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The Global Governance of Foreign Direct Investment: Madly Off in All Directions

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Dialogue on Globalization

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Preface

Foreign direct investment (FDI) is seen as essential for economic growth and development by a majority of economists and policy-makers in both developing and developed countries. This has let to growing competition to attract FDI and to provide conditions regarded necessary to make countries attractive for foreign investment on the one side and to somehow protracted and conflicting debates and political moves for a set of global rules governing investment to protect the rights of investors and to resolve potential conflicts between governments and transnational corporations on the other. Efforts by developed countries to establish a multilateral agreement on investment (MAI) since 1995 at the OECD failed and "were discontinued in April 1998 and will not be resumed" (OECD). Further moves to install multilateral investment rules at the World Trade Organization (WTO) were initiated at the Doha Ministerial Conference in 2001 as part of the so-called "Singapore Issues," but had to be abandoned at the 5th WTO Ministerial Conference in Cancun (2003) under growing opposition from developing countries and strong criticism not only from the NGO community, which has been criticizing a lack of binding rules for multinational or transnational corporations. It is interesting to note that the Sub-Commission on the Promotion and Protection of Human Rights in August 2003 passed a draft on "Norms on the responsibilities of transnational corporations and other business enterprises with regard to human rights,"* which provoked a similar complex controversy and is at present being debated at the UN Commission on Human Rights.

Notwithstanding substantial doubts that increased FDI and economic growth are not automatically linked and that investments agreements may be less important in attracting FDI than other economic and socio-political framework conditions, the proliferation of bilateral investments agreements (BITs) goes ahead unrestrained. This has let to a "spaghetti bowl" of rules, arbitrary definitions, unclear competences and responsibilities, and many developing countries are overburdened by requirements of bilateral negotiations and intransparent, sometimes conflicting, rules and overlapping obligations. In many cases long-term consequences and restrictions on "policy space" are obvious neither to decision makers nor to the interested public. Compared to international trade negotiations at the WTO and environmental concerns, the proliferation of bilateral investment agreements or the incorporation of investment provisions into wider economic agreements have found less international political attention and are rarely in the limelight of political debate.

This paper by Luke Eric Peterson, "The Global Governance of Foreign Direct Investment: Madly Off in All Directions," aims at providing a critical overview of the present situation with a special focus on policy implications, restrictions on government regulations and – in particular – the complex issues of investor-state disputes. Based on the view *"that investor protection is a legitimate goal – but one which needs to be balanced against other compelling public interests*," the author concludes: *"…there is a need for governments to scrutinize their existing treaties so as to ensure that they provide adequate safeguards for the exercise of legitimate government activity."*

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* See: Nils Rosemann: The UN Norms on Corporate Human Rights Responsibilities, Dialogue on Globalization, Occasional Papers Nº 20, 2005, FES Geneva.

1. Executive Summary

Notwithstanding a series of high-profile failures at the multilateral level, there has been steady growth of bilateral international treaties (BITs) for the protection of foreign direct investment. Cumulatively, these more than 2200 BITs, along with various other regional agreements (such as the North American Free Trade Agreement) constitute a de facto global investment regime – albeit one which is very patchy in its coverage.

Offering foreign investors a broad slate of legal protections – as well as recourse to international arbitration in the event of a dispute with the host state – these treaties will have potentially broad policy implications for governments playing host to foreign investment. While the treaties may be a useful bulwark against egregious interference or expropriation of foreign-owned property, they may condition more subtle measures taken by governments, including in the realms of regulation, taxation, legislation and judicial decision-making.

The last decade has seen a steady rise in litigation under these treaties, as foreign investors invoke their international protections in an effort to challenge objectionable treatment at the hands of their host government. Although there are very serious concerns about the lack of transparency surrounding this form of international dispute resolution, certain emerging patterns can be glimpsed. Recent investor-state disputes have seen multinational firms seek to challenge the imposition of health and environmental measures, various forms of taxation, and even the introduction of affirmative action policies designed to promote certain disadvantaged racial or ethnic groups.

As these treaties are seen to reach well-behind-the-border, and to apply to sensitive economic sectors and government measures, there is a need for governments to scrutinize their existing treaties so as to ensure that they provide adequate safeguards for the exercise of legitimate government activity. In many instances, the treaties appear to have been drafted with insufficient forethought, and without many safeguards, exceptions and limitations. In several notable instances, governments have moved to adapt their negotiating stance, in response to unforeseen uses of existing investment treaties by foreign investors to challenge government decisions or actions.

At the same time as a wholesale reevaluation of existing investment treaties may be warranted, there are grounds for reconsidering the present state of affairs whereby the global governance of investment takes place primarily through regional and bilateral treaties – which leads to serious lacunae in coverage. As can be seen in many instances, foreign investors may have wildly differing forms of legal recourse depending upon which passport they hold. Moreover, local enterprises, not to mention ordinary citizens or charitable organizations, will, as a rule, enjoy far less international legal protection from capricious action by governments. Questions can be raised about the narrow public priorities which have seen bilateral foreign investment protection treaties negotiated in large numbers at the same time as instruments for the protection of broader human rights, as well as the activities of charitable international organizations, have languished.

2. Multilateral Failures and Bilateral Successes[1]

Despite more than a half-century of efforts, the international community has yet to reach broad consensus upon the international standards of protection owed by host governments to foreign direct investment (FDI). Recent initiatives at the World Trade Organization (WTO) and at the Organization for Economic Cooperation and Development (OECD) have failed spectacularly. Earlier efforts at the OECD during the 1960s, and before that, discussions to create an International Trade Organization, also met with no success. Due to this persistent failure at the multilateral level, negotiations of the international rules governing FDI flows have been undertaken in a piecemeal fashion ever since – generally through the negotiation of individual bilateral treaties between two states (typically a capital-exporting country and a potential host country).[2]

In the stead of a multilateral agreement, these bilateral treaties are designed to clarify, at least for purposes of the two parties, what standards of protection will apply to investments from one country into the other. The treaties were viewed as essential by many capital-exporting countries, in view of the continued uncertainty as to the applicable international law standards. For example, during the 1960s and 1970s many developing countries supported UN General Assembly Resolutions which rejected Western legal standards, asserting the sovereign right of governments to nationalize property without needing to pay full compensation.[3] By many accounts it was this contentious political environment and the continuing failure to agree upon uniform multilateral standards which impelled many capital-exporting countries to develop bilateral investment treaty (BIT) programmes and to push these agreements in one-to-one negotiations with developing countries.[4]

By many accounts, the continuing failure to agree upon uniform multilateral standards which impelled many capital-exporting countries to develop bilateral investment treaty (BIT) programmes.

Since Germany pioneered the modern bilateral investment treaty in 1959, there has been steady – and in more recent times quite spectacular – growth in the number of these BITs. The 1990s saw a particularly marked increase in the negotiation of such instruments, even while developed country governments were trying (and failing) to cement in place a Multilateral Agreement on Investment at the OECD during the mid-1990s; that decade saw the number of BITs quintuple from 385 to 1,857.[5]

In addition, a growing number of wider economic agreements are incorporating investment provisions. For example, US Free Trade Agreements (FTA) incorporate BIT-style provisions into an investment chapter, as do free trade agreements

1 The author would like to thank Nick Gallus and Alice Bisiaux for helpful comments on an earlier draft. They bear no responsibility for the content of this paper.
2 Or earlier Friendship Commerce and Navigation Treaties, or Treaties of Amity.
3 UNCTAD, Bilateral Investment Treaties in the Mid-1990s, Geneva 1998, at pp. 3-4.
4 Ibid; Adeoye Akinsanya, "International Protection of Direct Foreign Investments in the Third World," 36 ICLQ, January 1987, pp. 58-75; Eileen Denza and Shelagh Brooks, "Investment Protection Treaties: United Kingdom Experience," 36 ICLQ, Fall 1987, pp. 908-923.
5 UNCTAD, "Bilateral Investment Treaties 1959-1999," UNCTAD/ITE/IIA/2, (2000), p. 1; see also Financial Times, "Rise in Bilateral Treaties to Guard investors," Dec. 19, 2000.

