VIEWS

In view of the growing interest surrounding the issue of a possible multilateral framework on investment, *Transnational Corporations* began, with Vol. 5, No. 3, a special section containing individual views on this subject.

Towards a multilateral framework on investment?

B. B. Ramaiah*

India values foreign direct investment (FDI) because of the role it plays in supplementing domestic capital and helping developing countries without adequate domestic resources to grow rapidly. Like many other developing countries, India has considerably liberalized its FDI regime and is committed to making it even more liberal, transparent and investor-friendly.

There is a considerable literature on the relationship between investment and trade. On the basis of that literature, it is often argued that since much progress has been achieved in the liberalization of border measures in relation to trade, the next logical step is to liberalize FDI so that transnational corporations (TNCs) have unfettered freedom to invest their resources and take their returns whenever and wherever they want. It is further argued that in order to ensure greater FDI flows, it is necessary to have a multilateral framework on investment.

The initiative for regulating the conduct of TNCs in order to curb recourse to various restrictive business practices came first from developing countries in the years preceding the launch of the Uruguay Round negotiations. A large number of restrictive business practices had been identified by the United Nations Centre on Transnational Corporations, and a draft Code of Conduct had been drawn up under the auspices of the United

* Minister of State for Commerce of India. This is a slightly revised version of a presentation made by the author at UNCTAD's Global Investment Forum, held in Geneva, Switzerland on 10 October 1996.

Nations Commission on Transnational Corporations. It was the feeling of developing countries that by having recourse to such practices, TNCs would seriously hinder the competitive position of domestic enterprises. Thus, when the issue of bringing the conduct of TNCs into a framework of discipline in the context of multilateral trade rules first arose, it was entirely with a view to checking the adverse effects of TNC behaviour in host countries. Since this was found to be inconvenient to developed countries, in which most TNCs originated, the matter was not pursued at all, and only a passing reference was made in article IX of the TRIMs Agreement to the effect that the issue of competition policy could be considered as a part of the TRIMs Agreement review in 1999-2000, along with the related question of policies regarding investments.

Instead of reviving the earlier agenda put forward by developing countries, keeping in view their development interests, protagonists of the proposed multilateral agreement on investment have started assiduously propagating a pro-TNC agenda on the erroneous assumption that autonomous policy measures for liberalizing FDI regimes adopted by countries which they regard as beneficial from their own point of view are the same thing as the countries being asked to enter into a multilateral investment framework. It is obvious, however, that the two things are not the same.

It has been argued that investment and trade are linked, but in their anxiety to stress this linkage, some people forget that investment has even stronger linkages, either positive or negative, with development. UNCTAD's *Trade and Development Report 1996* pointed out that some East Asian countries could benefit from FDI because of certain policies they followed in regulating and directing FDI flows. The fundamental issue which one needs to face squarely in addressing this subject is whether the present system of nation States, under which each country is free to pursue its own national development strategy and to decide about the role to be played by FDI in achieving various developmental goals, is compatible at all with a multilateral investment framework. Investment policy addresses a host of complex and interrelated matters of national importance: regional disparities, income inequalities, employment, environment, taxation and social justice, to name only a few. The content of these considerations varies not only from country to country but also in the same country over time. A multilateral investment framework would take away the right of national governments to regulate and channel FDI in the light of their own national developmental objectives.

The interests of foreign investors and those of national governments do not always coincide. Foreign direct investment can have both positive and negative effects. It can play a direct beneficial role by producing exportable goods and services, and an indirect role by producing such goods and services as may help in producing other exportable goods and services or in replacing imported goods and services. Besides, an indirect role can also include developing infrastructure facilities which may encourage further FDI inflows. But if TNCs are interested only in capturing the domestic market, this may still generate profit for the investor, but such profit may leave the country in the form of foreign exchange.

