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# Facilitating and Regulating Private Investment in a Developing Economy

S. K. Date-Bah\*

## I. The International Context for National Facilitation and Regulation of Private Investment

Transnational private investment in a globalized world has continued to be regulated and facilitated principally at the national level. The international legal framework for private investment is still fairly rudimentary. There is no international investment regime equivalent to the multilateral legal framework for trade that is established by the World Trade Organization system of conventions, agreements, rules and understandings, built on the foundations of the GATT. However, there is an increasing recognition by policymakers in many states that, as a result of globalization and other changes in the international market place, regulatory approaches to private investment both at the national and international levels must be refashioned<sup>1</sup> to respond to some of the consequences of transnational economic activity. For instance, in relation to financial services, there has been much talk of the need for a new international financial architecture. This need for international regulation is met, to a small degree, by the activities of multilateral agencies such as the World Trade Organization (WTO), the World Bank and the United Nations. This paper presents a brief overview of aspects of the current international multilateral legal framework for the facilitation and regulation of private investment.

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1. See Christopher McCrudden, *Regulation and Deregulation: An Introduction*, in REGULATION AND DEREGULATION: POLICY AND PRACTICE IN THE UTILITIES AND FINANCIAL SERVICES 3 (Christopher McCrudden ed., 1999).

*A. Regulation under the WTO system*

The WTO system focuses principally on the regulation and facilitation of trade, in contradistinction from investment, unlike the Havana Charter of 1948, which purported to establish the International Trade Organization. The Havana Charter aimed to facilitate and regulate both trade and investment. However, the Havana Charter was never ratified, never entered into force, and that part of it which was salvaged, namely the General Agreement on Trade and Tariffs (GATT), dealt only with trade. This is an artificially narrow focus since, in reality, trade and investment are indissolubly interlinked, and a global system of rules is needed as much for investment as for trade. Indeed, in 1955, a GATT review conference passed a Resolution on International Investment for Economic Development which stressed the link between increased investment and the promotion of greater trade.

The new WTO system in place since January 1995, while dealing principally with trade matters, contains some clusters of rules which have an impact on the regulation of private investment. For instance, the General Agreement on Trade in Services (GATS) regulates certain aspects of foreign direct investment. The GATS is one of many Agreements appended to the main treaty (The Marrakesh Agreement) establishing the WTO, which regulate a range of matters relevant to establishing a rules-based framework for the conduct of world trade. The GATS seeks to establish a basic framework for the international regulation of trade in services with the objective of opening up national markets for services to increasing international competition. The GATS provides an umbrella agreement which lays down general principles for the conduct of trade in all service sectors. The GATS defines "trade in services" as the supply of a service through cross-border trade, consumption abroad, commercial presence abroad or presence of natural persons in a country other than their own.<sup>2</sup> The last two categories of supply imply that foreign direct investment comes within the ambit of the Agreement since private commercial presence abroad and the movement of personnel abroad are often manifestations of foreign investment.

The GATS applies the fundamental principle of the GATT, the principle of the Most Favored Nation (MFN), to services. This means that, in relation to services within its ambit, all trading partners from contracting States must be treated in an equal and non-discriminatory way. Thus, irrespective of the extent of liberalization in any specific service sector, foreign service providers are to be given equal opportunities.

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2. General Agreement on Trade in Services, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1B, LEGAL INSTRUMENTS—RESULTS OF THE URUGUAY ROUND, 33 I.L.M. 48, art. I (1994).

Furthermore, when a host contracting State avails itself of the provisions under the Agreement to make a specific commitment in relation to a particular service sector, then it is obliged to give national treatment to foreign service suppliers in relation to that sector. In other words, foreign providers of that service must be treated no less favorably than nationals.

The general umbrella Agreement is supplemented by the opportunity for member States to enter into such specific sectoral commitments. For instance, a State may commit to giving foreign investors access to its insurance industry without any requirement for local equity participation. Once made, such a commitment is binding and cannot be retracted. Such sectoral commitments obviously facilitate foreign investor provisioning of the services with respect to which a host State has made a commitment. This effort to establish a level playing field between foreign and domestic service providers through international regulation is an illustration of one of the pockets of rules which exist at the international level to facilitate and regulate private investment. Sectoral commitments by host States in relation to particular service sectors are therefore emerging as an internationally binding technique for the promotion of foreign investment.

