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The impact of mega regional agreements on international investment rules and norms

Abstract
Repeated efforts to negotiate agreed rules on international investment have in the past been frustrated by differences between capital exporting and capital importing countries. In the place of an international agreement a patchwork of bilateral, plurilateral and multilateral agreements have established de facto norms. Recent shifts in the pattern of investment flows and perceptions of investment suggest there may be more scope for agreed international rules on investment, which has been an aim of EU policy for some time. The emergence of mega regional agreements have echoes of previous plurilateral agreements. Indeed, one of the stated aims of such agreements is to shape (de facto) rules on trade and investment. This paper assesses the impact of the mega regional agreements on international investment norms by considering the likely outcome of the Transpacific Partnership negotiations and the text of EU-Canada Comprehensive Economic and Trade Agreement. It finds the mega regional agreements are being negotiated at a time of shifts in the pattern of interests. Established capital exporting countries are now also becoming more host countries and are in the mega regional agreements concluding agreements with other capital exporters. The mega regional agreements therefore appear to be consolidating a reform of the de facto rules that redresses the balance between investors and host states in favour of host states.

1 Introduction
International investment[1] has long been a key feature of the international economy. In recent years its importance has been further enhanced by the growth of global production, intermediary trade and global supply chains. International investment policy is therefore arguably of equal importance to trade policy as it shapes competitiveness, market access and development. Unlike trade however, there are no agreed international rules governing international investment. In their place a patchwork of bilateral, plurilateral, preferential and partial multilateral agreements has grown up over many decades. Agreement on international rules was blocked by policy differences between developed and developing economies or capital exporting and importing countries, as well as differences between developed economies. Despite the lack of international agreement de facto norms have been created, largely as a result of asymmetric negotiations between developed and developing countries.

Recently there have been a number of underlying changes that have shifted well established preferences. Outward foreign direct investment from emergence economies has

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1 For the most part this paper is concerned with foreign direct investment as conventionally defined by the OECD, in other words investment in which foreign nationals exercise effective control, and not with portfolio investment in the forms of shares or bonds.

increased so the flow of investment is less North–South than it was. For example, in 2013 emerging and developing economies accounted for 39% of a total of $ 1.45 tn outward FDI, up from just 12% in the early 2000s. There has also been a reappraisal by some leading developing economies of the benefits of the de facto norms in international investment policy. Other important changes include the negotiation of mega regional agreements, such as the Transpacific Partnership, the Transatlantic Trade and Investment Partnership as well as agreements between major developed OECD economies such as the EU – Canada Comprehensive Trade and Economic Agreement (CETA) and the EU – Japan FTA and finally the emergence of the EU as a single actor in investment policy. This paper discusses the issues in and potential impact of the mega regional negotiations on international investment norms and rules. It starts by providing a brief historical background on how de facto norms have evolved. After a brief discussion of the current changes taking place the paper then describes the elements that together make up international investment rules. The paper then analyses the potential of the mega regional negotiations to bring about changes in the existing norms.

2 Evolution of de facto norms through a patchwork of approaches

The norms, rules and techniques that constitute the elements of international investment agreement today have been developed through a number of approaches over the past half century. The core *standards of investment protection* date back to the 19th century and the debate between the Calvo Doctrine (favoured by capital importing countries), according to which investment should be governed by the host state law; and the Hull doctrine of international investment law (favoured by the US) of prompt and effective compensation in cases pf expropriation (Vandevelde, 2010). In the negotiations of the International Trade Organisation (ITO) the US sought to negotiate an international agreement on investment protection and liberalisation. But in search of an agreement the US executive made concessions to enable host states to impose reasonable requirements on investors and to screen and control investment (Diebold, 1952). These concessions went too far and business withdrew its support, because it opposed the idea of imposing *requirements on investors*. With no agreement on investment it was left out of the GATT, which covered only trade.

Having failed in the multilateral setting of the ITO the debate shifted to the plurilateral OECD where a further effort was made to find an approach that could bridge the divide between capital exporters and capital importing countries. This attempt also failed, but the so-called Abs-Shawcross text that set out rules for investment protection based on a broad *definition of investment, national treatment* and *fair and equitable treatment* provided the model for the bilateral investment treaties (BITs) that followed. Led by Germany and other European countries 250 BITs covering investment protection had been concluded with developing countries by 1980 (UNCTAD, 2000). The plurilateral OECD also provided the forum for negotiations on the liberalisation of *capital transfers* in the form of the 1964 Codes on Capital Movements and Invisibles (Snyder, 1963). These codes and the OECD Investment Instrument were applied to progressively liberalise OECD investment at a fairly slow pace determined by unilateral decisions by OECD members. Once a sector or activity was liberalised a *ratchet mechanism* then bound those countries not to re-impose controls.

