

FOREIGN INVESTMENT IN THE WTO

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Abstract

This article explores the application of the policy science concepts of 'policy frames' and 'policy transfer' as explanatory tools in the study of law and legal reform. It does so by examining the transformation in international law of foreign investment issues from a state-centred classical international law frame, within which foreign investment appeared as a property issue and protection of property as the central objective of law, to a market-centred neo-liberal frame, under which foreign investment is regarded as a 'trade' issue and growth-oriented liberalization of trade the central objective of law. This transformation can be summarised very crudely as the replacement of a discourse in which states have rights and multinationals have duties, by one in which states have duties and multinationals have rights.¹ However, this transformation is neither complete, nor uncontroversial. This article considers recent efforts to launch negotiations for a multilateral agreement on investment within the WTO from this 'framing' perspective and concludes that framing analysis may have useful applications in the study of law.

Introduction

This article uses policy science literature on framing and policy transfer to examine the transformation in international law of foreign investment issues from a state-centred classical international law frame, within which foreign investment appeared as a property issue, to a market centred neo-liberal frame, under which foreign investment is regarded as a 'trade' issue. This transformation can be summarised very crudely as the replacement of a discourse in which *states have rights and multinationals have duties*, by one in which *states have duties and multinationals have rights*.² This article focuses in particular on the moves to initiate negotiations within the current World Trade Organisation (WTO) Doha Round on an international agreement on investment. The failure of these moves testifies to the fact that transformation of the foreign investment discourse is neither complete, nor uncontroversial. In considering these events this article employs the policy science concepts of 'policy frames' and 'policy transfer' as explanatory tools

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¹ Brewer and Young, *The Multilateral Investment System and Multinational Enterprises* (1998), p.273.

² Brewer and Young, *The Multilateral Investment System and Multinational Enterprises* (1998), p.273.

and considers whether they have anything to offer the study of law and legal reform.

The first section outlines the concepts of ‘framing’ and ‘policy transfer’ as developed in policy science literature. In the second section the process by which foreign investment issues were ‘reframed’ in neo-liberal terms as market issues is discussed. The third section then outlines the major legal developments which have emerged within this neo-liberal frame, and which serve to provide the normative content of the new frame: in particular the General Agreement on Trade in Services (GATS), the Agreement on Trade-Related Investment Measures (TRIMS) and the Draft Multilateral Agreement on Investment (MAI) are considered. The fourth section examines the recent debates in the WTO on a possible multilateral agreement on investment, in particular the conclusion of a negotiating mandate in relation to foreign investment at the Fourth Ministerial meeting of the WTO in Doha in November 2001, and the subsequent dropping of this item in 2004. A final section returns to the concepts of framing and policy-transfer and concludes that they may have useful applications in legal studies.

Framing and Law

Policy science literature on policy framing focuses on the way in which political issues are conceptualised, packaged, or presented in political discourse – framing – and how this framing assists or restricts the successful pursuit of issues in different policy contexts.³ The policy context may be composed of ideological, conceptual or normative elements, or may relate to historical contingency or institutional settings, but the central notion is that policies will be better received and more likely to be pursued or adopted where they ‘fit’ or ‘resonate’ with other surrounding policy frames, for instance where they ‘fit’ within the ideological mindset of the institution within which they are being promoted. Policy-making can thus be characterised as an ongoing conflict between actors over competing policy frames.⁴ Moreover, it can be observed that actors themselves will “gravitate to the policy-making arena(s) most favourable to their cause and their particular policy frame”, and, “seek. . . to create an institutional arrangement that strengthens those institutions that are supportive of them”.⁵ The policy framing literature has also been applied in relation to the policy transfer question; that is, the question about when and how policy solutions developed in one political context will be taken up and utilised in another political context.⁶ Finally, some literature has focussed on the production of

³ See in general Schon and Rein, *Frame Reflection. Towards the Resolution of Intractable Policy Controversies* (1994); McAdam, McCarthy and Zald (eds.), *Comparative Perspectives on Social Movements: Political Opportunities, Mobilizing Structures, and Cultural Framings* (1996).

⁴ *ibid.*

⁵ Mazey, “Introduction: Integrating gender – intellectual and ‘real world’ mainstreaming” (2000) 7(3) *Journal of European Public Policy. Special Issue on Women, Power and Public Policy in Europe* 333 at 339.

⁶ On policy transfer see, e.g. Dolowitz and Marsh, “Who Learns What from Whom: a Review of the Policy Transfer Literature” (1996) XLIV *Political Studies* 343; Rose, “What is lesson-drawing?” (1991) 11 *Journal of Public Policy* 3; Wolman, “Understanding Cross National Policy Transfers: The Case of Britain and the US”

policy frames, based on the insight that policy frames are “not just lying round someplace, available to be picked up and used... The frame has to be created.”⁷ By focussing on the reflexive process which lies behind the creation of policy frames, rather than on the competition between existing frames, such developments lead in turn to the suggestion that account must be taken of the contestable nature of policy frames and the influence which resistance to the development or establishment of a new policy frame might have in the shaping of the frame itself.⁸

These bodies of literature on policy framing and policy transfer can be seen as directly relevant to legal scholars concerned with explaining the success and/or failure of law reform initiatives and the wider implications of these initiatives. The concept of policy framing, for instance, can be related to the ideational aspect of law and specifically, the role of law in privileging some understandings of problems and some responses to them over other competing understandings and potential approaches. Law, in other words, can play an important part in the reinforcement or weakening of existing policy frames. Thus a particular legal reform, by contributing to the establishment or weakening of a policy frame, can have normative ‘weight’ beyond that particular policy setting.

In this sense the concept of a policy-frame performs a similar role in literature to the concept of a policy paradigm, denoting an established form or pattern to which subsequent laws or policies may or may not conform. Frames, however, can be distinguished from paradigms. Conceptually, ‘paradigm’ usually focuses on the ‘core’ or central features of laws, policies and analyses, stripping them bare or reducing them to a minimum yet essential content. Frames on the other hand, refer more to the outer limits within which laws or policies must fit if they are not to be disruptive of existing orders. Despite this difference of focus there is a sense, however, in which the concepts of ‘paradigms’ and ‘frames’ perform a similar role, describing or prescribing an ideal or exemplar that functions as a reference point in discourse. However, whereas the concept of a ‘paradigm’ usually refers exclusively to the ideational or normative content of particular laws or policies, ‘frames’ are often construed more widely to include institutional and/or process aspects; a policy frame is a ‘view of the world’⁹ which both

(1992) 5(1) *Governance: An International Journal of Policy and Administration* 27. On the role of framing in policy transfer see, for example, Schon and Rein, *supra* n.2; Hafner-Burton and Pollack, “Mainstreaming Gender in Global Governance” *EUI Working Paper RSC No. 2001/46* Florence, Robert Schuman Centre for Advanced Studies, European University Institute, 2002.

⁷ Tesh, *Uncertain Hazards: Environmental Activists and Scientific Proof* (2000), cited with approval in Welsh I. “Re-Framing Social Movements: Margins, Meanings and Governance”, paper presented to ECPR Conference, University of Kent, 6-8th Sept. 2001.

⁸ For a similar argument cast in terms of norm negotiation see Elgstrom, “Norm Negotiations. The construction of new norms regarding gender and development in EU foreign aid policy.” (2000) 7(3) *Journal of European Public Policy. Special Issue on Women, Power and Public Policy in Europe* 457 at 461.

⁹ Mazey, *supra* n.5, at 339.

defines the problem and prescribes the solution.¹⁰ Thus while both ‘paradigms’ and ‘frames’, once established, may have weight beyond the immediate policy setting, the weight of the frame may include matters such as the institutional setting and the means by which policies or laws are agreed on or adopted, as well as the content of those laws and policies.¹¹ Frames may dictate or suggest a choice of institution for a particular innovation in law or policy and/or a particular method of reform: frames, like institutions, ‘embed historical experience into rules, routines and forms that persist beyond the historical moment and condition’.¹²

It follows that a further use to which the concept of policy frames can be put in legal studies is in analysing the role of a particular legal landscape or set of rules in setting the direction or paths of future developments. It has been observed elsewhere that legal reforms and innovations will work best where they ‘fit’ well within the existing socio-legal landscape; that is, where there is ‘resonance’ with existing policy frames. Conversely, the policy context into which reforms are introduced will influence the ways in which those reforms are implemented and the ways in which they play out in a particular context.¹³ Overall it is clear that existing policy frames will serve to commend some policy proposals and condemn others, meaning that at times the extra support required to displace or reformulate an existing policy frame will be the factor which determines the choice between competing policy proposals.