It has to be recognized, however, that the GATS is of limited relevance as an instrument of multilateral investment regulation. It is not an instrument of investment regulation as such, but rather addresses investment as one of the ways for traders to gain access to export markets. It is thus an instrument of trade policy with an impact on the investment process. Its impact relates to the post-investment phase, in that it provides for rules governing the treatment of foreign service providers who have established a commercial presence in the jurisdiction of a contracting Member State. The rules it provides for include, for instance, those on domestic regulation (ensuring that regulation of services in a host country's jurisdiction is fair and objective) and on transparency (requiring host governments to publish all relevant laws and regulations and to establish enquiry points to provide specific information to other member States on all service sectors).

Another agreement appended to the Marrakesh Agreement Establishing the World Trade Organisation is the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS). This Agreement also contains a cluster of multilateral rules relevant to host country treatment of foreign investors, through its provisions on minimum standards for the protection of intellectual property. The aim of the TRIPS Agreement is to prevent unfair competition in countries which afford little or no protection for intellectual property, hence preventing piracy and counterfeiting. The TRIPS Agreement is based on three key principles:

- (a) Minimum standards: the provisions contained in the

Agreement for the protection and enforcement of intellectual property rights are minima and any country may provide greater protection.

- (b) National treatment: this principle, which lies at the heart of the Paris<sup>3</sup> and Berne<sup>4</sup> Conventions requires that countries protect nationals of other countries by treating them no less favorably than they treat their own nationals.
- (c) (c) Most Favored Nation (MFN) Treatment: The MFN standard requires the non-discriminatory treatment of nationals of all WTO States on an equal basis. MFN is one of the fundamental principles of the GATT system, which the WTO has inherited, and in the TRIPS Agreement, is expressed as follows:

With regard to the protection of intellectual property, any advantage, favor, privilege or immunity granted by a Member to the nationals of any other country shall be accorded immediately and unconditionally to the nationals of all other Members.<sup>5</sup>

Thus the standard of treatment to which a national of a WTO State is entitled must not be lower than that to which the national of any other WTO State is entitled. This implies that if a WTO State enters into a bilateral treaty on intellectual property with another WTO State which raises the level of protection of intellectual property rights available to their nationals in their respective national jurisdictions, this higher level of protection becomes automatically available to the nationals of all other WTO States.

A current issue relating to TRIPS has been the insistence by many developing countries that the minimum standard of protection relating to the patent rights of pharmaceutical companies should be relaxed in the interest of their public health needs. A key demand of the developing countries at the Fourth WTO Ministerial Meeting in Doha in November, 2001, was for clarification of what governments can do under the TRIPS Agreement by way of compulsory licensing or parallel imports of patented drugs in order to ensure access to life-saving drugs for the poor. Compulsory licensing enables the making of a drug locally in a host State without the consent of the patent owner. Parallel importing refers

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3. Paris Convention for the Protection of Industrial Property, Mar. 20, 1883, T.I.A.S. 6923, 7727, 21 U.S.T. 1583.

4. Berne Convention for the Protection of Literary and Artistic Works, Jan. 1, 1951, T.I.A.S. 3324, 6 U.S.T. 2731.

5. Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, LEGAL INSTRUMENTS—RESULTS OF THE URUGUAY ROUND, 33 I.L.M. 84, art. IV (1994).

to the practice whereby drugs which are a cheaper in one country are imported into another without the patent owner's approval. The Doha Declaration on the TRIPS Agreement and Public Health granted the developing countries the clarification they sought. It was made clear that the TRIPS Agreement was to be interpreted as supportive of the following WTO member State rights: protection of public health and, in particular, promotion of access to medicines for all; and granting of compulsory licenses; and the freedom to determine the grounds upon which such licenses are granted.<sup>6</sup>

In sum, the TRIPS Agreement also provides a cluster of multilateral rules which beneficially regulate foreign and domestic investors, but which were not formulated primarily as rules for the regulation of investments. Rather, the rules were conceived of as leveling the playing field for international trade. Similar clusters of rules are found in the Agreement on Trade-Related Investment Measures (TRIMS) which prohibits restrictive requirements on local content and trade-balancing.