Investors from industrialized countries want to come to developing countries for three main reasons. First, they apprehend that the return on capital in their home country is not adequate; secondly, they want to combine their capital with the cheap labour of the host country in order to reduce the cost of production; and thirdly, they want to utilize the raw materials of developing countries near their source. The host developing countries, on the other hand, are interested in the development of their services and infrastructure, which may help their industrialization and development; production of exportable goods; and continuous technological development in their industrial production and services. These two sets of objectives are not incompatible, and the interests of foreign investors and host governments may be harmonized. But it is critical that any FDI project meets both sets of objectives. With the removal of all national constraints on foreign investment, total FDI flows to a country may increase. But the increase in investment may not be in sectors to which the host country would like the investment to go. On the other hand, the increase may be in sectors where foreign investment is not desirable. That is why many developing countries are trying to frame their policies in such a way as to enhance positive efforts and minimize negative effects.

A multilateral framework on investment will, by definition, not be able to take on board every country's specific circumstances. There is a real risk that a uniform regime will accentuate the negative effects of FDI rather than enhance the positive effects. Where there is a divergence between the interests of the foreign investor and the interests of the people, as perceived by national governments, the latter must invariably prevail.

The argument that a multilateral arrangement will necessarily lead to more foreign investment in a given country is questionable. Private investment of any sort will be governed only by hard business principles, not by

the existence or otherwise of a multilateral agreement. Elimination of all regulation in respect of FDI will merely lead to such resources flowing into areas where effective demand exists, where profitability is highest, and where natural resources can be exploited. It will not lead to a more balanced flow of investment to various countries or significantly enhance the flow of investment to countries which are currently not attracting substantial FDI in spite of liberal regimes. For the same reason, it is difficult to accept that in the absence of a multilateral framework on investment, developing countries will have to offer more and more incentives in competition with each other to attract FDI. It is well known that incentives play an insignificant role in attracting FDI—other factors predominate in investment decisions.

This overwhelming emphasis on the free movement of investable resources is inexplicable. Capital is, no doubt, one of the important factors of production. But there are others too, such as the freedom of movement of labour, which is not being talked about at all.

In India's perception, the effort now being made to put the question of transnational investment on the WTO agenda in order to create a favourable environment for the activities of TNCs in the territories of WTO member countries shows clearly that the protagonists are strongly advocating the interests of the TNCs by trying to camouflage them with the argument that what is in the interest of TNCs will automatically also promote the interests of developing countries. This appears to be an exercise principally for the benefit of the TNCs and naturally raises many serious questions in the minds of developing countries such as India. The pursuit of development objectives, including the exploitation of human resources in a host country, cannot be subordinated to the rights of investors; each country must retain full competence to regulate and determine the role of FDI in the overall canvas of its development priorities and the strategy for achieving the same.

For these reasons, India feels that, *prima facie*, there is no need for a multilateral framework on investment. Nevertheless, India is of the view that all the issues and concerns relating to a possible multilateral framework on investment should be first discussed and analysed in a non-confrontational way in UNCTAD, as already decided by Ministers at the April/May 1996 UNCTAD IX Conference in Midrand (South Africa). Starting a so-called educative process in WTO to discuss the subject of investment is an avoidable duplication. UNCTAD is eminently suited for policy analysis, with particular focus on the development dimension in this area. India

strongly feels that this policy analysis should *inter alia* try to answer the following questions:

- Will transnational investments better serve the overall development of the host countries if they are subjected to national regulation or will they serve this objective better if they are left entirely free to operate in the territories of the host countries in an unrestricted fashion with full safeguards regarding remittances of profits, dividends and capital repatriation without any reference to the paying capacity and external account viability of the host countries?

- Does not the WTO TRIMs Agreement , by concentrating exclusively on the so-called trade effects of foreign investment and embargoing certain provisions having positive developmental effects for host countries such as those relating to export obligations and phased manufacturing programmes for increasing the level of indigenization in joint ventures involving foreign equity, have a negative impact on the developmental effects of foreign investment? Will the situation not be further compounded if the developing countries are asked to enter into a multilateral investment framework which will inhibit their ability to harness the possible positive effects of transnational investment in order to promote national development and keep the negative effects of transnational investment in check?

