A Model International Investment Agreement for the Promotion of Sustainable Development

The Preamble needs to create the context for the Agreement. It must emphasize that this is an agreement that seeks to promote investment that supports sustainable development, rather than pursuing investment protection and pro- motion without any criteria of quality. The Preamble must also recognize the need to ensure that investments that serve the purpose of this Agreement are in the public interest and deserve such protection as the international community can afford. It must establish that host states, home states and investors all have rights and obligations in relation to foreign direct investment and that it is the purpose of this Agreement to codify these rights and obligations in a balanced manner.

Many of the provisions of this Agreement will create conditions that are presumed to be conducive to all forms of investment, and increases in other investments that are not directly identified as promoting sustainable development are an intended by-product of this Agreement. Nevertheless, it is in the public interest of both host states and home states to actively promote sustainable development which is, consequently, the primary focus of the Agreement.

An alternative and closely related concept is that of promoting quality investment. Quality investments are ones that contribute to economic growth in a host state, make positive contributions to local communities and are environmentally sustainable.

The Preamble should reference relevant international declarations such as Agenda 21, the Monterrey Declaration or the Johannesburg Plan of Implementation, and the Millennium Development Goals, which can serve as a surrogate for a definition of "sustainable development."

Part 1. General Provisions

Purpose

The purpose of this Agreement is to increase long-term foreign investment that supports sustainable development.

Many developing countries have an inadequate capital base, either because of an insufficient domestic savings rate or for lack of the institutions required to create and enhance their capital base. For these countries, increases in foreign investment are one means to improve the overall availability of capital.

While it is readily apparent that the promotion of sustainable development requires investment, the identification of investment that supports sustainable development is a more difficult problem. The total volume of investment is an insufficient criterion. What are needed are criteria of quality to supplement the criteria of quantity. Three concepts might be relevant here. One is investments that are directly aimed at environmental enhancements. This could include environmental infrastructures (water and sewage), as well as the replacement of facilities that are environmentally damaging with those that are less or non-damaging, the replacement of coal-based electric plants with wind-based plants for example. A second concept is development projects that are essentially environmentally neutral. Many service sector investments or industrial investments with no negative environmental consequences would fall into this category, assuming they have positive development benefits. The third category would be investments with very high development benefits that have recognized environmental impacts that can, however, be mitigated. This concept recognizes that some beneficial investments may lead to environmental impacts, but relies upon a sound assessment to ensure they can be mitigated and are commensurate with development benefits.

One way in which to approach this is by an annex that permits countries to identify priority investments or areas of investment that meet their needs, for example renewable energy, or other power plants with offsetting emissions reductions, infrastructure for ecotourism, housing that meets certain standards, or health facilities. Nevertheless, this remains an area that requires additional research to permit the development of robust and practicable definitions. A definition of "sustainable development" should be avoided since it is unlikely that one can be found that is sufficiently operational.

A related purpose of the Agreement is to set minimum standards of investor conduct that can assist potential host countries

and foreign investors to ensure, both pre- and post-establishment, that the investments contemplated will fall within the purpose of the Agreement. In particular, this purpose would lead to specific tools being set out that would ensure a vetting of investments to be sure they are sustainable and for subsequent management of those investments towards the same ends.

Principles

The principles are to include, in particular, the need to achieve balance between investor rights, development objectives and protection of public goods in a manner that is legitimate, transparent and accountable. The importance of these principles is that they are part of the binding text of the Agreement and can be referenced throughout the Agreement and do not need to be repeated over and over again. They are designed to establish the fundamental standard against which all acts in relation to the investment must be measured.

Definitions

Investment that supports sustainable development" can be defined in relation to the broad concepts described above resulting in three forms of investments that fall within the definition. The experience of the Clean Development Mechanism of the Kyoto Protocol to the United Nations Framework Convention on Climate Change can provide useful guidance in developing criteria that identify "investment that promotes sustainable development."

The definition of host country presumably does not represent a problem. A Party that is the recipient of an investment covered by the Agreement is a host country for the purposes of the Agreement. This can be determined by reference to the countries listing investments in the annex in combination with the physical location of an investment.

Portfolio investment is currently covered by most BITs. We suggest that it not be included in a multilateral agreement.

The definition of "home country" is significantly more complex. This may well need to be the subject of an agreement between the investor and the host country, since many investors will be incorporated in more than one country. The definition needs to provide criteria to guide the necessary agreement, which should focus on the principal place of business of the investor. Other possible criteria may be a country where an investor already is operating a comparable facility.

