Additionally, there may be *regulatory effects*, depending on the host states' decisions to strengthen or enforce environmental standards—or, conversely, to freeze or lower them—in the context of heightened global competition for FDI. It has become clear that the scope for regulation of foreign investment will also be conditioned by international treaties. In particular, concerns have arisen that investment treaties may limit the ability of governments to regulate investment in the public interest, to impose necessary performance requirements, or to impose and enforce appropriate health, safety and environmental regulations.

While the past half-century has seen the gradual elaboration of a broad, multilateral architecture governing global trade, the governance of international investment offers a very different picture. Enterprises wishing to invest abroad need to be familiar with a staggering array of bilateral, regional and, to a limited extent, multilateral rules and regulations. Periodic efforts to elaborate a single, overarching multilateral agreement have been met with indifference or indignation and have ended in ignominy. Beginning with attempts to include investment rules as part of the ill-fated International Trade Organization in the 1940s, and following unsuccessful efforts to elaborate conventions at the United Nations (UN) and Organization for Economic Cooperation and Development (OECD) in subsequent decades, the World Trade Organization (WTO) is only the latest institution to grapple with this thorny topic.

Despite much effort, investment has only managed to gain a toehold in the WTO system. To the extent that trade in services requires a commercial presence by a foreign

service-provider in the territory of another state, the provider may enjoy certain investment rights under the WTO General Agreement on Trade in Services (GATS). Additionally, under WTO rules, investment measures, such as local content rules or trade-balancing requirements, would be prohibited, to the extent that they impact upon trade and violate the GATT (General Agreement on Tariffs and Trade) rules on national treatment and quantitative restrictions.

At the 1996 Singapore Ministerial Conference, an agreement was struck to create a committee—the Working Group on Trade and Investment—to analyze the investment issue. At the Doha Ministerial in 2001, this Group was given a new mandate: to clarify seven specific issues and to launch negotiations "on the basis of a decision to be taken, by explicit consensus." Members disagreed sharply as to the meaning of this opaque phraseology, with some insisting that negotiations were a foregone conclusion, subject only to agreement about procedural modalities (such as time and number of negotiation sessions), while others insisted that negotiating would only be launched once there was a convergence on substantive modalities (consensus as to the nature and direction of the obligations to be negotiated). In the end, these differences of opinion proved intractable and contributed, in part, to the breakdown of the Cancun Ministerial meeting. In the summer of 2004, WTO Members conceded that "no work towards negotiations on [investment] will take place within the WTO during the Doha Round."

In view of the negligible success at the multilateral level, many have sought to hedge their bets by pursuing so-called bilateral investment treaties (BITs) or investment rules in the context of wider bilateral or regional free trade agreements (FTAs). Figures compiled by the UN chart a fivefold rise in the number of BITs during the 1990s—with nearly 2,500 investment treaties concluded. At the same time, there has been a surge in bilateral FTAs, many of which also contain investment rules.

On occasion, these bilateral and regional investment rules may be formulated with an eye towards broader industrial and development goals of the host countries, however, most investment treaties are conceived with the interests of capital exporters very much in the foreground. While most BITs do not mandate market access *per se,* they do set into place a series of protections tailored to the interests of those foreign investors who have been given a green light to establish investments in a given territory. Standard investor protections include the provision of: non-discrimination against foreign investment; compensation in the event of nationalization or expropriation; minimum standards of treatment (e.g., "fair and equitable treatment"); repatriation of capital; and mechanisms for dispute settlement.

Although bilateral investment treaties date to the late 1950s, for several decades they had a low profile. This changed with the inclusion of investment provisions in the North American Free Trade Agreement (NAFTA) in the early 1990s. The NAFTA investment commitments had the potential to cast a shadow over a wide range of government measures, administrative decisions and even court decisions. This first became clear when the U.S.-based Ethyl Corporation filed suit under the NAFTA in an effort to challenge a Canadian trade ban on the gasoline additive methylcyclopentadienyl manganese tricarbonyl (MMT). Ethyl alleged that Canada had violated its legal commitments to foreign investors, and the firm sought multi-million dollar compensation. Rather than contest this claim, the Government of Canada offered partial compensation and rescinded the offending government measures. An increase in similar "copycat" litigation soon followed under the NAFTA, as well as under other BITs.

