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## Investment after Cancún

**Konrad von Moltke, Institute for Environmental Studies (IVM),  
Amsterdam and Dartmouth College, USA**

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Towards the end of the Cancun Ministerial Conference, the European Union (EU) conceded that investment was not going to be part of the Doha agenda. This concession took many observers by surprise because the EU had been insistent on the need to include this issue. Presumably the internal dynamics of the EU shifted once countries were represented in Doha by full delegations that reflected more of their internal interests and not only by the “needle’s eye” of the Article 133 Committee. Because the talks in Cancun collapsed, technically the EU is no longer bound by this concession. The meeting closed without any conclusion so that anything that was negotiated in Cancun is non-existent: negotiations are back where they were at before the Ministerial Conference began. In practical terms, however, it is hard to imagine that even with renewed pressure the EU could manage to have investment included on the Doha agenda once again<sup>1</sup>.

There is no prospect that investment can become an integral part of the Doha agenda without EU support. The United States has long been lukewarm at best towards the issue as part of the WTO—presumably because it is convinced that it can obtain everything it wants in bilateral negotiations, or that it can protect its investors without the need of a formal agreement. Japan, Canada, and Korea, the remaining *demandeurs*—all countries that for various reasons anticipate problems in protecting their investors abroad—are not able to shape the agenda by themselves.

This outcome is surprising. The compromise on the so-called Singapore issues forged in Doha never looked like a real compromise. The convoluted text of the Doha Declaration, identical for each of the four issues (investment, competition, government procurement and trade facilitation), seemed like a way to mask the fact that negotiations were being launched. What was demanded of the relevant WTO organs was not much different than what they would have done under a formal mandate to negotiate. The concept of “explicit consensus” contained in the statement by the Chair at the end of the Doha Ministerial meeting had no precedent in GATT or WTO and consequently seemed more like window dressing. Yet there was constructive ambiguity, and advocates and opponents of investment negotiations alike could read the decisions to suit their needs. This ambiguity disappeared on the next to last day of the Cancun Ministerial meeting, with a draft that was presumably the work of the (Canadian) “friends of the chair,” which explicitly linked concessions on agriculture to the launching of investment negotiations. That text forced decisions and was a contributing factor in the failure of Cancun.

There are two main reasons why investment has failed to be integrated into the Doha negotiating agenda. The Singapore Issues are heterogeneous and instead of reinforcing the push towards negotiation they created barriers for each other. Even a topic as anodyne as trade facilitation could not be considered in a reasonable fashion. While each issue may have succeeded on its own merits, taken together the problems increased. More importantly, resistance to

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<sup>1</sup> The Commission subsequently emphasized that its concession was now off the table and opened the way for possible negotiations between “willing” countries. Trineesh Biswas, “EU insists investment issue is not off the WTO agenda,” Investment Law and Policy Weekly News Bulletin, October 11, 2003. At [www.iisd.org/trade](http://www.iisd.org/trade).

investment negotiations among developing countries grew significantly over the few months before Cancun, possibly taking some negotiators by surprise. This resistance was fueled by several factors. There were continuing debates about the effects of the investment chapter of the North American Free Trade Agreement (NAFTA) and growing reluctance on the part of the non-NAFTA countries in the Free Trade Area of Americas (FTAA) negotiation to see the NAFTA provisions extended to the hemisphere as a whole; this while the NAFTA parties were still unwilling to recognize officially that there were problems that needed fixing<sup>2</sup>. Unease was growing about the use that was being made of dispute settlement provisions in bilateral investment treaties (BITs), in particular following the Argentine crisis. And there was no evidence that any existing investment agreements had benefited developing countries. In some sense it was investment that brought down the Singapore issues. Certainly investment attracted vastly more interest and articulated resistance than the other three issues. In light of the extraordinary difficulties in even identifying a viable negotiating agenda on these issues, it seems likely that the WTO is much better off without most of them—the exception being trade facilitation, which clearly needs to be addressed, presumably free from the threat of disputes. The WTO now needs to refocus on what it has done well in the past, namely act as a forum for negotiating important questions relating to trade in the narrow sense: the buying and selling of goods and services in international markets.