The definition should enable host countries to avoid the problem of "home country of convenience," that is investors incorporating in jurisdictions with A Model International Investment Agreement for the Promotion of Sustainable Development little or no relevant administrative experience to avoid home country standards. It should also limit the ability of investors to initiate disputes under BITs that may continue to exist with countries that are not involved in the initial transaction.

Scope of coverage

In determining the scope of coverage, the Agreement should draw on relevant precedents, including existing agreements and UNCTAD studies. It should not include portfolio investment and focus on investments that are medium- to long-term. Special provisions need to be made for state-owned enterprises and for business sectors in which state-owned enterprises exist. In addition, it should use lists of covered agreements in an Annex to exclude all ambiguity.

Once an investment is fully covered under the Agreement, all relevant aspects of that investment should be included, for example access to trade, market access rights, intellectual property and other intangible assets.

This article must establish that the Agreement applies in full to sub-national levels of governance.

General reservations and exceptions

Investment agreements have not usually included general reservations and exceptions. At the very least, there should be a provision to cover measures required for purposes of currency stabilization - possibly specifying participation by the International Monetary Fund. The underlying issue is that in a situation of currency crisis, as in Argentina or Thailand, all "citizens" of a country - including foreign investors who are "economic citizens" of that country - must share the burden of necessary, if painful, adjustments. Otherwise a single class of citizens, namely foreign investors, is indemnified, increasing the burdens for all others. If necessary, the underlying principles of equal treatment and fairness may need to be spelled out. Such a provision also has the advantage of ensuring that currency risk becomes an integral part of investment planning, which is ultimately desirable to ensure that investments are properly financed and any measures that are adopted for purposes of sustainable development do not get swamped by currency risks that have not been taken into account.

Exceptions need to be the object of careful negotiation so as to determine the full scope of their possible consequences, the availability of other legal provisions to ensure that public authorities have the necessary room for adjustment, and. possibilities for providing more specific provisions rather than general exceptions.

The goal of negotiations should be to ensure that parties do not need general reservations, i.e., that the list-in/list-out provisions provide sufficient flexibility to obviate the need for other provisions. Nevertheless, certain exceptions, for example for national security or currency instability, are likely to be necessary.

Part 2. Foreign Investor Rights and Standards of Treatment

Pre-establishment investor rights

Investment agreement provisions can be defined into two stages: those that apply before an investment is actually made and operative, and those that apply after it is made. In both instances, the goal is to establish a process that results in a balancing of investor rights and public goods in a manner that is legitimate, transparent and accountable. "Pre-establishment" rights apply to investors seeking to make an investment. This may include a right to invest in all or some sectors, as well as the right to national treatment and other standards of treatment in the course of administrative decision-making in relation to that investment becoming operational. Pre-establishment rights are controversial because they may open many economies to foreign investors in sensitive sectors.

An investor planning to invest in a country has a list of significant, quite well-defined needs, for example: access to natural resources, skilled labour, transport infrastructure, and critical services such as banking and insurance. It is in the interests of the host country to make every effort to ensure that these needs are met, as long as they are consistent with the country's overall development priorities.

Many earlier investment agreements do not include pre-establishment rights, while there is growing pressure in more recent negotiations to have them. It is important to clearly establish the operational parameters at the pre-investment stage so as to avoid conflicts at a later time. There should be an annex listing pre-establishment rights as well as any exceptions. Such annexes are often developed through an offer/acceptance process, which permits key stakeholders to articulate their concerns. Such a process must be fully transparent.

It is likely that both the positive and the negative list will remain dynamic over time, that is subject to modification in light of experience. This implies that a more flexible amendment procedure for these annexes is likely warranted, as compared to the actual provisions of the Agreement. However, special consideration may have to be given to the consequences of possible removals from an annex, and establishing conditions for such removals.

The purpose of the principal article on pre-establishment rights will be to introduce the rights into the treaty system in a manner that is in keeping with national development needs, priorities and laws. From the investor perspective, the primary purpose is to ensure that states exercise their rights in this area in a manner that is transparent, based on a system of publicly available laws and regulations.

National treatment

Non-discrimination represents a bedrock principle of any investment agreement, and "national treatment" (together with most favoured nation treatment) is an essential institution for the attainment of this goal. The provisions of national treatment are by now well known: Foreign investors enjoy all the rights of local investors under the concept of "treatment no less favourable in like circumstances." The definition of "like circumstances" can cause a great deal of difficulty in applying investment agreements, largely because investments are singular and the conditions that must be taken into account can vary widely from one instance to the next, even when seemingly like circumstances prevail. By explicitly addressing issues that relate to sustainable development in the remainder of an agreement many of the issues surrounding the definition of "like circumstances" are significantly attenuated.