Only thereafter can one arrive at any conclusion about whether there is a need at all for developing a multilateral investment agreement. ■

Towards a multilateral agreement on investment

Joel W. Messing*

Introduction

Transnational corporations (TNCs) cannot invest in countries where access is closed or constrained, and many firms refrain from investing where investment protection is inadequate or where treatment is discriminatory.[1]

This article discusses why TNCs seek a Multilateral Agreement on Investment (MAI); how it will benefit developing countries; the fundamentals and elements of a strong MAI; and various paths towards it. It focuses primarily on foreign direct investment (FDI), but it also discusses foreign portfolio investment. It is written from the point of view and in the parlance of private sector, direct and portfolio investors of conservative capital,[2] with respect for the interests and needs of developing countries and looking with

---

* Assistant General Counsel, Investment Law, CIGNA Corporation, Hartford, Connecticut, United States.

[1] There is anecdotal evidence that inadequate investment protection has resulted in disinvestment from Indonesia and the Republic of Korea and reluctance to invest in China, Malaysia and Thailand. In China, where investment disputes are increasing, only approximately 25 per cent of foreign direct investment for which contracts were entered into between 1979 and 1993 was actually undertaken (Ministry of Foreign Trade and Economic Cooperation, People's Republic of China, cited in Kwan, 1994, p. 31).

[2] In understanding investment decisions and making sound investment policy, it is analytically important to distinguish among conservative capital, speculative capital, and intermediate forms and grades of capital. Each has distinct characteristics, risk profiles, expectations and costs. This analysis applies to both direct and portfolio investment.

The most conservative capital (portfolio indebtedness) carries an absolute right of repayment (which may be secured by conditional ownership of property) and is priced to reflect various risks associated with the investor's ability to obtain repayment or its equivalent, e.g., credit risk, event risk, interest rate risk, market risk and foreign exchange risk. The obligation to make scheduled payments of principal and interest burdens the debtor country but avoids issues of foreign ownership and patrimonial cessions except upon a failure to pay. Conservative capital has a low risk tolerance, requires strong legal protection and hence is normally cheaper than speculative capital.

(*Continued on next page.*)

them towards a modern, developmentally useful MAI. The issues discussed in this article are viewed through the prism of actual transnational investment decisions, because that is the crucible in which the utility of the MAI will be tested and the prism through which its success or failure will ultimately be measured.

The purpose of a MAI: how it will benefit developing countries

Transnational corporations want to make investment decisions based upon the laws of economics, not the laws of politics; upon economic rationalism, not economic nationalism. In determining where to invest, TNCs evaluate and balance both positive factors and negative factors, including obstacles to foreign investment[3] and other elements of "country risk". Weighing both positive and negative factors, TNCs have historically allocated most of their FDI to countries within geographical proximity and countries with which they have had cultural bonds or affinities. The United States and Europe have invested mostly in each other.[4] Members of the

---

(Continued from preceding page.)

The most speculative capital ("venture capital") lacks an absolute right of repayment and is priced to reflect the high risks it bears. The yoke of debt service is absent, but foreign ownership and patrimonial cessions may have adverse socio-political implications for the host country. Speculative capital, with its relatively high risk tolerance, is less insistent upon legal protection and normally commands a commensurately high risk premium, in the form of preferred returns and ownership of production or resources. These principles apply to both direct and portfolio equity capital.

Intermediate forms and grades of capital (e.g., below-investment-grade debt and "equity") have characteristics, risk profiles, expectations and costs that reflect various combinations of conservative and speculative elements. Normally, the price of capital reflects the market's view of the risks associated with the investment, including legal risk.

[3] The obstacles to investment are as various and formidable as human creativity permits, but they tend to fall into common patterns and recognizable categories: screening of inbound investment, without clearly articulated criteria or guidelines; arbitrariness or nationalism in permitting FDI (e.g., opaque licensing requirements) and in treatment following establishment (e.g., exorbitant capital requirements); artificial limitations on ownership and mandatory divestiture requirements; discriminatory or otherwise inappropriate expropriation, and expropriation without adequate compensation; constraints on transferability, repatriation and convertibility of funds; trade-related investment measures; discriminatory incentives to domestic competitors; opaque laws and regulations; arbitrary exercise of unfettered bureaucratic discretion; insecurity of physical and intellectual property; failure to admit or harassment of foreign personnel; and inadequate enforcement of private and public obligations.

