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Multilateral and Regional Investment Rules: What Comes Next?

Maryse Robert

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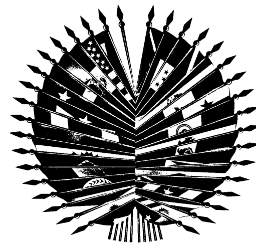

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INTRODUCTION

While investment rules are mostly absent from the multilateral system, the past decade saw a phenomenal increase in the number of bilateral and regional investment agreements concluded in the Americas.[1] The last ten years also witnessed strong growth in FDI inflows worldwide. This is particularly true in Latin America and the Caribbean. The 1990s marked the return of private capital to the region. FDI inflows increased by almost 1000 percent between 1990 and 1999, from US$8.9 billion in 1990 to US$90.5 billion in 1999. The region has become as attractive as developing Asia, which received US$106 billion in FDI inflows in 1999. Brazil, the Latin American leader, competes advantageously with the People's Republic of China (PRC), having obtained US$31 billion in FDI inflows in 1999 whereas the PRC received US$40 billion.[2] Market-oriented policies, including privatization programs, have played a significant role in the investment surge experienced by the region in the 1990s.

Trade rules governing foreign direct investment (FDI) in the Western Hemisphere began to converge in the 1990s. After years of imposing controls excluding or restricting the entry of foreign firms, Latin American and Caribbean countries embarked on a series of ambitious economic reforms in the mid-1980s and early 1990s. They abandoned the import-substitution model and undertook to liberalize trade and ease restrictions on foreign investment. At the beginning of the twenty-first century, most countries in the Western Hemisphere are now seeking to attract investment from abroad to foster economic growth and development and to stimulate transfer of technology and competition. While the 34 democratically elected governments of the Hemisphere are negotiating a hemispheric investment agreement within the Free Trade of the Area (FTAA) process, the issue of when and how the World Trade Organization (WTO) will tackle the whole set of multilateral investment rules remains to be addressed.

This study sets out to provide an overview of the main investment provisions that have been entered into between countries of the Americas and to identify the commonalities and divergences emerging from these instruments. The study then reviews the numerous endeavors to negotiate investment rules in the GATT/WTO framework, from the early attempts to the disciplines of the WTO Agreements, and the experience of the MAI negotiations, and discusses the options for negotiating multilateral investment rules at the WTO in the current policy context. The study concludes by describing some of the challenges facing countries of the region in their multilateral and regional investment negotiations.

APPROACHES TO INVESTMENT IN THE AMERICAS: PROTECTION AND LIBERALIZATION

In addition to laws and regulations that are more investment friendly, governments of the Western Hemisphere have entered into binding obligations to improve their investment climate. Traditionally, investment agreements have set standards for the treatment and protection of the investment and investor; have included an admission clause, which refers to the laws and regulations of the host state for the admission of investments; and have provided an effective dispute settlement mechanism between the investor and the host state. In the 1990s a growing number of countries in the Americas concluded agreements that go beyond this traditional approach. These new agreements include a right of establishment (right to establish a new business or to acquire an existing one) with no admission provision but with a list of country-specific exceptions; these agreements therefore add a "market access" component to the "protection element" of a traditional investment agreement. Investment agreements do not themselves attract investment, but they complement the main determinants of FDI flows. Countries

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[1] This paper draws from Robert, Maryse. 2001. "Moving Towards a Common Set of Multilateral Rules: Lessons from Latin America," in *The Future for Latin America in the Global Economy*, edited by Patricia Rich. London: Macmillan Press.

[2] Several Latin American countries experienced a significant increase in foreign direct investment (FDI) inflows in 1999. Overseas investment into Brazil totaled US$31 billion, while FDI flows into Argentina jumped more than three-fold to US$23 billion, due in large part to the US$13 billion takeover of YPF, Argentina's largest oil company, by the Spanish-based company Repsol. Mexico (US$11 billion), Chile (US$9 billion), and Peru (US$2 billion) also saw higher inward investment in 1999. However, Venezuela (US$2.6 billion) and Colombia (US$1.3 billion) suffered a decrease. See UNCTAD (2000) and *Financial Times*, "Latin America Sees Investment Surge," February 2, 2000, p. 7.

that have locked in the liberalization achieved at the domestic level have gained from the signaling effects of such binding agreements.

Bilateral Investment Treaties and Regional Trade Agreements

Since the early 1990s more than seventy bilateral investment treaties (BITs) have been signed between countries of the hemisphere. Of all these BITs, those signed by the United States and Canada include a right of establishment and a list of reservations.[3] At the regional level the North American Free Trade Agreement (NAFTA), the free trade agreement among members of the Group of Three (Colombia, Mexico, and Venezuela), and the bilateral free trade agreements signed by Mexico with Bolivia, Chile, Costa Rica, Nicaragua, and the Northern Triangle (El Salvador, Guatemala, and Honduras), and by Chile with Canada embrace this new approach. They incorporate a protection element and a market access component. The investment chapter of the free trade agreement between the Central American countries and the Dominican Republic includes an additional element, an admission clause, which somehow offsets the right of establishment of the national treatment provision. The Colonia Protocol for MERCOSUR (Common Market of the South) also includes an admission clause, whereas the Buenos Aires Protocol for non-MERCOSUR members follows the traditional approach adopted in bilateral investment treaties, and so does the investment agreement between the Caribbean Community and Common Market (CARICOM) and the Dominican Republic. Other arrangements such as Decision 291 of the Andean Community and CARICOM's Protocol II contain a few investment provisions. Protocol II establishes that members shall not introduce in their territories any new restrictions relating to the right of establishment of nationals of other member states except as otherwise provided in the agreement.[4] Finally, the bilateral investment treaties signed by each Central American country with Chile are incorporated as an integral part of the chapter on investment in the free trade agreement between Chile and these countries.[5]

CONVERGENCE AND DIVERGENCE OF INVESTMENT RULES IN THE AMERICAS

The 1990s have seen the emergence of a new consensus in the Americas over the rules governing foreign investment. On issues that once seemed controversial, common approaches have been adopted in investment agreements signed between countries negotiating the Free Trade Area of the Americas (FTAA). This section analyzes the convergence and divergence on the following issues: scope and coverage (including definitions of investment and investor); general standards of treatment; performance requirements; key personnel; compensation for losses; transfers; expropriation; and dispute settlement.

[3] In contrast to a general exception, which has the effect of exempting a party from the whole set of obligations contained in the agreement, a reservation is applicable only in relation to specific provisions. States usually take reservations regarding national treatment, most-favored-nation treatment, performance requirements, and senior management and boards of directors. A reservation identifies the sector in which the reservation is taken and the obligation against which the reservation is taken, and it often also refers to the specific measure (laws, regulations, or other measures) for which the reservation is taken.