Dropping investment from the Doha agenda does not mean that there will be no international negotiations on investment. It does not even mean that investment will not be an issue of concern in the WTO. As has often been pointed out, the General Agreement on Trade in Services (GATS) deals with investments that are necessary for the provision of covered services, even though the word “investment” never occurs in the text of the agreement. The Agreement on Trade Related Investment Measures (TRIMS) remains in force as part of the WTO package and there are significant differences of opinion between members as to its meaning and implementation that will continue to require attention. Indeed, the Committee on TRIMS continues its work and the Working Group on the Relationship Between Trade and Investment established by the Doha Ministerial Declaration has not been terminated. There is a possibility that WTO members with an active interest in investment issues may seek to obtain some of the results through interpretation of GATS and TRIMS that they were hoping to attain through the Doha negotiations. The indirect manner in which the GATS covers investments means that there is a significant space here for interpretation.

Some important developments in relation to international investment agreements are, however, likely to occur outside the WTO. The areas where there is significant likelihood of new developments are the bilateral investment treaties (BITs) and other bilateral agreements on trade and related issues, the FTAA, regional and inter-regional negotiations, and the Cotonou Agreement. This

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<sup>2</sup> Since then the NAFTA Free Trade Commission (that is the three trade ministers) has met and taken yet another timid step towards addressing some of the problems with NAFTA Chapter XI. Howard Mann, “The Free Trade Commission Statements of October 7, 2003 on NAFTA’s Chapter 11: Never-Never Land or Real Progress? AN IISD Comment.” Available at [www.iisd.org/trade](http://www.iisd.org/trade).

represents a substantial agenda, and thus far there is hardly any indication that the sustainable development dimension will be taken seriously in any of these negotiations.

***Bilateral Negotiations.*** Following the collapse of the Doha Ministerial, the US Trade Representative declared that his country would seek to accelerate the process of bilateral trade agreements. In practice “trade” can include any issue that is on, or has been proposed for, the WTO agenda. This has been accompanied by a move to split the G21+ Group that became the vehicle for exerting developing country influence in Cancun. This stance masks however, a loss of influence that the United States has suffered in the wake of the Iraq war. In practice it will be hard to exert effective pressure on any of the major participants in the G21+, (Brazil, China, India) and success in pressuring smaller countries will ultimately only serve to document the loss of US leverage. A process in which the United States negotiates bilateral agreements like the ones it has concluded recently (with Israel, Jordan, Chile and Singapore), will rapidly lose credibility if it does not include countries with significant economic weight. In the case of both Chile and Singapore, the United States experienced some difficulty in reaching agreement, suggesting that differences with larger countries will prove unmanageable. Obviously loss of influence is something that can be reversed, but only with notable changes either in US policies, or in the assessment of US policies by others.

The phenomenon of bilateral investment agreements (BITs) has a long history. There was an increase in the conclusion of BITs in the nineties, in part as a result of the collapse of the Soviet Union and in part because of the failure of the negotiations for a Multilateral Agreement on Investment (MAI) in the framework of the Organisation for Economic Cooperation and Development (OECD). There are by now well in excess of 2000 BITs, all of which were concluded without significant negotiations or public debate, often on the basis of a “model agreement” presented by the more powerful of the two countries involved. No BITs exist between equal partners. It is consequently hardly surprising that closer scrutiny of the BITs is revealing a long roster of problems, relating to the lack of consideration of development needs of the weaker partner, the lack of exceptions for financial crisis, the lack of general exceptions, the lack of recognition of the right to regulate, and the dispute settlement process that is neither transparent nor accountable and ultimately of questionable legitimacy.

Perhaps the most interesting development in relation to BITs has been the recognition on the part of the European Union that the model agreement currently in use by the United States is not compatible with the obligations of member states under the EU Treaties. There are some 1000 BITs concluded by the 15 EU Member states and the ten accession countries that are to join in 2004. Potential incompatibility with the EU Treaties was not recognized as long as these BITs were concluded with countries whose investors seemed unlikely to invest in the EU or to press claims against one of its Member states. Such is not the case with the United States, and it quickly became apparent that maintenance of the BITs between the United States and the accession countries could create serious problems. The EU pressed both the United States and the accession countries to amend their BITs. The United States, in keeping with the

attitude of all developed countries that have concluded BITs, was extremely reluctant to give up any rights its investors may have acquired. Only when it became evident that the accession countries would abrogate the BITs entirely—since EU accession was much more important to them—did the United States agree, reluctantly, to amend the treaties, although it refused to accept changes that would accommodate measures that might become necessary to address financial crisis in the Euro-zone. This result was codified in a Memorandum of Understanding between the EU, the United States and the accession countries.