Policy framing can also be usefully deployed in the task of explaining how and why particular legal reforms succeeded or failed in particular jurisdictions, when they were modelled, in whole or in part, on legal systems or legal reforms seen elsewhere. Political science explanations can be used alongside scholarship on legal transplants and on the globalisation of legal discourse¹⁴ to explore both the conditions for successful transplantation of

¹⁰ *ibid.*, 338; Schon and Rein, *supra* n.2, at xviii. In this respect there is resonance with Baachi’s work: Baachi, *Women, Policy and Politics: The Construction of Policy Problems* (1999).

¹¹ Thus at one end framing literature may overlap with bodies of work on path dependency; see for example Dimitrakopoulos, “Incrementalism and Path Dependence: European Integration and Institutional Change in National Parliaments” (2001) 39 *JCMS* 405; March and Olsen, *Rediscovering Institutions: The Organisational Basis of Politics* (1989); Wilkinson, “The WTO in Crisis: Exploring the Dimensions of Institutional Inertia” (2001) 35(3) *JWT* 397.

¹² March and Olsen, *ibid.*, at 167.

¹³ See, e.g. previous work on the impact of EC equality law in Member States’ laws and policies: Beveridge, Nott and Stephen, “Addressing Gender in National and Community Law and Policy-making” in Shaw (ed.), *Social Law and Policy in an Evolving European Union* (2000) at 135; Cram, “Governance to Go: Domestic Actors, Institutions and the Boundaries of the Possible” (2001) 39 *JCMS* 595; Kilpatrick, “Community or Communities of Courts in European Integration? Sex Equality Dialogues Between UK Courts and the ECJ” (1998) 4(2) *ELJ* 121.

¹⁴ See for example Seidman, Seidman and Walde, *Making Development Work: Legislative Reform for Institutional Transformation and Good Governance* (1999), especially contributions by Seidman, Seidman and Walde; Walde and Gunderson; Walde and von Hirschhausen; and Tamanaha; also Thome, “Heading South But Looking North: Globalization and Law Reform in Latin America” in Faundez,

legal 'models' or solutions, and the consequences of attempting such cross-cultural transplantation.

Cross-cultural legal transplantations can be seen to occur in many different ways and, as Nelken warns, these should not be oversimplified.¹⁵ Policy-framing literature posits legal transplantation as the outcome of discursive processes and suggests two particular means by which such transplantation might occur. The first is where policy-makers in one state, whether one or two policy entrepreneurs or the government at large, look to other jurisdictions for solutions to apparently similar economic, social or political problems. Through the process labelled as 'lesson-drawing', a solution which appears to be working elsewhere (in the originating state) may be used as a model by the policy-makers in the first state in the drawing up of proposals: here the protagonists have succeeded in establishing their policy-frame in the receiving state and this may include a new understanding of the problem as well as the solution. Rose identifies five ways in which the solution observed elsewhere may influence the new policy proposals, ranging from merely providing inspiration at one end of the spectrum, to serving as a blueprint at the other.¹⁶ Here the transplantation occurs *horizontally*, and will normally be instigated primarily by policy-makers within the host state. However it should be acknowledged that within the international community the originating state may in reality play a key role in commending the solution to the host state policy-makers or providing incentives for particular types of reform, such as when foreign aid takes the form of technical assistance and know-how directed at policy reform in the recipient state.

The second way in which cross-cultural transplantation can be seen to occur is via an international body such as an international organisation, or via a multilateral discourse, possibly though not necessarily encapsulated in a multilateral legal instrument such as a treaty. Cross-cultural transplantation will occur in this way where solutions developed in one jurisdiction or group of jurisdictions (the originating states) form the basis for the development of 'international' policies or norms, but require adoptive action within the domestic jurisdiction of other states (the host states). Here the transplantation occurs *vertically*, from the international level to the domestic level, and will normally be instigated by either the originating state(s), the international body (the intermediary) or both. It will also require at least the compliance of the host state, and possibly its active participation in adapting or adopting the policy to the local legal and political environment.

This second model fits legal developments in the European Union (EU), where the role of national governments and courts as implementers and enforcers of EU law and policy is well known,¹⁷ though the role of the

Footer and Norton (eds.), *Governance, Development, Globalization* (2000) 49; Watson, *Legal Transplants: An Approach to Comparative Law* (2nd, 1993).

¹⁵ Nelken, "Changing Legal Cultures" in Likosky (ed.), *Transnational Legal Processes: Globalisation and Power Disparities* (2002) 41 at 50-51.

¹⁶ Rose, *supra* n.5 at 21-22. Rose proposes a five-fold typology: Copying; Emulation; Hybridization; Synthesis; Inspiration.

¹⁷ Maher, "National Courts as European Community Courts" (1994) 14 *LS* 226; Snyder, "The Effectiveness of European Community Law: Institutions, Processes,

European Court of Justice in supplying the tools for the job has also been a key factor.¹⁸ It fits also the activities of the International Monetary Fund and the World Bank wherein policies regarding financial assistance to developing states are underpinned by ‘good governance’ strictures requiring changes in political structures and in laws and policies to make them resemble more those seen in developed free market economies.¹⁹ Finally, it also increasingly fits some international trade disciplines which, as Mary Footer has observed, now penetrate more deeply into domestic legal landscapes than previously:

‘[F]or many developing countries the implementation of WTO trade obligations is simply another item to add to the growing list of legal and institutional reforms that underpin neoliberal development policy, which is “...organised around a set of ‘best practices’ rules and institutions, derived from model market economies”.’²⁰

One clear example of this is the Agreement on Trade-Related Intellectual Property which requires *inter alia* the provision of particular forms of remedies in domestic law for infringements of intellectual property rights.²¹

The Re-framing of Foreign Investment

This second section attempts to map the reframing of the issue of foreign investment in international law from the late 1980’s to the present day. This reframing can be divided into three stages: the establishment of a link between ‘foreign investment’ and ‘trade’; full acknowledgement of the relationship between foreign investment and trade; and the realignment of ‘foreign investment’ and ‘trade’ issues as two aspects of a larger market liberalisation phenomenon. Before outlining these stages it will be useful to look briefly at the historic foreign investment ‘frame’ of classical international law

Tools and Techniques” (1993) 56 *MLR* 19; Temple Lang, “The Duties of National Courts under Community Constitutional Law” (1997) 22 *ELRev.*3.

¹⁸ Weiler, “The Transformation of Europe” (1991) 100 *YLJ* 2403; Snyder, *ibid*; see also Carol Harlow’s discussion of ‘vertical convergence’ whereby the ECJ requires, through its rulings, the alignment of national rules and procedures to a Community standard set by the ECJ: Harlow, “Voices of Difference in a Polyphonic Community. The Case for Legal Diversity Within the European Union” (2000) *Harvard Jean Monnet Working Paper* 2/00.

¹⁹ Faundez, “Legal Technical Assistance” in Faundez (ed.), *Good Government and Law: Legal and Institutional Reform in Developing Countries* (1997); Tshuma, “The Political Economy of the World Bank’s Legal Framework for Economic Development” (1999) 8(1) *SLS* 75; Turner and Hulme, *Governance, Administration and Development: Making the State Work* (1997); World Bank, *Governance and Development* (1992).

²⁰ Footer, “The WTO, Developing Countries and Technical Assistance for Trade Law Reform” in Faundez, Footer, and Norton, (eds.), *supra* n.14, 353 at 354. The quote is from Rittich, “Transformed Pursuits: The Quest for Equality in Globalized Markets” (2000) 13 *HHRJ* 233 at 234.

²¹ Part III of the Agreement on Trade-Related Intellectual Property Rights, 1994 in GATT *The Results of the Uruguay Round of Multilateral Trade Negotiations: The Legal Texts* (1994).

*Foreign Investment – the ‘old’ frame*²²

In classical international law, the issue of foreign investment was governed by two basic principles: the principle of territorial sovereignty and the principle that the state’s right of self-defence included a right to protection of its nationals abroad. Under the first principle, foreign investors were seen to fall under the jurisdiction of the host state, which in turn was empowered to subject foreign investors to the full panoply of local regulation. Thus the host state had the right to exclude foreign investment all together, or to permit only limited investment, perhaps only in certain sectors of the economy. Once admitted foreign investors could be subjected to local laws on matters as diverse as taxation, protection of the environment, health and safety, worker’s rights and corporate management. Moreover, there was no requirement of equal treatment with indigenous investors: foreign ownership, even of a locally incorporated subsidiary, might readily serve as the basis for discriminatory treatment.²³ The second principle, that the protection of states extends to their nationals abroad, came into play only in the event of expropriation; that is, where there was a ‘taking’ of property owned by a foreign national by the host state. While the sovereign right of states to nationalise, expropriate or otherwise interfere with property situated in their territory can scarcely be doubted, fierce arguments were pursued for decades over the conditions which might attach to this right, such as a duty to pay compensation.