[4] United States companies have a long tradition of investing in the United Kingdom, which over the last several decades has been the site of more United States FDI than any other country. See "Smitten by Britain: business rushes in", *New York Times*, 15 October 1995, section 3, p. 10.

overseas "Chinese commonwealth" (Kao, 1993, p. 24) have invested mostly in each other or in China.[5] Japan has been a leading investor in East Asia.[6] The net result is that FDI into all industrial countries exceeds FDI into all developing countries.[7]

Although in recent years "emerging markets" have experienced explosive growth in the volume and velocity of inbound foreign investment, the needs of developing countries for a critical mass of physical infrastructure (power generation and distribution, telecommunications and transportation), human resources (education and training) and export industries remain high. The demand for investment capital in developing countries exceeds the willing supply, and the available supply of capital also exceeds the willing supply.

The needs of poor countries for capital and of rich countries for investment are being reconciled to some degree through market forces, despite the absence of adequate formal arrangements to ensure investment protection.[8] However, many TNCs refrain from investing in countries where formal arrangements for investment protection are unsatisfactory or where treatment is discriminatory. This inhibits the flow of investment to where the "invisible hand" of market forces dictates and causes an inefficient, hence suboptimal, allocation of scarce capital among competing needs, with resulting economic and social distortions. Among these distortions is the payment by developing countries of uneconomic risk premia[9] to compensate for inadequate investment protection, the effect of which is to transfer scarce economic resources from poor countries to rich countries. Therefore, devel-

---

[5] "*Institutional Investor* has estimated that the private wealth of South-East Asia's 40 million ethnic Chinese exceeds $200 billion" (Kao, p. 32). A Singapore banker has estimated that 55 million overseas Chinese control $2 trillion of liquid assets (not including securities) (Seagrave, 1995).

[6] Some modern management techniques reinforce this trend towards regionalization: low inventories and "just-in-time" production make it advantageous for suppliers to be reasonably close to their customers.

[7] Investment inflows in 1995 amounted to $315 billion. Developed countries invested $270 billion and received $203 billion of global FDI flows. The spectacular growth of FDI among developed countries was accompanied by a hefty rise in flows to developing countries, which at $100 billion set another world record in 1995. See UNCTAD-DTCI (1996a) for a review of trends in FDI.

[8] Because the purpose of any economically rational capitalist investment is to earn a profit, investments made in the absence of legal protection bear significant legal risk. Presumably, they are made after assessing and taking into account all relevant risks and command an appropriate risk premium.

[9] Preferred returns or patrimonial cessions (such as foreign ownership of natural resources) on equity and premium interest rates on debt.

oping countries need to increase the supply of willing investment capital and simultaneously to reduce its cost.

The purpose of a MAI, therefore, is to reduce or eliminate obstacles to foreign investment, open markets, eliminate discriminatory treatment (both before and after establishment), reduce "country risk" and reallocate capital to its most productive uses. A strong, comprehensive MAI will improve investment conditions and returns, and create jobs and raise productivity and living standards at both ends of investment flows. By reducing developing "country risk" such an agreement will reduce risk premia, thus reduce the cost of capital, thus reduce the cost of economic development, and thus correct economic and social distortions arising from economic nationalism. By expanding the flow of long-term, fixed-rate debt capital into developing countries, such an agreement will reduce dependence on more expensive, sometimes more volatile, equity capital, thus improving leverage, and thereby accelerating and broadening economic development. This will also benefit developed countries as increased foreign investment reduces the need for, and thus the burden of, foreign aid.

The fundamentals: fairness, predictability, enforceability

Rational direct or portfolio investors have three primary objectives: to gain access for an investment; to earn an adequate, risk-adjusted return on the investment; and, ultimately, to recover the investment. To ensure that these objectives are met when investing across frontiers, particularly cultural frontiers, rational investors want to be protected by a law-based regime, supported by a socio-political culture, whose explicit purpose and demonstrated effect are the promotion and protection of foreign investment, and under which treatment of investment and investors is fair, predictable and enforceable. Fairness, predictability and enforceability should be the principal philosophical foundations of a modern, strong, comprehensive MAI.