Now that the difficulties surrounding the US-accession country BITs have largely been resolved, it seems appropriate to consider whether other BITs concluded by EU member states are consistent with the EU Treaties. Formally the BITs represent mutual responsibilities, involving identical commitments on the part of both contracting parties. In practice they have never been viewed in this light, since it was assumed that investments would flow in one direction only. Such a view did not, however, take into account the prospect of forum shopping by investors. Several instances are already known where (US) investors have been able to institute proceedings against a country with which the United States has no BIT, or under a BIT that was viewed as more advantageous than that concluded by the United States. Since the dispute settlement procedures under BITs are so intransparent that it is impossible to identify all current (or even concluded) disputes with any assurance, it is also impossible to determine whether more instances of forum shopping already exist. At the very least it is possible to assume that any of the BITs concluded by EU Member states and accession countries could be used against these countries by investors able to create an investment interest in the developing country in question—unless the definition of “investment” in the BIT is sufficiently carefully drafted to exclude such a possibility, either by defining “home country” or by establishing a criterion of significance for the investment. No such definitions are known to exist.

This line of reasoning raises the intriguing question as to whether the many BITs concluded by EU Member states and accession countries are compatible with the EU Treaties, and if not, how this problem is to be resolved short of massive renegotiation. The issues covered by the Memorandum of Understanding between the EU, the US and the eight accession countries are not trivial. The BITs in question are to be “amended in a variety of ways so as to limit the reach of rules on national treatment and most-favored nation treatment into certain sensitive areas of the economy<sup>3</sup>.” These sensitive areas are agriculture, audiovisual, securities, investment and other financial services, fisheries, hydrocarbons, subsidies, and three different modes of transport: air carrier, inland waterways, and maritime. It is not an exaggeration to say that these sectors are at the heart of economic and cultural development policies of the countries involved. It also seems reasonable to investigate whether similar exceptions would not be appropriate for developing countries faced with

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<sup>3</sup> Luke Peterson, “EU-US agree to alter US BITs with EU accession candidates,” Investment Law and Policy Weekly News Bulletin, September 19, 2003. Available at: <http://www.iisd.org/trade>. See also European Commission, “European Commission, eight acceding countries and US sign Bilateral Investment Understanding.” (press release) at [http://europa.eu.int/comm/trade/issues/bilateral/countries//usa/pr230903\\_en.htm](http://europa.eu.int/comm/trade/issues/bilateral/countries//usa/pr230903_en.htm)

demands for the liberalization of their investment sector. In other words the time may be ripe for a careful look at all BITs and their implications for sustainable development.

***Free Trade Area of the Americas.*** Negotiations for an FTAA were launched more than ten years ago, just before the successful conclusion of NAFTA and the Uruguay Round. The economic case for an FTAA has never been fully articulated. Its politics are fairly self-evident: the FTAA stands in a long tradition of US attitudes towards the Western hemisphere and represents in particular a challenge to European interests in Latin America. Not only does Europe have a colonial past and continuing cultural ties with many of the countries of South America, it is also the principal trading partner of most of these countries for the simple reason that they produce what Europe needs: commodities.

The agenda for the FTAA was modeled on NAFTA even though the political interests driving the negotiation were significantly different. The economic interests of countries such as Brazil and Argentina in FTAA are distinctly different than those of Mexico (or Canada) in NAFTA. Though the resulting problems were fairly predictable, they appear to have caught some of the negotiators by surprise. As has happened elsewhere, investment became one of the issues around which differences of opinion crystallized, presumably because of its overriding importance for development in general, and sustainable development in particular.

The FTAA negotiations have not been characterized by a high degree of transparency so it remains remarkably difficult to determine the actual state of discussions—more difficult certainly than in the WTO. Yet indications are that countries may be moving towards an “FTAA-lite” even though such an outcome would presumably be widely interpreted as a rebuff to the United States.

Despite these difficulties, there has been no effort to articulate investment rules that are more appropriate to the hemispheric context than the controversial investment chapter of NAFTA. The apparent reluctance to do so may be grounded in a reluctance to open the debate about investment rules to a more radical process of rethinking, since it is likely that new insights or changes in approach in one negotiating forum are liable to bleed rapidly into other fora.

