Is There Still a Possible Future for a Multilateral Investment Framework? (A Look at the Need for Incorporating Sustainable Development in FDI)

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1. Introduction

Jakarta- Today, Indonesia’s former environment minister, Mr. Sonny Keraf steps back into the area and joins the growing public outcry against last week’s recommendation to grant 15 mining companies access to protected forest areas. The House of Representatives (DPR), through Commission III and VIII, are currently deciding whether to sacrifice 11.4 million hectares of protected forest areas to a mining industry that has aggressively lobbied the government to lower its own environmental standards1. (Mineral Policy Institute, June 23, 2003)

Foreign Investment has become one of the important sources of income for a country and therefore has been engaged by governments around the world. Aside from benefiting the countries that allow investment into their territory (employment of labour, technology transfer, income from taxation, economic welfare), foreign investment would also bring in benefits for the foreign investors themselves (profit, capital gain, expansion of market). The need for economic growth and development in a global scale, have created more opportunities from developed as well as developing countries to engage in foreign investment. In the long run, it became apparent that competition arose, both from investors who seek investment opportunities overseas, as well as for those countries that have become more active in attracting investment to foreign investors.

However, if not taken care of properly, investment can also bring in negative aspects for either or both parties. The main issue would be if either the government or the foreign investor has concluded that there are problems in carrying out their responsibilities, it may cause the other party to lose its benefits or become disadvantaged, i.e. if an environmental problem arises such as the example seen in the article above.

With the different needs of each side, it then becomes an issue of how developed and developing countries or Least Developed Countries (LDCs) have different interests in order for their respective countries to obtain economic growth and increase the welfare of their citizens.

It is indeed a fact that the trans-boundary nature of foreign investment creates issues of having to select between different laws when a dispute arises and may cause a disadvantage to a particular party from either side. Therefore, legal certainty becomes important when engaging in foreign investment. It is also important that there is a consensus prior to using a particular law in a dispute settlement mechanism should such a dispute arise. Hence, there should be a prior mutual agreement made in order to manage and anticipate any issues during the process of pre-establishment or post-establishment of investing in a country. As more and more countries become engaged in global trade and investment with each other, there will likely be more cases arriving there from.

There are various ways of defining investment, and investment itself can be differentiated, depending on the type and purpose. This paper will focus mainly on the issues of foreign (direct) investment. According to Sornarajah2, “Foreign Investment involves the transfer of tangible or intangible assets from one country into another for the purpose of use in that

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1 Mineral Policy Institute, Public Outcry over Mining Threat to Indonesian Protected Forests, http://nrm.bappenas.go.id/HLN/03_11.html
country to generate wealth under the total or partial control of the owner of the assets.” He has also differentiated the term Foreign Direct Investment (FDI) with that of portfolio investment where there is “a movement of money for the purpose of buying shares in a company formed or functioning in another company, the distinguishing element being that, in portfolio investment, there is a divorce between management and control of the company and the share ownership in it.” 3 Sornarajah has also quoted E. Graham and P. Krugman’s definition by elaborating that “Foreign direct investment is formally defined as ownership of assets by foreign residents for purposes of controlling the use of those assets”.

Issues of foreign investment cannot be separated from the fact that it encompasses various aspects and dimensions, not just merely an economic issue, but it also has social, legal, political, cultural, as well as environmental implications. The investment practices that have been taking place for decades with the entrance of foreign investment from one country to another, have also been creating complexities in the area of international law as it also touches upon the issue of sovereignty of a state. “In the second half of the twentieth century, apart from the international law on the use of armed force, no area of international law has generated as much controversy as the law relating to foreign investment.” 4 The reason being is that historically, it arouse from the time after the end of the Second World War, when colonialism released forces of nationalism, which has also caused the newly independent states to end the economic dominance of the former colonial powers while creating the opportunity for them to control their own economies and enter themselves to the world market. 5 However, this also created another issue, that during the cold war, super powers have made foreign investment a battleground for ideological conflicts. 6 Thus, the non-aligned movement, which arose in response to this rivalry exerted pressure to ensure that each newly independent state had complete control of its own economy. 7

However, nowadays, international investment has become one of the ‘main manifestations and causes of globalisation’ 8. It has also created the opportunity for Multinational Corporations (MNCs) to increase their power in attaining their earnings to the capital-importing states. 9 They have become the “principal instruments of foreign direct investment and exerted power and influence akin to and sometimes exceeding those of states”, thus regarded by some as posing a “threat to the sovereignty of states”. 10 According to UNDP’s 1999 Human Development Report, global corporations now exert more economic power than nation-states, with 50 of the largest 100 economies in the world run by multinationals, not by countries. 11 It is also worth noting that according to the 1999 UNCTAD World Investment Report, total assets of the 500,000 foreign affiliates of some 60,000 Transnational Corporations (TNCs) are $14.6 trillion, of which estimated sales of $11 trillion top worldwide exports ($7 trillion) and the sales of foreign affiliates have grown faster than world GDP and exports of goods and services. 12

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3 Ibid, p. 4.
5 Ibid.
6 Ibid.
7 Ibid.
9 Sornarajah, Ibid.
10 Ibid.
12 Sikkel, supra. P. 161.
With the increase of companies worldwide engaging in cross-border mergers and acquisitions, particularly within the last decade, it has become difficult to identify the nationality of a foreign company as they can, for instance, come from one country and set up a business not necessarily in their country of origin, and after a while acquire or be acquired by one or more foreign firms from other countries.

“Furthermore, cross-holdings, share listings in several stock exchanges, the location of headquarters in countries other than the country of origin, and sourcing of inputs from facilities in multiple countries are all examples of how the ownership and nationality of TNCs have become less clear-cut”13.

Consequently, this will entail further complications in monitoring the activities of a TNC, let alone regulate their business should they cause any harm or damage in the country or its residents where it operates, creating the ability of TNCs to “internalize cross-border transactions and bypass national controls and scrutiny”14.

A question then arises on why do companies expend the effort required to invest abroad, even more so to developing countries, rather than staying in their home country and producing for export and/or licensing their technology to foreign companies15:

“Researchers have examined this issue for almost forty years. There is now a degree of consensus that an MNC typically is the outcome of three interacting circumstances. First, the firm owns assets that can be profitably exploited on a comparatively large scale, including intellectual property (such as technology and brand names), organisational and managerial skills, and marketing networks. Second, it is more profitable for the production utilizing these assets to take place in different countries than to produce in and export from the home country exclusively. Third, the potential profits from “internalizing” the exploitation of the assets are greater than from licensing the assets to foreign firms and are sufficient to make it worthwhile for the firm to incur the added costs of managing a large, geographically dispersed organisation”.

