杜哈投資協商：往何處？式微乎？

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中文摘要

海外直接投資(FDI)在世界貿易組織的最後兩次部長級會議中得到高度關注。2001 年的杜哈回合談判決定將投資談判延至 2003 年部長級會議。2003 年坎昆會議中，投資議題與其他同爲新加坡議題的三個項目成爲焦點：貿易與競爭政策，促進貿易，政府採購透明化。

從 WTO 討論投資以來一直假設多邊貿易體系的原則能使建立多邊投資協定更具活力。然而此一假設出現三大問題。其一，這些規則是落實在目的在培養與擴大全球商品貿易的架構下而非專爲培養與擴大全球投資流動的架構下。其二，任何 WTO 投資協定都需與既存的雙邊與區域投資協定有所妥協。其三爲實施對發展中國家有利的特別與差別待遇

所造成的衝擊。因此，檢驗實踐杜哈發展議程的其他途徑有其必要。

本文旨在探討將投資協定納入世界貿易組織眾多協議中必須決定的目標與主旨。在檢視世界貿易組織於杜哈談判前後的討論內容後，本文將著重於亟待解決的主要議題上。最後，本文將對未來提出建議。

雖然 WTO 投資協議所追求的目標是健全的，但是此一協議的協商分析與方法卻突顯出嚴重的問題。我們建議各國政府應儘快界定出一個更實際而具生產力的議程。在起跑點上，他們需要承認既存的雙邊協商協定網絡已提供強而有效的機制。WTO 的協商應該以補充或強化而非取代此一網絡爲目標。此外，各國也需接受一項事實：投資流動並不僅侷限於商品與服務的交換，而是受到各種不同因素與考量的影響。因而需要一套不同的規則與程序維繫，其所需要的機制是不同於商品貿易的。最後，如同在貨品貿易中帶來的無法估計的傷害般，各國政府需承認在投資領域中對開發中國家的特殊和區別對待規則會對這些開發中國家造成重大的傷害。

The Doha Investment Negotiations: Whither or Wither

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Introduction

High drama attended the issue of foreign direct investment (FDI) at the last two ministerial meetings of the World Trade Organization (WTO). At the 2001 meeting in Doha, the inclusion of investment in the mandate for the new round of multilateral trade negotiations became a make-or-break issue. The result was a decision to delay launching investment negotiations until the 2003 ministerial meeting, subject to an explicit consensus on the modalities of negotiations. The scope of the intended negotiations was limited to a narrow range of

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issues and heavily laden with references to the special development and financial needs of developing countries. At Cancun, investment was treated together with three other issues, trade and competition policy, trade facilitation, and transparency in government procurement, collectively known as the Singapore issues. At Cancun, the Chairman proposed only a modest step on investment — that the Working Group be mandated to elaborate the negotiating modalities for adoption at a later date. Although the European Union, the principal supporter of WTO investment negotiations, offered to withdraw the proposal, Japan and Korea insisted that at a minimum the Chairman's text be accepted. Developing countries, on the other hand, refused to accept any of the Chairman's proposals on the Singapore issues and, on that point, the meeting terminated.

From the outset of investment discussions in the WTO, it has been assumed that the principles of the multilateral trade system can inform the erection of a multilateral investment agreement. Three major issues arise from such an assumption and require examination if the WTO debate is to be joined on a basis likely to yield a coherent result. The first is the architecture of lodging rules designed to foster the expansion of global investment flows within an architecture designed to foster the expansion of global trade in goods. The second is the need to reconcile any WTO investment agreement with existing bilateral and regional investment agreements. The third is the implication of implementing special and differential treatment in favour of developing countries. In short, there are some large gaps in the intellectual capital necessary to launch negotiations.

As this examination proceeds, it would be useful to examine alternatives to implementing the Doha mandate. Recent experience suggests that a scaling back of ambition may need to be contemplated. It would be useful to examine the advantages and disadvantages of making the mandate an integral part of the GATS negotiations to achieve the goals of the Doha mandate. Ministers might also consider creating a broad multilateral framework in order to provide a bridge between the WTO and the existing network of bilateral agreements. At the low end of ambition would be a simple declaration of principles on the treatment of foreign investment. Finally, the option of taking investment off the WTO negotiating agenda should not be excluded.

A wise person once observed that “if you don’t know where you are going, you might end up somewhere else.” At some point, WTO ministers will need to dispose of the Doha mandate by deciding on the object and purpose of bringing investment within the WTO family of agreements. This article aims to contribute to that decision. After reviewing the main thrust of WTO discussions prior and subsequent to the Doha mandate, we focus principally on the major issues that require resolution. Finally, we offer some recommendations on the way forward. We do not discuss the economic and political issues surrounding the merits and demerits of foreign investment, a field that has already been amply plowed.

