



# ***“The International Investment Initiative – I<sup>3</sup>”***

**CONCEPT PAPER**

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# 1 THE INTERNATIONAL INVESTMENT INITIATIVE (I<sup>3</sup>): BACKGROUND AND RATIONALE

***International investment flows have become central for development and the expansion of the world economy...***

Today's world is one in which more goods and services are delivered to foreign markets through international production than through international trade. World exports of goods and services amounted US\$19 trillion<sup>1</sup> in 2009. Meanwhile, the sales abroad of foreign affiliate companies were worth almost US \$30 trillion.<sup>2</sup> Today there are more than 82,000 parent companies engaged in international production, with a network of close to 800,000 foreign affiliates across the world. The value-added of these affiliates worldwide accounted for 11 percent of global output in 2009.<sup>3</sup> With the dramatic growth of international trade in services and the increasing fragmentation of production on a global scale, governments in developed and developing countries alike have become acutely aware of the central role that foreign investment plays in positioning their national economies in an interdependent world market and in fuelling the well-being of citizens.

***Over the past two decades, investment has also become one of the most dynamic areas of international economic law...***

Such a trend stems from the negotiation of a patchy but extensive network of International Investment Agreements (IIAs) around the globe and from the increasing application of these agreements in order to address conflicts surging between foreign investors and States hosting the investment.

***This dynamism has been evidenced in treaty making, both from a quantitative perspective...***

The 1990s witnessed a literal explosion in the number of IIAs concluded, most of which were Bilateral Investment Treaties (BITs). While in 1990 there were approximately 400 BITs negotiated worldwide, by 2009 the number of BITs negotiated globally stood at a staggering 2700.<sup>4</sup> Such agreements have grown not only in number but also in complexity. Their normative content continues to evolve. Furthermore, in recent years, international investment rules have increasingly been adopted as part of Preferential Trade Agreements (PTAs). Such agreements, in addition to containing a variable range of trade liberalization and promotion provisions, feature commitments to liberalize and/or to protect investment flows between the parties. The number of PTAs has also registered spectacular growth, with more than 290 such agreements notified to the WTO at end-2009. Seventy such agreements were concluded between 2004 and the end of 2009.<sup>5</sup> While the rate at which new BITs have been concluded has slowed

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<sup>1</sup> Source, WTO.

<sup>2</sup> Source WIR 2010 UNCTAD.

<sup>3</sup> Ibid

<sup>4</sup> Ibid

<sup>5</sup> Ibid

down, the rate at which new PTAs with investment provisions have been concluded is on a strong upswing.

***...as well as from a qualitative perspective***

Over the last decade, IIA negotiations have addressed an **expanded range of issues**. A growing number of IIAs include more sophisticated investment protection provisions as well as liberalization commitments. Compared to BITs, PTAs show far more variation in their scope, approach and content. Moreover, recent PTAs tend to encompass a broader range of issues that in the most comprehensive agreements may include not only investment protection and liberalization, but also trade in goods and services, intellectual property rights, competition policy, government procurement, temporary entry for business persons, transparency, as well as protection of the environment and of labour rights.

International investment **rules are also becoming increasingly sophisticated**. Recent IIAs feature significant revisions of the wording of various substantive treaty obligations. One major impetus for such an evolution was the conclusion and implementation in 1994 of the North American Free Trade Agreement (NAFTA) between Canada, Mexico, and the United States. Arbitral decisions rendered under the investor-state dispute resolution provisions --first of the NAFTA but more recently of an increasing number of BITs -- have raised a number of legal and policy issues that have prompted the parties to reconsider some of the language used in their substantive as well as dispute settlement clauses in IIAs.

The evolution of international investment law has also been influenced by **rising South-South cooperation** in the investment field. Although developed countries seeking to protect their investments continue to be the most active treaty initiators, many developing countries have in recent years become active participants in the process of concluding IIAs. This reflects in part their desire to attract greater volumes of foreign investment, but also their emerging status as sources of outward investment. As an example, China has concluded more than 120 BITs and today ranks second after Germany as regards the total number of BITs concluded.