But how much fairness? How much predictability? How much enforceability? How liberal should the agreement be in promoting investment? How conservative in protecting it? Should it express high standards, low standards or intermediate standards of obligation? What does "protection" mean: should the agreement's main aim be to protect investors, or to protect the countries to which investment is directed, that is, to shield weak host

countries from competition? Indeed, do these aims conflict or are they consistent? And how does one reconcile the virtues of a free market with the perceived need of vulnerable countries for some measure of classic "protectionism"?

Fair balance and high standards

Although developed and developing countries have widely disparate socio-economic conditions (including widely varying capital needs, capital-formation rates and capital-absorption rates), a fair balance between the interests of capital exporters and capital importers is both desirable and achievable. If the purpose of a MAI is to foster a climate that will attract investment across borders, particularly cultural borders, the standard of protection for investors should be high. This can be achieved through an incrementally liberal, enforceable MAI with high standards of market access, transparency, non-discriminatory treatment and protection of investment. To assuage the concerns of developing countries, the agreement, while maintaining high standards, should recognize and respect the vulnerability of developing countries to competition from developed countries by allowing developing countries the time and space they need to prepare to compete (at least in industries in which they have or can develop competitive advantages), through a system of graduated market-access liberalizations or other transitional arrangements. Under a system of graduated market-access liberalizations, developing countries joining the MAI would be permitted to take reservations to national treatment in certain sectors, but the reservations would be scaled back over time.

The elements of a MAI

A MAI that is fair, predictable and enforceable should be strong and comprehensive and should contain certain minimum elements. These elements can be found in the investment chapter of the North American Free Trade Agreement (UNCTAD-DTCI, 1996b)[10] and in the United States model bilateral investment treaty, and are outlined below.

---

[10] The International Investment Instrument Compendium (UNCTAD-DTCI, 1996b) presents a collection of legally binding international instruments and other documents, such as guidelines, declarations and resolutions adopted for FDI.

Definition of "investment"

For the MAI to be meaningful and modern in the global economy of the twenty-first century, "investment" should be defined broadly and should include intellectual property rights and both direct and portfolio investment. For too long, investment-policy regimes have focused on FDI and either ignored or excluded portfolio investment. There is no meaningful distinction between them that would warrant treating them differently. There is no clear line between them. On the contrary, they have common characteristics, they form a continuum and they complement each other.[11]

As individual savings grow, and as financial institutions gain more power over the investment of savings and pensions, the volume and the projected growth rate of foreign portfolio investment may far exceed those of FDI. Portfolio investment provides economic leverage to direct investment. In the modern financial realm, domestic and international markets are converging,[12] public and private capital markets are converging,[13] trade and investment are converging, and direct and portfolio investment are converging. Both forms of investment face obstacles to access, discriminatory treatment and inadequate protection. Both should be permitted, protected and promoted by a strong, comprehensive MAI.[14]

Fairness: pre-establishment

Right of establishment

Subject only to explicit reservations (such as for industries legitimately affecting national security), a foreign investor should have the right to enter and establish itself in the host country on a basis that is no less favourable than that accorded domestic investors. In cases where the host country treats foreign investment better than it treats domestic investment, a foreign inves-

[11] For example, the conversion of an illiquid minority shareholding to liquid form through the contractual registration and listing of shares, and the building up of a portfolio investment to a controlling position.

[12] Users of capital seek finance on the best available terms, irrespective (generally) of the country of source. Investors search the globe for the best risk-adjusted returns.

[13] Classic public and private capital markets were distinct, but now there are "public" securities with limited liquidity and "private" securities with quasi-public features.

[14] Liquidity risks arising from short-term investment volatility may be addressed by narrowly drawn balance-of-payments exceptions to free transferability of funds.

tor should be treated on a basis no less favourable than that accorded the most favoured nation. Under this principle, the host country will not discretionarily screen and approve or disapprove prospective investments or investors. Hence, in qualifying for the right of establishment, a prospective foreign investor should receive the better of national treatment and most-favoured-nation treatment. This means, for example, that an investor should not be limited to minority ownership of a business enterprise or, after taking the initial risk and successfully launching the enterprise, be forced to divest its majority stake to domestic interests.