Careful attention needs to be given to the emerging reality that an investment agreement can provide foreign investors with rights that are not available to domestic investors and that create unjustifiable advantages, for example access to additional opportunities for dispute settlement or even an opt-out from domestic judicial proceedings. The concept of national treatment is not concerned with inequality where foreign investors are privileged, so this has not yet been an issue. Indeed, current BITs disputes expressly recognize that foreign investors now have greater rights than domestic investors in the host states. This situation is due to higher levels of protection under some of the provisions of the BITs in question. This Agreement seeks to balance such protection against host state rights and development objectives.

In some cases, host governments may take measures that are, or appear to be, discriminatory. Determining when such measures are justifiable presents significant challenges both in terms of criteria and drafting. This is a different situation than one where a legitimate regulatory measure may have the incidental effect of selective impact on certain foreign investors, for example when all investments in a certain sector are foreign-owned or when the definition of covered

investments under a measure includes a disproportionate number of foreign investments. In practice this may raise issues that are equivalent to the trade law concept of a disguised barrier to trade and it will require highly effective dispute settlement institutions to make such determinations in a manner that is legitimate, transparent and accountable.

Most-favoured nation treatment

The provision of most favoured nation treatment (MFN) is likewise a cornerstone of most investment agreements. It has not thus far posed the kind of challenges that are implicit in national treatment. Nevertheless, some important issues exist, in particular concerning the ability of investors to "cherry- pick" provisions from all investment agreements entered into by a country and with regard to developments in some multilateral environmental agreements that imply distinctions between investments from certain groups of countries.

There remains some ambiguity whether most-favoured nation treatment (MFN) transfers from one investment agreement to another, that is whether beneficiaries of rights accorded under one agreement can cherry-pick all other agreements signed by the host country to seek out the rights that best suit their needs. Any such process needs to be forestalled to ensure that public authorities retain the capability to make necessary and appropriate distinctions that reflect the specific circumstances of an investment or the past practices of an investor. Consequently, the content of MFN must be limited to national measures and not encompass other international (investment) agreements.

Fair and equitable treatment

"Fair and equitable treatment in accordance with international standards" represents a more comprehensive and principled standard than just "non-discrimination" but it requires careful interpretation to produce desirable out- comes. The need to include this provision recognizes that the attainment of non-discrimination is significantly more complex when it comes to investment, and that the classic principles of MFN and national treatment are not sufficient by themselves.

An agreement must give essential guidance to ensure that this is appropriately interpreted and implemented. One principal practical result of the debate on NAFTA's Chapter 11 (on investment) has been an interpretive statement by the three parties to clarify the reach of the concept of minimum standards of international law that is fundamental to "fair and equitable treatment."This statement, which limits the scope of this standard to extant principles of customary international law, is the starting point for any drafting that is to be undertaken.

It is important, however, to ensure that the introduction of "fair and equitable treatment in accordance with international standards" does not open up the entire Agreement to reinterpretation in light of any other treaty text that may have been concluded at the international level, or even private standards that may have evolved. The goal in this regard is to ensure that the parties retain an adequate measure of control over the pursuit of priorities of public policy without having to fear the involvement of international jurisdictions in an unpredictable manner.

Performance requirements

So-called "performance requirements" are one of the most contentious issues in the area of international investment agreements. They cover a range of requirements from an obligation to export a certain percentage of production, to local hiring requirements for management or directorships, to requirements to purchase certain inputs or other goods locally. On the face of it, performance requirements would seem to be attractive tools to ensure that foreign investment contributes to the local economy, and historically many developed countries have used them as part of their development strategy. Yet a fairly robust consensus exists that certain requirements can also be economically counter-productive since they bind an investor to a defined source of supply, a situation that will presumably always lead to higher prices than open, competitive markets. It is argued that the advantages of proximity are likely to ensure that local suppliers enjoy a measurable advantage in open competitive markets anyhow so that performance requirements have the effect of distorting prices without much impact on actual behaviours.

The situation is further obscured by potential inequality between public authorities and investors who command resources that far exceed the total output of the jurisdiction they are negotiating with. Moreover an ambiguous relationship exists between regulatory requirements imposed by a public authority and the contractual arrangements that may be made between an investor and that public authority in the context of private contracts, for example to purchase land, to secure services, or to ensure the construction of infrastructure necessary for the success of the investment.

