RETHINKING THE LINKAGES BETWEEN FOREIGN DIRECT INVESTMENT AND DEVELOPMENT: A THIRD WORLD PERSPECTIVE

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Abstract

Foreign Direct Investment (FDI) has been advocated as a panacea for the problems of the developing world for a long time. This article seeks to critically examine FDI and its "problem solving abilities" for the developing world. In doing so, the article narrows down and analyses the development of the legal and policy regime in seven specific areas of FDI activity. The analysis reveals the seldom-considered-ill-effects of FDI as a tool of development and trade at the international level. The article concludes by underlining the need to protect the interests of the developing world while charting out the future course of global FDI activity, if an equal world order is the goal. This will not be done by others and must be done by the developing countries themselves by undertaking various measures of capacity building for protection of their interests.

The seven areas the article analyses are: nature of investment treaties; dispute resolution; taking of property: expropriation, regulation and compensation; incentives; transfer of technology; corporate social responsibility, and; performance requirements.

Even as the global FDI activity sees a downturn under the effects of the financial and credit crisis and calls are made for fast and swift action to promote growth in FDI, this article underscores the importance of protecting the interests of the developing world for any action to be truly effective and meaningful.

I. INTRODUCTION

Of the many economic and commercial links between the states of the international community, arguably, the most overt and tangible is the link through foreign direct investment (FDI). FDI includes, *inter alia*, the transfer of tangible and intangible assets from one country into another for the purpose of their use in that country to generate wealth under the total or partial control of the owner of the assets[1]. Indeed, this characteristic of transfer of tangible assets for investment is unique

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1 M. Sornarajah, THE INTERNATIONAL LAW ON FOREIGN INVESTMENT 7 (2d ed., 2004).

to FDI. Moreover, the ability of the investor to exercise direct control over the management of the investment is also a peculiar feature of this type of investment.

Ever since FDI activity became a major component of international economic relations, several, including the WTO and UNCTAD, have touted it as being a panacea for the problems of the developing world. Without commenting on its correctness, it must be noted that this general excitement towards FDI translated into acceptance of this form of activity in the system of global trade. Taking this as a fact, this work then seeks to explore the linkages between FDI and development.

A columnist in a leading national daily in India recently compared the development of FDI activity to the proverbial act of throwing a frog in boiling water:

> "Throw a frog into a pot of boiling water and it will immediately jump out and survive. Put a frog into a pot of cold water and gradually raise the temperature to boiling point and it will stay in the pot and die. We laugh at the proverbial frog, but are we really that different?[2]"

The above question, thus, embodies the adverse effects of FDI if international regulation does not take into account the interests of the developing countries. After generating much excitement about the concept of FDI, signs that the developed nations may now use FDI as a tool to the adverse effects of the developing world are many. This work seeks to identify some such signs and offer remedial suggestions.

Part II of this work identifies seven areas or linkages between FDI and development. It is imperative for FDI to truly develop as a tool for global development that specific attention be paid to safeguard the interests of the developing nations. In effect, these areas represent "dangerous-zones" for the developing nations. The general trend of legal and policy regime development in these areas suggests the fact of FDI being adverse to the development of the third world. Nowhere is this list of seven linkages supposed to be exhaustive, it is merely a start, the Author hopes that the list only grows to safeguard the interests of the developing nations.

The recent global financial crisis only emphasizes the importance of keeping in mind the "development" dimension during the growth of the international regime regulating FDI. Even as the severe financial and credit crisis leads to dampening of

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2 Kishore Mahbubani, *Custodians of Liberal Trade, Can Asians Think? Hindustan Times,* June 26, p.11. Of course, the imaginary frog is a symbol of a much greater problem, *see* Paul Krugman, *Boiling the Frog*, *New York Times* A19 (13 July, 2009). Krugman explains: "the proverbial frog that, placed in a pot of cold water that is gradually heated, never realizes the danger it's in and is boiled alive. Real frogs will, in fact, jump out of the pot – but never mind. The hypothetical boiled frog is a useful metaphor for a very real problem: the difficulty of responding to disasters that creep up on you a bit at a time."

FDI growth and calls are being made for a 'fast, flexible, and coordinated response',[3] it is imperative that such a response take into account the interests of the developing nations, for it to be truly meaningful and effective.

This article crystallizes the already present difference in the interests of the host state and the home state. Admittedly, it is just an attempt, amongst many others, to streamline the objectives of FDI and its impact with the ideas of sustainable development and to maximize its developmental benefits. This is no small task, however, and in recognition of this ambitious responsibility, the humble scope of the article is, at least, to identify areas where synchronization between FDI and development objectives is imperative.

II. Linkages Between FDI and Development

A. Nature and Purpose of Investment Treaties

The forces of bilateralism have been extremely successful in international regulation of FDI. Every bilateral investment treaty (BIT) begins with a declaration as to the purpose of the treaty. This is usually stated to be the reciprocal encouragement and protection of investments.[4] This purpose, however, disguises the important fact that the flow that is contemplated, in reality, has little concern for the development concerns of the host nations.

In a claim against Chile, the ICSID (International Centre for Settlement of Investment Disputes) arbitral Tribunal in interpreting a Treaty provision opined that it would interpret the provision "in the manner most conducive to fulfill the objective of the BIT to protect investments and create conditions favourable to investments."[5]

In another BIT dispute-arbitration the ICSID tribunal held that it had to interpret the treaty provisions and rules in light of the treaty's object and purpose which was to "create favourable conditions for investments and to stimulate private initiative."[6]

In a third instance, the tribunal held that a similar, narrow treaty preamble and object mandated that "It is legitimate to resolve uncertainties in its interpretation so as to favour the protection of covered investments."[7]

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3 World Bank, *MIGA Tackles Declining FDI Levels and Growth Prospects in Vulnerable Economies*, 12 January, 2009, available at: http://web.worldbank.org/WBSITE/EXTERNAL/NEWS/0,,contentMDK:22031807 ~page PK:34370~piPK:34424~theSitePK:4607,00.html.

4 Sornarajah, *supra* note 1, 218.

5 *MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile* (ICSID Case No. ARB/01/7) at para.104.

6 *Siemens AG v. Argentine Republic* (ICSID Case No. ARB/02/08) at para.81.

7 *SGS v. Philippines* (ICSID Case No. Arb/02/06) at para.116.

The above three examples elucidate the generally narrow and lop-sided drafting of investment agreements, with emphasis on economic exploitation and little else in the form of broader objectives concerning development. Though, some treaties may take into consideration broader objectives of sustainable development etc., the parochial objectives of most treaties have a similar impact on the interpretation of the treaties, as is evidenced by the above awards.

