Draft Primer

Gender, Investment and FDI

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Content

Introduction

Today in the context of globalization and widespread trade liberalization, trade and investment are seen as complementary. Trade and (foreign) investment policies both affect the ability of companies to trade abroad and ultimately, the wealth of nations. Both trade and investment also involve the issues of the cross border movement of services and the location of production facilities (FDI), the contestation of domestic markets (market access and competition) and the sovereign rights of host governments to regulate these flows. Thus, in the first instance, the relationship between trade, investment and economic development is a complex and controversial issue. This is further complicated by the push by rich countries and transnational corporations for rapid and extreme liberalization of both trade and investment.

The objective of trade liberalization is the establishment of one set of rules on market access, including national treatment and MFN. The objective of investment liberalization is conceptually different from market access. The right to trade under free and non-discriminatory conditions is an accepted principle enshrined in the global economy since the 1940s (See the General Agreement on Trade and Tariffs, GATT). But the right to invest (or to establish production operations etc) in a country, which is not the legal resident of the investor, is singularly established. Governments have historically reserved the right to regulate the movement of capital (and labor) into their economies. So trade and foreign direct investment regulation and liberalization do not lead to the same approach. In the case of investment, the starting point has not generally been the right to invest but the country’s permission for it to be done. However, this is older conventional framework and understanding is being challenged and slowly eroded under investment liberalization processes in bilateral investment treaties (BITs) and free trade agreements.

The BITs mechanisms being negotiated between developed and developing countries include the following key elements: the right to invest, investor-state arbitration, non-discrimination (national treatment and Most Favored Nation), expropriation and compensation, taxation, financial transfer and dispute settlement.

Ultimately, there are increasing attempts by TNCs and their institutional allies in the G-8 governments and international governmental institutions such as the World Bank and the OECD to internationalized and ultimately multilateralized this new approach (see for example, Hildyard and Muttitt 2006). Both the developing countries, as a group, and civil society have been resisting these attempts globally and at the WTO. The initial worldwide resistance led to the rejection of the corporate led Multilateral Agreement on Investment at the OECD (MAI, mid to late 1990s) and more recently the wholesale rejection of three of the so-called Singapore issues (investment, competition policy and government procurement) at the Cancun Ministerial (2003).

From the perspective of development, gender and social equity there are some critical issues with regard to the relationship between trade and investment and trade liberalization and development. First, are the tensions around trade and development, itself. Second, is the relationship between trade and investment and what are the impacts for overall development. Third, what is the relationship between on the one hand, trade liberalization, and on the other hand, investment liberalization and development and how do the critical intertwine between the two impact gender and social development in developing countries. These issues critically underlie the tense debate between developed and developing countries over development:

what it is and how best to achieve it? What are the critical necessary and sufficient modalities of development? How are these modalities impacted by trade, trade related and investment modalities?

Clearly, underlying this debate are issue about: the right to development, governmental measures, and the right to regulate for both promoting economic development, as well as, in the public interest--whether this be on the grounds of simple public health concerns or involve wider social development issues such as access to essential public services and universal access provisions and technology transfer for the future growth and development of the society. Other quite important outstanding issues also include: Can the WTO principle of national treatment be readily transferable to the investment context? Would national treatment differ depending on whether it was applied to the pre-establishment or post establishment phase of an investment? What of Special and Differential Treatment for developing countries? And, what of the commitment to gender equality made in international instruments such as Beijing and CEDAW?

I. Scope and Definitions

What is investment? In simple terms, investment is a capital transaction in which the investor expects a return. Investment can thus be both private and public. One aspect of investment involves governmental lending (or ownership purchases, mostly portfolio, mostly lending, both long-term and short-term). But the most predominant form is private lending (or ownership purchases) which also includes long-term equity positions, bonds, stocks and patents or copyrights. There is also the distinction between portfolio investments and direct investment. Portfolio investment consists of lending to, or purchasing ownership shares in a foreign enterprise not owned or controlled by the investor--less than 10% of stocks or ownership of bonds. These include bills of credit, etc. maturing in a year or less. Direct investment consists of equity lending to, or purchase of ownership shares in a foreign enterprise, largely owned by and controlled by the investor (Lindert and Pugel)

There is also domestic investment and foreign forms of investment. Domestic investments are the varied forms of investment instruments undertaken by citizens or residents of a country within the confines of the national entity. This investment is motivated by earning and returns on physical capital and portfolio instruments. It is also determined by investors' confidence in the economy, political and economic stability. Both its quantity and quality are significantly influenced by domestic infrastructure (water, sanitation, energy) other public services, the interest and exchange rates and access to credit and technology.

Foreign direct investment comes in three distinct forms: 1. equity capital (FDI purchase of shares in an enterprise in a country other than its residence), 2. re-invested earnings (FDI share in [vis a vis equity capital], of earnings not distributed as dividend by affiliates or earnings not remitted by the FDI), 3. intra-company loans, or intra company debt (short or long-term borrowing and lending of funds between direct investors, parent companies, and affiliates. There are different measures and definitions for ascertaining the flow of foreign investment between countries[i].

