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## **Efforts Towards Multilateral Framework on Investment**

### **Summary**

*One of the most significant changes affecting the developing world during the last decade has been the enormous expansion in private foreign investment. The impact of direct foreign investment means not only money, but increased productive capacity, the transfer of technology, the introduction of new management skill, and the creation of links to world market.*

*Foreign direct investment has become a powerful and dynamic force for development throughout the world and for the integration of economies, sometimes recognized as the instrument of economic and political dominance and interference in the domestic affairs of developing countries. Consequently, the relevance of the formation of the multilateral framework on investment made it the subject of intense discussions during the last ministerial conferences in WTO, the 'central international economic institution'.<sup>1)</sup>*

*Due to all above mentioned reasons I have decided to analyze different perspectives on multilateral framework on Investment, briefly discuss what transpired during the negotiations on investment at Cancún<sup>2)</sup> and seek to provide some insight on the stage of deliberations in the area of investment in the future.*

**Key words:** *expansion in private foreign investment, creation of links to world market, foreign direct investment, multilateral framework on investment, investment in the future, negotiations on investment at Cancún, ministerial conferences in WTO.*

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1. Leonard Bierman, Donald R. Fraser and James W. Koari, "The General Agreement on Tariffs and Trade from a Market prospective", University of Pennsylvania, 1996
  2. Cancun, Mexico, 10-14 September 2003

### Background of Singapore Issues

Article IV of the Agreement Establishing the WTO<sup>3)</sup> requires ministers to hold biennial meetings to negotiate trade agreements, liberalize trade within a rules based system and review trade policies. The first ministerial meeting was held in Singapore in 1996. At this meeting the *demandeurs* (i. e. the EU, Korea, Canada, US and Japan) wanted to extend the WTO mandate to *investment, competition, transparency in government procurement and trade facilitation*. These issues are now known in the WTO parlance as the '**Singapore Issues**'.<sup>4)</sup>

At this point developing countries did not agree to launch negotiations on these issues because they insisted on clarifications of these concerns. They also wanted to understand the implications for negotiating these issues on a multilateral level. To address the concerns of developing countries, a working group was established.

### Issues Addressed by Working Group

*The working group<sup>5)</sup> on the relationship between trade and investment was set up to undertake analytical and exploratory work on investment with a view to coming up with elements for inclusion in a multilateral investment framework. Paragraph 20-22 of the Doha Ministerial Declaration<sup>6)</sup> clearly spells out the mandate of this group. These paragraphs also make provision for technical assistance and capacity building to developing and least developed countries.*

The working group has been working on the following issues:

(i) **Scope and definition:** The major issue here is whether to accept a broad definition of investment which is what the US and other developed countries want or to adopt a narrow definition which limits the negotiations to foreign direct investment which is in the interests of developing countries and also supported by the Doha Declaration. Members could not agree on this and the US indicated that it is better not to have a multilateral agreement on investment than to have a weak agreement that the developing countries were calling for.

(ii) **Transparency in the investment agreement:** Transparency means providing information. Transparency is a fundamental principle that runs through the WTO agreements like a golden thread and takes its natural place in the Doha Declaration as an important principle in the multilateral investment framework. It involves making information on investment laws, regulations, practices and policies readily accessible; notifying all the interested investors about any changes to such laws and ensuring that these laws are applied uniformly, impartially and reasonably. Developing countries and least developed countries have raised concerns about the technical and capacity constraints that exist which would make it difficult to comply with these burdensome obligations.

3. Article IV, para.1 " There shall be a Ministerial Conference composed of representatives of all the Members, which shall meet at least once every two years...."

4. so named as they were first raised at Singapore Conference in 1997.

5. established in 1996 at Ministerial Conference in Singapore.

6. .... November 2001,.....

(iii) *Non-discrimination* entails the application of *the most favored nation* and the *national treatment principles*. These two standards of treatment do not refer to equal or identical treatment but to "treatment that is no less favorable" than that accorded to the "most favored" third country, in the one case and to nationals (and products) of the host country, in the other. The most favored nation principle is meant to ensure non-discrimination between foreign investors from different foreign countries. National treatment proscribes discrimination between foreign and domestic investors.<sup>7)</sup>

(iv) *Modalities for pre-establishment commitments based on a GATS-type*: There are basically two approaches to liberalization, the first one is the *negative list* approach (top down approach) where countries list industries they want to keep exempted from liberalization. All the areas that are not exempted will be subjected to liberalization and the principles of non-discrimination apply. The US follows this approach. The second approach to liberalization is the *GATS-type positive list* approach where countries list industries to which specific provisions of an agreement, such as most favored nation and national treatment, will apply and the conditions for applying them. This positive list approach is favored by most developing countries because it gives them the flexibility they need in pursuing their development policies.

