

Bilateral Investment Treaties and Development Policy-Making



Luke Eric Peterson
International Institute for Sustainable Development
November 2004

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Luke Eric Peterson, Associate, International Institute for Sustainable Development

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International Institute for Sustainable Development

161 Portage Avenue East, 6th Floor

Winnipeg, Manitoba

Canada R3B 0Y4

Tel: +1 (204) 958-7700

Fax: +1 (204) 958-7710

E-mail: info@iisd.ca

Web site: <http://www.iisd.org/>

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1. Introduction

As flows of foreign aid to the developing world have stagnated in recent years, many governments have looked to foreign direct investment (FDI) to make up the shortfall. According to the United Nations Conference on Trade and Development (UNCTAD), the overwhelming proportion of recent changes to domestic laws affecting foreign investment have been designed to promote greater openness to FDI.¹

At the same time, governments have embarked upon an ambitious effort to conclude international treaties which purport to protect, promote and, in some instances, remove barriers to foreign investment flows. The international rules governing FDI first came to broad public notice in the mid-1990s during the OECD's ultimately unsuccessful efforts to negotiate a Multilateral Agreement on Investment (MAI).

Although the failed MAI generated considerable scrutiny, less attention has been paid to the broader universe of Bilateral Investment Treaties (BITs) which have been negotiated worldwide for several decades. The number of BITs exploded during the 1990s and into the new century. There are now about 2,265 such treaties in existence.² Most of these agreements have been concluded between a developed and a developing country, owing to their origins as instruments governing investment into the developing world. An increasingly sizable number, however, are concluded between two developing countries, and even between least developed countries (LDCs).

This paper examines these treaties and their impact upon development policy-making, with somewhat closer focus on the treaty practice of Switzerland and the United Kingdom.³ Development policy-making here refers to those

1 UNCTAD, *World Investment Report 2003*, United Nations, Geneva and New York, pp. 20–21.

2 UNCTAD, “Number of Bilateral Investment Treaties Quintupled During the 1990s,” Media Release TAD/INF/2877, available at: <http://r0.unctad.org/en/press/pr2877en.pdf>; UNCTAD, *World Investment Report 2003*, p. 21. UNCTAD, *World Investment Report 2004: The Shift Towards Services*, 2004.

3 For a survey of the UK bilateral investment treaty programme see Luke Eric Peterson, *UK Bilateral Investment Treaty Programme and Sustainable Development*, Royal Institute for

policies that a host government holds to be essential to promoting the basic needs of its citizens (including in relation to access to water and sanitation; eradication of hunger and extreme poverty; disease eradication; access to health care; provision of basic education; environmental protection; and health and safety).⁴ The paper begins with an examination of *what investment treaties say*—their substantive and procedural provisions—and then offers an analysis of *what the treaties do*—what concrete implications the treaties may have for developing countries.

For the sake of argument, this paper assumes that FDI can be a positive force in the domestic economies and development planning of developing countries. This avoids the considerable debate in the literature on the effectiveness of FDI as an engine for promoting economic development. Yet, even where FDI is presumed to play a positive role, emerging research questions the effectiveness of bilateral investment treaties as instruments for stimulating such FDI flows. At the same time, some substantive investment treaty provisions have been seen to have unanticipated, and potentially worrying, legal and policy implications for host states. Most investment treaties offer an innovative dispute settlement mechanism that permits foreign investors to mount international arbitrations against host states in cases where the investor alleges that the treaty's provisions have been violated. As will be seen, the number of treaty-based arbitrations has risen sharply in recent years. While this process is bedeviled by a lack of clarity and consistency, it can be seen that the treaties will harbour important consequences for developing countries. This paper identifies a number of key, emerging development linkages.

International Affairs Sustainable Development Programme Briefing Paper No.10 February 2004, available at: <http://www.riia.org/pdf/research/sdp/BinvestFeb04.pdf>

- 4 Although development is a term susceptible to many definition and interpretations, there has been considerable international consensus surrounding the eight so-called UN Millennium Development Goals, which are set out at <http://www.developmentgoals.org>

2. Bilateral Investment Treaties: What the Treaties Say

2.1 Typical contents

Bilateral Investment Treaties have been negotiated since the late 1950s. While sweeping characterizations would belie the diversity of these treaties, a number of general features have emerged. The typical modern BIT will include provisions designed to offer certain absolute standards of treatment (for example “fair and equitable treatment”); relative standards of treatment (National treatment or Most-Favoured Nation); protections against expropriation or nationalization; and recourse to dispute-settlement (state-to-state and investor-to-state). Many BITs also include provisions allowing for transfer of monies and for some protection from war and civil disturbance.⁵ A small number of BITs also contain provisions on the movement of key employees, and prohibiting certain forms of performance requirements.⁶ Generally, treaty provisions will only apply to investments once they have been established in the host state. However, some treaties—particularly those championed by the U.S., Canada and Japan—may extend protections to the pre-establishment phase, i.e., prior to the establishment of the investment in the host state’s territory.⁷ In terms of the sectors of the economy that are covered by the substantive disciplines, it is common for treaties to cover all sectors, with the exception of those which are expressly carved-out of the treaty, or exempted from the reach of certain of its provisions.

2.2 Provisions on development

International investment treaties are sometimes said to have set out development as a central objective. This is a view which had been espoused by

5 UNCTAD, *Bilateral Investment Treaties in the Mid-1990s*, (United Nations, New York and Geneva 1998) pp. 73-80.

6 UNCTAD, *BITs in the Mid-1990s*, pp. 81-3; Provisions covering performance requirements are found in some U.S., Canadian and Japanese treaties.

7 UNCTAD, *Admission and Establishment*, 1999, pp. 26-8; This issue is discussed more fully in the section on development linkages.

governments at the WTO's Working Group on Trade and Investment, and is attributed, in turn, to UNCTAD's work in this area.⁸ Certainly, any expression of the development intentions of the parties entering into such a treaty would be relevant for purposes of guiding the legal interpretation of the treaty. However, examples of treaties which set out development as an objective tend to come from exceptional bilateral treaties and, more often, from a handful of regional or multilateral agreements, such as the WTO's General Agreement on Trade in Services (GATS) or the Lomé Convention, rather than the overwhelming number of bilateral investment treaties.

Because treaty practice differs from country to country—and even within countries over time—generalizations must be made cautiously. However, the author's experience of examining more than 150 treaties—including a majority of those concluded by Switzerland, the United States, Canada and the United Kingdom, and a smattering of other treaties—suggests that references to development are exceedingly rare in treaties pushed by a number of Western governments with developing countries. For example, investment treaties signed by the U.K., Canada and Switzerland typically do not refer to development in any context—either in the preamble to the treaty or in the treaty's substantive provisions.

U.S. BITs do make some references to economic development: “Recognizing that agreement upon the treatment to be accorded such investment will stimulate the flow of private capital and the economic development of the parties,” and “agreeing that a stable framework for investment will maximize effective utilization of economic resources and improve living standards.”⁹ But even these references are clearly geared to the interests of the foreign investor—citing the desirability of enhanced flows and stability—without recognizing the need for government-intervention or appropriate-regulation as part of a successful development policy.

Just as investment treaties seem to have little to say about development—apart from a generalized faith that the treaties will yield investment, which will, in turn, lead inexorably to development—references to an actual *right* to development (which some commentators deem to be part of customary international law); international development law; or a right to regulate for development are

8 See for e.g., “Investment Rules For Developing Policies,” Communication from Japan, June 12, 2001, WT/WGTI/W/104, at para 13 and “Multilateral Framework for Investment; an Approach to Development Provisions,” Communication from Switzerland, May 16, 2002, WT/WGTI/W, at paras 19–20.

9 See for example the U.S. BITs with Azerbaijan, Bahrain, Uzbekistan, Croatia, El Salvador, Georgia, Honduras, Jordan and Albania archived at www.state.gov/www/issues/economic/bit_treaty.html

even less common.¹⁰ This widespread failure to identify development as an important objective of investment treaties will have important policy repercussions, as will be seen in the discussion of treaty object and purpose in section 5.2 below.

2.3 Special and differential treatment

Of course, simply because development is not *explicitly* articulated as an objective of an investment treaty does not mean that development considerations might not have guided the drafting of a treaty. So-called special and differential treatment might manifest itself in a treaty through differentiated obligations, phased-in commitments, or specially-tailored undertakings for the lesser-developed of the two parties to a treaty. While the occasional multilateral or regional agreement may have been inspired by a desire to enshrine special and differential treatment, such features appear rare in the general run of bilateral investment treaties.¹¹ In the author's experience, BITs tend to be highly reciprocal in their commitments—that is, standard treaty provisions will apply to home and host countries alike.¹² In theory, there are *potential* avenues for some differentiation of the obligations of developed and developing countries—even if their use in practice may be highly circumscribed by the more powerful country's interest in keeping differentiated commitments to a minimum.

Several examples where differentiation might occur, include:

- a. Developed nations can show sensitivity to treaty-partners at vastly different stages of development by absolving them from certain treaty obligations. For example, some early BITs did not impose obligations with respect to national treatment. However, such a rare concession may owe more to the negotiating leverage of a given developing country signatory, than to any broader development sensitivity on the part of the developed country partner. Thus, for example, China in its negotiations with the U.K. in the mid-1980s agreed only to provide national treatment “to the extent possible.” But, at the same time, numerous LDCs continued to be signed up to full and binding national treatment commitments in investment treaties with the U.K.¹³

10 UNCTAD's survey of a broader range of BITs yields no examples which reference the right to development, which many commentators hold to be a tenet of customary international law. See UNCTAD, *International Investment Agreements: Flexibility for Development*, UNCTAD Series on Issues in International Investment Agreements, (Geneva and New York 2000), p. 25.