There is some evidence that the proposed new EU Constitutional Treaty might give the European Commission broader competence to negotiate international investment agreements.

pursued by Canada and Japan. The latter has signaled in its 2002 FTA strategy that "(FTAs) offer a means of strengthening partnerships in areas not covered by the WTO and achieving liberalization beyond levels attainable under the WTO."[6] In Europe the situation is less clear-cut due to the shared competence of the European Union (EU) and its member states when it comes to economic matters. The EU's executive arm, the European Commission, negotiated on behalf of the member states during WTO discussions on investment. However, the member states have long negotiated their own bilateral instruments on investment protection. In the case of France and Germany, these programmes date to the 1960s and 1950s respectively. Although there is some evidence that the proposed new EU Constitutional Treaty might give the European Commission broader competence to negotiate international investment agreements, that treaty was not in force at the time of this writing, and a number of national referenda will need to take place before the new treaty would come into effect.[7] In the interim, EU member states continue to negotiate BITs on an individual basis, and many hundreds of such agreements are currently in force.

6 "Japan's FTA Strategy (Summary)," Economic Affairs Bureau, Ministry of Foreign Affairs, October 2002, available on-line at: http://mofa.go.jp/policy/economy/fta/strategy0210.html.

7 See Luke Eric Peterson, "New European Constitution Would Bring FDI Under European Competence," INVEST-SD News Bulletin, October 20, 2003, available on-line at: http://www.iisd.org/pdf/2003/investment_investsd_oct20_2003.pdf.

3. Contents of Bilateral Investment Treaties

The vast majority of bilateral investment treaties (BITs) are not instruments of liberalization per se.

Despite the tendency of some treaties, particularly broader free trade agreements, to include provisions geared to provide market opening for new investments, the vast majority of BITs are not instruments of liberalization per se. Rather than compel governments to open the door to foreign investment in any particular sector, most treaties simply provide protection for foreign investors operating in those sectors in which the host state wishes to permit foreign investment.[8]

While BITs differ in their details, they typically provide for the repatriation of profits and other investment-related funds; non-discrimination (both national treatment and most-favored nation treatment); some minimum standards (for e.g. “fair and equitable treatment” or “full protection and security”); as well as provisions for the settlement of disputes. In addition, it is common for these treaties to include guarantees of compensation in the event of nationalization, expropriation, or indirect forms thereof; the agreements also clarify what level of compensation (for e.g. full compensation) will be owed in such cases.

Figure 1: Standard investment treaty provisions

National Treatment

This protection is a relative one which entitles foreign investors (or investments) to treatment which is comparable to that enjoyed by domestic investors (or investments) in the host state.

Most Favored Nation (MFN) Treatment

A complement to National Treatment, is the grant of MFN Treatment which uses as a benchmark the treatment accorded to foreign investors (or investments) from third states.

Fair & Equitable Treatment

This protection offers some minimum, or absolute, protection, in contrast to other forms of protection which take as their reference point, the treatment accorded to nationals or other foreign investors (see national treatment and MFN below)

Restrictions on Expropriation and Indirect Expropriation

It is virtually standard for treaties to provide protection in the event of direct or indirect expropriation. Generally, this includes a requirement that the host state pay full compensation for any investment subjected to such treatment.

Free Transfer of Funds

The repatriation of investment-related funds (profits, interest, fees, and other earnings) is typically guaranteed under treaties.

8 However, treaties pursued by the US, Canada, Japan and several other countries do encompass so-called pre-establishment commitments, which may include a promise to permit entry to foreigners on a national treatment or most-favored nation basis.

The most notable of all BIT features has been the inclusion of a provision which grants foreign investors direct legal personality under international law.

The most notable of all BIT features has been the inclusion of a provision which grants foreign investors direct legal personality under international law. Equipped with this personality, investors may bring their own claims for damages where they allege that their host government has failed to uphold the substantive protections contained in the treaty. This novel form of dispute settlement stands in stark contrast to the WTO system, where only governments may mount international claims. Under most BITs, host states have waived their sovereign immunity, and have agreed to be bound by the decisions of external arbitration tribunals. This innovation has the effect of removing investor-state disputes from the jurisdiction of the host state's local court system.

4. Settlement of International Disputes Between Foreign Investors and States

Just as there is no single multilateral treaty on investment, there is no single forum for resolving treaty disputes which arise between foreign investors and their host states.

Just as there is no single multilateral treaty on investment, there is no single forum for resolving treaty disputes which arise between foreign investors and their host states. Each investment treaty provides for dispute settlement in some fashion; early treaties may have provided only for state-to-state dispute settlement, whereby the investor's home state would need to assert an investor's claims. More recent investment treaties generally provide scope for investor-to-state dispute settlement, typically providing the advance consent of both state parties to arbitrate disputes with covered investors. Most investment treaties no longer provide that foreign investors must exhaust their domestic legal remedies before mounting an international claim.[9] This may have the effect of internationalizing disputes which might have been resolved in the domestic courts of the host state. It should come as no surprise then that international arbitration is now viewed as the "universal 'default setting' for the settlement of international investment and other commercial disputes."[10] Typically, investors may detour around local courts, and avail themselves of whatever arbitral rules are set forth in the treaty, which may allow for some choice-of-forum.[11]

Most often, treaties will make reference to the International Centre for Settlement of Investment Disputes (ICSID), a member of the World Bank Group. The ICSID facility was purpose-built for the resolution of investment disputes between investors and states. The Centre has no standing court or tribunal; rather, it convenes a separate tribunal to resolve each new dispute which comes before the Center. In addition to the ICSID facility, an option found in many treaties will be arbitration under United Nations rules: those of the UN Commission on International Trade Law (or UNCITRAL). In contrast to ICSID, UNCITRAL is not a centre catering to investment disputes, rather it is a UN body tasked with drafting international commercial rules and legislation which may be used or adopted by parties at their discretion. The UNCITRAL rules were originally intended for commercial arbitration between two private parties, and contain features which were designed to accord greater confidentiality to such proceedings. Arbitrations occurring under the UNCITRAL arbitral rules are not supervised by the UNCITRAL Secretariat, nor are they even known to UNCITRAL staff in most instances. This marks a sharp difference with the ICSID facility which manages all cases arbitrated under the ICSID rules, and maintains a publicly available docket of all disputes before the Centre.

9 Horacia Grigera-Naon, "The Settlement of Investment Disputes Between States and Private Parties: An Overview of the Experience from the Perspective of the ICC," 1 Journal of World Investment, No.1, July 2000, at pp. 66-7.
10 Brower and Sharpe, op. cit., at p. 211.
11 This choice may have important impacts upon the level of transparency of a given arbitration, as well as upon various other factors, including the extent to which domestic courts may review arbitral decisions. See Luke Eric Peterson, "All Roads Lead Out of Rome: Divergent Paths of Dispute Settlement in Bilateral Investment Treaties," in L. Zarsky, ed., Balancing Rights and Rewards: *International Investment for Sustainable Development*, (Earthscan, 2004), at pp. 128-139.

It would appear that investment treaty arbitrations account for a very tiny, but growing, volume of disputes at these two commercial dispute facilities.