[4] The North American Free Trade Agreement (NAFTA) entered into force on January 1, 1994, whereas the G-3 agreement and the bilateral free trade agreements signed by Mexico with Bolivia and Costa Rica entered into force on January 1, 1995. The free trade agreements between Mexico and Nicaragua and between Mexico and Chile were respectively brought into effect on July 1, 1998, and August 1, 1999. The free trade agreement between Canada and Chile entered into force on July 5, 1997. The free trade agreement between Central American countries and the Dominican Republic was signed on April 16, 1998. The free trade agreement between Mexico and the Northern Triangle was signed on June 29, 2000. CARICOM and the Dominican Republic signed the Agreement establishing the Free Trade Area between the Caribbean Community and the Dominican Republic on August 22, 1998. A protocol to implement the agreement was signed on April 28, 2000. The Protocol of Colonia for the Reciprocal Promotion and Protection of Investment in MERCOSUR was signed on January 17, 1994. MERCOSUR's Protocol for the Promotion and Protection of Investment of Third States (Buenos Aires Protocol) was signed on August 5, 1994. Protocol II of CARICOM entered into force provisionally on July 4, 1998. Decision 291 of the Andean Community was signed in Lima on March 21, 1991.

[5] Article 10.02 of the free trade agreement between Chile and Central American countries, signed on October 18, 1999, states that parties may at any time decide —and must within two years of the entry into force of the agreement analyze the possibility— to broaden the coverage of the investment rules in the bilateral investment treaties between Chile and each Central American country.

Scope and Coverage

The scope of an investment agreement has three essential components. The substantive scope consists of the disciplines and the definition of key terms such as *investment* and *investor*. The territorial scope refers to the territory of the parties that falls under the agreement, including the application of the provisions at the sub-national level. In free trade agreements, this issue is generally dealt with in an article that covers the whole agreement. The temporal scope informs on whether the agreement applies to investments made, and disputes that arose, before the agreement entered into force. The provision on scope may also include economic activities reserved to the state that parties choose to exclude from the agreement. This is the case for the NAFTA-type agreements.

DEFINITION OF INVESTMENT. With the exception of CARICOM's Protocol II, which does not define investment, and Decision 291 of the Andean Community, which covers only FDI, all investment agreements in the Americas have adopted a broad, open-ended, asset-based definition of the term *investment.* Such definition is more encompassing than the traditional definition of foreign direct investment because it also includes portfolio investment and intangible assets such as intellectual property rights. Modern definitions typically use phrases such as "every kind of asset," "any kind of asset," or "every kind of investment," accompanied by an illustrative but nonexhaustive list of examples. The list commonly includes the following five components: movable and immovable property and any related property rights, such as mortgages, liens, or pledges; shares, stock, bonds, debentures, or any other form of participation in a company, business enterprise, or joint venture; money, claims to money, claims to performance under contract having a financial value, and loans directly related to a specific investment; intellectual property rights; and rights conferred by law (such as concessions) or under contract.

Although the objective of using such a comprehensive definition is to guarantee protection to as many forms of investment as possible, there has been an attempt to avoid coverage of purely monetary or speculative flows not related to an investment. Thus, recent agreements include qualifications of their coverage. For example, a few recent agreements exclude "real estate or other property, tangible or intangible, not acquired in the expectation or used for the purpose of economic benefit or other business purposes" from the definition of covered investment. This exception is built into the definition of investment in NAFTA, the Group of Three, and the Canada-Chile, Mexico-Nicaragua and Mexico-Northern Triangle free trade agreements. Their "asset-based" definition covers a broad list of assets that are expressly linked with the activities of an enterprise. It excludes, for example, those transactions that might occur in capital or money markets with no connection to a specific investment and claims to money that arise solely from commercial contracts.

DEFINITION OF INVESTOR. The definition of *investor* covers natural and juridical persons (or other legal entities). In most investment instruments citizenship is the only criterion used to determine whether a natural person should be considered an investor under the agreement. In a few bilateral investment treaties —for example, those signed by Canada—the definition is broadened to include permanent residents. Residency is also sometimes used to exclude natural persons from coverage of the agreements.

With respect to juridical persons, three different criteria have been commonly used to define the nationality of a company or legal entity: incorporation, seat, and control. Countries with common law tradition, such as Canada, the United States, and the CARICOM members, use the place of incorporation of a company to determine its nationality. Other investment instruments such as NAFTA and the Canada-Chile free trade agreement follow the same approach. Under NAFTA, to be an "investor of a Party" an enterprise (and a branch of an enterprise) must be constituted or organized under the law of that party. There is no requirement that the enterprise be controlled by nationals of a NAFTA country. If the enterprise is controlled by investors of a nonparty, however, benefits can be denied if the enterprise has no substantial business activities in the territory of the party under whose laws it is constituted. The denial-of-benefits clause also provides that the host state may deny benefits of the agreement if it does not maintain diplomatic relations with the nonparty or if it adopts or maintains measures with respect to the nonparty that prohibit transactions with the enterprise.

The incorporation criterion has also been used between countries with civil law traditions (Group of Three, and the free trade agreements signed by Mexico with Bolivia, Chile, Costa Rica, Nicaragua, and

the Northern Triangle). But civil law countries have traditionally relied instead on the place where the management or seat of the company is located. The two MERCOSUR protocols on investment have elected that criterion. In the case of BITs signed between Latin American countries, this criterion is often combined with the place of incorporation and, in some cases, with the requirement that the company actually must have effective economic activities in the home country. In other cases, BITs use the control of the company by nationals of a party as the sole criterion to determine its nationality. This is the case of the Colombia-Peru BIT. Finally, some agreements combine the above criteria or use them as alternatives. In general, it can be said that the combination of different criteria is used in those cases where governments are interested in restricting the benefits of the agreement to those legal entities that effectively have ties with the home country. In contrast, when the objective is to broaden the scope of application, agreements provide for the possibility of applying alternative criteria.

TEMPORAL SCOPE. All investment agreements that address this issue make clear that all investments, including those made before the investment agreement has entered into force, are covered by the agreement. In a few cases, for example, the Costa Rica-Mexico and the Central America-Dominican Republic free trade agreements, the agreement stipulates that it does not apply to disputes that arose before the entry into force of the agreement.

General Standards of Treatment

There is a broad consensus in the region on the treatment that applies to investments once they have been made by an investor of a party in the territory of another party. States have incorporated a number of standards of treatment in their investment agreements, including fair and equitable treatment, national treatment, and most-favored-nation (MFN) treatment.

