

THIRD WORLD *Economics*

TRENDS & ANALYSIS

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Concerns over imbalanced investment accords grow

The proliferation of international investment agreements has intensified concerns over the perceived pro-investor slant of these treaties and prompted moves to set relations between foreign investors and host governments on a more equitable footing. A UN rights expert has called on states to revise or terminate such agreements when they conflict with human rights norms, while India has drawn up a model investment pact that seeks to balance investor rights and obligations.

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Terminate BITs and FTAs that conflict with human rights

Pointing to adverse human rights impacts of international investment agreements, a UN expert has called on states to revise or terminate such accords when they contravene rights obligations.

by Kanaga Raja

GENEVA: States should test their existing bilateral investment treaties (BITs) and free trade agreements (FTAs) for compliance under their respective constitutions, and revise or terminate said agreements pursuant to the Vienna Convention on the Law of Treaties when they conflict with human rights obligations, a United Nations rights expert has said.

This was one of the main recommendations made by the Independent Expert on the promotion of a democratic and equitable international order, Alfred de Zayas (of the United States), in his report to the UN Human Rights Council, which convened its 30th regular session on 14 September-2 October.

In his report, de Zayas drew attention to the adverse human rights impacts of international investment agreements, bilateral investment treaties and multilateral free trade agreements on the international order, and called for ex ante and ex post human rights, health and environmental impact assessments of these instruments.

The rights expert observed that international investment agreements are not new phenomena in the international arena. Bilateral investment treaties currently number over 3,200, he said.

After years of experience with investor-state dispute settlement (ISDS), the International Centre for Settlement of Investment Disputes (ICSID) and other arbitrations, it has become apparent that the regulatory function of many states and their ability to legislate in the public interest have been compromised, de Zayas further said.

"The problem has been aggravated by the chilling effect of certain awards that have penalized states for adopting regulations to protect the environment, food safety, access to generic medicine and reduction of smoking, as required under the WHO Framework Convention on Tobacco Control. The legality of such awards is questionable as contrary to domestic and international *ordre public*, and may be considered, in some cases, *contra bonos mores* [against good mor-

als]."

According to the UN report, observers have noted retrogression in the protection of rights including the rights to life, food, water and sanitation, health, housing, education, culture, improved labour standards, an independent judiciary, a clean environment and the right not to be subjected to forced resettlement.

Moreover, there is a legitimate concern that international investment agreements might aggravate the problem of extreme poverty, foreign debt renegotiation, financial regulation and the rights of indigenous peoples, minorities, persons with disabilities and older persons and other vulnerable groups.

"Accordingly, all international investment agreements under negotiation should include a clear provision stipulating that in case of conflict between the human rights obligations of a state and those under other treaties, human rights conventions prevail," de Zayas stressed.

The report said that the 1994 North American Free Trade Agreement (NAFTA) is an example of an agreement that has led to relocation of manufacturing industries, resulting in loss of employment in the United States (estimated at 850,000 jobs) and the proliferation of assembly centres in Mexico, known as maquiladoras, where labour costs are lower and social protection below International Labour Organization (ILO) standards.

The rights expert noted that several international investment agreements are currently being negotiated, mostly in secret, including the Transatlantic Trade and Investment Partnership (TTIP), the Trade in Services Agreement (TiSA), the Trans-Pacific Partnership (TPP) and the Regional Comprehensive Economic Partnership.

Observers have noted grave democratic deficits with international investment agreements and investor-state dispute settlement tribunals and wondered why states continue to engage in negotiations based on partisan studies and overly optimistic forecasts about growth

domestic product (GDP) growth and employment, he said.

He noted: "Not only is there a failure of states to proactively disclose information about the agreements, but key stakeholders are excluded from the negotiating table, where mostly corporate lawyers and lobbyists participate. There is even an attempt to circumvent parliaments by 'fast-tracking' the adoption of these agreements, manifesting a gross absence of due process and hence of democratic legitimacy."

Investor-state dispute settlement

The rights expert said among the major threats to a democratic and equitable international order is the operation of arbitral tribunals that act as if they were above the international human rights regime. Investor-state dispute settlement tribunals are made up of corporate arbitrators whose independence has been repeatedly questioned because of conflicts of interest.

The ISDS system entails a completely separate system of dispute settlement, not only outside the domestic court system but above it, and without appeal.

"Can a democracy call itself democratic if it allows the creation of separate, non-transparent and non-accountable systems of dispute settlement?" de Zayas asked.

He said that observers question the legitimacy of tribunals where the investor can sue the state but not vice versa, and that interpretations of terms such as "investment", "expropriation" and "fair and equal treatment" have been expansive and difficult to reconcile with the interpretation rules under Articles 31 and 32 of the Vienna Convention on the Law of Treaties.

Indeed, said de Zayas, it is disturbing that arbitrators can disregard basic principles such as respect for the "margin of discretion" of states, state legislation and even the judicial pronouncements of the highest domestic courts.

"The one-way street of investor protection has not contributed to a culture of investor-state cooperation but fuelled an aggressive tendency to litigate and demonstrably generated a 'regulatory chill'."

He noted that arbitration may take place in Washington under the auspices of the World Bank's ICSID, but there is a worrisome degree of forum-shopping, and tribunals may meet before the Lon-

don Court of International Arbitration, the International Chamber of Commerce, the Stockholm Chamber of Commerce, the Hong Kong International Arbitration Centre or the United Nations Commission on International Trade Law (UNCITRAL).

The Independent Expert went on to flag a few cases in order to illustrate litigation practices and their human rights implications.

He said that one of the most egregious ICSID arbitrations was the case by US-based Occidental Petroleum against Ecuador concerning the termination of an oil production site in the Amazon, and resulting in an award of \$1.76 billion (\$2.4 billion with interest) to Occidental, which Ecuador accused of multiple human rights violations and environmental destruction.

"Only gradually are governments and parliamentarians beginning to counter the corporate move against the fundamentals of state sovereignty."

In the European Parliament, the issue of corporate blackmail has been raised in connection with the debate on the TTIP, where it has been argued that multinational companies are using investor protection rules to achieve corporate aims, increasing the cost to the taxpayer of defending public policy and rules.

"In this context, it must be stressed that the possibility that arbitrations may find for the state and against the investor does not remove the danger nor legitimize the investor-state dispute settlement model, since the mere threat of such arbitration has dissuaded even developed states like Canada from adopting social legislation. Developing countries are even more vulnerable to the threat, since they lack the resources to defend themselves against major transnational enterprises."

The rights expert underlined that the manifest abuse of rights by investors is so brazen that one could imagine that one day the military-industrial complex might invoke investor-state dispute settlement when a country decides to reduce or terminate the production of anti-personnel landmines or cluster bombs because they are contrary to international humanitarian law, thus "expropriating" expected profits of the arms industry.

It is not just a question of reforming the ISDS system for the future, but imperative to review and revise existing bilateral investment treaties and free

trade agreements, which were never intended to become prisons for states.

"If investor-state dispute settlement and ICSID have since mutated into institutions of economic coercion, they must be dismantled and reinvented through the Vienna Convention on the Law of Treaties."

Human rights regime

The report said although bilateral investment treaties and free trade agreements have been on the international agenda for decades, their human rights impacts have been under-reported. "Apparently the siren call of potential profit and the over-optimistic forecasts promising GDP growth and significant creation of jobs have been so seductive to some governments that human rights considerations have been neglected and state functions compromised."

The rights expert said that the large body of existing human rights treaties, protocols and declarations create a constitutional framework that must be taken into account whenever a state enters into agreements with other states and/or private-sector actors, including financial institutions and transnational enterprises.

"The human rights regime, including international and regional human rights treaties and the relevant ILO and WHO [World Health Organization] Conventions, must be treated as superior to other agreements, including bilateral investment treaties and free trade agreements. National courts and international tribunals and arbitration instances must be subordinated to this regime."

The report said among the rights that states must ensure are the rights to life, security of person, participation in the conduct of public affairs, homeland, movement, health, education, employment and social security. These commitments are enshrined, inter alia, in Articles 1, 2, 6, 9, 12, 17, 25, 26 and 27 of the International Covenant on Civil and Political Rights and Articles 1, 2, 5, 6, 7, 9, 10, 11, 12 and 13 of the International Covenant on Economic, Social and Cultural Rights.

The process of elaboration, negotiation and adoption of bilateral investment treaties and free trade agreements must conform with the requirement of Article 25(a) of the International Covenant on Civil and Political Rights to ensure participation by all stakeholders. This entails a proactive obligation on the part of

governments to disclose the necessary information and facilitate public participation. Access to information is an essential condition for the exercise of the right of freedom of opinion and expression under Article 19 of the International Covenant on Civil and Political Rights.

The report said: "Trade negotiations conducted in secret (although not a matter of national security!) and excluding key stakeholders entail prima facie violations of Articles 19 and 25 of the International Covenant on Civil and Political Rights."

De Zayas said democracy is not exercised only once in a while, but entails a continuing dialogue between representatives and constituents. Had it not been for WikiLeaks publishing several chapters of the free trade agreements under discussion, the necessary public debate could not even have gotten started.

Bold solutions needed

The report said extraordinary problems require bold solutions. Anti-democratic investor-state dispute settlement paroxysms can be neutralized by revision or termination of such dispute settlement.

It added that if states can adopt extraordinary measures such as bailing out delinquent banks, a fortiori they can adopt measures to protect the welfare of the population.

"Protective actions by a state whose economy, agriculture or industry is in danger of failure because of the sometimes unpredictable effects of bilateral investment treaties and free trade agreements may be justifiable under the force majeure principle."

The validity of bilateral investment treaties and free trade agreements should be tested under the rules of the Vienna Convention on the Law of Treaties. For instance, a treaty may be void if it can be established that there was a manifest violation of the state's constitution, errors relating to a fact or situation which was assumed to exist at the time the treaty was concluded and which formed an essential basis of its consent to be bound to the treaty (Art. 48), fraudulent conduct by a negotiating party (Art. 49), deliberately misleading or spurious claims, corruption (Art. 50), coercion (Arts. 51-52) or conflict with a peremptory norm of international law (Art. 53).

Treaties may also be terminated or their application suspended pursuant to the doctrine of material breach (Art. 60),

subsequent impossibility of performance (Art. 61) or fundamental change of circumstances (Art. 62).

Normally, treaties contain provisions for denunciation or withdrawal. In the absence of such provisions, such a right may be implied by the nature of the treaty (Art. 56).

"To the extent that bilateral investment treaties and free trade agreements lead to violations of human rights, they should be modified or terminated," said the rights expert.

"Are states or some transnational corporations guilty of 'conspiracy'? Actions in pursuance of such conspiracy could include deliberately giving false information; issuing false forecasts of GDP and employment growth; engaging think tanks, economists, universities or foundations in preparing 'teleological reports'; and colluding with media conglomerates to ensure that only the 'sunny' side of bilateral investment treaties and free trade agreements is presented and contentious issues are suppressed or minimized."