Developing countries focused on the UN, where they had a majority, and the 1974 G77 led proposal for a UN Charter on the Economic Rights and Duties of States aimed at reaffirming the Calvo doctrine and redressing what was seen as an imbalance favouring the interests of multinational corporations (MNCs) by imposing conditions on investors. This was opposed by OECD governments that proposed a non-binding *code of conduct for MNCs*, which ultimately took the form of the 1976 OECD Declaration and Decisions on International Investment and Multinational Enterprise (OECD, 1993).

During the 1970s the United States proposed a GATT for investment to protect US investment and complement the trade provisions in the GATT. This was opposed by developed and developing countries within the GATT because developed economies still controlled investment as part of national industrial policies and developing economies as part of their development strategies (Goldberg and Kindleberger, 1970) . When this renewed multilateral attempt failed, the US shifted to a multi-level approach. Arguably the most effective policy was a *unilateral* liberalisation in the late 1970s and early 1980s. This was followed by the UK in 1979 and subsequently, with a bit of a lag, by other west European governments. This shift to more liberal policies was shaped by an ideational shift from national champion strategies to more open investment policies. With a further lag this paradigm shift was followed by a growing number of developing countries, with competition for investment seen as the main driving factor. Developing countries then also moved to conclude more and more BITs in the belief that this would help attract more FDI (Elkins *et al*, 2008).

The failure of the idea of a GATT for investment was followed by another failure in the early 1980s to put investment on the GATT agenda at a GATT ministerial meeting in 1982. After this the US switched to a bilateral approach and developed a model comprehensive bilateral investment treaty covering liberalisation and protection of investment. European governments continued to conclude BITs that covered investment protection only. The 1982 US model BIT encompassed *de facto expropriation* backed by *investor-state dispute settlement* (ISDS) (US Senate, 1982) for protection and liberalisation of investment based on negative listing[2]. This became the model for NAFTA and all subsequent US comprehensive trade and investment agreements including, with some important modifications that will be discussed below, the US approach to the current mega-regional agreements of the Transpacific Partnership (TPP)[3] and the Transatlantic Trade and Investment Partnership, (TTIP).

In the GATT the OECD countries, led by the US, had some success with liberalisation in the shape of the Trade Related Investment Measures (TRIMs) Agreement in 1994 that prohibited 6 core *performance requirements*[4] and the General Agreement on Trade in Services (GATS) that introduced *pre-establishment national treatment* (i.e. liberalisation) for services for those sectors and activities positively listed. In the OECD there was discussion in the early 1990s of a further development of the investment instruments with a view to making the national treatment a binding obligation. But a disagreement between the US and the EU over – among other things – *sub-federal level coverage* (sought by the EU) and the scope for *national security controls* (broad for the US but narrow for the EU) blocked progress.[5] These intra-OECD differences continue to shape the current negotiations on a Transatlantic Trade and Investment Partnership (TTIP).

With the establishment of the WTO for trade, there was a consensus within the trade and investment policy community that agreement on international investment rules was the next agenda item. The US favoured a plurilateral route in order to shape the rules and ensure they set high standards. The European Union (EU) favoured a multilateral route in the WTO on the grounds that most barriers to investment were in non-OECD countries and that non-parties to a plurilateral negotiation could not be expected to sign up to something they had not negotiated. In the event both the plurilateral and the multilateral approaches were tried and both failed. The OECD initially made more rapid progress and a draft Multilateral Agreement on Investment (MAI) was developed by 1998. But the negotiators were not able to resolve some of the underlying differences between OECD countries. A concerted civil society campaign against the MAI also contributed to its demise (Henderson, 1999). When negotiators began to modify the draft agreement to address the concerns of civil society this undermined business support. Governments then saw little to gain and potential lost votes from pressing ahead with the negotiations. Discussions in the WTO working group on investment made little progress and efforts by the EU, Japan and Korea to have investment included in the agenda at the Seattle WTO Ministerial meeting were not supported by either the US or developing countries. A similar lack of support or opposition blocked the EU's efforts to have investment included as a 'Singapore' issue in the Doha Development Agenda (DDA).