Foreign investment has thus been treated typically by writers in international law as an aspect of the subject of the treatment of foreign nationals or ‘injuries to aliens’, the injury consisting of unjustified interference with the *property* of a foreign national. The many attempts which have been made to clarify the rules through codification, and the many judicial and arbitral innovations in this field, have been discussed largely in this context. An important trend evident in the second half of the twentieth century was to seek to reduce the scope for state-state conflict over the treatment of investors by creating mechanisms whereby disgruntled investors could bring

²² See generally Domke, “Foreign Nationalisations: some Aspects of Contemporary International Law” (1961) 55 *AJIL* 585; Foighel, *Nationalisation: A Study in The Protection of Alien Property* (1957); Friedmann, *Expropriation in International Law* (1953); Higgins, “The Taking of Property by the State: Recent Developments in International Law” (1982-3) 176 *Recueil des Cours* 259; Jain, *Nationalisation of Foreign Property: A Study of North-South Dialogue* (1983); Lillich (ed.), *International Law of State Responsibility for Injuries to Aliens* (1985); Miller and Stanger (eds.), *Essays on Expropriation* (1967); Schwarzenberger, *Foreign Investments And International Law* (1969); Sornarajah, *The International Law on Foreign Investment* (2nd, 2004), Chap.7; Verway and Schrijver, “The Taking of Foreign Property Under International Law: A New Legal Perspective?” (1984) 15 *NYIL* 3; White, *Nationalisation of Foreign Property* (1961); Wortley, *Expropriation in Public International Law* (1959).

²³ Though more recently it has been possible to point to a general prohibition in international law on discrimination on grounds of race which has the status of *jus cogens*, i.e. a rule from which there can be no derogation. However it should be appreciated that the presence of ‘race’ rather than ‘nationality’ discrimination will in practice often be obscure in a business context. Sornarajah suggests, however, that redistributions to promote equality may be justified: Sornarajah, *supra* n.22, at pp.327, 366-7.

actions directly against host states, which would serve to depoliticise the conflict.²⁴ Bilateral investment treaties (BITs) too have been regarded as a practical means for clarifying the scope and content of the duty owed by host states to home states in respect of the home state's nationals' commercial investments. Thus BITs have tended to focus on property protection issues, including expropriation. It is only more recently that US and Canadian BITs have evolved to address issues concerning the treatment of existing investments, importing concepts such as the 'most-favoured nation' and 'national treatment' principles from trade disciplines.²⁵

On the other hand, international trade disciplines, principally the General Agreement on Tariffs and Trade (GATT), were conceptualised as concerning traffic in goods from one state to another and as having little to say about the closely related but conceptually distinct question of production location.²⁶

Developing the new frame

(a) The first step in reframing foreign investment as an issue in international law required that a connection be made between trade in goods and foreign investment. This came through a focus by the U.S. government on the issue of 'performance requirements', which referred to the conditions and terms imposed by host states on foreign investors as a condition of their entry to or operation in the territory. The focus on 'performance requirements' was advanced on two fronts. One was the newly-revised U.S. Model BIT, launched in 1983, which contained provisions outlawing trade-related performance requirements.²⁷ The other was the assault, under the auspices of the GATT, on the performance requirements regime operating in Canada under the Foreign Investment Review Act (FIRA). Bringing its complaint to a GATT panel, the US argued, *inter alia*, that performance requirements such as local input requirements and export performance requirements, which were commonly the subject of written undertakings given by foreign

²⁴ Measures ranged from the 'internationalisation' of investment contracts to the establishment of *ad hoc* and systematic arbitral institutions and processes such as the Iran-US Claims Tribunal and the International Centre for the Settlement of Investment Disputes.

²⁵ UNCTAD, *Series on issues in international investment agreements – Admission and Establishment* (1999), at pp.26-28. First developed in the US Model BIT of 1994, this approach is also found in NAFTA, in the 1994 Treaty on Free Trade between Colombia, Mexico and Venezuela, within MERCOSUR and in the APEC Non-Binding Investment Principles, subject in each case to limitations and exceptions (*ibid.*). See also Eden, "The Emerging North American Investment Regime" (1996) 5(3) *Transnational Corporations* 61; Shenkin, "'Trade-Related Investment Measures' in Bilateral Investment Treaties and the GATT: Moving Towards a Multilateral Investment Treaty" (1994) 55 *U. Pitt. L. Rev.* 541.

²⁶ For a discussion see Bhagwati, "The Capital Myth. The Difference between Trade in Widgets and Dollars" (1998) 77(3) *Foreign Affairs* 7.

²⁷ Art.II:5 of the Model BIT provided: "Neither party shall impose performance requirements as a condition of establishment, expansion or maintenance of investments, which require or enforce commitments to export goods produced, or which specify that goods or services must be purchased locally, or which impose any other similar requirements." As Shenkin reports, most of the BITs concluded after the adoption of the new model included such provisions, though occasionally the binding language of the model was replaced in negotiations with soft or hortatory language: Shenkin *supra* n.25 at 580-582.

investors to the Canadian government during the approvals process, produced anti-competitive effects for goods produced elsewhere, and hence breached GATT non-discrimination rules. The GATT panel upheld the complaint²⁸, in part at least, thus recognising the link between conditions imposed on investors and trade in goods.

(b) The second step in the reframing of foreign investment in international law required full acknowledgement of the connection between foreign investment decisions and trade. Two factors in the global economy served to highlight this connection. The growth in foreign investment and in trade in goods, and increased industrialisation in developing states, served to erode previously understood divisions between primary and secondary producer states (central and periphery economies) and to replace it with an understanding centred on the notion of 'globalisation'. The 'globalised' economy was shaped not so much by 'inherent' advantages possessed by states, such as access to raw materials, technological capacity or closeness to markets, as by their ability to attract and retain capital investment and to foster prosperity and efficient markets. As a corollary, flows of foreign investment and trade in goods were clearly the consequence of single location decisions taken by transnational corporations. Thus the notion of globalisation helped to make visible the close connection between trade in goods and foreign investment.

A second factor was the rise of trade in services, perceived as largely technology-driven and hence more mobile than trade in goods. The increasingly important economic contribution made by this trade to developed countries' economies led to the inclusion of trade in services in the GATT Uruguay Round negotiations, with access for service-based industries to the economies of other states at the top of the agenda. Since market access is often realised by making an investment in the economy (for example, by establishing a subsidiary or a branch through which the services will be provided), foreign investment was implicated from the beginning in the negotiations on services.²⁹

(c) From these first two points flowed a third: the development of an understanding that trade and investment were two aspects of a single phenomenon; that they were merely components of something larger which was the 'market', the market in turn being understood as a single global market. Foreign investment, in other words, was located alongside trade issues within a single policy frame, so that it became difficult to discuss one of these without at least awareness of the implications for the other, and legitimate, possibly even normal, to discuss them together.³⁰ Moreover this

²⁸ *Canada – Administration of the Foreign Investment Review Act (FIRA Case)*, adopted on 7 February 1984, GATT Basic Instruments and Selected Documents Supp. 30, 140. See further Beveridge, *The Treatment and Taxation of Foreign Investment under International Law: Towards International Disciplines* (2000), pp.160- 161; Shenkin, *ibid.*, at p.563.

²⁹ Four modes of access are recognised in the GATS Agreement, Art. 1: for an overview see Sauvé, "A First Look at Investment in the Final Act of the Uruguay Round" (1994) 28(5) *JWT* 5.

³⁰ One example is the observation that some foreign investment, for example some investment into South-East Asia in the 1990's, was fuelled by restrictive trade policies: that is, it was 'tariff-jumping' investment. The phasing out of quantitative

policy frame was conceived in distinctively neo-liberal terms, with the focus on liberalisation rather than on regulation.

Through these three stages in reframing, the issue of the treatment of foreign investment ceased to be about the protection of the property of nationals abroad – the understanding on which classical international law rules rested – and came to be understood instead as a question of market regulation. To draw again on the policy science literature, there was now a clear ‘fit’ or ‘resonance’ between foreign investment issues and global trade issues. This resonance had further implications, some political and some normative.

An important political consequence of this reframing was that national restrictions on foreign investment came to be perceived as damaging to the global economy in the same way that national tariffs on goods were regarded as damaging to international trade. The progressive liberalisation philosophy that gave GATT its label as a one-way street, which also underpinned free trade areas and had become central in North-South relations under the ascendant neo-liberal orthodoxy, now attached also, in political and economic discourses, to foreign investment. Under this orthodoxy, state regulation of foreign investment became part of the problem, not part of the solution. The logic of this was irresistible: trade liberalisation and liberalisation of foreign investment were two key components in a larger economic integration project and while substantial progress towards liberalisation had been made in relation to one (goods), the other (services) had been left largely untouched. Indeed, given the rising importance of trade in services, it was now illogical and inefficient to look only at goods and to ignore restrictions on trade in services; hence, liberalisation of foreign investment became imperative.