11 UNCTAD, *Flexibility for Development*, p. 36.

12 This point was underscored in a submission by UNCTAD to the WTO's Working Group on Trade and Investment, WGTI/77 at para 45.

13 See e.g., U.K. investment treaties from the 1980s to the present day with countries such as Benin, Burundi, Angola, The Gambia, Laos, Lesotho, Sierra Leone and Uganda.

- b. Occasionally, international investment agreements (IIAs)¹⁴ will allow parties to shelter existing (or future) measures related to *selected industries or sectors* from the reach of particular treaty commitments. Such exceptions might be entered in the treaty text, or in a separate protocol. For example, Canadian BITs commonly include an annex where the parties may exclude existing and/or future measures in designated sectors (e.g., “social services”) from the reach of the national treatment obligation.¹⁵ Such exceptions are not common to all investment treaties. For example, none of the Swiss or U.K. treaties examined by the author exempt social services (such as health or education) from investment treaties. Indeed, sectoral exceptions of any kind are quite rare in the treaty practice of the U.K. and Switzerland. However, the 2002 BIT between the U.K. and Vietnam does contain an annex that enumerates a series of sectors where *existing* Vietnamese measures will be exempted from the national treatment duty to U.K. investors. These include: broadcasting; television; press; cinematic products; telecommunications services; tourism services; banking services; insurance services; exploitation of gas and oil; and fisheries. The U.K.-Panama BIT goes a step further in an annex which sets out a number of “economic sectors and activities which are constitutional and legal exceptions to be excluded from the effect of *this Agreement*.” (emphasis added).¹⁶ Second, even where exceptions are permitted, this presupposes a level of analysis and forethought which some of the least developed countries may not have, given their resource constraints and their limited experience with these types of investment rules.¹⁷

14 The term IIA is broader than BIT, and encompasses a number of regional or multilateral instruments on investment in addition to standard bilateral treaties. Although more than 98 per cent of known IIAs will be BITs, (thereby explaining this paper’s focus upon BITs) the term IIA is used in these sections because it is typically the small number of regional or multilateral instruments which contain language on development or offer special and differentiated treatment.

15 Agreement Between the Government of Canada and the Government of Barbados for the Reciprocal Promotion and Protection of Investment; Agreement Between the Government of Canada and the Government of the Republic of Trinidad and Tobago for the Reciprocal Promotion and Protection of Investments; Agreement Between the Government of Canada and the Government of the Republic of Ecuador for the Promotion and Reciprocal Protection of Investment, all available at: http://www.dfait-maeci.gc.ca/tna-nac/fipa_list-en.asp

16 These include: communications; banking; insurance; private-owned public utility companies; energy production; and the right to exploit natural resources, including fishing.

17 UNCTAD, *BITs in the Mid-1990s*, p. 24.

Such examples are remarkable, of course, because they are so unusual. Typically, the ability to write such exceptions into a treaty will be circumscribed by the asymmetry of negotiating power between the developed and developing nation; developed countries typically exert strong leverage in discussions. The usual practice is for the Western nation to table a negotiating template which hews closely to its established treaty practice with other nations. Exceptions, where permitted, tend to be few and grudging.¹⁸

- c. On occasion, treaty exceptions have been designed so as to reserve the right of one or both parties to accord special incentives or government aids to stimulate the creation of local industries. A small number of U.K. agreements, and an even smaller proportion of Swiss BITs reviewed by the author, will permit special treatment for small-scale industries—by derogating from the national treatment obligation—provided that such treatment does not “substantially impair” or “significantly affect” the investments of foreigners.¹⁹ More often, the treaties will require that host states treat foreign investors on par with their own nationals and/or investors of the most-favoured third nation—with no special exceptions for subsidies to local industries or other forms of exceptions for development purposes.²⁰
- d. Another means by which investment treaties might ensure that FDI in the host state will contribute to domestic development, is to impose certain responsibilities on investors or the investor’s home country. Such measures are exceedingly rare; an UNCTAD research paper on investment agreements and social responsibility prefaced its discussion of the “development obligations” of investors and home states, with an acknowledgement that “the subject matter of this paper is conspicuous by its relative absence from IIAs.”²¹ Indeed, what might be termed investor responsibilities by some, might be characterized as (ill-advised) performance requirements by others—and might be prohibited under some treaty models (performance requirements are discussed in section 5.8).

18 UNCTAD, *World Investment Report 2004*, p. 229.

19 See for example Art.3(4) of the 1990 Switzerland-Jamaica treaty or Art 3(3) of the 1989 U.K.-Guyana treaty.

20 It is quite standard, however, for treaties to make exceptions to national treatment/most-favoured nation treatment with respect to broader free-trade areas, customs unions, or double-taxation treaties. In other words, an investment treaty between a country which is party to the World Trade Organization and a party which is a non-WTO member, would not entitle, by virtue of the MFN clause, the latter party to all rights which the former party is obliged under the WTO agreements to share with WTO members.

21 “Social Responsibility,” UNCTAD Series on Issues in International Investment Agreements, 2001, p. 17.

While BITs can, in theory, be written with an eye towards flexibility for development purposes, it appears uncommon for them to have been crafted in such a manner. Rather, BITs tend to be *highly* reciprocal, narrowly focused on investment protection (rather than development or other policy goals), and garnished with few exceptions. Although the treaties generally lack development provisions, it would be inaccurate to infer that these agreements will have little impact upon the efforts of developing countries to pursue domestic development goals. Instead, as will be seen in the subsequent analysis, the treaties may have positive benefits for foreign investors, but they could have negative implications for host governments, insofar as they may circumscribe the ability of governments to take policy measures designed to promote domestic development objectives.

3. What the Treaties Do

3.1 Investment treaties and the stimulation of new FDI flows

A long-standing rationale for the conclusion of investment treaties has been their purported usefulness in stimulating new investment flows between the signatory countries. In essence, there is a straightforward expectation that the treaties will encourage new investment, which will, in turn, contribute to the economic development of the host state. Assuming that FDI can contribute to economic development, it remains questionable whether BITs play a major role in stimulating those desired FDI flows.

Several former officials involved with U.S. BITs negotiation during the 1980s have conceded that the treaties were not intended to “catalyze” new flows, but rather to protect existing (and subsequent) investments.²² Kenneth Vandavelde suggests that capital-exporting states “may have given priority in BITs negotiations to states that already were hosts to large amounts of its investment, so that BITs may be caused by investment flows and not the other way around.”²³

Some investment lawyers have highlighted the lack of “tangible evidence ... to demonstrate investment flows and a link to investment treaties.”²⁴ Indeed, two self-described proponents of the investor protections contained in such agreements, concede that the agreements may be *negatively* correlated to investment flows: with countries like Brazil and Nigeria seeing large investment

22 K. Scott Dudgeon, “United States bilateral Investment Treaties: Comments on their Origin, Purposes and General Treatment Standards,” 86 *International Tax & Business Lawyer*, Vol. 4, p. 111; Kenneth Vandavelde, “Investment Liberalization and Economic Development: the Role of Bilateral Investment Treaties,” 36 *Columbia Journal of Transnational Law*, 1998, No. 3, pp. 524–25.

23 Vandavelde, “Investment Liberalization,” 524–25.

24 Thomas Walde, with Stephen Dow, “Treaties and Regulatory Risk in Infrastructure Investment: The Effectiveness of International Law Disciplines versus Sanctions by Global Markets in Reducing the Political and Regulatory Risk for Private Infrastructure Investment,” 34 *Journal of World Trade*, 2000, No. 2, p. 12.

flows despite shying away from such treaties, while many Central African or Central American nations have seen little investment despite having entered into rafts of BITs.²⁵ Similarly, countries such as China and Cuba have seen sizable flows of investment from countries with whom they have not concluded BITs.²⁶

Recently, the World Bank's 2003 Report on the Global Economic Prospects of the Developing Countries concluded that "Even the relatively strong protections in BITs do not seem to have increased flows of investment to signatory developing countries."²⁷ The Bank relies upon a 2002 study by Mary Hallward-Driemeier of 20 years of data, which indicates that "Countries that had concluded a BIT were no more likely to receive additional FDI than were countries without such a pact."²⁸

Notwithstanding these nagging doubts about the impact of investment treaties upon investment flows, western nations have continued to champion the agreements—more likely, due to the enthusiasm of domestic investors for their protection standards, than as a result of any real evidence to show their efficacy in increasing FDI flows to developing countries.²⁹ More puzzling, however, is the enthusiasm of many developing countries to continue to enter into these treaties with developed states—and increasingly with their counterparts in the developing world.

Even if investment treaties play a relatively marginal role in the stimulation of new investment, it needs to be asked to what extent the protective function of the treaties will impact upon the ability of governments to regulate investments in the public interest, including for the furtherance of development goals.

3.2 Application of BIT protections by investors

In discussions within the WTO's Working Group on Trade and Investment, opponents of a proposed multilateral agreement on investment often touted bilateral treaties as more "friendly" for developing countries. The government

25 Walde and Dow, p. 12, note 32.

26 The China-US relationship is the most notable; On Cuba see: "The Contribution of BITs to Cuba's Foreign Investment Program," Jorge F. Perez-Lopez and Matias F. Travieso-Diaz, 32 *Law and Policy in International Business*, 529.

27 "Global Economic Prospects and the Developing Countries 2003," World Bank, p. xvii.

28 *Ibid*, 129.