Many recent bilateral investment agreements contain provisions that limit or ban the use of performance requirements. Yet performance requirements of one kind or another were once widespread in wealthy countries and the evidence is not clear whether they helped or hindered in an earlier stage of economic development. Indeed, it can be argued that rules of origin that continue to be used by developed countries in particular have the same effect as performance requirements. This is an issue that requires significant additional research. There may also be significant merit in distinguishing between different types of performance requirements, and simply leaving the use of many types to market forces to discipline. It may be

appropriate to raise the hurdle that must be taken before performance requirements can be imposed, for example through a structure of administrative review or even the use of third parties to ensure that requirements are reasonable and appropriate for the purpose they claim to pursue.

Both South Africa and Malaysia have enacted investment measures that would qualify as "performance requirements" under most definitions. These measures aim to balance historically accumulated racial and ethnic inequalities. They deserve special attention when addressing the issue of performance requirements.

Expropriation

From the perspective of many investors, protection against expropriation is the heart of any investment agreement, since expropriation is an incalculable event under most circumstances. Political risk insurance can provide partial protection, but the market for such insurance is dominated by public agencies. Expropriation always involves a private individual on one side and a public authority on the other.

All countries have laws and regulations that provide for the expropriation of private property for certain defined public purposes. These laws and regulations typically provide for compensation and establish standards by which to assess such compensation. Nevertheless, the process of legal expropriation is fraught with pitfalls. The relationship between the private owner and the public authority is hardly comparable to that between two voluntary private parties, and the outcome generally reflects the difference in power. Most countries consequently provide for institutionally elaborate avenues of redress for aggrieved parties.

Under like circumstances, the result of these processes can differ significantly from one country to another. International agreement provisions provide a common set of conditions for valid expropriations and for levels of compensation when an expropriation takes place. While there are presumably instances where discrimination against foreign investors occurs in the form of an expropriation, the standard conditions found in most existing international investment agreements go well beyond this issue to cover any expropriation for any reason, including non-discriminatory expropriations. It is not easy to settle disputes about expropriation. While investment agreements set an international standard, it also seems appropriate to recognize the general practices of a country with regard to expropriation as a relevant standard against which particular cases involving that country should be judged.

The experience under NAFTA has introduced an additional dimension to the expropriation debate in investment agreements. Many BITs include the concept of indirect expropriation, and this was done in NAFTA as well. But NAFTA also included the notion of measures tantamount to expropriation, which opened up a debate on what this was meant to mean. In particular, many investors and lawyers argued that it included the American legal concept of regulatory takings.

It is useful to understand the different concepts that are relevant here. An expropriation is generally understood as a measure that deprives an owner of the possession and use of his property. It is the complete or virtually complete loss of ownership or the control associated with ownership. Indirect expropriation means a situation where ownership rights are lost through means other than a transfer of ownership, such as the removal of all directors and their replacement with government officials. The concept of creeping expropriation implies a loss of ownership or control through a series of measures that collectively have the impact of an expropriation. Thus, more than one measure is involved in this case. Finally, the idea of regulatory taking has been raised under the NAFTA Chapter 11 cases. This implies a loss of economic value by virtue of certain regulatory restrictions being placed on an investment, for example in order to protect the environment, human health or for labour-related reasons.

Customary international law has traditionally recognized that the bona fide exercise of regulatory powers is not included in the concept of expropriation, but is excluded as an exercise of a state's "police powers." This is being challenged under NAFTA investor-state cases and in some BITs cases, based on the American regulatory takings concept. This issue remains unresolved in these cases, where international dispute panels have taken divergent views on this issue. One part of the problem is that NAFTA and most recent BITs contain no clear recognition of the right of public authorities to regulate, something that is essential if dispute bodies are to have adequate guidance on the nature of the balance that needs to be struck between private rights and public welfare measures. Some more recent investment agreements involving the United States have set out language that seeks to make adjustments to recognize the right to regulate as a general exception, while leaving tribunals the ability to assess the bona fides and proportionality of the measure. How these provisions will fare in practice is not yet clear. However, they do indicate the need to carefully consider this issue in any future agreements.

Senior management and boards of directors

In most instances, productive foreign direct investment requires incorporation in the host country, that is the creation of a legal entity that can exercise the rights and obligations that attach to that investment. To achieve proper control over an investment that may be incorporated in a foreign country, the investor must be in a position to maintain authority over the

senior management and boards of directors of that entity in a fashion that adequately reflects the nature of that investment. In practice, the ability to appoint a limited number of the most senior managers can already suffice to ensure adequate managerial control over an enterprise.

This implies the right to appoint (and remove) directors in accordance with contractual provisions and the law of the host country and the ability to require senior management to travel to the foreign investor's seat of business, and to have continuing access to senior management at the seat of business of the incorporated entity that represents the investment.