The UNCITRAL rules are not the only commercial arbitration rules which have been transplanted into international investment treaties, but they are distinguished by their ad hoc nature. Investment treaties may also incorporate references to commercial arbitration institutions, such as the Arbitration Institute of the Stockholm Chamber of Commerce or the arbitration facility of the International Chamber of Commerce.[12] These two facilities tend to specialize in commercial arbitration between private parties, and are less often referenced in investment treaties than the popular venues UNCITRAL rules. It would appear that investment treaty arbitrations account for a very tiny, but growing, volume of disputes at these two commercial dispute facilities.[13] In keeping with their commercial orientation, the ICC and SCC rules do not provide that a public docket of cases be kept. To the extent that information circulates about investment treaty cases handled at these institutions, it may be at the discretion of the parties involved, or as a result of the Secretariat's willingness to reveal basic statistical information about the overall number of treaty-based claims proceeding at its facility. The names of the parties, much less the details of the dispute – even if they be of compelling public interest – may not be disclosed as a matter of course. Table 1 illustrates which arbitral avenues are monitored by some supervisory institution, and whether data about cases is made available to the public.

Table 1: Key Features of Common Arbitration Rules

Arbitration Rule	Central Body Supervises and Tracks All Arbitrations	All Arbitrations Publicly Disclosed
ICSID	Yes	Yes
SCC	Yes	No
ICC	Yes	No
UNCITRAL	No	No

There have been widespread calls for reform of the present process, including efforts to promote greater transparency, accountability and independence.

As can be seen, not all avenues are monitored by a dedicated secretariat staff, and even those which are monitored may not generate publicly available information. This serious deficiency hobbles basic efforts to track investment treaty disputes – to monitor their frequency, their resolution, and to assess the policy implications that flow from the more than 2265 bilateral investment treaties which are now in existence.[14] As this mode of arbitration is now used to resolve disputes which may have serious public policy implications (see discussion in the next section), there have been widespread calls for reform of the present process, including efforts to promote greater transparency, accountability and independence.

12 Grigera Naon, op. cit., at p. 65.
13 UNCTAD, "International Investment Disputes on the Rise," Occasional Note, Nov.29, 2004.
14 UNCTAD, *World Investment Report 2004: The Shift Towards Services,* United Nations, (New York and Geneva, 2004), at p. 6.

In response to calls from civil society groups and news media, the three parties to the North American Free Trade Agreement (NAFTA) – Canada, the US and Mexico – have pledged to disclose all NAFTA arbitrations and open future arbitration hearings to the public. Likewise, both Canada and the US have altered their negotiating templates for future investment treaties so as to require that all disputes will be disclosed to the public and conducted publicly. However, the vast majority of existing treaties do not mandate such transparency, which means that the provisions of the given arbitration rules will prevail; as a consequence, some volume of disputes are launched without any public notice or disclosure, and the overwhelming proportion of legal proceedings themselves are resolved behind closed doors.[15] Nevertheless, from the information which has become public, some basic contours of dispute settlement activity are coming into view. The following section offers an overview of what is known about investment treaty litigation.

Some volume of disputes are launched without any public notice or disclosure, and the overwhelming proportion of legal proceedings themselves are resolved behind closed doors.

15 It should be noted that there is no consensus for transparency, even from groups representing developing country interests. One such group has criticized moves for greater transparency of legal disputes on the grounds that public access to proceedings may add to the already high cost of administering such arbitrations (See: The South Centre, "Developments on Discussions for the Improvement of the Framework for ICSID Arbitration and the Participation of Developing Countries," February 2005, at http://www/southcentre.org). To the extent that this concern is legitimate, real efforts should be undertaken to ensure that greater transparency need not add any financial burden for poorer governments. This might be done by providing Centres such as the ICSID facility with greater core resources for the facilitation of open proceedings.

5. Trends in Use of Investment Treaties

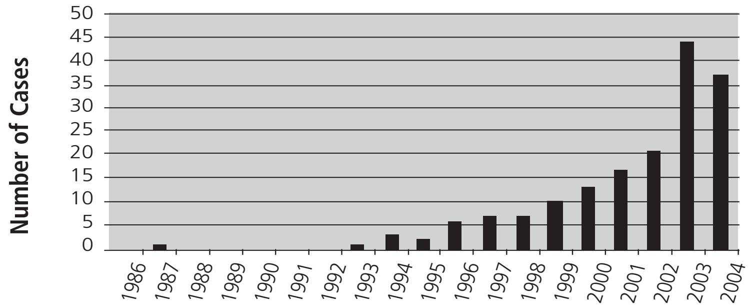
Publicly available information reveals that arbitration under investment treaties has grown steadily.

For many years, investment treaties lay dormant – largely ignored by both investors and by signatory governments. The first recorded arbitration by an investor under an investment treaty took place only in the late 1980s; it would be a further six years before another arbitration was launched by an investor.[16] Since then, however, publicly available information reveals that arbitration under investment treaties has grown steadily. One stimulus has been the legal developments under the NAFTA – where investment treaty-type provisions have been wielded by foreign investors in a very well-publicized fashion. In the late 1990s NAFTA's Chapter 11 on investment was invoked by a number of firms investing from one NAFTA country into another. Disputes with host states have run the gamut from objections to various tax, regulatory or administrative measures to allegations of denial of justice in domestic legal systems.[17] In these cases, foreign investors have opted for international arbitration over local avenues, and alleged violations by the host state of various substantive investor rights found in Chapter 11.[18] While many of these cases remain pending, they have served to raise the profile of NAFTA's investment chapter in particular, and international investor rights in general. Moreover, as will be discussed more fully below, an outpouring of public scrutiny and criticism has led to certain reforms of the NAFTA template.

More than 50 countries have confronted investment treaty claims from foreign investors; the large majority of these countries are developing or transition economies.

Looking beyond the NAFTA to the broader constellation of BITs, the number of known investor claims filed against host governments under these bilateral treaties has surged noticeably over the last decade, and particularly in the last five years (as can be seen in Figure 2).[19] More than 50 countries have confronted investment treaty claims from foreign investors; the large majority of these countries are developing or transition economies.[20]

Figure 2: Known Investment Treaty Arbitrations



Source: This graph is based upon an earlier graph produced by the author for the UN Conference on Trade and Development (see Footnote 19 below). The present graph has been updated to reflect known arbitral developments through the entirety of 2004.

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16 The first known case, Asian Agricultural Products Limited v. Sri Lanka, was launched in 1987 at the International Centre for Settlement of Investment Disputes (ICSID); It was only in 1993, that a second case American Manufacturing and Trading v. Zaire, emerged at the ICSID facility.

17 See IISD, Private Rights, Public Problems: NAFTA's Controversial Chapter on Investment.

18 A list of NAFTA investment arbitrations, current to January 1, 2005, has been compiled by the Canadian Centre for Policy Alternatives and can be found on-line at: http://www.policyalternatives.ca/documents/National_Office_Pubs/2005/chapter11_january2005.pdf.

19 UNCTAD, *International Investment Disputes on the Rise,* Occasional Note, Nov.29, 2004, http://www.unctad.org/sections/dite/iia/docs/webiteiit20042_en.pdf.

20 Ibid.

As the number of legal disputes continues to increase, it is becoming clear that there is no such thing as a typical investment treaty dispute. Investors may protest the wholesale nationalization of their property, or some ham-handed interference intended to have "an equivalent effect" to a nationalization. However, investors might also object to myriad other forms of government regulatory conduct, for e.g. the introduction of measures which phase out or limit the use of controversial or hazardous substances, as has happened in several notable NAFTA claims.[21] In some such cases, they might allege that such measures constitute an "indirect" form of expropriation. Increasingly, investors are also challenging changes in tax treatment or treatment at the hands of regulatory or administrative agencies, perhaps arguing that the taxes rise to the level where they are tantamount to an expropriation or destruction of an investment's viability.[22] At other times, investors might fall out with governments over the performance of contracts to provide infrastructure or to deliver services such as water, electricity or natural gas, and seek damages by arguing that the host government has violated its international obligations to protect the foreign investment from such interference or non-performance, or by alleging that the foreign investor has been the victim of discriminatory treatment. Equally troubling is the fact that some *unknown* proportion of disputes will remain hidden from view, meaning that certain categories of government policies, regulations or measures might be challenged without any public awareness or discussion.