29 The International Chamber of Commerce and the Business Roundtable are two influential business groups which have recently hailed the high-level of protections afforded in these treaties. See Luke Eric Peterson, "Key Business Group Wary of WTO Investment Talks," *INVEST-SD Bulletin*, May 23, 2003, <http://www.iisd.org/investment/invest-sd/>

of India opined that “(bilateral investment treaties) have found favour with developing countries like India because they do not place any restrictions on host countries in following their own foreign direct investment policies in the light of each country’s unique needs and circumstances.”³⁰ However, Turkey, another participant in the WTO discussion, probably came closer to reality with this comment: “Concerning efficiency of protection standards brought by BITs, there is very little practical experience to make an evaluation of the use of BITs.”³¹

Indeed, lawyers long recognized that these treaties were crafted in vague, open-ended terms; in the words of one arbitration lawyer, they “are maddeningly imprecise as to the substantive legal standard to be applied by the tribunal.”³² Only through actual arbitration between investors and states will the meaning of standard treaty obligations—and their implications for developing countries—be elucidated.³³ And, to the extent that this experience can be surveyed, it tends to disabuse claims that such investment treaties place no restrictions upon government policy-making by the host state. As the following sections explain, the number of treaty-based arbitrations has grown significantly in recent years. So too has the variety of ways in which the treaties may narrow the policy space available to governments playing host to foreign investment. Before turning to this experience, however, the next section surveys the procedures for dispute settlement.

3.3 Dispute settlement procedures

An investor-state dispute settlement mechanism became a virtually standard treaty feature during the 1980s and 1990s, during the period when the overwhelming number of BITs were negotiated.³⁴ The investor and the host

30 “Stocktaking of India Bilateral Agreements for the Promotion and Protection of Investments,” Communication from India to the Working Group on Trade and Investment, April 13, 1999, WT/WGTI/W/71.

31 “Turkey’s Experience with Bilateral Investment Treaties,” Communication from Turkey to the Working Group on Trade and Investment,” WT/WGTI/W/51.

32 William D. Rogers, “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, 2000.

33 Ibrahim Shihata and Antonio Parra, “The Experience of ICSID,” *ICSID Review*, Vol. 14, No. 2, Fall 1999, pp. 319, 336.

34 UNCTAD, *BITs in the Mid-1990s*, p. 94; Antonio Parra, “ICSID and Bilateral Investment Treaties,” *ICSID News*, Spring 2000, Vol. 17, No. 1; It must be noted that individual country practices, and even individual treaties, will differ as to the exact nature and scope of the investor-state dispute settlement mechanism.

government typically select one arbitrator each, with the chair of the three-member tribunal chosen by agreement of the two parties. Arbitrators serve only for a particular case, and can be drawn from the ranks of practicing investment lawyers. This peculiar system has drawn some criticism for its failure to employ “judges” who are permanently selected and entirely independent—in the sense that their other (including future) clients would have no stake in the treaty interpretations rendered in an arbitrator’s “quasi-judicial” capacity.³⁵

The arbitration rules of the Washington-based International Center for the Settlement of Investment Disputes (ICSID) are most commonly referenced in BITs.³⁶ Often, treaties will offer additional recourse to other sets of rules, including those of the International Chamber of Commerce (ICC), the Stockholm Chamber of Commerce (SCC) and, most often, the United Nations Commission for International Trade Law (UNCITRAL).³⁷ In instances where more than one set of arbitration rules are available in a treaty, investors typically enjoy the ability to choose which to use. As a consequence, this opens the door to so-called rules-shopping—as different arbitration rules may provide for differing levels of transparency, different applicable law, and varying levels of post-arbitration judicial review.³⁸

Transparency bedevils the arbitration process—with only the ICSID rules providing for public disclosure of disputes proceeding under their auspices. Investors can, and do, bring suit under treaties without needing to publicly disclose their claim against the host government. This lack of public disclosure raises concerns in an era when investment treaty arbitrations are often seen to harbour clear and wide-reaching political, social and financial consequences (see subsequent sections).

35 International Institute for Sustainable Development and Royal Institute for International Affairs, “Investment, Doha and the WTO,” Report of September 2003, pp. 9–11, available at: <http://www.riia.org/pdf/research/sdp/Investment%202.pdf>

36 These are the ICSID rules and the so-called ICSID Additional Facility rules. See Antonio Parra, “ICSID and Bilateral Investment Treaties,” *ICSID News*, Spring 2000, Volume 17, No. 1.

37 Antonio Parra, “Provisions on the Settlement of Investment Disputes in Modern Investment Laws, Bilateral Investment Treaties and Multilateral Instruments on Investment,” 12 *ICSID Review – Foreign Investment Law Journal*, 1997, p. 297.

38 Luke Eric Peterson, “All Roads Lead out of Rome: Divergent Pathes of Dispute Settlement in Bilateral Investment Treaties,” in L. Zarsky, ed., *International Investment for Sustainable Development: Balancing Rights and Rewards*, Earthscan, 2004.

In stark contrast to most domestic court processes, investment treaty arbitrations are not open to the public unless the parties desire otherwise.³⁹ Moreover, decisions and awards rendered by the Tribunal will not always be published—although an increasing number are released due to growing academic and public interest in this form of dispute settlement. Nevertheless, the author in his capacity as editor of a specialized news bulletin dedicated to treaty arbitration, is well aware that not all decisions circulate publicly—even if some circulate within the legal fraternity of investment counsel and arbitrators. These grave shortcomings in transparency necessarily preclude a full accounting and analysis of investment treaty arbitration, however the following section explores what is known about this phenomenon.

39 At the time of this writing, the ICSID Secretariat had issued a discussion paper which mooted changes to the arbitration rules in order to remove the “veto” of a single party over efforts to open up arbitral proceedings. See “Possible Improvements of the Framework for ICSID Arbitration” at <http://www.worldbank.org/icsid/improve-arb.htm>

4. Investor Usage of the Treaties

4.1 Data on investment treaty arbitrations

Because investment treaty arbitrations are resolved using a variety of different arbitral rules—not all of which provide for public disclosure of claims—there can be no accurate accounting of all such disputes.⁴⁰ Nevertheless, those investor-state arbitrations that have been brought to the Washington-based International Centre for Settlement of Investment Disputes are a matter of public record. And the vast majority of the 85 claims currently pending before ICSID (at the time of this writing) were brought pursuant to investment treaties.⁴¹ This reflects a trend whereby ICSID's caseload has shifted in recent years away from disputes brought pursuant to individual investment contracts between foreign investors and their host state, and more towards cases that invoke an international investment treaty.

In addition to these *known* ICSID arbitrations, there are an *unknown* number of claims occurring under other auspices, such as those of the Stockholm Chamber of Commerce Arbitration Institute or the UNCITRAL ad hoc rules of arbitration. There can be no comprehensive accounting of all such claims, even if anecdotal evidence—and ongoing investigations—uncover ever more such non-ICSID investment treaty arbitrations. That some portion of the arbitral iceberg remains hidden from view should be a matter of concern given that investment treaty disputes can have serious public policy implications. As will be seen in the following section, the sheer variety of disputes that are being presented to investment treaty tribunals is quite remarkable.

40 See Peterson, “All Roads Lead Out of Rome,” at note 38 above.

41 Figures are accurate as of November 19, 2004; See <http://www.worldbank.org/icsid/cases/pending.htm>

4.2 Issues emerging in arbitrations

While some of the earliest treaty claims arose out of clear-cut dispossessions or destructions of property,⁴² more recent investor claims pertain to a much broader range of alleged violations, including treatment at the hands of host state regulatory, administrative or tax authorities. Although investment treaty arbitration pre-dates the North American Free Trade Agreement, it does appear that investors drew inspiration from a series of quite high-profile investor suits mounted under the investment chapter of the NAFTA in the late 1990s. The government of Canada stoked fears when it chose to settle an early NAFTA claim brought by the U.S.-based Ethyl Corporation—offering millions of dollars in compensation, and reversing a regulatory decision—before an expropriation claim (which sought to challenge a trade ban on a controversial gasoline additive) could be legally resolved by the tribunal.⁴³ Subsequent rulings under the NAFTA and BITs have failed to resolve the uncertainty which has arisen with respect to the line between legitimate host government treatment of foreign investors and conduct which violates standard treaty provisions such as those on fair and equitable treatment, national treatment or expropriation. Encouraged by the legal uncertainty surrounding the substantive meaning of key treaty rules, foreign investors are turning to investment treaties with increasing frequency—and in an effort to challenge an expanding range of government interference.

A sizable number of cases now arise out of disputes involving the privatization of formerly public utilities—and may pass judgment on the legitimate scope of administrative or regulatory oversight—in sensitive areas such as electricity provision, waste management, and water and sanitation services. In at least nine documented instances, foreign investors which have been awarded concessions to provide water and sewage services in developing countries have run into conflict with regulatory authorities, and have had recourse to investment treaty arbitration in an effort to resolve their differences.⁴⁴ Notwithstanding

42 Asian Agricultural Products Limited v. Democratic Socialist Republic of Sri Lanka, Award and Dissenting Opinion of June 27, 1990, 6 *ICSID Rev.* —FILJ 526 (1991); and American Manufacturing and Trading Inc. v. Democratic Republic of Congo Award of February 21, 1997, 36 *ILM* 1534 (1997).

43 See discussion of this case in *Private Rights, Public Problems: A Guide to NAFTA's Controversial Chapter on Investor Rights*, IISD 2000, pp. 71–74.