Creating a profitable yet sustainable and fair investment regime worldwide would be too idealistic, however, it can be an objective that can be pursued with the cooperation and involvement of all parties engaged in foreign investment.

“The role of direct investment in the sustainable economic development of developing countries is well recognised. Accordingly, there have been calls for the creation of healthy investment climate world-wide for increased foreign investment16.”

2. FDI and Sustainable Development

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14 Ibid.
15 See www.wto.org/english/news_e/pres96_e/pr057_e.htm, Press Release PRESS/57 (on 9 October 1996)
16 Surya Subedi, Foreign Investment and Sustainable Development, p 413
Without the control of law that bind the parties involved, it would be difficult for a level playing field for investment to be created for the benefits of all. It is the reason then, that binding agreements among states was established so that there would be a clear enforcement and mutual understanding among the contracting states in order for the investment to take place without the fear of any parties being irresponsible or causing harm to the other party, such as lowering the environmental or labour standards by MNCs (creating a ‘race to the bottom’ effect) or unlawful government practices in host countries in order to gain individual profit from foreign investors (resulting to good governance issues).

International Investment Treaties or Agreements can be in various forms which can provide the framework for legal certainty for actors of foreign investment: ones that take place between 2 states (bilateral), between states within a particular geographical region (regional), between regional groups (plurilateral) or between states within the international global area (multilateral)\(^{17}\). Up to now, investment has been made in the form of bilateral, regional or intra-regional scope, as well as national laws or legislations which control foreign investment activities within a country. Unlike international trade relations, which have been legally bound under the globally practiced framework of the WTO that is applied globally (particularly towards its members), international investment has yet been formulated into a comprehensive global arrangement that is binding for actors of investment to abide to.

As both the capital-exporting states (home country) and the capital-importing countries (host country) coming from all parts of the globe have their own particular interests in order to achieve their own particular (economic) goals, it becomes apparent that the issue of creating an investment agreement in a global nature may cause conflicts, either during the process of negotiating the terms and articles of the agreement, as well as during the time of its implementation.

Host countries fear investor’s behaviour such as in labour and environmental issues, investors fear of having their investments expropriated through unlawful nationalisation process, discriminative treatment towards foreign investors (MFN, national treatment), developing countries’ fear of loss in their sovereignty as well as the fear of their domestic investors losing competition from the foreign investors which tend to have more resources and better capabilities in entering a market, thus can threaten the BOP or reserves and financial stability of the host country. This is why there is a binding investment regulation is required in order to create a healthy and sustaining investment climate for all.

However, there is an issue of what is clearly defined as ‘sustainable development’. There are various definition, but the Bruntland Commission of the World Commission on Environment and Development define sustainable development as: “Development that meets the needs of the present without compromising the ability of future generations to meet their own needs”\(^{18}\).

A foreign investor seeking for long-term investment in a country would only have confidence to open up and maintain their investment in that country if provided that the investment climate in that country is positive. On the other hand, those who are purely into the profit-making-oriented investors would search for those with the lowest standards. The ability for a host country to uphold the law and enforcing it is a key factor to convince investors that a country is safe for conducting business. That would entail, among others, that the investor

\(^{17}\) UNCTAD, World Investment Report 2003: FDI Policies and Development: National and International Perspectives, p. 88

\(^{18}\) Muchlinski, P, Towards a Multilateral Investment Agreement, p. 430
receives assurance that there is legal certainty for the investment put in would not be disturbed. Such issues as lengthy and complicated procedure to set up an investment, discriminative treatment between local and foreign investors by the local government, corruption or bribery by government officials, labour strikes, political chaos, unlawful expropriation of asset through nationalization process, governments using deregulation to attract investment; all those would mean that investing in that particular country would be risky and have the potential to suffer loss as well.

This is the main reason why economic, social and political stability is needed; legal certainty in the form of transparency of the domestic law and regulations should be upheld. There should also be binding agreements reached through fair and open negotiations between the host country, home country as well as the foreign investor on the conditions that need to be set for a favourable and sustainable investment.

As can be seen in the following sections, further analysis will be made on the efforts afforded by the OECD and the WTO to create an international investment framework which did not succeed in the making. In addition, it will see the current arrangement though BITs and other trade and investment arrangements in the past few years after the above unsuccessful attempts. Lastly, it will analyse the recent need to create a healthy global investment climate and whether or not the effort to see an outcome of any proposals for a new international investment agreement is worth looking into.

3. The Beginning: Negotiations of a Multilateral Investment Framework

This chapter will analyse the efforts that have been made by the first international institution that pioneered in formulating an international agreement on investment and identify the reasons of its failure.

The first international investment agreements were concluded through Bilateral Investment Treaties (BITs). During the 1950s through the 1970s, these treaties were mostly entered into by European capital-exporting countries and developing countries. During that time, there were only approximately a dozen treaties concluded each year, but then it rose to an average of 24 treaties per year in the early 1980s, and increased to around 40 treaties annually at the end of the 1980s. The number grew substantially ever since. According to UNCTAD, the number of BITs grew significantly during the 1990s. Their number increased from 385 in the year 1989 to a total of 2,265 in the year 2003. They now involve 176 countries and over 100 regional investment agreements concluded among states. While to-date, there has not been any multilateral investment agreement enforced, although several attempts have been made during the past decade, without success.

The first bold attempt in drafting an multilateral investment agreement was made by the Organisation for Economic Cooperation and Development (OECD), who had negotiated since 1995, the establishment of a binding agreement for its members, commonly known as the Multilateral Agreement on Investment (MAI), which would be subsequently open for

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19 Dolzer and Stevens, Bilateral Investment Treaties, p. 1, The first BIT was signed between the Federal Republic of Germany and Pakistan in 1959.
20 Dolzer and Stevens, Bilateral Investment Treaties, p. xii.
21 D Ibid.
22 UNCTAD, UNCTAD Analysis of BITs, [http://www.unctadxi.org/templates/Page_007.aspx](http://www.unctadxi.org/templates/Page_007.aspx)
signature (accession) to other non-members of the OECD. The contents of this agreement was made in a way to cater mostly the needs of transnational companies by focusing the need to protect the investor’s investment in the host country, therefore emphasising mostly on the need to have a fair and equitable treatment with local investors and strong dispute settlement system which would enable investor-to-state process in the event of any cases such as unlawful expropriation by a host country or other acts that may disrupt their operation in the said country.