As described above the US tended to shape the agenda of investment negotiations. EU Member States were active in BITS but the EU, which negotiated trade agreements, had no competence for FDI. In 2010 the adoption of the Treaty on Functioning of the European Union (the Lisbon Treaty) – against expectations and in the face of Member State opposition – brought FDI within EU exclusive competence. This means that Member States are no longer able to negotiate BITs. The EU now has the challenge and opportunity of developing a common position on investment and negotiating comprehensive trade and investment agreements (European Parliament, 2010). The debate on what the common EU policy should be has provoked a broad public debate in the EU that has taken control of policy out of the hands of the narrow policy elite of investment lawyers that previously shaped the Member State approaches to BITs and provided an opportunity for

[2] With negative listing all those activities or sectors listed are **excluded** from coverage of an agreement. With the alternative positive listing only those sectors listed are covered.

[3] Fifteen countries are currently negotiating the TPP including the USA, Japan, South Korea and a range of emerging and developing economies. Negotiations are in an advanced stage but not yet concluded.

[4] Performance requirements are imposed on investors as a means of ensuring that the host state's economy benefits. These include for example, local content requirements that are prohibited by the GATT or technology transfer requirements that are not yet prohibited by the GATT, but are being considered for the TPP.

[5] National security controls allow exceptions to liberal investment policy when states believe national security is at stake. For example, investment in the aerospace industry may be blocked because the host state wishes to maintain a nationally owned airframe industry.

an advocacy campaign by civil society non-governmental organisations (NGOs) opposed to globalisation and 'neo-liberalism'.

Apart from the US and the EU a number of other countries are concluding comprehensive trade and investment agreements. Many of these follow the NAFTA model, thus agreements negotiated by Mexico, Chile and Singapore with third countries following their agreements with the US, also adopted the NAFTA model.(Reiter, 2007). China has negotiated some FTAs that include investment, for example the bilateral agreement with Peru covers liberalisation, investment protection, and investor state dispute settlement (ISDS). Here then is an illustration of emerging countries adopting norms similar to those favoured by the OECD countries. Other net capital importing developing countries have moved to reassess their BITs. In the 1990s developing countries were falling over themselves to conclude BITs in the belief that this would lead to more FDI and facilitate their access to the international economy. With limited evidence that BITs have made such a contribution there has been a reassessment in a growing number of countries.

The discussion above shows how international investment rules have emerged from a patchwork of different initiatives. Together these have shaped the de facto rules on investment. Countries that have not been party to these agreements have then been left with the choice of conforming to the norms in order to 'compete' in attracting investment from countries of equivalent size and levels of development. This is more acute for smaller economies that lack the leverage of large domestic markets.

3 New factors shaping international investment policy

The de facto norms and rules have been shaped very largely by developed economies negotiating North-South agreements with developing countries. But the norms established over the years and sometimes decades ago may no longer match shifting preferences. There have been a number of recent developments that point to this.

- The distinction between capital exporters and importers has become less clear cut. A number of emerging economies are now developing 'home' state interests in protecting their FDI. It is anticipated that Chinese outward FDI will soon match the (high) level of inward FDI. A number of other emerging markets are also becoming more engaged in outward FDI, such as Hong Kong (China), and India although at a lower level.
- As noted above, a growing number of capital importing developing countries have begun to reassess their policies, due to ambiguity in the evidence on the impact of investment agreements on FDI.
- The bourgeoning of comprehensive trade and investment agreements is now including North-North agreements, so that developed economies are now committing to obligations with traditional capital exporting countries. Together with the growth of investment from emerging economies the developed market economies of the OECD are now also acquiring the status of host states within investment agreements.[6]
- Foreign direct investment has continued to grow and assume an ever more important role in the international economy and as a vehicle of globalisation.
- The European Union has now emerged as an actor in the international policy debate. Before the extension of exclusive competence for FDI to the EU in the Lisbon Treaty, EU Member States conducted much of the investment policy (outside of services). In the past the US was responsible for most initiatives in investment policy.

These developments, and in particular the last three have stimulated a broad debate on international investment policy and agreements. Finally, there is the addition of a growing number of preferential comprehensive trade and investment agreements so that investment policy has been drawn into the general debate on other trade issues. The mega regional agreements currently being negotiated have been in large part motivated by a desire to shape global trade and investment rules. So this brings us to the research question here namely, to what extent and in which way can the mega regional agreements be expected to shape international investment norms and rules?

4 Key issues in investment agreements[7]

In order to assess the degree to which these changes and in particular the mega regional agreements are changing the de facto norms, it is first necessary to discuss the various elements that go to make up international investment agreements (IIAs).This section picks up the issues identified in the discussion on the evolution of the de facto norms and discusses them in terms of the interests of the main parties.

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6 There has long been intra investment flows between OECD economies, but there were not investment protection agreements between them.