Transfers of assets

The ability to transfer dividends, profits, physical assets, or the revenue from selling an investment is again one of the fundamental rights that investors need. if they are to enter a market with a sense of assurance. This is particularly important in times of currency fluctuation or fiscal emergencies. It can be assured by explicitly recognizing the right of public authorities to take measures necessary to ensure the stability of the currency but including language that ensures this right is not used in a manner that represents discrimination against foreign holders of domestic assets.

Part 3. Foreign Investor Obligations

Pre-establishment investor obligations

Pre-establishment investor obligations are also designed to promote a process that ensures that investments are consistent with the goal of promoting sustainable investments, and that proposed investments do not harm local environments and communities.

Examples of pre-establishment investor obligations would include placing investors under an obligation to provide timely, complete and accurate responses to public authorities involved in reviewing an investment. For all major projects, both environmental impact assessment and social impact assessment should be required, based on adequate and effective national legislation (that meets minimum international standards) and, if that is not available, on home state requirements or accepted international practice as defined by UN organizations and the World Bank.

Provisions need to be made to ensure that the burdens imposed on potential investors are proportionate to the size of the investment and to its potential impact on sustainable development.

While investment agreements cannot be expected to establish specific environmental quality levels for different environments -these must be left to local governments due to the wide variety of relevant variables -they can establish minimum standards in areas such as environmental assessments that lead to informed decision-making and help protect against investments that are not sustainable. Such minimum standards would also reduce pressures against increased environmental protection, in the race for foreign investments.

Anti-corruption provisions should also be included.

Post-establishment obligations

Investors become "economic citizens" of the host country, that is they enjoy the rights and obligations that other citizens enjoy in relation to their investments.

The most fundamental obligation is to comply with the laws and regulations of the host state and its jurisdictions. Yet this represents a minimalist agenda, especially when investment agreements are developed in order to promote investment into countries with little or no legal provisions or administrative capability in important areas. Economic citizenship generally implies constructive participation in the processes of promoting sustainable development and, on occasion, actions that transcend the letter of the law.

Enterprises that benefit from the resources of the host state - access to skilled employees, use of natural resources and infrastructure can reasonably be expected to contribute to the sustainable supply of these services. While the payment of taxes is one form of contribution, the transfer of knowledge and techniques that can benefit the host state is widely viewed as part of the functions of foreign investors, part of the quid pro quo leading to the generation of mutual benefits.

For labour and human rights, there are internationally established norms that should form the basis of actions by international investors. For environmental purposes, establishing an obligation for the use of environmental management processes should be strongly considered

Corporate governance and practices

Foreign investors should adhere to local rules and internationally recognized practices to ensure corporate transparency. The issue here is to establish a constructive relationship between corporate governance and practices and the availability of local models - or the lack of them. Where strong local models are unavailable, recourse should be taken to internationally-accepted practices or to governance models that correspond to home country requirements.

An international investment agreement must incorporate explicitly or by reference to other relevant international agreements, rules against corruption at both the pre- and post-establishment phases. These must also apply equally to host country authorities and foreign investors.

More specific codes of practice for Corporate Social Responsibility (CSR) should be incorporated by reference, recognizing that significant portions of these are essentially voluntary in nature and may lead to a wide array of implementation measures to reflect appropriate adjustments to the particular circumstances of the enterprise, the host country and the host community.

The investor has a general obligation, essentially that of an economic citizen, to contribute to the development of the host community and state, and to ensure that its activities do not conflict with host state development objectives.

Legal liability for corporate decision-making by a foreign investor has traditionally been understood as resting in the host country. Experience has shown, however, that this is inadequate on many counts. Thus, investor liability must rest in the home country as well, involving a waiver of the claim of forum non conveniens as a barrier to suits in the home country. To be more specific, where decisions affecting the operation of a foreign investment are taken by the investor, liability should follow in that place of decision-making. This has already been accomplished for cross-border investment within the European Union.

Relation to use of investor-state dispute settlement

Performance in relation to the provisions of the Agreement concerning investor rights and obligations should be considered in investor/state disputes. This represents one part of the balancing of the different elements of the Agreement applying to the different actors in the process. Use of the investor-state dispute settlement process should be conditional on fulfillment of investor obligations.

It is not in the interests of public policy in either the host or the home country to provide rights to investors who undertake investments that are in obvious conflict with the requirements of sustainable development. This implies that the dispute settlement process must be sufficiently robust to take such factors into consideration in a legitimate manner.

