VOLUME 20 NUMBER 1 APRIL 2011

TRANSNATIONAL CORPORATIONS

United Nations
New York and Geneva, 2011
United Nations Conference on Trade and Development
Division on Investment and Enterprise

SPECIAL ISSUE

FDI, the Global Crisis and Sustainable Recovery

Guest Editors

Karl P. Sauvant and Miles Killingsworth

FDI, the global crisis and sustainable recovery

Ucheora Onwuamaegbu and Karl P. Sauvant *

The western financial and economic crisis that began in 2008 was the worst for 70 years – by far more severe than, for example, the Asian financial crisis in the 1990s and the post-September 11, 2001 crisis. Among its many effects has been a significant downturn in global foreign direct investment (FDI), a phenomenon whose impact has been different in developing and developed economies. Since economic growth is the single most important FDI determinant for attracting investment, the global economic slowdown, accentuated by the crisis, rendered key markets less attractive for foreign investors – and hence depressed FDI flows. This impact was aggravated by severe restrictions on the ability of firms to invest abroad.

In view of the widely acknowledged role of FDI in economic development, the Fourth Columbia International Investment Conference gathered world-renowned experts to examine the causes of the crises and, in particular, to discuss issues related to a sustainable recovery from the crisis. The Conference, organized by the Vale Columbia Center on Sustainable International Investment, the University of St. Gallen, and the Ministry of Foreign Affairs of Finland, with support from Vale, attracted 230 participants, from over 31 countries, including leading economists, representatives of governments and intergovernmental organizations, legal practitioners, and development experts. It specifically addressed how the crisis is affecting FDI (including the impact on flows, new players, changing patterns of agricultural sector FDI), the changing business environment for FDI (including the effect of the crisis on social conditions, corporate social responsibility and resource nationalism), and public policy opportunities for a sustainable recovery and sustainable development (including public-private partnerships, a global bankruptcy law and a sustainable investment regime).

The Conference offered a platform for a better understanding of the views and concerns of the principal players on the economic, social and environmental implications of the global economic crisis in the FDI field,

---

* Mr Onwuamaegbu was Rapporteur of the Fourth Columbia International Investment Conference, 5-6 November 2009. Dr Sauvant is Executive Director of the Vale Columbia Center on Sustainable International Investment.

and for exploring the way forward. It, thus, presented an opportunity to take stock as the impact of the crisis became clearer and the need to ensure a sustainable recovery, in light of worsening environmental conditions and insufficient attention to development needs in poor countries, became more apparent.

This introduction sets out the highlights of the presentations and discussions. It is followed by the publication of a selection of the papers that were presented at the conference.

The dimensions of the global crisis and challenges for sustainable FDI

Jeffery D. Sachs,[1] in his keynote speech titled "The dimensions of the global crisis and challenges for sustainable FDI", addressed the origins of the downturn and its manifestations, such as high and rising unemployment in both advanced and developing economies, from the Democratic Republic of Congo, where mines were closing, to the United States, where one person in nine was on food stamps.[2]

As causes of the problem, he identified misguided monetary policy, combined with deregulation of the derivatives market; the fact that the credit default swap market was allowed to grow from zero to $62 trillion with no regulation – by design; and that zero interest rates and unregulated credit default swap existed – partly due to lobbying in the United States Congress. He stressed the need for government to reassert and interpose itself, especially in regulating the markets.

Sachs noted, as a feature of the current downturn, a decoupling in the world economy. In effect, the crisis has had a differentiated impact on different regions of the world: Asia experienced a quicker recovery, because the region is now a free-standing economy and a major creditor of the United States and parts of Europe. This result, he noted, is largely attributable to stimulus packages in China and India, which helped the quick recovery in those countries. Sachs further observed

[1] Director, the Earth Institute at Columbia University; Quetelet Professor of Sustainable Development, Columbia University.

[2] The keynote speech was preceded by welcoming comments by Lee C. Bollinger, President, Columbia University. Bollinger, *inter alia*, stressed the importance of the free flow of information as a way of facilitating world order by projecting the experience of the past century onto the world stage, in order to maintain sustainable FDI.

that, with a few exceptions, most of China is experiencing massive growth, and that the same goes for other parts of Asia. Although China is relatively poor, it has a high capacity to absorb technology. According to Sachs, the risks to watch out for in Asia are crises of politics and/or environment. Otherwise, with exporters able to shift from the United States market to exporting to Asia, by 2025–2030, Asia stands a good chance of becoming the centre of the world economy, especially with regard to the size of its population.