In fact, to offset this inherent bias present in the purpose and object of some investment treaties, Professor Sinclair cautions the "risk that the placing of undue emphasis on the 'object and purpose' of a treaty will encourage teleological methods of interpretation [which], in some of its more extreme forms, will even deny the relevance of the intention of the parties"[8].

In adopting such an approach it is not the tribunal that is at fault, instead, much of the blame would go to the host State Government, which accepted such a narrow objective or Preamble in the first place. This may in turn, stem from the host country government's weak bargaining power resulting in an unfavorable distribution of benefits.[9]. The weak bargaining power is only an expression of the earnestness of the host countries to reach an agreement on investment with a major capital-exporting country, and the capital-exporting countries can in turn, demand strong protections for their foreign investors[10]. This coupled with the lesser fact that most treaties between developing countries and developed states are made by persons unskilled in international law, on the one side, and a team of sophisticated lawyers and economists, on the other[11] can be attributed to be the cause of narrow and uni-dimensional drafting of the treaties with little in the name of development.

Another reason on why there is no, or little, reference to economic development in investment treaties is the very premise on which investment treaties are made. The underlying assumption of investment treaties is that inflow of foreign investment leads to economic development and that such treaties lead to greater flow of foreign investment[12]. Both these assumptions are coming to be challenged.

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8 I. Sinclair, *The Vienna Convention on the Law of Treaties* (1984), at 130 Cited in *Plama Consortium Ltd v. Republic of Bulgaria*, decision on jurisdiction, 8 Feb. 2005, ICSID Case No. ARB/03/24, available at: http://ita.law.uvic.ca/chronological_list.htm., para.193; *See further* Yannick Radi, The Application of the Most-Favoured-Nation Clause to the Dispute Settlement Provisions of Bilateral Investment Treaties: Domesticating the 'Trojan Horse', 18 *Eur. J. Int'l L.* 757.

9 UNCTAD Secretariat, *An Overview of the Issues*, in UNCTAD, *The Development Dimension of FDI: Policy and Rule-Making Perspectives*, (New York & Geneva: UN, 2003) at p.2; *UNCTAD,* Investor–State Dispute Settlement and Impact on Investment Rulemaking, (UNCTAD/ITE/IIA/2007/3).

10 A.T. Guzman, *Why LDCs Sign Treaties that Hurt them: Explaining the Popularity of Bilateral Investment Treaties*, 38 Va. J. Int'l L. 639.

11 M. Sornarajah, THE INTERNATIONAL LAW ON FOREIGN INVESTMENT, (Cambridge University Press, 2004), p.219.

12 Sornarajah, p.262.

As is evident from practice, many states, particularly the least developed states, have liberalized their foreign investment laws and made a large number of treaties without witnessing the expected increase in the flow of foreign investment[13]. Even the institutions that had been promoting these treaties, now have studies indicating that any evidence that the treaties lead to positive flow of foreign investment is non existent and conjectural.[14] Thus, since the underlying assumption of the treaties is that flows of foreign investment leads to economic development, there is no reference to development in the treaties.

Another area of concern is the definition of an "investor" in an investment treaty. The openness of the definition allows foreign countries to choose a "home country of convenience".[15] In making this choice the investor would like to choose a home country which has a treaty with the prospective host country that would maximize the economic profits. Development would be of least concern to the investor in 'treaty shopping'. The potential for such abuse has been noted and addressed by the international community. The NAFTA includes a provision which allows a party to deny the benefits of the treaty to investors that have no 'substantial business activities' in their home country.[16]

Thus, we see, to the extent that development is addressed in international investment rulemaking, it is done in an indirect manner, and in a primarily defensive way, in order to shield the investors from shouldering full responsibilities under the agreement.[17]

B. Dispute Resolution

1. Internationalization

Majority of today's investment treaties provide for international arbitration as the means to settle disputes. Such treaties provide foreign investors with the ability to circumvent the local and national legal systems[18], in favour of an essentially private form of dispute settlement – investment treaty arbitration. This system of

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13 E.g. Ghana; See further Sornarajah, 262.

14 Mary Hallward-Driemeier, *Do Bilateral Investment Treaties Attract FDI? Only a Bit.... And they Could Bite,* WORLD BANK WORKING PAPER.

15 UNCTAD, Investor State Disputes Arising from Investment Treaties: A Review, (New York & Geneva: UN, 2005) at p.21.

16 Article 1113.2, The North American Free Trade Agreement.

17 UNCTAD, IIA Monitor No. 2 (2007): *Development Implications of International Investment Agreements*, 7, UNCTAD/WEB/ITE/IIA/2007/2 (September 1, 2007).

18 Modern Treaties rarely require the application of the exhaustion of local remedies rule, before the investor moves for arbitration. In fact, Arbitral tribunals have seized jurisdiction without the exhaustion of local remedies, even where the BIT mandated that local remedies be exhausted prior to commencement of arbitration. *See Maffezini v. Kingdom of Spain* (ICSID Case No. ARB/97/7) Decision of the Tribunal on Objections to Jurisdiction (Jan. 25, 2000), Award (Nov. 13, 2000), Procedural Order No.2.

investment dispute settlement, which was popularized during the BIT boom of the 1980s and 1990s, envisages that disputes between foreign investors and host states be settled by resorting to *ad hoc* arbitration under the rules of one of the many arbitral institutions. Thus, we essentially see a trend of internationalization of disputes as far a investment treaties are concerned.

The system of investment dispute settlement has borrowed its main elements from the system of commercial arbitration.[19] Arbitration, as a dispute settlement mechanism is not a panacea to development issues in cases of investor-state disputes. The basic reason for this is the conflict between the essentially private nature of arbitration and the often public nature of the issues at stake in investment treaty arbitrations. Investor-state arbitration is to be distinguished from classic commercial arbitration, on the basis of the State being the Respondent and the issues being decided in accordance with a treaty and the principles of public international law. Further, the decision on the dispute could have a significant effect extending beyond the two disputing parties.[20] Investor-state arbitrations usually concern controversial subjects, in which a State is a party, involves a clear public content, that directly affect the fundamental human rights of a sizeable population.[21] In this regard, the first and principal criticism of investor-state arbitration is its opacity. Keeping the public nature of issues in investor-state disputes in mind, the legitimacy of the decision and the arbitration is affected by the secrecy involved in the proceedings. In that regard, the decisions that affect millions of people cannot, and should not, be adopted in secrecy or in disregard of the interests of the affected population.[22] The OECD notes that under the existing rules in this area, hearings are treated as entirely private matters and publication of the resulting award often depends on the decision of one or both parties. There are cases in which published awards are edited to obscure the identity of the parties.[23] Even where *amicus briefs* have been accepted by tribunals, the hearings have been closed to the public.[24] Another argument against opacity in investment arbitration is the close relationship that exists between the ICSID, the authority entrusted with dispute resolution, and the World Bank Group, which in

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19 OECD, *Transparency and Third Party Participation in Investor-State Dispute Settlement Procedures, available at* www.oecd.org/dataoecd/25/3/34786913.pdf.