Argentina faces a remarkable 36 known claims under various bilateral investment treaties related to its financial crisis.

One visible trend in dispute settlement is that a striking number of investment treaty claims have arisen in the context of financial or currency crises and have seen foreign investors seek to recoup losses by holding host states liable for alleged breaches of their obligation to protect foreign investment from harm.[23] Argentina faces a remarkable 36 known claims under various bilateral investment treaties related to its financial crisis.[24] These claims allege damages arising out of the recent financial crisis, and involve a Who's Who of multinational corporations, including France Telecom, Total, Siemens, Enron, BP, British Gas, Suez and Telefonica. While the cases are being resolved behind closed doors, it is understood that many foreign investors are seeking compensation for losses allegedly caused by a series of emergency measures put into place by Argentina to stem the financial crisis. Foreign firms have alleged that the collapse of the peso, and the government's freeze on utility tariff hikes, have had an onerous effect upon foreign-owned utilities.

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21 Ethyl Corporation v. Canada, Crompton Corp v. Canada, Methanex Corp v. United States, information about each claim is available at: http://www.state.gov/s/l/c3439.htm and http://www.dfait-maeci.gc.ca/tna-nac/gov-en.asp (last checked on February 1, 2005).

22 Occidental Exploration and Production Company v. Republic of Ecuador, UNCITRAL arbitration, award rendered July 2004, currently on review in UK court system; Encana v. Republic of Ecuador, pending UNCITRAL arbitration; Enron Corporation and Ponderosa Assets L.P. v. Argentine Republic, pending ICSID arbitration.

23 Arbitrations are known to have been mounted against Russia in relation to its financial crisis in the late 1990s. See for example the promotional material of the law firm Freshfields Bruckhaus Deringer at: http://www.freshfields.com/practice/arbitration/experience/idisputes.asp (last visited March 18, 2005); the author is also aware of another claim mounted by a different law firm in relation to the Russian financial crisis; however, a lawyer involved in that case declined to discuss the details of this case, and would only confirm its existence. Both of these Russian cases are understood to have been settled on confidential terms, so they did not generate legal rulings by tribunals.

24 35 claims have been mounted against Argentina at the ICSID facility. Of these, all but 2 pertain squarely to losses related the financial crisis (Vivendi v. Argentina, Lanco v. Argentina). Another ICSID case, launched before the financial crisis, Enron v. Argentina, has since given rise to an ancillary claim related to the financial crisis. Outside of ICSID, there are at least three known treaty-based claims against Argentina relating to the financial crisis; these have been brought by UK companies, British Gas, National Grid, and Anglian Water Group.

Firms may have large US dollar-denominated debts but are paid in a devalued currency (the peso) with little prospect for raising customer rates in order to staunch losses.[25] As far as can be determined given the lack of publicity of the proceedings, foreign investors are alleging that various government actions and omissions breach prior contractual or treaty commitments made by the government, including the commitment not to engage in "indirect" forms of expropriation.

Looking beyond these claims against Argentina, the growing body of investment treaty disputes reveal that investment treaty rights operate *across-the-board,* with disputes arising in relation to investments in manufacturing, mining, electricity, water, telecommunications, financial services, media, transportation, and numerous other sectors. The cases also demonstrate that investment treaties reach well *behind-the-border* in order to scrutinize actions by national, provincial and local governments, including tax measures, administrative and licensing processes, health and environmental regulations, and even emergency measures taken in a financial crisis.

The across-the-board nature of these treaties and their intrusive behind-the-border reach provide reason for renewed scrutiny of these long-neglected international treaties.

Both of these features – the *across-the-board* nature of the treaties and their intrusive *behind-the-border* reach – provide reason for renewed scrutiny of these long-neglected international treaties. As will be seen in the next section, questions arise as to whether these once-obscure treaties are well-suited to "every-day use." Indeed, several governments have taken dramatic steps in recent years to revise their investment treaty templates so as to reduce the potential for unforeseen incursions into sensitive government functions or regulatory affairs.

The widespread pervasiveness of BITs presents various policy challenges as the treaties are increasingly being invoked by foreign investors as a matter of routine. Two basic concerns arise: first, to the extent that transparency permits scrutiny of treaty disputes, unforeseen policy implications are seen to arise – or have the potential to arise – out of the substantive treaty protections. Second, broader policy questions can be asked about global priorities and the privileging of foreign capital over other non-commercial interests, including the promotion and protection of human rights.

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25 Luke Eric Peterson, "Path Cleared for First Challenge to Argentine Emergency Laws to be Heard on Merits," INVEST-SD News Bulletin, August 1, 2003, available on-line at: http://www.iisd.org/pdf/2003/investment_investsd_aug1_2003.pdf.

6. Unforeseen Policy Implications of Treaty Commitments

One legal expert has described standard treaty provisions as "dazzlingly abstract" and 'maddeningly imprecise'.

As noted earlier, litigation involving such treaties was unknown prior to the late 1980s. Thus, hundreds upon hundreds of treaties were drafted in a context where it would have been legitimate to assume that the treaty provisions might never be subjected to careful scrutiny, interpretation and analysis.[26] Perhaps not surprisingly, investment treaties, particularly those not drafted in recent years, may be lacking in terms of their attention to detail and clarity. One legal expert has described standard treaty provisions as "dazzlingly abstract" and "maddeningly imprecise as to the substantive legal standard to be applied by the tribunal."[27] While others have noted that BITs were long drafted by bureaucrats and trade negotiators, with an eye to "ambiguity, open-endedness and need for substantial (unpredictable) interpretation of the treaty."[28]

At least two governments, Canada and the United States, have undertaken recent wholesale reviews of their negotiating templates, with an eye to adding more nuance and introducing additional safeguards.[29] In the words of one commentator reviewing the 2004 Canadian Model Foreign Investment Protection Agreement (FIPA), Canada no longer views "investment as a 'one-way street' where Canadian investors will always be the claimant in investment disputes. Instead, the new FIPA creates more of a 'two-way street' in which general extensions of investor rights are coupled with specific and detailed exemptions which are designed to preserve the state's power to intervene in markets to promote the public interest."

Agreements which might have been signed with little fanfare or public debate may have far-reaching legal, political and financial consequences.

An unspoken, but readily verifiable, corollary is that many other governments have devoted far too little consideration to using similar "specific and detailed exemptions" so as to mitigate some of the more far-reaching investor rights found in standard investment treaties.[31] This failure would not have been as worrying for signatories in an era where recourse to arbitration under a BIT was viewed as an absolute last resort, but in a context where the volume of claims has exploded, governments have good reason to be concerned about abstract, hasty and open-ended drafting practices. Heretofore-unnoticed treaties may be catapulted into the headlines

26 One survey of foreign investor attitudes towards such treaties reported in 2000 that investors "do not have much knowledge of the treaty, do not use it in any significant way and are not particularly interested (and thereby influenced) by the treaty." See Thomas Walde and Stephen Dow, "Treaties and Regulatory Risk in Infrastructure Investment," 34 Journal of World Trade, Vol.2, (2000), at p. 12.

27 Rogers, William D. (2000), "Emergence of the International Center for Settlement of Investment Disputes (ICSID) as the Most Significant Forum for Submission of Bilateral Investment Treaty Disputes," Presentation to Inter-American Development Bank Conference, October 26-27.

