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TRADE AND DEVELOPMENT BOARD
Commission on Investment, Technology
and Related Financial Issues
Expert Meeting on Existing Agreements on Investment
and their Development Dimensions
Geneva, 28-30 May 1997
Agenda item 3

EXAMINE AND REVIEW EXISTING AGREEMENTS ON INVESTMENT AND THEIR DEVELOPMENT DIMENSIONS IN PURSUANCE OF THE MANDATE OF PARAGRAPH 89(b) OF "A PARTNERSHIP FOR GROWTH AND DEVELOPMENT"

Chairman's summary */

The discussions of the Expert Meeting were structured according to the following five themes:

A. Main reasons for concluding bilateral investment treaties

1. Most experts who spoke observed that, for host countries, the most important purpose of bilateral investment treaties is to attract foreign investment in the interest of development. Bilateral investment treaties may contribute to that objective in a variety of ways, especially by helping to establish a favourable investment climate, building confidence and sending a positive signal to investors. Experts also observed that, for home countries, the most important purpose of bilateral investment treaties is to secure predictable conditions for their investment abroad, including certain standards of treatment and protection, and independent third-party means for the settlement of investment disputes. It was noted that bilateral investment treaties, as a rule, do not commit home countries to take concrete action to promote investment flows to developing countries. The objectives of any particular country may change over time as its role as a home and host country evolves.

*/ At its closing plenary meeting, on 30 May 1997, the Expert Meeting agreed that the Chairman's summary would constitute the substantive part of the report of the Expert Meeting.

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2. There were some comments on the advantages and disadvantages of bilateral and multilateral investment frameworks. According to some experts, among the advantages of a bilateral framework were that bilateral investment treaties could be tailored to the specific circumstances of the two parties and are relatively easy to conclude. Some other experts were of the opinion that the advantages of a multilateral framework included greater stability and transparency and a better opportunity for smaller and developing countries to exercise their collective bargaining power with a view ensuring that the developmental dimension is fully taken into account. While some experts questioned the need for a multilateral framework, others supported it. Some experts expressed concern about the unequal position of developing countries and small States in bilateral negotiations; similar concerns were expressed about multilateral frameworks, especially if they did not sufficiently address the development dimension.

B. Issues addressed by bilateral investment treaties

3. Some experts commented on existing disciplines in bilateral investment treaties and explored the possibility of additional commitments. Bilateral investment treaties typically contain provisions guaranteeing fair and non-discriminatory treatment for investment, protecting investment against expropriation and other forms of non-commercial risk, and establishing mechanisms for third-party dispute resolution. Some bilateral investment treaties include other clauses, such as restrictions on performance requirements, provisions to promote transparency of national law and balance-of-payments issues.

4. There are a number of other investment-related issues that bilateral investment treaties do not always cover, but which may need to be addressed although, in the view of some experts, not necessarily by bilateral investment treaties. These include restrictive business practices, environmental standards, social responsibilities of investors and obligations for progressive liberalization.

C. Experience with the application of bilateral investment treaties

5. Many experts noted that there is very little practical experience with the use of bilateral investment treaties and the information available on their application is mostly anecdotal. Bilateral investment treaties' provisions for third-party dispute settlement may, in the view of some experts, induce settlement through negotiations and thus prevent disputes from maturing. This may be the reason why, although many bilateral investment treaties provide for settlement of disputes by the International Centre for Settlement of Investment Disputes (ICSID), the resort to ICSID has been relatively infrequent. It was pointed out that dispute settlement should be accessible and affordable. It was also stated by some that bilateral investment treaties were relatively unknown among investors (as opposed to providers of finance and insurance), although investors are concerned about the issues that bilateral investment treaties address.

D. The role of bilateral investment treaties in the development of national law and standards of international law

6. Several experts observed that bilateral investment treaties typically address the same topics in much the same terms, though there are important

differences among them. Bilateral investment treaties often reflect, and are consistent with, provisions of national law; in other cases, bilateral investment treaties influence national law by virtue of the laws which Parties enact to meet the requirements of the treaties. While bilateral investment treaties constitute lex specialis, establishing treaty rights and obligations for the Parties, some experts questioned to what extent bilateral investment treaties would or could give rise to rules of customary international law.

E. The development dimension

7. There was general agreement that the increasing number of bilateral investment treaties has resulted from the recognition of the positive role that foreign investment can play in economic development. While some experts observed a correlation between the conclusion of bilateral investment treaties and the growth of foreign investment, many others were unable to establish such a connection. Thus, the view was expressed that, while bilateral investment treaties may contribute to the growth of investment, they are only a tool, one factor in creating a favourable investment climate. Other factors that may play a greater role in attracting foreign investment include the size and growth of the market, the quality of infrastructure and skills, political, economic and legal stability, and the new parameters of a globalizing world economy.

8. Many experts observed that bilateral, regional and multilateral frameworks for investment must take into account a host country's developmental objectives. For this reason, some experts considered that investment frameworks need to strike a balance between providing predictable conditions for investment abroad and reserving for host countries the flexibility to pursue their economic development in the framework of their own laws; as regards the latter, agreements should indeed be constructed in a manner that promotes the economic development objectives of developing countries. Finding a balance between the rights and responsibilities of home countries, host countries and investors begins with an appropriate approach towards liberalization and transparency of measures in general, on the one side, and, on the other, a balanced set of commitments between home and host countries, taking into account the definition of investment, the role of home countries in facilitating investment through insurance programmes, incentives or otherwise, the importance of technology transfer and technology upgrading, the importance of high-quality investment especially in priority sectors, environmental and consumer protection, the control of restrictive business practices, performance requirements, the development of local enterprises in host countries and the social responsibilities of investors. There is also the questions of freedom for movement of capital and the freedom for movement of persons.

9. From a developing country's perspective, the ultimate test of any investment agreement is its development friendliness.