There were also important normative consequences. Since the ‘problem’ was now framed in terms which mirrored the problems addressed historically in relation to trade in goods, foreign investment could now be presented as amenable to the same type of legal regime as trade in goods; that is, a GATT-type regime based on the ‘most-favoured nation’ and ‘national treatment’ principles.³¹ This, of course, was precisely what had already been pursued in free trade areas such as the European Union, where liberalisation of intra-Community investment is guaranteed by the freedom of establishment and the right to provide services, together with the freedom of movement of capital and goods.³²

trade restrictions was likely in this context, it was observed, to lead to changes in the direction and nature of inflows of foreign investment. *WTO 2000 Report of the Working Group on the Relationship Between Trade and Investment to the General Council* (WT/WGTI/4, 27 Nov. 2000)

³¹ Not all commentators have accepted this argument: see Bhagwati, *supra* n.23.

³² EC Law, however, does not refer explicitly to the ‘most favoured nation’ and ‘national treatment’ principles, using instead a general concept of non-discrimination; for a discussion see further Beveridge, *supra* n.26, Chapter Six. In the UNCTAD ‘Issues’ series ‘Admission and Establishment’ booklet this is labelled as the ‘mutual national treatment model’. It can be found, to an extent, in EC Association Agreements, in the OECD liberalisation codes, the CARICOM treaty and a number of other regional economic development agreements, subject to varying limitations and exceptions in each case: UNCTAD, *supra* n.22, at pp.22-26.

The second normative consequence was that the focus of attention within the area of foreign investment had broadened out from exclusive concern with expropriation at, by definition, the end of the life cycle of the investor, to the treatment of foreign investment at the pre-entry and operating phases. This also entails a shift from the property focus of traditional international law to a broader economic focus encompassing the freedom of an investor to exploit economic opportunities, costs associated with regulation, fairness of competition and the medium to long-term security of investments.

In conclusion, the reframing of foreign investment as an economic integration issue produced a political imperative to tackle restrictions on foreign investment, and the solution which commended itself was a cradle-to-grave legal regime founded on the non-discrimination - most favoured nation and national treatment - principles. It also encompassed a trajectory towards greater liberalisation. Though there was no explicit denial of the sovereign rights of host states, their regulatory powers were now discussed less as rights and more as 'limitations' and 'exceptions', opening up questions about how well this normative approach could accommodate environmental, social and cultural concerns.³³

To reduce this argument to its barest interpretation, this new 'trade' centred policy frame on foreign investment suggested a move from a discourse in which states had rights and multinationals had duties, to one in which states have duties and multinationals have rights. The focus of negotiations in future would be on the rights of multinationals to establish themselves in new locations, to operate there on equal terms with indigenous enterprises and to be protected from unwarranted and arbitrary state interference, and on the duties of states to liberalise in these areas and to provide a level playing field and a secure and transparent legal framework for foreign investors, subject only to agreed limitations and exceptions.

Law in the New Frame

This section outlines the major legal developments which emerged within this new neo-liberal frame, and which give it its normative content, in particular TRIMS, GATS and the Draft MAI. From the outset it should be recognised that these legal agreements and regimes both build on the new foreign investment policy frame identified above, and serve to reinforce or secure it. This reinforcement may in turn make it more difficult to secure legal developments in the future that do not fit within the new frame.

³³ This issue is explored elsewhere in relation to gender issues: Beveridge, "Feminist Perspectives on International Economic Law" in Buss and Manji, *International Law: Modern Feminist Perspectives* (2005) 173.

The Agreement on Trade-Related Investment Measures (TRIMs)³⁴

Trade-related investment measures were not included in the 1982 Ministerial Declaration which formed the basis of the preparatory work for launching the Uruguay Round, but were introduced into the preparatory discussions by the US in 1986.³⁵ During the intervening period the US had scored a partial victory in establishing in the FIRA Case³⁶ that certain TRIMs were in any case inconsistent with existing GATT articles. The negotiation of the mandate on TRIMs highlighted the differences between foreign investment 'frames' which are the subject of the earlier section of this piece, with the US and Japan, for instance, setting out to take a broad look at restrictions on foreign investment, while the EC and developing countries wanted to restrict the mandate to issues more specifically related to trade in goods. In the event the latter view prevailed, with the result that the TRIMs agreement is cast as an agreement which supplements the GATT and relates only to trade in goods.

The Agreement on TRIMs, concluded under the auspices of the Uruguay Round of Multilateral Trade negotiations, consolidated the decision of the GATT Panel in the FIRA case by formalising the notion that certain trade-related investment measures were contrary to the GATT. 'Trade-related investment measures' are national controls on foreign investment imposed *de jure* or *de facto* which have a distorting effect on international trade. The Agreement on TRIMs provides that such measures should not be utilised where they would be in conflict with basic GATT obligations (Articles III and XI) and this basic obligation is reinforced by the listing of the most trade-distorting of these practices in an 'Illustrative List of TRIMs'³⁷ agreed to be inconsistent with GATT. While the Illustrative List itself is modest, it is not intended to list comprehensively practices which are contrary to GATT. Hence it is always open to WTO Members to question practices not included in the Illustrative List, if necessary by resort to enforcement procedures. The establishment of this discipline as part of the WTO package means also that Members are expected to operate transparently and to respond positively to queries from other Members³⁸ and to co-operate with the WTO institutions, for instance in the Trade Policy Review Mechanism. A Committee on TRIMs was established to monitor the implementation of

³⁴ Agreement on Trade-Related Investment Measures (hereafter TRIMs) in GATT *The Results of the Uruguay Round of Multilateral Trade Negotiations: The Legal Texts* (1994); for discussion see, e.g. Knaw, "'Trade-Related Investment Measures' in the Uruguay Round: Towards a GATT for Investment" 16 *NCJ Int'L and Com. Reg.* 309; Shenkin, *supra* n.25; Stewart (ed.), *The GATT Uruguay Round: A Negotiating History (1986-1992) Volume II* (1993).

³⁵ For a full account see Stewart, *ibid.*, 2061-72.

³⁶ Canada – Administration of the Foreign Investment Review Act, adopted 7 February 1984, GATT BISD Supp. 30 140

³⁷ TRIMs, *supra* n.34, Annex.

³⁸ TRIMs, *ibid.*, Art.6; DSU, Art.4. Further reflections of this approach can perhaps be found in the establishment under the OECD of National Contact Points: OECD, *Guidelines for Multinational Enterprises, Decision of the Council June 2000 on National Contact Points C/M* (2000) 96/FINAL, 19 Jul 2000.

the Agreement and to report to the Council for Trade in Goods,³⁹ which in turn reviews the operation of the Agreement and can propose amendments.⁴⁰

It could be argued that the cumulative effect of these measures is to require justification of restrictions on foreign investment, except where they fall within a clearly accepted class of restriction. Overall, in terms of policy frames, the Agreement on TRIMs perhaps represents a half-way house, bringing foreign investment within the purview of WTO disciplines and under the scrutiny of WTO institutions, while still endorsing the traditional view that restrictions on foreign investment are permissible provided that they do not conflict with any *lex specialis*. However, while the 'old' policy frame is not displaced, it can be said to have been substantially undermined by the establishment of TRIMs as a future agenda-item and by the establishment of mechanisms – the DSB and the TPRM – by which regular scrutiny of existing restrictions on foreign investment became legitimate. The TPRM also contributes to the establishment of the new policy-frame in that it focuses on pre-entry and operating conditions imposed on foreign investment, rather than on expropriation issues.

The General Agreement on Trade and Services (GATS)

The principal significance of the conclusion of the GATS was the extension of multilateral trade disciplines to services sectors under the umbrella of the new WTO regime. The central legal obligations which accession to the GATS entailed can be divided between the general provisions and the scheduled commitments. The general provisions include adherence to the most favoured nation principle (MFN) in services sectors and a general requirement of transparency in services regulation, though these general obligations are hedged in practice by both country-specific and general exceptions. The general provisions refer to both access to markets for new service providers, and the regulation of existing service provision.

Under their schedules of commitment each state then undertakes to apply the national treatment (NT) standard of treatment to the sectors and activities included in their schedules. The schedules in turn are organised into four 'modes of supply' of services: cross-border supply of services; cross-border consumption of services; services supplied through a commercial presence in the territory of another state; and services supplied by nationals of one state in the territory of another.⁴¹ It is the third of these, the commercial presence in another state, which is of greatest relevance to foreign investment and this is defined to include 'any type of business or professional establishment' including the establishment of a juridical person (*e.g.* a company) or a branch or office.⁴² The schedules then list the major forms of restriction maintained by states in relation to the sectors covered, broken down by mode of supply. This adoption of 'modes of supply', as a central organising feature of states' commitments under the GATS has been criticised as providing an 'architectural incentive' to states to restrict many of their commitments to the

³⁹ TRIMs, Art.7. See, *e.g.* WTO, *Report (2000) of the Committee on Trade-Related Investment Measures*, G/L/390, 20 Sept. 2000.