FDI has specific motivations that are somewhat different from domestic investors. For example, foreign investors may establish a foreign affiliate in another country for market seeking (market access), efficiency (factor and location costs) seeking and resource seeking reasons. FDI is also characterized by:

- Investor has substantial control over the foreign subsidiary enterprises
- Controlled subsidiary may receive direct inputs of managerial skills, trade secrets, technology, rights to use brand names and instructions about which markets to pursue and which to avoid (Lindert and Pugel, p. 585)
- Direct investment is more than just capital movement. It may start with little or no net flow of financial capital.

II. Foreign Investment, Trade and Economic Development

Conventional wisdom would argue that FDI is a potent ingredient in development because it allows for the transfer of technology and capital and is hence a catalyst for development. But while, FDI may be associated with increased trade volumes it may also have undesirable impact on poverty eradication and gender equality strategies, the environment, labor laws and working conditions and overall economic and social development.

FDI, like trade, and development is a complex issues which is linked to the stage of foreign investment. The literature shows an initial complementary relationship between outward FDI and exports; but it could eventually turn into a substitute type relationship. So the FDI development inter-relationship is a complex issue requiring more disaggregative analysis in specific industries and service sectors (WIDER 2005). While FDI can be associated with increased trade volumes, it is important to consider a wide range of issues than simply increase trade flows one must look at the impacts of FDI on economic development, employment, social development and social equity issues.[ii].

FDI impacts development via tangible and intangible aspects such as technology innovation, organization, managerial practices and skills, human resource development, access to markets, forward and backward linkages with domestic enterprises. So Investment has the following aspects:

- Trade dimension
- Domestic savings
- Consumption pattern
- Capital formation
- Ownership of productive and financial assets and resources
- Technology (Transfer of technology)
- Finance
- Economic growth
- Competition
- Employment

Foreign direct invest therefore can have critical impact on economic development and economic growth. The most widely known positive impacts include:

- Conduit for transfer of technology and human skills
- New ideas and innovation
- Sources of capital
- Catalyst for development (when right linkages are present in sufficient amount)
- Value added/product upgrading and diversification of production and export base
- Pay higher wages than comparable local firms

But FDI can also have negative impacts on economic development, including not much significant contribution to social product, and little capital formation. The latter is more likely if the predominate form of FDI is through cross border mergers and acquisition (for example through privatization) as opposed to greenfield investment (currently about 1/3 of FDI to South)). Over reliance by developing countries on artificial incentives (tax concessions and subsidies) to attractive FDI can also have a negative impact on so both economic and social development, especially if these detract from public investment in building up the core areas of the economy and reducing the most negative aspects of public poverty. Furthermore, there is also the issue of the absorptive capacity of the local economy, which is likely to be very low if there is 'lack off available threshold human capital and infrastructural facility' (see WIDER 2005 and UNCTAD).

The most widely known negative impacts of FDI include

- Restrictive business practices of TNCs such as the parent company subjecting affiliates to subjected to export restrictions and adverse (for the host country) transfer of technology agreement between affiliates and parent company
- The distortive effect of transfer pricing (to avoid tax obligations) on government budgeting
- Instability in trade balance and BOP
- Exercise of undue political influence
- Negative impact of foreign affiliates on domestically available financing and SMEs

Due to these issues there is no necessary automatic and unambiguous beneficial predisposition of FDI to development. Therefore governments must proactively work to ensure balance between domestic and foreign investment in the context of national strategies at sectors level and macro level policies to promote the sustainability of the development process. The ability of developing countries' governments to ensure economic development depends on their ability to maximize technological transfer through such measures as performance requirements and technology transfer requirements. Governments must also work to ensure positive spillovers and increase the linkages between local firms/suppliers and FDI. Government also needs to ensure increase local technological frontier, industrial upgrading and extensive local linkage via technological transfer. It is only through this manner that a country is able to ensure that it does not simply become assembly operations sites of TNCs and that the inherent de-stabilizing effects of FDI on BOP are mitigated.

Just as with trade, governments can promote expansionary or restrictive polices. There is a two-way interplay between trade policy and investment policy. Restrictive trade policy may result in increased inflow of FDI (see the example of tariff jumping in South East Asia in the 1980s). But there may also be correlations between trade and investment flows. Increase trade liberalization can mean increase imports of inputs. But restrictive business practices by TNCs can result in their capture of the domestic market and not increased trade. This may be compounded by export restrictions imposed by parent companies.