44 *Compañía de Aguas del Aconquija S.A. and Vivendi Universal v. Argentine Republic* (ICSID Case No. ARB/97/13); *Aguas Provinciales de Santa Fe, S.A., Suez, Sociedad General de Aguas de Barcelona, S.A. and Interagua Servicios Integrales de Agua, S.A. v. Argentine Republic* (Case No. ARB/03/17); *Aguas Cordobesas, S.A., Suez, and Sociedad General de Aguas de Barcelona, S.A. v. Argentine Republic* (Case No. ARB/03/18);

the lack of transparency surrounding these cases, it is clear that some matters of public import are arising in the (closed-door) arbitrations. Materials related to one such case, *Compañía de Aguas del Aconquija S.A. and Vivendi Universal v. Argentine Republic*, suggest that the investor and the host state quarreled over such important matters as:

the method for measuring water consumption, the level of tariffs for customers, the timing and percentage of any increase in tariffs, the remedy for non-payment of tariffs, the right of (the investor) to pass-through to customers certain taxes and the quality of the water delivered.⁴⁵

A particularly notorious case has emerged in Bolivia, where a long-term water-supply contract between a consortium led by the U.S.-based Bechtel Corporation and Cochabamba, Bolivia's third largest city, yielded substantial hikes in local water rates—some bills doubled and amounted to a quarter of monthly incomes—and a legal expropriation by the firm of all public water supplies. The water project triggered widespread unrest, leading to serious violence and the eventual declaration of martial law. Company executives were warned by the authorities that their safety could not be guaranteed and they were forced to flee Cochabamba. Currently, the government and the consortium disagree as to whether *Aguas Del Tunari* abandoned its concession or was forced out. The matter is currently being resolved through investment treaty arbitration at ICSID—with the investor claiming that Bolivia's failure to protect its investment is in violation of the Netherlands-Bolivia BIT. Given that some of these water sector arbitrations arise out of disputes over water access, affordability and quality, it is conceivable that they could have implications for the obligations which host governments may have under international human rights law to promote a "right to water"—although it remains unclear whether host governments will choose to raise such rights with the tribunal, and what weight a tribunal would attach to them.⁴⁶

Aguas Argentinas, S.A., Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A. v. Argentine Republic (Case No. ARB/03/19), *Azurix Corp. v. Argentine Republic*, (Case No. ARB/03/30); *Azurix Corp. v. Argentine Republic* (ICSID Case No. ARB/01/12); *Aguas del Tunari S.A. v. Republic of Bolivia* (ICSID Case No. ARB/02/3); *Azurix Corp. v. Argentine Republic* (ICSID Case No. ARB/03/30); *SAUR International v. Argentine Republic* (ICSID Case No. ARB/04/4); *Anglian Water Group v. Argentine Republic*, UNCITRAL arbitration filed in 2003.

45 *Compania de Aguas Del Aconquija, S.A. & Compagnie General des Eaux v. Argentine Republic*, ICSID ARB/97/3, Final Award, at para 32.

46 For an in-depth discussion of such issues see Luke Eric Peterson, "International Human rights in Bilateral Investment Treaties and in Investment Treaty Arbitration," 2003, at <http://www.iisd.org/publications/publication.asp?pno=577>

The majority of known treaty-based water cases involve the Argentine Republic and are part of a wider category of disputes brought by foreign investors in relation to that country's financial crisis. In January of 2002, the Argentine government took a series of emergency measures, including elimination of parity between the U.S. dollar and the Argentine Peso, as well as the elimination of the pegging of tariffs in government contracts to inflation-adjusted U.S. dollars.⁴⁷ These measures have squeezed foreign investors who typically hold extensive U.S.-Dollar denominated debt, and have been forced to collect tariffs from customers in an increasingly devalued Argentine Peso.⁴⁸ As of this writing, most public utilities were still forbidden by the government from raising tariff rates—despite pressure having been placed upon the Government by the International Monetary Fund and the various investors. The government points to the internal social dislocation occasioned by the financial crisis—including dramatic increases in unemployment and a precipitous decline in the value of household savings (which were typically in Argentine Pesos)—as grounds for not raising tariffs charged to Argentines for basic public services. President Nestor Kirchner has warned that rate increases will not be considered until all foreign contracts can be “revised.”⁴⁹

In the interim, large numbers of foreign investors have resorted to arbitration under treaties concluded between their home states and Argentina in an effort to obtain compensation for revenues lost during the financial crisis. The first known case to challenge the emergency measures was brought by a U.S. investor, CMS Energy, whose investment in a natural gas transportation network was alleged to have been adversely affected by the government's emergency measures.⁵⁰ CMS alleges that Argentina's measures violate a number of investment treaty provisions, and in particular, are tantamount to expropriation due to their significant impact upon the company's financial statements. In 2003, an ICSID tribunal issued a decision on jurisdiction indicating that it

47 “The Argentine Crisis—Foreign Investor's Rights,” Freshfields Bruckhaus Deringer, January 2002.

48 The three Suez cases at ICSID fall into this category, as does the second Azurix case at ICSID, along with the SAUR International claim. In addition, the Anglian Water Group case under the UNCITRAL rules is understood to relate to the financial crisis.

49 “ENDESA, AGBAR, EDF and Suez fined by Argentina,” *El Pais*, Oct. 23, 2003; “Argentina feels the heat as debt-ridden electricity companies warn of blackouts,” by Adam Thomson, *The Financial Times*, Oct. 28, 2003.

50 Freshfields Bruckhaus Deringer, Annual Report 2002, available at <http://www.freshfields.com/publications/pdfs/annualreport2002.pdf>

had jurisdiction to examine the claim on its merits.⁵¹ Hearings were held on the merits in August of 2004 and a final decision is expected by January 2005.

Further complicating the difficult task confronting tribunals is that they are not operating in a vacuum. Several dozen claims have been mounted against Argentina, and are being resolved by separate tribunals, operating in parallel—which raises the prospect that these arbitrations may yield a succession of different rulings. Already, two parallel investment treaty arbitrations against another country, the Czech Republic, have generated contradictory rulings from the two tribunals. As will be explored in more detail in the section on development linkages, these parallel arbitrations have pinpointed a significant Achilles' heel of this investor-state arbitration process: its failure to consolidate similar cases under a single dispute resolution body, with the consequent potential to generate conflicting rulings, and contribute to considerable uncertainty for investors and host states alike.

While Argentina sets the pace in terms of the sheer number of treaty-based claims which have arisen out of its financial crisis, investment treaties are being invoked across the whole economic spectrum. Disputes have been seen in relation to the regulation of the broadcasting and audio-visual sectors,⁵² concessions to exploit precious metals in conflict-ridden nations,⁵³ decisions related to the environmental zoning of factories,⁵⁴ licensing of cellular telecommunications,⁵⁵ regulation of financial services,⁵⁶ and regulation of the newspaper publishing industry⁵⁷—to name only a few of the many sectors which have seen arbitrations launched. Increasingly, treaty arbitration is threatened or turned to by multinational firms embroiled in some of the largest and most

51 Luke Eric Peterson, "Path Cleared for First Challenge to Argentine Emergency Laws to be Heard on Merits," *INVEST-SD News Bulletin*, Aug. 1, 2003.

52 *Lauder v. Czech Republic* and *CME v. Czech Republic*, arbitrations under the UNCITRAL rules.

53 *Mimincoco LLC and others v. Democratic Republic of the Congo* (Case No. ARB/03/14).

54 *Lucchetti S.A. and Lucchetti Peru, S.A. v. Republic of Peru* (Case No. ARB/03/4).

55 *William Nagel v. Czech Republic*, arbitration mounted in 2002 under the Stockholm Chamber of Commerce rules; *Ameritech v. Poland*, UNCITRAL arbitration mounted in 1996 but settled before tribunal heard the entire case; *Telekom Malaysia v. Ghana*, UNCITRAL arbitration mounted in 2003; *Telenor Mobile Communications AS v. Republic of Hungary* (ICSID Case No. ARB/04/15); *France Telecom v. Lebanon*, UNCITRAL arbitration mounted in 2002.

56 *CSOB v. Czech Republic* (ICSID Case Arb/97/4).

57 *Mediaprint v. Czech Republic*. At the time of writing, this case had not been formally registered.

contentious international disputes with foreign governments, including the Russia-Yukos affair, Zimbabwe's controversial land reform policies, South Africa's Black Economic Empowerment Programme, and an Indian joint-venture power project involving U.S. firms Enron, Bechtel and General Electric.⁵⁸

It must be recalled, also, that some (perhaps significant) portion of investment treaty arbitration takes place without any public awareness. The following section examines some of the emerging development-policy lessons which can be gleaned from those cases which are known to be proceeding.

58 Russian, Zimbabwean and South African cases have been threatened, but, as far as can be determined, had yet to be formally launched as of this writing. However, Bechtel and General Electric are currently involved in a treaty-based arbitration against India, which has been reported to be the largest such claim in history. See "GE Dares walking away with Dabhol (and seek legal recourse for its claims of \$12 billion from India)," *India Business Insight*, October 18, 2004.

5. Development Linkages

5.1 Internationalization of disputes

Investment treaties typically provide foreign investors with the ability to bypass local and national legal systems, in favour of international arbitration. Modern treaties rarely require investors to exhaust their domestic legal remedies, prior to pursuing an international claim—in stark counterpoint to international human rights treaties which oblige victims to appeal to local courts in the first instance.