3.1 How the Idea of Creating a Multilateral Investment Framework Came About

The process of formulating the MAI was made through long negotiations within the 29 OECD wealthy member states, with an initial study conducted in 1991 to analyse the advantages and feasibility of a ‘wider investment instrument’, by concluding that there is a strong need for developing a new multilateral investment agreement with legally binding obligations and enforcement procedures which were to be reported to the OECD ministers in 1995\(^{23}\). The 1995 Ministerial Council took note of the report and agreed to the immediate start of negotiations in the OECD with the conclusion of a MAI by 1997\(^{24}\).

However, the drafting negotiations of the MAI were made in closed doors, therefore little had known the contents of the agreements being formulated. Only after nearing the end of the drafting which was scheduled to end in time for the next Ministerial Council in 1997, more parties, including observers from civil society groups and several developing countries were invited to provide their inputs before finalisation, bearing in mind that the agreement was made to be ratified by member states and open for accession to non-member states. What eventually happened consequently was the emergence of growing disagreement and complex controversy among civil society groups and developing countries on the deliberation of the agreement which focused too much on the investors’ point of view and objectives.

As the process of the negotiations neared the end of finalisation, more people became aware of the contents of the agreement which was highly influenced by the NAFTA Agreement. Non-Governmental Groups (NGOs) from Canada and the US who were initially actively debating on NAFTA, began to take a closer view at the MAI negotiations, by gathering information and trying to involve themselves in the remaining negotiation process\(^{25}\). The groups had scrutinised the articles relating to the provisions of expropriation and performance requirements, the impact on labour and developing country issues, but mostly they were concerned on the potential environmental impact of the MAI Agreement. This pressure led to them being invited in the negotiating group in October 1996. The NGOs in Paris (where the headquarters of the OECD is based) had the opportunity to have consultations with the OECD Group. Other groups in various other cities have also began building up pressure. The OECD then agreed to an informal meeting between the office of the negotiating group and some selected NGOs in December 1996. The negotiators in OECD made efforts to respond to the concerns raised such as by developing the ‘three anchor approach’\(^{26}\), however it did not prove effective.

As a result, the original deadline of May 1997 for concluding the negotiations failed to be met\(^{27}\), and the following negotiations involving NGOs hearing sessions did not manage to

\(^{23}\) Sikkel, p. 162.
\(^{24}\) Ibid. p 162-163.
\(^{25}\) Sikkel, p. 164.
\(^{26}\) Ibid., for more information on the three-anchor approach, see footnote of Sikkel in p. 164.
\(^{27}\) Ibid.
bring consensus to the conflicting parties, as the issues that were raised among them could not be resolved. Those debated issues within the draft MAI Agreement included, among others: not to lower environmental and labour standards to attract foreign investment, the relationship between the exercise of normal regulatory powers of government and expropriation and investors’ responsibilities in this field, the treatment of measures taken for reasons of security, public order, regional economic integration organisations, culture, subsidies, and government procurement, extraterritoriality issues such as conflicting requirements and illegal expropriation28.

There were even more attention from other parties with the media taking part in reporting on the MAI along with its process of negotiations which created more of a stir of opinions worldwide. In the end, it became clear that there lacked political will from the OECD’s side to settle the politically sensitive issues as the resistance grew larger. Debate within the OECD Member States in resolving some other pending issues also rose to surface, resulting in the withdrawal of France from the negotiations, leading the MAI into a halt.

“The MAI proposal arises out of a very specific agenda from which some of the wider implications of sustainable development have been excluded”29.

3.2 The Making of a Multilateral Agreement on Investment (MAI) in the OECD

The drafting of the MAI certainly had created much concern to those who were aware of the implications, particularly if such agreement were to be implemented towards developing countries, where most of the foreign establishments are located at. Therefore when several developing countries such as China, Brazil and Chile were invited as observers during the MAI negotiations, it was found that the articles in the draft agreement were mostly containing standards for the treatment of foreign investors and their investments which were set up too high with the aim to promote and realize the liberalisation of foreign investment worldwide.30

According to the mandate for the negotiations the MAI was to:

- Provide a broad multilateral framework for international investment with high standards for the liberalisation of investment regimes and investment protection and with effective dispute settlement procedures;
- Be a free-standing international treaty open to all OECD members and the European Communities, and to accession by non-OECD member countries, which will be consulted as the negotiations progress”31

The articles proposed in the draft MAI were divided into 12 articles which covers the following32:

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28 Ibid. 164-165
29 Muchlinski, P., Towards a Multilateral Investment Agreement, IEL with a Human Face, p. 431.
31 UNCTAD, UNCTAD Lessons from the MAI, p.13. (Draft MAI, 1995, p. 3)
General Provisions, Scope and Application, Treatment of Foreign Investors and Investments, Investment Protection, Dispute Settlement, Exceptions and Safeguards, Financial Services, Taxation, Reservations, Relationship to Other International Agreements, Implementation and Operation, and Final Provisions.

The requirements of the MAI prohibits host Contracting Parties to adopt special laws or policies on foreign investment in order to accomplish the national economic growth target, particularly with the ‘standstill’ and ‘rollback’ requirements, and they are no longer allowed to adopt such policies or measures after accession\(^33\). This realization of foreign investment will prejudice developing countries’ state sovereignty and have a negative impact on their national economic development. This would be unacceptable to developing countries at a present stage\(^34\), when many of the countries have yet an all-inclusive domestic rule on foreign investment and with certain sectors not being in the same level playing field to compete with the foreign investors, let alone having to accede to an international treaty that will enforce a fully liberalised investment regime using the standards of developed countries. It is worth to note that when the developed countries were in their development stage over half a century ago, they did not extend national treatment either, and also made many reservations with respect to the admission of foreign investment\(^35\). That is to say that the approach used by OECD in constructing the rules for foreign investment were made as if all the countries involved were in the same level of development stage, when in reality it is not.

There is a wide gap between the developed and developing countries which would make it difficult for creating a level playing field if the developing countries were not given the opportunity to create better standards beforehand in order to protect their national economy from deteriorating. Most of the national industries in these countries lag behind to those of the developed countries and their domestic capital are weaker\(^36\), therefore when developing countries open their doors to foreign investors in a way that the MAI desires, they would have to eliminate all measures inconsistent with the MAI and foreign investments from developed countries may flow straight in without any conditions, while the developing countries’ national investors would not be able to compete with the foreign investors\(^37\). As a result, national industries and ‘infant industries’ (i.e. the financial sector, services sector and public utility sector) of the host developing countries would be ferociously attacked or monopolized by foreign investors, causing the foreign investors to control a country’s domestic economy\(^38\).

