

THE DOHA ROUND AND INVESTMENT: LESSONS FROM CHAPTER 11 OF NAFTA

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THE 2001 MINISTER DECLARATION on the Doha round of WTO negotiations recognized:

...the case for a multilateral framework to secure transparent, stable and predictable conditions for long-term cross-border investment, particularly foreign direct investment, that will contribute to the expansion of trade.¹

The “crash and burn” of the proposed Multilateral Agreement on Investment (MAI) in the late 1990s will ensure that no one will be blithely optimistic of success in creating a major investment chapter in the WTO system.

The Organization for Economic Co-operation and Development (OECD), had tried to produce such a treaty, a proposed MAI. The proponents hoped that all OECD members would ratify it, and that many other states would join in as legally committed parties.

Within the OECD, however, it proved difficult to achieve consensus on some matters of principle, as well as detail. For example, some European states, including France, wanted to restrict the norms protecting investors (such as a guarantee of “full protection and security”) and did not want investors (as opposed to their home states) to have the right to bring actions directly against host states.²

From the outside, the MAI project was vehemently assailed by a worldwide coalition of non-governmental organizations. They portrayed the MAI as a scheme to protect rich multinationals from the regulatory

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¹ The Minister Declaration is posted on the WTO website at: <http://www.wto.org/english/thewto_e/minist_e/min01_e/mindecl_e.htm> (par. 20)

² See D. Henderson, “The OECD members: Several Bridges Too Far” in *The MAI: A Story and Its Lessons*, pp. 23-32. See Riyaz Dattu, “A Journey from Havana to Paris: The Fifty-Year Quest for the Elusive Multilateral Agreement on Investment,” 24 *Fordham Int’l L.J.* 275 for a review of disagreements in eight different subject areas.

reach of states that host investments.³ They were a vocal and powerful voice as OECD countries engaged in their internal consultations on the MAI project.

There are lessons to be learned from a failed proposal, but there might also be some intellectual and political insight to be gained from proposals that have actually succeeded. Its potential value in providing and testing ideas for the global trade system is in fact one of the strongest reasons for entering into a regional arrangement like NAFTA.

There are also, to be sure, potential and real drawbacks to regional trade agreements, such as NAFTA, in the context of building the WTO system. Regional arrangements can cause confusion and expense, as both citizens and governments try to cope with a proliferation of rules and institutions. They can sap energy from efforts to build a truly global system; regional arrangements may provide sufficient economic results, at least in the short and medium term, only to take the momentum away from efforts to produce even better results on a global scale.⁴

In government, as in private enterprise, there is a tendency towards "satisficing" – achieving a reasonably good result – rather than maximizing the achievement of important goals.⁵ Indeed, public attention and public policy planning is in practice often spurred by reaction to existing situations that appear particularly bad; it can be much more difficult to secure interest in reforms that are based only on long-range visions.

Regional agreements have also been criticized for causing "trade diversion." An enterprise in state A might routinely buy from a supplier in state C. But after state A enters into a regional arrangement with state B, the enterprise switches to a supplier in state B. The latter is a better choice now because there are no tariffs or other barriers to its entry, whereas the supplier in state C is still faced with these burdens. Gains in regional trade areas can thus disrupt and diminish global trade.

One of the main benefits of regional agreements, however, is that they can provide testing grounds for new norms and institutions. NAFTA, for example, provided an initial experiment in including services in trade agreements. Chapter 11 of NAFTA was innovative in placing an invest-

³ See J. Silver and L. Shaw, "The MAI Primer" online: The Canadian Centre for Policy Alternatives, <<http://www.policyalternatives.ca>>.

⁴ See J. McLaren, "A Theory of Insidious Regionalism" (May 2002) *Quarterly Journal of Economics*, online:<<http://netec.mcc.ac.uk/WoPEc/data/Articles/tpqjeconv:117:y:2002:i:2:p:571-608.html>> for a review and development of some economic drawbacks to regional agreements.

⁵ See M. Augier, "Sublime Simon: The Consistent Vision of Economy Psychology's Nobel Laureate" *Journal of Economics and Psychology*, 307-344.

ment section within the wider context of a regional free trade treaty. A substantial series of international decisions have interpreted and applied Chapter 11. The three state parties to NAFTA have adopted official clarifications of some of its provisions in light of those decisions.⁶ What does NAFTA teach about the problems and challenges – both in policy and politics – of including an investment provision in the web of a set of large agreements that define an overall trade regime?

Before examining those lessons of Chapter 11, however, a preliminary question might first be asked: what case is there for a WTOAI – a World Trade Organization Agreement on Investment?

A central argument of any deal promoting free movement – be it goods, services, capital or people – is that economic freedom is a component of human freedom. The larger the world in which an investor can operate, the more opportunity he or she has to engage in creative activity, to develop their business intellects, to interact with otherwise unknown peoples and environments.

