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BILATERAL INVESTMENT TREATIES IN THE CONTEXT OF INVESTMENT LAW

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I. Promoting and attracting investments under International Investment Law

The law on investment has been one of the fastest growing fields of international economic law over the last four decades. This is no small wonder if one reminds of the strong opposition between developed countries and developing countries in the early 1970's: how could a sizeable corpus of international law develop in that field, given that coherent and persistent opposition?

The answer is very simple indeed. Both developed countries and developing countries need to secure a stable legal environment for international investment. Of course, they do not perceive the problem from the same perspective: by and large, developed countries are investment-exporting countries, whereas developing countries are investment importing countries. This being said, developed countries need to promote investment by their nationals into developing countries, whereas developing countries need to attract investments from nationals of developed countries. The reasons for this differ, but whatever those reasons, offer and demand are present – though offer and demand do not balance each other.

Economic considerations are crucial and, indeed, essential in the investment decision-making process. Investors invest on the basis of economic considerations, not because of legal considerations. Legal considerations, however, if they do not play the role of an incentive, may come to play the role of disincentive. Sadly enough, this was the case in the late 60s, when developing countries – former colonies of former major European powers – embarked upon extensive expropriation policies which involve at foreign held investment – i.e. investment owned by nationals of the former colonial powers. These policies did not conform to the precepts of what developed countries alleged to be settled international law, and namely to what they claimed to be compensation standards – if for no other reason than developing countries could not possibly conform to these standards. The repudiation by developing countries, in the late 60s and the early 70s, of legal principles which developed countries claimed to be firmly established principles of international law no doubt contributed to the deterioration of the investment climate between developed countries and developing countries.

At this juncture, both developed countries and developing countries came to realise that such an unfavourable climate was detrimental to both of them. This growing awareness led to a new approach, aiming at restoring a favourable climate for North-South investment. The basic concept was to hold northern investors protected against the financial consequences of political risks, which might arise in southern countries. The most effective instrument here proved to be the domestic mechanisms of guarantee which capital exporting countries made available to those of their nationals who wanted to invest in capital importing countries: clearly, a potential investor will always prefer to rely upon that kind of insurance, rather than upon some complex procedure outside the jurisdiction of the State of which he is a national. Hence the effect of domestic systems of guarantee should not be under estimated: they were and still are, in certain cases, the prime incentive for foreign Investment.

If capital exporting countries were willing to pay the price for setting domestic systems of guarantees, they also wanted the capital importing countries to minimise the financial consequences of the political risks, which might jeopardise investments from their nationals. The quid pro quo was an easy find. What the northern countries wanted to secure from the southern countries was a firm commitment that investment related disputes between investors and investment importing countries should be settled before independent arbitral tribunals, on the basis of generally accepted principles of international law if necessary. And in the view of northern countries, an unilateral commitment from any southern State would not suffice, since it could be unilaterally terminated: it had to be expressed through a bilateral covenant between the capital exporting country and the capital importing country, because such a covenant, being in the nature of an international agreement, could not be unilaterally terminated under international law unless both Parties expressly agreed to such termination.

The main ingredients of the international legal system on investment then took shape. These main ingredients are three in number. First, investment exporting countries set up their domestic systems of guarantees – such as the BFCE or COFACE systems for France; the Hermes system for Germany; the MITI system for Japan; or the OPIC system for the United States. Secondly, and again under the influence of investment exporting countries, an international system of dispute settlement was created through one major piece of international legislation, i.e. the 1965 Washington Convention creating ICSID. Thirdly, investment exporting countries and investment importing countries started to conclude guarantee on international compacts under which the former would grant their domestic to investments by their nationals in the latter, under a condition that the latter would agree to submit disputes concerning these investments to ICSID jurisdiction. These reciprocal compacts came to be known, under US practice, as Investment Guarantees. These three elements still constitute the basis of what could be called ***the international legal system on international investment.***

This is not to say, however, that this international legal system has not evolved, nor that it will not further evolve. It must be stressed, quite on the contrary, that all three elements have gone through significant changes since the late 60s or the early 70s. Firstly, the investment importing countries, for a number of reasons, pressed for the setting up of an international system of guarantee: hence the 1985 Seoul Convention, creating MIGA, which proved to be an instant success. Secondly, it is fair to say that the ICSID system had a difficult start to the point that there was some discussion about a revision of the 1965 Washington Convention. But the international dispute settlement system has now gained momentum, and its efficiency is no more in question. Thirdly, and most significantly, the non reciprocal investment guarantees of the 60s and 70s have faded away and have now been replaced by an extensive network of bilateral agreements on the promotion and protection of investments (BITs), which are reciprocal in character.