Fairness: post-establishment

National treatment and most-favoured-nation treatment

Subject only to explicit reservations, a foreign investor, after establishing itself in the host country, should be treated on a basis no less favourable than that accorded domestic investors. In cases where the host country treats foreign investment better than it treats domestic investment, a foreign investor should be treated on a basis no less favourable than that accorded the most favoured nation. Hence an established foreign investor should receive the better of national treatment and most-favoured-nation treatment.

National treatment encompasses both substance and procedure and includes both official treatment and official protection of unofficial treatment.

Important examples of substantive national treatment are capital requirements and taxation. If a host country grants the right of establishment to a foreign investor and then imposes an absurd capital requirement or taxes the foreign investor more onerously than it taxes its domestic competitors, the foreign investor will suffer a competitive disadvantage, the purpose of having entered the local market thus being vitiated. Hence national treatment ensures a non-predatory environment for foreign investors.

Procedural national treatment means that administrative and judicial procedures should not discriminate against foreign investors. Entrenched bureaucracies and judiciaries, habituated to protecting domestic interests, should be reoriented to higher national purposes.

Nationalization and expropriation

Foreign investors should be protected against discriminatory or private-purpose nationalization or expropriation. If an investor's property is expropriated, the investor should receive "prompt, adequate and effective compensation".[15]

Transferability, repatriation and convertibility

A foreign investor should have the right to make cash transfers in and out of the host country, should be able to realize returns on its investment, and should be able to recover the proceeds of the sale or liquidation of its investment. The investor should have the right to effect all of these transactions in a freely convertible and transferable currency. To ensure that capital surpluses may be invested within the region, exchange-control restrictions on external investment should be eliminated.

Trade-related investment measures

Foreign investors should be protected against arbitrary or discriminatory measures and against performance or local content requirements. Host countries should not impose local hiring requirements or unduly burden the entry or sojourn of foreign employees. "Trade-related investment measures" distort the markets for both investment and trade and should be barred or at least rolled back over a prescribed period of time.

Investment incentives

To avoid market distortion, foreign investors should be protected against the provision of fiscal subsidies or other discriminatory economic incentives to their domestic competitors. To avoid bidding wars and misallocation of investment capital among countries, investment incentives should be prohibited or at least harmonized.

---

[15] This standard of compensation, known as the "Hull formula", is claimed by the United States and has gained international recognition. It was first enunciated in a 1938 dispute over Mexico's nationalization of foreign-owned oil fields, when United States Secretary of State Cordell Hull asserted that international law required Mexico to pay "prompt, adequate and effective compensation" (Norton, 1991 and Hackworth, 1942).

Predictability

Transparency

The key to predictability, and to the practical realization of national treatment and the other elements of fairness, is "transparency". Transparency helps ensure the rule of law; opacity protects unwarranted discrimination and corruption. Transparency will permit prospective investors to know in **advance** whether they have the right to invest and, perhaps more important, their rights and risks **after** they invest.

Laws, rules, regulations, administrative actions and procedures, and judicial interpretations should all be transparent. Information regarding the law, in all its forms and manifestations, should be publicly available, accessible, clear, accurate and timely. Laws should be administered openly and not arbitrarily. Transparency also implies capital markets that require open disclosure of a company's financial condition and that have comprehensive, rational accounting rules.

"Standstill" and "rollback"

Predictability will be enhanced if countries agree that their existing reservations to the right of establishment and national treatment will at least stand still, that is, not be expanded. However, effective investment reform implies that countries commit themselves to roll back over time existing reservations that do not legitimately affect their national security. All contracting countries should commit themselves to opening some markets immediately and opening other markets according to a fixed, relatively brief, timetable.

Enforceability

Dispute settlement and binding arbitration

Fairness and predictability will be useless abstractions in the absence of adequate enforcement mechanisms. Enforcement implies institutional arrangements—either the utilization of existing international dispute-settlement arrangements or new institutional arrangements specifically

tailored to investment disputes. Dispute-settlement arrangements should include a forum having jurisdiction, procedural rules, binding arbitration and the power to order relief.

Enforcement means effective, not merely nominal or theoretical, enforcement. It means enforcement at **all** political levels—central, provincial and local. It means respecting and abiding by the force of law, **not** the law of force.