FAIR AND EQUITABLE TREATMENT. Fair and equitable treatment is a general concept without a precise definition. It provides a basic standard unrelated to the host state's domestic law and serves as an additional element in the interpretation of the provisions of an investment agreement. Almost all agreements incorporate a provision on fair and equitable treatment. Notable exceptions include the free trade agreements concluded by Mexico with Bolivia, Costa Rica, and Nicaragua. This standard is generally combined with the principle of full protection and security or that of nondiscrimination. Full protection and security traces its origins in the modern Friendship, Commerce, and Navigation treaties signed by the United States until the 1960s. Although it does not create any liability for the host state, full protection and security "serves to amplify the obligations that the parties have otherwise taken upon themselves" and provides a general standard for the host state "to exercise due diligence in the protection of foreign investment."[6] In a few cases, these three standards are combined together. In other cases, it is clear that fair and equitable treatment shall be in accordance with the principles of international law. Most treaties also require some form of protection, albeit not necessarily full protection and security.

NATIONAL TREATMENT AND MFN TREATMENT. Two different approaches have been adopted with respect to the entry of investments and investors of a party into the territory of another party. Newer instruments such as NAFTA, the Group of Three, and the bilateral free trade agreements concluded by Mexico with Bolivia, Chile, Costa Rica, Nicaragua, and the Northern Triangle and by Chile with Canada create a right of establishment for investors and investments of the other party. In fact, these instruments have been designed with the purpose of assuring the free entry of such investments—albeit with country-specific reservations—into the territory of the host country. They require national treatment and most-favored-nation treatment and prohibit specific performance requirements as a condition for establishment. They indicate that such treatment shall be for investments made in "like circumstances." As mentioned at the beginning of this study, the Central America-Dominican Republic agreement adds an admission clause, which refers to the laws of each party. The Colonia Protocol for the MERCOSUR countries also includes an admission clause but does not refer to the laws and regulations of the parties. Other agreements require that the national treatment and MFN standards be applied to investments of investors *after* admission of these investments.

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[6] Dolzer and Stevens (1995, p. 61). These treaties provided for "the most constant protection and security."

NATIONAL TREATMENT is a relative standard that prohibits discriminatory treatment. The intent is to avoid cases in which investments—and investors—of other parties cannot compete on equivalent terms with those of the host state. All investment agreements in the Americas provide that once the investment has been made, the host state must accord national treatment to investments or investors of other parties, that is, treatment no less favorable than that granted to its investments and investors. The Andean Community's Decision 291 stipulates that national treatment can be regulated according to the national laws of each member. Although CARICOM's Protocol II does not include a national treatment provision per se, as mentioned earlier, it does establish that members shall not introduce in their territories any new restrictions relating to the right of establishment of nationals of other member states except as otherwise provided in the agreement.

With respect to MFN TREATMENT, most investment agreements in the region require that, once the investment is established, each party must grant investments of investors of other parties treatment no less favorable than that it accords to investments of investors of third countries. The Andean Community and CARICOM do not include an MFN provision. Therefore, members of these two arrangements are not required to extend to the other members more favorable treatment granted to non-members. It is also worth noting that the NAFTA-type agreements require that the investment and investor of another party be granted the better of national treatment and MFN treatment.

National treatment and MFN treatment are rarely accorded without limitations. The agreements that follow the NAFTA model and the CARICOM-Dominican Republic agreement state that these two standards must be granted in "like circumstances." U.S. and Canadian BITs refer to "like situations" or "like circumstances." The NAFTA-type agreements, which provide for a right of establishment, include a list of reservations to national treatment and MFN treatment. This list comprises non-conforming measures at the federal and sub-federal levels. The Colonia Protocol for MERCOSUR members also includes a list of temporary sectoral reservations.

A few investment agreements incorporate an exception to the MFN treatment in the case of the privileges deriving from membership or association in a free trade agreement, customs union, common market, or regional agreement. The two MERCOSUR protocols on investment, the free trade agreements concluded by Mexico with Bolivia, Costa Rica, Nicaragua, and the Northern Triangle, as well as those signed by the Dominican Republic with Central America and CARICOM do include such provision. The two MERCOSUR protocols, the Group of Three, and the CARICOM-Dominican Republic agreement also stipulate that the MFN treatment does not apply to preferences or privileges resulting from an international agreement relating wholly or mainly to taxation. The NAFTA and the free trade agreements concluded by Chile with Canada and Mexico have a general exception for taxation treaties that covers not only the investment chapter but the entire agreement.

Performance Requirements

The majority of bilateral investment treaties signed between developing countries in the Americas do not address performance requirements. The exceptions are the BITs between the Dominican Republic and Ecuador and between El Salvador and Peru. Free trade agreements do include provisions on performance requirements, however. Whereas those signed by the Dominican Republic with Central America and CARICOM refer to the WTO Agreement on Trade-Related Investment Measures (TRIMs), the others (NAFTA; those signed by Mexico with Bolivia, Chile, Costa Rica, Nicaragua, and the Northern Triangle; and the Canada-Chile agreement) go further, as does the Colonia Protocol of MERCOSUR. The TRIMs Agreement only covers goods and clearly states that no member shall apply any TRIM that is inconsistent with the provisions of Article III (principle of national treatment) or Article XI (general obligation of eliminating quantitative restrictions) of GATT 1994.

The NAFTA-type agreements prohibit specific performance requirements for both goods *and* services. For example, NAFTA and the Chilean free trade agreements with Canada and Mexico require that performance requirements to achieve a particular level or percentage of local content, to purchase local goods and services, to impose trade- or foreign exchange–balancing requirements, to restrict domestic sales of goods or services, to export a given level or percentage of goods or services, to transfer technology, and to act as exclusive supplier of goods and services be prohibited as a condition of

the establishment, acquisition, expansion, management, conduct, or operation of a covered investment. The first four requirements are also prohibited as a condition for receiving an advantage (that is, a subsidy or an investment incentive). There is, however, no such limitation on requirements to locate production, provide a service, train or employ workers, construct or expand particular facilities, or carry out research and development. Moreover, there are some exceptions to the performance requirement prohibition. For instance, NAFTA Article 1106 (6) provides that requirements to achieve given levels of domestic content or to purchase local goods and services are allowed, provided that they are not applied in an arbitrary or unjustifiable manner or do not constitute a disguised restriction, if these measures are necessary to secure compliance with laws and regulations that are not inconsistent with the provisions of the agreement; to protect human, animal or plant life or health; or to conserve exhaustible natural resources. Finally, the prohibition on performance requirements does not apply to some of the above requirements with respect to export promotion and foreign aid programs, procurement by a state enterprise, and the content of goods necessary for an importing party to qualify for preferential tariffs or tariff quotas.

The Andean Community, in contrast, establishes particular provisions for the performance of contracts for the license of technology, technical assistance, and technical services and for other technological contracts under the national laws of each member.

Key Personnel

Most free trade agreements and a few bilateral investment treaties (essentially those signed by the United States and Canada) in the Americas provide for the temporary entry of managers and other key personnel relating to an investment. Some agreements allow investors of another party to hire top managerial personnel of their choice, regardless of nationality. Other agreements state that a party may not require that an enterprise of that party appoint to senior management positions individuals of any particular nationality. These agreements also mention that a party may require that a majority of the board of directors of an enterprise that is an investment under the agreement be of a particular nationality, provided that the requirement does not materially impair the ability of the investor to exercise control over its investment.