Today, questions still remain unanswered about the meaning and policy implications of key investment treaty disciplines, particularly as they relate to the environment. It is unclear to what extent governments may regulate

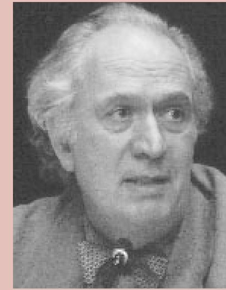
investments for health, safety or environmental reasons without running afoul of their treaty obligation to compensate foreign investors affected by "indirect" forms of expropriation. In a 2005 NAFTA arbitration between the Canadian-based Methanex Corporation and the United States Government, the arbitration tribunal observed that legitimate non-discriminatory regulations should not be considered to constitute a form of "indirect expropriation" of a foreign investment. It is unclear, however, whether this position will be followed by subsequent tribunals (which are not bound by the doctrine of precedent). Likewise, it is unclear to what extent the fear of treaty litigation by foreign investors will continue to discourage new regulation or be used to pressure governments to abandon proposed policies, particularly in developing countries lacking the resources to engage in expensive and time-consuming international arbitrations with foreign investors. Some also fear that national treatment obligations (i.e., to treat foreign investors on a comparable footing to domestic investors) might jeopardize the ability of governments to impose progressively more stringent environmental regulations as a given eco-system reaches its environmental carrying capacity.

Concerns have been raised about the preference of arbitration tribunals to interpret key treaty provisions in manners more favourable to commercial interests. This concern has been exacerbated by the relative absence of environmental and social provisions in most investment agreements, and the failure to list environment and sustainable development as treaty objectives, which could impact upon the subsequent treaty interpretation by arbitral tribunals.

As increased attention has come to focus upon the potential implications of these investment treaties, some governments, particularly in the developing world, have been hesitant to negotiate an even more ambitious *multilateral* accord on investment. Somewhat

Investment rules for sustainable development

By Konrad von Moltke



Investment determines the future of any market economy. It is at the heart of efforts to promote sustainable development. Without investment, all efforts to achieve sustainable development will be futile. As more investment becomes international in character, international agreements will be needed to ensure that such investment also promotes sustainable development. These rules will be of paramount importance to developing countries if they wish to avoid the mistakes concerning environment and development that were made over the past century by the industrialized world.

Governments and commentators have thus far failed to adequately recognize differences between international trade and international investment. The issue linkage "trade and investment" trips off the tongue with deceptive ease. Yet, trade and investment are distinct economic activities, as far removed from one another as the two sides of a balance sheet—assets and liabilities on one side; profits and losses on the other. The two are inextricably linked, yet nobody would confuse assets with sales. Indeed, to do so is a criminal offense in most market economies. It should consequently be self-evident that trade and investment require distinct regimes with rules and institutions that fit the needs of each activity.

The genius of the World Trade Organization (WTO) has been its ability to fashion rules that are appropriate to trade. Yet the temptation to take this success and apply it to investment must be resisted. It is hard to imagine how WTO rules can be made to fit the needs of investment. Indeed, even the negotiation process of the WTO is designed to meet the needs of trade rules, with a process of give and take, and may prove quite unsuitable to the development of investment rules, where right and wrong prevail.

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Governments have thus far negotiated investment agreements that address a limited part of the international investment agenda, namely investor protection. There are now nearly 2,500 bilateral investment treaties (BITs), but there is no clear evidence that this vast structure has contributed to better investment or has promoted development in poorer countries. Yet, governments persist in their attempts to create such rules by including them in bilateral and regional trade agreements or by folding them into other issues such as trade in services or non-tariff barriers to trade.

In the past ten years, governments twice sought to transform these patchwork investment rules into a universal agreement—and twice they failed. First at the Organisation for Economic Co-operation and Development (OECD) with the Multilateral Agreement on Investment (MAI) and again at the WTO with the attempt to include investment in the Doha Round. Yet, no lessons seem to be learned from this experience. Governments persist in negotiating rules that do not meet the core challenge of international investment, namely how to balance private rights and public goods in a manner that is legitimate, transparent and accountable. Such rules would also create a structure that promotes sustainable development.

Ultimately rules for international investment are about good governance for the global economy. Financial flows are already fairly unrestrained and countries compete to attract investment so that investor access is usually possible—what remains at stake are the conditions of access and operations, and that requires a continuous balancing of investor rights and the development priorities of the host state. That goal is much more difficult to achieve than simple liberalization of trade or opening of investment opportunities. It should be evident that investment agreements will be unlike trade agreements—and the institutions required to support them will be unlike those of the WTO.