28 Walde and Dow, 45.

29 Luke Eric Peterson, "US Releases Final Draft of Model BIT," INVEST-SD News Bulletin, Dec.17, 2004, available on-line at: http://www.iisd.org/pdf/2004/investment_investsd_dec17_2004.pdf ; and Luke Eric Peterson, "Canada Releases its Revised Model Investment Treaty," INVEST-SD News Bulletin, May 24, 2004, available on-line at: http://www.iisd.org/pdf/2004/investment_investsd_may24_2004.pdf

30 James McIlroy, "Canada's New Foreign Investment Protection and Promotion Agreement: Two Steps Forward, One Step Back?" 5 Journal of World Investment, No.4, August 2004, at p. 644.

31 See for example, the author's discussion of this issue in Peterson, "UK Bilateral Investment Treaty Programme".

– as they have in Ecuador[32], Argentina, or the Czech Republic[33] – when foreign investors dust off these obscure agreements, invoke their protections and file multi-million dollar lawsuits. Agreements which might have been signed with little fanfare or public debate may have far-reaching legal, political and financial consequences.

Several emerging policy implications are sketched out in greater detail in the next sections.

6.1 The Prospect for Conflicting Rulings and Interpretations

One leading investment arbitration expert commenting on the Czech Republic fiasco has cautioned that the present system of dispute settlement risks devolving into an 'arbitral casino'.

The opaque and decentralized nature of dispute settlement under investment treaties, coupled with vague treaty language, sets the stage for situations where different tribunals may review similar – or nearly identical – disputes, yet come to divergent, or even "utterly conflicting" rulings.[34] This happened most notably in the case of a prominent investment dispute against the Czech Republic which spawned two separate international arbitrations, one by the company itself, and the other by its US-based controlling shareholder.[35] In one of these arbitrations, the tribunal found that the Czech authorities had breached various investment treaty obligations, whereas in a parallel arbitration, a different tribunal examined the same facts and reached the contrary view. Despite winning one claim, the Czech Republic found itself paying more than US$350 million in damages to the affected investor.[36] Meanwhile, the conflicting rulings arising out of this notorious dispute have raised concerns that government may not be able to count upon uniform interpretations of their treaty commitments from one instance to the next. One leading investment arbitration expert commenting on the Czech Republic fiasco has cautioned that the present system of dispute settlement risks devolving into an "arbitral casino."[37]

Another scenario which generates uncertainty is one where a number of different foreign firms find themselves affected by a single government measure or policy – for example an increase in corporate income tax – and might launch individual arbitrations, under multiple treaties, sometimes without even disclosing the existence of these arbitrations. The Argentine Republic has faced upwards of three dozen investment treaty arbitrations, many of them before the ICSID facility, but some brought under the UNCITRAL rules of arbitration, and handled by a multitude of different tribunals, which might reach different conclusions on the legal issues at stake.

While some recent investment treaties have put into place provisions for the consolidation of related claims under the jurisdiction of a single tribunal, such consoli-

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32 Luke Eric Peterson, "Occidental Wins Investment Arbitration Against Ecuador; Ecuador Vows 'Appeal,'" INVEST-SD News Bulletin, July, 16, 2004, available on-line at: http://www.iisd.org/pdf/2004/investment_investsd_july16_2004.pdf.

33 Luke Eric Peterson, "Czech parliament sets up inquiry of investment dispute – tallies its losses," INVEST-SD News Bulletin, Sept.2, 2003, available on-line at: http://www.iisd.org/pdf/2003/investment_investsd_sep2_2003.pdf.

34 The quote is from Charles N. Brower and Jeremy K. Sharpe, 4 Journal of World Investment, No.2, April 2003, at p. 211.

35 Ronald S. Lauder v. the Czech Republic, UNCITRAL Arbitration Proceedings Final Award, available online at: http://www.mfcr.cz/index_en.php; CME Czech Republic B.V. (The Netherlands) v. The Czech Republic, UNCITRAL Arbitration Proceedings Partial Award, available online at: http://www.mfcr.cz/index_en.php

36 Luke Eric Peterson, "Czech Republic Hit With Massive Compensation Bill in Investment Treaty Dispute," INVEST-SD News Bulletin, March 21, 2003.

37 Jacques Werner, "Making Investment Arbitration More Certain – a Modest Proposal," 4 Journal of World Investment, No. 5, at p.7 67.

dation is not provided for under most treaties.[38] As a consequence, treaty signatories might face multiple claims, with no guarantee that all tribunals will interpret treaty obligations in a similar manner. Given this high degree of uncertainty, governments (particularly poorer ones) might choose to err on the side of caution, and refrain from exercising seemingly legitimate regulatory or policy functions, for fear that their actions might not withstand scrutiny in the "arbitral casino."

6.2 Restrictions on the Privileging or Subsidization of Local Industries

It is commonplace for investment treaties to accord foreign investors and investments a right to national treatment. This can be an important protection which ensures that foreign investors do not fall victim to discrimination on the basis of their nationality.

However, there are a variety of legitimate policy reasons why host governments might wish to retain the ability to treat foreign investors and nationals differently *in certain circumstances*. For example, governments might wish to provide special support, incentives or subsidies to infant industries or to encourage indigenous cultural industries (film, television, performing arts, news, etc.). However, standard treaty provisions on national treatment may entitle foreign investors to comparable incentives or treatment meted out to domestic firms, unless *express* drafting measures have been taken to safeguard a government's ability to introduce policies which favor its own nationals.

There are a variety of legitimate policy reasons why host governments might wish to retain the ability to treat foreign investors and nationals differently in certain circumstances.

In order to preserve policy space for government action, treaty drafters should ensure that relevant exceptions and exclusions are entered to the grant of national treatment. For example, Morocco's treaty with the United Kingdom stipulates that both National Treatment and MFN do not entitle foreign investors to privileges or preferences resulting from "any government aids reserved for its own nationals in the context of national development programmes and activities."[39]

Remarkably, many developing countries, including least-developed countries, have neglected to safeguard their ability to provide such preferential benefits to locals, or to introduce future schemes or programmes targeted to their own nationals, by omitting to subject treaty commitments on national treatment to specific exceptions or exclusions.[40]

6.3 Limits Upon a Government's Taxation Powers[41]

Investment treaties vary widely in terms of the constraints which they place on a government's taxation power, and governments should think more carefully about the extent to which treaties can discipline their taxation powers.

38 See for example the provisions of new US Free Trade Agreements, such as those with Morocco and Central America, at http://www.ustr.gov/Trade_Agreements/Section_Index.html (last visited: March.18, 2005)
39 UK-Morocco IPPA, Article 4 (c).
40 See for example, the author's discussion of this issue in the UK context, in Peterson, "UK Bilateral Investment Treaty Programme".
41 This section draws on a discussion of similar issues in Peterson, "UK Bilateral Investment Treaty Programme", at p. 7.

This may leave the door open for governments to use tax measures with impunity in order to take or destroy foreign-owned property.

At one extreme, all provisions of an investment treaty may apply to government taxation measures. At the other, governments may elect – as the governments of Bangladesh, Belgium and Luxembourg have done in their investment treaty – to exempt taxation from the treaty altogether.[42] The difficulty with the latter approach is that it leaves the door open for governments to use tax measures with impunity in order to take or destroy foreign-owned property. The difficulty with the former approach is that, in the absence of additional safeguard language, governments may unduly tie their own hands with respect to the use of a fundamental prerogative of democratic governments: that of taxation.