20 Nigel Blackaby, *Public Interest and Investment Treaty Arbitration, Transnational Dispute Management*, (Volume I, Issue #1) available at: http://www.transnational-dispute-management.com/samples/freearticles/tv1-1-article_56.htm.

21 See Petition for Transparency and Participation as Amicus Curiae in *Aguas Argentinas, SA v. Republic of Argentina,* ICSID Case Number ARB/03/19 available at http://www.ciel.org/Tae/Suez_ICSID_8Feb05.html.

22 *Id.*

23 Jack J. Coe, Jr., *Taking Stock of NAFTA Chapter 11 in its Tenth Year: An Interim Sketch of Selected Themes, Issues and Methods*, 36 Vanderbilt Journal of Transnational Law 1381.

24 CIEL, *ICSID Tribunal Affirms its Power to Admit Amicus Curiae Participation,* available at: http://www.ciel.org/Tae/ICSID_AmicusCuriae_1Jun05.html.

some cases may have an equity share or some regulatory influence over the Investor.[25] This relationship would clearly create a source of potential conflict of interests.[26]

The proponents of this mechanism may argue the points of speedy disposal and unfair treatment to the investor by the local court. Som also contend that internationalization of investor-state disputes would ensure that the dispute is resolved in light of international principles of development and environmental protection. However, practice paints a different picture. As mentioned above, the Tribunals have generally interpreted the Treaties through the lens of the narrow objectives and preambles.[27] In an arbitration proceeding concerning Article 1114(1) of the North American Free Trade Agreement (NAFTA), which addresses environmental concerns,[28] the Tribunal, in interpreting the provision, labeled it as merely 'hortatory'. The Tribunal did not even consider the Canadian defense – that Canadian hazardous waste should be disposed of in Canada itself, and not be sent across the border into the United States for disposal. This, despite the fact that Canada's stand to prevent the export of hazardous waste was in consistency with the obligations under the Basel Convention on the Transboundary Movement of Hazardous Waste.[29] Even with regards to human rights protection in international trade, tribunals have not accorded 'human rights' such a scope as would enable the interests contained in the formula to outweigh the interests of free trade.[30] In an arbitration proceeding initiated by a Costa Rican corporation with majority U.S. shareholders against the Republic of Costa Rica, the tribunal held that a foreign investment contract to convert a coastal area into a tourist resort had priority over a later decision of the state to preserve the unique wildlife of the region by converting the area into a nature reserve.[31] These decisions, made under various investment treaties, indicate that there is insensitivity towards issues of development in the very tribunals which obtain jurisdiction over the dispute through the dispute settlement mechanisms in

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25 See *Aguas Argentinas, SA v. Republic of Argentina,* ICSID Case Number ARB/03/19. Here the IBRD had played a key role in the design of the regulatory framework for public services under concession and in the privatization process, and the IFC held a percentage of Aguas Argentinas S.A, the investor, equity shares.

26 See CIEL AMICUS BRIEF p.13.

27 *Supra* n.1, 2, 3.

28 Article 1114(1) NAFTA reads: "Nothing in this Chapter shall be construed to prevent a Party from adopting, maintaining or enforcing any measure otherwise consistent with this Chapter that it considers appropriate to ensure that investment activity in its territory is undertaken in a manner sensitive to environmental concerns." Available at <http://www.sice.oas.org/trade/nafta/chap-111.asp>

29 Article 4(2) of the Basel Convention reads: "Each Party shall take appropriate measures to: ... (d)Ensure that the transboundary movement of hazardous wastes and other wastes is reduced to the minimum consistent with the environmentally sound and efficient management of such wastes, and is conducted in a manner which will protect human health and the environment against the adverse effects which may result from such movement" available at: http://www.basel.int/text/documents.html.

30 See e.g. *The Thai Tobacco Case* (1991) 37 GATT BISD 200.

31 *Santa Elena v. The Republic of Costa Rica,* ICSID Case No. ARB/96/1 (February 17, 2000).

international investment treaties.[32] Arguably, this may be worse than the non confidence of the foreign investor, based on the probability of bias, in the local courts and tribunals.

With provisions on investor-state arbitration written into treaties concluded by more than 170 nations–including virtually all OECD countries - it seems that the sheer number of countries that have consented to this dispute resolution model far exceeds the number of countries where corruption or inefficiency in the courts would seem to be a serious problem.[33] Another important point to be noted is that arbitration under the ICSID procedure is exempt from intervention or review by the local judicial bodies.

Solutions that have been offered to remedy some of these problems have themselves been very ambiguous. For example, the UNCTAD, acknowledging the need to prevent frivolous claims by investors suggests 'only the most serious claims'[34] should be brought before the dispute settlement bodies. This only leads to more questions like: what will be the criteria for judging the 'seriousness' of a claim? Who would judge the 'seriousness' of claims before the matter is brought to a dispute settlement body?

2. Costs

The costs of arbitration under investment treaties are substantial enough to bear a heavy burden on developed, and particularly the least developed countries. The average cost of hiring arbitrators for an ICSID Arbitration can be close to US$ 500,000.[35] The fees for hiring arbitrators has been constantly on the rise in 2002 the ICSID's daily fees payable to international arbitrators was increased from US$1100 to US$2000 and effective January, 2008 it has been increased to US$3000 per day.[36] The fee for legal counsels is still higher. The UNCTAD estimates the average costs for governments to be between $ 1 million and $ 2 million.[37] The Czech Republic had recently announced that it will spend nearly US$3.3 million in 2004 and US$13.8 million in 2005, to defend against more than half-a-dozen foreign investment arbitrations.[38] Compare these costs with the three-year average Gross National Income (per capita) of less than US $750 for Least Developed Countries, (which must exceed

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32 Sornarajah p.265.

33 Luke Peterson, *Bilateral Investment Treaties and Policy Making*, (International Institute for Sustainable Development, 2004) available at <http://www.iisd.org.> at p.22.