These differences are most obvious when it comes to dispute settlement. Trade disputes are about rules made by states and can be settled between states. Investment disputes are often about individual investments; they involve an investor and a state and thus require institutions that are capable of recognizing the legitimate interests of both (private) investors and public authorities. Settlement of investment disputes bears only passing resemblance to the settlement of trade disputes, and it must meet the essential criteria of being legitimate, transparent, and accountable.

The differences in dispute settlement are just the tip of the iceberg: international investment rules involve different parties, different issues, different principles, and different institutions than trade rules. Attempts to link them to trade agreements risk obscuring these differences and producing rules that neither promote investment nor support development.

International investment agreements involve three critical actors in the investment process: investors, host governments where investments are located, and home governments of the investors. Each of these actors has rights and obligations in relation to international investment, and rules governing these rights and obligations must be proportionate to the investments themselves: large investments in activities that are sensitive from the perspective of environment and development must carry more obligations than smaller investments in activities of lesser sensitivity. Getting this balance right requires a process of negotiation that is transparent and that is guided by a desire to promote public welfare even as investment is rendered more predictable and investor rights are protected.

Are there prospects that governments will finally begin to craft such international investment rules that serve both investors and the goals of public policy? Ultimately governments will have little choice but to do so because the logic of investment is inexorable, and international investment requires appropriate international rules. The question is only how long the detour to reach that outcome will continue to be.

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paradoxically, *bilateral* agreements continue to be negotiated—albeit for other, often political, reasons. Nevertheless, it is clear that many developing countries are becoming more mindful of the experience with the NAFTA and bilateral treaties, which has led to calls for revisions or amendments to the standard treaty format.

Interests and Fault Lines

At the WTO, a number of countries have criticized the Doha negotiating agenda's inclusion of the investment issue as overly ambitious, and have noted the lack of capacity of smaller developing countries to meaningfully engage in this discussion. Beyond this general concern, a host of more specific concerns have been raised in the Working Group on Trade and Investment, especially including a growing sense that the concrete meaning of many standard investment treaty disciplines has yet to be fully clarified.

Indeed, litigation under investment treaties is a relatively recent phenomenon, and dozens of disputes remain unresolved, with the consequence that tribunals have rarely had to interpret the meaning of key disciplines, such as national treatment, most-favoured nation (MFN) treatment and, to some extent, expropriation—much less, clarify how they may impact upon regulation and policy in sensitive areas such as the environment. Due to the lingering uncertainty about the meaning of some of the basic investment disciplines, governments have been wary about cementing those disciplines into a binding multilateral pact.

At the most basic level, the WTO discussions have seen disagreement as to the breadth of investments that might be covered. Some developing countries, such as China, favour a narrow definition covering only productive, long-term foreign direct investment, while developed countries tend to support a broader definition, which encompasses financial and other portfolio assets. Generally, bilateral investment treaties have adopted the latter

Investment law as if development mattered

By Marcos A. Orellana

Why was it that we needed international rules to govern international investment? Collective memory seems to be fading. Did it have anything to do with sustainable development, or was international law an instrument co-opted by the rich and powerful to re-discipline and exploit the decolonized nations of the world? Not the latter, many would argue. But certainly not the former either.

The search for investment law has been motivated by the desire to provide some measure of security to creative and imaginative investors who ventured into territories riddled with conflict or otherwise controlled by rudimentary governments and inadequate legal systems. Of course, these territories were rich with timber, minerals, oil and other commodities that could be extracted utilizing cheap labour, without worries of environmental regulation, typically at a huge profit. So, first with canons and gunboat diplomacy, and later with *coups d'états* and the promise of ready cash for debt-stricken countries or their leaders, international investment law jumped onto the scene.

Somehow the developmental dimension of investment law was thrown out with the bath water. A narrow mention of development did, however, find its way into the opening line of the International Centre for Settlement of Investment Disputes (ICSID) Convention's preamble, which refers to the role of international investment in international cooperation for economic development. Development concerns have since raised their head as an element in the definition of "investment" in international arbitral jurisprudence, for example, *Salini v. Morocco (Juris)*, thus influencing the scope of arbitral jurisdiction. It is here that a fork in the road becomes apparent. One

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of the two diverging paths is the so-called "ideological" route; where arbitral panels have simply assumed that investment automatically benefits the host state with technology, capital and know-how. The other is the "reality" route, where panels ask for indicators that can empirically measure the development impacts of investment.