Even where contracts between an enterprise and a state expressly limit recourse to local dispute settlement options, this may not restrict foreign investors from opting for international arbitration in situations where a bilateral investment treaty has also been concluded by the investor's home state and host state. Several recent ICSID cases have underscored this point by upholding jurisdiction to hear *treaty* claims, notwithstanding the fact that the foreign investor was party to a contract which specified that *contract* claims would be the exclusive province of a given domestic court.⁵⁹ Often, foreign owners of local firms or holding companies are free to assert international claims, which tribunals deem distinctive, due to their having different parties (the foreign owner, rather than the local firm) and different legal grounds (alleged breaches of the treaty, rather than breaches of contract). Indeed, in one water privatization disputes against Argentina, the Buenos Aires Government had gone so far as to insist that company officials waive their right to have recourse to the U.S.-Argentina BIT in the event of a dispute—however, an ICSID tribunal held that this waiver did not prevent the U.S.-based Azurix Corporation (the primary shareholder in the local subsidiary, Azurix Buenos Aires) from mounting its own international treaty claim for damages.⁶⁰

59 *Compañía de Aguas del Aconquija S.A. and Vivendi Universal v. Argentine Republic* (ICSID Case No. ARB/97/3) Annulment Decision of July 3, 2002, 41 ILM 1135 (2002); *CMS Gas Transmission Company v. Argentine Republic* (ICSID Case No. ARB/01/8), Decision on Jurisdiction of July 17, 2003, 42 ILM 788 (2003).

60 *Azurix Corp. v. Argentine Republic*, Decision on Jurisdiction, Dec. 8, 2003.

Despite their best efforts, governments are finding that, once they have concluded investment treaties containing open offers to investor-state arbitration, they cannot prevent foreign investors from taking their claims out of the local legal system. Proponents of this form of international arbitration sometimes describe it as an important safety valve in the event that foreign investors may not be able to receive a fair hearing in a host government's courts. Yet, with provisions on investor-state arbitration written into treaties concluded by more than 170 nations—including virtually all OECD countries—it seems that the sheer number of countries that have consented to this dispute resolution model far exceeds the number of countries where corruption or inefficiency in the courts would seem to be a serious problem. In any case, the concomitant failure of most modern investment treaties to require exhaustion of local remedies ensures that foreign investors will rarely need to dip even a toe into the local court system provided a treaty is at their disposal.

In addition to permitting investors to by-pass local court systems, investment treaty arbitration also insulates the proceedings from extensive review by local court systems. Arbitrations under the ICSID rules are wholly exempted from the supervision of local courts, with awards subject only to an internal annulment process. Meanwhile, arbitrations under other sets of rules may be subject to limited challenge in domestic courts. Such review will typically be circumscribed by laws designed for ordinary commercial arbitrations, and which may, as a result, accord a higher degree of deference to the findings of the arbitral tribunal.⁶¹ As Professor M. Sornarajah has recently noted, if the arbitration was legally sited in a country other than the host state, then there may be no capacity whatsoever for the host government to challenge the award in its own legal system.⁶²

Thus, governments acceding to investment treaties need to be aware that these agreements may serve to *internationalize* disputes which arise between regulators and foreign investors in sensitive sectors (including media, electricity, water, financial services, environmental regulation, etc.) and, in so doing, ensure that foreign investors may detour around domestic legal systems and laws applicable in that system.

61 In Canada, for example, review of several NAFTA arbitration awards have not yet clarified under what circumstances courts might show less deference to an investor-state arbitration (particularly one of some public interest) as opposed to a standard commercial arbitration. See Luke Eric Peterson, "Canadian court declines to set aside award in NAFTA Feldman arbitration," Dec. 8, 2003, *INVEST-SD News Bulletin*.

62 M. Sornarajah, Affidavit in Ontario Superior Court of Justice case between The Council of Canadians, *et al.* and Canada, Court file No. 01-CV-208141, at para 13.

For instance, at the time of this writing, the South African government had been served with notice that several foreign-owned mining corporations might bring claims under domestic law for expropriation.⁶³ The firms object to mining legislation inspired by a desire to redress historical economic marginalization of Blacks and South African minorities, and which imposes various constraints and obligations upon mining firms—including to surrender ownership over mineral rights, in favour of licences to exploit minerals. For several of the firms which notified claims in October 2004, this domestic recourse was their only option—as their home government did not have an effective international investment treaty with South Africa. At the same time, some foreign-owned mining corporations will enjoy a separate international avenue thanks to investment treaties which are in force. Rather than subjecting South Africa's minerals legislation to review by domestic courts, these foreign parties may appeal to an international arbitral tribunal—which would operate according to different applicable laws and standards. One lawyer familiar with a threatened treaty claim against the South African government told the author that businesses with access to international investment treaty arbitration may be able to obtain higher levels of compensation for losses due to their ability to skirt South African legal rules which would take into account historical prejudice against Blacks and minorities when assessing the level of compensation owed to individuals who have had their property dispossessed by government action.⁶⁴

5.2 Object and purpose of the treaty

Another important consideration for developing countries is that many investment treaties have been drafted in narrow, uni-dimensional terms, with treaty preambles hailing the need for enhancing economic cooperation and the creation of a favourable investment climate, and often little else in the way of broader objectives. While some treaties will take note of broader policy objectives—be they sustainable development, environmental protection or raising standards of living—this is not the norm. What's more, narrow preambular language will have an important impact upon interpretation of the treaty provisions, and the treaty's application in the context of disputes between foreign investors and host states.

Several recent treaty arbitrations have seen tribunals look to these narrow preambles, and, in the absence of any broader treaty objectives, adopt interpretations which err on the side of foreign investors and investments. For example,

63 Nicol Degli Innocenti and John Reed, "Foreign mining groups set to sue S Africa for expropriation," *Financial Times*, Oct.30, 2004.

64 Author interview with confidential source, November 1, 2004.

in a recent claim against Chile, the tribunal noted that it would interpret a treaty provision “in the manner most conducive to fulfill the objective of the BIT to protect investments and create conditions favourable to investments.”⁶⁵ In another recent BIT arbitration, a different tribunal observed that it was obliged to interpret key treaty rules through the lens of the treaty’s object and purpose, which was to “create favourable conditions for investments and to stimulate private initiative.”⁶⁶ And in a third recent treaty-based arbitration, the tribunal held that a similarly narrow treaty preamble dictated that “It is legitimate to resolve uncertainties in its interpretation so as to favour the protection of covered investments.”⁶⁷

While questions have been raised about the orientation of tribunal members—and the curious fact that practicing counsel for investors may serve as arbitrators in other investment treaty disputes, thereby having a first-hand influence in fleshing out key treaty obligations—it is not the case that tribunals are adopting indefensible readings of a given treaty’s “object and purpose.” Rather, much of the blame lies with governments which have negotiated treaties with narrow and terse preambular language, notwithstanding the fact that investment treaty disputes may arise out of investments in sensitive sectors—and in relation to a host of sensitive government functions (taxation, environmental regulation, health and safety measures, etc.). Given the nature of the disputes which are arising between governments and foreign investors under investment treaties, it will be important for governments to ensure that investment treaties recognize not only the importance of a favourable investment climate, but also the prerogative of states to regulate in the public interest and the importance of other policy goals, such as poverty alleviation, environmental protection and sustainable development. More balanced preambles might help to ensure that tribunals do not view it as “legitimate” to resolve uncertainties in treaty interpretation so as to favour investor interests.

5.3 Costs of investment treaty arbitration

As investor claims proliferate, the cost of defending against such claims is coming into focus. Developing countries—and particularly the least-developed countries—ought to be cognizant of the financial implications when offering an open consent to arbitration under a given investment treaty. These costs can be substantial. While estimates vary, the average cost of hiring three

65 MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile, Decision on Jurisdiction, at para 104.

66 Siemens v. Argentine Republic, Decision on Jurisdiction, at para 81.

67 SGS v. Philippines, Decision on Jurisdiction, January 29, 2004, at para 116.

arbitrators for an ICSID arbitration can be close to US\$500,000.⁶⁸ Arbitrations under other rules tend to be even more expensive.⁶⁹ Meanwhile, fees for legal counsel may run much higher—for example, the Metalclad Corporation is reported to have spent some US\$4 million on lawyers and arbitrator's fees in an arbitration under NAFTA, and a subsequent court challenge to the arbitral award.⁷⁰ The Czech Republic is known to have spent some US\$10 million to defend against two major arbitrations brought in relation to a large broadcasting enterprise. More recently, the Czech Republic has announced that it will spend some US\$3.3 million in 2004, and US\$13.8 million in 2005, to defend against more than half-a-dozen foreign investment arbitrations (it is unclear what proportion of these claims are contract-based or treaty-based).⁷¹

In a recent treaty arbitration, a state-owned Latvian electricity company conceded that it had to reappropriate funds earmarked for future investments in order to cover mounting legal costs in an investment treaty arbitration brought by a Swedish firm against the Republic of Latvia. Developing countries should also note that some arbitration lawyers advise investors to open up multiple legal fronts (arbitration, home and host state court proceedings) so as to add to the “cost and uncertainty” of disputes—“thereby creating an *in terrorem* effect that may spur a quicker or more favourable settlement.”⁷²

In addition to the costs involved in mounting a legal defence to treaty claims, the potential damages owing to investors can be substantial—depending upon the nature of the investment in dispute and the alleged damage. Earlier this year, the Czech Republic found itself on the losing end of a mammoth award—amounting to more than a third of a billion dollars (US)—which effectively doubled the country's public sector deficit and necessitated an

68 Gustavo Carvajal, presentation to workshop on investment, Americas Trade and Sustainable Development Forum, November 18, 2003, Miami; Shihata and Parra 1999, put the average figure at US\$220,000 in 1999 (excluding lawyer's fees). In 2002, ICSID's daily fee payable to ICSID arbitrators was increased from \$1,100 to \$2,000. On this schedule, the average cost would appear to rise to some \$400,000. See Schedule of Fees at <http://www.worldbank.org/icsid/schedule/schedule.htm>

69 *Ibid.*

70 See J.C. Thomas, “A Reply to Professor Brower,” *Columbia Journal of Transnational Law*, Vol. 40, No. 3, 2002.

71 Luke Eric Peterson, “Croatian firm invokes investment treaty to challenge Czech eviction notice,” *INVEST-SD News Bulletin*, Oct. 1, 2004, http://www.iisd.org/pdf/2004/investment_investsd_oct1_2004.pdf

72 R. Doak Bishop, Sashe D. Dimitroff, and Craig S. Miles, “Strategic Options Available When Catastrophe Strikes the Major International Energy Project,” 36 *Texas International Law Journal*, No. 4, Summer 2001, p. 668.

urgent debate over the appropriate fiscal policy response (i.e., an increase in taxes, increased borrowing or serious cuts to public spending).⁷³ To date, no other award has approached this level of damages, and it is important to note that tribunals rarely award damages that approach the vast sums claimed by investors at the outset of a case. Nevertheless, sizable compensation orders may occur—and the Czech Republic’s experience has galvanized the attention not only of that country, but of others as well.