34 UNCTAD, World Investment Report 2003, (Geneva & New York: UN, 2003), p.117.

35 *Ibid.*

36 ICSID, *Schedule of Fees,* available at <http://icsid.worldbank.org>.

37 UNCTAD, Investor State Disputes Arising from Investment Treaties: A Review, (New York & Geneva: UN, 2005) at p.8

38 Luke Peterson, *Croatian firm invokes investment treaty to challenge Czech eviction notice*, *INVEST-SD News Bulletin*, Oct. 1, 2004, <http://www.iisd.org/pdf/2004/investment_investsd_oct1_2004.pdf>

$900 to leave the list).[39]

This rise in investment disputes poses a particular challenge for developing countries. The financial implications of the investor-State dispute-settlement process can be substantial, from the point of view of both the costs of the arbitration proceedings and the awards rendered. In light of the large sums that have been awarded by some tribunals and the concern that developing countries will not be able to pay them, there is growing consensus in the international community that the development impact of an award should be taken into account by the tribunal before deciding on the measure.[40]

Many developing countries, in their over-eagerness, are entering into "high standard" investment regimes without understanding the litigious culture in which many investors operate and consequently underestimating the potential liabilities they may face in investor initiated disputes.[41]

C. Taking of Property: Expropriation, Regulation and Compensation

As a standard protection, investment treaties typically ensure that investors subjected to direct or indirect forms of expropriation will be compensated for their losses. However, the law in this area is still nebulous.

Take, for example, the case of environmental regulation leading to expropriation of the investor's assets.[42] Measures falling within the police powers of the state[43] are treated by international law as outside the scope of a taking of property[44] and are treated as regulations,[45] for which there is no need for payment

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39 UN-OHRLLS, *Criteria for Identification of the LDCs*,<http://www.un.org/special-rep/ohrlls/ldc/ldc%20 criteria.htm>.

40 UNCTAD, World Investment Report 2003, (Geneva & New York: UN, 2003), p.117.

41 Preparatory Committee for UNCTAD XI, Hearing with Civil Society and the Private Sector, *Statement of Mr. Stephen Porter,* available at: www.un-ngls.org/CIELfinal.doc.

42 Consider a situation where the investment is expropriated by the host state government to prevent the harm it was causing to the local environment. This is a common situation, foreign investments in developing countries are hardly screened for environmental impact and other developmental effects. Once the investment is allowed, its harmful effects on the environment are manifested. In the absence of strong regulatory frameworks in the developing countries, expropriation of the assets may be the only recourse available in such a situation.

43 For our purposes this includes: general taxation, regulation, forfeiture for crime, or other action of the kind that is commonly accepted as within the police power of states. *See* "Restatement of the Law Third, the Foreign Relations of the United States," *American Law Institute, Volume 1, 1987, Section 712, Comment g.*

44 In the case of *Técnicas Medioambientales Tecmed S.A, v. The United Mexican States*, ICSID Award Case No. ARB (AF)/00/2, although the Tribunal found an expropriation, it has stated that: "the principle that the State's exercise of its sovereign power within the framework of its police power may cause economic damage to those subject to its powers as administrator without entitling them to any compensation whatsoever is undisputable".

45 Howard Mann & Konrad von Moltke, *NAFTA's Chapter 11 and the Environment, Addressing the Impacts of the Investor-State Process on the Environment,* Working Paper 5, 599 (1999) available at http://www.iisd.org/pdf/

of compensation,[46] even if the regulation leads to the property losing all its value.[47] A breach in the ends of an important sovereign purpose need not be compensated.[48] The police powers referred to above, have been held to encompass environmental regulations.[49] Measures that are to protect the environment are non compensable,[50] and can justify severe destruction of alien property rights.[51] Protection of fauna and flora by not allowing extractions is a valid regulatory measure,[52] and is in conformance with the public trust doctrine.[53]

On the other hand there is enough jurisprudence to suggest that even environmental measures cannot fully diminish the value of an investment,[54] deeming it to be a police power. The sole effect test holds that the more restrictive a regulation,[55] the more the taking is an expropriation. When there is a clear commitment that compensation would be paid, then a taking without compensation would amount to expropriation.[56] Cases have in fact noted that "regulations can indeed be characterized in a way that would constitute creeping expropriation."[57]

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nafta.pdf; Keystone Bituminous Coal Ass'n v. DeBenedictus, 480 U.S. 470, 486 (1987); *Sea-Land Service Inc. v. The Islamic Republic of Iran*, 6 Iran-U.S.C.T.R. 149, 187 (1984).

46 G. C. Christie, *What Constitutes a Taking of Property Under International Law?,* 38 BYIL 307, 367 (1962); Restatement (Third) of the Foreign Relations Law of the United States § 712; Yves Fortier & Stephen L. Drymer, *Indirect Expropriation in the Law of International Investment: I Know It When I See It or Caveat Investor*, Icsid Review, Vol. 19, No. 2, 292 (2004); *Mugler v. Kansas*, 123 U.S. 623 (1887).

47 Penn Central Transportation Co. v. New York City, 438 U.S. 104 (1978); Michael A. Wolf, *Taking Regulatory Takings Personally: The Perils of (Mis)reasoning by Analogy,* 51 Ala. L. Rev. 1355, 1373-77 (2000); Matthew C. Porterfield, *International Expropriation Rules and Federalism*, 23, Stan. Env. L.J. 3 (2004).

48 Peter Charles Choharis, *U.S. Courts And The International Law Of Expropriation: Toward A New Model For BreachOf Contract*, 80 S. Cal. L. Rev. 1, 8 (2006); Arbitration between Valentine Petroleum & Chemical Corp. and Agency for International Development, 44 ILR 79, 89 (1967).

49 Art. 8.4, Multi Investment Guarantee Agency Rules Cf. S.K. Chatterjee, *The Convention Establishing the Multilateral Investment Guarantee Agency*" 56 *ICLQ* 76, (1987); Art. 915, North American Free Trade Agreement, *available at* http://www.dfait-maeci.gc.ca/nafta-alena/agree-en.asp.

50 J.L. Sax, *Takings, Private Property and Public Rights*, 81 Yale L.J. 149 (1971); *International Bank v. Overseas Private Investment Corporation,* 11 I.L.M. 1216, 1227 (1972).

51 Benjamin W. Jenkins, *The Next Generation Of Chilling Uncertainty: Indirect Expropriation Under CAFTA And Its Potential Impact On Environmental Protection*, 12 Ocean & Coastal L.J. 269, 289 (2007).

52 Special Committee on The Multilateral Agreement on Investment, *First Report*, 107, (1999), *available at* http://www.leg.bc.ca/cmt/36thParl/mai/1998/1report/index.htm.

53 Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention,* 68 Mich. L. Rev. 471, 485 (1970); *Sierra Club v. Morton*, 405 U.S. 727, 741-60 (1972).

