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International Investment Treaties and Developing Countries
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The establishment of international investment rules has often been regarded as an agenda that benefits mainly multinational firms and developed countries. However, international investment treaties can also bring benefits to developing countries. The globalisation of capital markets presents developing countries with unprecedented opportunities and challenges. These new opportunities and constraints, however, affect the smallest and weakest developing countries differently from the larger developing ones. To ensure that even the smallest gain from the global economy, the careful construction of multilateral investment agreements is essential.

The importance of foreign direct investment (FDI) flows today, derives only partly from their five-fold increase to developing countries in the past ten years. More importantly, services and goods are delivered more through FDI than through exports. As a result, it is hardly surprising that regional arrangements like the EU and NAFTA have focused on elimination of barriers to investment flows.

Recent debates on the links between globalisation and inequality have highlighted the skewed pattern of FDI flows away from the least developed countries (LDCs). While it is true that, in absolute terms, the greater part of foreign investment has gone to middle-income industrialising countries, particularly in Latin America and Asia, FDI accounts for a high proportion of private business investment in most developing countries relative to other sources of finance: one-half in Africa, one-quarter in Latin America and one-fifth in Asia. In other words, in spite of the receipt of a lesser proportion of total investment flows, foreign investment is more important to low-income economies than to middle-income ones. The implications are clear: greater access to productive technologies, acceleration in job creation and additional resources for human development.

However, the discipline required by developing countries to meet international standards as the critical condition that allows the optimisation of these opportunities. Failure to meet the standards of foreign investors is penalised by an out-migration of capital. The competition for attracting these flows is high.

Various signalling devices are used to indicate receptivity to international standards. Almost all developing countries have embarked on unilateral liberalisation of their investment regimes. However, the inadequacies of this strategy are twofold. First, if the poorest countries are unable to compete for investment, they run risks of introducing costly unilateral incentives such as tax holidays, subsidies and regulatory relaxation which precipitate a 'race to the bottom', in terms of investment regime liberalisation, with competitors for FDI. Second, even if domestic legislation and unilateral guarantees are identical to multilateral ones, the former do not substitute for the latter in terms of credibility. A network of bilateral investment agreements (BITs) has also emerged. But in both unilateral commitments and BITs, the larger developing

countries ('the Big Six': Brazil, China, Indonesia, India, Korea and Mexico) possess a much greater space for manoeuvre on account of their larger markets and greater weight in international forums. As a result, a multilateral investment agreement would offer several advantages over the existing patchwork of BITs and unilateral liberalisation measures. Investors would have a single standard to rely on. It would be well understood and could also be monitored by the recipient countries. It would be of particular value to the smaller developing countries, which lack the negotiating leverage to secure BITs that are favourable to them.

Much of the opposition to a multilateral investment agreement, has stemmed from the association of such an attempt with the MAI that was negotiated among the OECD countries, to the exclusion of developing countries. The opposition of developing countries and NGOs to this agreement was only one of the reasons that doomed the MAI to failure. To overcome the mistakes associated with the MAI, a more useful approach would be to negotiate a multilateral investment agreement within the WTO. The objective would be to establish 'a common set of binding rules providing a simplified, secure and predictable framework for investment encompassing existing bilateral agreements and practices.' These rules would cover asset protection, national treatment and dispute settlement. The interests of poor countries could be protected through provisions such as the concept of 'in like circumstances'. The concept allows a regulation of strategic sectors when foreign firms are very large relative to domestic firms.

However, it must be recognised that investment negotiations in the WTO will inevitably be slow. States are reluctant to bring issues associated with domestic jurisdiction to the international negotiating table, particularly when they spill over into questions of minimal labour and environmental standards and international tax issues.

Discussion

In the course of the discussion, chairperson Professor Neil McFarlane posed the counterfactual: what would be the consequences of not developing multilateral rules on investment? Further, given that a multilateral investment regime is also likely to curtail certain investment flows, is the establishment of such a regime desirable?

The speaker pointed out that liberalisation of financial flows has advanced rapidly from the national to the regional levels, and has further been institutionalised through various regional agreements. It is likely that the movement will expand over time to the international level. The issue then, is not whether an international investment regime will emerge, but whether it will emerge to help the poor. Tough international rules about investment flows may be devised as a part of such a regime to assist stability and growth in the least developing countries. Herein lies the scope for concerted policy formulation and action.

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