Economic freedom can also promote the overall development of global wealth. Investors are free to find the place for their capital that will return the most wealth to them. While much investment may be carried out by multinationals, these are largely owned by persons of moderate or limited means, whether directly as stock market investors or bondholders or indirectly through pension plans and other institutional holdings in which they have an interest. The taxation of the increased wealth of investors also contributes to the well-being of the home bases of investors who take risks abroad. In developing opportunities abroad, investors will create opportunities for the employees and contractors who perform the work and the governments that tax them.

The free movement of capital can have positive effects on the quality of government in all societies. There can be a “race for the top” in terms of regulatory and social welfare standards. Pressure is put on governments to develop systems that will attract capital in a competitive environment.⁷ That can mean, for example, developing an impartial and efficient court system to enforce legal rights.

It does not follow that free movement of investment capital is a “perfect good” in the real world. There appears to be room for legitimate

⁶ See C. Brower, “Structure, Legitimacy and Nafta’s Investment Chapter” 36 *Vand. J. Transnt’l L.* 37 for a discussion of some of the NAFTA case law and the binding interpretation of Chapter 11 issues by the three parties.

⁷ T. Friedman, hails the “golden straightjacket” that is placed on states as they try to attract capital from the mobile “herd” of potential investors. T. Friedman, *The Lexus and the Olive Tree* (New York: Farrar, Straus and Giroux, 1999).

debate about whether the completely unregulated inflow and withdrawal of capital can leave an economy too vulnerable to bubbles and panics as investors coalesce around a temporarily over or underoptimistic view of an economy.⁸ The Doha Declaration refers to “long term investment,” and the framers of the WTOAI could, if they see fit, provide some room for states to limit the sudden and massive inflow and outflow of capital by short-term investors.

Concerns can also be reasonably raised about whether foreign investors will behave as law abiding and fair-minded corporate citizens, or instead collaborate with local tyrants in their political oppression, or corrupt or add to the extent of the corruption of local kleptocrats. There is a risk that a large corporation will be so efficient and resourced that it can knock out local competitors, and assume a monopoly position.

Another concern that must be considered seriously is that of the “race to the bottom” – the fear that capital will be attracted to places in which money can be made easily because various standards – labour, environmental and human rights – are low.

Most of these concerns will often be overcome by market and political forces that tend to accompany increases in freedom of investment.

Rather than leading to market domination by a few players, opening a society up to foreign trade – including investment – is often the most

⁸ It may in practice be very difficult to define different categories of investment and establish a coherent and intellectually defensible regime that deals with them in fundamentally different ways. During the MAI negotiations, for example, France urged that the treaty not cover “portfolio investment” and “financial market” operations; Henderson, *supra*, footnote 2, at p. 31. But the growth of a society’s economy may depend on the ability of enterprises – be they locally or foreign owned – to issue stocks and bonds that are regarded as credible by foreign investors. Such instruments may be a necessary means of developing long-term projects. Engaging in a long-term investment may also be seen as less risky if the owners are reasonably free and secure to carry on associated activities such as buying and selling the local currency to minimize exchange fluctuation risks and to carry out transactions such as paying local employees. The concern that economies may be destabilized and damaged by sudden herd-driven surges in the inflow or outflow of money is a reasonable one, but would be best addressed by inserting express provisions that identify what measures states are permitted to adopt to ensure that capital markets operate in a reasonably stable manner. Within even the most market-oriented states, such as the United States, various rules and institutions that govern stock exchanges are put in place to put a brake on sudden shifts, be they caused by the rational need or emotional desire to “follow the herd”, a convergence of program trading or news which the market does not have time to properly absorb and consider.

effective means in practice of conducting an effective anti-trust policy. The introduction of new sources of investment may help to break up the domination – be it economic, political or both – of societies by a small number of local private enterprises or government agencies. If an economy is open to direct foreign investment from many different countries, competitors from different countries will help to ensure ongoing competition, even if some local competitors disappear. Furthermore, the influx of capital may go toward investing in locally-owned enterprises, or in forming partnerships, joint ventures, franchise agreements and other arrangements in which local enterprises are boosted economically by their collaboration with foreign investors.

Multinational corporations are often exemplary corporate citizens in less developed countries. They may be effectively required to act honestly and decently by the laws of their home country, as well as those of their host state. The United States has long required that companies that are U.S. nationals abide by U.S. anti-corruption and money-laundering statutes.⁹ The shareholders of a multinational – which can include pension plans connected with socially conscious organizations and “ethical” mutual funds – may put further pressure on a multinational to behave honourably. The fact that multinationals place so much emphasis on brand reputation may make them particularly responsive to charges of corporate oppression. An obscure garment manufacturer based in a local country might not be concerned about whether it is regarded as enlightened by residents of North America or Europe. But Nike must, out of economic self-interest, if not conscience, care very much if its brand reputation is impugned by charges that it treats its workers unfairly.

The investment herd does not always, or even generally, put pressure on states to lower their social standards. Investment is generally more, not less, likely to come to a country that has a well-regulated and credible system of financial regulation and a sound court system. Many investors may be attracted to a state that has a strong system of education, training and publicly-funded health care insurance; such programs may enhance the “human capital” available, and more than overcome the burden of increased corporate taxes necessary to pay for them. Many investors might also prefer to pour resources into states that have open and democratic political systems. They tend to be more stable and less corrupt than closed societies.