54 Art. 2101, North American Free Trade Agreement, *available at* http://www.dfait-maeci.gc.ca/nafta-alena/agree-en.asp.

55 Yves Fortier & Stephen L. Drymer, *Indirect Expropriation in the Law of International Investment: I Know It When I See It or Caveat Investor*, 19 ICSID Review 280, 292 (2004); David F. Coursen, *The Takings Jurisprudence of the Court of Federal Claims and the Federal Circuit,* 29 Envtl. L. 821, 848 (1999); *Agins v. Tiburon*, 447 U.S. 255, 266 (1980).

56 M. Sornarajah, *The International Law of Foreign Investment*, 294, (1994); Garcia Amador, Special Rapporteur, *Fourth Report on State Responsibility*, 1959, YBILC, Vol. 2, A/Cn.4/119, 45; *First Fid. Bank, N.A. v. Ant. & Barb.–Permanent Mission*, 877 F.2d 189, 193 (1989).

57 *Pope and Talbot v. Canada,* June 26, 2000, para 99.

A solution to this problem may be more detailed and specific drafting of the treaty by the developing countries, ensuring explicitly that sufficient room is available to them for protection and preservation. A recent Japanese BIT with Vietnam seeks to clarify that "the imposition of taxes does not generally constitute expropriation"– and offers several paragraphs of guidance on the matter to prospective arbitrators[58].

D. Incentives

Incentives are one of the many instruments used by governments to attract investment, to steer investment into favored industries or regions, or to influence the character of an investment, for example, when technology-intensive investment is being sought.[59] Incentives have been classified into three types: fiscal, financial and other incentives.[60] Fiscal would imply tax advantages to investors based on different criteria like profit (reduction of standard corporate tax rate, tax holidays *et cetera*), labour (reduction in social security contribution), import (duty exemptions on capital goods), etc..[61] Financial would imply provision of funds or capital directly to the investors in the form of investment grants, subsidized credits and credit guarantees and government insurance at preferential rates. Other incentives include regulatory incentives, subsidized services, market privileges and foreign exchange privileges.[62] The general effect of incentives as a class, is an overall increase in the profitability of the investment.

Although reliable statistics concerning the size of these incentives are lacking, a study conducted by the UNCTAD notes that incentive activities have increased considerably since the mid-1980s.[63] Empirical studies show that investment incentives play only a limited role in determining the international pattern of foreign investment.[64] The cross country variation in FDI inflow instead is a result of factors like market characteristics, relative production costs and resource availability. Nevertheless, these incentives may play a clinching role in deciding the flow of FDI in a highly competitive world economy, where competing host states are almost equally matched in all other aspects.

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58 See *Agreed Minutes of Japan-Vietnam agreement for the liberalization, promotion and protection of investment*, 2003 available at: Japan-Vietnam Agreement: http://www.mofa.go.jp/region/asia-paci/vietnam/agree0311.pdf.

59 UNCTAD, Incentives and Foreign Direct Investment (New York and Geneva, United Nations, 1996) at p.1. See also UNCTAD *Incentives* Series on issues in international investment agreements (New York and Geneva, United Nations, 2004).

60 UNCTAD, Incentives and Foreign Direct Investment, (New York & Geneva: UN, 1996); UNCTAD, *World Investment Report 1996*, (New York and Geneva: 1996).

61 See further UNCTAD, Incentives: Series on Issues in International Investment Agreements (New York and Geneva: United Nations, 2004), p.6.

62 *Id.*

63 UNCTAD 1996.

64 Blomström, M., A. Kokko and M. Zejan, Foreign Direct Investment. Firm and Host Country Strategies, (London: Macmillan, 2000).

The primary *caveat* concerning incentives, emerging from the research thus far, is that incentives should not be used where foreign investors do not differ fundamentally from local companies.[65] This is based on many reasons such as the distortion of competition in the economy that will result from subsidizing FDI and may lead to sizeable losses to domestic investors.[66] Thus, the rationale for subsidizing the inward FDI is to correct the failures of the market to reflect the "spillover" benefits.[67]

Problems with incentives, though underplayed by most developed nations, are many. Incentives prepare the ground for rent seekers.[68] Selectivity, in combination with opacity, increases the risk of rent seeking and corruption.[69] On the other hand, policy measures that focus on broad and general forms of support that are available to all firms, irrespective of nationality, tend to reduce rent-seeking and corruption.[70] As noted earlier, in an economic order where incentives would determine the flow of FDI, competition amongst governments to attract FDI may create problems. When governments compete to attract FDI there is a tendency to overbid and the subsidies may well exceed the level of spillover benefits, which will result in developmental losses.[71] These problems may be severe, if the incentives discriminate against local firms and cause losses of local market share and employment. However, the most important argument against incentives offered exclusively to foreign firms is based on the evidence that 'spillover' effects of FDI are not automatic, but depend crucially on conditions for local firms. The potential for spillovers is not likely to be realized unless local firms have the ability and motivation to learn from foreign MNCs and to invest in new technology.[72]

Incentives thus imply an outflow (in the form of the incentive) and an inflow (in the form of what the incentive seeks to achieve) of resources, and a careful balancing of the two would be required for development to remain sustainable. Fiscal incentive would entail loss of revenue by the host in the form of taxes. Financial

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65 M. Blomström, *The Economics of International Investment Perspectives,* in OECD, International Investment Perspectives, No.1 (2002) available at http://www.oecd.org/document/32/0,3343,en_2649 _201185 _1960864_1_1_1_1,00.html; K. Flamm, *The Volatility of Offshore Production*, Journal of Development Economics Volume 16 (1984), 231-248

66 Blomstrom/OECD.

67 Id. On spillover benefits, see Robert Lipsey, *Home and Host Country Effects of FDI* (Paper presented at the ISIT Conference on Challenges to Globalization, Sweden, 2002) available at: http://www.cepr.org/meets/wkcn/2/2316/papers/lipsey.pdf.

68 Blomstrom, p.176.

69 J. Bhagwati, FREE TRADE TODAY, (Princeton: Princeton University Press).

70 Blomstrom, p.177.

71 C. Oman, *Policy Competition for Foreign Direct Investment: A Study of Competition Amongst Governments to Attract FDI,* (Paris: OECD, 2000).

72 Blomstrom, p.177.

incentive would imply a direct offer of funds to the investor, *i.e.* a diversion of public funds to the investor and thereby public funds would become unavailable for other developmental purposes. Thus a careful economic analysis must be done in order to ensure that incentives to investment do actually result in sustainable development.