⁴⁰ TRIMs, Art.9.

⁴¹ GATS, Art.I.

⁴² GATS, Art.I (2).

'establishment' mode of supply and to impose restrictions on cross-border supplies of services, hence restricting economic integration.⁴³

The general provisions and the specific commitments under GATS taken together can be described as the normative requirements; they are supplemented by important institutional requirements and expectations. GATS, like GATT, can be seen as entailing both current commitments and an expectation that Members will participate in good faith in future rounds of negotiation with a view to further liberalisation of access and treatment. Indeed further negotiations in 1997 led to the conclusion of plurilateral agreements on financial services and telecommunications. In addition, GATS is subject to wider WTO disciplines, notably the Understanding on Rules and Procedures Governing the Settlement of Disputes (the DSU)⁴⁴ and the Trade Policy Review Mechanism.⁴⁵

Set against the backdrop of classical international law approaches to foreign investment, GATS can be seen as an important part of the 'reframing' of foreign investment issues as part of a wider trade liberalisation agenda. While some commentators have expressed disappointment with it and have pointed out its flaws⁴⁶, GATS succeeded in focusing attention on the pre-entry and operating phases of foreign investment, and balances state restrictions on foreign investment against the operation of the MFN and NT disciplines. It also embodies the expectation of future liberalisation and, through the establishment of a strong system for the resolution of disputes, establishes firmly that issues of foreign investment regulation fall squarely within the scope of international trade law.

The Draft MAI

The Draft Multilateral Agreement on Investment was an attempt to negotiate a multilateral agreement on investment which, unlike the Agreements on TRIMs, was not restricted to issues relating to trade in goods. Like GATS, its ambit extended to pre-entry restrictions and operating conditions, but it also embraced the traditional expropriation concerns and was not restricted to the services sector. In this sense it was regarded, by both its proponents and its detractors, as an ambitious treaty which would be substantially wider in scope than other existing foreign investment agreements. It can be seen as

⁴³ Sauvé "Assessing the GATS – Half-Full or Half-Empty?" (1995) 29(4) *JWT* 125 at 138.

⁴⁴ GATT *The Results of the Uruguay Round of Multilateral Trade Negotiations – The Legal Texts* (1994), 404.

⁴⁵ Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Annex – Trade Policy Review Mechanism, in GATT *The Results of the Uruguay Round of Multilateral Trade Negotiations - The Legal Texts* (1994), 434.

⁴⁶ Mattoo, "National Treatment in the GATS – Corner-Stone or Pandora's Box" (1997) 31(1) *JWT* 107; Mukherjee, "GATS and the Millennium Round of Multilateral Negotiations – Selected Issues from the Perspective of the Developing Countries" (1999) 33(4) *JWT* 87; Sapir, "The GATS From 1994 to the Year 2000" (1999) 33(1) *JWT* 51; Sauvé *supra* n.43; Yi Wang, "Most-Favoured-Nation Treatment Under the GATS – And its General Application in Financial Services" (1996) 30(1) *JWT* 91; Weiss, "The General Agreement on Trade in Services" (1995) 32 *CMLR* 1197.

an exercise in frame extension, seeking to both deepen and widen the new 'trade' frame identified above in normative terms: however, a free-standing agreement separate from the WTO was proposed and this had important consequences in areas such as dispute settlement.

The Draft MAI proposed that the MFN and transparency requirements of GATS would apply to foreign investment across the board.⁴⁷ In addition the NT principle would apply, but on a top-down basis rather than the bottom-up basis used in GATS. This would mean, in effect, that NT should be extended to any investments not excluded in the schedules of Contracting Parties or in one of the (limited) general exceptions provided in the MAI. Thus great importance would attach to the initial negotiations of country-specific schedules, an aspect which many felt would present a capacity-problem for the poorer developing countries most in need of protection. The Draft MAI also embraced the performance requirements agenda which had led to the conclusion of the Agreement on TRIMs, though the list of performance requirements which would be unlawful or restricted was substantially longer than that contained in the Agreement on TRIMs.⁴⁸ Taken together these developments seemed to many opponents of the MAI to push the pendulum too far: state regulatory action seemed potentially to be unduly restricted, without compensatory international legal mechanisms through which environmental, social and cultural concerns could be addressed.⁴⁹

On expropriation, the Draft MAI invoked international law standards, while providing that foreign investments should be treated fairly and equitably and accorded full and constant protection and security. Thus the standard of treatment required went beyond the non-discrimination benchmark to incorporate reference to the customary international law requirements concerning takings, including a reference to the Hull formula, though efforts to spell out in greater detail what this would entail had mixed results.⁵⁰

The Draft MAI provided two distinct dispute resolution mechanisms, one State-State, the other Investor-State. State-State arbitration before an *ad hoc* tribunal was envisaged for alleged breaches of the Agreement. The tribunal would be able to declare a Party's actions illegal, recommend action to bring the erring state into conformity with the Agreement and/or award compensation including, if both sides agreed, restitution. Provision was made for appeal where it was claimed that the original decision was flawed. Recourse to countermeasures in the event of non-compliance by a Party with the ruling of a tribunal was envisaged, though the level of supervision to be exercised by the Parties Group was contentious.⁵¹

⁴⁷ The definitions of 'investor' and 'investment' included are very wide: *c.f.* Beveridge, *supra* n.26, at pp.175-6.

⁴⁸ Beveridge, *ibid.*, pp.179-80.

⁴⁹ Zia-Zafiri, "International Economy and the Environment: Multilateral Agreement on Investment" (1998) 9 *Yearbook of International Environmental Law* 345; see also Waelde and Kolo, "Environmental Regulation, Investment Protection and 'Regulatory Taking' in International Law" (2001) 50 *ICLQ* 811.

⁵⁰ MAI Text, Chapter IV, Art.2: Expropriation and Compensation; see further Beveridge, *supra* n.26, pp.181-3.

⁵¹ *ibid.*, Chap.V, Article C(9) and Commentary thereon. Beveridge, *ibid.*, 185-6. An unfavourable comparison might be drawn with WTO dispute settlement provisions

Investor-State procedures were modelled on NAFTA Chapter Eleven provisions, providing for arbitration at the behest of an investor under ICSID, UNCITRAL or ICC rules.⁵² Disputes might be allegations of breaches of the MAI itself, or allegations of breaches of investment agreements entered into by the State and the investor. Since the Draft MAI dealt only with the obligations of states towards investors, and not with the obligations of investors, opponents of the MAI could portray the Investor-State provisions as creating a one-sided 'right to sue' for business corporations who would not be subject to any corresponding obligations under the Draft MAI to observe the laws and policies of the host states.⁵³ This was viewed as an attack on democracy and the regulatory power of the state: "a far-reaching move to bring international law into the service of the powerful and economically strong, while entirely neglecting the interests of the poor and economically weak".⁵⁴

Indeed the heavy reliance by the drafters on NAFTA Chapter Eleven served only to facilitate efforts by anti-MAI campaigners to frame the Draft-MAI as an effort to export already discredited NAFTA-type provisions to an unsuspecting world. Far from reinforcing the policy frame for foreign investment established by the Uruguay Round agreements, the Draft MAI could be portrayed as an attempt to introduce a competing and far more contentious frame into the international arena. A number of environmental cases which had proceeded to Investor-State arbitration under NAFTA Chapter Eleven were invoked as examples of the far-reaching and 'chilling' effects which the MAI might have on government regulatory action.⁵⁵

In the event, however, the negotiation failed and this wider policy-frame thus failed to materialise in any institutional sense. The negotiation, however, had served to bring together opponents of various aspects of the Draft MAI and to politicise the foreign investment issue. Disparate parties came together and their opposition coalesced into an act of resistance to any widening of the policy-frame. This resistance, it is contended, was central to subsequent multilateral negotiations on foreign investment.

under which the Dispute Settlement Body is vested with the authority to authorise (or refuse permission) for the permitted countermeasures: Understanding on the Rules and Procedures Governing the Settlement of Disputes, *GATT The Results of the Uruguay Round of Multilateral Trade Negotiations: The Legal Texts* GATT, 1994) 404, Article 22.

⁵² The arbitration procedure is not optional for states – the Parties' assent to the MAI itself would in itself serve as consent to arbitration.

⁵³ World Development Movement briefing paper "The MAI – A Dangerous Leap in the Dark" 1997, viewed at <http://www.gn.apc.org/negreens/mai-leap.htm>; Sforza-Roderick, Nova and Weisbro, "Writing the Constitution of a Single Global Economy" Preamble Collective, 1998, viewed at <http://www.islandnet.com/~ncfs/masite/analysis.htm>.

⁵⁴ Oxfam UK and Ireland Briefing Paper "The OECD Multilateral Agreement on Investment (MAI)", October 1997.