***Regional and Inter-regional Negotiations.*** It would appear that regional negotiations offer opportunities that have not been fully explored for addressing legitimate concerns about foreign investment. The two “models” available are the approach of the European Union, where investment rules are part of a complex institutional structure of political integration, and NAFTA, which developed investment rules in almost clinical isolation from the broader policy objectives of the countries involved. These two models represent opposite extremes, so that neither is likely to serve well as a template for other regions. Yet it is striking that apart from BITs, the most significant international investment rules are to be found at the regional level.

While the US emphasized its desire to seek bilateral “trade” agreements, the EU approach is based to a significant extent on a model of international

regionalization, reflecting Europe's own experience. The United States has never embraced the concept of regional agreements since these imply a degree of political integration that goes far beyond what seems acceptable in Washington—in particular beyond anything that might pass muster in the US Senate. Such an approach to globalization would furthermore have the effect of setting the United States in a “regional” (North American) context whereas its self-image is one of global pre-eminence.

There are indications, however, that the option is being seriously considered of pursuing regional agreements that involve a degree of political integration prior to further action in the WTO. In South America, Mercosur may provide the focus for the creation of a larger regional common market. Even in Asia there are signs that the relatively cautious countries of ASEAN may be opening up to a more regional vision—spurred on not least by the growing impact of China. This difference of approach remains one of the unresolved issues of the broader debate about globalization.

The unanswered question posed by this move towards regionalization concerns the linkages between investment agreements and political integration. It may not be possible to conclude legitimate and effective investment agreements without at least some degree of policy integration. If that is the case—and the difficulties encountered with all attempts to develop “multilateral,” that is broadly global rules, suggest that this may indeed be so—then regions will be the preferred venue for investment agreements.

The EU is engaged in so-called “inter-regional” negotiations, nominally with both the Mediterranean and Mercosur, but in practice only with the latter because the former has required what may be described as a multi-bilateral negotiating strategy. These negotiations include a significant element of political cooperation, which in turn implies a certain degree of political integration on the part of the negotiating partners. For now, the process of political integration in Mercosur exists more on paper than in reality. Yet institutionally the underlying Mercosur Treaty, modeled on the original EU Treaties, provides all the necessary tools to move in this direction.

***The Cotonou Agreement.*** Nowhere is the characteristic European approach to regionalism more in evidence than in the Cotonou Agreement that links it with the African, Caribbean and Pacific (ACP) countries. The Cotonou Agreement replaced the series of Lomé treaties, more traditionally structured development agreements. Cotonou is essentially a trade agreement with more explicitly articulated development goals and with a significant fund designed to promote their attainment.

The Cotonou Agreement is still in an early stage of implementation. Presumably the institutional arrangements adopted from the Lomé treaties, in particular the funding and disbursement arrangements, will be marked by a high degree of institutional and bureaucratic inertia. Nevertheless the overall framework is changing steadily, and a principal tool in pursuit of this aim is the negotiation of Economic Partnership Agreements (EPAs). These EPAs are to be concluded between the EU and regional groups of ACP countries. In some areas, such as the Caribbean and Pacific, obvious structures of regional integration exist. Some

of the details remain to be worked out. For example, not all members of Caricom are ACP countries. In Africa, the difficulty of determining which country will participate in which EPA are more pronounced; this in particular with regard to the relationship of EPAs to South Africa, the most important country south of the Sahara, but not an ACP country. Moreover South Africa has concluded a free trade agreement with the EU that is notably less generous than what African countries may reasonably expect from their EPAs.

Investment is bound to become a major issue in EPA negotiations, not only because it is in the interests of the EU to include investment and thereby to create some precedents for the broader negotiations that are intended but also because it is impossible to pursue development without proper attention to investment. The critical issue is whether the investment provisions of EPAs will adequately reflect the aspirations of the ACP countries involved for development in general, and sustainable development in particular. This is likely to be one of the areas where some of the most important innovations can occur. Moreover should it turn out that BITs between the EU member states and ACP countries require significant revision, the EPA negotiations may prove to be the vehicle of choice to address these issues. This would be facilitated by the fact that the Cotonou Agreement is concluded between the ACP countries, the European Union and its member states, so that all interested parties would be at the table.

**Conclusion.** Investment will not disappear as an issue for international negotiation. Indeed, it is liable to loom increasingly large. On the one hand there may be a need to rectify some of the mistakes that have been made in investment agreements in the past, both in NAFTA and in BITs. On the other hand investment is at the heart of any development process, and any bargain that adequately reflects the interests of both developed and developing countries must include investment provisions that strike a fair balance between the rights and obligations of all parties: host states, home states, and investors.