E. Transfer of Technology

Access to technology remains one of the basic requirements for economic growth and development. The less developed countries generally have limited access to technology and it would be difficult to meet their demands from domestic and internal sources. Investment can – and does – act as a tool here to facilitate efforts of the nations to acquire new technology. An investment relation between such a country and a developed country with advanced technology leaves room for transfer of technology and if done in the proper way, it can be highly beneficial for the development of the host nation.

Transfer of technology from the investor to the local-firms can happen either directly, such as a joint-venture between the local-firm and foreign investor, or indirectly, mainly by way of 'spillover' effects. Spillovers can occur in four ways: vertical linkages between affiliates and their suppliers and customers in the host country; horizontal linkages between between affiliates and domestic firms in the same sector; labour turnover from the affiliates to domestic firms; and internationalizations of R&D.[73]

Extensive empirical research, coupled with improved analytical techniques and models, has helped chart the relationship between FDI and technology transfer with specific reference to developing countries. Such research focuses on both, direct (joint venture) and indirect (spillovers) transfer of technology.

An important distinction raised by empirical evidence is between spillovers in developed and developing nations. Evidence on spillovers to local firms, where the firm is not engaged in a joint venture, is particularly weak for developing countries.[74] Research on developed countries consistently shows positive spillovers,[75] however, the case of developing nations is mixed.[76] Further, whereas the evidence for spillovers in vertical linkages is positive, it remains mixed in case of spillovers in

73 Moses M. Ikiara, *Foreign Direct Investment, Technology Transfer and Poverty Alleviation* (ATPS Special Paper Series No. 16) at 8-9, available at: http://www.atpsnet.org/pubs/specialpaper/SPS%2016.pdf [Hereinafter Ikiara].

74 Kamal Saggi, Trade, Foreign Direct Investment and International Technology Transfer : A Survey (Southern Methodist University) Nagesh Kumar, Foreign direct Investments and Technology Transfer in Development: A Perspective on Recent Literature (INTECH Paper No. 9606, United Nations University, 1996).

75 A. Kokko, *Technology Market Characteristics and Spillovers*, 43 Journal of Development Economics 279.

76 M. Haddad and A. Harrsion, *Are There Positive Spillovers from Direct Foreign Investment?* 42 Journal of Development Economics 51 1993.

horizontal linkages.[77] Being cautious, it can be said that FDI generates spillovers that lead to economic growth in certain circumstances. Such spillovers contribute to improving education levels,[78] wealth[79] and trade-openness.[80] However, the effect of spillovers is determined by a host of other factors, including: competition, labour standards, absorptive capacity of local firms (education), nature of FDI etc.[81]

Though international investment agreements have generally been silent on technology transfer, the willingness of home states to facilitate access to and transfer of technologies to host states is reflected in a number of other international agreements.[82] These agreements recognize that technology transfer to developing countries is important to enable their integration into the global economy, and meet their international obligations and commitments. They also acknowledge that technology transfer is important in facilitating the creation of a sound and viable technological base in developing countries.[83]

An integration of issues of technology transfer into Investment Agreements may be necessary for balancing the international market for technology and ensuring that technology is available to the least developed nations. At present the TRIPS Agreement offers only rather limited commitments. It may well be that such commitments may need to be extended into full technology transfer policies based on a legally binding commitment to ensure adequate access to technology.[84] Moreover,

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77 Ikiara 11.

78 E.D. Borensztein, *How Does Foreign Direct Investment Affect Growth*, 45 Journal of International Economics 1998.

79 M. Blomstrom, A. Kokko & M. Sejan, *Host Country Competition and Technology Transfer by Multinationals*, 130 *Weltwirtschaftliches Archiv* 52 (1994).

80 V.N. Balasubramanyam, M.A. Salisu & D. Sapsford, *Foreign Driect Investment and Growth in EP and IS Countries*, 106 Economic Journal 92 (1996).

81 Ikiara 11, 12.

82 UNCTAD COMPENDIUM OF INTERNATIONAL ARRANGEMENTS ON TECHNOLOGY TRANSFER: SELECTED INSTRUMENTS, (Geneva, United Nations, 2001), UNCTAD/ITE/IPC/Misc.5.

83 UNCTAD, FACILITATING TRANSFER OF TECHNOLOGY TO DEVELOPING COUNTRIES: A SURVEY OF HOME COUNTRY MEASURES (Geneva & New York, United Nations, 2004).
For example, the General Agreement on Trade in Services (GATS) acknowledges that the increased participation of developing country members in world trade shall be facilitated through, *inter alia,* access to technology on a commercial basis (Article IV) and further calls on Members to encourage foreign suppliers of telecommunication services to "assist" in the transfer of technology, training and other activities that support the development of their telecommunications infrastructure and expansion of their telecommunications services trade (Article XXV). In the TRIPS Agreement, certain development-oriented provisions have been included. For example, this Agreement contains, in Articles 66 and 67, a duty on the part of home countries to promote the transfer of technology to the least developed county members and to engage in positive programmes of cooperation with the developing and least developed countries in order to implement the substantive terms of the TRIPS Agreement. In addition the TRIPS Agreement offers transitional provisions allowing developing countries an extended period in which to ensure compliance with the disciplines introduced by the Agreement.

84 See Keith E. Maskus, INTELLECTUAL PROPERTY RIGHTS IN THE GLOBAL ECONOMY (Washington DC, Institute for International Economics, 2000) at pp.239-40.

in order to ensure sustainable development with an eye towards the environment it would be better to ensure transfer of environmentally sound technology.

F. Corporate Social Responsibility

This is another major point of intersection between investment and development and how the former can facilitate the latter. Corporate social responsibility, as a facet of investment, can propel development in three basic areas: labour rights, human rights, and environmental issues and development. This is not to say that this is an exhaustive list of what corporate social responsibility seeks to achieve, for it aims to further fair competition, anti-corruption, consumer protection etc.

In the recent past, there has been an increase in 'voluntary' efforts at corporate social responsibility, which includes such endeavours as voluntary codes of conduct, improved health and safety standards and social investment. Proponents hail these as innovative and pragmatic efforts at maximizing the contribution of foreign firms in development.[85] Efforts at corporate social responsibility can also serve as alternative to government regulation, especially in light of the changes in governance brought about by globalization in the developing countries. Critics, on the other hand, attack corporate social responsibility on two grounds:[86] first, that corporate social responsibility is a good attempt, however, it needs to be broadened and implemented better. For this, it is imperative that there be better integration between voluntary conduct and laws and government regulation.[87] Second, there is a belief amongst many that corporate social responsibility tends to be 'North Driven' and focuses on a narrow group of issues of relevance to the developing nations. Thus, for it to be truly meaningful corporate social responsibility efforts need to address issues affecting developing countries in greater detail.