The ideological approach is obviously attractive to operators used to dealing with formal representation, sanitized rates of return and no questions asked. This route, however, is not contextualized within sustainable development goals and can ignore impacts related to social inequity, environmental damage, and even the economic priorities of the host country. A few examples illustrate the problem: open-pit mining that affected sacred indigenous lands in California (*Glamis* case); water delivery services that excluded poor people from coverage in Bolivia (*Bechtel* case); a cigarette export business that could only be profitable if it violated Mexican tax laws (*Feldman* case). These cases illustrate investments that failed to deliver on their promised contribution to development, but nevertheless entangled the host state in international litigation.

The reality route to investment law can also be problematic. This is partly because development is not a black and white, fill-in-the-box, or go-down-the-list exercise. It involves highly contextual value judgments and evaluations. Clearly, arbitral tribunals are ill-equipped to determine what constitutes development because there are no precise indicators to assist them. Additionally, particularly in constitutional democracies, *ad hoc* arbitral tribunals lack the legitimacy to balance the fundamental developmental issues at stake. In the face of such practical and theoretical obstacles, the search for minimum developmental standards and screening mechanisms is underway.

The Clean Development Mechanism (CDM) of the Kyoto Protocol, for example, embodies an attempt to screen and recognize projects that contribute to global sustainability and the reduction of greenhouse gas emissions. Other screening mechanisms relating to investments have been criticized by capital exporting countries on the grounds that they can be open to corruption unless transparency is ensured at every turn, including in administrative agencies and dispute settlement.

International financial institutions that have a development and poverty eradication mandate seem to be making some progress. If their traditional approach was to measure development by counting royalties, income generation, transfer of funds, etc., the International Finance Corporation (IFC) and the World Bank are reinventing themselves and elaborating a set of indicators that would enable these institutions to screen project sponsors, determine their development impact, and exclude those with a proven negative track record. Major private banks have also announced their decision to apply IFC environmental and social standards. Export Credit Agencies from OECD countries also have agreed to benchmark their projects against the standards applied by the IFC or regional development banks. This diversity of standards and benchmarks speaks to the increasing importance of development concerns in investment financing.

While it is long past time for investment law to recognize these developments, it actually seems to be moving in the opposite direction. Recent bilateral investment treaties (BITs) grant broad rights and enforcement powers to investors, and restrict the ability of national and local governments to regulate the activities of foreign investors to meet local developmental, environmental and social priorities. In addition, the promise of good governance through investment disciplines is frustrated by unacceptable discrimination that provides foreign investors with greater rights than locals. Moreover, the huge transaction costs and potential liability associated with threats of litigation can stifle the development of necessary domestic laws and regulations in the public interest.

Recent analysis on state contracts, such as the Baku-Tbilisi-Ceyhan Pipeline project agreements, reveals an extreme model of investment protection that deprives host states of their regulatory powers and vitiates

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approach, serving to buttress the developed countries argument.

One issue, which is slowly emerging and which may have important consequences for environmental and other regulatory agencies, is the reach of treaty provisions on so-called minimum standards of treatment, for example to provide foreign investors with fair and equitable treatment, or, in the case of some treaties, to ensure that permitting, licensing and other administrative processes are transparent, coherent and responsive to investor interests. While these latter criteria may be viewed as requirements of good governance, it remains the case that the bureaucratic apparatus of many host governments may fall short of these substantive treaty obligations. When not accompanied by appropriate levels of financial and technical assistance, international investment treaty commitments may simply serve to put developing countries in violation of international law, and to provide foreign investors with a vehicle for extracting compensation for such failings. Another perverse consequence may be a heightened reluctance on the part of governments to introduce new regulations, or to seek enforcement of existing health or environmental regulations, lest such activity fail to live up to the standards of transparency and procedural fairness laid out in the investment agreement.

Although transparency is often guaranteed to foreign investors, it rarely extends to outside actors seeking to monitor the impact of foreign investments. Local communities and civil society groups can play a crucial role in mounting public pressure for environmental regulatory compliance. Yet, investment treaties generally fail to acknowledge this role, much less provide for tools—transparency, disclosure of information, public consultation—that might permit local actors to engage in an informed dialogue over foreign investment and environmental regulatory compliance.