7 For a discussion of the elements of investment agreements see Sauvent and Ortino 2013.

Broadly speaking IIAs have been characterized by general norms and principles that have not been closely defined. Disputes have then been resolved on a case-by-case basis by arbitral tribunals that have had fairly broad discretion to interpret the rules. Many of the suggested improvements or corrections in IIAs therefore involved more explicit or 'closed' definitions of standards or norms and measures to reign in the discretionary power of arbitral tribunals and make them more transparent.

4.1 Definitions and duration

The first issue concerns the definition of investment. Existing IIAs define investment broadly to cover all forms of investment including for example intellectual property rights and sometimes other intangible assets such as goodwill. Such open-asset definitions tend to favour investor interests over host states so that there have been suggestions to make protection for investment conditional upon it contributing to the local economy. Open-asset approaches could mean for example, that debt rescheduling (in cases of a sovereign debt crisis) could be challenged through an investment agreement as these affect asset values. Some agreements therefore explicitly exclude government bond liabilities from the scope of investment protection.

The definition of *investors,* in other words legal persons/companies that have for example not yet undertaken investment, as opposed to established investment in the host state could mean that a foreign investor might make a claim under the investor state dispute settlement (ISDS) if s/he is denied pre-establishment national treatment. In other words if investors are not defined as those that have 'substantial business activities' in the host state (an origin test), ISDS could be used to extend liberalisation (see below). If investors are defined very broadly, i.e. without the condition of having a substantial business presence, this also opens the possibility of 'treaty shopping', in other words using a letter box company in a country that has an agreement with a higher standard of investment protection with the host country than the investor's actual home country.[8]

The application of customary international law sets the norm for the duration of obligations under an IIA. This means that protection may continue for anything up to 10 years after a party rescinds an agreement. Provisions that enable commitments to cease with the rescinding of an agreement are therefore attractive to host countries unsure of the benefits of an IIA, but investors with long term commitments in a country clearly have an interest in greater predictability.

4.2 Liberalisation

Liberalisation can take a number of forms. First, pre-establishment national treatment which offers foreign investors the same conditions as national investors and therefore liberalises. Coverage of this commitment is determined by positive listing of all sectors liberalised or negative listing of sectors or sub-sectors excluded. As a general rule positive listing provides more flexibility to respond to the development needs of specific countries, which is important for smaller countries that have not had the administrative capacity to complete all the detailed schedules required for negative listing. The norm here has been positive listing for US-based agreements and positive listing for EU or Japanese based agreements and the GATS. Beside the agreements with the US, developing and emerging economies have preferred positive listing. Recent PTAs have also included general horizontal exclusions for certain activities, for example, the exclusion of natural resource sectors from liberalization commitments. Coverage is also determined by reservations or exceptions for existing non-conforming measures. These may be excluded by a general 'grandfather clause' that provides exceptions for any pre-existing, non-conforming measure, or a negative list of such pre-existing measures measures.

Second, a prohibition of performance requirements (PRs) or the linking of inward FDI to benefits such as tax incentives. The 1994 TRIMs agreement interprets the GATT as prohibiting six core PRs, such as domestic content, export, or trade balancing requirements. Further liberalisation is the norm in recent PTAs that also prohibit technical transfer or nationality (of senior management) requirements. Investors favour prohibitions of PRs, whereas developing economies see them as a means of ensuring that FDI contributes to local value added or positive spill-overs.

4.3 Standards of investment protection

There are three standards of protection that find widespread application in IIAs; national treatment, most favoured nation (MFN) status and fair and equitable treatment (FET). National treatment can be binding for pre-establishment (which means liberalisation) or post establishment only (investment protection only). Existing agreements and especially the EU Member State BITs

[8] Treaty shopping can be illustrated by the infamous case of Philip Morris case in which the company went through Hong Kong, which has a BIT with Australia that include ISDS, because the US has no such BIT.

tend not to define standards of protection and thus leave broad scope for interpretation by arbitral tribunals. More 'modern' agreements may contain a tighter definition, but judgments on compliance with general standards has to be made on a case-by-case basis, implying that the scope for interpretation remains. IIAs could include provisions that allow for consideration of whether differences in regulation that do not offer national treatment, can be justified for public policy reasons, something developing countries might wish. The norm could be national treatment in like circumstances, as in the GATT. Also borrowing from trade rules the norm could be the use of the least restrictive possible to achieve a given objective.

MFN is of course a standard provision in many trade and investment agreements. An un-qualified MFN standard is likely to mean that any better offer to another party in a future PTA will need to be extended automatically to the original parties to an agreement. Some PTAs provide only for negotiations to extend the more favourable treatment. A non-qualified MFN provision can also undermine 'more balanced' agreements. For example, right to regulate provisions in one bilateral relationship could be undermined by an unqualified MFN clause if an investor can 'import' less limited investment protection from an agreement with another country.