5.4 Asymmetries of information

Adding yet another layer of uncertainty to this process is the fact that not all arbitral rulings will be widely publicized. Even where earlier cases and rulings may be relevant to a subsequent dispute, there is no guarantee that those earlier rulings will be published—or even widely circulated. Rather, what tends to happen is that rulings are passed around informally by lawyers and arbitrators working in this field.⁷⁴ This serves to perpetuate a serious asymmetry of information between those parties who have the resources to hire one of the major multinational law firms which handle such cases in larger numbers—and those who lack the resources to hire the best counsel.

Major law firms can also develop a comparative advantage through their knowledge of investor claims which may have been settled by the parties. This information can be used subsequently, in an effort to persuade other host governments—particularly those with minimal experience of the arbitration process—that they should settle treaty claims, rather than defend them. One major firm managed to obtain a settlement from the Russian government in a claim brought by a U.K. financial services firm which suffered losses during the Russian financial crisis of the late 1990s.⁷⁵ Details about this settlement have never percolated up to the public, however they could be of some utility to the firm itself, which represents other clients in similar-type claims mounted against other governments which have undergone financial crises.⁷⁶

73 “Money for CME Could be Raised Through Special Tax – KDU-CSL,” CTK Czech News Agency, March 18, 2003.

74 See Luke Eric Peterson, “BIT award against Russia being challenged in Swedish appeal court,” *INVEST-SD News Bulletin*, Oct. 27, 2004, at <http://www.iisd.org/investment/invest-sd/archive.asp>

75 See: <http://www.freshfields.com/practice/arbitration/experience/idisputes.asp>

76 See Freshfields law firm briefing, “The Argentine Crisis – Foreign Investors’ Rights,” January 2002, available at: <http://www.freshfields.com/practice/corporate/publications/pdfs/2431.pdf>

5.5 Uncertainty surrounding the meaning of key treaty provisions

Investment treaties have been crafted in deliberately vague language, often to cover the broadest range of investment situations. Only with the recent surge in interest in these treaties, and their invocation in legal disputes, have tribunals begun to put flesh upon treaty provisions. Although dozens of tribunals are now grappling with cases arising out of BITs and the NAFTA, the full policy implications of most treaty provisions still remains unclear. In late 2002, a NAFTA tribunal noted that “in these early days of NAFTA arbitration the scope and meaning of the various provisions of Chapter 11 is a matter both of *uncertainty* and of legitimate public interest” (emphasis added).⁷⁷ The same holds true for bilateral treaties.

Further complicating matters is the fact that investment arbitration can be plagued by a troubling lack of consistency in the interpretation of the substantive provisions from one case to the next. This was most clearly illustrated in relation to two treaty claims mounted against the Czech Republic—*CME v. Czech Republic* and *Ronald Lauder v. Czech Republic*—by a broadcasting firm and its major shareholder. Two separate tribunals examined virtually identical facts in the *CME* and *Lauder* arbitrations, yet reached contradictory conclusions as to whether the Czech authorities had violated key investment rules such as those on non-discrimination and expropriation.⁷⁸ As has been noted in a previous section, the flurry of claims against Argentina in relation to its emergency economic measures could provide fertile ground for the sowing of wildly divergent interpretations of treaty provisions. One arbitrator sitting on several of these Argentine tribunals has warned that the system—such as it is—has a potentially fatal flaw: “You have the potential,” Professor Brigitte Stern warns, “for 20 arbitrations, one problem, and 20 solutions.”⁷⁹

Not only can tribunals reach widely divergent conclusions in parallel cases, but arbitrators are under no strict legal obligation to follow the path charted by earlier arbitral awards (assuming of course that such arbitral awards have seen the light of day in the first instance). Although earlier awards will tend to be “persuasive” for subsequent tribunals, they do not serve as binding precedents—indeed with conflicting awards having been handed down in cases such as those against the Czech Republic, it would be impossible for

77 *Mondev International Ltd. v. United States of America*, Award, October 11, 2002, at para.159.

78 See Charles N. Brower, “A Crisis of Legitimacy,” Oct. 7, 2002, reprinted at: http://www.whitecase.com/article_international_adr_10_7_2002.pdf

79 As quoted in Michael Goldhaber, “Wanted: A World Investment Court,” *The American Lawyer*, Summer 2004, at: http://www.americanlawyer.com/focuseurope/investment_court04.html

subsequent tribunals to hew to “precedents” when they may point in different directions. Little wonder one well-known Swiss arbitrator has warned that investment treaty arbitration is in danger of becoming a “legal casino.”⁸⁰ As a method of dispute settlement, investor-state arbitration harbours considerable uncertainty for host states whose actions will be examined before such tribunals. While well-endowed host states and multinational corporations can afford to gamble over such high stakes, small investors and small host states are less able to weather such an expensive and unpredictable form of justice.

Governments can take steps during treaty drafting to minimize some of these problems. For example, rules for the consolidation of related claims, can ensure that similar claims are consolidated under the jurisdiction of a single tribunal—so as to reduce the risk that parallel proceedings will lead to divergent rulings. Likewise, governments may look to joint interpretive statements or amendments as tools for clarifying the reach and implications of certain investment treaty provisions which have been subject to controversy. Under the NAFTA regime, the three parties (Canada, U.S. and Mexico) have issued a statement which clarifies the extent of the provision on minimum standards of treatment—a provision which had been subject to unanticipated interpretation in early NAFTA investment arbitrations. Additionally, improvements in dispute settlement may be effected by more detailed treaty provisions, for example obliging all arbitrations to be conducted in public, and for documents and decisions to be disclosed and published.

5.6 The right to regulate and to introduce social insurance programs

Investment treaties typically ensure that investors subjected to direct or indirect forms of expropriation will be compensated for their losses. The difficulty arises in trying to define indirect expropriation. For some time, it has been recognized under international law that so-called “creeping expropriation”—i.e., where the host state effectively expropriates an investment by a series of measures that, over time, deprive the investor of its use and enjoyment—may constitute a compensable form of *indirect* expropriation. It has been less clear, however, how to treat individual exercises of regulatory oversight which may deprive an investment of some of its value but which do not amount to a complete deprivation or where a deprivation is total, but the host state has acted for a “protective purpose” for example, to protect the public from environmental harm. Pending investment treaty disputes—and even unknown claims which are proceeding under cover of darkness—may grapple with the

80 Jacques Werner, “Making Investment Arbitration More Certain – A Modest Proposal,” *Journal of World Investment*, Vol. 4, No. 5, Oct. 2003.

question of to what extent exercises of a governments' so-called police powers (for example to regulate in the interests of environmental protection, public health, safety, etc.) are exempted from a treaty's provisions on expropriation.⁸¹

As of this writing, there is no settled approach to cases where investors allege that certain regulatory measures constitute a compensable form of expropriation. One recent NAFTA tribunal decision, in the case of *Marvin Feldman v. Mexico*, noted that some types of "valid governmental activity" would not be viewed as expropriation under the terms of the NAFTA, however the tribunal added that specific determinations would depend upon the specific facts of a given case. Other cases have underscored that "regulations can indeed be characterized in a way that would constitute creeping expropriation."⁸² A recent treaty claim by a Spanish investor, *Técnicas Medioambientales Tecmed S.A.,* against the Government of Mexico, held that regulatory decisions—including those dealing with environmental permitting and licensing decisions—can fall within the scope of what is considered to be a compensable expropriation.⁸³ The Spanish firm had sought compensation as a result of a decision by the Mexican Government's National Ecology Institute to refuse Tecmed a renewal of its annual permit to operate the Cytrar hazardous waste confinement facility in Hermosillo. According to news reports and the tribunal's own fact-finding, the Cytrar facility was plagued by "sit-ins by local residents protesting the site's technical viability and lack of public participation in decisions regarding the hazardous waste confinement, as well as legal questions regarding Cytrar's proximity to Hermosillo."⁸⁴ Tecmed countered that its Cytrar facility was the target of organized protests designed to achieve a protectionist end: protecting Mexico's only other hazardous waste storage facility in Mina, near Monterrey.

Notable amongst the tribunal's legal findings was this determination:

"We find no principle stating that regulatory administrative actions are *per se* excluded from the scope of the Agreement (on investment protection), even if they are beneficial to society as a whole—such as environmental protection, particularly if the negative economic impact of such actions on the financial position of the investor is sufficient to neutralize in full the value, or

81 On the concept of "police powers" see: M. Sornarajah (1994), *The International Law on Foreign Investment*, 294–6.

82 *Pope & Talbot v. Canada*, Interim Award, June 26, 2000, para 99.

83 *Técnicas Medioambientales Tecmed, S.A. v. United Mexican States*, ARB (AF)/00/2, available at: <http://www.worldbank.org/icsid/cases/laudo-051903%20-English.pdf>, at para 121.