⁹ See the discussion of the leadership of the United States in the area of Foreign Corrupt Practices Act in H. Manweiler and B. Schwartz, “A Proposal for an Anti-Corruption Dimension to the FTAA” (2001) 1 *Asper Rev. of Int’l Bus. and Trade Law* 67.

Another consideration that is often overlooked is that by increasing interactions among societies, open trade arrangements make populations more vulnerable to conduct based in other states. Governments often respond by pressuring each other to increase their regulatory standards. The European Union effectively pressured Canada into adopting an exemplary law protecting privacy; Canada did so to respond to EU Union concerns that international data flows would result in a loss of privacy protection for EU citizens.¹⁰

While market forces and home-state regulation may help in a great many cases to make multinationals act ethically, there is no theoretical or practical guarantee that they will always work. History shows, on the contrary, that multinationals at times can and do participate in the corruption of local governments or the oppressive treatment of local workers.

Furthermore, the political sellability of any arrangement must be considered, not only its perceived merit. Some "dead enders" will never accept either the economic logic or real-world applicability of the arguments made by investment liberalizers. They are so hostile to market economies, the concept of open trade, and to the credibility of international economic organizations like the WTO, that no persuasion is possible. But there must be a group that is more moderate and persuadable: open-trade skeptics could be persuaded to support an MAI-like component of the WTO provided that certain conditions are met about how that component is drafted and that other changes to the WTO system accompany it.

The NAFTA chapter on investment was influenced in many ways by even earlier arrangements – the provisions on investment in bilateral investment treaties (BITs). One of the distinctive features of NAFTA is that it placed investment provisions in the context of a wider set of agreements – NAFTA and the side-deals on labour and environment.

President Clinton, faced with opposition to the main NAFTA agreement, insisted that the side-deals be made. They were intended to respond positively to criticism that the agreement might have the net effect of weakening labour and environmental standards.¹¹ The side deals also commit states to enforce the laws they have on the books in the area

¹⁰ See B. Schwartz, "Canada's New Privacy law: Strategies for Compliance" (2002) 1 *Asper Rev. of Int'l Bus. and Trade Law* 125-132. Volume IV of the *Asper Review* will focus on money laundering and proceeds of crime, another area where Canadian standards have been dramatically raised in response to international pressure.

¹¹ See The North American Agreement on Environmental Cooperation and the North American Agreement on Labor Cooperation, online: <<http://www.naaec.gc.ca/>> and <<http://www.naalc.org/>> respectively.

of labour and environment. NAFTA agencies are created which can monitor progress on the practical implementation of national laws on labour and the environment, and use the weapon of publicity to condemn situations where governments fall short of doing so. The use of non-binding investigation and reports is a technique often used in international bodies. The fact that the reports are not legally binding helps to assuage concerns by states that they are surrendering too much sovereign decision-making authority to international bodies. As confidence grows through time, parties often agree to take the next step and allow monitoring bodies to go beyond making recommendations and instead issue legally binding decisions. This kind of evolution – first investigation and report, then legally-binding decision making – has taken place with respect to disputes under the main GATT agreement (on free trade in goods)¹² and within the European Human Rights system (countries were initially reluctant to submit to the binding decision making authority of a court, and the tendency was to opt for having disputes explored, instead, by a Commission that could issue only non-binding reports). The United Nations Human Rights Commission is still based on the investigation and reporting of individual complaints, rather than adjudication that is legally binding.

The Clinton approach did help to win over some NAFTA skeptics. His approach teaches a useful lesson about the political need to present packages that address concerns in a positive way.

The side agreements also proved – at least in one case, S.D. Myers and the government of Canada – to provide a useful source of interpretive guidance in reading the investment Chapter.¹³

It is not possible, however, to simply copy the NAFTA side-deal approach into the MAI context. The NAFTA side-deal approach was based in part on the fact that the three NAFTA amigos actually did have stringent environmental laws on their books, and that major progress would be gained by simply requiring them all to actually enforce them. There is no reason to expect that the whole WTO family happens to have similarly good laws on their books.

¹² It was in the Uruguay Round that the WTO finally introduced a legally binding adjudicative system for reports. Prior to that, panel reports were only recommendations, and did not become binding unless adopted by a consensus of the GATT parties – which could be precluded by the objection of the “losing” party.

¹³ S.D. Myers and Government of Canada, Decision of the Tribunal, liability phase, November 13, 2000, paragraphs 217 et seq; separate concurring opinion of Bryan Schwartz, November 12, 2000, (2001) 1 *Asper Rev. of Int'l Bus. and Trade Law* 337-408 and online: <<http://www.naftalaw.org/>>.