FET provisions can also be 'open' or 'closed'. Open provisions are not more closely defined and the scope for interpretation will depend on the extent to which customary international law is applied. 'Closed' FET provisions are those that list the sort of things that are not fair or equitable, such as denial of justice, due process or a lack of transparency in regulation.

4.4 Expropriation and the 'right to regulate'

Protection against uncompensated expropriation was one of the first aims of all investment agreements. In recent years protection against this 'classic' or direct form of expropriation has been augmented by protection against indirect expropriation. Investors will again tend to favour a broad standard for indirect expropriation that will cover actions by host states in the form of regulatory or other measures that diminished the value of their assets. Host states will be concerned about retaining the right to regulate to pursue legitimate national policy aims. Experience with NAFTA highlighted concerns that claims of indirect expropriation would lead to regulatory chill. The threat that investment agreements with investor state dispute settlement provisions (see below) could be used to undermine regulation in the pursuit of social or environmental goals has fuelled much of the opposition from civil society NGOs. In recent years therefore there has been a move to more closely define the scope of indirect expropriation and thus ensure or extend the 'right to regulate'. The issue is how broad this should be.

4.5 Obligations on investors

As noted above balancing rights for investors with obligations on investors has been a constant point of contention. At issue is whether there should be obligations on investors as well as host states and whether these should be binding. The norm has been to include voluntary norms, such as the OECD Code on MNCs or corporate social responsibility codes, if anything. Business interests have opposed any binding obligations. One proposal has been to condition access to ISDS for investors on their compliance with specific voluntary codes of practice.

4.6 Capital movements

Much of the early work in the OECD was on reducing and eliminating controls on capital flows. Investors wish to be able to repatriate profits and otherwise move capital related to FDI. The norm has therefore been to include provisions on free capital movements. But host states are sensitive to the need to retain the option of introducing capital controls, especially following the 2008 financial crisis. The norm therefore is to include exceptions from rules on free capital movements in the event of exchange rate or macro-economic instability. But practice has varied. The US model does not generally provided for such an exceptions whereas the EU trade agreements do. The current trend is towards including an exception to enable capital controls, but at issue now is how tightly this is worded and whether there should be specified limits to the period they can be applied.

4.7 Investor state dispute settlement (ISDS)

Last but by no mean least of the issues covered here is ISDS, which is the norm in IIAs. As noted above standards of investment protection require a case-by-case evaluation and the norm has been to rely on arbitration in line with ICSID or UNCITRAL.[9] NAFTA and subsequent US PTAs developed detailed provisions on ISDS that shape the current debate. In contrast the EU Member States BITs have little detail and leave interpretations of the substance and process to the arbitrators. ISDS is in the interests of

[9] ICSID, the International Centre for Settlement of Investment Disputes at the World Bank, and UNCITRAL, the UN Commission on International Trade Law in Geneva facilitate and establish rules for international arbitration of investment disputes. Neither body resolves disputes, these are carried out by arbitral tribunals.

investors in that it provides an ultimate remedy, seldom used, when governments do not comply with investment agreements. In recent years this right has been seen by civil society as the means by which investment agreements and more broadly 'globalisation' is a threat to the regulatory autonomy of states and thus the ability to pursue a range of social and environmental policies. More particularly the legitimacy of the private arbitration process to interpret agreements has been challenged. Short of excluding ISDS there are a range of refinements proposed to address some of the criticisms that the current norm leaves too much discretion in the hands of unaccountable arbiters.

- One proposal that has probably become the norm is transparency. To date it has been possible to have disputes between investors and governments to be settled behind closed doors. The adoption of the UNCITRAL code transparency for arbitral proceedings looks set to change this (UNCITRAL, 2014). The UNCITRAL code encompasses the provision of information on the cases and materials as well as public hearings. There is also the question of whether amicus curiae submissions to arbitral tribunals should be permitted.[10]
- The selection of arbiters is another area of possible refinement. Critics have argued that some arbiters have not only been unaccountable to the public but also less than independent. In order to avoid bias it has been proposed that arbiters be selected from a roster of approved arbiters selected by the Parties (i.e. the governments).
- A number of proposals have been made to address the costs of ISDS, which can range from $1m to $30 m, and deal with the practice of treaty shopping. These are a kind of 'small claims' court, measures to preclude frivolous claims or loser pays provisions. As host states win most cases this would be a disincentive for unfounded claims.
- Finally, as a means of bringing the application and interpretation of investment agreements back into the public domain there have been moves to give interpretative powers to the Parties (governments). A more radical approach proposed, but not yet applied in any agreement, is the introduction of a review body, perhaps similar to the WTO Appellate Body served by a panel of independent experts appointed by the parties, to review arbitral decisions and ensure these are consistent.