Another contentious matter has been the question of whether the grant of non-discrimination should extend to the so-called *pre-establishment* stage of an investment. While investment agreements routinely offer national treatment and/or MFN treatment to foreign investments which have been duly established in the host territory, it is less common for this prerogative to be granted to prospective investments. Under general international law, host governments enjoy full control of entry and establishment, and only a handful of countries have agreed to cede some of this control in their investment treaties. For its part, India has argued in its interventions at the WTO that commitments to accord non-discrimination at the pre-establishment phase are neither feasible, nor necessary, insisting that: “developing countries need to retain the ability to screen and channel FDI in tune with their domestic interests and priorities.” Depending upon a given country’s priorities, such screening could include assessments of prospective investments for their environmental suitability or their contribution to domestic development goals.

Notwithstanding the opposition, pre-establishment commitments are found in a small, but growing, number of bilateral agreements. The U.S. and Canada have included such provisions in many of their BITs and FTAs, and recently other countries such as Japan, Korea, Singapore and Mexico have begun to incorporate such provisions into investment agreements. In the event that such pre-establishment commitments are undertaken, they could either apply across-the-board, but subject to specific exceptions, through a *negative list approach*; or only to sectors which have been expressly designated by parties to an agreement, through a *positive list approach*. In the WTO context, there has been persistent disagreement as to which is the more appropriate approach. Some developed countries, including Canada, have championed the merits of a negative list approach, while many developing countries have spoken in favour of a positive list approach (notwithstanding

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their laws. These types of contracts force developing countries to capitulate to investor demands and are triggering in a new era of international corporate rule: where foreign investors are insulated from the reach of local laws and subject to their own self-regulation. Undoubtedly, a corporate dream come true—if only in the short term.

Environmental, health, and safety regulation is essential to safeguard fundamental rights of local communities and workers. Any project that cannot guarantee these minimum and necessary prerequisites cannot contribute to sustainable development, and must not receive international protection. If development really matters, then investment law needs to come to terms with this simple reality.

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their general opposition of pre-establishment commitments in any form).

A negative list approach raises concerns insofar as it may be beyond the capacity of less developed countries to analyze fully their economies and future policy priorities, in order to enter exceptions for all areas which should be sheltered from liberalization. By contrast, a positive list approach offers greater scope for committing only to sectors that the host government feels comfortable in committing. Given the relative irreversibility of such commitments once they are made, considerable foresight is required to ensure that crucial policy space is not ceded unintentionally.

On a related note, fault lines have also emerged over the use of performance requirements—i.e., the imposition of certain obligations on foreign investors at the point of entry or at some later stage in the investment. While the WTO Agreement on Trade-related Investment Measures (TRIMs) prohibits a category of performance requirements that impact negatively upon trade (e.g., requirements to export a given percentage of goods), governments generally remain free to impose a broad range of other requirements on foreign investors including requirements to establish joint venture, hire local employees (including from minority or disadvantaged groups), or invest in local research and development. Arguments continue as to the efficiency and effectiveness of such requirements, with some observers insisting that many are counter-productive and may serve to scare away investment, while others note that certain performance requirements can contribute to important policy objectives. One conceivable use for such performance requirements may be to mandate high environmental standards, or to diffuse more environmentally-friendly technologies.

Some governments, including India and Brazil, have called for a scaling back of the performance requirements currently prohibited under the TRIMs Agreement, and have resisted efforts to use bilateral trade and investment agreements to prohibit further categories of performance requirements. Meanwhile, the United States has called for an expansion of the TRIMs Agreement at the same time as it has used its bilateral agreements to ban a wider array of such requirements.

To some extent, disagreements over the imposition of specific performance requirements upon foreign investors foreshadow an underlying disagreement about the appropriateness of holding foreign investors (and even their home states) to broader responsibilities or obligations. The overwhelming proportion of agreements are narrowly focused upon investor rights, rather than responsibilities (such as to undertake environmental impact assessments, to respect basic human rights, abstain from corrupt practices, and

general corporate social responsibility). At the WTO, a number of countries—including China, Cuba, India, Kenya, Pakistan and Zimbabwe—have called for an examination of "legally-binding measures aimed at ensuring corporate responsibility and accountability relating to foreign investors." Such proposals have been rebuffed by others, including the European Union, which insists that an international investment agreement would be binding only on states, not individual enterprises.