Enforcement is a difficult political issue. The existence of a supranational forum in which to resolve disputes implies a diminution of national sovereignty. This is particularly painful for relatively new States that are still emerging from the psychic bonds of colonialism. Certain Latin American countries recently abandoned the more than a century-old Calvo Doctrine, under which the host country reserved exclusive jurisdiction over investment disputes (La Porta Drago, 1993).[16] All countries should be urged to emulate this concession to modern jurisprudence.

Paths towards a MAI

There are essentially three paths to enforceable market access, transparency, non-discriminatory treatment and investment protection: unilateral, bilateral and multilateral.[17] These paths all lead towards a MAI.

Unilateral initiatives

The overwhelming majority of FDI by firms from developed countries is in other developed countries, which share a common core of investment-protection principles and culture. A developing country **can** attract FDI from a developed country, whether or not it has entered into a formal treaty, if both in law **and** in fact it protects foreign investment. This requires an indigenous socio-political culture that encourages and protects foreign investment. Unilateral actions to this end by one country may lead to

[16] Calvo (1868). Led by Argentina, the birthplace of the Calvo Doctrine, some Latin American countries have agreed to international arbitration of investment disputes.

[17] There may also be regional arrangements (such as the North American Free Trade Agreement) and "plurilateral" arrangements (a variant of "multilateral" but with fewer participating countries).

competitive unilateral actions by its neighbours. This is sometimes referred to as "concerted unilateralism".[18]

Bilateral investment treaties

Throughout the world there are more than 1,100 bilateral investment treaties in force (UNCTAD-DTCI, 1996a). The theoretical number of bilateral treaties that would be needed to establish a formal, pan-global, bilateral investment infrastructure renders the bilateral investment treaty a cumbrous vehicle for global investment policy reform. Hence for both conceptual and practical reasons, multilateralism is superior to bilateralism in the investment context.

Multilateral agreement on investment

The Organisation for Economic Co-operation and Development (OECD)[19] is negotiating a MAI. Many members of the business community have strongly supported this objective, have advised OECD on the nature, scope, form and content of the Agreement, and have strongly urged that it prescribe the highest standards of market access liberalization, transparency, non-discriminatory treatment and investment protection, supported by effective dispute-settlement mechanisms.

While maintaining high standards of obligation, the agreement should accommodate the legitimate needs of developing countries by allowing them the time and space they need to prepare to compete (at least in industries in which they have or can develop competitive advantages), through graduated

---

[18] APEC (the commonly used acronym for Asia-Pacific Economic Cooperation, an evolving international forum comprising 18 member economies in the Asia Pacific region) is discussing "concerted unilateralism" as one of various modalities towards achieving its Bogor Declaration goals of "free and open trade and investment" by 2010 (for developed economies) and 2020 (for developing economies). See the APEC Economic Leaders' Declaration of Common Resolve, Bogor, Indonesia, 15 November 1994. APEC's members are Australia, Brunei Darussalam, Canada, Chile, China, Hong Kong, Indonesia, Japan, Malaysia, Mexico, New Zealand, Papua New Guinea, the Philippines, Republic of Korea, Singapore, Taiwan Province of China, Thailand and the United States.

[19] Australia, Austria, Belgium, Canada, Denmark, Finland, France, Germany, Greece, Iceland, Ireland, Italy, Japan, Luxembourg, Mexico, Netherlands, New Zealand, Norway, Portugal, Republic of Korea, Spain, Sweden, Switzerland, Turkey, the United Kingdom and the United States.

market-access liberalizations or other transitional arrangements. To attract developing countries, there should be no dilution or diminution of the high standards of obligation that are necessary to make the agreement effective for its intended purposes. Lower, softer standards of reform may be easier for developing countries to attain, but they will not suffice to attract the requisite volume of capital. Therefore, it is in the long-term self-interest of developing countries to prepare to work their way up the graduated liberalization ladder to the high platform of investment policy that will attract the capital (especially the lower-cost, long-term, conservative capital) that they need.