***The evolution in international investment law is also being shaped by increasing recourse to investor-State international arbitration...***

Provisions relating to investor-State dispute settlement have been included in IIAs since the 1960s. However, active use of these provisions to institute arbitral proceedings was rare until the last decade. For instance, from 1987 to mid-1998, only 14 BIT-related cases were brought before the investor-State arbitration proceedings of the International Centre for Settlement of Investment Dispute (ICSID), and only two awards and two other settlements were issued over this period.<sup>6</sup> The period since the late 1990's has witnessed growing judicial activism. **The cumulative number of treaty-based cases had risen to more than 300 by 2009**, with more than 200

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<sup>6</sup>All cases can be found on the ICSID webpage at [www.worldbank.org/icsid/cases/cases.htm](http://www.worldbank.org/icsid/cases/cases.htm), or at [http://ita.law.uvic.ca/chronological\\_list.htm](http://ita.law.uvic.ca/chronological_list.htm).

brought before ICSID (including ICSID's Additional Facility) and more than 100 cases before other arbitration fora.<sup>7</sup>

**Recent cases have spanned the whole range of investment activities and all kinds of investments**, including privatization contracts and state concessions. Measures that have been challenged include emergency laws put in place during a financial crisis, value-added taxes, the re-zoning of land from agricultural to commercial use, measures regulating hazardous waste facilities, measures relating to divestiture of shareholdings of public enterprises to a foreign investor, as well as the treatment of media regulators. Disputes have involved provisions such as those on fair and equitable treatment, non-discrimination, expropriation (including so-called regulatory takings), as well as the scope and definition of investment agreements. **According to UNCTAD, at least 50 governments – 31 of them developing, 11 developed and 8 transition economies - have been involved in investment arbitration over the past decade.**

There are few signs suggesting that the number of investment disputes is about to abate. On the contrary, the **number of arbitration proceedings is growing steadily and is likely to continue to do so.** In part, such a trend owes its origin to the continued growth in the number of investment agreements. It also reflects the fact that foreign investors are becoming increasingly aware of the opportunities offered by investment agreements to challenge measures taken by governments that they perceive as negatively affecting their investments. Moreover, in an increasingly integrated world economy, interaction between foreign investors and host country governments prone to exercising regulatory sovereignty can only increase, raising the possibility for conflict among them and thus illustrating anew the need for effective dispute resolution mechanisms.

Increasing recourse to **investor-State arbitration has fuelled the development of a growing volume of jurisprudence** which is still evolving and is only beginning to be subjected to analytical scrutiny within the legal and academic communities. An interesting dynamic has emerged between such evolving case law and investment treaty-making, as governments pay closer attention to the legal impacts of the wording of particular clauses included in their IIAs. Arbitral awards have demonstrably led the governments of numerous countries to revise their IIA templates based on the interpretations arising from international arbitral decisions.<sup>8</sup>

***New developments in international investment law are generating debate among investment stakeholders...***

Legal activism in investment rule-making and litigation has also started to generate controversy among certain organizations of civil society, international investors and

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<sup>7</sup> Source: UNCTAD, (2009) *Latest developments in Investor-State dispute Settlement*, IIA MONITOR No. 1, 2009, *International investment agreements*, (Geneva: United Nations)

<sup>8</sup> This point has been developed in detail in UNCTAD, *Investor-State Dispute Settlement and Impact on Investment Rulemaking*, New York and Geneva, 2007.

governments. While certain sectors consider the increase in litigation as a natural trend derived from the development of a rule-oriented international investment regime, others argue that the nature and features of investor-State arbitration make the latter unsuited to address the matters of public policy which are often at the root of an increasing number of investor-State disputes.

***Thus the need for legal research, training, advice in international investment law and policy and an informed dialogue among investment stakeholders...***

The trends depicted above point to the need for focused legal research, training, specialized advice and informed discussion in the field of international investment law and policy, with great interest for the public and private sector alike. Moreover, despite the ever deeper interaction between international investment and trade, investment law has tended to evolve separately from the regulatory regime governing international trade. The failed attempt at crafting a Multilateral Agreement on Investment (MAI) in the 1990's was very much reflective of these two "solitudes". Experts from both fields all too rarely interact with one another. This has fuelled an artificial and unduly segmented vision of these two fundamental pillars of international economic law and policy. Indeed, **despite their particular features and complexities, international trade and investment are no longer two competing but rather complementary ways to serve and integrate international markets.** There is, accordingly, a genuine need to assess and study both subject areas through a more integrated lens and to strive to identify and exploit the natural synergies between them and extend them to other rising fields of international economic law, such as competition law and policy, to which they are inextricably linked.