According to Sachs, a potential threat to the rise in the world economy is worldwide environmental crisis, which is deepening. In particular, climate shocks, food and water crises, deforestation, habitat loss, and species extinction are getting worse. Similarly, health conditions that have emerged in recent history, such as the AIDS, SARS and H1N1 viruses, are all in some respect attributable to environmental factors. Indeed, the world has reached a level of human impact on the environment that is unsustainable (China's growth alone is having a significant environmental impact), and markets alone do not ensure the sustainability of investment. The approach of governments, including that of the United States, should shift from "scrambling" to "conserving".

Sachs considered that the technological capacity and potential to resolve crises exist. However, the framework for that capacity to assert itself does not yet exist. Highlighting the critical role of the United States in creating most of the post-Second World War international institutions, including the United Nations, Sachs noted that the United States' dominant position in the world is waning because of factors including the following: the dispersion of power and technology globally since 1980; the rise of Asia; problems of the United States' political system (including the dominance of the lobby system, which impedes necessary corrective government actions); and the lack of coherent climate, health care and fiscal policies, although the Obama administration has taken action in this respect.

A new form of global governance is, therefore, needed to replace the hegemony model, which is now over, and in any event not feasible in a world characterized by global literacy. Possible replacement models include the G20 model, which, although it has not succeeded before, could well do so. This model brings together four international organizations and a number of governments, and represents about 4 billion people. The discussions of the G-20 Group are at a very high level, and it could direct the United Nations to take actions in treaty format. There is, however, no institutional framework, as yet, for the work of the Group.

Another possible model is the Regional Integration model as it currently exists among member States of the European Union. This model is being replicated in other regions, as in Africa, where the Africa Union is, commendably, seeking to copy the European Union model. East Asia could also find a way institutionally to create regional governance; and ASEAN plus the Republic of Korea, China and Japan will be a remarkable force, which will take shape over time. Yet another possible model is the Local Governance model, which, in the United States, for example, would entail more devolution of power from the Federal to State Governments. Such a model is particularly feasible in a globalized world economy, in which it is now easier for local governments to conduct business with the entire world. A final possible solution is one that brings together, and harnesses, the capacities of industry, civil society and public/private partnerships, where industry and not government takes the lead. Indeed, companies have the capacity, but not the incentive, to solve global problems. Therefore, a normative environment in which strong roles are played by civil society and government regulation might help achieve the desired result.

How does the global crisis affect FDI?[3]

Gary Clyde Hufbauer,[4] in a presentation titled "The impact of the financial crisis and recession on global FDI flows",[5] assessed the overall impact of the crisis on the quantity and patterns of FDI flows by region, sector and mode of entry (especially of mergers and acquisitions (M&As)), including a discussion of the staying power of FDI in times of crisis, and some policy implications arising from the findings. Noting that most industry-level FDI flows, regardless of sector, have declined and that, generally, companies (even amongst resilient industries,

[3] This was the title of a session of the conference which was chaired by Katharina Pistor, Professor, Columbia Law School.

[4] Reginald Jones Senior Fellow, Peterson Institute for International Economics.

[5] The presentation was based on a paper co-authored with Lauge Skovgaard Poulsen, Ph.D. candidate, London School of Economics.

such as health care, biotech and renewable energy) were reducing their international activities, he concluded that there are reasons to be sceptical about the medium-term prospects for FDI recovery after the current crisis. Further, he predicted that FDI inflows to emerging markets would recover faster than developed economies, partly due to the increase in South-South FDI flows. He counselled that, by keeping the investment climate open and improving the many dimensions of good governance, governments would be able to facilitate and retain foreign investment, which would be critical for recovery.