Thus, to the extent that there was inadequate disclosure of the risks, false representations and overly optimistic growth forecasts, there was no informed consent and the Vienna Convention on the Law of Treaties provides grounds for modification or termination, said the report.

Substantively, it added, investor-state dispute settlement tribunals cannot immunize investors from responsibility to make amends for damage caused, and the "polluter pays" principle cannot be trumped by a claim that paying fines is tantamount to an "expropriation". Such a claim would be rejected by any independent tribunal as blatantly frivolous and contrary to *ordre public*.

"Pursuant to this analysis, the denunciation of international investment agreements is not only legitimate but also legal and their 'survival clauses' must be seen as null and void when they are intended to perpetuate a system that violates human rights."

Bearing in mind that the essence of capitalism and investment is risk taking, states must insist that investors accept the risk and subject themselves to national legislation in a manner similar to the Calvo doctrine, which holds that jurisdiction in international investment disputes must lie with the country in which the investment is made.

"This doctrine has been adopted into the Constitutions of many Latin

American states, and merits being used as a model for international investment agreements."

For decades, investor-state dispute settlement arbitrations have de facto upset the international order, but they cannot trump the Charter of the United Nations. Just as other economic paradigms were abandoned, eventually investor-state dispute settlement will be recognized as an experiment gone wrong, an attempted hijacking of constitutionality resulting in the retrogression of human rights.

De Zayas said it would be appropriate to reaffirm that while free trade and investment agreements have their *raison d'être*, the primary role of the state is to act in the public interest. There are ample opportunities for corporations and investors to make legitimate profits and enter into genuine "partnerships" with states and not into asymmetrical relationships. The rule of thumb should be to: (a) give to corporations what belongs to them – an environment in which to compete fairly; (b) give back to states what is fundamentally and inalienably theirs – sovereignty and policy space; (c) give parliaments what belongs to them – the faculty to consider all aspects of treaties without undemocratic secrecy and fast-tracking; and (d) give to the people what is theirs – the rights to public participation, due process and democracy.

Recommendations

The rights expert called on states to, amongst others, ensure that all trade and investment agreements – existing and future – represent the democratic will of the populations concerned. Negotiations on current drafts must not be secret or "fast-tracked", but, on the contrary, must be subject to public participation on the basis of independent human rights, health and environmental impact assessments.

States must ensure that all trade and investment agreements recognize the primacy of human rights and specify that, in case of conflict, human rights obligations prevail. States must uphold their *erga omnes* (towards everyone) obligation to implement human rights treaties and observe ILO and WHO Conventions.

States must ensure that international investment agreements do not undermine their ability to implement the industrial and macroeconomic policies needed for development, which is an

essential objective of United Nations "constitutional" law, and take steps to revise promptly existing bilateral investment treaties and free trade agreements with negative effects on human rights.

"States should test existing bilateral investment treaties and free trade agreements for compliance under their respective Constitutions, and revise or terminate said agreements pursuant to the Vienna Convention on the Law of Treaties when they conflict with human rights obligations."

All future international investment agreements should provide for the settlement of disputes not by investor-state dispute settlement but by the national courts or a special international investment court explicitly bound by the recognition of the primacy of human rights, public interest and national sovereignty.

States must deny effect to investor-state dispute settlement and ICSID awards that violate human rights, practise solidarity with states seeking to modify or terminate bilateral investment treaties, free trade agreements or investor-state dispute settlement agreements or deny effect to arbitral awards, and take measures vis-a-vis investors and transnational corporations violating international human rights law.

The rights expert called on the UN Conference on Trade and Development (UNCTAD) to consider convening a conference to explore the possibilities of revising or terminating existing bilateral investment treaties and free trade agreements that contain provisions that have interfered with the state's duty to legislate human rights, implement economic policies and regulate in the public interest.

"Such a conference should advance the UNCTAD 'action menu' and 'road map' for reform," de Zayas said. (SUNS8096) □

(continued from page 12)

the US voted against the UN's important efforts to limit repeat financial crises. It stressed that because inequality was directly connected to a country's debt, the principles to guide sovereign debt restructuring were critical to creating inclusive societies.

The next steps will include a follow-up process to this landmark vote, which will ensure that the further development of the UN principles on sovereign debt restructuring processes will stay alive within the General Assembly in the immediate future. □

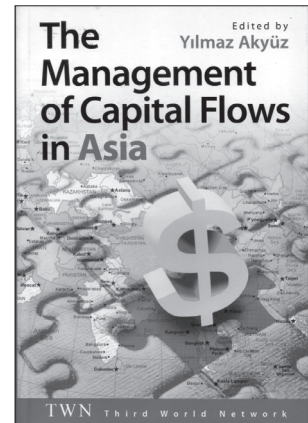
The Management of Capital Flows in Asia

Edited by *Yilmaz Akyüz*

THE 1997 Asian financial crisis brought home to the region's economies the importance of managing capital flows in order to avert financial shocks. This book looks into whether and how this lesson was taken on board by policy makers in Asia, and, accordingly, how capital account regimes in the region evolved in the post-crisis period.

The early years of the new millennium saw a strong surge of capital flows into Asian emerging markets amid conditions of ample global liquidity. In response to the influx of funds, these countries generally chose to keep their capital accounts open to inflows, dealing with the attendant impacts by liberalizing resident outflows and accumulating foreign exchange reserves. While this approach enabled them to avoid unsustainable currency appreciations and external deficits, it did not prevent the emergence of asset, credit and investment bubbles and domestic market vulnerability to external financial shocks – as the events following the 2007 subprime crisis would prove.

This book – a compilation of papers written in 2008 for the first phase of a Third World Network research project on financial policies in Asia – examines the above developments in relation to the region in general and to four major Asian developing economies: China, India, Malaysia and Thailand.



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South demands credible, developmental outcomes at Nairobi

Developing countries have opposed moves to push through an outcome at the forthcoming WTO Ministerial Conference that is light on development-friendly content.

by D. Ravi Kanth

GENEVA: In what seemed to be a strong rebuff to WTO Director-General Roberto Azevedo and the United States, a large majority of developing and least-developed countries on 17 September rejected ideas floated by them for cobbling a small package of deliverables for the 10th WTO Ministerial Conference (MC10) in Nairobi, Kenya, in December, several trade envoys told the *South-North Development Monitor (SUNS)*.

At an urgently convened meeting of heads of delegation (HoD) to discuss possible deliverables for MC10, trade envoys of the developing countries and least-developed countries (LDCs) demanded "credible" and "developmental" outcomes based on the Doha Development Agenda (DDA).

In nuanced interventions, developing countries such as China, India, Brazil, Argentina, Indonesia (on behalf of the G33 farm group), Venezuela, Pakistan, Lesotho (on behalf of the African Group), Uganda, Rwanda and Cuba said they will not accept the proposal from the US for voluntary contributions by all to reduce domestic farm subsidies nor allow efforts to weaken special and differential treatment.

The developing and the poorest countries said categorically that regardless of the outcomes in Nairobi, the DDA negotiations shall continue until there is resolution of all unresolved issues.

They expressed concern over attempts by the major developed countries, particularly the US, to bury the DDA negotiations at Nairobi without addressing the developmental goals, laid out in the ministerial decisions since the launch of the negotiations in 2001 in Doha, Qatar.

In the face of such unprecedented unanimity among the developing countries and the LDCs to ensure that there are credible outcomes at MC10 and that the DDA negotiations are not declared dead at Nairobi, Azevedo concluded the HoD meeting without indicating the way forward. The Director-General (DG) merely said the picture is clear, accord-

ing to a trade envoy present at the meeting.

"This is one of the rare meetings in which some developing countries who have remained on the sidelines came out in full blast against the ongoing efforts to close the round with a small package," the envoy said.

Turnaround

Azevedo had commenced the meeting with his introductory remarks that there is a turnaround from the first semester (January-July) in exploring possible outcomes for the Nairobi meeting.

"The view emerging from many of the [recent] meetings in which I have participated is that a set of deliverables is within reach, [and] has the potential to make the [10th] ministerial [conference] a success and help us move our work forward," the DG said. "And crucially there is the common view that those deliverables should have development and LDC issues at their heart."

"Once we have a clear picture of what the Nairobi outcomes might look like, then we can work hard to deliver them," Azevedo maintained, instead of suggesting or identifying the issues that need to be resolved at Nairobi based on the Ministerial Declaration at MC9 in Bali, Indonesia.

The Bali Ministerial Declaration clearly stipulated accords for binding the so-called best-endeavour decisions concerning the specific issues of the LDCs, and for resolving the remaining issues of the DDA in agriculture, market access for industrial goods, services, rules and development by MC10.

Although the post-Bali agenda was to be finalized by end-July this year, it was successfully scuttled by a major developed country (the United States) on one pretext or another because of the country's Farm Bill that was enacted last year.

The US Farm Bill provides for subsidy programmes and outlays well beyond what was envisaged in the 2008

revised draft modalities for the DDA agriculture negotiations. The US was clearly not in a position to fulfil the \$14.5 billion limit set out in the revised draft modalities because of its latest farm law. To cover up this ugly reality, the US disingenuously brought forward one obstacle after another to ensure that there was no post-Bali work programme, according to several developing-country trade envoys.

Instead of naming and shaming the country that is responsible for wreaking havoc in the DDA negotiations, the DG went along, merely acquiescing to the demands made by that country for a small package of deliverables for the Nairobi meeting, the trade envoys said.

At the HoD meeting, the DG referred to the small package involving LDC issues, outcomes on the export competition pillar in the Doha agriculture package (while remaining silent on the market access and domestic support pillars) and a number of provisions to improve transparency in several issues. The DG also spoke about the need for voluntary contributions from members in the domestic support pillar.

The DG's remarks were echoed by the US, which called for a package of outcomes involving LDC issues, export competition in the Doha agriculture package and transparency provisions.

The US also spoke about its "non-paper" on domestic support (see following article), arguing that the underlying rationale is that all members must voluntarily contribute to reducing their domestic farm subsidies.

The European Union made an ambivalent statement to the effect that it is ready to work for a package of issues, while acknowledging that all unresolved issues in the DDA must be addressed in a comprehensive framework.

Japan said there is no appetite for the Doha negotiations after the Nairobi meeting. (The Doha negotiations were launched in 2001 by the EU and the US with support from Japan.)

Switzerland surprised the participants at the HoD meeting with its strident criticism of the small package involving the issues in the farm export competition pillar, particularly the elimination of export subsidies. Switzerland said it will not accept deliverables only in the export competition pillar without respecting the "parallelism" with other areas as laid out in the 2005 Hong Kong Ministerial Declaration.

The Swiss statement came as a rude shock at the meeting, as it brought to the

fore specific concerns by individual countries over the small package, according to a developing-country trade envoy.