Moreover, most free trade agreements grant temporary entry to a business person to establish, develop, administer, or provide advice or key technical services to the operation of an investment as long as the business person or his enterprise has committed, or is in the process of committing, a substantial amount of capital. The business person must comply with existing immigration and labor laws and work as a supervisor or executive or in a job that involves essential skills.

Compensation for Losses

No investment agreement requires compensation for losses due to war or other armed conflict, civil disturbances, or other *force majeure* (including natural disasters, as mentioned in the Costa Rica-Mexico agreement). Most agreements, however, provide for national treatment and MFN treatment in respect to any measure a party adopts or maintains related to those losses. This issue is either covered in a specific provision on compensation for losses or by the national treatment and MFN provisions. It is worth noting that the CARICOM-Dominican Republic free trade agreement grants only the MFN treatment in such cases.

Transfers

All investment agreements state that the host country must guarantee the free transfer of funds related to investments to investors of the other party. Most include an illustrative list of types of payments that are guaranteed such as returns (profits, interests, dividends, and other current incomes); repayments of loans; and proceeds of the total or partial liquidation of an investment. In addition, other types of payments are often listed; these include additional contributions to capital for the maintenance or development of an investment, bonuses and honoraria, wages and other remuneration accruing to a

citizen of the other party, compensation or indemnification, and payments arising out of an investment dispute.

Most agreements stipulate that the transfer shall be made without delay in a freely convertible currency or freely usable currency at the normal exchange rate applicable on the date of the transfer.[7] Some agreements allow for limitations or exceptions to transfers, such as balance of payments difficulties and prudential measures, as long as these restrictions are exercised for a limited period of time in an equitable way, in good faith, and in a non-discriminatory manner. Chile reserves the right to maintain requirements and adopt measures for the purpose of preserving the stability of its currency.[8]

Expropriation

An important concern of foreign investors is to ensure that their interests are protected in the event that the host country expropriates their investment. Investment agreements generally refer to either expropriation or nationalization (or both) without differentiating between these terms. In fact, the language is broad enough to allow for coverage of "indirect" or "creeping" expropriations, that is, measures having equivalent effects to expropriation or nationalization. Under customary international law, states are allowed to expropriate foreign investment as long as it is done on a non-discriminatory basis (that is, under principles of national treatment and MFN treatment), for a public purpose, under due process of law, and with compensation. With the exception of the Andean Community's Decision 291 and CARICOM's Protocol II, which do not cover this issue, all investment agreements discussed in this paper prohibit the expropriation of investments except when these conditions are met.[9]

Most agreements use the Hull formula, which stipulates that compensation should be "prompt, adequate, and effective."[10] Only in a very few cases is the more general expression "just compensation" used. In relation to the value of the expropriated investment, most agreements use the term "market value" or "fair market value," while others use expressions such as "genuine value," immediately before the expropriatory action was taken or became known, thus protecting the investor from any reduction in value that may result as a consequence of the expropriation. Agreements also stipulate that compensation shall include interest and, in most cases, specify that it should be calculated at a normal commercial rate from the date of expropriation. In general, payments must be fully realizable, freely transferable, and made without delay. In some instances, payments must be transferable at the prevailing market rate of exchange on the date of expropriation. In most cases, however, exchange rates are not dealt with in the context of expropriation. Instead, general transfer provisions are applicable.

Dispute Settlement

Following traditional treaty practice, provisions for the settlement of disputes between parties are included in both bilateral investment treaties and in regional trade arrangements containing provisions on investment. In the free trade agreements, investment disputes between parties fall under the general dispute settlement mechanism included in these agreements. This mechanism is based on consultation and, failing resolution through consultation, panel review. In the Andean Community, state-to-state disputes are referred to the Andean Court of Justice. MERCOSUR's Colonia protocol provides for disputes concerning its interpretation or application to be resolved through the disputes settlement

[7] There are five currencies, as defined by the International Monetary Fund, as freely usable: U.S. dollar, yen, deutsche mark, French franc, and pound sterling.

[8] These measures are explained in Annex G-09.1 of the Canada-Chile free trade agreement. In BITs signed by Chile, transfers of capital are restricted for a period of one year.

[9] Some treaties add expressions such as "national interest," "public use," "public interest," "public benefit," "social interest" or, "national security." Notwithstanding the fact that "public purpose" is difficult to define in precise terms, there is a general consensus that a sate can adopt expropriatory measures only when there is a collective interest that justifies it.

[10] This standard was formulated by U.S. Secretary of State Cordell Hull, who declared in 1938, in correspondence to the Government of Mexico, that "under every rule of law and equity, no government is entitled to expropriate private property, for whatever purpose without provisions for prompt, adequate and effective payment thereof." See Dolzer (1981).

procedures established in the Brasilia Protocol of December 17, 1991. When disputes involve a third state, the Buenos Aires Protocol refers them to ad hoc arbitration. Protocol IX of CARICOM addresses the issue of disputes among members. In Central America there is no regional agreement on investment, but there is a new state-to-state dispute settlement agreement approved on September 27, 2000, which means that should members of the Central American Common Market (CACM) sign an investment agreement, their state-to-state investment disputes would most likely be covered by this new agreement.

Almost all investment instruments include separate provisions for the settlement of investor-state disputes. This constitutes a departure from past practice in this field where no such mechanism was provided. Thus, a foreign investor was limited to bringing claim against the host state in a domestic court or having its home state assume his claim against the host state (diplomatic protection). Investment agreements include a reference to a specific institutional arbitration mechanism. They normally refer to arbitration under the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention) or under ICSID Additional Facility Rules where either the host or home state of the foreign investor is not an ICSID contracting party.[11] Following an increasingly common practice in modern investment agreements, most agreements include alternative forms of arbitration such as UNCITRAL (United Nations Commission on International Trade Law) rules.[12] These might prove particularly relevant where ICSID arbitration is unavailable due to jurisdictional constraints.

Most agreements require that the investor and the host state seek to solve the dispute amicably through consultations and negotiations before taking it to arbitration. In some cases, a certain period of time has to elapse before the dispute can be submitted to arbitration. Evidently, investors also have the right to bring disputes to local courts of the host state, although agreements differ in the way recourse to local remedies is treated. The most common approach is to allow the investor to choose between referring the dispute to local courts or resorting to arbitration. When following this approach, a number of BITs signed between Latin American countries as well as the Colonia Protocol state that election by the investor of either international arbitration or domestic remedies “shall be final.” Other agreements provide for arbitration only when the case has previously been submitted to local courts *and* a certain period of time (usually eighteen months) has elapsed without a final decision being made or the decision is inconsistent with the agreement or the decision is “manifestly unjust.” A different approach is taken in recent U.S. BITs. To avoid inconsistent decisions in different forums, the agreements do not allow recourse to international arbitration if the investor has already submitted the dispute to local courts or administrative tribunals.

