INTERNATIONAL RESPONSES TO INVESTMENT PROBLEMS

Some Basic Comments*

Dr. Ibrahim F.I. Shihata**

General :

1 — Universal awareness of the challenge presented by the problems of foreign investments has led so far to the adoption of certain international measures which have generally taken one of three forms : the conclusion of bilateral or multilateral treaties establishing standards for the treatment of foreign investors ; the establishment of facilities for the settlement of investment disputes; and the provision of financial guarantees against non-commercial risks. The development of such measures does not seem however to have been based on an agreed definition of the problems involved, even though such a definition may provide the logical prelude to devising effective responses. To be sure, there has been a wide assumption underlying the different approaches to the effect that the problem is in essence a matter of quantity ; that international measures are basically needed to stimulate a greater inflow of private capital from rich to poorer countries. Acting on this assumption international efforts seem to have paid less attention to the equally if not more relevant questions of what kind of investment ought to be internationally encouraged, what international rules of behaviour should the investors be called upon to follow and how to effectively combat the harmful effects of foreign investments on the economies of the recipient countries.

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** Legal Adviser, Kuwait Fund for Arab Economic Development, Kuwait (and Associate Professor of International Law, Ain-Shams University, Cairo). Opinions expressed in this article are personal opinions and do not necessarily reflect the official views of the Kuwait Fund for Arab Economic Development.

2 — There has also been a tendency to deal with the issue as if foreign investments constitute one homogeneous whole and therefore deserve the same international legal treatment. No legal differentiation was therefore devised for the old colonial-type investments which enjoyed concessionary terms that would have been unthinkable for Western countries even in the last century. Investments in the extractive industries, which flourish on the depletion of non-renewable resources of host countries and which may thus have little positive effect on the value added to the national economies of these countries (as the income generated by them is in essence a cash form of the depleted wealth), have not been treated as an independent category either. Nor, for that matter, have multinational firms been singled out for a special treatment in view of their strong bargaining power vis à vis host countries as well as parent governments. The principle of equality, held dear in the literature on the international legal treatment of foreign investments, has thus been advocated for what are basically unequal subjects.

Factors of Success :

3 — The success of international responses to investment problems, like indeed the success of any response to a given challenge, does not depend on their content alone. Of equal importance is the source of the suggested action and the approach and techniques followed in presenting it to the interested parties.

4 — International financial institutions have proved to be particularly useful catalysts in developing successful remedies within certain limitations. Thus, while the powerful and prestigious World Bank seems to have been the «right» source for initiating such responses as the creation of the International Centre for the Settlement of Investment Disputes (ICSID) and may eventually succeed in playing a major role in the development of a universal investment code, it does not seem to have met the same measure of success in sponsoring the establishment of a multinational insurance agency. If such an agency is to be financed by the rich industrialized countries which already have their national insurance programs, these countries themselves or an association of them, such as the Organization

for Economic Cooperation and Development (OECD), may be better suited to act as the exclusive sponsor for creating that agency or for adopting more modest proposals like the establishment of an international reinsurance corporation to serve the existing national agencies. The Kuwait Fund for Arab Economic Development has, on the other hand, successfully sponsored the creation of the Arab Corporation for Investment Guarantee on regional basis, with the participation of the capital exporting as well as the capital importing Arab countries. The basic difference is of course that rich Arab countries, not being industrial states looking out for export markets and foreign sources of raw materials, have no national programs for investment insurance and indeed no clear economic interest in encouraging their nationals to invest in other developing countries. They were persuaded to participate in the project by the participation of the poorer countries in the share capital of the corporation and in its other responsibilities.

5 — The Source of the response is also particularly relevant in determining the chances of success for the many proposals for the adoption of an international code of investment. Such chances are usually greater when the code is developed by a regional organisation to be exclusively applied by its member States. A wider acceptance of such a code is rather unlikely, as is the case for codes devised by sources which are or appear to be partisan on behalf of the investors or the host countries. Proposals like the OECD's draft convention on the protection of foreign property or the Asian African Legal Consultative Committee's resolution on the status of aliens may remain, therefore, merely as instruments for the stimulation of further legal thinking on the subject.

6 — The approach followed in drafting the ICSID Convention seems also to have been a positive factor in its eventual adoption by a great number of States. The close consultation of all the States members of the World Band and the successive regional meetings gave even the smallest State the comforting feeling of participation in the making of the Convention. This is a lesson which can be usefully followed in the presentation of other international responses if such collective diplomacy is properly administered by an efficient and trusted secretariat.

Continued personal contacts with Government officials, especially in the developing countries is also an important approach for the success of future steps. The particular fickleness and second thoughts of decision makers in these countries, along with their rapid replacement, pinpoint the importance of this factor.

7 — A response emanating from the «right» source and presented in the «right» procedure may still remain without universal acceptance if its contents are objectionable to any given group of States. The result is that universal regulation will necessarily aim at the bare minimum which can be attained in a particular situation. This may in certain circumstances present a step forward, like in the case of the procedural facilities provided by the ICSID Convention. In other situations, however, all sides may be left in a better position without agreement on the attainable minimum. This seems to be the case with the proposed international investment codes. Due to the seemingly incompatible interests of the capital importing and capital exporting countries (although they all play host to some foreign investment) a comprehensive and universal agreement on the substantive rules regulating the treatment of foreign investments may not provide a useful remedy to their problems at present. This should not mean, however, that the issue ought to be ignored in favour of the procedural approach and the last defence technique of investment insurance.