Where treaty rules do apply to taxation, the rules on expropriation may function so as to discourage governments from effecting an expropriation using tax measures, by requiring compensation for such instances of expropriations-by-taxation. A challenging question, however, is how to draw the line between legitimate tax measures (which will be expected to have some financial repercussions upon affected foreign investors) and those which cross over into the territory of an "indirect" form of expropriation. As one tax lawyer has observed: "it is not necessary to establish a total deprivation or abandonment of an investment in order to demonstrate expropriation."[43] One partial solution to this lack of clarity about the boundary is to take away some of the discretion for arbitrators to draw their own lines, and to specify, in much greater detail, what forms of taxation should not be considered to constitute expropriation. Japan, for example, has gone to considerable lengths in a recent treaty with Vietnam to clarify under what circumstances tax measures should not be considered to be in violation of treaty commitments to foreign investors. The "Agreed Minutes" to the treaty specify that "a taxation measure will not be considered to constitute expropriation where it is generally within the bounds of internationally recognized tax policies or practices."[44]

Governments will need to consider if there are circumstances under which they would wish to reserve the right to treat foreign investors differently than local enterprises for tax purposes.

Treaty provisions on expropriation are not the only ones which may be of concern to tax authorities, however. Other treaty disciplines including those on national treatment and fair and equitable treatment will apply to tax measures, unless the treaty dictates otherwise. Governments will need to consider if there are circumstances under which they would wish to reserve the right to treat foreign investors differently than local enterprises for tax purposes – for example, perhaps to introduce special tax credits or exemptions for *domestic* infant industries or small entrepreneurs.

While arbitrary discrimination against foreign investors should be disavowed, treaty signatories may have legitimate policy reasons for wishing to favor domestic business interests in certain tax situations. In such circumstances, it will be imperative to draft the treaty accordingly, so as to safeguard this prerogative. For example, many UK BITs will stipulate that the grant of national treatment does not extend to "domestic legislation relating wholly or mainly to taxation."[45]

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42 Belgo-Luxembourg Economic Union and Bangladesh Agreement for the Promotion and Protection of Investments (with exchange of letters), May 22, 1981, available on-line at: http://www.unctad.org/sections/dite/iia/docs/bits/belgo_lux_bangladesh.pdf.

43 John Boscariol, "Trade agreements limit governments power to tax," The Lawyers Weekly, Buttersworth Canada Ltd., Dec.12, 2003.

44 Japan-Vietnam Agreement available at: http://www.fco.gov.uk/servlet/Front?pagename=OpenMarket/Xcelerate/ShowPage&c=Page&cid=1045739996216.

45 See for example, Article 7 of UK IPPAs with Argentina, Nigeria, Guyana and Burundi, texts available on-line at: http://www.fco.gov.uk/servlet/Front?pagename=OpenMarket/Xcelerate/ShowPage&c=Page&cid=10457 39996216.

At the same time, governments should give thought to the process by which tax-related disputes will be resolved. If matters are left to the standard investor-state arbitration process, such review might occur out of public view and arbitral decisions may not be reviewable in domestic courts.[46] Governments might consider reform of the standard arbitration model so as to require disputes to be resolved in public. Similarly, they might require tribunals to have sufficient expertise and credibility to resolve taxation disputes.

Furthermore, some investment treaties set forth additional safeguards for cases involving tax matters – requiring claims to be scrutinized first by the relevant tax authorities of the two treaty parties – before they might be subjected to arbitration.[47] If both parties concur that the measure is not an expropriation, then the matter will not be referred to a tribunal for further adjudication. Another approach would be to require that claims are submitted to domestic courts before being subject to international arbitration. This approach – perhaps in combination with more careful consideration of which treaty rights should apply to tax measures – might serve to limit the instances where foreign investors can go straight to ad hoc international arbitration when they object to a tax measure in a host state.

6.4 Public Interest Regulation as a Form of Expropriation

Just as the protections contained in standard investment treaties may apply to taxation measures, they may apply to a host of other sensitive government measures such as health, safety or environmental regulation.

Various different treaty obligations may impact upon the regulatory powers of national and sub-national governments. For example, there is a concern that treaty obligations to provide compensation for "indirect" forms of expropriation might entrap certain legitimate public interest regulations which happen to infringe upon the profitability of a foreign investment, even as they further important policy goals such as health or environmental protection.[48] Respected investment arbitration experts have warned of the potential for "policy chill, leaving governments reluctant to legislate around public services for fear of lawsuits from disgruntled foreign investors."[49]

There is a real concern that treaty obligations to provide compensation for 'indirect' forms of expropriation might entrap certain legitimate public interest regulations which happen to infringe upon the profitability of a foreign investment.

At this early juncture, tribunals have yet to delineate a clear line between those types of measures which fall within a government's legitimate regulatory purview, and those which cross over into the realm of an "indirect" expropriation and trigger the treaty's stricture against expropriation without compensation.[50] Over time, tribunals may help to clarify the dividing line; however, leaving the matter up to "judicial" determination is problematic in that the line might be drawn at an inappropriate place.

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46 The extent to which domestic courts may review arbitration awards will depend upon the arbitration rules used, and the court system where the arbitration was legally sited. For more information see: Peterson, "All Roads Lead Out of Rome," in Zarsky, op.cit.
47 See for example, Article 2103 of the North American Free Trade Agreement.
48 Aaron Cosbey, Howard Mann, Luke Eric Peterson, Konrad Von Moltke, Investment and Sustainable Development: A guide to the Use and Potential of International Investment Agreements, IISD, 2004, pp. 12-15
49 Marc Lalonde, opinion article, The Toronto Star, May, 1, 2002; Mr. Lalonde is an arbitrator in several investment treaty disputes, as well as a former Cabinet Minister in Canada's federal government.
50 Cosbey, et. al., op. cit.

Some governments, like the United States, are refusing to leave matters wholly to tribunals. In recent US agreements, more careful treaty drafting has been introduced in an effort to clarify that "except in rare circumstances, nondiscriminatory regulatory actions by a Party that are designed and applied to protect legitimate public welfare objectives, such as public health, safety, and the environment, do not constitute indirect expropriations."[51] While this language has been criticized by some labour and environmental groups for not providing *sufficient* protection for legitimate regulatory measures, it does represent an undoubted improvement over most existing investment treaties which give no guidance to tribunals as to how to determine which types of regulations or what level of interference will constitute an "indirect" expropriation.[52]

The failure of many governments to include such clarifying language in their treaties could present a greater risk that legitimate regulatory measures will be chilled – or if imposed, found to run afoul of treaty provisions on expropriation, thereby triggering the award of compensation to affected foreign investors.

6.5 Positive Discrimination to Remedy Past Injustices

The failure of many governments to include such clarifying language in their treaties could present a greater risk that legitimate regulatory measures will be chilled.

Governments may wish to retain the policy flexibility to introduce preferential schemes designed to promote the socio-economic prospects of disadvantaged indigenous or minority groups. In order to shelter such policies from challenge by foreign investors (who may find themselves at a perceived disadvantage) it will be important for governments to enter detailed exceptions to treaty provisions so as to safeguard their ability to use such preferential policy measures. Otherwise, governments might face claims from foreign investors which lay claim to equivalent treatment (invoking the National Treatment obligation), or alleging that a given policy violates the investor's right to be free of certain duties or obligations (such as the imposition of performance requirements).