Some dispute settlement tribunals have said that corrupt practices, if proven, should disqualify an investor from the use of the investor-state dispute settlement process. The above section sets out additional parameters for consideration in this regard. It may prove necessary to establish a mechanism to review investor conduct.

Part 4. Host State Rights and Obligations

Treatment in accordance with rights in Part 2

The host state has an obligation to maintain an economic and regulatory environment that is supportive of investment. This involves respect for the rights enunciated in Part 2 of the Agreement.

Beyond this basic obligation, the host state must take all steps necessary to ensure that regulatory requirements are clear and established by a process that is legitimate and transparent and that provides adequate opportunities for affected parties to participate. It must avoid changes that are arbitrary or not in accordance with established procedure or internationally-recognized principles of due process.

The host state has a duty to protect the investor from strife and to ensure that the law is upheld. It has liability for compensation in cases where investor interests are damaged by reason of a failure of the host state to live up to its obligations, subject to exceptions as agreed, for example in cases of labour strife that is in accordance with internationally-accepted norms such as those enunciated in ILO Conventions.

Due process and right of appeal

The host state has an obligation to maintain administrative services that are necessary for the operation of an investment, subject to the payment of reasonable charges and fees. Access to administrative services shall be on a non-discriminatory basis and subject to basic rules of due process.

Where a right of appeal against administrative decisions is provided, this right shall be extended to foreign investors on a

non-discriminatory basis.

Maintenance of environmental and labour standards

Host countries must strive for high standards of environmental protection. They will avoid actions that reduce the effectiveness of international environmental agreements at the global, regional and bilateral level. They will adhere to internationally-recognized core labour standards.

The host state shall not arbitrarily change environmental and labour standards. In particular, it shall not use such reductions as an incentive to attract or maintain investments.

Host states shall provide for the creation and maintenance of facilities that may be required for the purpose of environmentally-responsible management, in particular for water supply and treatment and waste management and make them available in a non-discriminatory manner, with appropriate charges.

Environmental standards shall be developed and applied in accordance with the law and due process. Third parties shall have the opportunity to participate in this process in accordance with such law and process. Host states shall endeavour to establish rules of participation that reflect accepted international practice, for example as outlined in the Arhus Convention.

It may prove desirable to establish a mechanism modeled on Article 14 of the NAFTA environmental side agreement establishing the Commission for Environmental Cooperation (CEC). Article 14 creates a process that permits civil society groups to submit complaints about the enforcement of environmental regulations to the CEC for review in accordance with fairly strict requirements for admissibility.

The right to development

The investment Agreement must recognize the host state's right to development, including the right to regulate investors and investments so as to pro- mote important development goals. These goals need to be transparent and established by a process that is itself both legitimate and transparent.

Within the framework of its development objectives, the host state may decide to impose "performance requirements" on investors that is certain conditions relating to these development objectives. They may include such matters as the use of local inputs, local labour, or the performance of certain services for local communities. Performance requirements pertaining to exports, in particular the requirement to export a certain percentage of production, are not permissible.

The right to regulate

Host states have the right to regulate in the public interest. International investment agreements must specifically recognize this inherent right and duty of states. They should not follow the example of trade law in this regard and make the right to regulate an exception to investor rights. Such regulation must serve a legitimate interest and not be a disguised measure intended to impact a foreign investor in a manner prohibited by the Agreement.

Regulations should also be applied in accordance with transparent rules and established administrative procedures. Regulatory decisions with a major impact on individuals should be taken in a manner that permits all interested parties to participate.

Host states have a duty to regulate in the public interest that is to maintain a regulatory structure that is transparent and appropriate. When these conditions are met, regulation in the public interest would not give rise to claims for compensation by a foreign investor.

Regulatory actions can be subject to fees that must be reasonable and proportional.

Anti-corruption

Host states will adhere to internationally-recognized standards for the control of corruption and establish effective policies and measures to ensure their respect in practice.

Part 5. Home State Rights and Obligations

Investment promotion and facilitation

Home states are encouraged to promote and facilitate investment in host states. This can take the form of providing information all the way to providing pre-investment services or even direct support for investments that also contribute to the attainment of sustainable development, for example in relation to international environmental obligations. Any such

activities need to be open and readily recognizable and undertaken in consultation with host states.

The benefits of investment promotion and facilitation for home states can be numerous. In addition to contributing to the attainment of policy goals such as the prevention of global climate change, the preservation of biological diversity or the avoidance of emissions of persistent organic pollutants that are capable of spreading through the environment, investment promotion and facilitation can strengthen the international position of domestic investors.

Access to investor information

Upon request, home states shall provide host states with information concerning the performance of investors in the home state economy. It must be possible to transmit confidential information in a manner that is appropriate to its character.