The Relation Between Trade and Investment

Trade and investment tends to go hand in hand. Trade liberalization has positive effects on the volume of FDI inflows due to the fact that it may make the domestic market more dynamic leading to higher growth and expansion of demand in the host countries (UNCTAD). Reduction of trade barriers means that TNCs can import better and lower cost inputs which would expand export oriented production in the host country and in the context of regional and multilateral trade agreements, these exports would face fewer barriers (WIDER 2005). It is argued that trade liberalization has an effect on the quality of FDI. Trade protection is vilified for creating economic rent which is captured by the FDI and transferred abroad and engendering a lack of competition which resulted in very little transfer of technology to its affiliates. However, today under trade and investment liberalization, BITs and investment liberalization provisions may also create similar result of dampened technological transfers.

Unquestionable, the major selling point of FDI attractiveness to developing countries, from the perspective of long term growth and development, is the issue of transfer of technology.
FDI affect development and economic growth through capital formation, technological and managerial know how. There are great expectations by developing countries policy makers on the spillover effects of technological transfer (vertical and horizontal; more vertical if there is linkage between FDI and local suppliers and buyers). The underlying assumption is that FDI can result in more effective use of resources in host countries.

As noted by WIDER (2005), technological transfer promotes growth as the local firms absorb the technology. It also contributes to the creation of R&D capabilities, which are necessary to shift production from low value added activities to high value added activities.
All of these potential effects of FDI can transform the both the value and volume of developing countries export thus heightening the effect of their overall trade and international competitiveness.

The central importance of technology transfer

FDI is seen as a channel for technology transfer. However, the mechanics of how technology transfers occur is not simple. This may involve internal transfer from parent to affiliates, the positive externalities (spillover effect) from the training of locally hired employees of the foreign affiliates and the establishment of linkage between TNCs and local firms and institutions (WIDER 2005).

There has been a long-standing and sometime contentious struggle between host countries and their FDI guests about how best to maximize technology transfer. Historically, for the now developed countries, as well as the newly industrialized countries of South East Asia, the answer has been through (sometimes, mandatory) performance requirements and technology requirements. Given its industrial development strategies a government often resort to mandatory technological requirements to expanded dynamic comparative advantage and encourage the diffusion of technology[iii].

Increasingly however, with BITs and investment liberalization provisions in the emerging new FDI regime, developing countries are having less and less policy space and permitted tools to direct the qualitative impacts of FDI on their economies. The nature and challenges in this regard will be discussed in section IV below. Now we turn to explore the social dimensions of FDI on developing countries.

Foreign investment is an important component in export promotion growth strategy of developing countries. On the positive side, inflows of FDI generate new sources of employment and likely increased incomes for household and revenues to government that will enable better individual and national standard of living. But a the same time the privatization of state owned entities, de-regulation of labor and commodity markets and the elimination of restrictions/limitations which many governments have undertaken as part of their strategy for attracting FDI may have offsetting and adverse impacts on employment, wages, working conditions and access to public services. Thus, while the intent behind FDI is to increase the level of competition and decrease the level of protection, such a policy agenda often translates into adverse consequences for local small and medium sized businesses that often cannot compete with the big well-endowed multinationals. This has serious implications for women entrepreneurs, including micro enterprise, especially in the areas of agriculture and craft.

In the next section we focused attention on gender and foreign direct investment an area that has been well investigated by academic and policy oriented researchers. Most studies tend to concentrate on the employment dimension but there are a few that explores the broader questions of resource allocation, and exchange rate effects.

<u>Overview of Dimensions of FDI impact on Development</u>

Economic parameters:

Macroeconomic stability	Domestic savings
Fiscal position	Balance of payment
Employment	Consumption patterns
Finance	Transfer of Technology

Ownership of productive and financial resources & privatization

Managerial skills	Competitiveness

Income & wealth distribution
Strategic development policies at the sectoral level
Sustainability of the development process

Trade parameters:

Imports/ exports	International competitiveness
Foreign exchange rate	Trade balance

III. Gender and Foreign Direct Investment

FDI is generally expected to absorb labor, provide income and hence help to reduce poverty.
There is a high share of female employment in TNCs particularly for export intensive labor export oriented assembly and manufacturing (Joekes and Weston 1994). Tzannatos 1997 estimates that of the 4 million world employment in TNC in the 1990s, women workers comprised 60-80%. However, there are issues about the quality of employment (wages, the working conditions, contribution to knowledge and skill upgrade) of male and female workers and managers. A recent study of trade and investment in Bangladesh show that inflows of FDI and trade liberalization did not significantly improve the correlates of poverty (real wages, employment etc), Rahman and Bhattacharya, 2000.

In terms of gender, there was a decrease in the share of women in household and agriculture sector and rising share in manufacturing and services but female still were concentrated in a limited number of sectors (such as embroidery and textile, wearing apparel) and in EPZ where female employment was two and half time the ratio of males (Rahman and Bhattacharya

2000). This support findings of the Starnberg Institute that 'product mix is key to determine sex ratio of employees' (cited in Braunstein 1999) and that 'the jobs women hold in manufacturing in foreign affiliates and in enterprises link to TNCs through non-equity arrangements have mainly been low skilled jobs' (UNCTAD 1999).