Other Issues

Other issues are also covered in some investment agreements. Two are mentioned here: general exceptions, and environmental concerns.

GENERAL EXCEPTIONS AND OTHER DEROGATIONS. General exceptions allow countries to exempt from the obligations of an agreement all actions related to such exceptions; that is, they often—but not always—apply to all obligations and also to all parties to an agreement. They are generally invoked for reasons of maintenance of national security, international peace and security, and public order. In the Americas, the free trade agreements, U.S. BITs, and the Peruvian bilateral investment treaties with Bolivia, Paraguay, and Venezuela permit such general exceptions. Other exceptions to treaty obligations include a carve-out for taxation matters found in almost all investment agreements; exceptions to the MFN principle when a party is a member of a preferential trade agreement; country-specific reservations with respect to national treatment, MFN treatment, performance requirements, and senior management and boards of directors; temporary derogation in case of balance of payments problems; and prudential measures to protect the rights of creditors and the stability of the financial system.

[11] The ICSID Convention came into force in 1966. On the ICSID Convention, see ICSID (1985); on the ICSID Additional Facility Rules, see ICSID (1979).

[12] Only in the case of the Haiti-United States BIT is a reference made to arbitration under the International Chamber of Commerce. On UNCITRAL, see United Nations Commission on International Trade Law (1976).

ENVIRONMENTAL CONCERNS. The free trade agreements and most post-NAFTA BITs signed by Canada mention that nothing is to be construed so as to prevent a party from adopting, maintaining, or enforcing any measure otherwise consistent with the agreement that it considers appropriate to ensure that investment activity in its territory is undertaken in a manner sensitive to domestic health, safety, and environmental concerns. The parties recognize that it is inappropriate to encourage investment by relaxing domestic health, safety, or environmental measures. Accordingly, a party should not waive or otherwise derogate from, or offer to waive or otherwise derogate from, such measures as an encouragement for the establishment, acquisition, expansion, or retention in its territory of an investment of an investor. If a party considers that another party has offered such an encouragement, it may request consultations with the other party and the two parties shall consult with a view to avoiding any such encouragement.

INVESTMENT IN THE FTAA NEGOTIATIONS

The 34 democratically elected governments of the Western Hemisphere are taking part in a regional negotiation to establish the Free Trade Area of the Americas (FTAA). These negotiations were officially launched at the Second Summit of the Americas held in Santiago, Chile, in April of 1998. In addition to investment, there are eight negotiating groups in the FTAA: market access; agriculture; services; government procurement; intellectual property rights; subsidies, antidumping and countervailing duties; competition policy; and dispute settlement.[13]

The objective of the FTAA Negotiating Group on Investment (NGIN) is to establish a fair and transparent legal framework to promote investment through the creation of a stable and predictable environment that protects the investor, the investment, and related flows without creating obstacles to investments from outside the hemisphere. Essentially, the mandate of the NGIN is to develop a framework incorporating comprehensive rights and obligations on investment, taking into consideration the substantive areas already identified by the FTAA Working Group on Investment, and a methodology to consider potential reservations and exceptions to the obligations.

During the first phase of the negotiations (May 1998-November 1999), the NGIN discussed twelve issues identified by the working group as possible elements for inclusion in an investment chapter. The discussions have focused on basic definitions of investment and investor; scope; national treatment; most-favored-nation treatment; fair and equitable treatment; expropriation and compensation; compensation for losses; key personnel; transfers; performance requirements; general exceptions and reservations; and dispute settlement. During the second phase of the FTAA negotiations in 2000, the NGIN began to prepare a draft investment chapter, as instructed by trade ministers at their Fifth Ministerial Meeting held in Toronto in November 1999.[14]

[13] The Trade Negotiations Committee (TNC), which is composed of trade vice ministers, has the responsibility of guiding the work of the negotiating groups. A consultative group on smaller economies, a joint government-private sector committee of experts on electronic commerce, and a committee of government representatives on the participation of civil society also meet regularly. The Administrative Secretariat of the FTAA and the Tripartite Committee institutions (Organization of American States; Inter-American Development Bank; and U.N. Economic Commission for Latin America and the Caribbean) provide respectively administrative and technical support to the FTAA process. The Administrative Secretariat is located at the same venue as the meetings of the FTAA entities, i.e. Miami from May 1998 to February 28, 2001; Panama from March 2001 to February 28, 2003; and Mexico City from March 2003 to December 31, 2004.

[14] The Tripartite Committee, particularly through the Organization of American States, is providing technical and analytical support to the NGIN. The Negotiating Group on Investment requested the Tripartite Committee to update the two compendiums that were prepared under the guidance of the FTAA Working Group on Investment: the Organization of American States's "*Investment Agreements in the Western Hemisphere: A Compendium*," and the Inter-American Development Bank's "*Foreign Investment Regimes in the Americas: A Comparative Study*." The Negotiating Group has also discussed the statistical studies prepared by the UN Economic Commission for Latin America and the Caribbean on investment flows in the region. These studies are available on the official FTAA home page (www.ftaa-alca.org).

INVESTMENT RULES AND DISCIPLINES IN THE WTO

There is no comprehensive agreement on investment at the WTO, whose investment framework is rather limited in scope since it is primarily confined to performance requirements in the Agreement on Trade-Related Investment Measures (TRIMs), which covers goods only, and to 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. It includes disciplines on trade in goods and services, and on investment in services but investment in goods has yet to be fully covered. Moreover, the traditional elements of an investment agreement, such as investment protection, are not addressed by WTO rules.

Several agreements resulting from the Uruguay Round include investment provisions. These are: the WTO Agreement on Trade-Related Investment Measures (TRIMs), the General Agreement on Trade in Services (GATS), the Agreement on Subsidies and Countervailing Duties (SCM), the Agreement on Trade-Related Intellectual Property Rights (TRIPS), and the Plurilateral Agreement on Government Procurement (GPA).

The TRIMs Agreement establishes an illustrative list of prohibited performance requirements, those contrary to the principle of national treatment (Article III of GATT 1994), such as local content and trade-balancing requirements, and those inconsistent with the general obligation of eliminating quantitative restrictions (Article XI of GATT 1994), such as trade and foreign exchange–balancing restrictions and domestic sales requirements. Member countries had ninety days from the date of entry into force of the WTO agreement to report all inconsistent TRIMs to the Council for Trade in Goods. Developed countries had to eliminate these TRIMs within two years of the date of entry into force of the WTO Agreement, whereas developing countries had until January 1, 2000. Least-developed countries are required to undertake the same commitments within seven years, i.e. by January 1, 2002. The Council may extend the transition period for developing and least-developed countries. In fact, nine countries - Argentina, Chile, Colombia, Malaysia, Mexico, Pakistan, the Philippines, Romania, and Thailand- asked for additional time to comply with the TRIMs Agreement. Most countries requested more time to phase out investment restrictions in the automotive sector. Requests for deadline extensions ranged from five months in the case of Chile to seven years in the case of Argentina, Colombia, and Pakistan.