An alternative is to require that WTO parties accept a core package of commitments to existing treaties on labour standards, the environment and human rights. For example, all parties to the WTO could be asked to commit to the core conventions of the International Labour Organization (ILO). The latter has a non-binding system of investigation and reports on complaints. In some of my earlier work on the development of the Free Trade Area of the Americas, I have recommended this kind of approach.¹⁴

This approach would not necessarily require the "side commitments" to be enforced by WTO institutions. "Institutional economy" ought to be a watchword of the development of the WTO, as with other organizations: new documents or institutions should be created only where necessary, and effective deployment should be made of resources outside of the WTO that are already in place.¹⁵

The "side deal" approach might not provide sufficient "linkage," from the point of view of some skeptics, between the hypothetical WTOAI and environment, labour and human rights norms. They might argue that some of the existing agreements on the environment, labour and human rights are not currently enforceable through legally-binding dispute resolution. They might further argue that there should be a tight link between compliance with the "side deals" and rights to be enforced under the WTOAI.

They might propose that that if a multinational is found to be a violator of a core ILO convention it would forfeit its right to make any complaints under the WTOAI if it is mistreated by the host country. This might be called the "clean hands" linkage, by analogy to the law of equity maxim; whereby you may be barred from bringing a suit in equity if you yourself have behaved in an inequitable manner toward the other party.

There are principled and political difficulties with pressing this linkage to the maximum. From the point of view of fairness, there might be grave disproportionality between the offence and the consequences if a multinational committed a breach of an environmental standard – something that might ordinarily warrant a \$50,000 fine – but suffered the additional consequence that it lost its international remedies in respect of essentially unrelated actions by the host country (e.g., expropriating its main plant without compensation). From the political perspective, coun-

¹⁴ See B. Schwartz, "Lawyers and the Emerging World Constitution" (2001) 1 *Asper Rev. of Int'l Bus. and Trade Law* 1-29 and J. Mercury and B. Schwartz, "Linking Labour, the Environment, and Human Rights to the FTA" (2001) 1 *Asper Rev. of Int'l Bus. and Trade Law* 37-65.

¹⁵ B. Schwartz, "Lawyers and the Emerging World Constitution," *ibid*, 12-13.

tries that host multinationals will be reluctant to suddenly accept a ratcheting-up of the legal "bite" of various agreements in areas such as the environment, labour and human rights.

A further difficulty with the side-deal approach just sketched is that the focus would be on arrangements that focus on the rights and responsibilities of states. They are not necessarily drafted or designed in a way that addresses the conduct expected of individual companies. Yet a key feature of Chapter 11 – which in my view ought to be carried forward into the WTOAI – is that investors can themselves bring complaints of mistreatment by host states. To have a reasonable measure of security, investors must not be in a position where potential claims are raised or ignored at the discretion of their home state, and traded away or settled for a pittance if that is required in the interest of overall state-to-state diplomacy.

Another option would be to link a WTOAI to the inclusion of a tough anti-corruption component in the WTO system. I have argued strenuously for such a development in the context of the proposed FTAA.¹⁶ The tying of anti-corruption measures to better safeguards for the influx of foreign capital seems like a reasonable linkage to make, both intellectually and politically, and I would recommend it for the WTO as well.

In this article, I will propose another kind of balancing maneuver – one that incorporates anti-corruption principles, but would address other issues of honest and fair dealing as well. It would focus on bringing into the WTO system "codes of corporate conduct."¹⁷

After the public relations shellacking the OECD received from critics of the MAI, the former regrouped and produced a set of Guidelines for

¹⁶ H. Manweiler and B. Schwartz, "A Proposal for an Anti-Corruption Dimension to the FTAA and Anticorruption dimension to the MAI" (2001) 1 *Asper Rev. of Int'l Bus. and Trade Law* 67-85.

¹⁷ See P. Aleander Haslam, "Surplus Value: The Americas at a Crossroads in the Corporate Social Responsibility Debate" Policy Paper for the Canadian Foundation for the Americas, online: <http://www.focal.ca/images/pdf/csr_03.pdf>, which reviews from a Canadian perspective the case for pursuing an agenda of "Corporate Social Responsibility" in the international trade law arena. The article begins with recounting some recent stories in which Canadian companies have arguably behaved in objectionable ways in their dealings in third world states, but maintains that these are not representative of the Canadian business establishment as a whole. He urges that Canada and Canadian Companies have been a "world leader" in CSR, and calls for developing a unified and well-monitored code of conduct for the Americas. The ideas proposed in this paper would suggest that Canada might wish to take the lead in introducing CSR into the larger World Trade Organization system.

Multinational Companies. It is a comprehensive and demanding set of aspirations for multinational corporations. It addresses issues such as environmental protection, fair treatment of workers, human rights and a competition policy. The Guidelines speak directly to corporations, and do not focus only on how governments supervise and regulate them.

The principles in the OECD guidelines were not crafted with a view to being legally enforceable. Many of its norms go beyond limited and precise "do's and don'ts"; they are cast in general terms that call for positive efforts to achieve general goals, such as promoting economic and social development. Other provisions "encourage" various kinds of socially beneficial conduct, rather than setting out mandatory requirements.

Some of the norms go admirably beyond what international law currently requires. Treaties on corruption, for example, regrettably but typically permit "facilitation payments" – bribes to secure the performance of routine governmental functions – as opposed to those necessary to secure a contract or economic right in the first place. The OECD guidelines more generally and admirably call for multinationals to refrain altogether from bribery.