In addition, unlike many other investment agreements, the MAI had included not only Foreign Direct Investment (FDI), but it also included portfolio investments, which would furthermore risk developing countries with limited resources. This agreement also would enable foreign investors to not only have the same treatment as national investors, but it would also enable foreign investors and their investments to enjoy more favourable treatment than domestic investors and their investments\(^39\).

Moreover, the dispute settlement system in the MAI, which the drafting of articles were made in accordance to NAFTA’s chapter 11, would allow foreign investors the right to sue the host

\(^{33}\) Ibid. p. 86.
\(^{34}\) Huiping, supra, page 68.
\(^{35}\) Ibid. p 68
\(^{36}\) Ibid, pg. 85.
\(^{37}\) Ibid.
\(^{38}\) Ibid.
\(^{39}\) Ibid.
government in an international arbitration tribunal should that government be deemed to cause distortion or loss to the operation of the TNC in the host country. Such a system would not be possible for domestic investors to pursue, thus creating a ‘supranational treatment’ for the foreign investor in a host contracting country.40

NAFTA Chapter 11’s dispute settlement mechanism allows for private parties (investors) to directly initiate arbitration with host states, in what is known as an investor-state dispute mechanism. This procedure contrasts to the process of trade law disputes such as the model used in the WTO, which is strictly state-to-state. Chapter 11 allows parties to arbitrate cases under any of three pre-existing arbitration mechanisms: the International Centre for the Settlement of Investment Disputes (ICSID), the ICSID Additional Facility, and the United Nations Commission for International.

With such a one-sided approach, it is no wonder that there were pressures for the drafting of the MAI by OECD to be reconsidered, as it created dismay from various parties.

One among the main lessons that can be learned from the failure of the MAI, is that any organisation who has an interest in globalisation in general and in investment rules in particular, should take into consideration the concerns of the various groups very seriously if it hopes to have those rules approved by domestic parliaments and supported by the society in general.41

“To avoid and resolve such disputes, and to conclude a worldwide legal investment agreement, the developed countries need to fully take into account and respect the right to their own administration of developing countries in the field of foreign investment and to balance the interest of the two worlds, while at the same time promoting and pursuing international investment liberalisation”.42

3.3 The Debate Continues in the WTO

With the collapse of the MAI negotiations, however, the pressure grew almost immediately for international investment negotiations to be taken up directly by the WTO. The inclusion of investment along with the other three “Singapore issues” (competition policy, government procurement and trade facilitation) for specific study and analysis became the compromise, without prejudice to any further decision on negotiations.43

The issue of creating binding rules on investment is not a new issue within the WTO fora. In fact, the 1948 General Agreement of Tariffs and Trade (GATT) had already included several aspects of investment policy.44 Even before that, it has emerged during the era of establishment of the International Trade Organisation (origin of the GATT and “spiritual ancestor” of the WTO) through the Havana Charter, provisions on foreign investment were already included in Articles 11 and 12 - but attempts to reach a comprehensive multilateral

40 Ibid.
42 Ibid. p. 88.
agreement with binding rules have thus far not been successful\textsuperscript{45}. Even when the ITO was being negotiated, there was a reluctance to extend the scope of trade agreements to include foreign companies for fear that this would undermine sovereignty\textsuperscript{46}.

It was realised at that time that there was a growing importance of FDI, and with the absence of binding multilateral rules on national policies toward FDI, it was viewed as an obstacle that could slowdown the pace of further integration of the world economy. International agreements, such as bilateral investment treaties, double taxation treaties, regional trade agreements and certain WTO provisions play a key role in building investor confidence by locking in policy commitments over time\textsuperscript{47}.

In the 1990s, the EU, through the EU Commission and the EU Trade Commissioner, began to propose that a binding international investment agreement be regulated under the WTO. With the global economy showing progress, the EU suggested that creating a level playing field for FDI would be essential in order to ensure market access, guarantee ‘free choice of means’ without the imposition of ownership limits or performance requirements, and fair and non-discriminatory treatment after entry\textsuperscript{48}.

“Recent developments in international economic law, including but not exclusively the WTO Agreements, reflect that ascendancy in political and economic spheres of a free trade orthodoxy. In turn, they play their own part in embedding and reinforcing that orthodoxy in international economic relations. However, the negotiating framework established in accordance with the principles of state sovereignty, economic self-determination, sovereign equality and pacta sunt servanda serves to ensure that many other interests and ideologies are also reflected in the WTO Agreements and in other recent developments; aspects of these agreements reflect economic nationalism, political independence, preferential trading arrangements, different and more favourable treatment and the doctrine of non-intervention.”\textsuperscript{49}

Issues of investment have been incorporated in other agreements within the WTO sphere. As foreign investment is very much linked with the work of the WTO in the trade and services sector, it has been regulated under other WTO Codes, from The 1994 Agreement Establishing the World Trade Organisation (the Uruguay Round results). These are the Agreement on Trade-Related Investment Measures (TRIMS), the General Agreement on Trade in Services (GATS) and The Trade-related intellectual property rights (TRIPs)\textsuperscript{50}.

TRIMs require compliance to be achieved on certain provisions on trade-related investment measures at different timeframes in accordance to whether it is categorised as a developed or developing country\textsuperscript{51}.

The GATS Agreement regulates the liberalisation of trade in services with specific commitments to be achieved by member states. Among the four modes of supply covered by

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\textsuperscript{45} See www.wto.org/english/news_e/pres96_e/pr057_e.htm, Press Release PRESS/57 (on 9 October 1996)
\textsuperscript{46} Woocock, S. ibid. p. 168.
\textsuperscript{47} WTO, Annual Report 1996.
\textsuperscript{48} Muchlinski, P. Towards a Multilateral Investment Agreement, p. 432.
\textsuperscript{49} Beveridge, F. (2000), The Treatment and Taxation of Foreign Investment Under International Law, p. 2.
\textsuperscript{50} www.wto.org
\textsuperscript{51} Ibid.
\end{flushleft}
GATS Mode 3 (services supplied via a ‘commercial presence’ in the territory if another state) includes investment. This mode is defined as:

“any type of business or professional establishment, including through (i) constitution, acquisition or maintenance of a juridical person, or (ii) the creation or maintenance of a branch or a representative office, within the territory of a Member for the purpose of supplying a service\textsuperscript{52}”.