Pre and Post Doha

It is far from obvious why a mandate to negotiate a WTO investment agreement should provoke such controversy. There is no dispute that the rapid expansion of FDI is the most dramatic feature of global economic performance over the last 15 years.[2] Although the economic slowdown in the United States and other industrialized countries has resulted in diminished flows, a return to normal growth rates will almost certainly produce resumption in FDI growth. Developing countries have been rapidly liberalizing their investment policies and negotiating bilateral investment agreements (BITs).[3] As a general proposition, the superiority of multilateral economic agreements over bilateral and regional agreements is uncontested. The WTO is the logical home for an investment agreement, since it embraces virtually all the home countries of foreign investment and most of the host countries; as well, a number of existing WTO agreements already address FDI issues. It would be reasonable to conclude that the negotiation of a WTO investment agreement should not, in principle, present greater obstacles than those encountered in the negotiation of other WTO agreements. Furthermore, the inclusion of investment in the negotiating mandate would enlarge the menu of useful trade-offs necessary for the successful conclusion of any comprehensive trade agreement.

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[2] Between 1996-2000, global foreign investment inflows grew at an annual average rate of 40 percent, the export of (non-factor) goods and services at 4.2 percent, and GDP at 1.2 percent. UNCTAD, *World Investment Report* (WIR), 2001, table, p. 4.

[3] Between 1991 and 2002, 95 percent of 1,641 policy changes made national policies more welcoming to foreign investment. By the end of 2002, there were almost 2,200 BITs. WIR, 2003, pp. xvi-xvii. WT/MIN(96)

At the Singapore Ministerial meeting in 1996, ministers agreed to establish a working group on trade and investment on the understanding that an "explicit" consensus would be required for future negotiations.[4] Between 1997 and 2001, the working group focused upon the relationship between trade and investment for development and economic growth, and the relevance of existing international instruments. The Doha Declaration narrowed the focus of the working group to seven issues: 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. However, the Doha Declaration retained the language of Singapore by specifying that "…negotiations will take place … on the basis of a decision to be taken, by explicit consensus, on modalities of negotiations."[5]

Over the course of 22 working group meetings held between 1997 and 2003, the proponents of a WTO investment agreement made three main points.[6] The first was that the importance of investment as the primary driver of global economic growth meant that "a basic framework of [investment] rules … would be beneficial for the world economy as trade

[4] Paragraph 20 of the Singapore Declaration on WTO website: doc. WT/MIN(96)/DEC

[5] Paragraphs 20-22 of Doha Declaration (WTO/WT/MIN(01) accessed at WTO website.

[6] The reports of the Working Group as well as papers for discussion submitted by WTO members can be found on the WTO site in the document series WT/WGTI.

rules have been for most countries over the past fifty years."[7] The second was that a multilateral agreement would complement the large network of bilateral and regional agreements which is not universal and which exhibits highly variable scope and coverage.[8] The third was that three current WTO agreements — the General Agreement on Trade in Services (GATS), the Agreement on Trade-Related Aspects of Intellectual Property Protection (TRIPS), and the Agreement on Trade-Related Investment Measures (TRIMS) — create a convenient and effective foundation upon which a comprehensive investment agreement could be negotiated.[9]

These arguments encountered stout resistance from a number of developing countries on the grounds that investment is a domestic matter, not an international trade issue susceptible to rule making within the multilateral trade system.[10] In this view, a sensible foreign investment strategy requires measures to

[7] The European Union (EU) position is representative of this view. See EU website: trade-info.cec.eu.int/europa/2001newround/18.htm. See also the Japanese paper, "Consideration of the Necessity of Multilateral Investment Rules from Diversified Viewpoints," submitted to the Working Group March 7, 2002: doc. WT/WGTI/W158.

[8] See Communication from Canada, Costa Rica and Korea, doc. WT/WGTI/W162 June 2003, paragraphs 7-13.

[9] For a discussion of the treatment of foreign investment issues in the current WTO, see M. Koulen, "Foreign Investment in the WTO," in E.C. Nieuwenhuys and M.M.T.A. Brus, eds., *Multilateral Regulation of Investment* (Boston: Kluwer Law International, 2001), 191-203. See also Pierre Sauvé, "A first Look At Investment in the Final Act of the Uruguay Round," *Journal of World Trade*, 28(5), 5-16.