Future Steps :

8 — There are areas where international regulation is required and seems to be attainable on group basis, if not on a universal scale. Among these areas the following may readily present themselves for possible consideration, although they may not all be in the same degree of ripeness for immediate action :

First : Some of the existing international responses need to be gradually strengthened, if they are to be effective at all. The ICSID, for instance, cannot remain for ever without continued jurisdiction, thus repeating the unhappy experience of the Permanent Court of Arbitration. One of the objectives of

its Secretariat should be to persuade member States to include in their investment laws and contracts compromissory clauses accepting the jurisdiction of the Centre, or to issue declarations to that effect similar to those issued by States under Article 36/2 of the Statute of the International Court of Justice. Efforts for the international resolution of conflict of private company laws and for their unification as well as the progressive development of international company law rules should also be activated on the intergovernmental level.

Secondly : If the principle of renegotiation of old investment contracts whose terms have been outdated by economic and political developments is accepted, as I think it should be, there is a clear need for an agreed definition of this principle. Furthermore, conflicts arising in the renegotiation process — being polycentric problems of varied magnitudes, not typical legal disputes — may need for their resolution new types of international forums. Such forums would take up the issue when negotiations fail, not necessarily for the purpose of imposing a settlement but more appropriately for suggesting guiding principles to be followed in further discussions between the parties.

Thirdly : More effective efforts may presently be exerted for the resolution of the conflict between capital exporting and capital receiving countries in their manipulation of international capital flows for improving their balance of payments. In particular, the measures adopted by certain capital supplying countries in their attempt to benefit at the expense of the capital importing countries call for collective measures on the part of the latter or, if at all possible, for international agreements to resolve this conflict.

Fourthly : If establishing an international code of behaviour for multinational corporations involves formidable difficulties at present, the need for the progressive development of such a code cannot simply be ignored. This is particularly true in the extractive industries of developing countries where there is a fairly high degree of concentration of control of the industries and of their export markets in a limited number of firms in each industry. It is also of special relevance to the exploitation of

new resources such as the seabed and the ocean floor. The parent countries may eventually find enough common interest to unite with host states in an agreed regulation of the behaviour of those evergrowing giants. Short of such an agreement, the less developed host countries are certainly called upon to devise their own rules and to adopt measures for their implementation. The pioneering initiatives of such organizations as the OPEC in this direction may point to the possibility of further action on regional or sectoral basis. There is certainly a great deal to be added to ensure systematic and progressive local participation in equity, continuation of the transfer of technology and managerial techniques, reinvestment of an increasing percentage of profits and prevention of their use in competitive areas in other countries, training and promotion of local personnel, etc. The effectiveness of such measures depends, however, on improving the professional capacity of the developing countries' bureaucrats and technocrats involved—a fact which calls for the more pressing task of establishing international centres for the training of such staff in the ways of dealing with foreign investments and for supplying them with adequate information on the subject.

Precautions :

9 — On devising international measures such as the ones already mentioned we should not perhaps lose sight of the fact that some developing countries have spared no effort in the encouragement and protection of foreign investments, by way of issuing favourable laws and statements, entering into bilateral and multilateral investment treaties, etc., yet they remained ignored by the investors because of some myth about their unfavourable investment climate or due to ignorance of, or actual lack of, good investment opportunities in their territories. Myth and ignorance can certainly be remedied by international centre or centres for investment information which may be sponsored by an association of investors or, more appropriately, by the interested developing countries themselves. The actual lack of investment opportunities is a different matter, however. Short of a non-existing philanthropic investor, the flow of foreign capital to areas lacking attractive investment opportunites can only be expected under generous insurance of commercial risks or outright subsidies. Although such measures might be cited

as examples of what aid agencies in the rich countries can do for their nationals investing in less developed countries, the mixture of international charity and transnational private business does not seem however to provide a happy solution for this problem.

10 — It is also true — although it is not commonly observed — that different developing countries have different investment problems and therefore may have good reasons to adopt different policies for the treatment of foreign investments. If dealing with foreign investments as if they constituted a one whole was an erroneous generalization, elements of error are equally discerned in the assumption that all developing countries should be expected to react in the same way to the problems of foreign investments or to the international responses devised for tackling these problems.

A Legal Precondition for Universal Regulation ?

11 — Finally, it may be noticed that economists and businessmen have been speaking of the multinational firm as one entity with such an ease that cannot perhaps be shared by the lawyer. For although the term has been used to mean different things, the so-called multinational firm is in the typical case an integrated system of corporations under the global control of a parent company, and is not, legally speaking, one single corporation. However, the formulation of legal standards and rules to direct multinational enterprises towards a more desirable and effective international economic order assumes the possibility of dealing with each one of these integrated systems as one legal entity. Since that cannot be achieved through any domestic legal system without stretching its scope to such extraterritorial limits as may not be readily acceptable to other host countries, there may be room to initiate thinking of a novel concept of international or transnational corporate personality for the integrated system of the group of domestic corporations which makes a multinational enterprise. Such a legal person would be a direct subject of the envisaged international law rules, while each of its domestic corporate components remains subject of the domestic legal system concerned which would be limited in this respect by the higher international law standards. This,

of course, is a vision for the future (perhaps the far-away future) which assumes agreement on the legal criteria for the definition of the multinational enterprise along with some form of international recognition for these enterprises. As such, it may appeal to business circles for the legally recognized international status which it confers on the multinational enterprise as an integrated transnational system. It may also appeal to States insofar as it provides the legal basis for directly subjecting the multinational enterprise to international rules. It is not realistic however to expect a quick acceptance of this concept by either side at present. I am presenting it, at any rate, as an elementary thought which may prove under closer scrutiny to raise more problems that it can help solving. However, it may deserve that closer scrutiny to examine its potentialities as a useful legal basis for further international responses to investment problems.