The GATS is not an investment agreement, but it includes several investment-related provisions. First, the definition of services incorporates four modes of supply, one of which, the third mode, “commercial presence in the territory of any other member,” is essentially an investment activity and a right of establishment. Commercial presence means, under GATS Article XXVIII, “any type of business or professional establishment, including through (i) the constitution, acquisition or maintenance of a juridical person, or (ii) the creation or maintenance of a branch or a representative office, within the territory of a Member for the purpose of supplying a service.” It is worth noting that such definition is not as comprehensive as the definition of investment found in most bilateral investment treaties and free trade agreements signed in the Americas.[15] The fourth mode, which is the supply of service “through presence of natural persons of a Member in the territory of any other Member,” is also linked, albeit indirectly, to investment issues because it implies the temporary entry of managerial and other key personnel.

The GATS is the WTO Agreement with the most far-reaching implications for a multilateral investment agreement because of its all encompassing MFN provision (GATS Article II), which applies across the board to all members and services sectors. Although MFN exemptions are allowed, if listed in an Annex at the time of the entry into force of the Agreement, they are temporary in nature and subject to multilateral review. The GATS also provides that preferential treatment may be granted to a foreign service supplier located in a party who is a member of an economic integration agreement if such agreement has substantial sectoral coverage and provides for the absence or elimination of substantially all discrimination through the elimination of existing discriminatory measures, and/or prohibition of new or more discriminatory measures (GATS Article V). Other GATS provisions of a general nature that are investment-related include transparency obligations, general exceptions, and security exceptions.

[15] Sauvé (1994, p. 9).

Moreover, unlike the North American Free Trade Agreement (NAFTA), the GATS does not contain a right of non-establishment promoting services trade along lines of comparative advantage. Such right ensures that no Party may require a service provider of another Party to establish or maintain a representative office or any form of enterprise, or to be resident, in its territory as a condition for the cross-border provision of a service. A right of non-establishment prohibits regulators to require establishment as a pre-condition for delivery of a service.

The GATS provisions regarding national treatment (Article XVII) and market access (Article XVI) are conditional, a clear departure from common practice in investment agreements with respect to the national treatment provision.[16] They are granted according to specific commitments listed in members' schedules indicating to which sectors and modes of supply these provisions apply. GATS thus makes use of what is known as a "positive list" by identifying those sectors that are covered by the agreement. More specifically, this approach means that new discriminatory measures are allowed in sectors not included in a member's schedule. Moreover, in sectors where commitments have been made, existing measures inconsistent with the agreement do not have to be eliminated as long as they are listed in a member's schedule.[17] In fact, once a sector is listed in a member's schedule, it is bound in full by the market access and national treatment obligations for the four modes of supply, unless a limitation to this treatment (the negative list approach) is specified for one or several modes in the columns entitled "limitations on market access" and "limitations on national treatment." Schedules include a number of "unbound" entries for each mode of supply, which means that a WTO member is not bound by any commitment in GATS for a particular mode in a particular sector with respect to either national treatment or market access. When commitments are unbound, countries are not obliged to maintain the same level of openness or to liberalize further. Commercial presence is the mode with the lowest percentage of unbound commitments; it has been scheduled for full liberalization by about 20 percent of WTO members. Liberalization of mode 4, movement of natural persons, was much less common, with full liberalization by less than 1 percent of WTO members. The GATS includes commitments to further liberalize trade in services. WTO members are currently engaged in a second round of negotiations, which began in January 2000.

The Agreement on Subsidies and Countervailing Measures (SCM) contains disciplines covering investment-related issues. Some examples of investment incentives (fiscal, financial, or indirect) fall under the meaning of subsidy, as defined in the SCM. Except as provided in the Agreement on Agriculture, such investment incentives are prohibited if they are conditioned upon export performance or use of domestic over imported goods (Article 3). Other incentives that may not be prohibited but that are found to cause adverse effects are subject to compensation. However, as noted by the WTO, "the underlying concepts of the SCM are oriented toward trade in goods, and as such may not in all cases be easily applied to investment incentives." For example, an investment incentive is usually granted *before* any production begins, which means that "neither a recommendation to withdraw or modify a subsidy, nor a countervailing duty applied to the exported goods, will be able to 'undo' or to change an investment that already has been made."[18]

The Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) is the first ever comprehensive multilateral agreement to set minimum standards protecting all areas of intellectual property rights, to include domestic enforcement measures, and to be covered by a dispute settlement mechanism. Its impact on investment issues, although indirect, is nonetheless significant. The TRIPS Agreement contributes to strengthening the protection afforded to foreign investment by reinforcing the protection of intellectual property rights, one of the key elements often listed in the definition of investment found in most recent BITs and free trade agreements currently in force worldwide.

The Plurilateral Agreement on Government Procurement (GPA) also includes investment-related provisions. The GPA is one of the plurilateral agreements set out in Annex 4 of the WTO Agreement, which means that not all WTO members are bound by its obligations. The cornerstone of the GPA is non-discrimination, either with respect to domestic products, services and suppliers (national treatment), or

[16] WTO (1996, p. 71).

[17] Sauvé (1994).

[18] WTO (1996, pp. 72–73).

with respect to goods, services and suppliers of other parties (MFN treatment). With regard to all laws, regulations, procedures and practices regarding government procurement covered by this Agreement, each party shall ensure that its entities shall not treat a locally-established supplier less favorably than another locally-established supplier on the basis of degree of foreign affiliation or ownership; and that its entities shall not discriminate against locally-established suppliers on the basis of the country of production of the good or service being supplied, provided that the country of production is a party to the Agreement. The GPA applies to government procurement of entities selected by each party and covers central government entities, sub-central government and other entities, services and construction services.

Post-Uruguay Round: WTO and OECD Initiatives

Shortly after the end of the Uruguay Round, two initiatives were undertaken by the WTO and the OECD to address the issue of investment in a multilateral context. At the Singapore Ministerial Meeting in December 1996, WTO members agreed to create a Working Group on the Relationship between Trade and Investment (WGTI). The mandate of the Group was not to negotiate an investment agreement but rather to begin analytical and exploratory work on the linkages between trade and investment. Earlier, in May 1995, the OECD Ministers had launched negotiations on a Multilateral Agreement on Investment (MAI).