Although the agreement is being negotiated in OECD, it will be open for accession by all countries. With OECD and APEC now sharing seven members,[20] and with other developing economies seeking or contemplating OECD membership,[21] this Agreement is being negotiated in the full view of developing countries and with their direct or indirect participation. If it addresses the needs of both developed and developing countries as outlined above, this Multilateral Agreement on Investment will reflect the state of the art for investment promotion and protection and have the potential to exert a magnetic force that will attract non-OECD member countries, which can accede to it when they are ready and willing. This would avoid the need for more regional investment regimes[22] and lead to the global rule of law for investment. This is an ambitious undertaking, but developed and developing countries alike are ambitious in their visions and goals.

Conclusions

Countries that want to attract capital and are willing to do what is necessary to attract capital—that is, protect investors—should commit themselves to formal obligations when they are ready (subject to minimally

[20] Australia, Canada, Japan, New Zealand, Mexico, Republic of Korea, and the United States.

[21] Chile, Hong Kong, Republic of Korea and Singapore.

[22] In November 1994, at Jakarta, APEC ministers endorsed a document entitled "APEC Non-Binding Investment Principles" (UNCTAD-DTCI, 1996a). For APEC this was a constructive first step towards investment reform. However, as a non-binding, ministerial statement of mere aspirations to mere principles, unsigned, unratified, unincorporated into national law, unenforceable, and lacking meaningful clauses on national treatment, repatriation and dispute settlement, it will not protect private investors against the risks of unfair, arbitrary and unpredictable treatment. There is no evidence that investment in developing APEC economies has increased because of the announcement of these Principles. Their value appears to be more inspirational and motivational for the APEC process than protective and promotional as regards investment.

necessary, explicit derogations or reservations). Countries that are unwilling to commit themselves to formal obligations will find themselves at a disadvantage in the competition for scarce capital.

Until effective investment protection exists, capital-needy countries will continue to look to capital-rich countries within their own cultural realms, particularly in the case of Asia, where capital-needy countries will look to Japan and the overseas ''Chinese commonwealth'', where there is less concern with legal formalism than in the West. Countries seeking more Western capital may unilaterally establish within their own borders adequate investment-protection regimes or enter into bilateral investment treaties until a MAI is available.

Discussions of investment liberalization and protection in other forums should complement, not impede, efforts to negotiate a MAI in OECD and to make that agreement accessible and useful to all. However, policy makers should carefully guard against both the confusion and the ''negative pull'' that would inevitably result from the creation of a less ambitious investment regime elsewhere.[23]

Diluting worthy investment principles merely to achieve consensus or harmony will not achieve economic goals, and hence is not in the long-term interest of any developing country. Preparing over time, individually and collectively, with the support of developed countries, to meet a high standard of international obligations is in the long-term interest of all countries.

Perhaps the combined force of unilateral initiatives, bilateral investment treaties, current OECD investment negotiations and developed country support for developing country needs will lead the modern global economy towards a multilateral agreement on investment. ■

---

[23] Indeed, no multilateral investment regime may be preferable to a substandard one. Participation by advanced industrial countries in a substandard investment regime would implicitly undermine existing bilateral and regional treaties and mislead developing countries regarding the intentions and requirements of transnational corporate investors.

References

Calvo, Carlos (1868). International Law of Europe and America in Theory and Practice.

Hackworth, Green H. (1942). *Digest of International Law*, vol. 3 (Washington, D. C.: Government Printing Office).

Kao, John (1993). "The worldwide web of Chinese business", *Harvard Business Review*, March-April, pp. 24, 32.

Kwan, Chi Hung (1994). "Asia's New Wave of Foreign Direct Investment", *NRI Quarterly* (Winter), p. 31.

La Porta Drago, Rafael (1993). "Reducing Latin American political risk," *International Financial Law Review*, 12, 3 (March), pp. 39-40.

Norton, Patrick M. (1991). "A law of the future or a law of the past? Modern tribunals and the international law of expropriation", *American Journal of International Law*, 85, 3 (July), pp. 474, 475n.

Seagrave, Sterling (1995). *Lords of the Rim: the Invisible Empire of the Overseas Chinese* (New York: G. P. Putnam's Sons).

UNCTAD, Division on Transnational Corporations and Investment (1996a). *World Investment Report 1996: Investment, Trade and International Policy Arrangements*. Sales No. E.96.II.A.14.

———— (1996b). *International Investment Instruments: A Compendium*. Sales No. E.96.II.A.12 (the set).