The GATS include issues of obligations on host country regulators to treat foreign-owned companies in the same way as nationally owned companies (national treatment) after establishment, as well as requirement of most-favoured treatment and transparency issues. It also does not include issues on investment protection and its dispute settlement system uses state-to-state rather than investor-to-state.

TRIPs also contains provisions relating to investment, which can be found in the provisions on investor protection with regard to intellectual property\textsuperscript{53}.

At the First WTO Ministerial Meeting in Singapore in 1996, the EU proposed for the setting up of the Working Group on the Relationship between Trade and Investment. As there were oppositions from many developing countries as well as the US to start negotiations on investment in the WTO, the remit of the Working Group was constrained to studies with due observance of the following\textsuperscript{54}:

1. The implications of the relationship between trade and investment for developing countries and economic growth,
2. the economic relationship between trade and investment
3. the existing instruments and activities regarding trade and investment
4. identification of common features, differences, advantages and disadvantages of entering into bilateral, regional and multilateral rules on investment

Following the above study, during the 1999 WTO Ministerial Conference in Seattle, the WTO had planned to incorporate the investment issues in the launching of a new round of negotiations of the WTO Millennium Round. However, since the Member States failed to reach an agreement, the issue was not continued.

In the Fourth Ministerial Conference in Doha in 2001, the Ministers declared the Doha Development Agenda, which among others agreed to start negotiations on issues of relationship between trade and investment.

In paragraphs 20-22 of the Doha Ministerial Statement, it contains a conditional mandate to negotiate on investment, with the condition being agreement on the modalities of the negotiation at the next Ministerial Meeting in Cancun.

The Doha Declaration paragraph 20 mentions as follows:

\textsuperscript{52} GATS Agreement, Article I (2).
\textsuperscript{53} Ibid.
“Recognizing the case for a multilateral framework to secure transparent, stable and predictable conditions for longterm cross-border investment, particularly foreign direct investment, that will contribute to the expansion of trade…”

Many host countries have made efforts to lure foreign investors through different schemes of investment incentives, while foreign investors make efforts to look for opportunities worldwide to invest at the minimum cost of production and operation as possible in order to gain maximum profit.

As there were no consensus on the issue of investment was reached at the 5th Ministerial Conference of the WTO in Cancun in 2003, the investment issue is no longer pursued in the WTO as part of the Doha Work Programme.

### 3.4 The Reason of Past Failures

UNCTAD assisting developing countries to participate as effectively as possible in international investment rule-making at the bilateral, regional, plurilateral and multilateral levels. The programme embraces capacity building seminars, regional symposia, training courses, dialogues between negotiators and groups of civil society and the preparation of a series of issues papers.

**Global and policy context**

The processes of economic globalisation and the new orientation of many Governments’ economic policies make international investment agreements instruments that contribute to establishing a predictable environment for the promotion, protection and treatment of FDI. Indeed, a number of common elements may now be found among such agreements. At the same time, given that FDI issues are closely interwoven with domestic policy matters, international investment agreements are subject to particular scrutiny.

**Negotiating approaches**

The complexity of negotiations increases as more and more countries are involved. By the same token, the more countries are involved, the more it may be advisable to take a modest and incremental approach. This raises questions of how broad the agenda of any particular set of negotiations should be, and how ambitious parties want to be concerning the nature of commitments. Too ambitious investment negotiating agendas at the international level may have a lesser likelihood of success than more modest and incremental propositions. In any event, the success of negotiations also depends upon the clarity with which each participant perceives the aims and objectives of the negotiations as a whole, as well as the forum in which negotiations take place. Given the complexity of negotiations, pre-negotiation preparation by the parties, and careful preparatory work on the substantive provisions, is therefore important. Moving from the bilateral to the regional level and from the regional to the multilateral level involves not only quantitative changes (in terms of numbers of countries involved) but also qualitative changes (in terms of the nature of the agreements involved). In particular, while investment agreements, be they bilateral, regional or multilateral, by definition are legally binding, multilateral agreements are often perceived as having a more extensive international legislative character, whereas bilateral agreements are seen more as creating special law between the parties. Therefore, the existence of a network of BITs cannot be assumed to signal the preparedness of countries to move to another level, in spite of a convergence of perspectives in certain substantive areas as signified by existing BITs. At the same time, investment rule-making, which takes place in a framework that allows for broader trade-offs between the parties, may prove easier, whether this is at the bilateral, regional or multilateral level. In the final analysis, the desirability and effect of any particular agreement depends on its content.
Content
The negotiation of international investment agreements includes interrelated, difficult policy
issues that at least in principle touch upon a whole range of domestic concerns, including,
increasingly, social and environmental matters. Indeed, such agreements reflect increasingly
the growing internationalization of the domestic policy agenda. Failure to take related issues
of national policy properly into consideration and to reflect a certain balance between rights
and responsibilities – either by including them within the same instrument or by establishing
bridges with other binding and non-binding international instruments – might affect the
overall acceptability of a particular investment agreement.

While international investment agreements by definition contain obligations that, by their
very nature, limit to some extent the autonomy of participating parties, the need for a certain
degree of flexibility to allow countries to pursue their development objectives in light of their
specific needs and circumstances must be addressed. The more investment agreements go
beyond promotion and protection issues and in particular attempt to include commitments to
liberalise, the more complicated their negotiation becomes. Where liberalisation is sought,
progressive liberalisation of investment regulations (going beyond “standstill”) may be more
acceptable than up-front and all-embracing commitments to liberalise.

Procedures
Transparency in the conduct of investment negotiations plays a key role in securing the
necessary support and legitimacy for international investment agreements. The awareness,
understanding and input of civil society from both developed and developing countries is
important. The involvement of all interested parties from the initial stages of discussions or
negotiations, through appropriate mechanisms, may prove crucial for the success of
negotiations.

4. The Current State (Efforts to Create a Common Ground)

With the failure of concluding an MAI by the OECD and as the initiative to include a
Multilateral Investment Agreement within the WTO was unfruitful, many international
institutions began to analyse the implications of the two unsuccessful attempts and on
questioning where should foreign investment arrangement go from here, and whether there is
still a possible future for a multilateral investment framework.