Strong statements

In sharp opposition to the DG's and the US interventions, the coordinators of various country groupings such as the G33, the African Group, the LDC Group, and the Africa, Caribbean and Pacific (ACP) Group, as well as trade envoys of China, India, Brazil, Argentina, Venezuela, Cuba, Pakistan, Rwanda and Uganda, among others, issued strong statements denouncing the efforts to construct a small package on a pick-and-choose basis.

Indonesia, on behalf of the G33, said "we do not have clarity yet on what concrete and meaningful DDA deliverables would be doable and acceptable to all of us."

"The Group is of the view that any ideas on the deliverables for MC10 must pass the test of faithfulness to the development dimension of Doha, especially for developing members and LDCs," Indonesia emphasized.

"For the G33 and as enshrined under the Hong Kong Declaration," said Indonesia, "meaningful Special Products and accessible and effective Special Safeguard Mechanism are critical development deliverables for developing country members, SVEs [small and vulnerable economies] and LDCs."

Indonesia also drove home the message that "members must continue following up the Bali mandate to find a permanent solution for public stockholding programmes."

The African Group issued the strongest statement yet that it will not accept a set of ideas, on the pretext of a small package, that are inconsistent with the development dimension of the Doha negotiations.

Rwanda said the developing and poorest countries were promised that they would be integrated into global trade through the DDA but now all efforts are directed at taking the life out of the negotiations.

Uganda said the poorest countries will not allow a situation of "status quo or perish" at this juncture, demanding credible and comprehensive outcomes based on the Doha agenda.

China said it would accept neither voluntary contributions nor a small package without laying out the roadmap for concluding the Doha negotiations.

India denounced "a call by some members, who want to maintain the 'status quo' at any cost, for taking a final view one way or another on the DDA."

Without naming the countries, India said some members who were ready to live with a "recalibrated outcome now seem to be in a position to contribute nothing to an outcome as envisaged in the DDA and ministerial decisions thereafter."

"It seems to us that the attempt therefore is to selectively pick out the elements on which they have some comfort and package them for an outcome at MC10," India maintained, expressing concern over the latest narrative of these countries "to set terms for post-Nairobi negotiations in the WTO." According to India, "a selective package plus a post-Nairobi agenda which would ironically cover the core issues of the DDA seems to be emerging among such members."

India demanded "a comprehensive and balanced outcome in all the three core negotiating areas viz. Agriculture, NAMA, Services, as well as internally on all three pillars of Agriculture, even if a downward recalibration of ambition is a necessary condition for fulfilling the development mandate of this Round."

Even if a "comprehensive" outcome at Nairobi is not possible due to paucity of time, India said, it will reject calls to "declare that the DDA is concluded in the extreme – dead." (At a meeting of

seven major industrialized and developing countries held at the Australian mission earlier in the week of 14 September, the US had described the Doha negotiations as being "like a 'patient' which is dead but needs a doctor to certify the death.")

Multilateral negotiations such as those envisaged under the DDA are an ongoing process since they are aimed at deep-seated reforms to correct inequities, India maintained.

New Delhi said it will test new ideas or proposals presented by some members as to whether they are "equitable and do not impose unreasonable expectations on or specifically target a handful of members." India called for urgent discussion on a proposal made by G90 members for "strengthening the Special and Differential provisions in the current GATT and WTO rules."

Brazil spoke about negotiating as well as political deficit to address the outstanding issues in the DDA. Brazil said it would press for progress vis-a-vis the status quo on all three pillars of agriculture, particularly domestic support.

In crux, the HoD meeting provided the writing on the wall about the growing anger and frustration of developing and poorest countries which increasingly feel that they are being misled and denied developmental outcomes as set out in the DDA, several envoys concluded. (SUNS8096) □

US receives major setback on its domestic support non-paper

A US proposal on dealing with "certain forms" of domestic farm support has met with a less-than-receptive response from other WTO member states, reports D. Ravi Kanth.

GENEVA: The United States received a major setback over its proposals to avoid any cuts to its own domestic support programmes and get all WTO members to undertake voluntary commitments to reduce their market price support programmes and input subsidies, several trade envoys told the *South-North Development Monitor (SUNS)*.

The setback to the US came on 23 September at a meeting of select trade envoys from over two dozen countries convened by the new chair of the Doha agriculture negotiations, Ambassador Vangelis Vitalis of New Zealand, to discuss the state of play in the domestic support negotiations and the way forward

for the Nairobi Ministerial Conference, which starts on 15 December.

At the meeting, China is reported to have rejected the proposal from the US that calls on all members at the WTO to undertake voluntary commitments to reduce their market price support programmes and input subsidies. India described the US proposal on domestic support as an attempt to "kill" many birds with one shot, particularly the food security public stockholding programmes in developing countries.

Many developed countries such as Canada, the European Union, Norway, Australia and New Zealand, along with several developing countries such as

Mexico, Colombia, Brazil, Argentina, Paraguay, Pakistan and the Philippines, raised serious questions as well as voiced doubts whether the US paper on domestic support addresses all trade-distorting domestic subsidies, according to envoys present at the meeting.

“Standstill” commitments

The US deputy trade envoy Christopher Wilson spoke about the salient features of its proposal which intends to tackle “certain forms of trade-distorting domestic subsidies.”

The US “non-paper” on domestic support targets the market price support programmes and the input subsidies that developing countries are allowed to provide to their resource-poor farmers under the special and differential treatment provisions in the WTO Agreement on Agriculture (AoA).

A non-paper is a discussion paper that does not necessarily represent a country’s official position.

The US non-paper has called for “standstill” commitments on market price support programmes and input subsidies despite Article 6.2 of the AoA which says: “In accordance with the Mid-Term Review Agreement that government measures of assistance, whether direct or indirect, to encourage agricultural and rural development are an integral part of the development programmes of developing countries, investment subsidies which are generally available to agriculture in developing country Members and agricultural input subsidies generally available to low-income or resource-poor producers in developing country Members shall be exempt from domestic support reduction commitments that would otherwise be applicable to such measures, as shall domestic support to producers in developing country Members to encourage diversification from growing illicit narcotic crops. Domestic support meeting the criteria of this paragraph shall not be required to be included in a Member’s calculation of its Current Total AMS [Aggregate Measurement of Support].”

Despite this provision in the AoA, the US non-paper explicitly says: “Without prejudice to the rights and obligations of Members under the WTO Agreement on Agriculture, including Article 6.2, each Member should avoid using market price support and input subsidies for agricultural products.”

The US said that “each member undertakes the commitments in Annex A

[of the non-paper].” Annex A, as proposed by the US, says categorically: “Each Member shall, with respect to agricultural products, undertake each commitment set forth in its schedule to this Annex, which shall include: a) not increasing either the applied administered price for any agricultural product receiving market price support or the number of agricultural products to which the Member provides market price support; or b) not increasing its budgetary outlays for, or the scope of, product-specific input subsidies for agricultural products above the level in effect as on the date of this Ministerial decision.”

Washington specifically provided examples in its paper as to what each member is required to do. They include:

“[Member X – Member X shall not provide support for any agricultural product for which market price support is not authorized under its domestic law as of the date of this Ministerial Decision.]

“[Member X – For any agricultural product for which market price support is authorized under the domestic law of Member X as of the date of this Ministerial Decision, Member X shall not maintain an applied administered price higher than the applied administered price as of the date of this Ministerial Decision.]

“[Member X – Member shall not provide any product-specific input subsidy for any agricultural product not eligible under its domestic law to receive a product-specific input subsidy as of the date of this Ministerial Decision.]

“[Member X – Member X shall not increase, above levels for the last full year preceding the date of this Ministerial Decision, budgetary outlays for the subsidization of any agricultural product effectuated by means of product-specific input subsidies on the following inputs: fertilizer, seeds, electricity, or diesel fuel.]”

In his intervention at the special meeting of the Doha negotiating body on agriculture, the deputy US trade envoy argued that an outcome of some sort on domestic support is necessary. “We know the red lines of the members and in fact, the red lines have become more bright now and they will not change,” he said.

The US maintained that certain forms of domestic support are more distorting than others. Washington’s idea will lead to less distortion in agriculture, he claimed.

Without naming the country, the US

admitted that “one member” rejected the proposal, suggesting that it is not sure of next steps.

Reform path

In response, the European Union called for substantial reductions in trade-distorting domestic support and farm subsidies. The EU maintained that it has reformed its subsidy programmes, saying that “all members should follow the path of the reform.”

The EU supported a joint paper by Australia and Canada for commitments to reduce domestic subsidies by major players. The EU said “standstill” in existing farm subsidies is not an option and all members must adhere to reducing their trade-distorting domestic support.

Mexico said reduction commitments in domestic support can be dealt with only at the WTO, arguing that “we have a good deal in Rev. 4 or the revised draft modalities of 2008,” according to a participant familiar with the meeting.

“In the US approach, there is cherry-picking and we must look at all distorting subsidies and OTDS [overall trade-distorting domestic support] is the best way forward,” Mexico argued.

Canada said its joint paper with Australia has provided an approach and the way forward has to cover all forms of subsidies. “If there is no political appetite then it makes sense to lock the reforms achieved so far,” Canada said, implying that if there is no political appetite, then the US paper should be looked at to agree on standstill commitments.

Argentina maintained that members are far from convergence on domestic support. It called for ensuring that domestic support remains in the post-Nairobi work programme, a suggestion shared by Colombia.

The Philippines said members must move on all three pillars – domestic support, market access and export competition – for which the Rev. 4 revised draft modalities remain the basis. “The US paper is not in line with the Bali mandate and it has suggested that developing countries must contribute without any assurance from the big developed countries on how other issues will be tackled,” the Philippines said, according to a participant present at the meeting.

Norway said it has offered credible outcomes in all three pillars of agriculture. Australia said it would prefer an approach that tackles all forms of domestic support.

Japan said there is a need for

recalibration in domestic support along with market access. New Zealand said domestic support is important for all members, emphasizing the need for an outcome. Brazil said reforms in domestic support are essential for a credible outcome at Nairobi.

In sharp criticism of the US proposal, India said there is no consensus yet on the elements – export subsidies, export credits, food aid and state trading enterprises – in the export competition pillar. India said members must appreciate the US efforts because the US proposal “kills many birds with one shot and among the birds one big bird is the public stockholding programmes.” India argued that the American proposal is targeted at specific programmes, particularly the *de minimis* commitments. India also asked who would evaluate the voluntary commitments as proposed in the US paper.

China rejected the US proposal, saying it is not based on the Rev. 4 text. Supporting India’s position, China said the US proposal is “politically and economically not acceptable.” The American proposal not only goes against the Doha mandate but would also undermine the special and differential treatment provisions in the GATT architecture.

The chair Ambassador Vitalis concluded that the US proposal has raised sharp questions and doubts and was even rejected by some members. He said it raised questions about the architecture of commitments, suggesting that it is difficult for members to accept as part of the way forward, according to participants.