***"I<sup>3</sup> - the International Investment Initiative"***

Recognized as one of the world's leading centers of graduate training and research on the law, economics, and policy of trade regulation, the World Trade Institute (WTI) aims by launching the International Investment Initiative to fill a perceived gap in the study of the interaction between international trade and investment and to direct more focused attention among all relevant stakeholders to the rapidly evolving field of international investment law and policy. In doing so, the WTI plans to develop close partnerships with leading international organizations, academic institutions, governments, civil society organizations and the private sector in developing the I<sup>3</sup>, the first stage of which will be implemented over the 2010-2012 period.

## 2 The $I^3$ : GENERAL OBJECTIVES

$I^3$  aims at fulfilling three general objectives:

- To analyze the multiple interactions between international trade and international investment law and policy, exploring synergies between them and fostering a more integrated study and application of international economic law;
- To undertake cutting edge research, human capital formation, technical assistance and policy advisory services on international investment law and policy aiming to address the needs of different stakeholders involved in international investment relations, i.e., governments, investors engaged in international investment, as well as inter-governmental, non-governmental and other academic institutions
- To provide a forum where the different stakeholders involved in international investment can have a well-informed and constructive dialogue on investment-related issues of their interest.

## 3 $I^3$ : ACTION PLAN

### 3.1 HUMAN CAPITAL FORMATION AND TRAINING

Human capital formation and training comprises **three different categories of activities**:

**First**, the subject of **international investment law** will be incorporated more comprehensively into the WTI's flagship **Masters in International Law and Economics (MILE)**. In so doing, the WTI will not only provide a fuller learning platform within one of the world's most specialized degrees in international economic law, but will also contribute to achieving one of the core objectives of  $I^3$ : to explore interactions and synergies between trade and investment law and policy.

**Second**, through  $I^3$ , starting in July 2011, the WTI will develop a two-week **summer academy** specifically devoted to the study and analysis of international investment law and policy. The summer academy will provide an excellent opportunity for government officials, professionals of the private sector, academics and members of civil society in general to update their knowledge of key trends in this rapidly evolving field of legal and policy practice.

**Third**, in addition to the MILE and the Summer Academy,  $I^3$  will design and implement **short courses, learning modules and workshops** tailor-made to the needs of governments, small and medium-sized enterprises (SMEs), international governmental and non-governmental organizations and academic institutions on specific subjects relating to international investment law and policy.

## **3.2 RESEARCH**

*I*<sup>3</sup> will undertake research projects aimed to addressing cutting-edge issues of interest to the different investment stakeholders in the field of international investment law and policy. Among the specific areas for research for the 2010-2012 period are the following:

- Investor-State dispute prevention mechanisms and policies
- The investment policy of the European Union
- Legal regulatory audits in selected countries
- Areas of inter-relation between trade and investment in the multilateral and regional trade systems
- Impact assessment methodologies for IIAs

*I*<sup>3</sup> will include a “Visiting Fellows Program” aimed at providing scholars and experts from all over the world interested in undertaking research in the field of international investment law and policy with full access to the WTI’s outstanding research infrastructure in Bern, Switzerland. Visiting Fellows will also take advantage of the dense network of researchers anchored around the WTI and pursuing work under the NCCR-Trade project funded by the Swiss national Science Foundation (see [www.nccr-trade.org](http://www.nccr-trade.org)).