There is no doubt that, although at times there can be conflicts of interests, both developing
and developed countries as well as foreign investors from both parts of the world
acknowledge that FDI is needed to boost their economic income. What becomes an issue is
that, with the competition to attract and obtain FDI becoming increasingly high, there is a
tendency for both governments and foreign investors to pursue a ‘race to the bottom’ by
lowering standards in order to reap the most benefits from the available resources. With such
a stiff competition, these parties have the potential to neglect the developmental and
environmental sustainability. This is where a strong and binding international investment
framework is needed to control foreign investment so that it will not cause substantial loss to
any parties, neglect the needs and welfare of the citizens, or create destruction to the
environment. Host governments should also create national legislations which will ensure that
the implementing domestic laws are in accordance with the above needs. “National
governments need to select the kinds of foreign investment that will produce net benefits for their citizens and reject those investments whose overall impact will be negative.”

OECD Study

With most FDI flows originating from OECD countries, developed countries can contribute to advancing this agenda. They can facilitate developing countries’ access to international markets and technology, and ensure policy coherence for development more generally; use overseas development assistance (ODA) to leverage public/private investment projects; encourage non-OECD countries to integrate further into rules-based international frameworks for investment; actively promote the OECD Guidelines for Multinational Enterprises, together with other elements of the OECD Declaration on International Investment; and share with non-members the OECD peer review-based approach to building investment capacity.

The overall benefits of FDI for developing country economies are well documented. Given the appropriate host-country policies and a basic level of development, a preponderance of studies shows that FDI triggers technology spillovers, assists human capital formation, contributes to international trade integration, helps create a more competitive business environment and enhances enterprise development. All of these contribute to higher economic growth, which is the most potent tool for alleviating poverty in developing countries. Moreover, beyond the strictly economic benefits, FDI may help improve environmental and social conditions in the host country by, for example, transferring “cleaner” technologies and leading to more socially responsible corporate policies.

The UN through its various international bodies have been active in initiating several proposals for creating a conducive place for states and global companies in doing business.

The United Nations Conference on Trade and Development (UNCTAD), as an international institution that deals with development country issues, acknowledges the importance of FDI to their economies.

“With its enormous potential to create jobs, raise productivity, enhance exports and transfer technology, FDI is a vital factor in the long-term economic development of the world’s developing countries”

UNCTAD have contributed in providing technical assistance for developing countries in order for them to prepare when negotiating the modalities of investment in various international investment agreements that they intend to engage in with other countries.

UNCTAD have stated that developing countries seem to recognise that a sound institutional framework is necessary for attracting investment. That is to say, these countries acknowledge that in order to attract FDI in their country, they need to ensure that FDI contributes to their economic development. And this can be achieved with the existence of

55 Ellwood, ibid., p. 61
57 www.unctad.org/sections/dite_dir/docs/wir03br.faundez_en.pdf (last visited 29 July 2005)
legal certainty through the drawing up of binding investment regulatory framework, such as in the form of investment agreements.

UNCTAD has suggested that when developing countries negotiate investment agreements, they should ensure that concessions are made to include 8 key issues of the following:\58:

1. Definition of investment
2. National treatment requirement
3. Rules on nationalization and expropriation
4. Dispute settlement procedures
5. Performance requirement provisions
6. Investment Incentives
7. Technology Transfer
8. Competition Policy

The 8 policy areas should be in line with national development strategies, which should mean that countries must ensure that their foreign investment policies are closely linked to their development objectives.\59 In this relation, UNCTAD continues to play a significant role to Developing Countries to provide technical assistance and guidance during negotiations in order to achieve the above objectives. Such development objectives have also been declared in another UN body through the UN Millennium Development Goals (MDG), which is aimed to be achieved by 2015.

Efforts have been made through The UN Global Compact 2000\60 was created to embrace 9 universal principles, which includes, among others, Human Rights, Labour Standards and Environment. This can be seen as a positive step that can provide at minimum, some guidelines that can create a harmonised system of rules of global economic activities while taking the necessary steps to achieve a sustainable development and “to contribute to the emergence of shared values and principles which give a human face to the global market”\61.

OECD’s attempt to create a MAI and the negotiations in the WTO to include an international investment agreement in the Doha Development Agenda did not succeed in the making due to various reasons. One among them is that the current arrangement lacked the development dimension, which is needed by the developing countries in order for them to sustain their growth, and the lack of the said issue have appeared in the previous proposals introduced in the two institutions. This created further questions on whether there is actually a need to create an internationally binding instrument to regulate foreign investment activities or should it remain as is with the different types of bilateral and regional trade and investment arrangements that currently exist.

However, it is acknowledged that at the current state, there have been a growing number of bilateral treaties engaged between states and regional trade arrangements incorporating issues of investments, creating an overlapping of commitments from the various countries involved which would be difficult to implement. There has been an increase in the number of trade and

58 Ibid.
59 Ibid.
60 See www.unglobalcompact.org
61 UN Secretary General Kofi Annan in commenting on the Global Compact 2000.
investment agreements. Many recent trade agreements address investment directly or have indirect implications for investment.

Ironically, what becomes more difficult is the fact that developing countries continue to have a weak bargaining position in the negotiation process of concluding these investment treaties as well as in its implementation. It is mainly as a consequence of the different perspective on the various economic needs between developed states, developing states as well as the foreign investors which are mostly multinational corporations which leads to concerns that there are conflicts of interests between each other. This notion gained further weight as the discourse and debate intensifies between the different parties with differing interests and priorities.

It is important that the objectives are taken into consideration when engaging in trans-boundary investments with other states as well as with multinational corporations (MNCs) who are actively pursuing foreign investment activities. As far as MNCs are concerned, they have been linked with the needs to promote Corporate Social Responsibility (CSR) in order to minimise the negative effects of globalisation towards other nations.

This is especially true in terms of the implications for developing states which have in the past resisted the international law rules relating to the expropriation of foreign investors and sought instead the development of a new international economic order including, inter alia the establishment of binding rules addressing the behaviour of TNCs. As far as MNCs are concerned, there have been some multilateral arrangements that provide a non-binding international, national, or corporate codes of conduct.

Particular attention in this debate is devoted to the role of transnational enterprises, as they have become prominent actors on the international scene alongside states and international governmental organisations. The traditional power of states to protect and realize social and economic rights has diminished as a result of globalisation, deregulation and privatization; the economic power and influence of transnational enterprises has substantially increased. The investments made by these enterprises can enrich the social and economic development of many countries and contribute to the quality of life of people everywhere. However, it seems that without a clear global agreement on the conditions of investing, in particular in developing countries, it is difficult to find a fair balance between interests of the investors in the one hand, and of the states and the people of the states, in which the investments are made, on the other. There is much debate on the social aspects of the global economy; on globalisation with a human face.