One feature of many investment agreements, which has contributed to calls for a balancing of investor rights with responsibilities, has been the grant of direct legal personality to investors; i.e., enabling them to mount an international arbitration against host states. In stark contrast to the WTO dispute settlement rules, which are exclusively reserved for state-to-state disputes, most recent investment agreements provide recourse to so-called investor-state arbitration. This novel device has permitted investors to challenge government measures, policies or actions which are thought to contravene the substantive provisions of a given treaty. The investor-state mechanism has given rise to a substantial volume of litigation in recent years.

Notably, the 2001 Doha Declaration—which charged the Working Group on Trade and Investment with its new mandate—refers only to the need to clarify how investment disputes would be settled between member-states under any prospective WTO investment agreement. Some developing countries, joined by Canada, are opposed to the inclusion of an investor-state dispute settlement mechanism in the WTO (even though such a device is common in bilateral agreements to which they may be party). Others, including Chinese Taipei, have argued for the usefulness of investor-state dispute settlement in the WTO, partly because the overwhelming proportion of bilateral investment agreements already accords this important privilege to investors.

Just as investor-state dispute settlement was not included in the Doha mandate, neither was the contentious issue of expropriation. While this appeased many developing countries, business groups were not enthusiastic about any multilateral agreement which failed to protect against expropriation.

Trends and Future Directions

The consistent failure to launch multilateral investment negotiations has meant that the constellation of bilateral investment treaties and investment provisions in bilateral and regional free trade agreements has continued to expand. Indeed, some of the most investor-friendly provisions which have been so controversial at the multilateral level (e.g., prohibitions against categories of performance requirements, commitments covering investment at the pre-establishment stage) are already enshrined in newer-model bilateral agreements concluded by the U.S., Canada and Japan with a variety of other countries. Discussions in the WTO Working Group on Trade and Investment remained conspicuously silent on the fundamental question of the relationship between the existing bilateral agreements and any multilateral agreement that might emerge.

Investor enthusiasm for these bilateral agreements can be seen both in the strong surge in litigation under the agreements, and in the fact that many influential business groups were agnostic about a proposed WTO investment agreement. The prevailing view in the United States and in other industrialized countries seems to have been that the business community could secure more favourable terms in bilateral agreements than in any multilateral agreement launched under the auspices of a so-called "Development" Round.

As the bilateral arena continues to see a flurry of negotiations, some governments are taking notice of the potential environmental

impacts of such agreements. Recent negotiating templates unveiled by Canada and the U.S. seek to clarify that non-discriminatory health and environmental regulations will rarely be deemed to constitute an indirect form of expropriation; thus seeking to allay some concerns that public interest regulation could be construed as conflicting with investment rules on expropriation. However, civil society groups have called for more comprehensive efforts to incorporate environmental considerations into investment agreements.

While greater attention is starting to be paid to the potential impact of ambiguous treaty language upon the right to regulate in sensitive sectors such as health and environment, it remains the case that investment agreements continue to commit developing countries to a series of extensive and sometimes unclear legal obligations. This is particularly the case when binding commitments are undertaken to liberalize certain sectors. An absence of foresight may lead to consternation in future, as the policy implications of (perhaps ill-considered) treaty commitments come to exert pressure on governments. Moreover, the bilateral negotiating dynamic tends to be highly asymmetrical—with a powerful (often developed) government insisting that negotiations proceed from a template of its own design.

While the prospects for a multilateral agreement seem dim following the decision to exclude investment from the current round of multilateral trade negotiations, it may be time for a fundamental rethinking of international investment agreements, perhaps leading to the elaboration of a balanced, model agreement which could set forth a more nuanced package of rights and responsibilities for investors and governments alike. To this end, in 2005 the International Institute for Sustainable Development (IISD) unveiled a proposed *Model Agreement on Investment for Sustainable Development*. Any successful multilateral agreement will need to appeal to all stakeholders—Northern and Southern governments, business and civil society groups—if it is to supplant and supplement the existing expanse of bilateral, regional and multilateral rules which have grown up over the last half-century. In the interim, bilateral and regional investment agreements continue to proliferate at a remarkable rate, in the absence of clarity about the full implications of such agreements for health and environment, and in a context where developing country interests are more easily marginalized.