[10] The Indian delegate made a crisp statement to this effect at the December 2002 meeting of the Working Group. See doc WT/WGTI/M19, paragraph 177.

determine the form of investment that most contributes to development, for example, by favouring green-field investments over mergers and acquisitions, or by imposing performance requirements on foreign investors to generate employment, transfer of technology, export performance, training, or research and development. From this perspective, there is also the potential for conflict between the development interests of host countries and the global profit maximizing aims of foreign investors that needs to be met by a code enforced by home countries to regulate the behaviour and operations of investors in host states.[11] Bilateral agreements, on the other hand, are more flexible instruments than multilateral agreements, since they can be tailored to meet particular policy needs. There is an obvious worry, perhaps not wholly unfounded based on past experience, that the agenda of the industrialized countries would dominate any WTO investment negotiation.[12]

The pre-Cancun report of the working group recorded that the wide gaps that remain between the supporters and opponents of WTO investment negotiations. In the view of the former, the time has come to move to negotiations. In the view of the latter,

[11] See paper submitted by China, Cuba, India, Pakistan, and others: doc WT/WGTI/W/152.

[12] For a developing country perspective of the arguments for and against a WTO investment agreement, see “Multilateral or Bilateral Investment Negotiations: Where can Developing Countries make Themselves Heard?” A briefing paper issued by the CUTS, Centre for International Trade Economics and Environment, No.9/2002 at CUTS.org. Bernard Hoekman and Kamal Saggi set out the arguments for a multilateral agreement but find none of them compelling. See “Multilateral Disciplines for Investment-Related Policies,” Policy Research Working Paper No. 2138, Development Research Group, World Bank, Washington D.C. 1999.

significant differences remain and a decision to move to negotiations is premature.[13]

Major Issues

Investment negotiations both benefit and suffer from the success of the multilateral trading system in fostering the expansion of international trade. The benefit derives from importing the trade system’s principles of non-discrimination, its progressive liberalization, and its effective enforcement of rules into investment agreements and internalizing them into domestic investment policy. Investment negotiations suffer from the uncritical assumption that a multilateral investment agreement can be erected on trade agreement principles without a careful examination of issues specific to investment and investment agreements, including: the disconnect between the architecture of the trade regime and the fundamental nature of investment; the need to reconcile any WTO investment agreement with existing bilateral investment agreements; and the implications of implementing special and differential treatment in favour of developing countries.

Architecture

The architecture of the multilateral trade system, first embodied in the 1947 GATT, is based upon the reciprocal exchange of rights and obligations by governments regulating the measures they can take to affect the flow of international

[13] See report of Working Group to the General Council: WT/WGTI/7, paragraphs 56-58.

trade. The treatment of investment within this architecture presents three troubling considerations.

First, GATT rights and obligations bear upon the treatment accorded by governments to the import and export of goods into and from their territory and treatment of those goods within the domestic market. This treatment affects directly the economic interests of traders and producers within the territories of WTO members. Such traders and producers have a territorial identity, which a government may act upon. In investment, the emergence of global capital markets with few restrictions on the movement of capital creates a disconnect between the governments party to an investment agreement and investors. An investor might raise capital in several countries to invest in a country that has an investment agreement with the home country of the investor. Investors resident in other countries, which do not have an investment agreement with the host country, would thereby obtain benefits which their home countries have not negotiated. An investment in one country might be sold by an investor of a country that does not have an agreement with the host country to an investor of another country that does have such an agreement. The benefits of that agreement would typically accrue to that investment.[14]

[14] Another example is the use by an investor, resident in a country that is not party to an investment agreement, of a subsidiary in a second country as a vehicle for investment in a third country. If the latter's country were party to an investment agreement, its terms would typically apply to any eligible investment irrespective of the source of the capital. Consider the case of a Canadian investor raising capital on the global market for investment in a range of developing countries where the protections of an investment agreement were critical. Since Canada is party to only 17 bilateral investment agreements, the Canadian investor might well be advised to

In such circumstances, a government could well find itself owing obligations to investors in countries with which it does not have an agreement or with respect to investments which were not included in the agreement. For example, in 1998 a Dutch Antilles company obtained a judgement against Venezuela for the latter's failure to honour promissory notes purchased by Venezuelan citizens and subsequently sold to the Dutch company. Thus an investment that began as a transaction wholly internal to Venezuela, and enforceable in the event of dispute under domestic law, became subject to the jurisdiction of an investment agreement without the consent of either party to the agreement.[15] Similarly, the home country of the investor has no way of capturing the economic advantages of an investment agreement if its companies are used as investment vehicles for investment sourced elsewhere. At the same time, it could well find itself a party in cases where it has no direct economic interest. In principle, the multilateralizing of investment obligations through the WTO ought to mitigate anxieties on this

establish an investment subsidiary in Germany, which is party to 112 agreements, in order to obtain a much wider range of coverage. The World Bank under the International Centre for the Settlement of Investment Disputes (ICSID) lists the BITS for each World Bank member; available at Worldbank.org/ICSID.