⁵⁵ These included the *Metalclad*, *Ethyl*, and *S.D. Myers* cases. For a discussion see Beveridge, *supra* n.26, at pp.154-158; 190-91; Ganguly, "The Investor-State Dispute mechanism (ISDM) and a Sovereign's Power to Protect Public Health" *Columbia JTL* 1999 113; Waelde and Kolo *supra*, n.45.

Foreign Investment in the WTO

This section examines the debate which proceeded between 1995 and 2004 on whether a multilateral agreement on investment should be introduced into the WTO. This debate can be seen, it is argued, as a debate between those who continued to attach importance to the 'old' frame outlined above and who did not wish to proceed any further with the new frame tentatively established through TRIMS and GATS, and those who wished to extend this new frame further and reinforce it by negotiating a multilateral foreign investment agreement along the lines set out in the Draft MAI. Resistance to such a development, it is argued, played an important part in shaping the mandate on foreign investment negotiations agreed at Doha and was in the end fatal to the debates. Indeed at times it threatened to spill over and jeopardise the whole of the Millennium Round of trade negotiations.

Shaping the Issue – talks about talks

In 1996 the WTO established a Working Group on the Relationship between Trade and Investment⁵⁶ to examine the relationship between trade and investment. Foreign investment is also examined by the Committee on TRIMs and the Council on Trade in Services, as part of the review work conducted by these bodies into the operation of the TRIMs and GATS respectively. Some, though not all, of the issues worked on by these bodies were also the subject of proposals for the Millennium Round Negotiating Agenda and, though the failure of the Seattle Ministerial Conference in December 1999 meant that between then and the Fourth Ministerial Meeting in Doha in 2001 there was no official Mandate, discussions about possible disciplines continued.

The Working Group began its work by establishing links with other interested bodies.⁵⁷ Co-operation was established, as required in the Singapore Declaration, with relevant UNCTAD bodies and with the World Bank and the IMF (who have observer status at the Working Group). The Working Group began its deliberations by adopting a 'Checklist of Items' which would form the basis of its work programme⁵⁸ and met regularly between 1996 and 2001, receiving written comments and hearing the views of a range of WTO Members and of interested intergovernmental organisations on a range of foreign investment-related issues.⁵⁹

It is difficult to discern any clear outcomes since, with no negotiating mandate and hence no authority to take any decisions or soundings which might have indicated the balance of views among Members, the Working Group (inevitably) was no more than a talking shop. While at times some distinctly neo-liberal views were propounded arguing the case for a GATS-

⁵⁶ Hereinafter 'Working Group'.

⁵⁷ WTO 1997 *Report of the Working Group on the Relationship Between Trade and Investment to the General Council* (WT/WGTI/1/Rev.1, 9 Dec. 1997).

⁵⁸ Checklist of Issues Suggested for Study, *ibid.*, Annex 1.

⁵⁹ WTO 1997 *Report of the Working Group on the Relationship Between Trade and Investment to the General Council*, *supra* n.57; 1998 *Report*, (WT/WGTI/2, 8 Dec. 1998); 1999 *Report*, (WT/WGTI/ 3); 2000 *Report*, (WT/WGTI/4, 27 Nov. 2000), 2001 *Report*, (WT/WGTI/5/Add.1, 22 Oct. 2001), 2002 *Report*, (WT/WGTI/6, 9 Dec. 2002), 2003 *Report*, (WT.WGTI/7, 11 July 2003).

style multilateral agreement on investment, there were also voices of dissent to be heard at regular intervals. Moreover, over this period of time the balance of power within the WTO between developed and developing country Members changed radically. What follows is an attempt to identify some of the important themes of the Working Group's discussions, rather than any sort of representative summary of the discussions or an attempt to identify common ground between WTO Members.

One key theme was the importance of foreign investment to development, and hence the importance of developing state policies towards foreign investment. Foreign direct investment was often characterised as bringing a package of tangible and intangible benefits to host states, and as an important vehicle (as important as trade in goods) for the integration of developing economies into the world economy. However, there were also many concerns raised about how the potential negative effects of foreign investment could be reduced and about whether a 'development-friendly' multilateral agreement on investment could be produced.

Liberalisation of the regulation of foreign investment was also a key theme, with many contributions either pointing to the low level of regulation currently in place in successful economies, or arguing that intervention came at a high price. Sometimes, however, there was resistance to this viewpoint.⁶⁰

Globalisation also featured as a recurrent theme in discussions, with the view regularly expressed in one context or another that globalisation presented a threat to developing countries, especially the least-developed countries. For some, this required an increased focus on competitiveness, and that foreign investment should be approached in this context.⁶¹

A further major theme was the question of what, if anything, multilateral rules could achieve that the existing network of bilateral treaties and other international instruments could not. In the earlier years of the Working Group's existence a number of Members made rather non-specific and general observations about the patchy nature of existing commitments and the general lack of transparency which reliance on bilateral treaties fostered. For some Members the bilateral approach was problematic, resulting in an absence of normative coherence, and creating the potential for gaps and conflicts between existing instruments.⁶² Others defended the bilateral approach as a method which afforded Members freedom and flexibility in pursuing their development objectives.⁶³ By 2000, with the prospect of a negotiating mandate in sight, this debate had become a little more focussed on the possible alternatives, with Members more willing to express their support or opposition to particular models of multilateral agreement. A key question was whether, and if so how, a multilateral agreement could provide benefits while preserving a substantial degree of flexibility to enable states to pursue a range of regulatory objectives. While a small number of states

⁶⁰ See, e.g. the claims and counter-claims made about the effectiveness of a 'hands-off' approach in encouraging the transfer of technology: *2000 Report*, paras.9-13.

⁶¹ *1998 Report*, para.20.

⁶² *1998 Report*, paras.143, 146, 154, 164-5.

⁶³ *ibid.*, paras.139, 147. This difference of opinion is still evident in 2001: *2001 Report*, paras. 8-9, 12.

wanted the option of a MAI-like top-down agreement to remain on the table, a much greater number focussed on the possible advantages and weaknesses of a bottom-up GATS-type approach.⁶⁴

A final and recurrent theme throughout the discussions of the Working Group was the need for further study of many of the issues addressed.⁶⁵ Two observations may be pertinent here: the first is that many Members, particularly developing country Members, resisted the assumption that liberalisation was necessarily a good thing and called regularly for such arguments to be grounded in research and studies which addressed the particular situations of different Members. In other words, there was a recurrent call for policy development to be evidence-led, rather than ideologically-driven.

A second observation is that these calls for further studies supported and echoed the view put forward by some developing country Members to the Ministerial meeting in Seattle in 1999 that the area of foreign investment was not yet 'ripe' for the launch of negotiations on a multilateral agreement. This view also helps to explain the eventual compromise reached in Doha, where a mandate for negotiations was concluded but with a built-in delay.⁶⁶

The Doha negotiation mandate

The negotiating text for the Doha Ministerial meeting in November 2001 documented a serious split over the very idea of opening negotiations on a foreign investment agreement under the auspices of the WTO.⁶⁷ Though the same developed countries who supported such a move were keen to emphasise that this would not be a new MAI, many developing countries were convinced that the time was not yet ripe for any negotiations along these lines, and resisted such a development. Developing countries were keen instead to build on the post-Seattle agenda of increased attention to the issues of concern to developing countries, increased technical assistance and capacity-building efforts to enhance the domestic capacity of developing countries, and greater effort to ensure the full participation of developing countries in international negotiations. Specifically in relation to foreign investment there was a view that further studies were required before multilateral disciplines could be negotiated.⁶⁸

⁶⁴ See, e.g. *2000 Report*, paras.26-33; *2001 Report*, paras.35-7, 43, 46, 49. See also Kentin, "Prospects for Rules on Investment in the New WTO Round" (2002) 29(1) *LIEI* 61 at 66-7.

⁶⁵ There are numerous such references throughout the cycle of reports. See, e.g. *2000 Report*, para.20 (relationship between foreign direct investment and the transfer of technology), paras.24-33 (various); *2001 Report*, para.17 (mergers and acquisitions) and para.28 (investment incentives).

⁶⁶ See 4.3 below.

⁶⁷ As in many areas of the current round of talks, the demarcation lines do not follow traditional North-South or East-West lines: on this issue the EC was the strongest advocate of inclusion while the US did not set this as one of its priorities, apparently concerned that a 'watered-down' MAI would be worse than no agreement at all: *c.f.* Schlegelmilch. "WTO: Why still no Multilateral Rules for Foreign Direct Investment" (2000) 6(3) *Int.TLR* 78.

⁶⁸ UNCTAD has played an important role in furthering the study of foreign investment, particularly with the development needs of developing states in mind.

