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Investment Treaties and Investor Corruption:
An Emerging Defense for Host States?
by Jason Yackee

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Dealing With the Increasing Complexity of Investment-Related Treaties: A Framework and Some Policy Guidelines

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Bilateral investment treaties (BITs) used to be boilerplate: taken out of a drawer before official visits; signed with pomp and circumstance but not much attention to precise wording. Today, the diversity and ramifications of investment-related treaties are staggering. For one thing, the boom in arbitration cases made everyone realize these treaties matter. Variation, precision and extensive footnotes and explanatory protocols are commonplace. They often incorporate or respond to past arbitration awards, building a useful bridge between litigation and negotiation.

Another contributing factor is the increasing overlap between investment treaties and trade agreements. That each country often has dozens of each does not make it any easier. Switzerland, for example, is a party to the International Centre for Settlement of Investment Disputes (ICSID), the World Trade Organization (WTO) and the Energy Charter Treaty (ECT), has 26 free trade agreements—not counting the European Free Trade Association (EFTA) and the bilateral agreements with the EU—and is a party to 124 BITs. Some FTAs are concluded by Switzerland alone, most on behalf of EFTA.

Some FTAs include an investment chapter, others do not. Some FTAs have an additional GATS-like services chapter—singling out access and non-discrimination for FDI in services (not manufacturing)—others do not, or liberalize "establishment" for both services *and* goods. Some BITs, in turn, liberalize and protect investment (without making the goods v. services distinction), others say nothing on access and only protect sunk investments. Some treaties provide for product or sector specific carve-outs, grandfathering of certain measures or general exceptions, others do not or do so differently. Some treaties (or chapters within treaties) provide only for state-to-state dispute settlement, others include a standing offer for arbitration with private investors. A third type provides for private standing but subjects it to consent by the respondent state on a case-by-case basis.

The Most Favoured Nation (MFN) provision may streamline some of this diversity but its coverage and reach remain highly contested: Does MFN in a BIT extend to benefits granted to other countries in the WTO or an FTA? Conversely, does MFN in GATS or an FTA automatically incorporate substantive or dispute settlement advantages given to another country in a BIT?

These mind-boggling questions of diversity and overlap must not be exaggerated. Large areas of convergence remain and overlaps operate at the edges and have so far not played a major role in dispute settlement. That said, overlaps and conflicts are better avoided or regulated through careful drafting and negotiation of treaties. Protracted, costly and unpredictable litigation is clearly second-best.

Table 1 below offers a practical way to think about these overlaps, asking two basic questions:

(1) What is the business or economic activity at issue: *goods or services* (or both)?

(2) What is the problem or governmental restriction complained about: is a country making it more difficult to *trade* goods or services; or is a country restricting access or not protecting foreign *investment* (or both)?

Table 1: A Practical Guide to Finding the Applicable Agreement(s)

		GOVERNMENTAL RESTRICTION			
		TRADE		INVESTMENT	
		Country restricts **ACCESS** of goods or services (imports or exports)		Country restricts **ACCESS** of investments or investors	Country fails to **PROTECT** investments/ investors
BUSINESS ACTIVITY		no local investment	with local investment		
	GOODS industry, agriculture	- GATT - FTAs - GPA	- TRIMS - GATT - FTAs - GPA	- (Some) FTAs - (Few) BITs	- BITs - (Few) FTAs - TRIPS
	SERVICES financial, tourism, engineering, telecom etc.	- GATS - (Most) FTAs - GPA	- GATS - (Most) FTAs - GPA	- GATS Modes 3 & 4 - (Most) FTAs - (Few) BITs	- BITs - (Few) FTAs - TRIPS

GATT	General Agreement on Tariffs and Trade (and possibly other trade in goods related agreements in Annex 1A to the WTO Agreement)
FTAs	Free Trade Agreements
GPA	Government Procurement Agreement (plurilateral agreement binding on a sub-set of WTO members)
TRIMs	(WTO) Agreement on Trade-Related Investment Measures
GATS	General Agreement on Trade in Services
BITs	Bilateral Investment Treaties
TRIPS	(WTO) Agreement on Trade-Related Aspects of Intellectual Property Rights

For a businessperson or economist these distinctions—goods v. services; trade v. investment; access v. protection—may make little sense or be hard to make. For legal purposes they are crucial as they direct to different levels of protection and obligation.

> With sufficient resources and creativity, investors and traders can forum shop or cross-reference between treaties to obtain the maximum level of access and protection, coupled to the most desirable remedies.

For business, the end result is that international protection of traders and investors is scattered across a diversity of agreements. Those able to exploit this diversity can benefit. Others may get lost. With sufficient resources and creativity, investors and traders can forum shop or cross-reference between treaties to obtain the maximum level of access and protection, coupled to the most desirable remedies. Looked at from the perspective of a regulating state, hands are tied and flexibilities negotiated in an ever growing set of treaties. *Cui bono?* Here as well, resourceful countries may be able to deal with it and even turn it to their advantage. They can use complexity as a device to minimize their commitments in negotiations; in litigation, they can use jurisdictional objections or cross-refer to carve-outs, conflict clauses or exceptions in other, overlapping treaties to avoid or limit responsibility or minimize damages or other remedies. In contrast, countries with fewer resources can be misled or make scheduling mistakes which may end up costing dearly.

Overlaps and complexity are on the rise and here to stay. For governments, the challenge is how to deal with it. Below are some policy guidelines focused on the negotiation stage that may alleviate problems of overlap:

- Better to integrate commitments into a single treaty, rather than to conclude a BIT and an FTA with one and the same country.

- Regional or plurilateral treaties instead of bilateral agreements avoid some level of overlap.

- Negotiate explicit carve-out or priority provisions to clarify the scope of each agreement, and which agreement prevails in the event of conflict (this is often done for the WTO-FTA overlap; less so for the BIT-FTA/WTO overlap). Such overlap clauses should address also overlaps between dispute settlement provisions.

- Be aware of formalistic distinctions engrained in the minds of negotiators (e.g. services v. goods; trade v. investment; access or establishment v. protection). Clarify the dividing lines, avoid sharp distinctions that make little economic sense and double-check that these distinctions do not inadvertently cover (or not cover) industries or problems of interest.

- Realize that a broad consent to arbitration clause (e.g. “any dispute with respect to investment”) or broad umbrella clause (e.g. “any commitments entered into in relation to investment”) may cover claims in outside agreements (such as GATS or FTAs).

- MFN can also trigger unexpected consequences: an MFN clause in a BIT may not only apply to benefits granted in other BITs but also in other investment-related treaties such as GATS, TRIPS or FTAs. Similarly, when concluding a BIT, the benefits therein may have to be extended to other countries pursuant to MFN clauses in BITs, the WTO or FTAs. Carefully wording the MFN clause is a must. Carve-outs or exceptions may be called for (we find them in the WTO but not as much in FTAs and even less so in BITs).

- Where levels of commitment and flexibility vary, breach of one treaty may possibly be justified under another treaty (say, BIT breach justified with reference to an FTA or the WTO).

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- In any event, realize that what you agree to in one treaty may bleed over into another, albeit through the softer process of interpretation of one treaty with reference to another, or the process of cross-fertilization of jurisprudence developing under different treaties.

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