In addition to the impact of FDI on the pattern of female and male employment in export enclaves, there are also concerns about the health and safety of the work, the burden of social reproduction and paid work (whether women are engaged in the formal sector or in subcontracting and homeworking). Joekes and Bifani (UNCTAD 1999) also raise questions abut the relative effect of women's wages on women's overall level of economic empowerment if the family structure and intra household dynamics are such that women do not have control over the income that they earn. Braunstein also raised the question of the nature of the family and household structure as a constraint on women's availability for paid work. She noted that in some cases this might mean that women (in patriarchal family structure) are only available for homework that must be engaged in side by side with housework.

Gender concerns therefore arise in the discussion of investment liberalisation in many dimensions. Some of the most important dimensions include:

- FDI's impact on the quantity and quality of female and male employment.
- FDI and foreign investment overall impact on the nature, size and growth potential of women owned and operated small and medium sized firms in host countries (though FDI's impact on production/sectoral and resource allocation and competition).
- FDI's contribution to a rapidly accelerating climate of extreme de-regulation of labor market and the consequent implications for women's health and morbidity.
- Corporate Social Responsibility in terms of environmental concerns, social concerns, working conditions and the transfer of technology.
- Performance requirements on FDI regarding technology transfer, the strengthening of domestic capabilities/linkages to domestic enterprises (especially small and medium sized enterprises) and regional development promotion.

Other indirect impacts of foreign investment on gender equality include:

- FDI's impact on taxation/tax revenue--the implication for public expenditure and hence allocation to the social sector.
- FDI's impact on the availability of different types of infrastructure (roads, electrification) and social services—if expenditures are switch away from providing, say agricultural feeder roads to towards projects that secure operating space and transportation for attracting FDI.
- FDI's impact on the exchange rate and the balance of payment
- FDI's impact on local investment/credit market if TNCs seek local funding.

<u>Foreign investment, production, resource allocation and gender</u>

At the meso level, there are issues of transactions cost, imperfect information, gender biases, market inter-linkages, and asymmetry of property rights. Thus for example the expansion of investment opportunities due to the infusion of foreign investment may not be available to women entrepreneurs due to gender biases that either lock women into or lock them out of particular markets.

Foreign investment, exchange rate effects and gender

The economic effect of both trade and investment work through macro policy and exchange rate policy. The link between foreign capital inflow and the real economy of the host country operates via a two-way transmission mechanism--the exchange rate and the interest rate. It may be either growth inducing or growth stagnating. Capital account surplus and positive capital inflow are both associated with pressure on the exchange rates which may or may not be exacerbated by the actions of the central bank to either keep the exchange rate stable by controlling domestic liquidity and or to sterilisation measures such as raising the domestic interest rate. This has important consequences for domestic investment. Either way there are adverse employment and purchasing power effects (and hence distributional consequences for different groups in the society. Particular effects are likely to be deep, traumatic and longer lasting for the marginalized and the poor who have little resources to offset such economic shocks. Women tend to dominate in these groups.

Given women's responsibility for social reproduction, gender biases in accessing credit and declining government services in the context of declining purchasing power imply increase burden for seeking and providing alternative food and care services as well as income generation. High interest rate is also likely to crowd out female entrepreneurs seeking credit for initiating or expanding businesses. The literature on structural adjustment provides ample evidence in this regard.

Other areas where foreign investment policy may have some strong effect for women include under the intellectual property rights agreement which have both trade and investment implications may have negative impacts on women in their multiple roles as farmers, healers, developers and conveyors of traditional knowledge and technology.

Box 7: Gender, investment and employment inter-relationships:

Household relations are a central determination of female labor to TNCs. Different types of household labor (whether patriarchal, female headed or bargaining) lead to different reservation wages to TNCs.

There is a high share of female employment in TNCs particularly for export intensive labor export oriented assembly and manufacturing (Joekes and Weston 1994).
Tzannatos 1997 estimates that of the 4 million world employment in TNC in the 1990s, women workers comprised 60-80%. However, the rise of subcontracting and domestic outwork is making this more difficult to assess since TNC connect via local intermediaries (Ward and Pyle 1995)

Product mix is key to determining sex ratios of employees. For example, electronic and garment manufacturing employ mostly women, more industrial sectors employ more male labor (Starnberg Institute 1989, ILO 1988); there are also differences in terms of marital status with younger women been in electronics; older and married women in textiles and garments.

TNCs in electronics and EPZs are very footloose due to the intensity of international competition, production and trade cycles in garments and electronics and low cost penalty for high labor turnover. But even when TNCs are stable they are able to effectively utilize the threat of moving to strengthen and maintain their bargaining power.

Garment and light assembly seems to be more prone to subcontracting and domestic work than electronics (Mitter 1994 and Kim 1997)

Key questions for gender and investment

To what extent does gender play a role in the level of investment and the structure of investment by industries and activities in the country?