## **3.3 ADVISORY SERVICES AND TECHNICAL ASSISTANCE**

*I*<sup>3</sup> aims to provide advisory services and technical assistance to governments and SMEs and to work collaboratively with leading inter-governmental and non-governmental organizations and other academic institutions in designing and implementing various capacity building activities in the field of international investment law and policy. In particular, advisory services and investment-related technical assistance will comprise the following activities:

### **3.3.1 Governments**

- Negotiation and implementation of IIAs:
  - Diagnostic help and advice on consistency issues with domestic laws and international commitments
  - Assisting negotiators to prepare for future negotiations by creating or updating a country’s model treaty, or clarifying the country’s position on various principles of international investment law
  - Identifying priorities for investment treaty negotiations and advising on detailed positions tabled during negotiations
  - Ensuring that all non-conforming measures are identified and notified under relevant treaty provisions

- Ensuring that treaty commitments are fully adhered to and that any changes required to domestic law are properly anticipated and fully implemented
- Putting in place procedures for information sharing with investors and potential investors, including on international treaty obligations agreed to in IIAs.
- Preparing the inter-governmental machinery required to handle disputes effectively when they are initiated by investors – through negotiations, conciliation and mediation, as well as investor-State arbitration
- Advice on international investment law and jurisprudence:
  - Legal opinions
  - Facilitating access to available information on treaties, cases and arbitrators
- Assistance on investor-State dispute prevention

### **3.3.2 Small- and Medium-Sized Enterprises (SMEs)**

- Advice on how to take advantage of existing IIAs:
  - Activities covering the details and application of negotiating international investment treaties and key concepts of international investment law
- Advice on International Investment Law and Jurisprudence:
  - Legal opinions
  - Facilitating access to available information on treaties, cases and arbitrators.
- Dispute prevention assistance:
  - Advice on how to use existing mechanisms of dispute prevention in host States
  - Transmitting to competent host country authorities the nature and basis of legal or regulatory problems affecting SMEs
  - Assisting in mediating with competent authorities of host States

### **3.3.3 International Organizations**

- Tailor-made design and implementation of capacity-building programs for governments on international investment law and policy.

### 3.4 DISCUSSION AND OUTREACH ACTIVITIES

*I*<sup>3</sup> aims to provide a venue where different stakeholders of the investment community – governments, the private sector, international organizations and civil society – can freely discuss issues of common interest related to investment law and policy. *I*<sup>3</sup> also aims to become a forum where such discussion can be instrumental to informed decision-making and dialogue among investment stakeholders. Four different kinds of discussion and outreach activities are envisaged:

- Brown bag luncheon seminars for members of the WTI-NCCR-Trade research community, relevant Swiss institutions and the diplomatic community in Bern;
- A Distinguished Lecture series allowing senior experts to address issues of interest relating to international investment law and policy;
- A series of “closed and informal dialogues among investment stakeholders”, where investment stakeholders can freely dialogue on issues of interest under Chatham House rules; and
- Organization of major international conferences on issues relating to investment law and policy.

## 4 ORGANIZATIONAL STRUCTURE

*I*<sup>3</sup> is being launched initially as a program of the WTI and will thus benefit from the expertise, resources and infrastructure of the Institute. Given the specificity and novelty of the subject of international investment law and policy, *I*<sup>3</sup> will be developed through an inclusive approach, aiming to forge cooperation and synergies with a broad array of stakeholders. Thus, *I*<sup>3</sup> will draw on the expertise of - and develop close working partnerships with - other academic institutions, international organizations, governments, civil society organizations and the private sector in different parts of the world in address their pressing needs for state-of-the-art training, research and advice in the field of international investment law and policy. In pursuing its aims, *I*<sup>3</sup> will revolve around an organizational structure in which the core administrative team is complemented by a faculty drawn from the leading centers of higher learning in the world, a set of institutional partners – comprising international organizations, academic institutions, governments, CSOs and private sector representatives, as well as an Advisory Board (see Figure 1 below).

### ***The World Trade Institute***

The World Trade Institute (WTI) is a centre of advanced studies and a forum for interdisciplinary research and teaching in international trade law, economics and international relations, fostering interaction between students and professionals, and allowing researchers and practitioners to pool their expertise.

As a centre of excellence of the University of Bern (Switzerland), the WTI provides teaching, training, consulting and research in the field of International Trade Regulation. The WTI flagship academic program is the Master of International Law and Economics (MILE).

The WTI hosts the Swiss National Centre of Competence in Research on International Trade Regulation. It also shares its premises with the Department of Economic Law; this fosters close cooperation between the three institutions.

**FIGURE 1.  $\beta$  ORGANIZATIONAL CHART**