(v) *Development provisions*: The working group has been working on ways to make development an integral part of the investment framework. It is argued that most international investment agreements focus too much on liberalization and protection of investment without making development a key objective. The relationship between trade, investment and development has been explored and developing countries have been very vocal in this area.

(vi) *Exceptions and balance-of-payments safeguards*: The balance-of-payment safeguards are very important in any investment framework. In general, many international investment agreements contain clauses on free transfer of funds and the balance-of-payments safeguards function as a buffer when countries face a financial crisis. Members generally recognize the need for these provisions but disagree on the form they should take. Paragraph 22 of the Doha Declaration clearly provides for balance of payment safeguards as an important exception to the non-discrimination principles.

(vii) *Consultation and the settlement of disputes between members*: Some members prefer including investor-state dispute settlement provisions, while others neither want the investor-state dispute settlement nor the WTO dispute settlement procedures to apply.

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7. The national treatment principle poses the greatest development implications. According to the current trends in international investment agreements it combines two issues that used to be dealt with separately. *The first* one is the application of the national treatment in the pre-establishment phase or broadly speaking market access. *The second* one relates to the application of the national treatment in the post-establishment phase of the investment process. The latter approach is more acceptable, but many countries are opposed to the former because they want more room to exercise their international law rights to control admission and establishment of investors. According to the 2003 United Nations Conference on Trade and Development (UNCTAD) World Investment Report (WIR 03, pp. 103) no country presently offers an unconditional right of admission to foreign investment.

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### Different Perspectives on Multilateral Framework on Investment

The demanders argue that after seven years of study and analysis, ministers should now launch negotiations on a *WTO Agreement on investment*. They are not satisfied with the current international regime of individual bilateral investment treaties<sup>8)</sup> and the regional investment agreements. According to the demanders, such a multiplicity of investment rules leads to confusion. They argue that a multilateral investment framework would establish a stable, non-discriminatory environment that would increase investment flows. With the dwarfing of official donor assistance, foreign direct investment may prove to be a viable source of capital.

However, many developing countries are of the view that the working group must continue with the process of clarification. They argue that the existing bilateral investment treaties already provide adequate legal protection to investors, and question whether a WTO agreement would indeed increase investment flows. They are also concerned that a multilateral agreement would increase their commitments while limiting their ability to regulate investment inflows in line with national development objectives.

Both sides confirm that foreign direct investment is important for development, and may lead to increased export competitiveness and technology transfer. However, they disagree on how to regulate it. The **Doha Declaration** provides that negotiations on an investment agreement would take place after the next ministerial conference in Cancún *'on the basis of a decision to be taken, by explicit consensus at that session on the modalities of negotiations i. e. how the negotiations are to be conducted.'* However, considering the different views that members have, to reach consensus on the Singapore issues is very difficult. A closer look at the negotiations in Cancún shows how insurmountable this task is.

### Different Demands During Ministerial Conference in Cancun

When the draft was released, the arguments between the demanders and antagonists were intensified. The revised Ministerial Text proposed to launch negotiations on transparency in government procurement, trade facilitation and investment. However, on investment the text provides that the *clarification process must be accelerated* before launching negotiations.

The EU initially expressed dissatisfaction with the draft Text, and called for negotiations on investment to proceed immediately. However, at the eleventh hour, it agreed to drop all the other issues and negotiate trade facilitation **only**.

The draft has been described as "scandalous" because it does not take into account the concerns of developing countries.

*All developing countries* were opposed to launching negotiations on Singapore Issues. Some Latin American countries including **Colombia**, **Peru** and **Chile** were prepared to support the launching of negotiations if they got concessions in other areas, particularly agriculture. **Morocco** has also signaled its support for negotiations on the Singapore Issues.

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8. UNCTAD estimates that over 2,100 bilateral treaties on investment are currently in place.

**India** opposed the launching of negotiations, and expressed concern that the paragraph on investment and competition does not make any reference to "explicit consensus". **Malaysia** also did not support the text and was not prepared to move on the Singapore Issues regardless of developments in any other area. A number of **African, Caribbean and Pacific (ACP)**<sup>9)</sup> countries stressed that the clarification phase should continue for all issues.

The poor countries have also been criticized for adopting an agenda which is too defensive, and this has led one WTO official to remark that if developing countries after seven years of clarification do not understand these issues then they will never understand them. The repeated call for the process of clarification to continue has been interpreted by observers as a polite way of reminding the demanders of the old adage that where there is no will among poor countries to negotiate the Singapore Issues surely there is no way for the demanders.<sup>10)</sup>

The meeting collapsed mainly because of deep divisions among members on the Singapore Issues.<sup>11)</sup>

### Future Prospects in Area of Investment

It is uncertain what will happen next to the Singapore Issues. According to the US one thing is clear: bilateral and regional agreements will be the order of the day.