[15] This action occurred under the terms of the Netherlands-Venezuela Agreement on Encouragement and Reciprocal Protection of Investment and was adjudicated under ICSID procedure (case 37.ILM 1998 available at the World Bank site). In a similar case, the US-based Bechtel Corporation has used its Dutch subsidiary to bring an ICSID action(No.28 on the ICSID list of pending cases) against Bolivia under the terms of the Netherlands-Bolivian Bilateral Investment Treaty. See CUTS briefing paper for a short summary of the case.

score by spreading risk. In reality, however, the prospect of a multilateral agreement has increased the level of uncertainty.[16]

Second, there is a major difference between the reach and intrusiveness of trade obligations and investment obligations elaborated on the same principles. In a trade agreement, the obligations apply to a reasonably defined set of measures such as tariffs, quotas, internal taxation, and product standards that affect the movement of goods across borders and within domestic markets. While GATT, and subsequent WTO, jurisprudence, testifies to the complexity of the practical application of such measures, their reach is essentially transaction-based, affecting the actions of buyers and sellers. Further, the rules of the GATT largely consist of a set of negative prescriptions by which governments agree to refrain from trade-restrictive actions. Some of the WTO agreements have changed the emphasis from negative prescription to positive action, raising fundamental issues of governance and posing new challenges to the values and preferences of the parties.[17]

In an investment agreement, the obligations apply not only to transactions but to the operation of enterprises and the treatment of foreign-owned assets across potentially the full

[16] A clear sub-theme running through the pre-Doha discussions of the working party was precisely anxiety about the scope and impact on national policies of a multilateral agreement. See WT/WGTI/7, paragraphs 28-35.

[17] We explore the implications for the WTO and its members arising from the shift in emphasis from negative to positive prescription in Dymond and Hart, "Post-Modern Trade Policy: Reflections on the Challenges to Multilateral Trade Negotiations After Seattle," *Journal of World Trade Law* 34:3 (June 2000).

spectrum of government regulation of business activities. Further, these obligations do not terminate with the transaction but remain in force so long as the agreement is in effect and the investment remains within the country. In a positive rule-making regime, in circumstances in which traditional border barriers to trade have been eliminated or reduced to nuisance levels, the meaning of national treatment has been stretched to erase the boundary between the domestic and the external economy. While there may be a solid economic case for positive rule making, the effect is to bring into play the deep social and historical roots that underpin systems of national or sub-national regulation, and thus raise profound issues of national self-determination. The choice that host states face is how much policy flexibility to maintain at the cost of reducing their attractiveness to foreign investors. A multilateral agreement, as noted above, creates a high level of anxiety as the tools that host states have sought and used in the past would disappear, enforced by an agreement over whose content they may have little control.

The third architectural challenge in negotiating a multilateral investment agreement is finding a balance of advantage. Trade negotiations bring together countries with conceptually similar objectives, informed by mercantilist instincts. It is access to foreign markets that provides the political muscle for negotiations. Success is judged and explained in terms of the economic benefits that flow from expanded export opportunities. An overall balance of benefits, or advantage, is achieved when the parties to the negotiation judge that the enhanced export opportunities gained outweigh the increased access granted to imports. The most-favoured-nation principle extends these benefits through enhanced export opportunities to all members of the regime, irrespective of their contribution to reducing trade barriers. When the primary objective of the negotiations is expanded exports, the agreement of other countries to provide and guarantee liberal terms of access to their markets is essential. The more countries that join such a liberalizing instrument, the greater the export market access achieved and the more ample the economic benefits.

Investment agreement negotiations, on the other hand, bring together countries with conceptually different objectives for which the impulse to find a balance of advantage could prove destructive. For capital importers, it is access to foreign capital that provides the political muscle to propel the negotiations. The objective is to reduce the real or perceived risk premium associated with foreign investment by offering protection against a range of perils, such as expropriation without compensation. Success in capital-importing countries is measured and explained in terms of the increased volumes of foreign investment that result from the agreement. Demanding reciprocal treatment in investment negotiations makes no economic sense. Indeed, for developing countries, the offer of treaty-based protection for their outward investment is more of a disincentive than an inducement to enter into an agreement. Further, the benefits of reducing such premiums on a wider multilateral basis are probably more theoretical than real. It follows that, since the benefits of multilateralizing unilateral liberalization are not apparent, it makes little sense to limit access to foreign capital by tying commitments to its governance to the fate of multilateral negotiations. For capital-exporting countries, this equation is turned on its head. The objective is to secure the highest degree

of protection possible for their investors and investments. Attracting foreign investment is not their objective. For these countries, the advantages of multilateral agreements are self-evident.

Reconciliation with Existing Agreements

The reconciliation of multilateral trade agreements with bilateral agreements does not normally pose serious legal or commercial policy problems. The Vienna Convention on the Law of Treaties provides that when treaties cover the same subject, the treaty that is later in time or more specific in content will generally prevail in the event of conflict.[18] Alternatively, parties to bilateral and multilateral agreements may specify which agreement prevails in the event of conflict.[19] In some cases, existing bilateral agreements may be suspended so long as the related multilateral instrument is in force.[20] As a matter of commercial policy, the development of trade agreements over the last fifty years has followed a steady path towards deeper and broader rights and obligations, with each new agreement encompassing and adding to the rights and obligations of existing agreements. Internalizing these successive agreements

[18] Article 30. See text at www.fletcher.tufts.edu.