At the international level, The UN has played an important role in promoting partnerships with TNCs through efforts like the Global Compact,[88] and numerous initiatives brokered or announced at the World Summit on Sustainable Development,

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85 Peter Utting, *Promoting Development Through Corporate Social Responsibility – Does it Work?* Global Future (1 September, 2003) available at: http://www.unrisd.org/unrisd/website/newsview.nsf/(httpNews)/B163470112831808C1256DA90041ECC5?OpenDocument [Hereinafter Utting].

86 Utting, *Id*.

87 Julien Levis, *Adoption of Corporate Social Responsibility Codes by Multinational Companies*, 17 Journal of Asian Economics 50. Levis notes: "MNCs' managers have no incentive to adopt codes that truly limit corporate externalities. Regulation by public authorities or at the industry level provides better safeguards than regulation by the individual company itself", *Id.* At 50.

88 "The UN Global Compact (GC) is a voluntary corporate citizenship initiative that engages businesses with civil society and labor organizations, governments, academic institutions and other stakeholder groups. It is based on ten universal principles that address the areas of human rights, labor, environment, and anti-corruption." *See* Amy Wing Shan Ko, *Overview of the Global Compact and CSR*, UN Connections Issue No. 83, available at: http://www.wfuna.org/site/c.rvIYIcN1JwE/b.4177929.

held in Johannesburg in 2002.[89] In respect to these international efforts, Utting notes:

> "As currently constituted, however, many UN-business partnership initiatives are characterised by weak screening mechanisms to select appropriate partners, and weak compliance mechanisms to ensure that companies significantly improve their social and environmental performance. There are also concerns that partnerships provide the corporate sector with undue influence in the governance structures of multilateral institutions and the public policy process."[90]

In the developing countries, corporate social responsibility policies have largely been demanded by consumers, NGOs, and TNCs with little interest from local companies.[91] Indeed, in as much as these local firms supply the TNCs, a state enforced corporate social responsibility policy will ensure compliance at all levels, ensuring that a truly effective meaning is given to the policy.

It is rather difficult to predict the inclusion of such provisions in future Investment Agreements. However, in light of the increasing awareness, it is rather certain that some reference will be made to corporate social responsibility in such future agreements.

G. Performance Requirements

Performance requirements are stipulations, imposed on investors, requiring them to meet certain specified goals with respect to their operations in the host country.[92] They are, and have been, used by developed and developing countries together with other policy instruments, such as trade policy, screening mechanisms and incentives, to enhance various development objectives. The UNCTAD classifies performance requirements into three categories: The ones prohibited by the WTO Agreement on TRIMS because they are inconsistent with Articles III & XI of the GATT;[93] Ones that are prohibited or discouraged by regional or bilateral agreements (but not Multilateral Agreements), and those which are not subject to control by any international investment agreement.[94]

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89 Utting, *supra* n. 85.

90 Utting, *Id.*

91 Charlotta Unden, *Multinational Corporations and Spillovers in Vietnam – Adding Corporate Social Responsibility* (Master's thesis, Spring, 2006, Institution of Economics) at 27, available at: http://www.csr-weltweit.de/uploads/tx_jpdownloads/FDI_CSR_Vietnam.pdf. Unden studies and notes this in the specific context of Vietnam.

92 UNCTAD, Foreign Direct Investment and Performance Requirements: New Evidence from Selected Countries (2003, New York & Geneva, UN).

93 Article III includes the obligation of National Treatment (NT) and Art.XI deals with the General Elimination of Quantitative Restrictions.

94 *Ibid* at p.3.

Whereas data exists to show that performance requirements were used in the 1970s and 1980s in sectors where FDI was concentrated (automobile, electrical, chemicals, mining and petroleum),[95] for various reasons the use of performance requirements has declined over time.[96]

A cursory look at the above mentioned data may lead us to the conclusion that the developed countries no longer want to regulate the behavior of the foreign investors. However, studies have shown that the decline in the use of performance requirements has been accompanied by an increase in the use of other trade and investment policy instruments (rules of origin used by EU and NAFTA; screwdriver regulations; antidumping measures *et cetera*),[97] thus indicating that the developed countries still want to regulate FDI. It has been observed,[98] that developed countries have extensively used performance requirements and that the present day low incidence leads to a rather deceptive conclusion of inefficacy of performance requirements, primarily because of the use of other regulatory instruments by these countries in light of the ban on performance requirements under the TRIMs.[99]

The case of developing countries is not very different. Developing countries have used performance requirements extensively to regulate FDI.[100] Surveys have noted that the largest incidence of performance requirements has been in large developing countries such as Brazil, China, India and Russia.[101] However, at least two studies indicate that the declining incidence in case of developed countries has been duplicated in the case of developing countries too. The European Round Table of private investors found the incidence to have declined sharply in the first half of the 1990s and the decline to have continued till 1999, at least.[102] Leaving from the ERT Study, the UNCTAD has confirmed the general trend of discontinuing

95 UNCTAD, WORLD INVESTMENT REPORT 2003, (Geneva and New York: UN, 2003), p.119 [Hereinafter WIR 2003].

96 EA Safarian, MULTINATIONAL ENTERPRISE AND PUBLIC POLICY: A STUDY OF INDUSTRIAL COUNTRIES, (Aldershot: Edward Elgar, 1993); OECD, INVESTMENT INCENTIVES AND DISINCENTIVES: EFFECTS ON INTERNATIONAL DIRECT INVESTMENT, (Paris: OECD, 1989); UNCTAD, Foreign Direct Investment and Performance Requirements: New Evidence from Selected Countries, (Geneva and New York: UN, 2003) [Hereinafter UNCTAD FDI].

97 WIR 2003, p.119; UNCTAD FDI, p.12. *See further* P. Messerlin, *The EC Antidumping Regulations: A First Economic Appraisal, 1980-1985*, 1989 *Weltwirtschaftliches Archiv,* 125, 3, pp.563-587; P. Krugman, M.Obstfield, INTERNATIONAL ECONOMICS (New York: McGraw Hill, 2000).

98 N. Kumar, *Performance Requirements as Tolls of Development Policy: Lessons from Experiences of Developed and Developing Countries for the WTO Agenda on Trade and Development* (New Delhi: Research and Information System for the Non Aligned and Other Developing Countries, 2003) RIS DP#52/2003, p.16 [Hereinafter Kumar/RIS].

99 Kumar/RIS, p.5.

100 UNCTAD FDI, p.13; WTO and UNCTAD, UNCTAD JOINT STUDY ON TRADE RELATED INVESTMENT MEASURES AND OTHER PERFORMANCE REQUIREMENTS, 2002 G/C/W/307 Add.1.