This has become a live issue in the context of South Africa's Black Economic Empowerment (BEE) Programme, where the government is promoting the greater integration of Black and historically disadvantaged minorities into the domestic economy through such measures as race-based affirmative action; requirements for firms to divest minority shareholdings to persons from designated indigenous or ethnic groups; and the introduction of "new-order" mining rights and licenses which replace outright private ownership of mineral resources in South Africa.[53] Foreign investor objections to certain of these BEE policies have contributed to a stalemate in treaty discussions between the US and the Southern African Customs Union, as South Africa has come to recognize the importance of sheltering sensitive policies like the BEE programme from future treaties.[54] In some of South Africa's recent investment treaties, including one with Mauritius, the government has made sure to expressly dictate that the national treatment and MFN provisions will not entitle foreign investors to privileges or preferences resulting from "any law or

51 See for example, Annex 10-D, US-Chile Free Trade Agreement.
52 Letter of January 16, 2004 to Wesley Scholz, US Department of State and James Mendenhall, Office of the US Trade Representative, from AFL-CIO, Center for International Environmental Law, Earthjustice, Friends of the Earth – US, National Wildlife Federation, Oxfam America, Sierra Club.
53 For information about the BEE programme see the website of the South African Department of Trade and Industry: http://www.dti.gov.za/bee/bee.htm (last viewed on March 18, 2005).
54 Luke Eric Peterson, "US-Southern Africa Negotiations Stall; Race-based Affirmative Action an Obstacle?" INVEST-SD News Bulletin, July 22, 2004, available on-line at: http://www.iisd.org/pdf/2004/investment_investsd_july22_2004.pdf.

measure in pursuance of any law, the purpose of which is to promote the achievement of equality in its territory, or designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination in its territory."[55]

However, not all of South Africa's earlier-negotiated treaties shelter such policies from the coverage of the investment treaty. A number of earlier treaties concluded with European governments during the 1990s – including treaties with Sweden, the United Kingdom, the Netherlands and Switzerland – omit this important exception. This omission could expose BEE policies to legal challenge by foreign investors.

Other governments wishing to reserve their own ability to develop special programmes or privileges for disadvantaged citizens or groups, could find themselves in the same situation as South Africa. In the case of the UK's treaty programme with dozens of developing countries, it is clear that many developing country parties have failed to include this type of exception in their treaties.[56] It is difficult to surmise whether this reflects the considered view of the treaty parties, or whether the need to include such exceptions and safeguards simply failed to cross the minds of treaty negotiators – many of whom may have been negotiating at a time when the wide regulatory implications of investment treaties were not readily apparent.

Other governments could find that their policy latitude has been limited by their failure to incorporate appropriate safeguards and limitations into their own investment treaties.

One thing is clear: some treaties will safeguard the capacity of governments to use such measures without fear of violating their investment treaty commitments; however, other governments could find that their policy latitude has been limited by their failure (or the failure of a predecessor government) to incorporate appropriate safeguards and limitations into their own investment treaties.[57]

6.6 Summary of Policy Implications

The foregoing discussion has highlighted a few of the emerging policy implications which have come to notice as bilateral investment treaties are beginning to be invoked by foreign investors, and interpreted by dispute settlement tribunals. There are various other emerging policy implications which should warrant much more detailed scrutiny.[58] At a minimum, there is clearly a need for greater transparency of investment treaty dispute settlement, so as to permit close monitoring and analysis of treaty use and interpretation. Without such transparency, governments are unlikely to grasp the full import of their international obligations under the current international investment protection regime. At the same time, even with *incomplete* information on the present state of affairs, there are broader policy questions which can be asked about the political priorities which have driven the construction of this regime to its present state.

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55 Article 3(4), Agreement Between the Government of the Republic of Mauritius and the Government of the Republic of South Africa for the Promotion and Reciprocal Protection of Investments.

56 UK treaty texts can be viewed at: http://www.fco.gov.uk/servlet/Front?pagename=OpenMarket/Xcelerate/ShowPage&c=Page&cid=1045739996216.

57 For examples where governments have had the foresight to shelter such programmes, see Chile's Annex II exceptions to the US-Chile Free Trade Agreement at page 6, where Chile "reserves the right to adopt or maintain any measure according rights or preferences to socially or economically disadvantaged minorities."

58 See for example, Aaron Cosbey, Howard Mann, Luke Eric Peterson, Konrad Von Moltke, Investment and Sustainable Development: A guide to the Use and Potential of International Investment Agreements, IISD, 2004; Peter Muchlinski, "A Development Perspective on Bilateral Investment Treaties," Presentation to the Symposium on the Implications of a Possible US-Pakistan Bilateral Investment Treaty, Oct.12, 2004, available on-line at: http://www.uspakistanlaw.com/Peter%20T%20Muchlinski%20Paper.pdf (last checked on January 31, 2005); Luke Eric Peterson, "Bilateral Investment Treaties and Development Policy-Making," (IISD, 2004), available on-line at: http://www.iisd.org/publications/publication.asp?pno=658 (last visited on February 2, 2005).

7. Broader Considerations

A highly sophisticated international regime for the protection of foreign investment has emerged in the post-World War Two period. Yet, composed as it is of many bilateral and regional agreements, the regime provides a very ad hoc and incomplete coverage for foreign investment protection. Under the current fragmented arrangement, some foreign investors may enjoy high levels of investment protection thanks to the foresight of their governments in having concluded treaties with a particular host government. At the same time, many foreign investors may have minimal international recourse.[59]

The situation in Zimbabwe provides some insight into the inadequacies of the current investment protection regime.

The situation in Zimbabwe provides some insight into the inadequacies of the current investment protection regime. In recent years, the sub-Saharan African country has forged ahead with a controversial land reform programme, that has seen widespread property invasions and seizures, particularly of large agricultural lands held by foreigners or foreign passport-holders.[60] It has been widely reported that a number of European governments have made vigorous diplomatic representations to Zimbabwe on behalf of their citizens who have been affected by land seizures, invasions or other abuse.[61] Often, these governments have invoked the provisions of investment protection treaties in defence of their citizens' interests.[62]

For a period of time, it appeared that these diplomatic entreaties enjoyed some success in persuading the Zimbabwean government to limit interference with certain investors. More recently, however, the government appears to have forged ahead with compulsory acquisition, irrespective of whether a given property is protected under an international agreement.[63] Thus, some individual investors are now turning to international litigation under investment treaties in an effort to seek recompense for losses.[64] Yet, because only a few of Zimbabwe's international investment treaties have been ratified, only selected nationalities enjoy international protection. Whereas a group of Dutch nationals have sought to bring a claim to the ICSID facility in Washington, other affected nationals, such as those of the United Kingdom are without recourse.[65] International protection against egregious seizures and destruction of property are thus enjoyed only by a small coterie of foreign nationals. Arguably, a multilateral regime of some sort would be fairer insofar as it could guarantee a minimal standard of protection to all foreigners affected by such incursions.

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59 Apart from the skeletal obligations under customary international law, which would require that the investor's home state would need to assert those minimal protections on behalf of an investor.
60 For background see: http://news.bbc.co.uk/1/hi/in_depth/africa/2000/zimbabwe/default.stm (last visited on January 31, 2005).
61 Luke Eric Peterson, "Zimbabwe facing treaty claims arising out of land reform programme," INVEST-SD News Bulletin, Jan.21, 2005, available on-line at: http://www.iisd.org/pdf/2005/investment_investsd_jan21_2005.pdf.
62 Ibid.
63 Ibid.
64 Ibid.
65 As of January 1, 2003, UNCTAD reported that Zimbabwe had ratified BITs with only 4 countries: China, Denmark, the Netherlands, and Serbia & Montenegro (see: Country list of BITs available on-line at: http://www.unctad.org/Templates/Page.asp?intItemID=2344&lang=1). The UK has concluded a BIT with Zimbabwe, but despite having been signed, the agreement was never ratified.

Not only does the present regime short-change many foreign investors, it also provides little protection for the activities of foreign non-governmental organizations (NGOs) which may be subjected to abuse and property loss while operating abroad, during the course of their ministering to the sick, building and operating schools, or delivering food aid and clean water.[66] Questions should arise as to this lacuna in coverage.

The present regime also provides little protection for the activities of foreign NGOs.