The OECD has played an important role – and may be the most important role – in the development of that international legal system, as it now stands. Of course, the OECD could not play the key role in the creation of either ICSID or MIGA, since these are both world-wide organisations, which the OECD does not claim to be. Both the ICSID Convention and the MIGA Convention therefore originate from the one other major organisations, which at the same time is a world-wide organisation and has gained wide recognition in the field of international investment, i.e. the World Bank. Rather, the role of the OECD has been focused on providing the development of a network of bilateral investment treaties. In that connection, the OECD has been a key provider of the legal materials which have been used as building blocks of BITs. The 1962 draft convention on protection of foreign assets has proved to be a source of unequalled inspiration in the development of investment law: it can even be said that it has provided the model on which all major investment exporting countries- which are all OECD members – have patterned their own networks of BITs.

What we call the ***international legal system on international investment*** may therefore be defined as a complex system of international agreements, multilateral as well as bilateral, and which are interrelated to one another. This international legal system was born out of the necessity to cope with an emergency situation. The full fair and entire protection and security of international investment had been endangered by extensive expropriation policies, and it was widely felt that in order to restore a climate favourable to international investment, the international community – developed countries and developing countries alike – should conduct a concerted effort in order to develop a set of international commitments defining the obligations of investment importing States in connection ***with protection of international investments***. It may be assumed that the concerted effort of the international community, in which the OECD has played a leading role, has proved successful.

Why, under these circumstances, should SEE countries bother to join that concerted effort? The problem of protection has gone away. Moreover, the problem of protection, such as it developed in the 1960s and 1970s, could not possibly develop in the SEE nowadays: the order of the day does not call for any extensive policy of expropriation: it would rather call for an extensive policy of privatisation. No one doubts, however, that adherence by emerging countries to the international legal system on international investment is a most desirable signal which these countries will address to the international community taken as a whole. As I understand it, this signal means three things, (i) that the emerging countries have reached a level of political security and stability which enables them to fully participate in the system; (ii) that by taking part in the system, they have become fully cognisant with the obligations resulting therefrom, and that they are ready to assume these obligations – both in law and in fact; and (iii) that by assuming these obligations they also want to be regarded as full players in the field of investment law and find it desirable to be associated with its further developments.

Therefore, it is not unreasonable to conclude from the foregoing that SEE countries were expected to do at least three things. One was to adhere to multilateral instruments already in existence, such as ICSID and MIGA. This has already been done, and had demonstrated the clear willingness of SEE countries to adhere to the international legal system. Another was to start negotiating BITs with investment exporting countries, and namely EU investment exporting countries. In that connection, I would like to stress, perhaps at the expense of the OECD, other organisations and other States, that the negotiation of BITs is an active process. Capital importing countries are not expected to stand idle until capital exporting countries make a negotiation offer, based upon their own model treaty, and then accept it or reject it as a whole. Bilateral negotiations are a two way channel; and while it is not unusual that the original imput comes from developed countries, it would be most detrimental if no feedback ever came from SEE countries. This, fortunately, has also largely been done, and a healthy network of BITs has started to burgeon in the sub-region.

Still, something more seems to be in order. Waving the flag may not be enough. BITs are intended to create or at least contribute to the creation of new flows of investments – a difficult task in itself, since treaties do not create economic conditions for foreign investments; rather they are intended to remove legal obstacles to the free flow of investment. Furthermore, as indicated above, in the field of international investment, demand is higher than offer. It is therefore submitted that SEE countries make a collective effort to attract investment decisions. Any collective action by SEE therefore is going to prove more fruitful than individual action by any of the SEE.

II. Purpose and contents of Bilateral Investment Treaties (BITs)

One may easily conclude from the foregoing that the cornerstone of the international legal system on investment is the Bilateral Investment Treaty (BIT). The purpose and contents of BITs, their political and technical aspects will be discussed at length during this session. It might be worthwhile, however, to make a short preliminary presentation in this keynote speech – it being understood that distinguished speakers and participants will be free to elaborate specific aspects therefore during the course of this seminar.

Bilateral investment treaties developed out of an emergency situation, which reached its peak, as has been, mentioned earlier, in the late 60s and early 70s. By that time, an ideological and political conflict was opposing developed countries and certain developing countries with respect to expropriation of foreign investment - and for a while, the positions of developed countries and developing countries on the issue seemed irreconcilable. But even this may have been the case, there also was a growing awareness that continuance of that conflict was not in the best interest of either developed countries or developing countries, and that something had to be done in order to restore a climate favourable to international investment.