In his presentation titled "The impact of the crisis on new players: are they ready to pounce?", Ravi Ramamurti[6] identified the new players in FDI as sovereign wealth funds (SWFs), private equity (PE) funds and emerging market TNCs, examining their respective roles in FDI and addressing the question as to how they have fared during the crisis – in particular, whether they are capable of dislodging Western transnational corporations (TNCs) as a result of the crisis. Although SWFs are not new on the scene, they have been more active in FDI during the crisis, yet their future in FDI seems uncertain. PE funds are also not new, but their contribution to FDI remains small and may not be sustainable. SWFs remain marginal players and PE funds are volatile in their operations. According to Ramamurti, of the three players, only emerging market TNCs are both significant enough and capable of a sustained contribution to FDI flows. Indeed, they have been steadily increasing in importance, with their stock growing by six times between 1990 and 2001 and by three times between 2000 and 2008, to a figure of approximately $2.6 trillion. The advantages enjoyed by emerging market TNCs include a deep understanding of local customers; a capacity for ultra low-cost value chain operations; know-how for operating in economies with weak institutions; and late-mover advantage in mid-tech industries. Indeed, some are already leading players in certain fields, such as Chinese companies in the solar energy sector. On the downside, their activities are frequently implicated in the depletion of natural resources. As a result, traditional TNCs will have to compete effectively with emerging market TNCs if they are to survive.

[6] CBA Distinguished Professor of International Business; Director, Center for Emerging Markets, Northeastern University.

In a presentation titled "Sustainable FDI in agriculture: the challenges ahead", James Zhan[7] highlighted the key emerging trends in activities of TNCs in agriculture (including the evolving pattern of agriculture FDI and contract farming) and the related development challenges. Discussing the policy implications that arise from these trends for developing countries and the international efforts underway to promote responsible investment in agriculture, Zhan noted that agriculture is insignificant in terms of percentage share of total FDI, and that Western TNCs involved in agriculture are more focused on cash crops, while those from developing countries tend to be more involved in food production. He identified as an overall challenge the need to ensure investment in sustainable agriculture, especially as contract farming is a good way for TNCs to enjoy a regular income. In particular, the challenges are how to ensure, by way of safeguards, that TNCs do not jeopardize food security, since they focus more on cash crops; and how to monitor land acquisitions, especially, since TNCs are acquiring huge expanses of land in developing countries and these activities have an environmental impact. Indeed, agriculture is responsible for a substantial share of carbon emissions.

In the ensuing discussion, Jorge Héctor Forteza[8] noted the absence of scruples on the part of some resource-based TNCs. While companies from Brazil and India are doing well, few are playing in higher value-added fields, although, admittedly, some bring in innovation. These companies have succeeded by developing strategies that are suitable for their own environments, but this is not always a good thing, since the implication is that they are succeeding simply due to their ability to deal with peculiar systems. In effect, they are better at operating in weak regulatory environments, and such operating models do not necessarily travel well. Therefore, with the exception of a few companies in Brazil, China and India, the challenge is to find emerging market TNCs that will operate effectively at the higher end of global operations. According to Forteza, it could be another 20 years or so before emerging market TNCs are able to compete effectively globally.

[7] Director, Division on Investment and Enterprise Development, UNCTAD.

[8] Professor of Strategy and Competitiveness, University of San Andrés, Buenos Aires.

Rainer Geiger,[9] also commenting on the new players in the world FDI market, noted that, while some are very complex operations, SWFs in general could play an important role in future FDI. While the role of TNCs in sustainable FDI, on the other hand, would seem dubious, performance requirements for such companies might be a good thing, especially if they have received government assistance package. Overall, the current financial crisis presents a major opportunity for the building of a comprehensive governance system for FDI.

United States recovery, global sustainable development and FDI

In the luncheon address titled "U.S. recovery, global sustainable development and FDI", Joseph E. Stiglitz[10] noted that the current crisis was likely to change the global economic landscape for years to come. The indicators include the fact that the ordinary rules of capitalism have been suspended with the introduction of massive bail-outs by the Government of the United States. The concept of banks that are too big to fail – introduced by the Bush administration and upheld by the Obama administration – is a new rule that never previously applied in capitalism. These "too big to fail" companies can enter into risky businesses, knowing that, if things go wrong, the Government will bail them out. This has unbalanced the playing field, because capital will keep flowing to the big banks, which now have "government insurance". Subsidies are less fair than tariffs as they amount to a trade distortion favouring the rich countries. Every country can impose tariffs, but only the very rich can provide subsidies. In light of all this, Stiglitz questioned how any developing country investor could compete with the Government of the United States, which explicitly stands behind the United States banks.