In a nutshell, the US’ proposal has suffered a major setback and it has to be seen what Washington would do next. (SUNS8099) □

Uruguay abandons TiSA

Uruguay has become the first country to pull out of plurilateral negotiations on a controversial accord to open up services markets.

by Roberto Bissio

MONTEVIDEO: Just a week before the deadline for submitting national offers on liberalization of services sectors under the ongoing “secret” talks for a Trade in Services Agreement (TiSA), Uruguayan President Tabare Vazquez decided on 7 September to abandon the plurilateral negotiations and has directed the government to comply.

Uruguay is the first participant to abandon the ongoing TiSA talks. At an earlier stage, when the plurilateral talks idea was broached in 2012 by the so-called “Really Good Friends of Services”, Singapore was part of this group, but it withdrew as soon as the sponsors (Australia, the United States and the European Union) outlined their views and demands.

At that initial stage, the proposal was for an “International Services Agreement (ISA)”, to be negotiated plurilaterally and lodged in the World Trade Organization as an Annex IV agreement. [See Chakravarthi Raghavan (2014), *The Third World in the Third Millennium CE, Vol. 2: The WTO – Towards Multilateral Trade or Global Corporatism?* (Third World Network, Penang), pp. 367–368. For an analysis of the TiSA talks and implications for the WTO multilateral trading system, see Raghavan’s article in *TWE* No. 597.]

The Uruguayan president’s action

followed a decision taken on 5 September by a very large majority of the Frente Amplio, the governing leftist political coalition, against Uruguay continuing to be part of the TiSA negotiations. The talks are taking place in Geneva but outside the framework of the WTO and its General Agreement on Trade in Services (GATS).

The Frente Amplio’s decision considered it “inconvenient” for Uruguay to keep negotiating TiSA, “taking into account our vision on an integral development of the nation”. There were 117 votes in favour of leaving the negotiations and only 22 against it.

TiSA is widely recognized as an attempt to ultimately exert pressure on other countries to sign on to an agreement the nature of which has not been accepted within the WTO multilateral trading system and its agreements and rules. It was initiated by the United States and Australia with the European Union as a key player as well.

With the withdrawal of Uruguay from the negotiations, the remaining countries are Australia, Canada, Chile, Chinese Taipei, Colombia, Costa Rica, the European Union, Hong Kong China, Iceland, Israel, Japan, Liechtenstein, Mauritius, Mexico, New Zealand, Norway, Pakistan, Panama, Paraguay, Peru, Republic of Korea, Switzerland, Turkey

and the United States. Noticeably absent are the majority of developing countries, especially the larger ones.

The factions in the Frente Amplio led by Economy Minister Danilo Astori and Foreign Minister Rodolfo Nin were the only significant ones in the coalition to support TiSA. The Movement for People’s Participation led by former president Jose Mujica voted against, even though Mujica was still president when Uruguay joined the negotiations last February.

When the Frente Amplio formally took a vote against TiSA, the right-wing parliamentary opposition offered their votes to build an ad hoc majority in favour of the agreement and thus divide the governing coalition.

However, Tourism Minister Lilian Kechichian, acting as spokesperson for the Council of Ministers, announced on 7 September that “the President respects the majority and has asked the foreign minister to implement it”.

Ministerial analyses

The governing coalition had studied the issue over four months, and before making its decision, the coalition’s governing council demanded from all ministries an analysis on how the opening up of the services sector would affect their agendas and what items they would want to include in the “negative list” of sub-sectors not to be opened up.

(A “negative list” approach means that all sectors are liberalized except for those specifically excluded. A “positive list” approach liberalizes only those sectors that are included in a predetermined list and usually also allows for conditions on such liberalization.)

The *La Diaria* newspaper had access to the summary of ministerial analyses presented to the Frente Amplio council by its chair, Daniel Marsiglia. According to *La Diaria*, the Ministry of Labour and Social Security stated that some of the TiSA requirements would contradict the norms of the International Labour Organization (ILO) that Uruguay has signed up to and that are therefore to be considered as national law.

The Ministry of Industry, Energy and Mines informed the council of the governing coalition that the proposed TiSA would imply risks to the telecommunication policies of Uruguay. Since a privatization law was repealed by referendum in 1992 the telephone company (fixed lines), the generation and distribution of electricity, the country’s only oil refinery and all water and sanitation services have been run by state-owned companies. Further, the state-owned

banks, even when competing with private national and international banks, hold three-quarters of deposits, while the state-owned insurance company controls around half of the market.

Meanwhile the state-owned cellphone company has double the number of subscribers compared to the two competing foreign-owned cellphone corporations. The telecommunication policy that TiSA would challenge has allowed Uruguay to have a phone network that is 100% digitized. All towns and schools are linked via optic fibre and all children of schoolgoing age are provided with free access to the Internet, as part of the "one laptop per child" policy that Vazquez himself started in his previous presidential term. (Vazquez was president before Mujica. Both were elected by the Frente Amplio coalition of progressive parties and movements.)

The Ministry of Agriculture rejected the liberalization of some services it provides, in particular the identification and tracking of cattle which allows Uruguay to export meat at higher prices than its neighbours. The Ministry of Tourism, overseeing an area that accounts for the majority of the country's services exports, reported that no benefits would be

obtained from TiSA in its area as tourism is already liberalized. The Health Ministry reported that it is not in a position to produce a "negative list" due to the rapidly changing nature of the health services that could make such a list obsolete in a short time.

On the other hand, TiSA was positively reviewed by the Ministry of Foreign Affairs, which argued that the presence of Uruguayan negotiators in the TiSA-related meetings would help them "gain experience". The Ministry of Economy and Finance highlighted that TiSA would bring benefits to local software producers and professional services (such as lawyers and accountants).

Interestingly, when the Frente Amplio convened a public discussion, the chair of the Uruguayan Chamber of Software expressed hope that TiSA would help them open up markets by allowing their technicians to travel abroad more freely, yet demanded that the government procurement system continue to favour offers from national companies over those from foreign corporations. It became clear during the debate that this sector, which accounts for at most 2% of national income, was ill-informed.

The so-called Mode 4 provision of services (i.e., the movement of natural persons abroad to supply a service) is excluded from the ambit of TiSA at the instance of the United States. In the US, the EU and Australia, the movement of natural persons for supply of services is governed by visa requirements of immigration policies and the application of "needs tests". Thus the Uruguayan software industry would not have obtained from TiSA the access it wants and at the same time risked losing continued government support if the agreement they had lobbied for were to be accepted by Uruguay.

With the decisive vote, socialist parliamentarian Roberto Chiazzaro highlighted that it was the first time TiSA had been discussed widely and openly in any country and "it is remarkable how much people got informed, participated and discussed and Tabare [President Vazquez] has to be praised for having heard the people and his political organization before taking a decision". □

Roberto Bissio is Director of the Third World Institute based in Montevideo, Uruguay. An earlier version of this article was first published in the South-North Development Monitor (SUNS, No. 8091).

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UN adopts landmark resolution on principles for sovereign debt restructuring

The UN General Assembly has adopted a set of principles to guide sovereign debt restructuring, taking what has been welcomed as an important step towards plugging a major gap in the international financial system.

by *Bhumika Muchhala*

NEW YORK: The United Nations General Assembly on 10 September adopted a resolution on principles to guide sovereign debt restructuring processes.

This landmark resolution was submitted to the General Assembly by South Africa (current chair of the Group of 77 and China developing countries). It had been initiated by Argentina in the wake of the vulture funds lawsuit by an international hedge fund against the country.

The resolution yielded a “yes” vote from 136 countries from Latin America, Asia, Africa and the Caribbean. A “no” vote was registered by six countries: the United States, Germany, the United Kingdom, Japan, Canada and Israel. Forty-one countries abstained from voting either yes or no.

The votes reflect the typical geopolitical pattern in the UN where developing countries vote in favour of measures to increase the stability and fairness of the international financial system, while the most powerful developed countries often block such measures, arguing that such discussions must only take place within international financial institutions and not the UN.

The vote means that the UN General Assembly has declared that sovereign debt restructuring processes should be guided by nine basic principles. Unlike the UN Security Council, which has the power to issue legally binding resolutions, General Assembly resolutions are non-binding. But they carry political weight.

While the resolution does not reflect the original subject of establishing a multilateral legal framework for sovereign debt restructuring (see below), the nine core principles that have been adopted have been called a historical breakthrough because the vast majority of nations in the world have spoken out for a change to the current creditor-led debt system that has repeatedly failed numerous countries.

The resolution outlines nine principles that should be respected when restructuring sovereign debt: sovereignty, good faith, transparency, impartiality, equitable treatment, sovereign immunity, legitimacy, sustainability and majority restructuring.

The principle of sovereignty is encapsulated by the following language in the resolution: “A sovereign state has the right ... to design its macroeconomic policy, including restructuring its sovereign debt, which should not be frustrated or impeded by any abusive measures.”

The principle of sustainability implies that sovereign debt restructuring workouts lead to a stable debt situation in the debtor state, preserving creditors’ rights while promoting economic growth and sustainable development, minimizing economic and social costs, warranting the stability of the international financial system and respecting human rights.

The principle of sovereign immunity from jurisdiction and execution regarding sovereign debt restructurings is a right of states before foreign domestic courts and exceptions should be restrictively interpreted.

Transparency focuses on the need to enhance the accountability of the actors concerned.

Equitable treatment refers to the equitable treatment of creditors and debtors, and impartiality refers to the impartial conduct and decisions of all institutions and actors involved in sovereign debt restructuring workouts.

The principle of legitimacy entails respect for the requirements of inclusiveness and the rule of law.

Majority restructuring implies that sovereign debt restructuring agreements that are approved by a majority of creditors are not to be impeded by other states or a non-representative minority of creditors.

The vote came one year and a day

after the General Assembly first agreed to negotiate and adopt a multilateral legal framework for sovereign debt restructuring processes on 9 September 2014. Following the September 2014 vote, an Ad Hoc Committee was established on 29 December 2014 with the mandate to elaborate such a framework. Bolivia chaired the Committee. The nine principles were the outcome of negotiations within the Committee (see TWE No. 598/599).

The results of the vote for the General Assembly resolution on the principles, when compared to the September 2014 vote, reflect an increase of 12 countries for the “yes” vote and a decrease of five countries for the “no” vote. The same number of 41 countries abstained in both years.

The countries whose votes changed from an abstaining vote in 2014 to a “yes” vote this year were Iceland, Ukraine, Armenia, Serbia, Papua New Guinea and Montenegro. The countries whose votes turned from a “no” vote to an abstaining vote were Australia, Czech Republic, Finland, Hungary and Ireland.

With the exception of the six countries that voted against the principles, all other developed countries abstained. Developing countries that also abstained included Mexico, Colombia and Gabon.

Debt-stricken Greece abstained, although it made a significant break from the European Union’s collective boycott of the entire process by participating in the final negotiation session of the Ad Hoc Committee in July. Other developed countries, most notably the US, Japan and Canada, as well as the International Monetary Fund (IMF), also refused to participate in the three week-long negotiation sessions of the Ad Hoc Committee over the last one year.