4.8 Summing up on the substance

This section has provided a brief summary of the elements that go to make up IIA. These have been introduced over a period of time through the patchwork of different agreements. Efforts to negotiate comprehensive international investment rules have failed in 1948 (ITO), 1960 (OECD), 1998 (MAI) and arguably 2003 (WTO Doha agenda). But a set of de facto norms has been established. This set of norms now appears to be in a state of flux due to structural changes in the nature of investment flows and shifts in policy preferences. The following section analyses the impact of the mega regional agreements.

5 The impact of the mega regional agreements[11]

The mega regional agreements are arguably plurilateral agreements that could influence the shape of de facto norms governing international investment policy. An analysis of the mega regionals poses a challenge in the sense that neither the Transpacific Partnership (TPP) nor the Transatlantic Trade and Investment Partnership (TTIP) have been completed. For the TPP it has been necessary to draw on unofficial versions of the negotiating text. For TTIP the negotiations have made less progress, due to the controversy surrounding in particular the ISDS issue that has led the European Commission to introduce a period of (further) public consultation. So the CETA agreement between the EU and Canada is taken as a proxy for transatlantic investment norms. This is reasonable because CETA provides an indication of what the emerging common EU investment policy looks like and how it might be reconciled with the North American norm.

6 More liberalisation but some redressing of the balance between investors and states

The first point to note is that the mega regionals as currently drafted will not bring about any radical reform to the existing de facto norms. The impact would be more a modification. There remains some uncertainty over TTIP of course and the TPP text is only an unofficial text. But it is fair to say that the overall impact is a modest adjustment/modernisation. There is a strengthening of liberalisation

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10 Amicus curia are submissions from a non-party to the dispute, such as a civil society non-governmental organization in this case.

11 This analysis is based on the text of the CETA agreement in which the references are to the articles in the investment chapter see http://trade.ec.europa.eu/doclib/docs/2014/september/tradoc_152806.pdf and the unofficial negotiating text of the investment chapter of the TPP see http://www.citizenstrade.org/ctc/wp-content/uploads/2012/06/tppinvestment.pdf

provisions, reflecting the predominant US and EU investor interests. On the other hand the CETA and TPP circumscribe investor rights somewhat in that they include more 'closed' definitions of investment protection standards that provide less scope for arbiters. On the question of ISDS the emerging norm appears to be one that shifts the balance of control somewhat back to states and makes arbitration more transparent and accountable.

This section addresses the various elements that go to make up investment norms. Both the TPP text and CETA continue to define investment in broad terms covering portfolio and foreign direct investment as well as intellectual property rights. But there has been a move to clarify that the rescheduling of sovereign debt is excluded from coverage (CETA Art X:3 (4)). Investors are defined as those with substantial interests in the Party (CETA Art X:3 (3)). This limits the scope to use 'letterbox' companies to treaty shop.

The mega regional agreements appear to have strengthened negative listing as the norm for determining coverage, although there remains scope of course for positive listing in agreements with developing countries. Both the TPP text and CETA use negative listing. This has been the US/ North American approach for some time, but for the EU this constitutes a shift in policy. The TTIP negotiations also appear to be working on the basis of negative listing. Negative listing is used for scheduling coverage of the core rules of pre and post national treatment, MFN and FET as well as for existing non-conforming provisions under the exclusions articles. The alternative of a general grandfathering of existing non-conforming measures has therefore not been used. For developing countries or governments with limited capacity to identify everything that has to be negatively listed this poses something of a challenge. On the coverage of sub-central government, an issue that has been a problem in transatlantic negotiations in the past, the approach in the TPP text and the CETA is to offer national treatment at the state or provincial level. In other words investors from parties to the agreement would be offered access equivalent to that offered to investors from other US states or Canadian provinces.[12] A sensitive issue in TPP is the coverage of state owned enterprises (SOEs). A clear aim of the US, with China and Vietnam in mind, is to establish a norm that SOEs will be subject to the disciplines of the TPP. Another way the mega regional agreements will strengthen liberalisation is to add a prohibition of PRs related to technology transfer to the list of 6 TRIMs. Both texts also prohibit nationality conditions for senior management, but allow them for company boards. Finally, the TPP text (Art II:5) and CETA (Art X:7 (4) clarify that investors cannot use ISDS to extend the coverage of the agreement.