Part of the solution to the current problems will come from FDI, e.g. from China. China's investment in Africa exceeds that of the World Bank and the African Development Bank combined. China will take a loss on its dollar holdings if it lets its currency appreciate. Depreciation of the dollar is therefore unpopular with China. Stiglitz supported the

[9] Attorney-at-law, Senior Advisor, Arab Centre for the Development of the Rule of Law and Integrity.

[10] Nobel Laureate and University Professor, Columbia University.

call for a global reserve currency, but noted that the Government of the United States is not enthusiastic about this idea, because of its huge deficits. The United States is currently able to borrow at zero interest rates, and the worry is that this ability would be diminished with a movement to a global currency. This is wrong because that ability is already diminished. In effect, a global reserve currency system would be good for the world, but will present problems for the United States in financing its deficits.

According to Stiglitz, financial markets are an important aspect of FDI as they provide the necessary financing for investments. However, confidence in United States banks' abilities regarding risk management has been undermined by the crisis. This will likely lead to the development, in Asia, of its own financial market. Indeed, one lesson from Iceland's bank failure is that a single market system cannot work without regulation.

The crisis and the changing business environment for FDI[11]

In speaking about "Managing at a time of deep crisis", John D. Daniels[12] addressed three issues: the position of FDI in the global economic recovery; the methods for harnessing the capabilities of TNCs with regard to environmental sustainability; and changes occurring as a result of the crisis that might affect managerial behaviour in the future, particularly as it relates to FDI activity. Concerning the effects of the crisis, he noted that the current situation has increased the risk of a return of nationalization and expropriation, as it has provided an easy excuse for dictators, for instance, to expropriate if they wish to do so. In addition, the recent increase in transport costs has reversed offshore activities, not only because of the actual costs but also due to the uncertainty of the costs resulting from their volatility. Another effect of the economic crisis is that companies have been forced to downsize (especially abroad) in order to protect their core locations, which are their home markets. He concluded that, while TNCs have played a role in the economic and environmental crisis currently facing the world,

[11] This was the title of a session of the conference, which was chaired by Richard N. Gardner, Professor of Law and International Organization, Columbia Law School.

[12] Samuel N. Friedland Chair, University of Miami.

others – domestic firms, governments that do not take actions – are equally or even more culpable. The crisis will however bring about changes in the way TNCs and countries operate, which changes are likely to subsist long after the crisis is over.

In his presentation: "Enhancing the contribution of FDI to development: a new agenda for the corporate social responsibility community", Theodore H. Moran[13] analysed how corporate social responsibility (CSR) programmes have been affected by the crisis and, most importantly, what the role for CSR would be in achieving a sustainable recovery. He proposed a new CSR agenda that focuses not only on direct philanthropy, but also on socially responsible ingredients that operations of foreign investors could inject into the system. This is all the more effective when the operations of TNCs are run in an open, competitive and well-structured manner.

Daniel M. Price,[14] in "The rise of FDI protectionism", assessed the impact of the crisis on the attitude towards inward and outward FDI and, in particular, what policy and regulatory actions had been taken. He examined the question of how to deal with the rise of FDI protectionism, and expounded on the effect of various bail-outs of national industries and firms and the possible international investment law implications of these bail-outs. In particular, Price identified new frontiers in FDI protectionism, led by those states in the developing world that traditionally restrict investors, but by developed countries. These frontiers are in financial regulatory reform; domestic stimulus and crisis response; climate change; and national security and the scramble for resources.

On financial regulatory reform (in Europe and the United States), for example, he noted that the Government of the United Kingdom has proposed liquidity requirement for its banks, albeit for their United Kingdom holdings only and not globally. Steps have also been taken by the Swiss authorities in this direction. Price argued that these new regulatory requirements are turning back the clock, both in Europe and

[13] Marcus Wallenberg Chair in International Business and Finance, Georgetown University School of Foreign Service; Non-Resident Senior Fellow, Peterson Institute of International Economics.

[14] Senior Partner for Global Issues, Sidley Austin LLP; former Assistant to the President and Deputy National Security Advisor for International Economic Affairs in the Bush administration.

the United States. On domestic stimulus, he noted that some of these programmes discourage cross-border investment. National security concerns and their impact on FDI flows are becoming more important.