The call made in Agenda 21 adopted by the 1992 Rio Conference on Environment and Development, is an example:

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63 Ibid.
64 Beveridge, Fiona, The Treatment and Taxation of Foreign Investment Under International Law, p. 1.
65 N. Ibid. p. 1.
66 N Ibid.
67 N Ibid., as mentioned by M. Sassoli in “The Impact of Globalisation on Human Rights”.
68 N Ibid.
69 N. Ibid.
70 Niewenhuys, p. 1.
“Investment is critical to the ability of developing countries to achieve needed growth, to improve the welfare of their populations and to meet their basic needs in a sustainable manner, all without deteriorating or depleting the resource base that underpins development. Sustainable development requires increased investment, for which domestic and external financial capital, which depend on a healthy investment climate, are an important source of financial resources.”


Only recently, legal experts and academicians began proposing to have a middle ground that is intended to bridge the gap between the various needs and interests of the differing sides (between capital-exporting and capital-importing countries as well as the main actors of investment, the foreign investors). The previous proposals of MAI by OECD and IIA by the WTO was more of an effort to emphasise investment liberalisation under the initiative of the capital-exporting countries and aimed mostly for the treatment and protection of foreign investors, not including issues that would give certainty to development and environmental sustainability which is the main concern of capital-importing countries.

What is absent, however, is any reference to the linkage of an Multilateral Investment Framework to sustainable development, as opposed to simply development. In particular, a paper submitted by China, Cuba, India, Kenya, Pakistan and Zimbabwe in November 2002 raises a number of issues concerning corporate social responsibility and the conduct of transnational corporations.71

To a limited extent, MNEs, as foreign investors, have been addressed by the International Labour Organisation (ILO) and the OECD in the 1970s through the Codes of Conduct for MNEs.72 Other international institutions have as well come to play for states or TNCs to be called to account in an international organisation such as the UN, NAFTA, or the EU.73 However, most of the responsibilities of foreign investors as well as the role of international institutions are disregarded in the bilateral treaties or other international investment treaties, in particular environmental and social responsibilities.74 This can be seen, for instance, with the regional Investment Agreement of the Association the South-east Asian Nations (Framework Agreement on the ASEAN Investment Area) which mainly focuses on the area of Investment Facilitation, Promotion, and Liberalisation in order to stimulate economic growth and attract more investments into the region, without binding provisions as such to maintain sustainability of the human welfare or the environment nor rules regulating the behaviour of the foreign investors.75

This is why before even embarking on another attempt to create any new international investment framework, there is a need to firstly establish constructive relations between foreign companies and host developing governments. This can eventually be developed into an enforceable set of rules that would provide both the TNCs towards host as well as home countries a basic middle ground for further arrangements.

71 IISD. Ibid.
72 Ibid. p.26
73 Ibid.
74 Ibid.
75 See www.aseansec.org
In fact, this approach was attempted through the draft UN Code of Conduct on Transnational Corporations, in which the rights and obligations of foreign companies and host governments were spelled out. The efforts to establish this Code of Conduct were finally killed off in 1992. However, the draft is still useful as an example of a different approach. In the meantime, in the absence of an international regime to regulate the activities of foreign investors, the tendency has been to look to the state to formulate policies and enact legislation to minimise the negative impact of the activities of foreign investors on the environment.

Furthermore, should there be a new international investment agreement, a basic common ground on what parties of investment would be able to achieve could be laid out as guidance in the crafting of a new framework agreement. What the International Chamber of Commerce (ICC) adopted in the 1972 through their Guidelines for International Investment could serve as a source of inspiration for such an approach.

With regard to investment, just recently, the Global Compact representatives together with the UN Environment Programme Finance Initiative together with head investors representing nearly $2 trillion in assets held discussions that led to the launching of the Principles for Responsible Investment with the focus on the relationship between environmental, social, and government factors and long-term investment objectives. Again, this can also be seen as a positive approach. However, what remains to be seen is whether there is a willingness from foreign investors to engage in such an activity in the future implementation process should it not be binding for foreign investors.

In January 2005, the International Institute for Sustainable Development (IISD) initiated the creation of a new Draft Model International Agreement on Investment for Sustainable Development, taking into account the ‘rights and obligations for investors, home states and host states—a model consistent with the goals and requirements of sustainable development and the global economy of the 21st century’. It has been discussed in various workshops and has been made open for comments from experts, academicians and governments. The publication has been launched in mid-2005 in the Commonwealth Secretariat in London, and commended by representatives of developed and developing countries as a positive step to provide a possible solution to the creation of a multilateral investment regulation after the unsuccessful efforts made by OECD and the WTO.

The contents of the Model Agreement can be seen as a new perspective. It further comments on how the draft differs from the MAI or IIA approach taken by OECD and the WTO, as it also contains the issues of treatment and protection of foreign investors, dispute settlement while noting the past failures made by the two institutions, and introducing other issues such as corporate social responsibility, binding multinational companies investing in a country to take due observance of issues that concern the developing countries such as labour condition and environmental protection. It also takes into account the issues of corporate governance and anti-corruption within the capital-importing state to provide legal certainty for foreign investors while operating in the host country. It also introduces the creation of a single body that shall be in charge of monitoring the operation of the international investment agreement.

[77] Subedi, Surya. Foreign Investment and Sustainable Development, p. 419.
[78] Ibid. p. 27-28
[80] Ibid.
With the requirement to refer all other previous and future treaties based on the agreed articles contained in this agreement, there will no longer be an overlap of commitments by states. Another new approach is that the depositing of the instrument of ratification would be submitted to the Secretary General of the United Nations, and therefore this would bind the members who ratify it into committing into the agreement. If and when such agreement is established and agreed upon by all parties, there would also be an establishment of a new independent panel which would bear the responsibility of settling all the cases that may arise based on this agreement, in the event of any possible disputes which have to be settled, by upholding the rights and obligations of all the parties engaging in foreign direct investment with an objective to maintain its sustainability for the future nations to benefit from.

5. Conclusion

From the previous chapters, it is apparent that although the past two attempts to create a multilateral investment agreement through the OECD and WTO forums had been opposed and thus failed to be established, it is acknowledged that there is still a need to have legal certainties for regulating investment, and that the growing number of states engaging in bilateral investment treaties as well as regional trade and investment arrangements have become more complicated as it has created a web of possible overlapping of commitments as well as investment dispute issues that may arise due to such complexities. It is also a fact that investment is needed by both developed and developing countries alike, and with the hopes of creating growth opportunities that would benefit their economy, it would also be beneficial for the foreign investors who would gain more profit and opportunity to expand their market.