The norm of liberal capital transfers is confirmed in the TPP text (Art II:8) and CETA (Investment Chapter Art:12) but with exceptions. Under the TPP text controls on capital transfers are possible in 'the event of serious balance of payments or external financing difficulties'. In CETA the EU has included its standard exceptions clause to permit controls on capital flows for up to six months when 'in exceptional circumstances' capital flows 'threaten to cause serious difficulties for the operation of the economic and monetary union of the European Union' (Chapter Art:12). So the mega regional agreements would consolidate the norm of liberal capital flows but with a safeguard in 'exceptional circumstances', so the issue is how tightly the exception should be defined.

With regard to standards of investment protection the leaked TPP text and the CETA again follow the established norm of general national treatment in 'like circumstances'. There is no provision to allow for differential treatment on the grounds of public policy. Both the TPP text and CETA approaches include an unqualified MFN clause (CETA Art X:7 (4) and TPP II:5). But this does not extend to investment protection. In other words investment protection measures cannot be imported from another preferential agreement. On FET the CETA text (Art X:9) appears to use a closed definition, although the scope is subject to review by the Services and Investment Committee of CETA. The TPP (Art II:6) text that is available has an open definition of FET that will however, comply with customary international law.

One of the areas 'modernised' in the CETA, at least as far as Europe is concerned, is that of indirect expropriation and the right to regulate. Here the common EU policy has moved towards the North American model, because of the shift to policy making at the EU level, which has opened up the debate. The European Commission as negotiator for the EU must now represent broader interests than those of investors. These are represented in the public debate and in particular in the European Parliament that must give it's consent to any agreement. Both CETA (Art X:11 (3) and the draft TPP text (Annex II – B) include provisions stating that 'except in rare circumstances' non-discriminatory

[12] In EU US negotiations on TTIP this may still constitute a difficulty because the EU effectively extends mutual recognition to investors from the US or Canada that establish in one EU member state.

regulation pursuing legitimate public policy objectives, such as health, safety and the environment, should not constitute indirect expropriation. Although the wording is slightly different between the two agreements this appears to have the making of a new norm if CETA is ratified and the TPP text forms the basis of the final agreement.

The mega regional agreements do not appear likely to 'modernise' the norm with respect to obligations on investors. The TPP leaked text includes reference to voluntary standards on corporate social responsibility, but is still to be agreed and is in square brackets.

The issue of ISDS is controversial in both the TPP and TTIP negotiations. Exclusion of ISDS as has been urged by some countries[13] and civil society NGOs, would however run contrary to the current de facto norm. The CETA text includes ISDS and it has introduced a number of 'modernising' provisions that as noted above limit the scope for the interpretation of disputes by private arbitral tribunals. But neither the TPP nor of course the TTIP negotiations have been completed and it remains to be seen how the current controversy over this issue will play out. [14]

In response to the criticism that ISDS is opaque and unaccountable a number of reforms have been proposed and important changes have found their way into the TPP and CETA texts. Both texts provide for full transparency of arbitral processes (all documents, minutes, public hearings) (Arts X:25 CETA and II:23 for TPP). The CETA in particular incorporates the UNCITRAL Transparency Rules, indicating how norms can emerge from various fora. CETA also has a binding inclusion of amicus curiae, but in the case of TPP the arbitral tribunal 'may' accept them. The CETA also requires to use of a roster of arbiters to prevent the arbitration process being dominated by a few leading lawyers, and provides for a code of conduct for arbiters.

Both CETA and TPP include provisions that would reduce the costs of arbitration. There are provisions that would allow for frivolous claims to be thrown out (CETA X:29 and 30), provision for the consolidation of cases (CETA X:41 and TPP II:27), and provisions precluding multiple claims (CETA X:21 and X:23; and TPP II:19 2(b)).

Both CETA (Art X:27 (2) and X:35) and TPP (Art II:25) adopt the norm of the Parties to the agreements having power to interpret the standards of protection or other aspects of the agreement. This is a move to shift control over international investment law back towards the state and away from private arbitration. In the case of CETA this will be a binding power for the Trade Committee (i.e. the committee of the EU and Canadian government that is to oversee the application of the CETA). In the case of the TPP text a tribunal requests an interpretation from the TPP Commission, which has 90 days to agree on an interpretation. The more radical step of creating an appeal procedure is mentioned in both texts. In the case of CETA (Art X:42) the idea of an appeal or review body is to be considered by the Committee on Services and Investment, and issues to be discussed are listed. In the case of the TPP text the prospect seems more remote as Art II:22 (10) includes only the wording in the event of an appeal/review procedure being developed.

This section has shown that the mega regional agreements are bringing about a degree of modernization of the established norms, but within the framework of liberal policies.