Highlights of statements during the vote

The G77 and China group of 134 developing countries said that the text provided a good basis for future discussions. The principles had been drafted in a way that brought a “win-win” situation for debtors and creditors. The issue of debt sustainability was central to achieving national and international development goals. The international community needed to now march with vigour to achieve the post-2015 development agenda and to ensure that no one was left behind.

In direct opposition, the European Union stated that the resolution’s text

contained a number of statements that did not accurately reflect international law or treaties. The EU stressed that the IMF was the appropriate institution to host global discussions on the subject.

The United States said the resolution was deficient on several counts, including the implication of a right of a state to debt restructuring and the threat to contractual obligations. A statutory mechanism for debt restructurings would sow uncertainty in financial markets. The US supported the EU, saying that the United Nations was not the appropriate venue for such issues.

The Caribbean Community stated that the matter of a multilateral framework for sovereign debt restructuring was of great interest to the group because unsustainably high debt burdens remained a major challenge to the economic development of the region. Debt servicing had far exceeded expenditure on social services, including health and education, which had adversely affected overall socioeconomic development. Therefore, countries must be given an opportunity to undertake orderly debt arrangements as a means of stabilizing their economies.

The Alliance of Small Island States said debt sustainability posed a serious challenge to the group, which suffered a disproportionately high ratio of debt to gross domestic product (GDP).

Australia said it did not support any unilateral right to debt restructuring. However, it expressed a commitment to work towards achieving a solution.

Russia, voting in favour of the principles, said it had always supported improvement in the sovereign debt restructuring process within the UN and the principles adopted provided the basis for a fair, balanced and effective process for sovereign debt restructuring through a universal legal mechanism that could apply to all forms of external debt.

Also voting in favour, Iceland said that the resolution was a balanced text, and that ad hoc arrangements had created incoherence and unpredictability.

Argentina said the adopted resolution was a text in favour of stability. Debt was responsible for inequality and took advantage of less developed countries. It was wrong to say that the UN, as a democratic forum where all sovereign countries had a voice, was not the right forum for debt discussions. Countries had a right to restructure debt and it was crucial to put an end to the power of vulture funds that fed on the lack of global legislation to take advantage of many poor countries.

Argentina stressed that the current

economic crisis highlighted how foreign debt had become for many countries a heavy burden that endangers growth and employment. It was necessary to change the international financial architecture so that no one would suffer from the exploitation by vulture funds.

Bolivia, which had chaired the Ad Hoc Committee, said the adoption was the culmination of a process that had seen tireless efforts of several delegations and support of the Secretary-General as well as the President of the 69th General Assembly. This collective endeavour had the potential for creating long-term positive economic outcomes for developing countries.

Cuba said countries that were held back economically because of punitive debt repayment conditions could now look forward to better days. However, the resolution only represented the first step of a process to address external debt in all its manifestations.

India said the issue of debt restructuring was not just a problem for developing countries. Debt affected inclusive development and political stability globally. By adopting the resolution, the UN was formalizing a set of basic principles for restructuring debt and thereby laying down powerful markers for dealing with sovereign debt. The principles themselves were non-binding in nature and India called for voluntary adherence to them.

Singapore said it voted in favour of the resolution because the non-binding principles on debt restructuring were a practical outcome of the Ad Hoc Committee on that matter. However, the contractual rights of all creditors must be taken into account. Any further consideration of the issue must secure the active and inclusive participation of debtor and creditor countries, the IMF and other financial institutions.

The Union of South American Nations (UNASUR) said an important step had been taken at the United Nations, which had the legitimacy to deal with challenges that affect the international community as a whole. The resolution provided a fair basis for debt restructuring in the interest of all parties concerned. Debt crises were costly and led to cuts in spending on health and education, undermining overall economic health. The adoption of the text, following open and transparent negotiations, had provided a set of principles towards establishing a multilateral framework on sovereign debt restructuring.

Nicaragua said it was important to put into practice mechanisms that could prevent and resolve economic crises. The

basic principles put forth in the resolution must be at the basis of a legal framework for any future agreement. Nicaragua reaffirmed the role of the General Assembly as a universal and equitable forum on matters of economic nature.

Chile said the matter of sovereign debt restructuring was a global challenge that was best suited on the agenda of the United Nations. As long-term debt sustainability was central to sustainable development, the resolution opened the door for further discussions on all forms of external debt.

Brazil said the current international financial architecture was not conducive to the achievement of the UN's Sustainable Development Goals (SDGs). Brazil also expressed regret that not all international financial mechanisms had participated in the discussions.

Positive reactions

Meanwhile, Pope Francis has also endorsed the UN principles amidst Greece's ongoing debt crisis.

The UN's Independent Expert on the effects of foreign debt and human rights, Juan Pablo Bohoslavsky, released a statement saying that the resolution was a positive step towards clarifying which existing rules and principles of international law apply to sovereign debt issues, and would provide legal guidance on how to prevent and deal with vulture funds.

He stressed that sovereign debts should be geared towards implementing economic and social policies, with a view to achieving growth and development in the concerned countries. Unfortunately, as was too often the case, sovereign debts could also throw millions of people into poverty, in particular when resulting in a debt crisis.

The UK's Jubilee Debt Campaign reacted positively to the vote, saying that it could prove to be a historic breakthrough because the vast majority of nations had spoken out for a change to the broken debt system. "From the Greek debt debacle, to Argentina being held to ransom by vulture funds, to decades-old debt crises in Jamaica and El Salvador the need for change has never been clearer."

The UK-based organization also stressed that it was outrageous that the UK government had chosen to put reckless lenders ahead of people around the world by voting against these principles.

The press release of Jubilee USA similarly expressed disappointment that

(continued on page 5)

International trade, investment accords, increasing controversies

International investment treaties have provoked growing apprehension over their broad scope and the far-reaching rights they confer on foreign investors. *Andrew Cornford* reviews two recent initiatives aimed at addressing these concerns.

With the proliferation of bilateral and plurilateral international trade and investment agreements, and increasing controversies over their provisions for dispute settlement, two recent proposals on settling investment disputes have begun to attract attention and consideration in national and international circles.

This article reviews major provisions of international investment treaties, often with special attention to their historical development, and reviews the above two proposals: a draft model bilateral investment treaty mooted by the government of India – a key developing country that is both trying to attract foreign investment for development and that also has enterprises investing abroad – as well as some ideas outlined in papers published by an academic institution in a developed country.

Contentious accords

Investment treaties were a sequel to earlier agreements covering similar issues such as friendship, commerce and navigation treaties. Their development accompanied the absence of consensus concerning the rights of external investors and the appropriate treatment of different parties during a period of proliferating expropriations. Owing to the overlap between foreign investment and domestic regulation, demands for compensation may be triggered not only by partial or complete expropriation but also by the direct and indirect effects on foreign investors of host countries' regulations more generally.

Accords on investment and trade have proliferated in recent years. The coverage of such accords has expanded over the years and now often includes not only domestic regulations which bear on foreign investment – the subject of investment treaties – but also issues traditionally treated as part of cross-border trade.

The first bilateral investment treaty was concluded between the Federal Republic of Germany and Pakistan in 1959. By the end of the 1980s, more than 300 such treaties had been signed between advanced and developing economies (Guertin, 1990: 122).

By 2006, there were 2,400-2,600 bilateral investment treaties in place, most of them between advanced and developing countries but several also between developing countries (Lowenfeld, 2008: 554). By 2014, the total had risen to more than 3,200 (UNCTAD, 2013: 2).

However, there are indications of dissatisfaction among a number of parties to such treaties, particularly developing countries: this has in some cases led to declarations of intention to modify the terms of the treaties or actually to withdraw from them.

Coverage and procedures for dispute settlement in international investment and trade agreements are proving increasingly controversial.

The current controversy reflects contentious issues in two

ongoing plurilateral negotiations, on the Trans-Pacific Partnership (TPP) and Transatlantic Trade and Investment Partnership (TTIP) agreements. The targets of contention include provisions designed to achieve regulatory convergence among the participants in the negotiations regarding subjects such as environmental regulation and intellectual property rights. Moreover, the rules agreed under these agreements will increase the scope for private investors to bring suits against governments, under the procedure known as investor-state dispute settlement (ISDS), for future losses imputed to changes in regulation and other official actions.

Major subjects raised in the controversy over such treaties are worth examining against a model bilateral investment treaty put forward in India which contains provisions clearly designed to avoid common criticisms of such accords (see <https://mygov.in/group-issue/draft-indian-model-bilateral-investment-treaty-text>). This model treaty is the government's reaction to a recent proliferation of cases in which investors initiated potentially costly arbitral proceedings against India (Krishnan, 2015).

Outline of the Indian model treaty

The classification of subjects in investment treaties varies but the coverage of most treaties is fairly standard. The Indian model treaty is distinguished by the extent to which it emphasizes and spells out the obligations of investors. Less emphasis is given to promotion and protection of investment.

Articles 1 and 2 cover definitions, scope and general provisions. The scope is notable for the detailed specification of the investors and investments which are covered by the treaty and of those which are excluded.

Articles 3-7 treat major obligations of the two parties to an investment. Article 3 treats the obligations of the parties under international law and regarding the observance of due process. Article 4 prescribes, subject to certain qualifications, national treatment for investors.

Article 5 prescribes rules for deciding whether a measure constitutes expropriation and is thus eligible for claims under this heading. The article explicitly excludes from claims non-discriminatory regulatory actions by a party that are designed and applied to protect legitimate public welfare objectives such as public health, safety and the environment.

Article 6 covers the conditions under which current and capital cross-border transfers of funds are allowed.

Article 7 covers the entry and temporary sojourn of personnel connected to the investment.

Articles 8-13 cover legal obligations of investors and investments as well as those of the investor's home state.

Articles 9-13 are fundamental to the operation of the treaty. Article 9 concerns the obligation against corruption. The obligation as to disclosure in Article 10 covers complete information regarding activities, structure, financial situation, perfor-

mance, relationships with affiliates, ownership, governance and various other matters.

Article 11 contains the obligation to comply with the host state's laws on taxation. Under compliance with the law of the host state (Article 12) are specified laws on wages, employment, labour rights and social security, on the environment and the conservation of natural resources, on human rights, and on consumer protection and fair competition.

Under Article 13, investors and investments are to be subject to civil actions for liability in the judicial process of their home state for acts and decisions in the home state where these lead to damage, personal injuries or loss of life in the host state.

Article 14, the longest of the model treaty, covers settlement of disputes between an investor and a party (in other words, the controversial subject of investor-state dispute settlement). It sets out procedural obligations such as the exhaustion of local remedies which must be met before submission of the dispute to external arbitration, the appointment of the arbitrators for the arbitral tribunal, prevention of conflicts of interest involving the arbitrators, the burden of proof and governing law, counterclaims against the investor and investment, the distribution of the costs of the arbitration, and restrictions on diplomatic exchanges between the parties to the dispute.