Some were of the view that the existing arrangement of BITs and regional trade and investment agreement would do better than creating a new multilateral investment framework.

“As there are still uncertainties on the content of customary international laws on foreign investment, as well as the difficulty of concluding a binding international investment agreement to protect foreign investors, the option of turning to BITs could be the measure for guaranteeing the protection of foreign investors and a way to attract investments for host countries.”

There are, of course, those who are not in line with the above point. For developing countries themselves, being a party to any multilateral investment agreement would have considerable advantages over the existing patchwork of BITs because investors would have a single standard to rely upon which could be well understood and monitored.

In general, the oppositions that had occurred for the proposals of creating a multilateral investment framework through the OECD and the WTO forums were not to oppose an international investment framework per se, but it was mainly due to the opposition to the contents contained within the two proposed agreements which was imbalanced by catering more to the legal protection of the foreign investors operating in the capital exporting countries and not taking into account the position and concerns, such as environmental issues, of the capital importing countries which would disadvantage developing countries, as most of the foreign investments are set up in these areas.

82 Beveridge, Fiona. ????Page ???
83 Fitzgerald, E.V.K, “Developing Countries and Multilateral Investment Negotiations”, from Multilateral Regulation of Investment, p. 37.
The major issue of the Multilateral Agreement on Investment (MAI) is not whether foreign investment is good or bad, or should or should not be welcomed. The real issue is whether or not national governments should retain the right and power to regulate foreign direct investment (FDI) and to have the adequate authority and means to have policy instruments and options over investment, including foreign investment\(^84\).

Also, there are indeed various parties who have (mild or strong) oppositions towards globalisation as a whole, which has tended to create more possibilities for cross-border investments with the opening up of trade and investment barriers between states. However, it is indeed a fact that this phenomena exists and we cannot turn back from this reality.

“We cannot go back on globalisation; it is here to stay. The issue is how we can make it work. And if it is to work, there have to be global public institutions to help set the rules.”\(^85\)

It is in fact due to this globalisation phenomena that in the last couple of decades there have been a shift in how people perceive about how the global economy should be pursued. People have come to recognize, that although there is a need to achieve economic growth, it is also important to respect the human value of the people and the peoples’ welfare as well as its environment through sustainable development. The past few decades have seen concerns such as environmental depletion become an issue that need to be addressed properly by both host and home countries to “co-operate to promote a supportive and open international economic system that would lead to economic growth and sustainable development in all countries” as stated in the Rio Declaration.

It is important that both foreign investors and host developing countries, who, without doubt, have different goals and interests, should always incorporate the aspects of sustainable development, and legalize it in the form of every agreement engaged between them. This can be dealt by creating an investment-friendly environment with the hopes of bridging the gap between them without damaging any human values.

“To a large extent, an investment friendly environment is also a development-friendly environment. At the same time it is important to ensure that the development needs and concerns of host developing countries are centrally addressed by any investment agreement so that it is development-friendly as well as investment-friendly in its orientation”\(^86\).

In an attempt to bridge this gap of differing opinions, legal experts and academicians have initiated to advocate the creation of a more ‘development friendly’ investment regime. Ideas such as an international investment agreement which takes into account sustainable development has began to emerge in the past several years after lessens learnt from the past failures by OECD and the WTO to create a multilateral investment framework. With the emergence of an internationally binding investment regulation that caters to the needs of both the capital-exporting and capital-importing countries as well as foreign investors, it can be seen as a balance to creating a sustainable investment which would be beneficial for all.


It is worth noting the proposed Draft Model Agreement of International Investment Agreement which was recently introduced and launched by IISD. By far, this could be considered as the first positive step towards the opportunity of creating a neutral yet comprehensive approach to obtain positive outcomes for capital-exporting and capital-importing countries. It is seen as an attempt to address both the developing countries’ and developed countries’ concern of the negative impacts by binding all parties in a single regulatory framework on investment. IISD’s approach is to ensure that all foreign investors do not undermine the environment of the country where they are carrying out their respective business activities in their goal to achieve profit, and that host countries also make sure that they maintain a strict approach in order to ensure that the foreign investment would be beneficial for the welfare of the citizens as well as their environment. In this way, it would maximize the possible benefits of FDI within their territory and minimize the negative effects by covering all the aspects that have been a main concern for those who were previously against the two attempts to establish a Multilateral Investment Framework.

However, the proposed articles contained therein is of course still open to suggestions and criticisms as it is in the format of a ‘model agreement’, which would be used as a guideline for future negotiations when creating an international investment treaty. This may also provoke further discourse on how such a treaty can be implemented with thousands of BITs and numerous regional trading and investment arrangements already concluded. Another issue that may emerge is on whether establishing a new international institution would be the answer to creating a new rules-based international investment system, and henceforth would guarantee that in its implementation and negotiations would continue to serve its main purpose to maintain the sustainability of development and of investment itself.

Should such an effort to create a new binding multilateral agreement fail as well, some people are of the view that the current system of having bilateral and other regional trade and investment arrangement would still be effective, although inefficient, to provide the coverage of investment, treatment, protection, and promotion. What is also important for this to work is to ensure that the domestic investment laws and regulations are in line with the objective of the goals made within the international arrangement, whichever it is.

In conclusion, as in all negotiations in any other international institutions, no effort would reap any benefits if there were no consensus on what is the main concern that needs to be addressed in any form of agreement involving so many states with various needs. As far as any international investment agreement is concerned, what is needed first and foremost is the willingness of governments to cooperate through a level playing field and understand the existence of various interests of all the parties involved, taking into account all the matters related to the particular issues in engaging in FDI activities (pre- and post-establishment), and committing themselves to engage in fair and transparent negotiations to create a legally binding agreement that will be abided by all parties involved.
While the emphasis in the 1970s and 1980s was on the control of the activities of foreign investors, the 1990s has seen a change of attitude and now the foreign investors have been seen as agents of modernization, partners of trade liberalisation and contributors to sustainable development. The call made in Agenda 21 adopted by the 1992 Rio Conference on Environment and Development, is an example:

“Investment is critical to the ability of developing countries to achieve needed growth, to improve the welfare of their populations and to meet their basic needs in a sustainable manner, all without deteriorating or depleting the resource base that underpins development. Sustainable development requires increased investment, for which domestic and external financial capital, which depend on a healthy investment climate, are an important source of financial resources.” (Agenda 21, para 2.23. Report of the United Nations Conference of Environment and Development, Volume I: Resolutions Adopted by the Conference (NY, UN, 1993)