Heightened sensitivity to the situation of developing states and, in the wake of the terrorist attacks of September 11, 2001, to the security implications of failing to address the needs of these states, may have served to ensure that developing countries had some degree of success at Doha, notably in the Declaration on the TRIPs Agreement and Public Health⁶⁹, in the reaffirmation of the principle of special and differential treatment⁷⁰, and in ensuring that developing countries' concerns were noted in relation to a number of items in the agreed work programme.⁷¹ Overall, however, the developed countries succeeded in their objective of establishing negotiating mandates over a broad range of issues.⁷²

In relation to investment, the Doha Ministerial Declaration stated that "negotiations will take place after the Fifth Session of the Ministerial Conference".⁷³ The Working Group on the Relationship Between Trade and Investment would in the meantime continue its work, concluding its series of discussions clarifying aspects of the relationship between trade and investment, while the WTO in co-operation with other intergovernmental organisations (including UNCTAD) would address capacity-building and technical support issues in relation to developing country Members. The language was obscure: the Working Group would develop, prior to the Fifth Ministerial, a draft text on 'modalities' which the Fifth Ministerial would be asked to adopt by explicit consensus, allowing negotiations to take place thereafter. It was not entirely clear what 'modalities' meant in this context.

See, e.g. the annual *World Investment Reports*, the *Issues in Bilateral Investment Treaties* series and the numerous other studies listed at www.unctad.org.

⁶⁹ WT/MIN(01)/DEC/W/2 of 14 Nov. 2001. This affirmed that the TRIPs agreement should be interpreted in such a way as to be 'supportive' of WTO Members' right to protect public health and to promote access to medicines to all (para.4).

⁷⁰ Doha Ministerial Declaration of 20 Nov. 2001, WT/MIN(01)/DEC/1 (hereafter Ministerial Declaration), para.44.

⁷¹ Ministerial Declaration, *ibid.* For instance, emphasis was placed on the issue of technical co-operation and capacity building (paras.38-41) and on the issue of quota-free access for products originating in least-developed country Members (para.42), though the obligations undertaken in these fields were 'soft' in nature. For a useful discussion of the background to the conflict between developed and developing states see Wilkinson, *supra* n.10.

⁷² Ministerial Declaration. The areas on which mandates were secured include: implementation issues (para.12); Agriculture (para.13); Services (para.15, building on the Guidelines and Procedures for the Negotiations adopted by the Council for Trade in Services on 28 March 2001); Market Access for Non-Agricultural Products (para.16); a Multilateral Framework on Investment (para.20); a Multilateral Framework on Competition Policy (para.23); a Multilateral Framework on Transparency in Government Procurement (para.26); the Dispute Settlement Understanding (para.30); and Trade and Environment issues (para.31).

⁷³ This technique of agreeing to future negotiations was also adopted in relation, for example, to competition policy and a decision on the modalities of the negotiations was first to be taken at the Fifth Ministerial. There was a notable contrast with areas such as Agriculture where negotiations were to produce the framework (modalities) for future commitments by March 2003 and draft commitments were to be made in advance of the Fifth Ministerial: Ministerial Declaration, para.13. Agriculture was not the only area subject to much shorter time constraints: *c.f.* para.15 on Services; para.12 on Implementation Issues.

The reference to 'explicit consensus' for the adoption of a draft text on modalities was an interesting development. The need for consensus, meaning the agreement of all states, or at least the absence of dissent, was previously established.⁷⁴ It appears that following an intervention by Jamaica and a number of African nations an interpretative amendment to the text adopted at Doha was approved, which defined explicit consensus as the formal written consent of each Member.⁷⁵ The requirement was used in relation to foreign investment, competition, trade facilitation and procurement.

The Ministerial Declaration appeared to commit the WTO to follow a GATS-type, positive list approach to any multilateral agreement on investment which emerged. It also stated that any such agreement should reflect "in a balanced manner" the interests of home and host states, and take due account of development policies of host governments as well as "their right to regulate in the public interest".⁷⁶ The work programme established for the Working Group on the Relationship between Trade and Investment included a mandate to clarify the use of dispute settlement 'between members' in relation to trade and investment. It was argued that this excluded investor-state dispute settlement from consideration.⁷⁷ Thus it can be seen that many of the tensions evident in earlier discussions of the Working Group also affected the mandate.

The Ministerial Declaration also contained a general provision stating that, with the exception of the work to be undertaken on improvements and clarifications of the Dispute Settlement Understanding, any agreements reached would be treated as parts of a single undertaking.⁷⁸ Given the context of different timescales for different areas of the Work Programme, this appeared to mean that all WTO Members would be required to participate in all the new agreements under discussion (except in relation to the DSU as indicated above). Alongside the 'soft' commitments on capacity-building and technical assistance for developing country Members, the Ministerial Declaration also stated that the "special development, trade and financial needs of developing and least-developed countries should be taken into account as an integral part of any framework, which should enable Members to undertake obligations and commitments commensurate with their individual needs and circumstances."⁷⁹ It was also established in relation to the Work Programme as a whole that the principle of special and differential treatment for developing and least-developed countries should be

⁷⁴ Jackson "The Great 1994 Sovereignty Debate: United States acceptance and implementation of the Uruguay Round results" (1997) 36 *Columbia JTL* 157.

⁷⁵ *C.f.* Public Citizen "What Really Happened at the WTO Qatar Ministerial: US Concedes Everything and Get's. . .What?" <http://www.citizen.org/trade/wto/Qatar/> The Chair of the Ministerial meeting in his closing remarks commented that in his view this language "would give each member the right to take a position on modalities that would prevent negotiations from proceeding after the fifth session of the ministerial conference until that member is prepared to join in an explicit consensus." Quoted in Trade Regulation Newsletter 35/36 at p.4.

⁷⁶ Ministerial Declaration, para.22.

⁷⁷ Trade Regulation Newsletter 35/36 at p.4.

⁷⁸ Ministerial Declaration, para.47.

⁷⁹ Ministerial Declaration, para.22.

taken fully into account.⁸⁰ In general terms these conditions could be said to reflect growing attention to the development issue and to the concerns of developing countries post-Seattle.

The tensions inherent in the Ministerial Declaration proved in the end to be fatal as far as an agreement on investment was concerned. Following the failure of WTO Members to reach any agreement at the 5th Ministerial in Cancún in September 2003 the breadth of the Millennium Round negotiating agenda came under renewed scrutiny. In August 2004, after protracted periods of stagnation in the negotiations, the issues of investment, competition and transparency in government procurement were dropped from the negotiations.⁸¹ This in return reflected a growing consensus that investment and other ‘Singapore’ issues such as competition were proving too expensive for the WTO negotiations i.e. that the wider failure of the negotiations at this juncture could be attributed, in part at least, to the insistence of some Members on retaining these issues.⁸²

Doha, Foreign Investment and Framing

Employing the framing analysis developed above, a number of points can be made about the failure of the Doha Round in relation to foreign investment.

First, the decision to pursue this issue under the auspices of the WTO served to reinforce the framing of the ‘problem’ of foreign investment as one of trade barriers: state regulation was the ‘problem’ and liberalisation the solution. Thus a GATS-type solution – whereby states would give commitments on market access and apply established non-discrimination principles and transparency rules – was viewed as the obvious solution. Thus the ‘new’ policy frame, tentatively established in the Uruguay Round agreements, received a major (if temporary) boost.

Furthermore, during discussions in the WTO Working Party on Trade and Investment and negotiations, the parameters of the new frame became clear: traditional investment protection issues would be addressed, endorsing the cradle-to-grave approach of the Draft MAI, but using a GATS-style bottom-up approach to commitments. The re-location (and tailoring) of a potential multilateral investment agreement to the WTO emphasised the interrelationship between this issue and other market integration issues, a matter given considerable concrete significance through the commitment in the Doha Declaration to treat resultant agreements as part of a single undertaking. This can be understood as an act of frame alignment.

⁸⁰ Ministerial Declaration, para.50.

⁸¹ WTO Doha Work Programme, *Decision Adopted by the General Council on 2 August 2004*, WT/L/579 of 2 August 2004.

⁸² House of Commons, International Development Committee *Trade and Development at the WTO: Learning the lessons of Cancún to revive a genuine development round* HC 92-I of 2003-4; UNICE *Post-Cancún Trade and Investment Strategy* UNICE Position Paper of 5 December 2003. The issue of foreign investment, previously politicised through the MAI negotiations, may to some extent have acted as a ‘lightning conductor’ for more general concerns: *c.f.* Kennedy, “A WTO Agreement on Investment: A Solution in Search of a Problem?” (2003) 24 *U. Penn. JIEL* 77 at 178-182.