It is indisputable that NGOs and not-for-profit organizations are often subjected to interference, harassment or seizure of property and assets. Recently, the Soros-Kazakhstan Fund has alleged that the Kazakh tax authorities are pursuing a politically motivated claim in an effort to drive the charity out of Kazakhstan.[67] Meanwhile in nearby Afghanistan, hundreds of NGOs and charities are facing political harassment and threats to have their organizations dissolved.[68] And in Zimbabwe, NGOs have been subjected to the same patterns of abuse, violence and property seizures inflicted upon property rights holders, and a new Non Governmental Organisations Act reportedly bans foreign human rights groups from operating altogether.[69]

Oddly, NGOs and charities enjoy few of the extensive protections and procedural rights – including access to a special process of binding international arbitration – which are enjoyed by many foreign investors. This omission seems unusual given that a common rationale for investment protection treaties has been the supposed link between foreign direct investment and the host state's well-being – that is to say, investment is accorded international protection not on a human-rights-based view that property warrants *intrinsic* protection, but rather on the presumption that foreign capital is *instrumental* to other policy ends, including economic growth and economic development.

Investment is accorded international protection not on a human-rights-based view that property warrants *intrinsic* protection, but rather on the presumption that foreign capital is *instrumental* to other policy ends.

While a persuasive argument can be made that some forms of foreign direct investment will further the development ends of particular societies – and warrant international protection on those grounds – it would seem at least as plausible to suggest that charitable not-for-profit projects can also contribute to a state's development, and thus warrant similar protection on the same rationale which is used to justify investor protection. For example, the work of Jeffrey Sachs and the UN Millennium Development Goals Project has highlighted the fact that some "non-viable" developing economies may require vast amounts of basic development assistance – treating diseases, building schools, roads and other infrastructure – before they may be in a position to play host to – and reap benefits from – private foreign direct investment. Yet, despite this, governments have exerted tremendous energy in erecting broad international protections for foreign investors, while little has been done to enshrine protective frameworks for "Good Samaritans."

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66 While some investment treaties might be drafted so broadly as to cover for-profit and not-for-profit investors, these treaties are still geared to protect investments, not the charitable or development activities of not-for-profit groups.

67 "Soros Fund Says Kazakh Tax Charges Aim to Halt Operations," BBC Monitoring International Reports (available thru Lexis-Nexis), Dec.29, 2004.

68 Carlotta Gall and Amy Waldman, "Under Siege in Afghanistan, Aid Groups Say their Effort is Being Criticized Unfairly," the New York Times, Dec.19, 2004.

69 "Gloomy Zim Election Countdown Begins," Wilson Johwa, Mail & Guardian Online (South Africa) Jan.14, 2005, available on-line at: http://www.mg.co.za/articlepage.aspx?area=/breaking_news/breaking_news__africa&articleid=194539.

Quite simply, if international investment protection is undertaken on a rationale which views the economic development of host states as a priority – and which agrees to protect foreign direct investment to that end – then other non-commercial actors who contribute to the development of a host state would also seem to warrant some international protection.

Questions arise as to the equity of a system which places all of its emphasis upon the protection of foreign individuals.

At the same time, questions would arise as to the equity of a system which places all of its emphasis upon the protection of foreign individuals. Local citizens affected by violence and property seizure would enjoy no such international recourse, unless they could invoke the provisions of international human rights treaties which might be available to them (a prospect largely unavailable for Zimbabweans). While an increasingly sophisticated regime for the protection of foreign investment has been elaborated, basic international human rights treaties have gone unratified or are lacking in obvious enforcement capacities. Even where highly-evolved human rights institutions exist, as is the case for Western and Eastern Europe, Russia, and the Americas, these institutions may impose onerous obligations upon claimants, such as a requirement to exhaust domestic legal remedies before individuals may bring claims before international courts of tribunals.

Thus, the international community has set up a fast-track regime for the protection of foreign investment – permitting investors to leap to international arbitration – while individual victims of abuse, be it from loss of property, liberty or even life, queue up on the slow-track to justice. Where a lost dollar is deemed a matter more pressing than a lost life, and a breach of contract is a higher priority than a breach of an individual's right to be free of torture, there would seem to be a fundamental misordering of priorities on the part of those many governments which have exhausted their energies in erecting the present regime protecting foreign investment.

8. Conclusion

While proposed agreements such as the OECD Multilateral Agreement on Investment were subjected to rigorous public scrutiny, many hundreds of bilateral agreements have entered into force without public notice or scrutiny.

Many of the existing investment treaties were concluded at a time when such agreements had yet to be invoked and interpreted. This may help to explain why so many treaties have been drafted in vague, open-ended terms, with a striking absence of safeguards and exceptions. Parliamentary hearings such as those seen in Canada and the UK in response to the proposed Multilateral Agreement on Investment are virtually unheard of with respect to bilateral investment treaties. Indeed, it is unclear to what extent most governments have conducted even *inter-governmental* consultations when negotiating investment treaties, despite the potentially broad implications of the agreements for health, education, environment, culture and other areas of government oversight.

There is some irony here. While proposed agreements such as the OECD Multilateral Agreement on Investment (MAI) were subjected to rigorous public scrutiny, many hundreds of bilateral agreements have entered into force without public notice or scrutiny. This reality casts some doubt on the oft-repeated claim that the defeat of the MAI was somehow a “major victory” for critics of unfettered globalization.[70] For those who take the extreme view that investor protection is an illegitimate international goal, the sober reality is that there have been rather more ‘losses’ than ‘victories’ of late, as bilateral treaties have proliferated with surprisingly little public notice.

For those who take a different view, as this author does, that investor protection is a legitimate goal – but one which needs to be balanced against other compelling public interests – the recent surge in litigation under these bilateral investment treaties should point to an acute need for greater transparency and additional reform of dispute settlement processes, so that governments and other stakeholders can readily ascertain the emerging policy implications of these long-ignored treaties.

In the North American context, increased awareness of the potential implications of investor-state disputes has served to influence the parties to the NAFTA to review their respective negotiating templates. NAFTA governments have made revisions to the NAFTA, and have recognized the need for more carefully calibrated exceptions and exclusions to be included in future agreements.[71] Outside of this North American context, however, many governments have been much slower to recognize problems like the ones identified in this paper. As investor use of these treaties is likely to grow, governments may discover that their investment treaties may tie their hands – perhaps unwittingly – in significant ways. On the brighter side, investment agreements typically have finite life-spans – for 10 or 15 years oftentimes – and can be phased out, amended or even supplanted by a single multilateral agreement, given sufficient political will.

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70 The quote is from Naomi Klein, No Logo, (Alfred A. Knopf, 1999), p. 443.
71 For a partial account of developments in Canada, see McIlroy, op.cit.

Assuming that greater transparency can be brought to bear upon investment treaty dispute settlement, an informed (and ever-more-detailed) debate can be expected to take place with respect to the merits and shortcomings of investment treaties, and how they may be improved. Investor protection may be a laudable global policy priority, but there is considerable scope for correcting the imbalance of current agreements, in order to ensure that they do not undermine legitimate policy measures of government.

At the same time, even more fundamental questions deserve to be asked about the policy priorities which have undergirded the rush to conclude narrowly-conceived investment protection treaties, at the same time that the interests of local property-holders and the basic human rights of ordinary citizens have been accorded scant attention and energy. To maintain the tenuous conceit that investment protection treaties reinforce foreign direct investment, and thus benefit local communities, may require that the proponents of such agreements also demonstrate greater solicitude for the broader interests of those communities. Such concern might manifest itself in greater efforts to champion not only the rights of foreign businesses, but also of the foreign not-for-profit organizations, local businesses and local citizens who may suffer themselves from arbitrary or egregious abuse at the hands of the state.

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