6.1 The impact on developing countries

Of course these mega regional negotiations do not include many developing countries and no African states. So if these agreements shape the de facto norms governing international investment agreements as the plurilateral agreements of the past have will this be in the interests of developing countries. Smaller developing economies without significant domestic markets or raw materials have to compete more for inward FDI so are less able to resist the expectations - based on the prevailing norms discussed here - of capital exporting countries when negotiating comprehensive trade and investment agreements. Although not covered here it is worth noting that China, the largest source of outward FDI from the emerging countries, also expects investment protection measures in the agreements it negotiates with other countries.

The mega regional agreements seem very likely to produce more balanced norms in terms of the rights of investors and the right to regulate. Having included the right to regulate for themselves in agreements with other developed economies the EU and US will find it difficult not to accept equivalent provisions in north-south agreements. This means explicit rights to regulate for host states that were not included in the previous BITs or PTAs.

[13] The leaked TPP text has a footnote excluding Australia, which was not ready to accept ISDS in the US–Australian PTA.

[14] At the time of writing the European Parliament had, on 28th May adopted a resolution supporting the European Commissions approach to negotiations that includes ISDS along the lines of the CETA text.

The revisions and modernisation of investment dispute settlement that are emerging from the mega regional agreements will also represent an improvement on the previous position of developing countries. Investor state dispute settlement provisions will still be the norm, but they will be more transparent and should be less costly for developing countries, thanks to a norm that will constrain frivolous actions and prevent forum shopping.

In some substantive areas the emerging norms may help developing countries. For example, there seems to be an emerging norm that capital controls should be possible, the only issue is under what conditions. The exclusion of sovereign debt rescheduling from investment protection provisions is also a useful clarification that could be important for some countries.

These modifications to the established norm may not fully match the preferences of developing country governments, but they represent a shift towards these preferences compared to the previous de facto norms. In a few areas however, the mega regional agreements appear to be diverging from the preferences of developing economies. First, there appears to be a shift towards negative listing of coverage, although this does not mean that the EU and Japan could not continue with their policies of positive listing, especially in agreements with developing economies. Second, the mega regional agreements appear to be adding further performance requirements to the list of the prohibited. First in line are PRs related to technology transfers. But again these seem likely to be more relevant for agreements with the more advanced emerging economies such as China and perhaps India than smaller developing economies.

7 Conclusions

The de facto norms that emerged from a patchwork of agreements over the past half century have predominantly served the interests of investors and have been shaped by developed, capital exporting economies. The differences between capital exporters and capital importing developing or periphery economies blocked any agreement in the past on de jure international investment rules for the past century. De facto norms have however, been established through the negotiation of a patchwork of agreements.

In the recent years there has been a shift in the pattern of investment flows and views on investment agreements, that suggests some convergence of interests and preferences between these two groups of countries. The developed OECD economies are now concluding comprehensive trade and investment agreements between themselves, so that these countries also potentially face investors challenging national policies on a regular basis. The growth in emerging market outward investment also means that the OECD economies may assume something of a host state role vis-à-vis developing/emerging country investors. Driven by civil society concerns about the impact of obligations under investment provisions in PTAs on domestic regulatory policies, developed country governments have begun to qualify investment protection provisions in PTAs and to constrain the role of private arbitration in interpreting investment protection norms. At the same time the parties to the CETA and TPP are strengthening the liberalisation aspect of investment agreements.

Emerging markets are adopting the prevailing norms developed by the OECD economies. China has also followed the de facto norm in its agreements, such as with Peru and its position in the Regional Comprehensive Economic Partnership (RCEP - that includes Japan, India and China as well as Australia and New Zealand - discussions borrows heavily from the de facto norms discussed in the early sections of this paper.

The convergence of preferences offers a better prospect of reaching an agreement on international investment than for many years. A genuine agreement requires however, that the interests of all countries are reflected in any agreement and that all countries feel ownership of such an agreement. The mega regional agreements being negotiated reflect the interests of the parties only. In adjusting the balance of investment agreements somewhat in favour of protection of the host state interests, the US and EU are really only responding to domestic pressures and interests. But if these adjustments shape the prevailing norms all countries and in particular smaller developing countries will also benefit. On balance therefore the mega regional agreements are shaping or confirming shifts in the prevailing norms that govern international investment agreements. By shifting the balance somewhat towards the interests of host states the new norms could be closer to the preferences of developing countries than was the case in the past. On the other hand, pressing ahead with mega regional agreements that modify the de facto norms for investment policy will reduce the incentive to reach a genuine multilateral investment agreement.

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