Past investor performance in relation to environment and sustainable development is a strong predictor of future performance in these areas. Access to such information can enable host state authorities to make necessary determinations concerning reasonable expectations for investor performance.

Investment insurance

Investment insurance can contribute to a spreading of risks associated with foreign direct investment while also making the investment more readily calculable. Insurance should not be of a nature to represent a hidden subsidy.

Investment insurance is to be supplied with the full knowledge of the host country.

Taxation

The home country shall maintain a tax regime that deals with revenues from investments in the host country in an open and equitable manner. Home country and host country shall collaborate to ensure that double taxation does not occur.

Capacity building

Governance of host countries is critical to the ability of these countries to attract foreign investment. Moreover, investors are likely to respond favourably to practices that reflect their home state experience. Consequently, capacity building represents a critical dimension of home state support for foreign investment, in particular when the goal is to promote long-term relationships between the relevant public agencies.

Liability

Liability represents an essential element of investor risk. Circumstances where liability is not properly assigned to investment activities represent instances of moral hazard, that is incentives to undertake investments that provide investors with profits even when none are generated by the investment itself or to engage in behaviours that are damaging to the public interest of the host countries.

Agreements are required between host state and home state to ensure that liability extends to those who exercise effective control over investments and lasts as long as the investment engenders risks in the host state, whether it is productive at the time or not. These agreements must also require governments to preclude the application of the forum non conveniens doctrine as a defense. Host states can also require the posting of bonds to secure certain risks, for example the reclamation of a mining site after its productive life is finished.

Part 6. Relation to other Agreements

Relation to bilateral investment treaties

A robust multilateral investment treaty must be in a position to replace all bilateral treaties between the parties. No existing bilateral investment treaty incorporates the balanced set of rights and obligations of all actors in the investment process or meets the essential standards of legitimacy, transparency and accountability of the type of Agreement described here. Consequently, there is in an irresolvable conflict between the existing BITs and the Agreement that is proposed here. As a result, all bilateral investment treaties between the parties should be repealed.

Bilateral investment treaties between parties and non-parties must either be revised or repealed. At a minimum, the operation of MFN provisions must not permit investors from parties to cherry-pick the most advantageous provisions of any remaining bilateral treaties.

Relation to multilateral or other trade and/or investment agreements

This Agreement is to be compatible with existing regional and multilateral investment agreements. The provisions of the WTO Agreement on Trade Related Investment Measures (TRIMS) are relatively modest and it should be possible to comply with them -except for the possible problems associated with the operation of MFN between the TRIMS Agreement and this Agreement, and certain performance requirement issues.

Many countries are by now members of regional agreements that include pro-visions applicable to investment. After completion of the Economic Partnership Agreement (EPA) process under the Cotonou Agreement, this will be true of most countries. These agreements need to be mutually compatible and necessary adjustments will need to be made in a manner to avoid transitional conflicts.

The WTO General Agreement on Trade in Services (GATS) does not deal explicitly with investment but contains provisions that are applicable to investment by virtue of its inclusion of "Mode 3" (commercial presence) among the covered activities. The relationship between GATS and this Agreement needs careful assessment.

Relation to international environmental agreements

Investment is central to the attainment of the goals of many of the numerous multilateral environmental agreements (more than 300 in number). A multi-lateral investment agreement must enable the exploration of such options, including the possibility of incorporating provisions in international environmental agreements that build on such an investment agreement.

The use of exceptions to address international environmental issues should be avoided as far as possible, since these suggest that investment and the achievement of environmental goals are in conflict. Not only is there no conflict in theory, provisions need to be developed to ensure that the two groups of agreements are mutually reinforcing.

Part 7. Dispute Settlement

State-state disputes

The investment Agreement needs to incorporate the most highly evolved system of state-state dispute settlement. State-state disputes are to be expected when parties adopt laws or regulations that are or may be discriminatory to groups of foreign investors or classes of foreign investments.

Details of the dispute settlement provisions can be addressed in an annex. The essential principles, however, need to be articulated in the body of the Agreement, including consultation, conciliation and mediation, and the requirement that all arbitration proceedings meet fundamental standards of legitimacy, transparency and accountability.

State-state disputes should be accessible to all interested parties who must enjoy clearly defined rights to intercede (amicus briefs).

Investor-state disputes

Investor-state dispute settlement is required to deal with disputes arising from individual investments that are undertaken by private investors. State-to-state dispute settlement alone is not appropriate where the rights of individual investors are at stake.