Under the OECD guidelines,¹⁸ each state that adopts them is required to establish a "national contact point" (NCP). The latter can be a government office, or it may consist of a body with appointees from government, labour, employers' organizations or other interest groups. The NCP is mandated to publicize and promote the Guidelines, answer queries about them, report to the OECD on its activities and assist in resolving specific complaints. Specific complaints about compliance by a multinational with the Guidelines can be made to an NCP. If those involved in a particular instance cannot reach an agreed resolution, the NCP is required to issue a statement on what, in its view, the Guidelines require.

An NCP must report annually to an OECD Committee on International Investments and Multinational Enterprises (CIME). The latter's responsibilities include assessing whether an NCP has met its obligations, and issuing an opinion on whether the Guidelines have been correctly interpreted when an NCP has considered a particular case.

The OECD guidelines are similar to many initial innovations in international norm-building: they are not legally enforceable, but are instead supported by a system of monitoring and publicity.

The international community ought to explore whether linkage between a WTOAI and the OECD guidelines is possible. There are many possible options.

¹⁸ See The OECD Guidelines for Multinational Enterprises, online: <<http://www.oecd.org/dataoecd/56/36/1922428.pdf>>.

One option would be to require parties to commit to both a WTOAI and the OECD guidelines as part of the overall WTO package of agreements. CIME could remain responsible for oversight, or be replaced by a WTO equivalent.

Another possibility would be a “partially binding/partially hortatory” model. The WTO parties would identify those provisions of the Guidelines that can and should be regarded as legally binding. Here is an analogy: when the Parliament of Canada adopted into its comprehensive privacy statute a set of guidelines prepared by the Canadian Standards Association, it stipulated that “should” statements would be considered as recommendations, rather than as obligations.¹⁹ Parliament also legislated a series of exceptions and qualifications to the guidelines. The WTO parties could adopt a similar approach to the OECD guidelines. They could authorize CIME (or its WTO equivalent) to continue to oversee compliance generally, but provide the additional options when a special interest group or state believes there has been a violation of a mandatory provision of the guidelines that has been identified as mandatory.

Under the “partially binding/ partially hortatory” model, what would be the consequences for a corporation that is found to be in violation of the guidelines?

One possibility would be the “clean hands” approach: a multinational could not invoke its rights to bring a claim under the WTOAI against a host state if that multinational has been conducting itself in that state in a manner contrary to mandatory provisions of the Guidelines. Once again, there are problems in both principle and practicality with such tight linkage. The “punishment” to the corporation might greatly outweigh the crime. The multinational’s WTOAI claim might be endlessly stalled and protracted, moreover, by the host state’s attempts to show that the multinational has behaved improperly in any of a number of respects.

The most simple and achievable approach, then, might be the first identified: to combine in the WTO system a set of rights for investors that are enforceable, but to require that all WTO parties also commit to the OECD guidelines or some variant of them.

There might be complaints that investors have enforceable rights under the WTOAI, but that the Guidelines are not legally binding. There are, however, reasonable answers to this point.

- Investors are subject to the legally binding regulations by both their home states and by the host state. The WTOAI rights given to investors would only be a means of self-

¹⁹ *The Personal Information Protection and Electronic Documents Act*, S.C. 2000, c. 5.

defence to multinationals against certain kinds of discriminatory, protectionist or unjust conduct. The OECD guidelines would encourage home and host states, as they craft appropriate regulations, to constrain multinationals and to encourage them to comply with these laws;

- The OECD guidelines contain some norms of a broad nature that are intended to inspire and encourage socially responsible activity, but are too broad or demanding to properly be treated in the same way as clearer and more modest do's and don'ts.

A further question of "linkage" between a WTOAI and other norms is as follows: to what extent should any WTOAI expressly provide that states are justified in limiting investors' rights in the interests of other values, such as health or the environment?

The GATT agreement on goods contains a section (Article XX) that lists a set of values that justify a state in infringing on GATT's open-trade norms.²⁰ States can adopt measures that are necessary to protect these interests as long as the measures involved do not amount to arbitrary or unjustified discrimination and are not a disguised form of protectionism. A similar approach was adopted in the General Agreement on Trade in Services (GATS).

Chapter XI of the NAFTA, unlike some other chapters, is not generally subject to a Chapter XX. Some particular provisions, including 1106, do contain Chapter XX-like language. Concerns might be raised about whether investor-protecting provisions that are not linked to a "safety valve" pose an unreasonable threat to the ability of host states to regulate in the interests of social values.

In the S.D. Myers case, my separate concurring opinion suggested that reasonable freedom of regulation for host states was supported by considerations apart from Chapter XX. In the context of the "national treatment provision" of Chapter XI, I suggested that:

Among the conclusions that I will arrive at is this: that in determining whether a foreign investor has been discriminated against, contrary to Article 1102 (National Treatment) of NAFTA, a tribunal may in many cases have to pursue the same kind of approach as would be taken in an Article XX case under the GATT. In particular, if:

²⁰ Such values include the protection of "human, animal or plant life or health" and "the conservation of exhaustible natural resources." See article XX online: <http://www.wto.org/english/docs_e/legal_e/gatt47_02_e.htm#articleXX>.