[19] The North American Free Trade Agreement (NAFTA) provides, in Article 103, that its terms prevail in the event of any inconsistency with the GATT or other agreements except where provided otherwise in the NAFTA. It also provides, in Article 106, that the trade obligations of certain environmental agreements will prevail in the event of any inconsistency with the NAFTA.

[20] By exchange of notes, Canada and the United States suspended the application of their 1938 trade agreement upon the entry into force of the GATT. Canada, *Treaty Series, 1948,* No. 36, Appendix C.

into domestic legislation and external commercial policy has not generally required governments to make awkward choices among conflicting agreements. Reconciling a WTO investment agreement with the extensive network of existing BITs, however, would pose a significant challenge since the former, if it remains faithful to the Doha mandate, would considerably diminish the rights and obligations set out in the overwhelming majority of bilateral agreements currently in force.

The primary focus of a modern BIT is the protection of foreign investors and investments within the territory of the host country. Its overriding purpose is to constrain the ability of host states to interfere arbitrarily with the operations of foreign investors and investments within their territory. This protection is conveyed principally by provisions delimiting the circumstances in which expropriations may occur, providing a procedure whereby the expropriation can be challenged, and requiring that the foreign investor be promptly and adequately compensated. An obligation to grant fair and equitable treatment reinforces this protection by establishing an international legal standard to which host states can be held accountable. National treatment and most-favoured-nation treatment obligations are useful obstacles to discriminatory treatment. Provisions requiring the free transfer of funds give an investor the flexibility to operate the investment profitably. Later versions of the BITs provide for limitations or prohibitions on the imposition of performance requirements upon foreign investors and the right to the temporary or permanent entry of technical and managerial personnel. Virtually all modern agreements provide a right for foreign investors to obtain third-party arbitration for disputes

arising from the performance of obligations by the host country.[21]

A WTO investment agreement based on the Doha mandate would, in effect, reverse the trend to ever increasing disciplines upon the capacity of host states to interfere with the operations of foreign investment and investors. The mandate does not envisage any of the standard elements of investment protection. It has only two elements that provide for substantive obligations: transparency and non-discrimination. While both are standard features of BITS, the scope and provisions would govern their practical effect. Here the mandate provides for a positive list approach modeled on the GATS, i.e., the agreement would apply only to those sectors that WTO members agree to put in their schedule of commitments. Based on the experience of the GATS, it is reasonable to assume that the coverage would, at least initially, be more meagre than ample.[22] The reference to development provisions creates an expectation that developing countries would be able to opt out of the main provisions of the agreement if they were judged incompatible with development objectives. The reference to exceptions and balance-of-payments safeguards creates another category of circumstances in which the substantive provisions of the agreement would not apply. The references to consultation and dispute settlement suggest that the normal WTO provisions, especially as regards the latter, would apply and that the investor-state dispute settlement

[21] See UNCTAD, *Bilateral Investment Treaties*, 29-104 for a discussion of the principal features of modern BITS. See also annual WIR reports which trace the evolution of BITS.

[22] About two-thirds of WTO members scheduled fewer than 60 sectors of the 160 sectors specified in the GATS list.

procedures that are now commonplace in modern BITS would have no place.[23] The overall result would be an agreement stripped of most of the core provisions that constitute a modern BIT.

The legal problem of reconciling such an agreement with existing BITs would not be complicated if WTO members agreed essentially to suspend the operation of any BIT for as long as the WTO agreement were in force. It is difficult to imagine, however, that capital-exporting states would forego the rights their investors enjoy in BITS, for example, protection from expropriation, in return for a WTO agreement, or that capital-importing states would find it advantageous to lower the standards of protection they already grant to foreign investments. In such circumstances, the Vienna formula would be an awkward solution, since the scope of coverage as defined in the later instrument would prevail in the event of conflict, while the protection against expropriation would be contained in the bilateral instrument. The approach followed by the NAFTA countries is more workable, but would be immensely time consuming and labour intensive. It would require each party to a BIT to engage in a round of negotiations with its bilateral partners to determine the circumstances in which the BIT or the WTO agreement would apply and to reflect the results in its internal regulations governing the treatment of foreign investment.

[23] If the debate on dispute settlement in the working party is a reliable guide, there is virtually no sentiment favouring an investor-state mechanism in a WTO agreement. See Report of the September 2002 meeting of Working Group in doc WT/WGTI/M19, paragraphs 158 to 202.