Details of the dispute settlement provisions can be addressed in an annex. The essential principles, however, need to be articulated in the body of the Agreement, including consultation, conciliation and mediation and the requirement that all proceedings meet fundamental standards of legitimacy, transparency and accountability. Provisions are required to ensure that the parties cannot influence the outcome of disputes by participating in the selection of arbitrators or panelists, as is currently the case.

The relationship between international disputes and domestic remedies must be defined, giving priority to the exhaustion of domestic remedies before permitting international dispute settlement. There may, however, be some circumstances where this is not possible, or where the nature of these domestic remedies themselves is at issue.

The use of commercial arbitration institutions for the purposes of investor-state dispute settlement is inappropriate. Of the institutions generally mentioned in investment agreements, only ICSID appears viable for investor-state dispute settlement, provided it is appropriately amended to meet the standards of this Agreement. Other commercial arbitration institutions should restrict their activities to investor-investor arbitration.

Investor-state disputes should be accessible to all interested parties who must enjoy precisely defined rights to intercede or to become party to a dispute. Procedures recently adopted by the three NAFTA parties could be considered in more detail in

this regard.

Appeal process

A standing body is required for appeals from both state-state and investor-state disputes. In principle a single body can serve both purposes.

Governing law

Disputes will be governed by the provisions of this Agreement, by national law, and by relevant international law.

Part 8. Institutional Provisions

Conference of the Parties

The Conference of the Parties shall meet regularly to review the operation of this Agreement. It is able to adopt interpretative statements and notes by unanimous consent. It appoints the Secretary General who will head the Secretariat and adopts the program and budget for the Secretariat.

Executive Body

An Executive Body is created. It meets regularly and provides guidance to the work of the Secretariat between meetings of the Conference of the Parties.

Secretariat

A Secretariat is created, headed by a Secretary General. The Secretariat shall prepare the meetings of the Conference of the Parties and the Executive Body and shall undertake the tasks assigned to it by this Agreement or by these bodies. The Secretariat shall be located in XXXX.

Budget

A budget will be adopted at regular intervals. Countries party to the Agreement will make contributions to the budget reflecting the volume of foreign investment received or made by their investors.

Monitoring

The Secretariat shall develop a system to monitor international investment flows and their contribution to sustainable development. It will report regularly to the Conference of Parties on the results of this monitoring activity and may suggest measures to be adopted to ensure the attainment of the objectives of this Agreement.

Investment policy review

An investment policy review mechanism is established. Parties to this Agreement will be reviewed at regular intervals in accordance with procedures adopted by the Conference of Parties to promote the attainment of the objectives of this Agreement.

Cooperation with other organizations

The Secretariat will establish working relations with intergovernmental and non-governmental organizations with a special interest in international investment. The results of this cooperation will be reviewed regularly by the Executive Body.

Part 9. Exceptions

National security

General exceptions for national security will be included in the Agreement.

Balance of payments

Provisions will be made for measures to be taken in exceptional circumstances relating to severe fluctuations in currencies that threaten the stability of the monetary system.

Rules for taxation measures

This Agreement shall not limit the right of parties to tax individuals engaged in lawful activities within their territory, provided such taxation is non-discriminatory in nature.

Regional cooperation

Parties to this Agreement are encouraged to enter into regional cooperation agreements with other parties as appropriate to promote the full attainment of the goals of this Agreement. Such cooperation can extend to the creation of the public institutions and services that are required to meet the parties' obligations under this Agreement, whether as host or as home countries of international investment.

Part 10. Final Provisions

Review of treaty operation

The Conference of Parties will regularly review the operation of the Agreement, taking into account all relevant information available to the Secretariat.

Amendment

Amendment of the Agreement should be done through the unanimous consent of the Conference of Parties, subject to customary ratification requirements.

Amendment of the annexes for included sectors for pre-and post establishment rights may be subject to different rules that allow for greater flexibility, while ensuring that any investments made or in the process of being made pursuant to then applicable rules are not disentitled to the rights acquired at that time.

Entry into force

This provision should specify the number of ratifications and/or accessions needed for the Agreement to enter into force.

Withdrawal

There is usually a minimum period for which the Agreement must be in force before a party can withdraw. In addition, there would be a notice period for a withdrawal to become effective.

The major issue here, however, is the possible survival of the investor's rights after a host state or home state has withdrawn. Most agreements include some form of grandfathering of an investor's post-establishment rights if a state has withdrawn.

The current model for international investment agreements (including many failed attempts, such as the OECD's MAT) is too narrowly focussed on investor rights. This paper asks what an investment agreement would look like if its goal from the outset were to achieve sustainable development. The result is a novel mix of rights and obligations for investors, host states and home states.