- a government has a legitimate environmental objective; and
- something about the situation of foreign investors unavoidably requires them to be treated differently from local investors in order to achieve that environmental objective

then the appropriate conclusion will generally be that the foreign investors is not being subjected to the kind of discrimination that is prohibited by Article 1102 (National Treatment) of NAFTA.²¹

As did the main tribunal award, my separate concurring opinion also took note of a variety of signals within Chapter XI and from the side-deals that suggested that the interpretation and application of open-trade norms in NAFTA should take account of the importance the NAFTA parties placed on environmental protection.

The simplest route, however, might simply be to include a Chapter XX safeguard in any WTOAI, just as was done with the GATT. This approach would permit the interpreters of the WTOAI to draw on state practice and a growing body of WTO case law on the meaning and application of Chapter XX generally.

Does Chapter XI teach anything about the approach, scope and language of investor-protecting norms themselves?

The most activity and disagreement in the context of Chapter XI was with respect to the open-textured language of Article 1105, the "general protection" provision. Article 1105 states that:

Minimum Standard of Treatment

1. Each Party shall accord to investments of investors of another Party treatment in accordance with international law, including fair and equitable treatment and full protection and security.
2. Without prejudice to paragraph 1 and notwithstanding Article 1108(7)(b), each Party shall accord to investors of another Party, and to investments of investors of another Party, non-discriminatory treatment with respect to measures it adopts or maintains relating to losses suffered by investments in its territory owing to armed conflict or civil strife.

²¹ *Supra* note 13.

3. Paragraph 2 does not apply to existing measures relating to subsidies or grants that would be inconsistent with Article 1102 but for Article 1108(7)(b).

Within and among NAFTA panels, varying interpretations have been offered of this provision. As noted earlier, the three NAFTA parties issued a joint clarification of its meaning in light of several earlier provisions. The drafters of the WTOAI will obviously want to review these NAFTA decisions and clarifications with a view to defining the envelope of possible interpretations under a similar provision of the WTOAI. It is especially important to do so in the context of the WTOAI for several reasons:

- With NAFTA, more open-ended language might be defensible in light of the ability of NAFTA parties to issue binding interpretations by consensus. No such “clarification” process is plausible in the context of the much larger and, more ideologically divided WTO family. Negotiated revisions to the agreement are the only effective way of amending it; Given the experience with the MAI, in which oppositionist NGOs raised concerns based on worst-case possibilities concerning the interpretation and operation of language, the political project of “selling” a WTOAI will be best promoted by providing as much clarity and direction on the meaning of provisions as possible.

It has been argued earlier that it may be useful to draw upon other areas of GATT with respect to defining “safety valves” for Chapter XX, so it might be useful to draw upon those other areas in defining investor-protecting norms. The concepts of administrative impartiality and transparency have been expressly incorporated in various sections of the GATT family, and some “cutting and pasting” must be useful in better defining the WTOAI equivalent of s. 1105. Another issue that could be addressed is whether unfairness has to rise to some level of seriousness or material impact before it can trigger a complaint under a “general protection” provision in the WTOAI.

The next major issue to be addressed is the scope of application of the WTOAI: would certain areas be exempted from its application (e.g. culture)?²² Would states be able to unilaterally shield existing measures from

²² See Bryan Schwartz, “Canadian Cultural Policy in a World Context” (2002) 2 *Asper Rev. of Int'l Bus. and Trade Law* 1-21, for a skeptical view of cultural protectionism (“keeping out”) and the counterproposal that states focus instead on taking positive steps to build up the cultural activity and understanding within their borders (“building up”).

its application? Would states be able to add additional reservations beyond existing measures? Would the WTOAI disciplines *prima facie* apply to all sectors, or only to those which a state chooses to voluntarily place on a schedule?

The GATS agreement is based on the last-mentioned model. The theory is that in successive rounds of negotiations, states will negotiate and cajole each other into adding more and more sectors to their individual schedules. The model of progressive liberalization was used in the original GATT with respect to tariff reductions on goods.

Chapter 11 of NAFTA *prima facie* applies to almost all sectors. The following limitations, however, are recognized:

- There is a “carve out” for financial services, which are dealt with by another Chapter of NAFTA, Chapter 14;
- Subsidies and government procurement are also largely excluded by Article 1108(7). States are also permitted by Article 1108 to shield existing non-conforming measures;
- General exceptions to the scope of NAFTA are set out in Chapter XI, including measures to protect national security and many tax measures;
- As experienced between Canada and the United States, there is limited protection for “cultural industries.” A party has the right to unilaterally shield a cultural program from the application of NAFTA, but the other party has the right to engage in proportionate trade retaliation in some other area.

On the whole, then, Chapter 11 is broad in its application and carve-outs and room for opting-out is limited.

It seems likely that the WTOAI will, to a considerable extent, be based instead on the “progressive liberalization” model. The Doha Declaration refers to the “positive list” approach used in GATS. States will have the option of keeping many or all sectors of their economy closed to the establishment of foreign investment. Once investment is permitted, however, obligations such as non-discrimination would apply.