Price was followed by a presentation on "Multinational enterprise strategy after the crisis: responding to new challenges", by Alan M. Rugman.[15] Rugman discussed some of the implications of the crisis for the strategy of TNCs. Some of these relate to the increased emphasis that was placed on sustainable development, including as regards the use of energy and climate change. Others had to do with the use of subsidies, the rise of FDI protectionism and the promotion of national champions. Rugman noted that strategies of TNCs are geared towards creating firm-specific advantages. Home government policies, such as subsidies, on the other hand, reinforce country-specific advantages that do not necessarily coincide with firm-specific, micro-level decisions of firms. In any event, while Western TNCs benefit from the international diversification of their operations, emerging market firms are viewed by their governments as national champions and are more likely to be beneficiaries of advantageous country-specific policies. FDI from developing countries is driven more by country-level, rather than firm-level, factors. This explains the much-touted resilience of emerging market TNCs in the face of the crisis. It also means that the crisis has had different implications for developed country TNCs and emerging market TNCs, so their approaches and responses will of necessity be different.

Climate change, FDI and the Copenhagen Summit

In his dinner address, titled "Climate change, FDI and the Copenhagen Summit", Robert Orr[16] noted that the crisis is hitting the "near poor" of the world the hardest, turning them to the "new poor". The social impact of the crisis is therefore of concern, especially if the global response does not include vulnerable members of the society. The Copenhagen climate negotiations, which he described as the most complex in the history of mankind, would – if successful – unlock capital globally. Global economic recovery would in any event benefit from a

[15] Professor of International Business and Director of Research, School of Management, Henley Business School, University of Reading.

[16] Assistant Secretary-General, Strategic Planning Unit, Executive Office of the Secretary-General, United Nations.

jolt from a climate change deal. He hoped that a macro framework agreement would emerge from the Copenhagen negotiations from which a legally binding document could then be negotiated ultimately to produce a treaty. The main elements of a macro deal would involve all countries; include mid-term targets, i.e., by 2020 for developed countries; and mitigation commitments by all for between 25 and 40% reduction in carbon emissions by 2020. Finance and technology are both important to aid adaptation and mitigation of countries to the changing global climate.

Public policy for FDI and sustainable recovery[17]

The presentation by Jennifer Clift,[18] titled "Do we need an international bankruptcy law for TNCs?", discussed the desirability and feasibility of developing an international bankruptcy law and its importance to sustainable recovery and development against the background of growing numbers of insolvencies with international, cross-border dimensions and the work currently being undertaken on enterprise groups and cross-border insolvency. Clift noted that a lot has been achieved in the area of insolvency law reform since the Asian crisis, including removal of the stigma attached to insolvency as part of the normal business cycle. This is particularly important since an insolvency regime can facilitate economic recovery. She observed that the present international norm is to move away from an effective liquidation regime towards greater emphasis on the restructuring of debts. There is still a role for liquidation, but mechanisms that will achieve the purpose of insolvency, such as the sale of a business as a going concern, would better achieve the aim of insolvency.

Addressing the question of whether an international regime is needed for dealing with insolvency generally, Clift observed that the laws of individual states are different and produce many insolvency regimes, resulting in the fragmentation of large businesses operating across borders, and that such a situation would only be acceptable if liquidation were the object. Otherwise, an international regime is crucial, especially for dealing with large companies made up of different

[17] This was the title of a session of the conference which was chaired by José E. Alvarez, Professor of Law, New York University Law School; Former President, American Society of International Law.

[18] Senior Legal Officer, United Nations Conference on International Trade Law.

smaller affiliates. The options for dealing with an international regime include a single law, with each country dealing with companies within its territory. This is close to what is in place now, but it has its defects. Alternatively, UNCITRAL has come up with the middle-way solution of a Model Law, which so far has been adopted by 18 states of the 192 members of UNCITRAL. Although the world is moving closer to greater cooperation, resolution of this issue remains elusive. Regionalization will help reduce the number of jurisdictions to deal with, but problems would still persist with inter-regional dealings.

In a presentation titled "Public-private partnerships and FDI", Geoffrey Hamilton[19] discussed how FDI can contribute to a sustainable recovery from the current crisis, (particularly through public private partnerships (PPPs), including a discussion of long-term financing, creating international support for a green recovery, the development and role of infrastructure banks, and ensuring the availability of finance for sustainable FDI through export-credit agencies, risk insurance agencies, the IFC, and similar institutions. He called for the establishment of a United Nations PPP centre for PPP excellence, which would address challenges and barriers to PPP FDI in emerging markets, including the dearth of bankable projects.