Working Group on the Relationship between Trade and Investment

At its first meeting held on June 2-3, 1997, the Working Group on the Relationship between Trade and Investment (WGTI) adopted a work program that focused on the following issues: implications of the relationship between trade and investment for development and economic growth; economic relationship between trade and investment; preparation of an inventory and analysis of the existing international instruments and activities in the area of trade and investment; and on the basis of the first three elements, identification of common features, differences and possible gaps in existing international instruments; respective advantages and disadvantages of national autonomy and bilateral, regional and multilateral rules on investment, in particular from a development perspective; the rights and obligations of home and host countries and of investors and host countries; and the relationship between international cooperation on investment policy and international cooperation on competition policy. The Group's mandate was reviewed by the General Council after two years of operations. The Council decided that the Working Group should continue its educational work on the basis of the mandate of the Singapore Ministerial Meeting.

OECD-Multilateral Agreement on Investment

The United States successfully convinced its OECD partners to start negotiating, in 1995, a multilateral agreement on investment, which would 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 April 27-28.

The MAI negotiations ended in failure in the Fall of 1998, after the French government had announced that it was pulling out of these negotiations. The reasons for this failure lie, for some analysts, 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 trying to convince everyone that the MAI was a bad deal only 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. Another element played against the agreement. The MAI was a single-issue negotiation, which meant

that all the trade-offs needed to be made within the context of the investment provisions.[19] In the Americas, the United States, Canada, and Mexico participated from 1995 to 1998 in the MAI negotiations, whereas Argentina, Brazil, and Chile took part in these negotiations as observers starting in 1997.

MULTILATERAL INVESTMENT RULES: WHAT COMES NEXT?

The fact that investment liberalization has taken place at the national level without a multilateral framework, and the failure of the OECD-based MAI negotiations, may suggest to some analysts and countries that such framework is unnecessary or too difficult to achieve. However, as mentioned earlier, the WTO system suffers from a clear imbalance. In fact, it lacks "modal neutrality," that is, in the words of Patrick Low and Arvind Subramanian (1996), "equality of policy treatment regardless of the means by which producers choose to supply a given market –whether through imports, foreign direct investment, temporary presence, or the licensing of domestic producers."[20] The globalization of the world economy and the internationalization of production have shown that investment has also become a complement to trade.[21] Firms have more choices. They can choose which "modality" (trade, FDI, licensing, etc.) to use to maximize access to resources and markets, and, in the process, increase their competitiveness. Firms often combine investment and trade to exploit, in the most optimal manner, the opportunities offered by their "portfolio of locational assets."[22]

Whereas traditional BITs are "enabling in character," which means that "by themselves, they have little or no effect," because they do not include a market access component,[23] regional trade agreements, in contrast, are likely to have a significant impact on FDI flows when they result in a more liberal investment policy and the opening up of sectors, which had in the past been closed to foreign investors. They may also have a positive influence on FDI inflows by speeding up investment liberalization either before the conclusion of the agreement or during the implementing phase. Economic growth generated by regional trade agreements may also encourage higher levels of FDI inflows. Trade barriers, such as stringent and restrictive rules of origin in a free trade area, which discriminate against non-member countries are another important –albeit undesirable from an allocation of resources' standpoint- factor that may lead to an increase in FDI flows into a region, more specifically tariff-jumping FDI in this case. Firms may wish to switch from exports to FDI in order reap the benefits of the regional market. It is fair to say that all countries do not necessarily benefit equally from a regional investment framework. States that choose to restrict access to some of their sectors or industries may not see much increase in FDI inflows. Similarly, countries, which had a fairly open investment regime prior to the entry into force of the agreement, may not experience a surge in FDI flows. In fact, it is difficult to determine *a priori* which countries will benefit the most from a liberalized investment framework because other policy determinants and economic variables play a significant role in explaining an increase in FDI inflows. Each country must be able to exploit its own country-specific advantages, and, in that regard, policy choices still matter. It is also worth emphasizing that small countries stand to benefit from a liberalized regional trade and investment framework because market-seeking foreign firms interested in a region will no longer exclude countries with a small domestic market when analyzing locational advantages.

A set of multilateral investment rules would not necessarily result in an increase in FDI inflows in any individual country. There is no reason to believe that all countries would behave identically with respect to investment liberalization and other important policy determinants of FDI inflows such as privatization policy, competition policy, macroeconomic policy, and tax policy. The policy framework of each country matters a great deal. States would not lose their policy flexibility by negotiating multilateral rules.

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[19] For more on the MAI, see Dymond (1999) and Graham (2000).

[20] Low and Subramanian (pp. 390-1).

[21] For an excellent discussion on this issue, see WTO (1996), pp. 52-55.

[22] UNCTAD (1996, p. 97).

[23] UNCTAD (1998, p. 118).

Apart from the importance of addressing the issue of “modal neutrality” underlined above, a multilateral framework would ensure transparency, predictability and a degree of legal security with regard to domestic FDI regimes. Moreover, a multilateral investment framework does not negate the ability of countries to enhance their attractiveness to FDI flows by improving their physical infrastructure (e.g. telecommunications, roads, ports, airports, power), human resources, and technology. These economic determinants play a key role in encouraging foreign firms to invest in a country. In fact, a comprehensive multilateral investment framework would draw attention to these factors, and contribute to a more efficient allocation of resources, especially if it addresses, in some ways, distorting practices such as investment incentives and performance requirements.

The objective of “modal neutrality” explained earlier would suggest that there is a compelling case to be made for comprehensive multilateral investment rules that cover goods *and* services. Without prejudging the decision that countries will make, a few scenarios are briefly discussed below.

Should WTO members decide to negotiate a comprehensive agreement on investment, they would need to determine the scope of that agreement and to address its three components. As mentioned earlier, the substantive scope consists of the disciplines of the agreement, including the definition of key terms such as investment and investor, i.e. which investment and which investor will be entitled to benefit from the agreement. Countries would need to assess the impact of these definitions on the provisions of the agreement and an eventual liberalization process. Should the definition of investment include FDI, portfolio investment, real estate and intangible assets? Should it be broad enough to allow for the inclusion of new forms of investment, while providing for the definition of what is *not* an investment (in order to exclude short-term capital flows)? Should the definition also apply to commitments made in the GATS? As explained earlier, the definition of commercial presence under GATS Article XXVIII is much narrower but does cover pre- and post-establishment investment.

The provisions on national treatment and MFN treatment are another key element of a comprehensive agreement on investment. WTO members would need to decide whether to apply the MFN and national treatment provisions across the board to all members and sectors (with reservations), or to adopt the GATS approach, i.e. to have an all encompassing MFN provision with temporary exemptions and a conditional national treatment standard, which would apply to all sectors for which members would make commitments. Members would also need to assess whether the Agreement on Investment would include commitments to investment liberalization in both goods and services, i.e. how would the current GATS commitments be affected by this new instrument? In fact, should WTO members adopt the “positive list” or bottom-up approach of the GATS by identifying which sectors are covered by the agreement? Or, should they embrace a “negative list” or top-down approach to lock in the liberalization achieved at the domestic level and ensure that all future measures are covered by the agreement? Another relevant question is whether the commitments made by WTO members would reflect the status quo, regardless of the approach adopted. This has proved to be difficult for tariffs at the GATT and the services commitments in the GATS.