What is the quality (in terms of wages, working conditions and skill development) that trade and FDI provide to men and women?

What are the scope and opportunities for women to move into managerial and middle level jobs in the trade and FDI sector?

What are the employment and human resource development issues of trade and investment in terms of men and women?

What are the income generating activities of men and women that arise directly or indirectly from trade and foreign investment? How sustainable are these and what mechanisms are needed to ensure sustainability?

In terms of non-equity arrangements (licensing, franchising and subcontract) what is the difference in terms of male owned versus female owners firms to participate. Which gender dominates, in what type of arrangement? What are the particular gender constraints to accessing each type of arrangement?

How are male and female businesses able to participate in the supply and distribution chain of MNC? Are these established and what degree of co-ordination, technical and financial assistance are needed by men's and women's owned business to effectively participate in these?

What are the capabilities of domestic firms, in particular women owned firms to benefit from the 'spillover' effect of the presence of TNC? What is the most effective and gender sensitive role of government in facilitating this process?

To what degree are women gaining high-level managerial positions in TNCs?

What are the gender impact of the cost and benefits of investment incentives (fiscal and financial) for attracting FDI?

What are the possible gender consequences of application of national treatment principle to investment?

IV. International Rule-making for Foreign Direct Investment

In the real world of today, many southern governments are turning more and more to FDI due to decreasing access to bank credit, slow or stagnating aid flows and the increasing need for technology and know how. Underlying this trend is the increasing pressure by TNCs and their supports in the rich countries for greater and greater liberalization of investment internationally. Thus there has been a proliferation of bilateral investment treaties and other types of mechanisms and processes to liberalize investment along side trade liberalization.

The intent behind this push is to radically reduce or eliminate governmental measures that apply to foreign companies. These set of measures, so-called 'trade related investment measures,' which have been used historically by all governments to secure economic development goals and to protect the balance of payments, are now argued to be directly or indirectly distorting to trade. Trade related measures include local content requirements, incentives tied to exports, requiring foreign investors to purchase a certain quantity of components locally, requiring foreign companies to export products, requiring foreign companies to share know how/new technology with local work force, requiring foreign companies to hire a certain percentage of local workers and managers, restricting the import of components used in the production of goods, and restricting foreign companies access to foreign exchange.

Because these investment measures involving the domestic regulations functioning of governments and governments' overall sectoral and macroeconomic management of the economy, investment liberalization raises more complex issues than trade liberalization. Trade liberalization focuses on market access at the broad level and there is already an acceptance of the right to trade. As noted above, investment requires the explicit permission of individual countries and behind the border national planning and industrial issues. There area also critical questions of national treatment and whether it is readily transferable from the arena of goods and services to foreign direct investment as well as to the nature of the investment context, involving issues such as pre-establishment or post establishment phase of investment. Would national treatment differ in each phase? Further there is the related issue of foreign investment and competition policy.

From the purview of economic development, governments need to have measures to ensure and promote industrial upgrading and ensure the development of human and physical capacity to move forward in economic, human and social development. It is important for the government to have the authority to regulate all firms (domestic and foreign) of investment.

To this extent many countries have relied extensively on measures such as local content requirements[iv]. For example, Brazil, Korea, Taiwan and Mexico, in the car industry, utilized local content requirement to create sourcing industry for cars and electronics industries. These governments also utilize trade investment measures in order to increase the benefits from FDI, to have some degree of power and control over foreign firms, to protect local business and provide them with a complementary role in the operations of the FDI.

Increasingly, however, there have been strong attempts by TNCs and their institutional supporters to curb, prohibit and ultimately eliminate such government recourse to investment regulation. Attempts to impose multilateral discipline on investment have at least a twenty-year history. The GATT 1947 had little specific rules on investment. (In earlier times investment and trade were seen as alternatives (substitutes). However, many northern governments argued that GATT's obligation of national treatment (article II.4) and non discrimination (Article XI) applied to investment in some cases. Southern governments disagreed and rejected that the GATT had competence in the investment area. They preferred bilateral approaches.

Today with the dominance of the view that trade and investment are complementary and inextricably intertwined processes, disciplines on investment is scattered throughout the WTO agreements (see in particular Article III and Article XI, GATT 1994) but are most prominent in at least three places: TRIMS (encapsulates articles III and IX), the General agreement on trade in services (GATS), the agreement on Subsidies and Countervailing Measures and the Trade-related Intellectual property (TRIPs) agreement.

While TRIMS[v] prohibit some trade related measures, it focuses on measures on trade in goods. It does not address minimum export requirement, technology transfer requirement, subsidies, tax incentives offered to Foreign, or issues of employment of national or joint venture requirements. Also a country is technically free to use BOP measures and have restrictions on the repatriation of dividends, ceilings on equity holdings of FI

Overall, WTO investment provisions in these agreements are limited in scope and lack coherence. Hence there has been a significant push towards greater and greater investment liberalization.