Special and Differential Treatment[24]

The Doha Declaration calls for special and differential treatment for developing countries in 27 of its 52 paragraphs, an emphasis reinforced by a separate "implementation agenda" that addresses the demands of developing countries to renegotiate the implementation of current WTO commitments.[25] Paragraph 22 of the Doha Declaration refers to "the special development, trade and financial needs of developing and least-developed countries [which] should be taken into account as an integral part of any (investment) framework to enable members undertake obligations and commitments commensurate with their individual needs and circumstances." It thus creates the expectation that any WTO investment agreement will contain special provisions for developing counties.

The principal instruments of special and differential treatment in the GATT, and subsequently the WTO, have been rule-avoidance and the creation of preferences for the exports of developing countries. The continuing vitality of special and differential treatment is the culmination of 50 years of denial of the basic premise of the multilateral trading system in the GATT and subsequently the WTO. Special and differential treatment rests upon the perception that developing countries are unable to take full advantage of the opportunities created by the

[24] This section draws on Hart and Dymond, "Special and Differential Treatment and the Doha Development Round," *Journal of World Trade* 37:2 (April 2003), 395-415.

[25] Some 85 proposals have been made since the Doha meeting. Agreement has been reached on none of these. See *Inside US Trade*, March 28, 2003 for a report on the state of discussion to date.

multilateral system and need to shelter their economies from the rigours of international competition in order to nurture their industries to a point at which they can fully participate in the international economy. Its impact has been to deny developing countries the opportunity to exploit the principal advantages of the multilateral trade system — support for domestic economic policy reform, a benefit that accrues whether a country is developed or developing. Introducing special and differential treatment into an investment agreement would further vitiate its benefits for developing countries[26]

The rationale for an investment agreement lies in some basic economic and political realities. The vast majority of bilateral investment agreements have been concluded to provide protection for FDI from industrialized countries to developing countries whose record in providing a stable and secure investment climate is suspect in fact or in perception. If developing countries were exempted from the application of the central rules of a WTO agreement, the effect would be to create more favourable conditions for foreign investment in developed rather than developing countries. Not only would investors in developed countries be discouraged from looking to developing countries, the investors in these countries would find outward

[26] The appeal of special and differential treatment is devoid of any economic rationale and will continue to retard economic development, poverty alleviation, and the full participation of developing countries in the trading system. Such reasoning as there is fits David Henderson’s (*Innocence and Design*, Oxford, 1986) definition of do-it-yourself economics (DIYE). He observes that more than two centuries have passed since the publication of Adam Smith’s *The Wealth of Nations*, ideas and beliefs which owe nothing to any recognized economic theories still retain their power to influence people and events.

investment into industrialized countries a much more attractive proposition to the extent that treaty-based protections are important to their investment decision. As for preferences, they could only work in one direction, again to the disadvantage of developing countries, by creating high standards of obligations on the treatment of foreign investment in developed countries. Again, the economic impact would be perverse measured against the intent of an investment agreement in the Doha context, which is to foster economic growth in developing countries.

Quite apart from the inherently contradictory character of introducing special and differential treatment into an investment agreement, the attempt to do so would send largely negative messages to investors. The message, in effect, would be that developing countries are not prepared to accept obligations in the WTO on their treatment of foreign investment, with negative implications for their readiness to observe obligations that an increasing number have already undertaken in their BITs.[27]

Alternatives

There are three alternative approaches that would avoid the architectural and reconciliation challenges posed by the negotiation of a comprehensive WTO investment agreement. Each would represent a significant scaling back of the ambition of integrating investment disciplines into the multilateral trade system. So long as the introduction of special and differential

[27] The 2002 WIR (p. 95) observes that “the principle of special and differential treatment … needs to be developed further in investment.” We agree, if what they mean is that traditional S&D is counter productive and useful S&D is limited to capacity building and similar measures.

treatment did not occur, each could contribute incrementally to the security and stability of the international investment policy environment and provide a negotiable outcome that would facilitate a successful conclusion to the Doha Round. If none of these alternatives command support, the option of dropping investment from the Doha negotiating agenda should also be considered.[28]

The GATS Option

The first alternative would be to transfer the Doha investment mandate into the WTO services negotiations by reaching an "explicit consensus on modalities" to this effect. These negotiations began in 2000 pursuant to Article XIX of the GATS and endorsed by the Doha Declaration (Paragraph 15). Their objective, as agreed by the GATS Council, is to liberalize services trade through the reduction and elimination of barriers to market access.[29]

There is an arguable case for embracing this alternative. Barriers to foreign investment in the manufacturing and resource sectors have largely disappeared. By one estimate, some 80-85 percent of barriers to foreign investment are in the services

[28] Some months before the Doha meeting, the need for casting ambitions lower could be foreseen. See Pierre Sauvé, " Scaling Back Ambitions on Investment Rule-Making at the WTO," in Journal of World Investment Vol. 2. 2001, pp.529-36