One of the main components of bilateral and regional investment agreements, investment protection provisions, is essentially absent from the WTO framework. There is no coverage of matters related to expropriation, an issue that has become politically very sensitive “in countries with high levels of regulatory and NGO [non-governmental organization] activism.”[24] A comprehensive agreement on investment at the WTO could address this issue and define the concept of indirect expropriation in such a way as to reaffirm the rights of sovereign countries to regulate. WTO members could also decide to ignore this issue altogether and rely on their network of bilateral investment treaties and regional agreements.

Although payment and transfers, an important component of the provisions on investment protection, are covered in the GATS, the provision on this issue is commitment-specific, which means that it applies only to scheduled sectors and modes of supply. In contrast, the transfer provision in investment agreements is of a general nature. Investment agreements also include two dispute settlement mechanisms. One deals with disputes between states, and the other allows investors of a Party to bring a

[24] Sauvé and Wilkie (2000, p. 341).

claim against another Party. It appears unlikely for the time being that investor-state arbitration would be exported to Geneva because of the burden it would impose on the current system and the political sensitivities it would generate.

A comprehensive agreement would also include provisions on performance requirements and may cover investment incentives. There has been intense competition among both developed and developing countries in trying to attract FDI by using investment incentives. Central and sub-national states (that is, provinces and states) in developed countries make great use of these instruments. Investment incentives –be they fiscal, financial, or of other types- often play a significant role in influencing the location of some specific investments. They may also lead countries to embark on costly "grant shopping," resulting in discrimination and distortions in the allocation of production and resources, essentially in rent-seeking behavior by investors. Countries with fewer resources may find it difficult to compete on a level playing field with other states using such instruments. Countries with federal structures have traditionally been very hesitant to tackle this issue in international negotiations. They often feel they cannot or should not bind their sub-national states. Provisions on investment incentives could address issues related to their scope, codification, the prohibition of some types of incentives, and the principles of transparency and non-discrimination (national treatment and MFN treatment).

A second scenario is to expand the current WTO investment framework without negotiating a comprehensive agreement on investment. Several options are possible. WTO members could focus on investment liberalization in the GATS and ensure that the commitments reflect more closely the investment regime in place in each member country. Members could also elect to develop disciplines on investment in goods to address the market access component of an investment agreement. Disciplines on investment incentives promoting transparency and non-discrimination, as explained in the previous paragraph, could be added to the SCM, and commitments made in the Plurilateral Agreement on Government Procurement (GPA) could be multilateralized. A third scenario would be for WTO members to negotiate a Plurilateral Agreement on Investment, which would be comprehensive in nature. The European Commission floated this idea in December 2000.

CHALLENGES AHEAD

Countries must reflect on the role that an investment agreement should play, and what they want to achieve at the WTO and in the FTAA agreement. A lot of progress has been made with respect to the rules and disciplines governing investment in the Americas. In fact, there are more commonalities at the regional level than multilaterally. By building on the existing consensus in the FTAA, countries of the Americas will strive for a balanced framework that will ensure mutual advantage and increased benefits for all participants. In so doing they may wish to review their recent experience with their own investment instruments and draw lessons to be applied in their negotiations. On investment matters, the FTAA offers an opportunity to show how regional agreements can contribute to building a stronger multilateral trading system.

More broadly, countries of the Americas face numerous challenges at the beginning of the twenty-first century. A first challenge is to ensure that their market-oriented reforms implemented during the 1990s are sustained in the long run. A sudden change in policy towards protectionism could lead to severe capital outflows. A second challenge is to include in trade and investment agreements the liberalization achieved unilaterally. Both developed and developing countries benefit from the signaling effects of a negotiated agreement that provides legal security to international investors. Countries also gain in credibility if there is no gap between bound and applied commitments to market access. In the context of a hemispheric investment agreement, Latin American countries must decide, along with the United States, Canada, and the Caribbean, whether the FTAA investment chapter will represent a commitment that reflects the status quo or go beyond the current level of liberalization. They must also discuss whether the agreement should aim at progressive liberalization with a built-in agenda for future liberalization. But more important, countries of the region need to identify their objectives, priorities and interests in negotiating investment agreements, be they at the regional or multilateral level.

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The Organization of American States

The Organization of American States (OAS) is the world's oldest regional organization, dating back to the First International Conference of American States, held in Washington, D.C., from October 1889 to April 1890. The establishment of the International Union of American Republics was approved at that meeting on April 14, 1890. The OAS Charter was signed in Bogotá in 1948 and entered into force in December 1951. Subsequently, the Charter was amended by the Protocol of Buenos Aires, signed in 1967, which entered into force in February 1970; by the Protocol of Cartagena de Indias, signed in 1985, which entered into force in November 1988; by the Protocol of Managua, signed in 1993, which entered into force in January 29, 1996; and by the Protocol of Washington, signed in 1992, which entered into force on September 25, 1997. The OAS currently has 35 Member States. In addition, the Organization has granted Permanent Observer status to 48 States, as well as to the European Union.

The basic purposes of the OAS are as follows: to strengthen peace and security in the Hemisphere; to promote and consolidate representative democracy, with due respect for the principle of non-intervention; to prevent possible causes of difficulties and to ensure the pacific settlement of disputes that may arise among the Member States; to provide for common action on the part of those States in the event of aggression; to seek the solution of political, juridical and economic problems that may arise among them; to promote, by cooperative action, their economic, social and cultural development, and to achieve an effective limitation of conventional weapons that will make it possible to devote the largest amount of resources to the economic and social development of the Member States.

MEMBER STATES: Antigua and Barbuda, Argentina, The Bahamas *(Commonwealth of)*, Barbados, Belize, Bolivia, Brazil, Canada, Chile, Colombia, Costa Rica, Cuba, Dominica *(Commonwealth of)*, Dominican Republic, Ecuador, El Salvador, Grenada, Guatemala, Guyana, Haiti, Honduras, Jamaica, Mexico, Nicaragua, Panama, Paraguay, Peru, St. Kitts and Nevis, Saint Lucia, Saint Vincent and the Grenadines, Suriname, Trinidad and Tobago, United States, Uruguay and Venezuela.

PERMANENT OBSERVERS: Algeria, Angola, Austria, Belgium, Bosnia and Herzegovina, Bulgaria, Croatia, Cyprus, Czech Republic, Denmark, Egypt, Equatorial Guinea, European Union, Finland, France, Germany, Ghana, Greece, Holy See, Hungary, India, Ireland, Israel, Italy, Japan, Kazakhstan, Korea, Latvia, Lebanon, Morocco, Netherlands, Norway, Pakistan, Philippines, Poland, Portugal, Romania, Russian Federation, Saudi Arabia, Spain, Sri Lanka, Sweden, Switzerland, Thailand, Tunisia, Turkey, Ukraine, United Kingdom, and Yemen.

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