In "Elements of an international investment regime that encourages sustainable international investment", Gus van Harten[20] discussed how the international investment law and policy regime could be moved in a direction that made it more supportive of sustainable development – including through treaties, voluntary initiatives, contract negotiation, and the like. Van Harten noted that, to encourage sustainable development, the international investment regime must ensure that there is sufficient policy space and regulatory flexibility for governments, while reassuring investors that they would not be targeted *ex post facto*. These twin aims are not met by the current regime of bilateral investment treaties and other investment treaties. There should be a focus on first fixing domestic policy frameworks before looking to the international regime. This would attract FDI, as investors would normally look at domestic regimes before international ones.

[19] Chief, Cooperation and Partnerships Section, United Nations Economic Commission for Europe, Economic Cooperation and Integration Division.

[20] Associate Professor, Osgoode Hall Law School, York University.

Van Harten criticized the use of arbitration instead of courts to deal with "important" issues, noting that arbitration lacks the openness and independence available in judicial proceedings, and the absence of institutional judicial safeguards in arbitration, observing furthermore that the main advantages to investors of the availability of arbitration are moral persuasion and deterrence, and noted that most investors would otherwise never be in a position where it made sense for them to go to arbitration rather than the courts. The reasons for this include the cost of arbitration proceedings; the fact that arbitration sours the relationship between the investor and the host government; the danger of costs award against the investor, making it difficult, if not impossible, for them to continue afterwards; the fact that many governments use delaying tactics in their proceedings, which could be frustrating for, and possibly eventually exhaust the investor in the proceeding; as well as the fact that, as happens in commercial arbitration, there are recent indications that governments may resist or refuse to pay arbitral awards obtained against them by investors.

Regarding ways to improve the system, van Harten suggested the introduction of institutional safeguards of judicial independence, which he considered to be better in courts than in arbitration; the introduction of measures to make the system more accessible to small players; the imposition of a duty on investors to exhaust local remedies before proceeding to arbitration; a change to the mechanism of using damages as primary remedy in arbitration; and rendering ineligible for compensation general measures that are not discriminatory.

In a presentation titled "Investor state arbitration and the financial crisis: A perspective from ICSID", Meg Kinnear[21] provided an institutional perspective from ICSID's experience with financial crisis-related disputes. It is possible that the current crisis will result in a further increase in the number of cases brought to ICSID, which have been on the rise in recent years in any event. Issues that may become more relevant in this context include considerations of the rights of host countries to take certain actions (e.g., the question of essential security interests) and considerations of sustainable development in dispute settlement. It remains to be seen whether the crisis will influence the decisions of governments to strengthen existing investor–state dispute

[21] Secretary-General, International Centre for Settlement of Investment Disputes.

settlement mechanisms or, on the contrary, weaken them. Either way, new treaties would have to be worded very precisely in order to deal with emerging issues. On its part, ICSID has been introducing various initiatives better to serve its users, and is therefore prepared to deal with any surge in case load that may result from the current crisis. These steps would, in turn, ensure that the Centre remains a leader among arbitration institutions.

In the ensuing discussions, the panel and conference participants discussed various points arising from the above presentations.[22] Kevin P. Gallagher called for the introduction of policies by which FDI helps with sustainability, and not crowding out domestic investment. Crowding out results in slower economic recovery. Hence, in previous crises, recovery was quick in Asia, but not Latin America, where FDI substituted local investment in the wake of the financial crisis. Howard Mann noted that sustainable development requires investment; that investments made now will determine whether the planet is sustainable environmentally in 30 years – in other words, the results of investments today will be felt in 30 years; and that there is no conflict between the interests of the business community and the sustainability of development.

Jose Alvarez questioned the conclusion by Clift that the lack of adequate insolvency law hinders FDI. He wondered to what extent the emphasis in insolvency situations should be to keep a business as a growing concern, as opposed to liquidating it. Regarding the court model for appointment of arbitrators for investor–state disputes, he noted that even the International Court of Justice (ICJ) has a politicized method of selecting judges and does not have an enforceable code of ethics. He noted that the issue should not simply be the creation of policy space, but rather determining what should go into the space. This will require a reconsideration of existing BITs, one treaty at a time, ultimately resulting in the creation of new types of BITs, with a focus not so much on where to litigate, but what to litigate.