The re-location of the talks to the WTO also carried significant institutional consequences. Re-framing the issue as a 'WTO issue' made it foreseeable that any emergent foreign investment agreement would be subject to other parts of the WTO package (such as the DSU and the TPRM). As far as dispute settlement was concerned this in turn appeared to resolve doubts about what type of dispute resolution mechanism would be involved – it seemed unlikely, at least at an initial stage, that any 'Investor-State' mechanism might be involved, since this would have been so far out-of-line with what already existed at the WTO.

Had the negotiations been successful, the result would have been a form of policy transfer which combined elements of copying/emulation with elements of hybridization/synthesis.⁸³ The direction of policy transfer would have been more or less along a classical North/South axis whereby norms already established in developed states (here the parties to the Energy Charter Treaty, the NAFTA State Parties, the EU Member States and, more generally, the OECD Members) would have been transferred, in this case via an international institution, to developing states. Any multilateral investment agreement negotiated within the normative and institutional context of the WTO was likely to impose obligations on WTO Members relating to transparency, notification, scrutiny and review of exceptions and exclusions from its core principles, and dispute settlement (through the operation of the WTO Understanding on Dispute Settlement). In turn these institutional dimensions may have served to ensure that the policies transferred via that agreement became firmly embedded in the domestic law of the recipient states.

However there was also significant evidence of resistance to the 'new' frame, from developing states. This was notable in discussions both before and after this mandate was established and in the mandate itself, for instance in the commitment to a bottom-up agreement (in contrast to the top-down approach of the Draft-MAI), in the affirmation of states' right to pursue their development goals and to "regulate in the public interest", and in the specific references to the development, trade and financial needs of developing and least-developed states. Above all it was evident in the requirement for "explicit consensus" before negotiations of binding commitments could proceed: there was resistance to the whole move to frame the problem as a 'trade' problem amenable to a WTO-type solution.

Resistance to the Draft MAI appeared to have cast its shadow forward into the Doha negotiations, so that developing countries' concurrence in the negotiation of any international investment agreement always remained highly conditional and contingent. This perhaps serves to demonstrate that 'frames' can be presented negatively as well as positively, so that 'framing' can serve opponents as well as proponents of a proposed policy solution by bringing possibly disparate opponents together. In this instance, the weight of environmental, social and development groups was combined in opposition to the proposed policy frame, and this opposition transferred from the Draft MAI to the WTO negotiations, though the substance of the objections held by different groups may have been very different. As the Doha Round progressed, heightened awareness of development concerns

⁸³ See, Rose's typology, *supra* n.16.

appears to have served, if anything, to strengthen attachment to the 'old' frame, placing emphasis on the need for foreign investment to be regulated in the interests of the host state and harnessed to the development goals of the host state.⁸⁴

'Framing' and legal studies

This article has sought to examine the WTO negotiations on a multilateral agreement on investment as an attempt to build on a policy frame tentatively established in the Uruguay Round in which foreign investment is seen as a trade issue amenable to the application of trade law concepts, techniques and regulatory approaches. Indeed, the moves after the failure of the Draft MAI talks to relocate this issue to the WTO in part reflected a view that the WTO had the necessary expertise on trade issues as well as credibility as a global institution.⁸⁵ In this final section the argument is advanced that framing analysis can assist in the development of an understanding about why a proposed policy development failed, here the negotiation of a WTO multilateral agreement on investment.

Throughout the course of events documented above, the resistance of developing states to moves to initiate negotiations on a foreign investment agreement within the WTO was not centred on a single issue but rather on a broad set of concerns. For instance there was disagreement on normative issues, such as the appropriateness of open-door policies to developing countries, as well as concerns about process, here a fear that developing countries lacked the capacity to fully protect their interests even under a bottom-up approach to future negotiations on commitments in the investment field. These concerns persisted throughout the discussions, even despite assurances that there would be scope within any proposed agreement for individual WTO Members to adequately address their concerns (as exists, it can be argued, in the GATS and in the Agreement on TRIMs).⁸⁶ Yet many of the developing states in question have already accepted the high standards of protection proposed for existing investments in other obligations (such as Bilateral Investment Treaties) and/or already have broadly open door policies in place, and all have previously accepted this procedural approach in the context of services provision under the GATS. This suggests that it was not just the substantive rules which were at issue.

⁸⁴ *E.g.* in November 2002 a Submission from China, Cuba, India, Kenya, Pakistan and Zimbabwe raised the issue of the conduct of multinationals, connecting it with the corporate social responsibility agenda which can be said to have enjoyed something of a renaissance in recent years: WT/WGTI/W/152, 19 Nov. 2002.

⁸⁵ One of the biggest issues raised during the MAI negotiations was the credibility of the OECD as a forum, given the stated intention of opening the resultant treaty up for global participation.

⁸⁶ Bora and Graham have argued that the real choice facing the WTO was between deepening of commitments in these areas and the negotiation of a new free-standing agreement on investment; however, Cosbey *et al* suggest that the scope of existing disciplines on investment is so limited that this sort of argument cannot be sustained: Bora and Graham, "Investment and the Doha Development Agenda" in Petersmann (ed.) *Reforming the World Trade System: Legitimacy, Efficiency, and Democratic Governance* (2005) 335 at 336; Cosbey *et al.*, *Investment, Doha and the WTO* International Institute for Sustainable Development (2003).

There were also concerns about institutional issues, such as the linking of foreign investment to other WTO disciplines such as dispute settlement, despite the fact that developing states are already broadly supportive of these institutional dimensions of the WTO. However bringing foreign investment disputes under the remit of the dispute settlement body would have reversed the trajectory pursued in the second half of the twentieth century away from state-state settlement processes, another factor that may have pushed support back towards the 'old' frame. Finally there were concerns relating to linkage, particularly the scope which the single undertaking approach would create for linkages to be made between concessions on foreign investment and concessions in areas of critical importance to developing countries such as access to markets for agricultural products.⁸⁷

One way of looking at this would be to say that these states simply failed to be convinced, on a cost-benefit analysis basis, of the potential benefits the new agreement might hold for them. However, their resistance reflects an understanding that the proposal to negotiate new rules in that particular forum introduced a package of inter-linked concerns – that it implied possible consequences that extended beyond the potential normative commitments which a new agreement on investment might entail.

Additionally it seems that developing states were rejecting not just the proposed solution but the way in which the foreign investment 'problem' was presented. Under the proposed new frame the long-term trajectory underlying reform is towards liberalization – an objective which can be described as a cornerstone generally of WTO Agreements. However this liberalization agenda appeared to conflict directly with the apparent desire of many developing states to repatriate the issue of foreign investment by refocusing on issues concerning the regulation of investors and questions of corporate social responsibility: from the discussions it was clear that for many developing states the problem was not so much whether to open up to foreign investors but how to regulate foreign investors to minimise negative impacts and maximise their contribution to the host's development goals. Thus, rather than seeking reassurances about the new agreement and whether it would accommodate their concerns, the resisting states displayed an attachment to the pre-existing, property-centred policy frame which placed greater emphasis on the sovereign rights of states and their inherent right to regulate activities on their territory in the public interest.⁸⁸ Thus it can be said that it was the whole package of proposed reforms which they resisted, rather than its contents.

The concept of 'framing' and the idea of a clash of policy frames appear to capture the essence of this resistance accurately and to offer a plausible explanation for the failure of the WTO initiative. In particular it captures the

⁸⁷ Hoekman and Saggi question the value of a commitment to a WTO agreement on investment as a bargaining chip for developing countries in the 'grand bargain' context: Hoekman and Saggi "Multilateral Disciplines for Investment-Related Policies?" *World Bank Research Working Papers*, No. 2138.

⁸⁸ Interestingly the US's decline in support for a WTO investment agreement can also be seen as a defensive action to protect the progress which had been made particularly in the NAFTA sphere to establish its preferred policy-frame: see n.67, above.

essential connection between substantive norms, processes and institutions which explains why many states who might accept particular standards in one institutional context (a BIT) might rationally oppose the same standards in a different institutional context (the WTO). In this aspect in particular framing appears to offer something beyond the concept of a paradigm and, by focussing attention on the longer-term implications of the policy 'turn', alters the parameters of the 'grand bargain' calculation. Moreover it captures the many aspects of this negotiation which revolved around competing explanations of the 'problem' rather than competing versions of a 'solution'. Finally, it focuses attention on where the new frame originated (and who created it) and hence on the policy transfer/legal transplant dynamic of the proposed solution.

With the abandonment of this negotiating item in 2004 it appears that efforts to re-frame foreign investment as a 'trade' issue have, temporarily at least, run aground. While GATS and TRIMs remain part of the WTO package agreed in the Uruguay Round, the developed states who supported the negotiation of an agreement on investment as part of the Doha Round failed to convince developing states that widening or deepening of the new 'trade' frame for foreign investment was a positive step. Instead, developing countries have opted to continue to pursue their interests through the patchwork of national laws, bilateral investment agreements, multilateral agreements and non-binding codes with which they were already familiar: indirectly the old 'property' frame may have received a boost.