Today, investment liberalization is occurring via Bilateral Investment Treaties and investment liberalization provisions in regional and free trade agreements.[vi] BITs and RTAs/FTAs now about 2500 worldwide (accounting for over 30% of world trade)--mainly between North and South. In 2006 alone, there were over 60 BITs (and over 200 regional trade agreements, Oxfam 2007). On average, two BITS are signed a week.

The new investment liberalization approach seeks to prevent countries from requiring FDI to transfer technology; to train workers and to source input locally. These new investment rules cover all kinds of assets and operate at the pre establishment (so that government cannot screen FDI) and post establishment (so that government cannot regulate FDI once it enters) stages o FDI. They also cover issue of compensation and destroy ability to balance corporate and citizens' rights. This balance was grounded in agreement around compensation for direct expropriation but now it is extended to cover issues related to taxation or changing environmental regulation. According to Oxfam (2007), more than 170 countries are involved in BITs that allow FDI to access to international investor-state arbitration to settle disputes before using national courts. 'such arbitration fails to consider the public interest, basing decisions exclusively on commercial laws' Oxfam 2007, p.24.

Oxfam (2007) illustrates many example of such disregard for national regulation. For example, there are the outstanding claims against Argentina ($18 billion, arising from the government's attempt, in the midst of a financial and emergency situation, to encourage FDI to stop charging dollar equivalent rates for basic utilities such as water and gas, 2001-2002) this resulted in a group of 39 foreign investors filling for compensation of lost revenue. There is also the case of the Bolivian water privatization case. TNCs have sued government for increasing VAT, re-zoning lands from agriculture to commercial use, regulating hazardous waste facilities (Mexico, NAFTA tribunal ruling: " no principle stating that regulatory administrative actions are per se excluded from the scope of the agreement, even if they are beneficial to society as a whole – such as environmental protection'. Oxfam p. 25)—on the grounds that these actions have adverse consequences on profits (including anticipated profits.

Oxfam argues that these arbitrations decisions 'undermine the rule of law in the south, circumvent national legal system…(and set) double standards since national investors have no such recourse'. As noted by Oxfam, the "(l)egal basis for international arbitration tribunal is loaded against public interests... These panels are hosted by the Bank and the UN but 'shrouded in secrecy' Oxfam p.24

Mechanisms for enforcing the new investment liberalization rules include arbitration clauses (and tribunals) and 'project-specific legal regimes know as Host Government Agreements (HGAs). As argued by Hildyard and Muttitt 2006, these mechanisms provide companies with effective control over the legislations and regulations that apply to their activities and require states to compensate them for any new laws that affect corporate profits (Hildyard and Muttitt 2006, p.2). These complement existing and evolving older legal instruments (developed in oil, gas and extractive industries in 1960s) called Production Sharing Agreements (PSA) with new or tightened conditions and control over laws and legislations in the sphere of activities these companies as well as over the development of the host state's natural resources (Hildyard and Muttitt 2006). Furthermore, as noted by Hildyard and Muttitt, through stabilization clauses (nested in HGA and PSAs) governments' agree to compensate concessionaires for changes in legislation that adversely affect their business. What is new is not that they have extensive rights and profits with minimal obligations but that now TNCs generated rules and provision are increasingly exerting extensive enforceability and dominance over international, national and municipal laws (Hildyard and Muttitt 2006).

These instruments are now in the framework of international investment treaties as opposed to standard concession agreements, which was subject to national laws. Hence, TNC can say: "Without having to amend local laws, we went above or around them by using a treaty; George Goolsby, Baker Botts Architect of legal regime of British Petroleum. Baker-Tbilisi-Ceyhan oil pipe line (cited in Hildyard and Muttitt 2006). BP and other TNCs claim that HGA has 'automatically assume(ing) the status of international public law' (even as it remains a private contract).

TNCs and their supporters such as the World Bank are now attempting to lodge these cutting edge in instruments into BITs, free trade agreement and ultimately in the WTO.

The current architecture for investment liberalization consists of a patchwork of ad hoc approaches by the G-8 governments, and inter-governmental organizations to more coherent attempts at multilateral approaches in the OECD and the UN.

A. Ad Hoc approaches

- BITs (Bilateral investment treaties)/HGA, PSA etc.