Article 15 deals with disputes between the parties over the interpretation and application of the treaty. Articles 16-17 specify the general and security exceptions which can be invoked by the respondent state. Article 18 specifies procedures to be met when general exceptions are invoked.

Articles 19-23 cover miscellaneous matters: relationship with other treaties, denial of benefits to entities lacking for various reasons the status of bona fide foreign investors and investments, consultations and periodic reviews, amendments, and entry into force.

Article 24 specifies the duration of the treaty – 10 years unless there is an agreement on renewal – and allows for termination if one party gives the other notice six months in advance of its intention to terminate.

Definition of eligible investors and investments

Investment treaties typically begin with a broad definition of the investors and investments admitted to the host country. Some treaties (such as most of those involving the United States as one of the parties) specify national treatment amongst the conditions for entry, i.e., entry for foreign investors and investments on the same terms as those available for residents, while specifying exceptions from such treatment for certain sectors or activities such as airlines, cabotage, telecommunications and finance. Other treaties provide for entry in accordance with the host party's legislation and regulations. The latter is the approach of the WTO General Agreement on Trade in Services (GATS).

An important feature of investments eligible for admission is the extent (if any) to which it includes different categories of financial instrument. Many bilateral investment treaties include portfolio as well as direct investments under the heading of entry.

The coverage of the Indian model treaty is directed at investors rather than financial instruments. Thus, "investment" is defined as "an Enterprise in the Host State, constituted, organized and operated in compliance with the Law of the Host State and owned or controlled in good faith by an Investor" (Article 1).

The definition of investment continues by specifying "for clarity" that investment does not include various financial

assets amongst which are specified "portfolio investments" as well as "any other claims to money that do not involve the kind of interests or operations set out in the definition of investment in this treaty".

This approach would appear to exclude the liberalization of capital movements from the obligations of the model treaty. The approach would distinguish the treaty's obligations from those in many other treaties which accommodate such liberalization.

Such exclusion might be justified as being in accord with the recently more accommodating stance of the International Monetary Fund (IMF) towards countries' management of capital movements. This stance reflects acknowledgement by the IMF that the management of capital flows can be a reasonable part of policies designed to control the destabilizing impact which capital flows can have on countries' macroeconomies (Cornford, 2014: 2-4).

Non-applicability

Bilateral investment treaties generally list some activities or sectors excluded from the coverage of the treaty. These may comprise various activities of the government, taxation, and other national laws and regulations designed to promote or protect the public interest.

The Indian model treaty contains broad provisions under this heading. These include general protection for the governments' legal and regulatory authority (including changes and other reforms): "Nothing in this Treaty shall be interpreted to restrict the rights of either Party to formulate, modify, amend, apply or revoke its Law in good faith. Each party retains the right to exercise discretion with respect to regulatory, compliance, investigatory matters, including discretion regarding allocation of resources and establishment of penalties" (Article 2.4).

Such protection for governmental authority means that in the design and drafting of new laws there is no need for apprehension on the part of the host country that external parties will use bilateral investment treaties as vehicles for nullifying or restricting the impact of reforms and regulations (an effect aptly described as "regulatory chill").

The Indian model treaty excludes from applicability government procurement, subsidies and grants, services supplied in the exercise of government authority (services supplied neither on a commercial basis nor in competition with one or more service suppliers), taxation measures, the issuance of compulsory licences granted in relation to intellectual property rights (their revocation, limitation or creation), and commercial contracts between a party to the treaty and an investment or investor (Article 2).

The "taking" concept

The early history of the claims of cross-border investors against host states concerns principally cases of partial or total expropriation or nationalization, often of oil or petroleum interests. Moreover, the character of international arbitration of disputes between such parties was strongly influenced by the decisions of an international tribunal, established in 1981, to adjudicate claims between United States parties on one side and the government of Iran and Iran state-owned entities on the other.

The establishment of this tribunal was part of a settlement, the Algiers Accord, negotiated through the intermediation of the government of Algeria, which also covered the following issues: the release of United States hostages; the return to Iran

of a major part of Iranian financial assets in banks in the United States which had been frozen by the American government; the termination of litigation against Iran and Iranian entities in the United States; and the establishment of a fund in a security account in the Netherlands from which United States claims against Iran recognized by the tribunal would be satisfied (Lowenfeld, 2008: 542-543).

During a lengthy period, which for minor cases lasted well into the new millennium, the Iran-United States Tribunal adjudicated cases involving not only expropriation but also commercial disputes about payments not made, contracts terminated or not fulfilled, and letters of credit dishonoured or drawn on wrongfully. In cases not involving expropriation or nationalization, the tribunal generally accepted as part of the basis for its decisions the concept of "taking".

This was defined in the 1961 Sohn and Baxter Draft Convention on State Responsibility as follows (Lowenfeld, 2008: 546): "(a) A 'taking of property' includes not only an outright taking of property but also any such unreasonable interference, use, enjoyment, or disposal of property as to justify an inference that the owner thereof will not be able to use, enjoy, or dispose of the property within a reasonable period of time after the inception of such interference. (b) A 'taking of the use of property' includes not only an outright taking of the property but also any unreasonable interference with the use or enjoyment of the property for a limited period of time."

"Taking" thus defined covers many different categories of commercial dispute other than outright expropriation or nationalization. Prior to the Iran-United States Tribunal, what could and what could not be subjects of investment disputes eligible for arbitration or legal settlement had lacked definition. The range and volume of the tribunal's work has contributed to the evolution of law on international investment and to entrenching the concept that such law applies not only to disputes between states but also between states and other foreign parties.

In the context of the precedents of the work of the Iran-United States Tribunal for subsequent investment disputes, it is important to remember that a task of the tribunal was to decide what constituted a contract eligible for adjudication, since the tribunal was not adjudicating on the basis of the terms of a pre-existing treaty or international agreement. As already discussed, the Indian model treaty carefully defines what is covered by "investment".

National treatment/fair and equitable treatment

National treatment is designed to assure foreign suppliers of goods or services treatment no less favourable than that accorded to domestic suppliers. National treatment can cover conditions of entry or market access as well as regulatory treatment to a foreign supplier in a country's market, or only the latter.

According to the approach of the WTO General Agreement on Trade in Services, national treatment is designed to equalize post-entry conditions of competition for domestic and foreign suppliers. In many bilateral investment treaties, especially those in which the United States is a party, national treatment is an obligation on conditions for entry as well as on post-entry treatment.

However, national treatment does not guarantee minimum standards of treatment to foreign suppliers even when no discrimination can be shown. Fair and equitable treatment is designed to assure that a minimum international standard of behaviour will apply to a foreign supplier. Examples of cases where such a minimum standard has not been applied might

be administrative delays which hinder the start of projects or other investments after the receipt of a licence or a successful bid by a foreign supplier.

The problem with fair and equitable treatment is that, unlike with national treatment, there is no agreed standard of comparison which will serve as the basis for judging whether it has been met.

In 2001, the absence of such a standard led the Free Trade Commission created by the North American Free Trade Agreement (NAFTA) to issue an interpretation of the Minimum Standard of Treatment in Accordance with International Law which includes the following: "The concepts of 'fair and equitable treatment' and 'full protection and security' do not require treatment in addition to or beyond that which is required by the customary international law minimum standard of treatment of aliens."

The interpretation went on to add: "A determination that there has been a breach of another provision of the NAFTA, or of a separate international agreement does not establish that there has been a breach of [the Article containing these standards]" (Lowenfeld, 2008: 557-558).

This still means that the contents of fair and equitable treatment depend on the interpretation of the applicability of customary international law to the case under consideration.

The obligation of national treatment in the Indian model treaty is post-entry (Article 4). It is also hedged with specified exceptions. These include laws and measures of regional and local government; wide discretion for decisions regarding law enforcement; and the extension of financial assistance by a party in favour of its investors or investments in pursuit of legitimate public purposes such as the protection of public health, safety and the environment.

There is no reference in the Indian model treaty to fair and equitable treatment as such. However, under Standard of Treatment (Article 3), each party is not to subject investments of investors of the other party to measures which constitute the following: (i) denial of justice under customary international law; (ii) unremedied and egregious violations of due process; and (iii) manifestly abusive treatment involving continuous, unjustified and outrageous coercion or harassment.

There is also a clause similar to the analogous one in NAFTA's Minimum Standard "that a determination that there has been a breach of another provision of the treaty does not establish that there has been a breach of the model treaty's Standard of Treatment."

Exceptions

The Indian model treaty contains extensive lists of exceptions designed to provide free scope for government action by the host state as well as subjects off-limits for dispute settlement.

According to the General Exceptions of Article 16: "Nothing in this Treaty precludes the Host State from taking actions or measures of general applicability which it considers necessary to the following": the protection of public morals and the maintenance of public order; ensuring the integrity and stability of the financial system; remedying serious balance-of-payments problems and exchange-rate and external financial difficulties; ensuring public health and safety; protecting and conserving the environment; improving working conditions; securing legal compliance for laws relating to deceptive and fraudulent practices and defaults; protecting personal privacy; and protecting national treasures and monuments. Moreover, measures taken by local bodies and authorities are covered by the General Exceptions.

In addition to General Exceptions, the Indian model treaty specifies Security Exceptions which cover the disclosure of information considered by a party contrary to its essential security interests or the taking of actions considered necessary for the protection of its essential security interests (Article 17).

Measures for the protection of a party's essential security interests are to be imposed on a non-discriminatory basis (Annex 1). The defence of a measure or measures as being justified by Security Exceptions is to be non-justiciable and not open to review by an arbitral tribunal established to settle disputes under the model treaty.

MFN

Most bilateral investment treaties contain most-favoured-nation (MFN) clauses which, as in the case of their analogues for cross-border trade, guarantee treatment to foreign investors covered by the treaty at least equal to that granted to foreign investors from any other country. However, MFN clauses in investment treaties may be subject to specified exclusions of varying degrees of comprehensiveness (Lowenfeld, 2008: 572).

The approach of the Indian model investment treaty is simply to exclude MFN treatment. Such an exclusion enables India to provide differential benefits to foreign investors according to such features of its relations with the investors' home states as the scale of incoming investment from this source.

Expropriation

Expropriation has historically been at the heart of the development of rules on the treatment of international investment. In disputes on the subject before 1945, the so-called Hull Doctrine jostled with the Calvo Doctrine (Lowenfeld, 2008: 472-473 and 475-480).

The Hull Doctrine was summarized in a statement of the United States Secretary of State (in a letter to the President of Mexico in 1938) as follows: "The Government of the United States readily recognizes the right of a sovereign state to expropriate property for public purposes ... it has been stated with equal emphasis that the right to expropriate property is coupled with and conditional on the obligation to make adequate, effective and prompt compensation."

