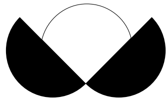

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Despite their differences, GATS and BITs are part of the same agenda

By Scott Sinclair

A recent analysis in Bridges Monthly ("International Investment Rules: Is the GATS Campaign Becoming a Red Herring?" by Luke Eric Peterson) suggests that the GATS campaign is in danger of becoming a "red herring" – in other words, a distraction.

This is hardly the case. It is ironic that Peterson's analysis disparages the GATS campaign and suggests it is based on "elaborate hypothetical scenarios" just as leaked, draft EC GATS requests confirm – in very concrete terms – the long reach of this multilateral investment agreement.

Peterson makes the valid point that bilateral investment treaties (BITs) are proliferating with next to no public scrutiny. Motivated by victories under NAFTA's investment rules, multinational investors are turning to these little-known treaties to frustrate environmental protection and other public interest regulations. The most recent BITs are top-down in coverage, include a broad definition of investment, investor-state dispute settlement, and monetary damage awards.

It is odd, however, that Peterson singles out GATS campaigners and analysts for not paying enough attention to the regressive features of BITs. Many of the groups and analysts that are active on the GATS also worked to expose and derail the Multilateral Agreement on Investment and, in the Americas, have been busy highlighting the dangers of NAFTA chapter 11, the proposed investment provisions of the FTAA, *and* of copycat provisions in BITs.

Despite their important differences, all these investment agreements, including the GATS, are best understood as parts of a single, corporate-driven agenda. The plethora of threats and negotiating venues present a daunting challenge for citizens and non-governmental organizations. They cannot focus exclusively on any one aspect of this agenda, but must address it as an interrelated whole.

BITs should not be neglected. But, in many respects, broad-based regional or multilateral investment agreements such as the NAFTA, the failed MAI, the proposed FTAA, the GATS and the proposed WTO investment agreements pose more formidable challenges.

1. Although the most recent BITs (from the mid-1990s onwards) apply a NAFTA/MAI model, BITs vary considerably and not every BIT contains as far-reaching and intrusive rules.
2. It is far easier to renegotiate or withdraw from a stand-alone BIT than from a multilateral or regional trade and investment agreement.
3. Governments, even of smaller countries, could refuse to pay egregious BIT arbitral awards without facing trade sanctions or provoking a crisis in general trade relations.

Moreover, most BITs are signed between developed and developing or so-called transitional economies, while investors are based overwhelmingly in OECD countries. This power imbalance poses serious problems for the south. But it also means that challenges

to public policies in the north are far more likely to come from investors based in the US, Japan, the EU or other developed countries than from elsewhere. Around four-fifths of global foreign investment occurs between OECD countries. BITs generally don't apply to these investments. As US law professor Robert Stumberg testified during the MAI debate: "There are not too many investors from Tajikistan who own real estate near Atlanta." This helps explain why, in the aftermath of the MAI's demise, multinational corporate lobbies shifted their efforts to broadening and deepening an existing multilateral investment agreement, the GATS.

Unlike the GATS, the latest generation of BITs and the NAFTA investment chapter are top-down in coverage and enforceable though investor-state dispute settlement. In these respects, they are certainly more menacing than the GATS. The bottom-up features of the GATS provide governments with certain flexibility, although this is often exaggerated. State-to-state dispute settlement reduces the number of controversial cases. But, in other important respects, GATS rules go beyond BITs and even the NAFTA investment and services chapters.

For example, the GATS national treatment rule applies to subsidies, whereas NAFTA's national treatment rules do not (cf. NAFTA art. 1108.7 and 1201.2.d). GATS Article XVI prohibits quantitative restrictions (such as limits on the number of service suppliers), while the NAFTA investment and services chapters do not (cf. NAFTA Article 1207). Finally, GATS Article VI aims to apply a necessity test to non-discriminatory domestic regulation, which is not a feature of the NAFTA chapter 11 or of BITs.

GATS Article VI should frighten any progressive analyst familiar with the much-abused NAFTA investment protection provisions. Article VI could actually apply a tougher test than NAFTA Article 1110 to a broad range of public interest regulations. This is because the measures "tantamount to expropriation" restricted by NAFTA are a mere subset of the "burdensome measures" that Article VI aims to eradicate. It would be far easier, for example, for a foreign investor to demonstrate that denying a permit for a toxic waste dump or banning a harmful gasoline additive is "more burdensome than necessary," than to prove that it is "equivalent to expropriation." It must also be borne in mind that Article VI restrictions already apply provisionally in sectors covered by a country's specific commitments (GATS Article VI.5).

Peterson's article misrepresents GATS dispute settlement stating "A ruling against the host state might trigger damages which would be in the form of 'substitute compensatory commitments'." But the GATS is subject to the same legally binding dispute settlement procedures as other WTO agreements. While under WTO dispute settlement rules, disputants can try to negotiate a settlement, the losing government is usually expected to modify or remove the non-conforming measure. If the loser fails to do so, the complainant can impose trade sanctions, including cross-retaliation. So if, for example, Mexico loses the impending GATS case on telecomms, some of its services, manufacturing, or agricultural exports could be barred from US markets. This is not a threat to be taken lightly.

The kicker in Peterson's analysis is the suggestion that WTO negotiations on investment "could represent either an opportunity to reform and replace those existing investment agreements which are proving problematic, or a further extension of what appears to be a flawed, imbalanced network of bilateral treaties." The former scenario is dubious.

The WTO negotiations on investment offer no realistic opportunity to reform existing BITS, any more than they present an opportunity to reform NAFTA chapter 11 or the GATS. Neither the US administration and its corporate community (which are fiercely resisting serious reforms to NAFTA's investment chapter) nor other Quad governments

can reasonably be expected to agree to undercut their bilateral or regional investment agendas at the WTO. Any new WTO rules on investment would be a floor, not a ceiling, for other international investment agreements including BITs.

The WTO needs to be scaled back, not expanded into controversial new fields of regulation, such as investment. NGOs should work with developing countries resisting the Quad's efforts to push investment on to the negotiating agenda and, if the negotiations proceed after the next ministerial, cooperate to prevent their consummation.

It is a mug's game to rank threats posed by corporate-biased investment agreements. If forced to rank, most North American NGOs would probably put NAFTA chapter 11 at the top. But a clear understanding of NAFTA's threats to public services and public interest regulation motivates, not undermines, further work on the GATS. The challenge is to weave together citizen and NGO campaigns on the various facets of the corporate agenda on investment agreements – not to split them apart.

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