84 Talli Nauman, "CYTRAR Parent Firm Files World Bank Complaint Against Mexico," *Borderlines*, October 24, 2000, <http://www.us-mex.org/borderlines/updater/2000/oct24CYTRAR.html>

economic or commercial use of its investment without receiving any compensation whatsoever.”⁸⁵

While it is unclear to what extent future tribunals will follow the Tecmed reasoning—or that of some other tribunal—what can be stated with authority is that tribunals can, and will, assume the jurisdiction to review the treatment of foreign investors by the host state’s regulatory and administrative authorities, and to assess whether this treatment may be deemed to constitute a form of compensable expropriation. Unfortunately, cases on this question have not led to clear guidelines as to what, if any, category of *bona fide* regulatory measures could be spared such review.

Another type of government policy which may be adversely impacted by treaty provisions on expropriation is the creation and operation of national social benefits schemes, for example in the area of health. To the extent that provision of health insurance has been left to individuals or private insurance firms, governments may confront serious obstacles should they decide at a later date to introduce national health insurance schemes along the lines of those employed in many developed countries. If *foreign* firms are engaged in the sale of private health insurance in a given territory, they might seek compensation under treaty rules on expropriation, in the event that the host government introduces national schemes which threaten the market share of existing providers.

This is a message which was underscored by a special Commission struck by the Canadian Government to explore future improvements in Canada’s national health care system.⁸⁶ While Canada provides health insurance to all Canadians for most health care needs, the advisors to the Commission cautioned that an extension of these forms of public insurance into new areas such as dental care, home care or prescription drug insurance, could run afoul of Canada’s commitments under international investment rules.⁸⁷

By the same token, the introduction of more basic forms of public health insurance—for instance for hospital care or primary physician care—in

85 Tecmed v. United Mexican States, at para 121.

86 The Commission and its report can be found here: www.hc-sc.gc.ca/english/care/romanow/index1.html

87 This was the message of two separate reports solicited by the Commission. See Jon R. Johnson, “How Will International Trade Agreements Affect Canadian Health Care?,” Discussion Paper No. 22, October 2002, available at: http://www.hc-sc.gc.ca/english/pdf/romanow/pdfs/22_Johnson_E.pdf and Canadian Centre for Policy Alternatives Consortium on Globalization and Health, “Putting Health First: Canadian Health Care Reform, Trade Treaties and Foreign Policy” Summary Report, October 2002, available at: http://www.hc-sc.gc.ca/english/pdf/romanow/pdfs/Summary_Globalization_E.pdf; See also Luke Eric Peterson, “How Trade Deals Hurt Policy,” *Globe and Mail* (Toronto), July 20, 2004, commentary, page A17.

developing countries could run afoul of commitments made in bilateral investment treaties, in the event that foreign investors covered under the treaty had come to play a role in the provision of private health care insurance and were subsequently deprived of this market stake.

Thus, the substantial costs which might be incurred by host states contemplating a move towards universal forms of health insurance have the potential to be increased further by virtue of investment treaty requirements which call for compensation to be paid to those foreign investors which would stand to lose their market share in the provision of private insurance. This eventuality signals a worrying feature of these poorly-understood investment treaties—one which should be studied much more closely before governments in the developing world accede to further investment agreements.

In view of these problems, those intent upon concluding investment treaties should note that there are ways to enhance the ability of governments to regulate in the public interest or to retain the right to introduce new social insurance programs—without fearing challenge from affected foreign investors. The discretion of arbitral tribunals may be narrowed through the use of much more detailed drafting of treaty language. The investment chapters of several recent U.S. free trade agreements seek 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 expropriation.”⁸⁸ Likewise, a recent Japanese BIT with Vietnam seeks to clarify that “the imposition of taxes does not generally constitute expropriation”—and offers several paragraphs of guidance on the matter to prospective arbitrators.⁸⁹ Also, treaty language could be designed to protect the right of governments to progress towards the provision of universal health insurance, without needing to compensate private insurance firms for any loss of market share.

Meanwhile, it could be clarified that dispute settlement—or expropriation clauses—are not applicable where a government introduces a new public insurance scheme which is designed to promote fundamental policy objectives such as broadening access to health care.

For the present, governments must be cognizant of the fact that standard investment treaty language on expropriation—when combined with a right of investors to investor-state arbitration—may lead to situations where tribunals assume jurisdiction to review the legality of a state’s treatment of that investor.

88 US-Chile FTA, Chapter 10, Annex 10-D, Article 4 (b).

89 See Agreed Minutes of Japan-Vietnam agreement for the liberalization, promotion and protection of investment, 2003; text available on-line at: Japan-Vietnam Agreement: <http://www.mofa.go.jp/region/asia-paci/vietnam/agree0311.pdf>

Governments would do well to reflect upon the breadth, and potential implications, of such treaty commitments *prior* to acceding to them. One eminent arbitrator has warned that the definition of expropriation remains “in flux” and that foreign investors ought to pay heed to the warning “caveat investor.”⁹⁰ By the same token, however, such warnings would seem to apply just as strongly—if not more so—to less wealthy developing countries, particularly the LDCs.

5.7 Control over entry/establishment in the host state territory

One strategy for host states to retain wider discretion in the regulation of their domestic economy is to refrain from granting foreign investors a right of establishment. Some developing countries insist that their ability to retain control over entry and admission of new investment is an important tool for development-policy making, allowing for the protection of infant industries and more generally the elaboration of strategic industrial policy. This point was underscored in discussions at the World Trade Organization.⁹¹

Most investment treaties do not extend market access privileges or rights of establishment to foreign investors—however recent treaties negotiated by several major trading powers do include some commitments at the pre-establishment stage. For example, the recent practice of Canada, the United States and Japan has been to accord national treatment or most-favoured nation treatment to investors wishing to *establish* an investment or to make an *acquisition* of an existing enterprise.⁹² This, in effect, gives any foreign investor the right to enter and invest, in sectors which are open to domestic investors.

Given that attempts to launch multilateral negotiations on investment at the World Trade Organization were set back by the collapse of the 2003 Cancun Ministerial Conference, efforts to gain market access for Western investors in the developing world are more likely to be pursued at the bilateral level than at the WTO. With members of the so-called Quad (Canada, U.S., Japan and EU) all pursuing some form of investment liberalization as part of their

90 L. Yves Fortier, “Caveat Investor: The Meaning of “Expropriation” and the Protection Afforded Investors under NAFTA,” *News From ICSID*, Vol. 20, No. 1, Summer 2003.

91 “Stocktaking of India Bilateral Agreements for the Promotion and Protection of Investments,” WT/WGTI/W/71, April 13, 1999, at para 6.

92 However, decisions taken by host states in relation to questions about establishment are not always eligible for arbitration under the treaty’s dispute settlement rules. For instance, Canada exempts decisions on acquisition from both the investor-state and state-state mechanism, while decisions on establishment are excluded from the reach of the investor-state mechanism. See Canada-Latvia Foreign Investment Protection Agreement, Article II (4) a & b.

bilateral relations, many developing countries can expect to face individual requests for market-access commitments.

It is unclear what efficacy such provisions could have in terms of guaranteeing new FDI flows. However, developing countries should note that under the model favoured by the Quad countries, any investment which does come—whether stimulated by the treaty or some other factor—will enjoy a right of entry on par with domestic firms. This will present problems for the same reasons which have been voiced in the debate at the WTO—not least, the fact that many countries lack the capacity to assess which sectors ought to be protected from foreign competition. Indeed, even more advanced economies in Eastern and Central Europe have been seen to have entered into pre-establishment commitments which have proven ill-advised in hindsight. Recently, the European Commission intervened with the United States on behalf of a number of candidates for EU accession, in order to roll back certain pre-establishment commitments which had been made in investment treaties between these countries with the United States.⁹³

In the event that pre-establishment commitments are held out as a necessary component of an investment treaty, developing countries could press for a positive-list approach which would ensure that commitments are only applicable to specific sectors scheduled by the host state. As well—to the extent that capacity constraints permit—developing country negotiators would be advised to examine the types of reservations entered into by other countries (developing and developed) in investment treaties—in order to gain some indication of sectors which may warrant protection.

5.8 Restricting the ability of states to impose social obligations on investors

States may screen incoming investors in an effort to select those projects which best serve the host state's broader economic development strategy. In a closely related vein, states may have important public policy reasons for imposing conditions and responsibilities upon investors operating in their territory. However, the narrower *economic* case for the imposition of so-called performance requirements upon foreign investors, is mixed. The 2003 UN World Investment Report concluded that “there are valid economic arguments for using performance requirements in some circumstances.”⁹⁴ At the same time, there is evidence that some performance requirements will prove inefficient, and lead to higher costs associated with foreign investments. Ultimately, however, host states would seem best-placed to undertake their

93 This incident is discussed at more length in the section on performance requirements below.

94 UNCTAD, *World Investment Report 2003*, p. 119.

own assessments as to whether these potential distortions—and the possible loss of potential investments—will outweigh the policy objectives underlying the imposition of performance requirements in a given circumstance.