FDI and African economic development

[22] The lead discussants were Kevin P. Gallagher, Associate Professor, Department of International Relations, Boston University; and Maya Steinitz, Associate-in-Law, Columbia Law School

In a luncheon address titled "FDI and African economic development", Kaire Mbuende, Ambassador of Namibia to the United Nations, questioned whether FDI has really been good for Africa in terms of its impact on local economies. He noted that investments would go where the returns are likely to be highest, regardless of any incentives available or the lack thereof. He stressed the need for policy to ensure that the result of FDI is beneficial to the host country, noting that unless there is a shift in character of FDI, from extractive industries towards technological transfer and management to develop African human resources, the beneficial impact of FDI will continue to be minimal.

FDI, the global crisis and sustainable recovery: the way forward

In addressing the topic "FDI, the global crisis and sustainable recovery: the way forward", a concluding roundtable panel consisting of Karl P. Sauvant as Chairperson, as well as Karin Lissakers,[23] Daniel M. Price, Jeffrey D. Sachs, and Manfred Schekulin,[24] discussed possible lessons from this crisis for the future of FDI and government-business relations – in particular, how the crisis could be used as an opportunity to enable FDI to play a role in a sustainable recovery.

Manfred Schekulin noted that, among the lessons to be drawn from the crisis, is that better regulation by governments is required. Similarly, steps should be taken to ensure that the true identity of investors is known to regulators in order for regulation to be effective. For instance, regulators need to be made aware when sovereign investors are investing through private equity funds. Indeed, increased participation of the EU in the regulation of FDI is desirable. With the Lisbon Treaty now signed, the EU has FDI treaty-negotiating competence, and this should make the process easier. Schekulin further proposed that any new regime for FDI should start from the concept of property protection; look at the broader issues that link it to society; consider denationalization/ privatization; and deal with dispute resolution, including transparency.

[23] Director, Revenue Watch Institute; former United States Executive Director on the Board of the International Monetary Fund.

[24] Chairperson, OECD Investment Committee.

Dan Price observed that well-regulated markets deliver benefits; that the world needs global rules in this respect and is gradually getting close to this goal with more BITs coming into effect, all with concordant provisions; and that the G20 is also playing a useful role in global regulation. Price further noted that, although there are lots of existing, although underutilized, tools for regulating FDI, a multilateral agreement on investment would be desirable, but its negotiation would be difficult.

Karin Lissaker propounded that "transparency" is one principle that should be embodied in any global regime, since common rules and standards are attained faster with transparency. Therefore, public information is crucial to know who is doing what.

Various other points, suggestions and recommendations were also made in the course of the concluding roundtable:

- Making OECD Guidelines binding is a challenge.
- Many of the economic development goals of governments should be put to tender.
- The most sustainable sort of investment is that which marries the core purpose of the investor with those of governments.
- The world ought to be thinking of how to build legitimate economic development goals into contracts.
- Most FDI is not done in the context of a contract, but rather under a general regulatory and treaty regime. With regard to contracts, it is best to set everything in law and then have an open bid auction, rather than negotiate individual contracts, especially since large investors will always have better professional assistance from lawyers, etc., when negotiating individual contracts. In any event, government contracts should be negotiated publicly, and their terms should also be public. Although it is often governments that insist that contracts be confidential, the IFC is moving towards insisting that the contracts that the IFC is involved in be made public. Guidance is also available from the Natural Resources Charter (naturalresourcescharter.org), which deals with everything concerning contract negotiation.

Conclusion

The conference presented an opportunity for a wide-ranging analysis of the causes and consequences of the crisis, especially as they relate to FDI. Its timing ensured that the resulting proposals were not facilitated by the benefit of hindsight, but informed only by contemporaneous experience, which not infrequently is a true test of analytical rigour. Indeed, there were various proposals from the conference, ranging from a call for a new reserve currency, to one for a new CSR agenda that focuses not only on direct philanthropy but also on socially responsible ingredients that FDI could inject into their activities. While a number of the ideas were new, some – equally relevant – were reiterations or modifications of existing themes.

Ultimately, as the world emerges from the current crisis, future analysis would be beneficial, not only to assess the accuracy of the predictions and efficacy of those of the proposals that would have been implemented, but also to ensure a continued dialogue that would potentially help in the understanding and handling of future crises and to limit their impact – especially as it is universally accepted that the occurrence of global economic crisis is inevitable, even if the timing and origins would always remain a matter for prediction.