- World Bank (MIGA, ICSID)

  The Bank actively promotes investment liberalization are

  Private sector development strategies (Privatization and deregulation)
  Reform of domestic regulations that impacts FI. This overlaps with WTO agenda
  Promotion of sound investment climates through emphasis on reduction of behind border regulations (see competition policy)
  Policy advice on policies that affects FDI and promote TRIMS compliance via FIAS (foreign investor advisory services) and MIGA.
  MIGA: Multilateral Investment Guarantee Agency (Since 1988)
  Encourage the low of investment to the south
  Provide investment insurance against non-commercial risk
  Provide Technical assistant to attract FDI
  ICSID: International Centre for the Settlement of Investment Dispute (since 1964)

- FTAs (e.g. NAFTA)

- EPAs/ Regional agreements

B. Multilateral approach

- OECD

  Code of liberalization of capital movements (1961)
  Declaration on International Investment and MNE (1976, revised 2000)
  Guidelines for MNE (1976, revised 2000)
  CIME: Committee on International Investment and MNE (1973)
  Provides changes for guideline. (Worked on the MAI as well as Post Doha Investment agenda)

  OECD guides revision includes recommendations on sustainable development, human rights, good corporate governance, and protection of whistle blowers. NGOs and the general public can bring cases on noncompliance to national Contact Points (the Forum for reconciliation ad problem solving.

- UN (see for example, UNICITRL--UN Committee for International trade laws, the UN Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices and the Global Compact)

- WTO (discussed above)

V. Towards sustainable investment frameworks

Elements towards a more sustainable development and gender friendly investment framework are being forged by civil society collaborations in partnership with some developing countries. Some of the key elements and templates of model investment frameworks are highlighted below.

International and regional level considerations

Clearly a sustainable investment framework must be premise on at least the following seven key pillars:

- National treatment: No mechanical application of national treatment. This could be harmful to development. This is so particularly sensitive due in part to the fact that FDI are increasingly resort to merges and acquisitions and in part to the size of TNC, which is generally out of proportion to small and medium sized firms in the receiving economy. The issue of national treatment could pose serious drawback for women's empowerment in terms of the cooling effect on subsidies, grants or set aside for local, women-owned business. Such actions may violate WTO rules unless such benefits could also be extended to foreign investors.

- Subsidy/domestic regulations. Since women owned business tend to dominate the micro and small business sector there is likely to be significant adverse impacts if such preferential options and set-aside programs were subject to challenges by TNCs.

Effectively, governments' plans to initiate such programme as part of gender mainstreaming commitments are likely to be subject to a chill effect.

- Right to regulate: Resolve economic sovereignty dilemma

- TRIMS: need to re-open the TRIMS discussion in the WTO. There should not be blanket ban on all TRIMS.

- Development dimension and SD&T: Preserve aspects of trade related measures, which promote development. These include option for and around local content requirements, trade balancing requirements, employment requirements, transfer of technology, balance of payments safeguards (emergency safeguard measures are available in GATS and could be a model for goods) and protection for infant industries and SMEs. There must also be policy space for prudential measures, such as the central banks' intervention to limit potential and actual harmful impacts of FDI. (This is currently undefined in the financial annex of the WTO).

- Social and gender dimensions (see above under gender section)

- Corporate social responsibility and the primacy of human rights instruments

National level considerations

At the national level, governments and civil society need to consider the following:

- Develop appropriate guidelines for linkage programs that is appropriate for enterprise development and FDI promotion with emphasis on the quality of FDI flows. In this context determine the nature and extent of the backward necessary for future growth and productivity of the economy including a typology of the competitiveness needs of local enterprises. This could be part of the pre-establishment phase discussions.

- Clarify how the treatment of investment in RTA/EPAs relate with that in the discussion at the international and multilateral levels, as well as, with national development strategies

- Evaluate what 'yellow light' and 'green light' host country measures do the country need to maintain. In that context, determine the legal regime for development related subsidies that would be important to the country and sub region for enterprise development.

- Develop some benchmark of the right to regulate beyond expropriation that are essential for a country and sub region. Under take the evaluation of which combination of the GATT, TBT and GATS approaches to right to regulate is the most important and appropriate for a country. This should also include issues of safeguard (including the relevance of time-bound or other safeguard in addition to balance of payment and transfer payment).

- The special and differential component of any investment provisions must be premised upon the right of Governments to regulate in the public interest.[1] In the context of investment, because of its critical relationship to trade and development, safeguards provisions (such as transfer of payments, protection against import surges and balance of payment safeguards) are necessary but not sufficient to preserve the right to regulate. Government must have full control to determine, develop and enforce disciplines with regards to economic, social, environmental and administrative regulations in the favor of economic development and social and gender equality objectives.

- Evaluate implications of qualification of National treatment such as exception and derogations and their importance for national development relative to the protection and nurturing of domestic SMEs etc.

(Source: James et al)

[1] Please see also the Doha Ministerial Declaration paragraph 22.

Appendix: Emerging Model agreements for investment

International Institute for Sustainable Development's (IISD) Model Agreement starts from the clear relationship between investment and the achievement of sustainable development. Among other features, it:

- recognizes that an investment agreement is fundamentally about good governance, and that protection of investor rights and obligations and host state rights and obligations are an essential part of that equation;
- applies basic standards of good governance to the agreement itself, including through an appropriate institutional mechanism;
- establishes a clear purpose for the agreement: to foster international investment that is supportive of sustainable development aspirations and requirements in both the North and South;
- develops provisions that balance the rights and obligations of investors, host states and home states; and sets out specific proposals to fix the broken investor-state arbitration system.