101 UNCTAD FDI p.14; Taylor Nelson Sofres Consulting, *Survey of attitudes of the European business community to international rules,* Report for the EC Directorate General of Trade (Brussels, 2000).

102 European Round Table, IMPROVED INVESTMENT CONDITIONS: THIRD SURVEY IN IMPROVEMENTS IN CONDITIONS FOR INVESTMENT IN THE DEVELOPING WORLD, (Monteux: Impremerie Corbaz, 2000).

the use of performance requirements in a study of four developing countries: Chile, India, Malaysia and South Africa.[103] But this again may be attributed to the decreasing inclination towards the use of performance requirements in TRIMs and various other international agreements.

Several reasons have been attributed for the decreasing incidence of performance requirements. Decline in the use of performance requirements has been attributed to the increasing ban on their use in the various international agreements.[104] Thus a country must discontinue their use in order to fulfill its obligations under international law. The WTO TRIMs Agreement requires the member to discontinue the use of several performance requirements. Similarly, the WTO Agreement on Subsidies and Countervailing Measures requires the member countries (with exceptions) to eliminate subsidies contingent on export performance. Moreover, countries have done away with performance requirements to comply with the programs of the World Bank and the IMF. Participation in schemes of regional economic integration, such as the EU and NAFTA has also led to a decline in the use of performance requirements by member countries.[105]

The increased competition in attracting FDI has also led to the removal of barriers, and liberalization of FDI regimes, this has included doing away with performance requirements, because of the belief that they hinder FDI inflow in an environment of increased competition. This however, may not be a completely correct hypothesis.

Another suggested reason is there normal phase-out because of the realization of their objectives. Performance requirements may have been withdrawn because of achievement of the objectives that the governments wanted to realize though them. Malaysia let go of the employment requirement of hiring Bumiputeras as stipulated goals were met.[106] This reason itself would suggest that performance requirements have been successful in meeting their development goals.

The declining incidence may also indicate the ineffectiveness of performance requirements in achieving their objective, experienced by certain countries in as much as the costs have exceeded the benefit.[107]

However, it must be noted here that there is only mixed evidence as to the effect of performance requirements on inflow of FDI. Studies claim positive and

103 UNCTAD FDI.
104 UNCTAD FDI, p.19; WIR 2003, p.119.
105 UNCTAD FDI, p.19.
106 UNCTAD FDI, Ch.IV.
107 UNCTAD FDI, p.19.

negative effects. Moreover, Kumar's study on Japanese and US TNCs, concludes that performance requirements negatively affect FDI in case of US FDI, but not in the case of Japanese FDI.[108] This is corroborated by another study for the period of 1982-1988 which observed a negligible negative effect of LCRs and EPRs in the case of US Investors, but observed a positive effect in the case of Japanese Investors.[109] A general assumption of the negative effect of performance requirements on FDI is also inconsistent with the following facts: China has managed to attract huge volume of inflows despite stringent performance requirements enforced with respect to exports, ownership as well as local content.[110] Similarly, Indian auto industry attracted nearly all global auto majors to set up their plants in the country despite many performance requirements imposed on them during the 1990s.[111] In Malaysia FDI grew by 26 per cent on average per year compared to only 4.8 per cent growth of domestic investment despite performance requirements.[112]

Even if a slight adverse effect of performance requirements on FDI inflow is acknowledged, developmental benefits accruing to the PR-imposing host country may greatly outweigh the adverse effects.[113] In the cases where PRs may affect the magnitude of FDI inflows due to poor locational advantages, host governments have generally used a combination of PRs and fiscal incentives to neutralize the potentially adverse effect of PRs on FDI inflows, while improving their quality to meet their development policy objectives.[114]

Also, if there is consensus on any one aspect of performance requirements it is on the positive effect of export performance requirements. Moran, UNCTAD and Kumar agree that export performance requirements (EPRs) can be extremely effective in forcing FDI to generate more economic benefit to the host country.[115]

On an analysis of evidence on the efficacy of performance requirements Kumar notes that well conceived PRs with clear objectives and effectively enforced are not

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108 N. Kumar, *Performance Requirements as Tolls of Development Policy: Lessons from Experiences of Developed and Developing Countries for the WTO Agenda on Trade and Development* (New Delhi: Research and Information System for the Non-Aligned and Other Developing Countries, 2003) RIS DP#52/2003, p.15 [Hereinafter Kumar/RIS].

109 S.C. Hackett and K. Srinivasan, *Do Supplies Switching Costs Differ Across Japanese and US Multinational Firms*, (1998) 10 Japan and World Economy, 13-32.

110 D. Rosen, Behind the Open Door: Foreign Enterprise Establishment in China, (Washington, DC: Institute for International Economics, 1999).

111 N. Kumar and N. Singh, The Use and Effectiveness of Performance Requirements: The Case of India, (New Delhi: RIS and UNCTAD, 2002).

112 Lim Pao Li and A.O. Cheng, IMM 2002, Malaysian Case Study of Use and Impact of Performance Requirements (UNCTAD, 2002).

113 Kumar/RIS, p.15.

114 Kumar/RIS, p.15.

115 T.H. Moran, Parental Supervision: The New Paradigm for FDI and Development, (Washington, D.C: Institute for International Economics, 2001); Kumar/RIS; UNCTAD FDI.

only able to meet their objectives but may also bring significant favorable externalities to the host countries. The effectiveness of PRs in meeting their policy objectives depends on the clarity of objectives, the policy capability of the governments, market size, absorptive capacity in terms of skills of the work force and strength of domestic enterprises, and other location advantages and policies.[116]

III. Conclusion

An assimilation of the above information may indeed conjure up a jaundiced view of FDI, a view that might not appreciate the role FDI has played in world trade and development. However, as credit must be given where its due, it must be noted that for the development of a more equal world order, the developing countries need greater protection of interests and necessary support, to be able to compete with the developed countries in a free and fair manner in the field of FDI. Indeed, some action in the form of differential treatment is required to achieve this equality amongst inherently unequal categories of the developed and developing countries. The developing countries need to pay specific attention to formulating their policy towards FDI, especially in respect to the areas discussed.

The developing countries need to ensure that policy decisions on FDI should be made after a careful economic analysis and not by way of popular opinion, for that almost always has been manufactured by the developed countries. The time has come for the third world to stop behaving like the proverbial frog,[117] and recognize that the benevolent regulatory regime enabling their rapid economic growth is now under serious threat. Immediate attention given to these, and more, issues will avert the imminent threat of a creeping threat posed by FDI indifferent to development concerns.

116 Kumar/RIS, p.16.

117 See *supra* n.1.