[29] The guidelines for the negotiations were adopted by the WTO Council on Trade in Services in 2001. WTO doc. S/L/93 March 28, 2001.

sector. These estimates are supported by a breakdown of the exceptions to the MAI notified by the member countries of the OECD, 63 percent of which fell in the services sector.[30] Many of barriers are in the critical tradable sectors such as telecommunications, transport, audio-visual, and financial services. Further, the core provisions of the GATS already cover the principal elements of the Doha investment mandate. It would, therefore, be unnecessary to negotiate separate provisions governing issues such as non-discrimination, exceptions, and development provisions since they are already covered. If the GATS negotiations resulted in major new market access commitments for service sectors under this mode, the result would be a significant expansion of investment opportunities, achieving thereby one of the objectives of the DOHA investment mandate. The architectural challenge posed by a comprehensive investment agreement would vanish. The reconciliation dilemma would arise only for BITS and regional investment agreements in which WTO members have undertaken liberalization in service sectors that are now or might be covered in the GATS. There are few agreements where this problem would arise.

There are, however, three drawbacks to employing the GATS as a vehicle to fulfil the DOHA investment mandate. The first is that while the GATS provides for the right of establishment and forbids restrictions on transfers and payments (Article XI), it contains none of the other protections of investors

[30] See Chapter 4, "International Agreements to Improve Investment and Competition for Development," in *Global Economic Prospects, 2003*: *Investing to Unlock Global Opportunities* (Washington: World Bank, 2002), 126. See also Pierre Sauvé, "Collective Action Issues in Investment Rule-making," background paper for this chapter.

and investments that are standard and important features of BITs. Chief among these is the protection against expropriation. Under the GATS, there is neither legal impediment to the expropriation of an investment made pursuant to its provisions nor any requirement for compensation. Since a principal purpose of any investment agreement is to reduce the risk premium by constraining the scope for arbitrary and capricious interference by the host state, it is questionable whether a GATS-based agreement would make more than a marginal contribution to security and stability of the international investment policy environment.

Second, the GATS definition of an investment is enterprise-based rather than asset-based, as is the case under most BITs. This means that the range of investments covered under GATS liberalization would be considerably narrower than that available under BITs. While nothing in the services mandate precludes an examination of the definition, the effect would be to widen the scope of the services agreement in order to accommodate the effective liberalization of investment barriers. From discussions to date in the service negotiations and in the Investment Working Group, it is doubtful whether there would a strong appetite among a sufficiently broad range of WTO members to produce a consensus to move in this direction.

Third, the WTO dispute settlement mechanism is ill-suited to the adjudication of investment disputes. Typically WTO disputes involve a measure alleged to be inconsistent with WTO obligations that affects transactions between buyers and sellers and for which the value may be calculated. The complaining country is normally acting for a large number of its producers

and exporters whose interests have been damaged.[31] The preferred remedy is bringing the offending measure into conformity with WTO obligations, failing which trade compensation, or retaliation, may occur to rebalance the overall structure of WTO rights and obligations as between the countries involved. In an investment dispute, such remedies would yield little value to the investor since the security of the investment would already have been fatally compromised. Most investment disputes typically involve the interests of a single investor. In any such dispute, under WTO procedures, the complaining country becomes, in effect, the representative of a single firm challenging the sovereign actions of another country. Investors would be entitled to considerable doubt whether their home government would pursue such a case with due diligence. In such circumstances, the advantage which effective enforcement mechanisms are intended to generate, that is the security and stability of the rules, is likely to be vitiated.

<u>Establish a WTO Floor</u>

While building on the GATS does not appear to hold much promise, a number of other WTO agreements do provide some useful guidance for a more productive approach. Both the Agreement on Trade-Related Intellectual Property Rights and the Agreement on Telecommunications use some innovative techniques on which a more productive approach to investment might be modeled. Similar to the TRIPS Agreement, a WTO investment agreement could establish as a condition of WTO

[31] The dispute between Canada and Brazil over airplane subsidies is an exception, since there is only one involved exporter in each country. See WTO site for report of panels and the Appellate Body on this dispute.

membership the establishment of an appropriate regime to govern foreign investment. To that end, members would remain free to rely on existing bilateral or regional arrangements, to negotiate new bilateral or regional arrangements, or to rely on a set of guidelines setting out minimum levels of commitments for WTO members. In effect, therefore, a WTO investment agreement would establish a floor of good practice that all members must meet, while allowing continued reliance on higher levels of commitment worked out on a bilateral or regional basis. In the event of any conflict between the WTO Agreement and bilateral or regional agreements, the latter would prevail. Access to WTO dispute settlement procedures would be limited to failure to implement an appropriate regime.