Southern Agenda on Investment" (SAI).

IISD and

- University of San Andrés, Argentina;
- Fundação Centro de Estudos do Comércio Exterior, Brazil;
- Thai Development Research Institute, Thailand; and the
- Trade Law Centre for Southern Africa.

Sources for more on investment frameworks and ongoing updates on investment liberalization include: International Institute for Sustainable Development (www.iisd.org), Investment Treaty News (ITN), Investment Watch and Corporate European Observatory (CEO), Multinational Monitor.

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[i] For example, the IMF defines FDI in terms of investment that reflects the objectives of a resident entity in one economy obtaining a lasting interest in an enterprise resident in another country. Here, the lasting interest implies the existence of a long-term relationship between the direct investor and the enterprises and a significant degree of influence by the investors on the management of the enterprises. Thus the concept of 'lasting interest' is not defined by IMF in terms of specific time frame. The more pertinent criterion is that of the degree of ownership in an enterprise. The WTO defines FDI as a percentage of 10% or above of ownership. This is often deemed to reflect a lasting interest. But there are differences; for example, if a direct investor owns less than 10% but has an effective voice in management of the enterprise then it is an FDI. In the GATS, FDI is commercial presence (Mode IV).

The World Bank defines FDI in terms of net inflows of investment to acquire a lasting management interest (10% o more of voting stocks) in an enterprises operating in an economy other than the investors home. Sum of equity capital, reinvested earnings, other long term capital and short term capital as shown in the BOP (WIDER 2005)

[ii]In 1999 the flow of FDI totaled $865 billion of FDI. The volume of production of goods and services on account of FDI exceeded that supplied by international trade. Global sales and gross product linked to international production have increased faster than global exports and gross domestic products (by 3.2% and 4.1% between 1982 and 1999). Fifty percent of international trade is due to intra trade between MNE affiliates.

[iii] As discussed in WIDER 2005, mandatory technological requirement is contentious. Antagonists stress that mandatory technological transfer is counter productive as it decreases the rate of technology diffusion. Thus they would argue more in favor of a more 'natural diffusion' of technology through training of local staff and cooperation with local firms. In this context the government would focus on the investment environment (investment in education, training and infrastructure).
Those who opposed mandatory technology transfer argue in favor of the necessity of 'market oriented policies that aim to enhance the spread of technology via mechanisms such as the movement of skilled labor, contractual arrangements between FDI and local firms, in –house R&D and competition in host markets'. Some would further seek 'stable and predictable legal and regulatory framework with adequate protection of IPR, human capital formation and competition policy.'

Proponents of mandatory transfer of technology argue that it mandatory technology transfer is often necessary. They deny that it not have a significant negative effect on either the level of FDI flows or the quality of technology received by the host country. In this framework, mandatory technology transfer can play a positive role. For them, simply having good macroeconomic environment and infrastructure may only lead to exploitation of static comparative advantage. This will not result in any expansion of local technological frontier. Nor will it generate industrial upgrading, nor the creation of extensive linkages. It is therefore very important that host countries play a pro-active role in inducing TNCs to upgrade technologies and to enter complex activities. Source: WIDER 2005.

[iv] LCR, equity and export requirements and incentives are instruments to transfer rents from MNEs to host country. But they also impact competition policy areas. TRIMS linking equity partnership to exports are problematic as they are imposed for BOP reasons not for development objectives. Regulations that limit the operation of FDI to designated regions and areas of host countries or prohibit certain economic activity; stipulations on joint venture and MA are all aspects of competition policy.

[v] Trade related investment measures covers: local content requirements, incentives tied to exports, requiring foreign investors to purchase a certain quantity of components locally, requiring foreign companies to export products, requiring foreign companies to share know how/new technology with local work force, requiring foreign companies to hire a certain percentage of local workers and managers, restricting the import of components used in the production of goods and restricting foreign companies access to foreign exchange. These measures are argued to violate national treatment principles and article XI of WTO (prohibition of quantitative restraints). Under the TRIMS agreement WTO members are to phase out TRIMS, which violate national treatment and QRS. It is narrow in its scope, since it only focus on goods, does not include subsides, tax incentives etc. GATs definition of investment is covered in article 28; asset based but limited to investment (purchase of shares, stock and debentures and participating in company). GATS covers investment in services. ACSM: applies to investment incentives that are subsidy (actionable and non actionable). Like TRIMS ACSM investment related provisions are limited to goods and does not cover investment that are not subsidy.

[vi] It is argued that BITs are needed for FDI inflow but Brazil is reported to be a large receiver of FDI and it has not ratified a single BIT while many African countries have signed over 1000 BITs and yet receive less than 4% of global FDI (Oxfam 2007).