Some capital-exporting nations have preferred not to leave such decisions in the hands of host governments. At the multilateral level, the WTO agreement on Trade-Related Investment Measures (TRIMs) prohibits several types of performance requirements which host states might impose upon investors. These include measures which specify a given level of domestic inputs; measures which place limits on imports or exports by foreign investors; and measures which limit foreign investors' access to foreign exchange. Some countries—including Canada, the United States and Japan—go further in pushing bilateral investment treaties which prohibit a broader range of performance requirements than those covered in the WTO TRIMs pact. Canadian BITs often proscribe domestic content rules, mandatory technology transfers, and mandatory sourcing from local suppliers.⁹⁵ Some Japanese BITs also prohibit rules which dictate that individuals of a given nationality be appointed to executive, managerial or directorial roles; duties to achieve a given level of research and development in a given territory; and requirements that a regional or world headquarters be located in the host state's territory.⁹⁶

While close attention has been paid by researchers to the *economic* impacts of performance requirements—and to the possibility that requirements may be inefficient in economic terms—less attention has been paid to other *social* policy objectives which might be advanced through the use of performance requirements. It is possible that treaty prohibitions against select performance requirements may hinder government efforts to pursue certain types of social policies. For example, affirmative action programs, such as South Africa's Black Economic Empowerment program, which are designed to encourage the economic opportunities of disadvantaged individuals or groups, may run afoul of performance requirements bans. South Africa's BEE scheme is an effort to boost the prospects of its black majority, along with those of other ethnic minorities, which suffered systemic discrimination under the Apartheid system. The government has introduced targets for firms operating in some sectors, such as mining, requiring divestment of minority stakes to black-owned firms. "Scorecards" are being used in an effort to reward firms for achieving progress in areas such as: "the appointment of black executives to

95 See for example, "Agreement Between the Government of Canada and The Government of The Republic of Trinidad and Tobago For the Reciprocal Promotion and Protection of Investments," Art. V (2).

96 See for e.g., "Agreement Between Japan and the Socialist Republic of Viet Nam for the Liberalization, Promotion and Protection of Investment," Article 4.

company boards of directors; establishing supplier relationships with local black firms; and the promotion of employment equity within the firm.”⁹⁷ However, U.S. business interests have expressed concern that the imposition of such duties and obligations upon foreign investors amount to performance requirements.⁹⁸ The problem of reconciling the BEE program with standard investment treaty disciplines has helped to stall negotiations on a free trade and investment agreement between the United States and the Southern Africa Customs Union.⁹⁹

5.9 Standards of conduct for bureaucratic and administrative agencies

In the view of some analysts, investment treaty disciplines can be a catalyst for good governance. Provisions obliging governments to provide “fair and equitable treatment” or “full protection and security” are viewed as important brakes on arbitrary or opaque government conduct. Reduction of corruption and of the arbitrary abuse of citizens and investors alike will be a necessary—but not sufficient—condition for development. For instance, observers have pointed to a lack of transparency and good governance as an enormous drain on the life-prospects of citizens in many resource-rich developing countries.¹⁰⁰ However, sequencing of international commitments and domestic reform will be an important consideration for under-resourced developing countries.

While entering into binding international law commitments may serve to focus the minds of government authorities—in the absence of resources and capacity to reform domestic governance processes, countries might simply find that they have agreed to international standards which cannot be met in the short, or even, mid-term. Indeed, a lack of clarity as to the concrete demands of certain treaty provisions has led even middle-income developing countries, such as Chile, to discover that their domestic governance processes sometimes lack the requisite coordination, coherence and clarity to pass muster upon review by an investment tribunal.¹⁰¹

97 “South Africa’s Black Economic Empowerment Plans an Obstacle to a US FTA?” by Luke Eric Peterson, *INVEST-SD News Bulletin*, July 8, 2003.

98 *Ibid.*

99 Luke Eric Peterson, “US-Southern Africa Negotiations Stall; Race-based Affirmative Action an Obstacle?,” *INVEST-SD News Bulletin*, July 22, 2004, available at: http://www.iisd.org/pdf/2004/investment_investsd_july22_2004.pdf; Carli Lourens, “Delay in US trade talks may hurt other Sacu deals,” *Business Day* (South Africa), Oct. 22, 2004.

100 See Transparency International’s *Corruption Perceptions Index 2004*, at <http://www.transparency.org>; Human Rights Watch, *Some Transparency, No Accountability*, 2004, at www.hrw.org/reports/2004/angola0104

101 MTD Equity Sdn. Bhd. and MTD Chile SA v. Republic of Chile, Decision on Jurisdiction.

Foreign investors have also proven more savvy at playing the arbitration system when it comes to challenging the administrative process of a host state under international law. One noted arbitration survey found that well-resourced foreign investors may employ extremely detailed and sophisticated forms of legal record-keeping in order to catalogue all of their interactions with administrative officials in case such a record need be adduced in a subsequent dispute.¹⁰² At the same time, poorer host governments may lack the basic infrastructure and foresight to keep similarly detailed records which might buttress their own case in the event of an arbitration arising at some later date.¹⁰³

Thus, governments that expose themselves to the possibility of such arbitrations through the conclusion of investment treaties ought to be mindful that these treaties may entail a higher degree of administrative and infrastructural record-keeping in relation to foreign investments. Although the author is not aware of studies which have been undertaken to measure the extent of such expenses, other studies have calculated that compliance with others types of international trade agreements can amount to sizable sums—particularly for least-developed countries which may have other more compelling public spending priorities.¹⁰⁴

5.10 Irreversibility of treaty commitments

If and when problems arise with respect to investment treaty commitments, revisions to the treaty will not be practicable or straightforward. Some treaties, such as the NAFTA, provide for the ability of the parties to issue interpretive statements which will clarify the intent of the parties, and be binding upon arbitral tribunals. BITs typically do not expressly provide for such interpretive statements. Nevertheless, where *both* parties wish to alter or even terminate a BIT it would seem to be a prerogative of sovereign nations to do so at any time.¹⁰⁵

102 Dezalay and Garth, *Dealing in Virtue: International Commercial Arbitration and the Construction of a Transnational Legal Order*, (University of Chicago Press, 1996), 93–95.

103 *Ibid.*

104 Dani Rodrik, “Trading in Illusions,” *Foreign Policy*, March–April 2001; Michael J. Finger and Philip Schuler’s “Implementation of Uruguay Round Commitments: The Development Challenge” (Washington: World Bank Policy Research Working Paper No. 2215, October 1999). While the sums involved differ by orders of magnitude, the concern over misplaced priorities remains valid.

105 See Article 30, of the Vienna Convention for the rules which would give priority to a more recent agreement to amend or abrogate an earlier treaty. The Convention is available online at: <http://www.un.org/law/ilc/texts/treatfra.htm>

Of course, many of the reasons why a particular state might wish to amend or abrogate a treaty will not necessarily be shared by the other state party. For example, interpretations which deeply encroach upon the ability of host states to regulate inward investors may not be problematic from the perspective of capital-exporting nations, which typically serve as the home country of the investors which will be benefiting from such an overly permissive climate. Indeed, investment treaties may be considered to be a prerequisite—or down-payment—for developing countries to gain more favourable market access in developed countries—often through the subsequent (or simultaneous) conclusion of a broader free trade agreement.¹⁰⁶

Typically, the rights and protections contained in investment treaties are not easily amended or abrogated—absent the desire of *both* parties. Rather, the tendency has been for host states to adapt as best they can to the more circumscribed policy options which may present themselves where investment treaties govern the relationship between foreign investors and host states. For example, the Philip Morris Company is known to have threatened to use the NAFTA investment chapter to challenge restrictions on packaging of cigarettes proposed by the Canadian government in the mid-1990s. These threats are widely credited with having convinced Canadian to back away from plans to impose plain packaging. As far as we know the Canadian government never contemplated seeking revisions of the treaty in order to ensure that it could not be used to stifle public health regulations.¹⁰⁷

While the concrete meaning of most standard investment treaty protections is still unclear, host states confronted with the prospect of costly arbitrations, and potentially onerous damage claims, may be exercising greater caution in their policy-making—rather than contemplating the even *more* costly political price that might be paid for *post-facto* amendment or abrogation of these treaty commitments. Once the shoe is on—no matter how uncomfortable the fit—the shoe may need to be worn, rather than altered.

106 For example, the U.S. is insisting that a bilateral investment treaty be agreed with South Korea prior to negotiations on a wider trade pact.

107 Barry Appleton, Testimony before the British Columbia Legislature Special Committee on the MAI, *Hansard*, September 30, 1998.

6. Conclusions

Investment treaties have been seen to have doubtful impacts upon the stimulation of new foreign direct investment, at the same time they enshrine far-reaching rights and protections for those investments which do flow between home and host country. Dispute settlement is often closed to the public and not subject to clear rules of precedence. Given the current ambiguity of many key treaty provisions, foreign investors with deep pockets may be well-advised to launch creative damage claims when they come into friction with regulators or government agencies in the host state. In the absence of full information about how earlier disputes may have been resolved, and in the absence of any procedural rules which would oblige subsequent disputes to be decided in a similar fashion, developing countries may be confronted with considerable uncertainty about the concrete policy implications of the international treaties to which they have acceded.

As treaty-based arbitrations proliferate, they have raised red flags about the manner in which standard treaty provisions such as those governing performance requirements or expropriation may be used to circumscribe the regulation of foreign investors—even for important social, cultural, environmental or public health ends. Treaty rules may make it more difficult to introduce or extend national benefits schemes (for example, in the area of health) if they would require existing foreign investors to relinquish a given business line (for example, health insurance).

Some of the more worrying concerns discussed herein may be assuaged by arbitral tribunals that reject tenuous and entrepreneurial investor claims. Nevertheless, given the innumerable uncertainties that are emerging in this heretofore little-noticed area of international law, developing nations would be advised to undertake significant “due diligence” before agreeing to be bound by further such investment treaties.



Bilateral Investment Treaties and Development Policy-Making

This paper looks at the impacts of bilateral investment treaties—of which there are now over 2,000—on development-oriented policy-making. It assesses the major elements of concern in the various formulations of key obligations, and the types of desirable policies they might prevent.