The Calvo Doctrine drew on the writings of Carlos Calvo, a 19th-century Argentine jurist, who maintained that under international law aliens had no rights greater than those of a country's citizens. This could lead to the argument that property owners should be incorporated under the laws of the host country, in the process renouncing all forms of protection on the part of their home country.

During the period from 1945 until the early 1970s, there was a wave of expropriations and nationalization linked to decolonization, Communist rule in Eastern Europe and elsewhere, and a resurgence of nationalism in Latin America. This was accompanied by debates in the United Nations culminating in the 1974 adoption of a Charter of Economic Rights and Duties of States.

Article 2 of the Charter included the following rights: "1. Every State has and shall freely exercise full permanent sovereignty, including possession, use and disposal, over all its wealth, natural resources and economic activities ... 2. Each State has the right ... (c) To nationalize, expropriate or transfer ownership of foreign property in which case appropriate compensation should be paid by the State adopting such measures, taking into account its relevant laws and regulations and all

the circumstances that the State considers pertinent. In any case where the question of compensation gives rise to a controversy, it shall be settled under the domestic law of the nationalizing State and by its tribunals, unless it is freely and naturally agreed by all the States concerned that other peaceful means be sought on the basis of the sovereign equality of States and in accordance with the principle of free choice of means."

On a track parallel to but separate from the debates in the United Nations, the Convention on the Settlement of Investment Disputes between States and Nationals of Other States established the International Centre for Settlement of Investment Disputes (ICSID) within the World Bank. ICSID provides a forum for the settlement of investment disputes between parties from home and host countries which have accepted the Convention.

Private investors are explicitly included amongst the parties eligible to initiate disputes. In 1978, ICSID established the Additional Facility to deal with arbitration and conciliation between host states and investors in cases where the Convention could not be deployed because either the host state or the home state of the investor was not a party to the Convention.

Widespread ratification of the Convention, though a gradual process, took in more than 150 countries by the beginning of the new millennium. However, recently as part of their re-evaluation of the costs and benefits of bilateral investment treaties, a number of developing countries have announced their intention to withdraw from the Convention.

The concept of expropriation lacks precise definition. It clearly overlaps with "taking" (discussed above). Indeed, it could be argued that in practice expropriation is a sub-category of "taking".

Bilateral investment treaties refer to "expropriation or nationalization", "expropriation direct or indirect", and "expropriation through measures tantamount to expropriation". Some of these terms are clearly designed to include measures constituting creeping expropriation within the treaties' provisions on expropriation (Lowenfeld, 2008: 559).

Central to the concept of "taking" is interference in the business activities of the foreign investor or investment. But this leaves open for interpretation in particular cases the question of whether the interference has been sufficiently serious to qualify as expropriation. In actual cases under NAFTA the argument for expropriation has sometimes been rejected in favour of the lesser failure to accord the investor or investment fair and equitable treatment.

Importantly, in view of the controversy surrounding the TTIP, in legal rulings regulation has not necessarily been associated with a deprivation of ownership rights sufficiently severe to qualify as expropriation (Lowenfeld, 2008: 560-563).

In the Indian model treaty, nationalization and expropriation "for reasons of public purpose" is legitimate but must be accompanied by adequate compensation. The determination of whether a measure or measures should be classified as expropriation "requires a case-by-case, fact-based inquiry."

The evidence that expropriation has taken place should include the following: "(i) permanent and complete or near complete deprivation of the value of the Investment; and (ii) permanent and complete or near complete deprivation of the Investor's right and management and control over the Investment; and (iii) an appropriation of the Investment by the Host State which results in transfer of the complete or near complete value of the Investment to that party or to an agency or instrumentality of the Party or a third Party" (Article 5.2).

"Non-discriminatory actions by a Party that are designed and applied to protect legitimate public welfare objectives such

as public health, safety and the environment shall not constitute expropriation" (Article 5.4).

These conditions are stringent and are likely to narrow the range of cases in which the existence of expropriation can be demonstrated. They are consistent with correspondingly stringent rules concerning exceptions (already discussed) and dispute settlement (see below).

Compensation

The main issues under the heading of compensation concern the period of time before compensation is paid (promptness), the form in which it should be paid (sometimes characterized as effectiveness of compensation), and how much. The third of these issues is the crucial one since performance under the other two depends on settlement of the question of how much.

Under the heading of promptness, allowance has to be made for delays due to the resolution of practical problems which have to be dealt with in disputes. Delays are often reflected in interest charges which accrue from the date of the expropriation.

The rules as to the form in which payment is made usually guarantee that the currency of payment should be convertible and not subject to restrictions on transfer. If payment is made in financial instruments, the rules guarantee their value (with compensation for discounts from face value, etc.).

Concerning how much compensation should be paid, agreement is necessary as to the date of expropriation or other forms of "taking". This is often contentious since the loss of earnings which is to be compensated will be determined by the extent of expropriation or "taking" on this date.

But the most difficult problem associated with how much compensation should be paid is that of valuation of the assets or the "taking". Terminology under this heading is fluid. The concepts denoting compensation go under several names – "market value", "fair market value", "genuine value" and "just compensation" – but mostly boil down to one of a limited number of valuation methods.

A useful classification of these methods is that of Robert Herz, former chairman of the United States Financial Accounting Standards Board (FASB) (Herz, 2013: 182-191). This classification consists of three headings: (i) amortized cost, the original cost minus amortization plus the sum to be received at final settlement; (ii) fair value, the amount for which an asset could be exchanged between knowledgeable parties in an arm's-length transaction; and (iii) current value, the present discounted value of the future net cash flows that an asset is expected to generate.

Each of these valuation methods has advantages and disadvantages:

- Amortized cost is based on contractual features of an asset and thus avoids the misleading volatility and noise which often characterize reported financial results.
- Supporters of fair value stress incorporation by the concept of current market and economic conditions, and not the past costs and prices used to estimate amortized costs. But application of fair value can be problematic when market prices are not available. In their absence, United States accounting rules suggest alternatives such as the prices of similar assets or valuation based on models.
- Current value picks up the phasing in time of inflows and outflows associated with an asset and also makes possible the incorporation of the effects of changes in interest rates through the discount rates used in estimation. The problem with current value is due to the difficulty of identifying in

advance the future inflows and outflows used in the calculation.

Cursory consideration points to the difficulties associated with these valuation methods in investment disputes, especially when one of the parties is a developing country lacking a market for the shares of the investment in question or characterized by economic conditions that complicate estimation of prospective revenues and costs.

In the case of the Iran-United States Tribunal, where identification of the nature and extent of the "taking" was itself often a complex matter, "each case was examined in detail, with accountants and industry experts, in some instances presented by the parties, in others called by the Tribunal itself. The awards rarely accepted the experts' detailed submissions but reflected also the judgements of the Chamber hearing the case" (Lowenfeld, 2008: 552).

While bilateral investment treaties often specify criteria for compensation in cases of expropriation or measures tantamount to expropriation, corresponding criteria are not included for other violations of treaty terms (such as national treatment, fair and equitable treatment, or protection and security). In such cases arbitral tribunals have typically borrowed from rulings concerning expropriation (Lowenfeld, 2008: 567). The absence of such criteria makes judgements under such treaties concerning, for example, the impact of regulation more unpredictable or even arbitrary.

Under the Indian model bilateral investment treaty, compensation "shall be adequate and reflect the fair market value of the expropriated Investment, as reduced after application of relevant Mitigating Factors" (Article 5).

The mitigating factors specified include the following: (a) current and past use of the investment; (b) duration and previous profits; (c) compensation and insurance payouts received from other sources; (d) options available for the mitigation of losses and reasonable efforts made towards such mitigation; (e) conduct of the investor which has contributed to damaging the investment; (f) relief of obligations due to the expropriation; (g) liabilities owed to the government of the host state; (h) unremedied harm or damage to the environment or to the local community; (i) other relevant considerations regarding the need to balance the public interest and the interests of the investment.

Moreover, "[t]he computation of the fair market value ... shall exclude any consequential or exemplary losses or speculative or windfall profits claimed by the Investor, including those relating to moral damages or loss of goodwill" (Article 5). The mitigating factors and the exclusion of speculative gains are clearly capable of significantly constraining the amount of compensation.

Moreover, the rules of the Indian model treaty leave unsolved the problem mentioned above of which method of valuation should be used, a problem likely to be especially difficult to resolve in the case of takings other than straightforward expropriation.

Financial transfers and entry and sojourn of personnel

Cross-border financial transfers and the access of foreign personnel in connection with operations linked to the investment are subjects which also arise under the heading of international trade in financial services of the WTO General Agreement on Trade in Services.

On transfers, Article 6 of the Indian model bilateral investment treaty specifies rules similar to those of Article XI of the GATS which permit all funds of an investor related to an investment in its territory to be freely transferred.

Likewise, the treaty permits temporary restrictions on transfers "in the event of serious balance-of-payments difficulties or threat thereof, or in cases where, in exceptional circumstances, movements of capital cause or threaten to cause serious difficulties for macroeconomic management, in particular, monetary and exchange rate policies" (Article 6). Government policy regarding transfers would also be covered by the General Exceptions of Article 16 which include actions and measures "remedying serious balance-of-payments problems, exchange rate difficulties and external financial difficulties or threat thereof".

On the access of foreign persons, each of the parties to the treaty shall permit persons of the other party and employees of the investor or investment, subject to domestic law and considerations of reciprocity, to enter and remain in their territory for the purpose of engaging in activities connected to the investment (Article 7). Under Article 16 of the WTO GATS, limitations on the access of foreign persons employed in connection with the cross-border provision of financial services are to be a subject in the negotiation of specific commitments.

Dispute settlement

Dispute settlement is now one of the most contentious of the subjects of bilateral and multilateral trade and investment treaties. This is to a significant extent due to provisions for investor-state dispute settlement.

As of 1945 investment disputes were settled either through national courts or through international tribunals of which the most important was the International Court of Justice. Article 34 of the latter's statute permits only states to be parties before the Court. Thus, if a private investor wanted to bring a suit against a government, the investor would have had to persuade its government to pursue the case on its behalf, thus transforming the case into a dispute between states (Folsom, Gordon and Spanogle, 1991: 1098-1101).

The proliferation of investment disputes during the following 20 years, due partly to decolonization, Communist governments in some states, and more assertive national economic policies in many developing countries, was the inspiration for the establishment of ICSID, which accommodated agreements between private parties and states for the purpose of arbitration or adjudication, although as of the 1980s, in only about 40% of bilateral investment treaties was the private investor provided with direct access to arbitration; in the remainder, working through national governments was still required (Guertin, 1990: 125).

The following years witnessed an expansion in the number of agreements covering international investment as well as changes affecting the scope and character of such agreements. Bilateral investment treaties remain the most frequent form of such agreements but investment-related provisions are now also included in economic partnership agreements, free trade agreements, agreements for regional economic integration, and framework agreements for economic cooperation.