A suitable set of guidelines would need to be elaborated along lines similar to the guidelines on competition principles set out in the Agreement on Telecommunications.[32] The guidelines could draw upon the basic commitments found in modern BITs relating to non-discrimination, fair treatment, investor protection, transfer of funds, and transparency which WTO members are prepared to recognize in their treatment of foreign investment. Such an agreement would be relatively straightforward and side step many of the difficulties outlined above. The inclusion of special and differential treatment for developing countries, for example, would be wholly unnecessary and inappropriate. At the institutional level, the establishment of a Council on Investment, similar to the Councils on Trade in Goods, Trade in Services, and Trade-Related Intellectual Property, would provide a permanent forum for consideration of investment-related issues

32 See WTO site for the text of the Agreement on Telecommunications.

at the multilateral level, and oversee the operation of the guidelines.[33]

A Declaration of Principles

A third, less ambitious alternative, would be to develop a Declaration of Principles on the treatment of foreign investment by WTO member countries.[34] Such a declaration would be normative rather than prescriptive. The content of the Declaration could draw upon the basic commitments found in modern BITs relating to non-discrimination, fair treatment, investor protection, transfer of funds, and transparency which WTO members are prepared to recognize in their treatment of foreign investment. It could establish the Working Group on Trade and Investment as a permanent WTO body for consultation and peer review. These principles could serve several purposes: as a framework for WTO members to manage their foreign investment relations in circumstances where they are not governed by bilateral or regional agreements; as a device for developing countries lacking a large network of bilateral or regional investment agreements to send a strong signal of investors of their openness to foreign investment and their

33 The WTO's Trade Policy Review mechanism already provides, of course a forum for the consideration of investment policies. Creating a separate council on investment would give the issue much higher profile.

34 There is precedent for this approach in the *Final Act* of the Uruguay Round. It contains a Declaration on Dispute Settlement Pursuant to the Agreement on Implementation of Article VI on the General Agreement on Tariffs and Trade 1994 or Part V on the Agreement on Subsidies and Countervailing Measures. The Declaration "recognizes …. the need for consistent resolution of disputes arising from anti-dumping and countervailing duty measures."

commitment to equitable and transparent treatment of such investment; and as the starting point for future WTO negotiations.[35] This decidedly soft option may prove in the end to have the estimable merit of any negotiation, that is, the least unsatisfactory of all other possible outcomes, including rancorous failure.

Abandoning a WTO agreement

The impulse to negotiate a multilateral regime to govern the flow of international investment has a long but troubled history. The first failure, at the beginning of the era of multilateral cooperation, was the stillborn International Trade Organization. The latest was the collapse of the negotiations for a multilateral agreement on investment (MAI) held among members of the Organization for Economic Cooperation and Development.[36]

[35] Although there is little evidence to support the existence of any such signaling effect (see for example, "Do Bilateral Investment Treaties Attract FDI? Only a bit … and they could bite." Mary Hallward-Driemeier, World Bank Study, June 2003. available at wb.org.) the enthusiasm for BITs suggests that policy makers have reached the opposite conclusion, whatever the evidence.

[36] For an account of the negotiations and the role which investment played, see Michael Hart, *Also Present at the Creation: Dana Wilgress and the United Nations Conference on Trade and Employment at Havana* (Ottawa: Centre for Trade Policy and Law, 1995) For an account of the MAI negotiations, see W.A. Dymond, "The MAI: A Sad and Melancholy Tale," in Fen Hampson, Michael Hart, and Martin Rudner, eds., *A Big League Player? Canada Among Nations 1999* (Toronto: Oxford University Press, 1999).

The absence of a multilateral agreement has been filled by the current network of almost 2,200 bilateral agreements providing a principled and effective framework of rules, and that continues to be focused on adapting the disciplines and architecture of trade agreements to non-trade transactions. Further as the rapid growth of foreign investment has shown, investors have not been deterred by the absence of a multilateral framework. It may, therefore, be reasonably concluded that there is no serious gap in international disciplines governing the treatment of FDI. To the extent that maintaining investment on the negotiating agenda constitutes a serious obstacle to progress on the broader agenda, setting investment aside and relying upon the disciplines provided by BITS and investment provisions in regional trade agreements, may prove appealing.

Conclusion

While the objectives sought in a WTO investment agreement may be sound, the analysis and approach to negotiating such an agreement have revealed serious problems. We recommend that governments move quickly to define a more realistic and productive agenda. As a point of departure, they need to recognize that the existing network of bilateral agreements already provides a robust and effective regime; WTO negotiations should aim to complement and strengthen this network rather than replace it. Additionally, they need to accept that investment flows are affected by different factors and considerations than the exchange of goods and most services, requiring a different set of rules and procedures held together by a different architecture than that which applies to trade in goods. Finally, they need to accept that pursuing special and differential treatment for developing countries, which has already done immeasurable harm to the interests of developing countries in the context of trade in goods, is even more perverse and counterproductive in the context of investment rules.

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