Some scholars have argued that the incremental, “positive list” approach is the only one that is politically feasible. In NAFTA, only three parties had to agree to investment liberalization. In the WTOAI system, where many more states would be involved, how would consensus be possible on a high level of discipline?

It will be regrettable, however, if the WTOAI simply adopts the GATS opt-in approach. The governments of many states, including developing

ones, may continue to deny their people the benefit of greater inflow of investment. It is doubtful that progressive rounds of negotiation will succeed in opening economies. With GATS, it is possible to trade concessions of the same kind and readily comparable value; state A can offer to open up its education sector to state B (and by the non-discrimination principle, to all other WTO states) in return for state B's opening up its transportation sector to state A (and by the non-discrimination principle, to all other WTO states). With respect to investment however, how would a similar trade-off work when state B has little capital to export, and sees no advantage in state A's permitting more foreign investment?

It would be preferable therefore for the WTOAI to have a broad *prima facie* sweep and limited exceptions. Failing that, if the "GATS-like" approach is to be used, there should be an obligation on all states to at least open up a specified percentage of its economy. (In the Uruguay round of WTO negotiations, states committed to reduce the percentage of agricultural support they provide, so there is precedent for putting an aggregate ceiling on the amount of trade-distorting measures adopted). In each round, the floor could be increased at the same time as discussions take place on specific issues.

With respect to dispute-settlement and other institutional arrangements, Chapter 11 made distinct and innovative provisions for investment disputes. It was provided that a state could directly bring to international commercial arbitration a complaint against a host state in respect to an alleged Chapter 11 breach. The investor was given the option of using a variety of existing systems, including the International Centre for the Settlement of Investment Disputes (ICSID)²³ or United Nations Commission on International Trade Law²⁴ (UNCITRAL) rules.

As an arbitrator in a Chapter 11 case that is still under judicial review as I write, I have been reticent about canvassing the quality or character of the cases actually decided under Chapter 11. While some remain concerned about the potential for arbitral panels to interpret and apply NAFTA in a way that is unduly favourable to investors, some observers of the actual history to date have suggested that the track record suggests a balanced approach. The latter note suggests that arbitral panels have not been unduly receptive to investor claims at the expense of state sovereignty; that most claims have in fact been outright objected; that even where claims have to some extent been allowed, such as my own case, S.D. Myers, arbitrators have taken note of the directions in NAFTA con-

²³ See online: <<http://www.worldbank.org/icsid/>>.

²⁴ See online: <<http://www.uncitral.org/>>.

cerning the broad authority of governments to act in the public interest, including in areas such as the environment.²⁵

The experience with Chapter 11 raises a number of questions for study:

- Should investors be free to choose among several existing arbitration options that exist independently of the WTO?
- Should an investor-state mechanism be established within the WTO? If so, how will that system fit in with the general dispute-settling mechanism under the WTO?

NAFTA does not have a binding dispute settling mechanism with respect to most issues, so there was no ready means of integrating the Chapter 11 process with a general mechanism. That opportunity would exist within the rules of the WTOAI. The major triumph of the Uruguay Round of the WTO negotiations in 1994 was to create a general system of legally binding settlement of specific disputes. It includes panels at first instance, and then an appeal to a standing appellate body.

Serious consideration should be given to using the same process for investor-state disputes under the WTOAI as is generally done under the WTO. There would be more certainty about the remedial path to be followed. The parties would have the institutional support provided by the WTO. Useful innovations in the WTO procedures, whether developed by treaty amendment or practice, could be extended to investor-state issues. A consistent approach might emerge, for example, with respect to the right of non-governmental organizations (NGOs) to make submissions in cases generally. A body of public precedents would be established, with the Appellate Body helping to provide a clearer sense of overall direction. Ideas from the investor-state area could be applied in other kinds of disputes, and vice versa.

The case for access to an appellate body is greater in the context of the WTOAI than it is in NAFTA for several related reasons. First, under NAFTA, clarifications of Chapter 11 can be achieved by consensus of the three parties. If a course of decisions is unclear or, in the view of democratically accountable governments, mistaken, corrective action is possible in many cases. By contrast, rapid and unanimous agreement seems like a farfetched possibility in the context of the much larger WTO family.

²⁵ C. H. Brower III, "Investor-State Disputes under NAFTA: A Tale of Fear and Equilibrium" (2001) 28 *Pepp. L.Rev.* 43, 46.

