DEVELOPMENT IMPLICATIONS OF INTERNATIONAL INVESTMENT RULE MAKING

by

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1. INTRODUCTION

International trade and investment are the major engines for driving both national and global economic growth and can potentially act as forces for sustainable development especially for developing countries as well as countries with economies in transition. But this is not automatic especially when trade and investment policies are in conflict with development policy; and when the international system of investment is atomised, complex, and inadequately transparent and rapidly changing, resulting into so many development challenges.

As stated in document TD/B/COM.2/EM.2111 which was prepared by the secretariat, the development implications and challenges arising from this system will be enormous, greatly affecting developing countries because of lack of capacity for establishing and maintaining policy coherence, preserving regulatory flexibility and ensuring that the development dimension is realistically emphasized in investment agreements so as to attract and fully benefit from Foreign Direct investment (FDI). The other big challenge for developing countries is their capacity to negotiate before being signatories to these investment agreements both at bilateral and multilateral level.

2. CURRENT SITUATION

At present countries have shifted to Bilateral Investment Treaties (BITs) because of the systematic failure of governments to conclude a multilateral investment agreement leading to rapid multiplication of these international agreements. According to the Freiedrich Ebert Stiftung (FES) conference report (February 2007), BITs were designed by western capital exporting governments to protect investors when they make investments abroad, especially in the developing countries to supplement domestic legal systems, so as to provide protection against many kinds of interference by host governments and discrimination against foreign investors and investments. This is because there is no international law governing the treatment of foreign investment just like a single organisation; the World Trade Organisation (WTO) governs world trade and a collection of regional and bilateral trade agreements.

But the draw back of these international treaties is that they have permitted foreign investors to sue host governments under international law if they see that there is a breach of treaty obligations. In other words foreign investors view these treaties as an effective tool for challenging unappealing domestic policy or laws especially when it comes to public interest regulations on issues like security,
health, environment and others. This has effectively made these treaties lean closely towards investment protection while neglecting the development agenda of a country forgetting the fact that the host government needed the Foreign or International investment solely for developmental purposes.

So, the question here is how to rationally bring the development agenda of a host country in tandem with investor protection to ensure fairness, transparency as regards international investment and clearly identify reasons why governments are shying away from international multilateral investment agreement to bilateralism leading to the so called proliferation of investment agreements.

3. BILATERALISM VS MULTILATERALISM

As already indicated there is a major shift from Multilateralism to BITs by governments basically due to failure to conclude the former. Several reasons for this scenario have been given from different schools of thought, among them being the following:

- There is a potential for some investment treaties to fail to provide safeguards for developing countries to take measures that would benefit domestic firms such as subsidies for small industries, land reform and preferential treatment for disadvantaged persons, which can be important matters of public policy. There is a fear that international rules of investment could limit the power of governments to implement such public policies for which could result to lawsuits using international law.
- Legitimate functions of governments such as taxation, regulation and protection of human rights could be jeopardised by a broad international investment rule regime
- There could be loss of independent financial and economic policy when it comes to meeting requirements for accession a multilateral investment agreement. In other words the two will not be in line with the country’s development policy and goals hence underdevelopment or stagnation.

All the above reservations against the multilateral framework pertain to policy and regulation, implying that the various governments feel that an international investment rule framework will involve a loss of economic sovereignty and diversion from the pursued industrialisation and development strategies.

But all this does not make bilateralism the ultimate option as we have already seen that it has caused a proliferation and atomisation of investment agreements with potential developmental risks when it comes to policy and regulation. While we are saying that governments are resorting to it due to the non-existence of an international system of investment rules, we need also to look at the issue of competition for FDI especially among developing countries.
This competition makes the developing countries to take what is on the table leading to dilution of regulation in terms of labour standards, environmental protection etc regardless of the developmental implications or consequences. In this case what is on the table are offers of bilateral agreements with the capital exporting country negotiating from a position of strength and the developing countries from a position of need.

This again results in investment agreements, which are more of investor protecting than development oriented. Therefore is not wise to take the bilateralism as advantageous over multilateralism especially when it comes to issues of regulation and policy orientation in developing countries more especially those with a small natural resource base. So in this case one can obviously see that both bilateral and multilateral agreements are somehow circumstantial which means it is difficult to stop the proliferation of these BITs. So as already stated the question here is how to form the international investment rule making system that is fair, transparent, well regulated and development oriented while taking into account or consideration of both (investor) private and public interests or concerns.

4. WHAT SHOULD BE DONE

Although it is difficult to come up with a perfect international investment rules regime due to varying interests, levels of development and differences in resources, we still need to formulate the international rules system probably along the lines of the WTO. Therefore, before this is done several issues must be addressed especially for the developed countries or investment capital importers so as to improve their regulatory and policy frameworks. Among them are the following:

- In the light of the serious development policy implications for the developing countries and countries with economies in transition there is a need to assist these countries to formulate proper policy and regulatory frameworks and improve their capacity to properly analyse and assess the benefits of the investment agreements before being signatories to them.
- The international system of investment rules must be devised in such a way as not to tie the hands of government and elected officials when public interests are at stake. This can be done by the inclusion of clauses for the right of host governments to ask for revision of the investment treaty when public interests justifiably outweigh investor interests. On the very same note, the treaty must allow for exceptions when it is in conflict with vital public policy interests of a particular capital importer.
- There is a need to clearly define or interpret expropriation so that there is a clear line between expropriation and legitimate regulation so as not
to jeopardise legitimate functions of governments and other regulatory bodies while at the same time protecting the interest of the investor.

- The arbitration mechanism must be transparent on a mandatory basis so that the mist is cleared on the impact of functions of states or governments when it comes to regulation, application of labour standards etc. This could however be achieved only if in the first place, the investment agreements themselves are concluded in a transparent manner with a vigorous public debate of the proposed agreement in the capital importing country. This would also help to check corruption between the investor and responsible officials especially politicians of the host government. Countries with inadequate capacity to settle disputes using existing local legal systems must be encouraged to introduce commercial courts to ensure that investment disputes are resolved expeditiously. Another way of making sure that investors do not take advantage of weak regulatory and legal set ups in developing countries is by providing for a provision through which host governments can bring a dispute for settlement against an investor right in the capital exporting country (see FES report, February 2007)

5. CONCLUSION

Since the basic objective of international investment is to improve development through the expansion trade fostered through the application of rules built around the fundamental precepts of non-discrimination, liberalisation and enforcement, the structure of the international investment rules should be based upon clear statements of principle; for example non-discrimination in domestic regulation, which is then modified by the provision of exceptions thereby providing flexibility in regulation.

It is quite clear that without international investment in development countries development is will be very slow or virtually impossible. This must not push or make developing countries to allow inappropriate investments that can undermine communities, the environment and domestic development strategies hence the need to strive for well-planned and high quality foreign investment by improving the rules that govern international investment. This will help developing countries to attract FDI that promotes sustainable development.

In other words, there should be encompassing and overbearing investment rules that oblige foreign investors to meet their development obligations in the countries they invest in while at the same time protecting their investment from government interference, nationalisation and expropriation.
REFERENCES

Peterson, L.E. FES report (February 2007)