Such agreements often include more than two countries as parties and cannot thus be classified as bilateral. This has led to the use of the term "international investment agreement" as the umbrella class. Expansion in the number of international investment agreements has been accompanied not only by expansion in the number of investment disputes subject to adjudication or arbitration but also by an increase in the number of cases involving ISDS.

Under arbitral tribunals (ICSID and others), dispute settlement involves interpretation of applicable agreements which

may or may not include the possibility of ISDS. Article 25 of the ICSID Convention defines nationals of other contracting states to include foreign corporations and other juridical entities whom the parties have agreed should be treated as eligible for arbitration under the Convention. Recourse to ISDS is now substantial. By the end of 2014, according to the UN Conference on Trade and Development (UNCTAD) data bank, the number of concluded ISDS cases had reached 356.

Under the ICSID Convention, arbitration usually involves three arbitrators, one selected by each of the parties to the dispute (host state and investor) and a presiding arbitrator agreed by the two parties or, if they cannot agree, by the chairman of ICSID, ex officio the president of the World Bank. This pattern of selection follows that of other international arbitration tribunals.

In view of these procedures and the now substantial history of ICSID and other similar tribunals, why has the subject of ISDS recently become so contentious? Partly this is simply a case of the way in which bilateral and multilateral agreements with an extensive and potentially intrusive scope as far as national regulation is concerned provide enterprises but not other groups (such as trade unions and civil-society groups) privileged access to arbitration and adjudication by offshore tribunals, with in many cases no provision for appeal against their decisions.

Moreover, the range of subjects covered in international investment agreements has broadened to large parts of domestic regulation of the environment, investment and finance, intellectual property, etc. The consequences can be perverse. Control of cross-border capital movements, for example, is increasingly accepted as a necessary part of the armoury of policy measures for handling systemic financial risk and the management of the balance of payments. IMF recommendations as to the use of such measures could easily conflict with obligations undertaken by a country under an international investment agreement.

Estimating compensation in favour of investors in cases brought by them concerning a country's regulation presents difficult problems. As noted above, such estimates have long been made in cases of this kind. However, established guidelines are lacking, with the result that estimates of risk are unpredictable and arbitrary. How, for example, would estimation be approached for compensation of an investor due to the effect on an investment of the imposition of capital controls?

The growth of ISDS in arbitration under bilateral investment treaties has been accompanied by systemic features which raise serious questions about the justice of the decisions reached. These features, as listed in a speech by George Kahale (Kahale, 2014), a senior arbitration lawyer, include the following:

- A "club of international arbitrators" is shaping a new body of international law, though in many cases the members of the club are not well versed in international law. Members of this group are also dependent upon the parties or arbitral institutions for future appointments – a dependence which all too easily compromises their conduct in particular cases.
- Bilateral investment treaties often contain overly expansive provisions concerning fair and equitable treatment and MFN.
- "Mega cases" based on a cavalier approach to legal principles and worth more than \$1 billion have been brought against states. Claims have sometimes been of the same order of magnitude as the country's GDP.
- Although there is nothing to stop an arbitrator from applying a personal interpretation of law, their decisions can

be characterized by finality in the absence of procedures for appellate review.

- In view of the selection procedures for arbitrators, impartiality is difficult to achieve. As Kahale puts it, "Experienced practitioners are able to predict the outcome of a case purely based on the composition of the tribunal."

- A bias against states and in favour of investors is perceived by many observers. Kahale acknowledges that there are studies showing that states win more than 50% of cases but counters that this figure is "meaningless, if that same figure happens to represent the percentage of cases that never should have seen the light of day or that would never survive a motion to dismiss in a national court".

The approach to ISDS of the Indian model investment treaty is to restrict investors' rights under the treaty regarding recourse to external arbitration. The rights apply only to investors and investments specified in the treaty. Thus, the disputes admitted are those dealing with treatment of the investor, expropriation, transfers, and entry and sojourn of the investor's personnel. Excluded from the treaty's scope are portfolio investments (Article 1).

Moreover, as already mentioned, cross-border transfers related to investments (such as contributions to capital, profits, interest, royalties and management fees) must meet conditions as to compliance with a broad range of local laws and regulation (including those concerning labour obligations and taxation) (Article 6). The control of cross-border capital movements is not only permitted as a response to balance-of-payments difficulties but may also be justified by macroprudential reasons since, as also mentioned above, under Article 6 temporary restrictions on transfer are deployed when movements of capital cause or threaten to cause serious difficulties for macroeconomic management, in particular, monetary and exchange rate policies.

The Indian model treaty's procedures to be pursued in investment disputes include the exhaustion of local remedies and other conditions which must precede submission of a dispute to external arbitration (Article 14). The investor must establish that continued pursuit of domestic relief would be futile because (1) there are no reasonably available legal remedies in the respondent country capable of providing relief regarding the dispute in question, or (2) the process for obtaining legal relief provides no reasonable possibility of obtaining such relief in a reasonable period of time.

Even after the transmission of the notice of dispute to the designated representative of the respondent party, the disputing investor and the respondent party are to use their best efforts to resolve the dispute amicably through consultation, negotiation or continued pursuit of any available domestic remedies or solutions. Non-compliance with any of the conditions set out under these procedures leads to the barring of the investor from taking subsequent steps to pursue external arbitration of the dispute.

Counter-claims against the investor are possible for breaches by the investor of obligations under the treaty regarding corruption, disclosure, taxation and compliance with the law of the host state. Explicitly mentioned here are laws relating to labour and wages, environmental and conservation law, human rights, and fair competition and consumer protection.

The eventual appointment of three arbitrators is subject to detailed provisions regarding conflicts of interest. Such a conflict will be deemed to exist in the presence of various circumstances including the following:

- the arbitrator is or has been a legal representative of

the appointing party or an affiliate of the appointing party in the three years preceding the commencement of the arbitration;

- the arbitrator is a lawyer in the same law firm as the counsel to one of the parties;

- the arbitrator is acting concurrently with the lawyer or law firm of one of the parties in another dispute;

- the arbitrator's law firm is currently rendering or has rendered services to one of the parties or to an affiliate of one of the parties from which the law firm derives a significant financial interest;

- the arbitrator has been comprehensively briefed by the appointing party concerning the merits or procedural aspects of the dispute prior to appointment;

- the arbitrator has publicly advocated a fixed position regarding an issue in the case to be arbitrated.

These conditions should reduce the opportunities for the conflicts of interest and other abuses of the arbitral proceedings in investment disputes which were described earlier. Under Burden of Proof and Governing Law (Article 14), the treaty is to be interpreted "in the context of the high level of deference that international law accords to States with regard to their development and implementation of domestic policies".

More specifically, the governing law for the interpretation of the treaty by the arbitral tribunal should be the treaty itself, the general principles of public international law relating to the interpretation of treaties, and – for matters relating to domestic law – the law of the home state of the respondent.

The investor must establish a breach of the respondent's obligations under the scope and general provisions of the treaty (Article 2 that specifies the subjects to which the treaty applies and subjects excluded from its scope).

Moreover, the investor must have suffered actual and non-speculative losses as a result of the breach, and the losses must have been foreseeable and directly caused by the breach. Decisions as to the award of compensation are to be reached by a majority of votes of the arbitral tribunal. Provisions as to the amount of compensation, which are set out under expropriation, were discussed above.

Suggestions as to alternative approaches

The Indian model bilateral investment treaty contains strong standalone rules. Other possible ways of confronting perceived shortcomings of investment and trade treaties have also been suggested. Two such alternatives are contained in proposals of the Global Economic Governance Programme of the Oxford University Blavatnik School of Government.

One of these alternatives, which is intended for the TTIP negotiations but could also be deployed in accords between developing and developed countries, is an "ISDS Patches Model". The other, which is designed specifically for developing countries, involves the use of state interpretation of investment treaties.

The "ISDS Patches Model" is designed to limit recourse to investment arbitration by ensuring that ISDS is an option only in exceptional cases (Kleinheisterkamp and Poulsen, 2014):

- The first decision on the legality or illegality of acts subject to dispute settlement would be taken by local courts (the "first patch"). This will ensure that investment arbitration is the last rather than the first resort in an investment dispute.

- Under the "second patch", there would be a compre-

hensive state “filter” of private claims by home and host states. If both agree, the dispute should be settled by domestic judges rather than international arbitrators. The objective here would be to safeguard public policies regarding subjects such as taxation, financial stability, environmental protection, health concerns and consumer protection.

- The “third patch” would allow parties to issue binding joint and prospective interpretations of the provisions of an investment agreement. This possibility would give states greater control over the arbitral process by steering the development of the law created by the agreements.

- Under the “fourth patch”, investors and states would be given the opportunity to appeal the decisions of arbitral tribunals before an independent appellate body analogous to that available at the WTO. This would help to avoid the lack of coherence and occasional contradictions which sometimes characterize the decisions of arbitral tribunals.

The second proposal would involve state interpretation of investment treaties. States would use their full powers to limit and shape the interpretive power of arbitral tribunals regarding investment treaties (Gertz and St John, 2015). This could be done in three ways: (1) through unilateral statements of particular clauses of treaties submitted by a non-disputing as well as a disputing party; (2) joint statements with treaty partners providing agreed clarification and interpretation of clauses for future tribunals; and (3) joint statements by a number of states – not necessarily all parties to the same treaty – on mutually agreed interpretations of provisions common to many investment treaties.

Each of these options is concerned primarily with procedures to be followed in arbitration of investment disputes. The first two “patches” of the “ISDS Patches Model” are drafted in the same spirit as the Indian model bilateral investment treaty. But unlike with the model treaty, neither proposal includes rules tailored to the particular issues likely to arise in investment disputes.

Recent Indian developments

In response to criticism that the Indian model bilateral investment treaty is too one-sided regarding certain subjects and may excessively deter foreign investment, there have been indications of official reconsideration of key provisions in the form of a review in a recent report of the Law Commission of India (Krishnan, 2015).

Particular subjects covered by this review which may lead to modified provisions in a revised version of the model treaty include the following: (1) extension of the definition of investments covered to include portfolio investments as well as foreign enterprises (Article 1); (2) more flexible rules than the obligatory exhaustion of recourse to local courts with no allowance for re-examination by an arbitral tribunal of legal issues “finally settled by any judicial authority of the host state” or review of the merits of a decision made by such an authority (Article 14); and (3) the substitution of internationally agreed minimum standards to replace the exclusive authority accorded to the government of the host state to decide when it invokes exceptions to justify actions or measures regarding such subjects as public health, the environment, public order and morals, working conditions, and financial stability (Article 16).

The eventual outcome of any modification is unpredictable since arguments are likely to be put forward against ma-

ior modifications of the model treaty. Greater openness to portfolio investments can easily become a vehicle for backdoor (unwanted) liberalization of cross-border capital movements.

Moreover, a difficult balance would need to be achieved in a strengthening of the role of arbitral tribunals in relation to that of local law and courts. Finally, minimum international standards may be an inadequate substitute for state policy autonomy regarding exceptions to the treaty. □

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