Finally, some consideration should be given to what is missing in NAFTA Chapter 11, compared to what is required by the values that underlie open trade regimes generally. The main gap, in my view, is the absence of any effort to deal with investment incentives. Multinationals are free to pit NAFTA governments (including subnational governments like states, provinces and municipalities) against each other in bidding wars to obtain investment. The multinational ends up unnecessarily benefiting at the expense of the taxpayers of the "winning" country; if there were mutual subsidy disarmaments, no state would have to build and feather the nest for the new arrival. The decisions by governments about which particular investments to support are inevitably subject to influence by partisan political considerations. Governments are likely to be influenced by corporate power (including campaign donations) and by the extent to which a potential investment site in the country might reward the government with a sizeable wad of votes in the next election. Keeping government out of investment incentive wars is a way to keep government more honest, impartial and rational in the way it taxes and spends. Even a government that is trying to view the matter from a strictly clinical economic perspective is not likely to be a skilled chooser of which investments are likely to be long run winners and losers.²⁶

Article 1108 of NAFTA exempts from the application of the non-discrimination principle "subsidies or grants provided by a Party or a state party, including government supported loans, guarantees and insurance." Within the MAI proposal, OECD states adopted varying views on investment incentives, ranging from "do nothing" to proposing that investment incentives be governed by a non-discrimination principle.

Limitation on investment incentives ought to be of particular concern to less developed countries. They should not be in a position where they can lose much-needed capital to developed countries who can strew the path of a potential incoming investor with money; where scarce resources are spent in "successful" incentive wars with other developing countries; where the prestige and resources devoted to luring an investor helps to tighten the government's relationship with the winner, to the detriment of a fair and impartial government.

Ideally, the competition for investment among states will take place in the area of providing a healthy climate: states will concern themselves with providing an honest legal system, well trained or educated employees, transportation and communication networks that are affordable and safe, and reasonable levels of taxation. In pursuing these goals, govern-

²⁶ B. Schwartz and K. Boryskavitch, "Subsidies and the Agreement on International Trade", (2003) 3 *Asper Rev. of Int'l Bus. and Trade Law*.

ments will not be influenced by favouritism for particular enterprises or make the mistake of thinking that politicians and bureaucrats have the necessary information and experience to determine which particular private sector projects should be initiated with the benefit of public hand-outs.

The WTOAI would ideally include disciplines on investment incentives. The MAI negotiating text reflected uncertainty and disagreement among the parties about what, if anything, should be done about investment incentives. Those who favoured even tougher measures proposed, as a compromise, the following options:

- Stipulating that investment incentives must be governed by the non-discrimination principles of GATT (Most Favoured Nation Treatment prevents discrimination among different countries and National Treatment prevents discrimination between outsiders and locals);
- Requiring that the principle of transparency apply, so that the rules of the investment subsidy game would be public and known to all; and
- Permitting another party that considered itself adversely affected to at least require consultations.

These disciplines would at least make a start on bringing the “incentive war” under control. But they would in most instances leave states free to continue to victimize themselves and beggar their neighbors through competitive subsidies. In addition to the measures mentioned here, perhaps the WTO parties could consider:

- Caps on the size of the incentive that could be given in the context of any investment – e.g., 5% of the value of the capital investment that the company will be making in its first ten years of operation; and
- Caps on the overall percentage of the GDP that a state can spend every year on investment incentives – some small percentage of its GDP.

CONCLUSION

SOME ACADEMIC COMMENTATORS HAVE QUESTIONED whether much effort should be made in producing a WTOAI in the Doha round.²⁷ They argue that there is a large web of bilateral investment treaties, BITs, which add up to a fairly large measure of security and liberty for investment; that the trend in recent years has been for states to unilaterally liberalize investment; that there is no “great clamour” from any quarter demanding such a treaty.

My response would be as follows:

- The system of BITs leaves out many potential bilateral relationships, and there may be many states that are not party to any of them. As a result, many states, including less developed ones, may be receiving far less investment than they could be if there were a reasonable WTO regime in place. It would be a service to the people of some of the less developed countries to require their governments – if they wish to remain part of the WTO system – to accept a WTOAI as part of the package;
- The system of BITs is complex and involves very different treatment by one state of its potential trading partners. A major virtue of the WTO in general is that it simplifies and equalizes the terms and conditions of international trade on a global basis. Doing so in the area of investment is of value just as it is with respect to goods and services;
- If many states are currently more open than usual to foreign investment, this is the best possible time politically to attempt to entrench some level of liberty and security for investment in the WTO system. Making progress in the WTO is always difficult, considering the complexity of the issues and the need for consensus. If there is a tendency toward openness in a particular area of trade, the moment should be seized; it may not soon come again. A “clamour” for reform will often be necessitated by the observation that some states are currently resolved to adopt harsh and protectionist measures; the prospects of achieving global consensus on openness at such times are going to be particu-

²⁷ K. C. Kennedy, “A WTO Agreement on Investment: A Solution in Search of a Problem,” Spring 2003, U. Pa. J. Int’l Econ L. (2003).

larly grim;

- The building of the WTO system requires a long-term vision, and the willingness to adopt a series of specific programs to incrementally achieve it. If freedom and security of investment would promote world social welfare – and it is submitted here that it would – then at least some steps should be made in this round to more firmly place investment disciplines in the system.

The Doha round could be an opportunity to show how freedom and security of investment can be linked with other goals, such as promoting good corporate citizenship, in a way that facilitates the development of a world trade system that is widely seen as balanced and just. Comparing and contrasting the MAI and NAFTA experiences can be a useful exercise in thinking through the theoretical possibilities and political sensitivity needed to place another important chapter in the global constitution.