The most obvious solution would have been to bring developed countries and developing countries alike at the negotiation table and bring them to negotiate out all their differences, including their differences on investment. This is precisely what was done at the 1976 Paris Conference – the so-called Conference on international economic co-operation, which came close to a historical compromise between the North and South. The attempt ultimately failed. Since no multilateral agreement could possibly be reached at that point in time, then developed countries settled for the next best solution, and that next best solution was to build networks of BITs intended to resolve the problem.

After a short period of time during which developed countries relied upon the non-reciprocal Investment Guarantees – see above – most OECD members embarked upon a more ambitious policy of concluding reciprocal BITs with developing countries who had demonstrated some willingness to co-operate. Developed countries made negotiation offers to these developing countries individually. These offers were made on the basis of the provisions in the draft OECD convention for the protection of foreign assets – see also above. The draft convention was thus promoted de facto to the rank of a model treaty on protection of investments, which the OECD members came to rely upon in their bilateral dealings with non-OECD members.

It is true that the concept of the Model Treaty, at that time, was not something totally unknown in international economic law. The League of Nations, when it started working on avoidance of double taxation, had gone through an experience not unlike that of the OECD in the field of international investments. The League of Nations originally intended to promote one single multilateral instrument on avoidance of double taxation: but when this proved unfeasible, for reasons which were at the same time political and technical in character, then the League settled on what it considered to be the second best possibility – i.e. the drafting of model bilateral treaties on the avoidance of double taxation which member States could use in their bilateral dealings. Needless to recall here that the heir to the League of Nations tradition in this area of avoidance of double taxation is no one else than the OECD itself.

The OECD draft convention on protection of foreign assets has been, by a strange turn of legal history, became the matrix of model treaties, which the OECD members use in bilateral investment negotiations. No wonder, therefore, if the BITs which are patterned after these models present so many similarities one with the other. This is because the legal framework does not vary much from one model to another model. The definition clauses are identical; the admission clauses call for national control over admission of foreign investment; the standards of treatment – fair and equitable treatment – and of protection – full and entire protection and security – always are the same, etc…. It should come as no surprise to anyone that, as a consequence of these similarities, some legal scholars have submitted that the general standard in BITs merely restated general principles of international law – a view which certainly would not have been considered as acceptable by developing countries not so long ago. These general standards, as well as other clauses in BITs, will be the subject of further discussion today and tomorrow, and I will therefore not expand on them at this point.

What seems clear, however, is that the single model treaty on investment protection, which originated from the OECD draft convention some forty years ago, does not now reign supreme anymore. This is not to say that the concepts of protection upon which it was premised are no longer accurate from the legal standpoint. This rather means that the current issues are no more issues of investment protection, as they used to be in the 1960s and 1970s. To be sure, protection issues will never go away, as demonstrated by the Ethyl and Metalclad cases. But they are likely to be raised in a way, which is going to be different from the way in which they were raised in the late 60s, or early 70s. The old problems of expropriation have now subsided. The problem of the day is the know whether States may take, in the public interest, general, non discriminatory measures against foreign investment, without incurring any liability. Both the Ethyl case and the

Metalclad case suggest that the regulatory sovereignty of State may now be challanged under international treaties.

The emphasis in BITs, however, is slowly shifting from protection issues to treatment issues. The conflicting views are no more between developed countries and developing countries and they are no more protection oriented; they are between developed countries and they are treatment oriented. A number of differences can certainly be picked out between most model BITs which European members of the OECD are using, on the one hand, and the model BIT which the USTR has released in the mid 1980s for American negotiators. But the one major difference is that European models still are premised on national control over admission of foreign investment, whereas the US model is tilted in favour of an open door policy – ***the so called national treatment clause in the pre-investment phase.*** Free movement of international investment and removal of any governmental interference are issues which must be dealt with by SEE, and which this conference should help them, if not to fully resolve, at least to fully apprehend and comprehend.

As a final remark, participants in this conference may find that BITs are somewhat unbalanced instruments, in the sense that they read like instruments on the rights of MNEs and duties of the sovereign States, and that they are seemingly blind to the duties of the MNEs, and to the rights of the sovereign States. This is perfectly true. But there is a clear answer to that. BITs were never intended to be a charter of the economic rights and duties of either the MNEs or the sovereign States. Their purpose is a more limited one: it is to promote investment by defining the duties of the MNEs and the rights of the sovereign States, not by defining the rights of MNEs and the duties of sovereign States. This is all what BITs are about. But this, of course, does not mean that MNEs have no duties and sovereign States have no rights. Indeed, if one international organisation has taken action in order to promote a comprehensive view of the rights and duties of both the MNEs and the sovereign States, this is the OECD through the 1976 instruments on international investment and multinational enterprises.