The significant question is, will poor countries be able defend their interests when faced with economic giants like the US? It is interesting to monitor countries' efforts in dealing with investment on regional or bilateral level. It is argued that poor countries are better off at the multilateral level than when they are picked on by powerful nations on bilateral level.

The idea of countries unifying and negotiating as a block is not a new phenomenon.<sup>12)</sup> Third world countries came together and successfully opposed the demands of the developed countries<sup>13)</sup>.

The obligations in bilateral investment treaties exceed those imposed by traditional international customary law. Many developing countries are calling for fewer obligations under a multilateral investment framework. It is submitted that developing countries are likely to benefit more when they negotiate as a group than on a one-on-one basis.

9. The ACP group was not interested in the last minute offer by the EU. However, some argue that this was an attractive offer and if developing countries had accepted it things could have been different, but others blame the EU for waiting until it was too late.
10. When the Mexican Trade Minister Luis Ernesto Derbez saw that the negotiations were heading nowhere, he decided to pull the plug and there was an avalanche of acrimony and frustration among the demanders whilst a euphoric atmosphere prevailed among those who were opposing the Singapore Issues.
11. Some observers argue that if the members had started with agriculture instead of the Singapore Issues an agreement could have been reached. However, be that as it may, it is no use to cry over spilt milk. The focus should be on the meeting of the WTO General Council at Senior Officials level that will be convened no later than 15 December 2003.
12. History shows that, immediately after de-colonization, third world countries clubbed together under the United Nations and passed many resolutions. The **Charter of Economic Rights and Duties** is a good example. Under this charter, investment protection was dependent on the goodwill of the host state and the principle of national sovereignty was paramount. The US and other developed countries opposed this and sought stronger rules to protect investors and their investments. Third world countries were against stringent investment rules because they were afraid of losing their newly found sovereignty to foreign investors.
13. A vivid illustration of this is when they opposed the '**Hull rule**' which requires the host state to pay adequate, prompt, and effective compensation on expropriation. The US was annoyed by this and took an aggressive approach on a bilateral level and countries ended up accepting the very same rules they had been opposing. This dynamic inconsistency is still going on and poor countries are still likely to throw in the towel when approached by the big countries.

## Conclusion

From the above discussion it is patently clear that the demandeurs's efforts to launch a multilateral agreement on investment has suffered a major setback<sup>14</sup>.

This means that all efforts have turned to bilateral and regional arrangements. It is important for developing and least developed countries when negotiating international investment treaties, be it on bilateral, regional or even multilateral level, to aim at regulating investment in a manner which promotes economic growth and sustainable development. To get the most out of foreign investment it is not only important to liberalize investment and maintain an open door policy, but it is also vital to have strategic policy intervention to regulate investment in a way that promotes the objectives of the host country.

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### НАПОРИ УСМЈЕРЕНИ НА КРЕИРАЊЕ МУЛТИЛАТЕРАЛНОГ ПОРЕТКА ИНВЕСТИЦИЈА

#### Резиме

*У току последње деценије, једна од најинтересанијих промјена, нарочито значајна за земље у развоју, је енормна експанзија инвестиција. Директна страни улагања не значе само новац, већ и повећање продуктивних капацитета, трансфера технологије, представљање нових структура менаџмента, и стварање линкова према свјетском тржишту.*

*Директна страна улагања представљају снажну и динамичну снагу развоја у транзиционим земљама. Са аспекта економских интеграција, директна страна улагања се препознају као инструменти економске и политичке доминације, као и мјешања у унутрашња питања земаља у развоју. Као последица тога, значај формирања мултилатералног поретка инвестиција је уцинио да управо то буде предмет неизвјних дискусија у току министарских конференција у Свјетској трговинској организацији.*

*У складу са прелиминарним разлозима, изложићу различите ставове који се односе на креирање мултилатералног поретка инвестиција, укратко коментаришући преговоре које су се одиграле у Саопш-у и нудећи соопштена виђења мултилатералног поретка инвестиција у будућности.*

**Кључне речи:** експанзија инвестиција; мултилатерални поредак инвестиција; земље у транзицији; економске интеграције; директна страна улагања; стварање свјетског тржишта; министарске конференције; преговори у Саопш-у; инвестиције у будућности.

14. It is also interesting to note that previous attempts to get a multilateral agreement on investment off the ground in the Organisation for Economic Cooperation and Development (OECD) suffered a similar fate.