The conclusion to be drawn regarding the regulation of investment available under the WTO regime is that it is fragmentary and its impact on the investment process is incidental rather than frontal.

### *B. Regulation under the World Bank System*

There are two legally binding Conventions concluded under the auspices of the World Bank Group which provide multilateral rules on private investment, but each has a rather narrow focus. Therefore, they do not provide a comprehensive framework of multilateral rules for investment in the way that the WTO system provides for trade. These two Conventions are the 1965 Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (ICSID) and the 1985 Convention Establishing the Multilateral Investment Guarantee Agency (MIGA). However, the World Bank instrument with the most comprehensive scope is not even a binding legal instrument, but rather, comprises guidelines which it has commended to its Member States. This document, the *Legal Framework for the Treatment of Foreign Investment*,<sup>7</sup> was attached to a Report to the Development Committee of the World Bank. The Committee agreed in a meeting in September, 1992, to recommend the guidelines contained in it to all Member States.

The World Bank Guidelines focus on the protection and the stan-

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6. World Trade Organization, Declaration on the TRIPS Agreement & Public Health, Fourth Ministerial Conference in Doha, Qatar, ¶¶ 4-5 (adopted Nov. 14, 2001) available at <http://www.wto.org> (last visited May 17, 2003) [hereinafter Doha Declaration].

7. *Legal Framework for the Treatment of Foreign Investment*, Nov. 1992, 31 I.L.M. 1363.

dards of treatment owed to the foreign investor by host States. This focus is in contrast to the earlier work done by the United Nations Centre on Transnational Corporation (UNCTC) culminating in the UNCTC Draft Code, which was never adopted. The focus of the Draft Code was on the obligations of multinational corporations to host States.

The abandoned UNCTC Draft Code arose out of developing countries' concerns about the power of multinational corporations and the need for host States to be strengthened in their relations with these corporations. Under the auspices of the UNCTC, a working group produced a draft Code after several meetings, but the representatives of the developed States in the group differed from the representatives of the developing countries on many important issues. Efforts stretching over a decade to resolve these differences proved fruitless and no consensus was ever reached. However, the process of attempting to reach a consensus on the Draft Code revealed the extent of the differences between the capital-exporting countries and the capital-importing countries.

### *C. Explanation for Absence of a Multilateral Regulatory Framework*

The reason for the absence of a multilaterally agreed legal framework for the regulation of private investment is not difficult to discern. States have failed to agree on substantive principles and standards on this issue. States have had conflicting views on their rights and obligations and those of private investors. The disagreements have been between the North and the South and between the East and the West. This has bedevilled all efforts to reach a comprehensive multilateral agreement on the regulation and facilitation of private investment. The disagreements relate to differing interpretations of the customary public international law rules relating to State responsibility for injury to aliens and to their property. According to the traditional interpretation of these rules, a host State is obligated to observe an international minimum standard in the treatment of aliens and their property. The duty to comply with this international standard is not necessarily discharged by according to aliens the same standard of treatment as nationals. If the national standard falls below the minimum standard, the delinquent State may attract liability under public international law. While most developing countries accept that customary public international law limits the freedom of action of host States in their treatment of aliens and their property, the developing countries interpret the content of the relevant rules differently. Some public international law writers from developing countries have disputed whether the classical rules on State responsibility for the treatment of aliens and their property are part of contemporary customary interna-

tional law,<sup>8</sup> since their universality has been denied by some authoritative writers. The Ghanaian lawyer, Dr. S.K.B. Asante, concludes, after reviewing the relevant legal materials, that:

The traditional concept of State responsibility originally fashioned by the Western world as a body of civilised and liberal international standards for the protection of individual aliens subsequently came under attack when it was perceived as either inequitable or inadequate for the purposes of addressing the concerns of an enlarged international community which lacked homogeneity as to political, economic or developmental values and goals. While it cannot be unequivocally asserted that a new doctrine of State responsibility now commands universal support, it is equally clear that the traditional concept no longer prevails. The international legal scene is both fluid and uncertain, and calls for the formulation of new standards.<sup>9</sup>

#### D. *Bilateral Investment Treaties*

It is in this context of uncertainty regarding the customary public international law rules on the treatment of foreign investment that many capital-exporting States have sought greater certainty through the conclusion of bilateral investment treaties (BITs) with capital-importing States. Through BITs, (the first of which was concluded in 1959 between West Germany and Pakistan), the uncertainty that exists at customary international law on the issue of the standard of treatment to be accorded to foreign investors by host States can be addressed. UNCTAD estimates that over 1800 of these BITs have been concluded to date, (rising from less than four hundred at the end of the 1980s).<sup>10</sup> They are, accordingly, a significant source of the international law relating to the treatment of private investment. However, they are sources of conventional international law and not necessarily of general customary international law.

Because of the great number of them, BITs are currently more significant in the protection of foreign investments than the general rules of customary international law. Although initially concluded between capital-exporting and capital-importing countries at the request of the capital-exporting country, this pattern has changed since the 1900s, and more developing countries and countries in transition have begun to sign treaties among themselves.<sup>11</sup>

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8. M. SORNARAJAH, *THE INTERNATIONAL LAW ON FOREIGN INVESTMENT* 120 (1994).

9. S.K.B. Asante, *International Law and Foreign Investment: A Reappraisal*, 37 INT'L & COMP. L. Q. 588, 626 (1988).

10. Bilateral Investment Treaties 1959-1999, at 1, U.N. Doc. UNCTAD/ITE/IIA/2 (2000) available at <http://www.unctad.org/en/docs/poiteiid2.en.pdf> (last visited Oct. 15, 2003).

11. *Id.* at 2.



*E. Towards Fair and Balanced Legally Binding Multilaterally Agreed Standards Governing the Conduct of Host States and Foreign Investors in Relation to Foreign Investments*

It is clear, from what I have outlined concerning the international legal framework for private investment across national boundaries, that a multilaterally agreed framework is lacking. This fact is perceived in many quarters as an impediment to increased transnational private investment flows and has led to the creation of bilateral investment treaties between capital-exporting and capital-importing States. However, the bargaining position of capital-importing States in relation to such bilateral treaties is weak. This has led to developing countries' acceptance of treaty obligations in spite of the fact that they firmly reject these obligations as not being part of customary international law. A multilateral negotiating forum would be better suited to paying attention to the views of developing countries. Thus, in spite of the failure of the UNCTC to come up with a legally binding multilateral instrument, it would be in the interest of the developing countries to make another effort to achieve an agreed multilateral regulatory and facilitating framework for transnational private investment.

A new multilateral instrument should improve upon previous failed attempts, including the Draft UNCTC Code of Conduct and the OECD's draft Multilateral Agreement on Investment ("MAI"). The instrument must accommodate both the right of host countries to regulate private investments on their territory and the investors' claims for protection of their investments.

The advantage of a multilateral instrument would be the establishment of greater certainty regarding the legal rights and responsibilities of investors and host States and, therefore, the reduction of risks perceived by foreign investors to attach to their investments. A balanced multilateral instrument would also increase trust between host States and foreign investors.

An important issue is the forum within which such a multilateral investment instrument should be negotiated. Some WTO members, both developed and developing, have advocated that the WTO be the forum for such negotiations. At the Fourth Ministerial Conference of the WTO in Doha from November 9-14, 2001, these WTO members advocated the start of negotiations for a WTO Agreement on foreign direct investment, as part of the next round of trade talks. They have contended that the existing regime of BITs is confusing and complicated and thus not conducive to increased investment flows. However, many developing countries have shown no enthusiasm for this proposal. The developing countries opposed to this proposal prefer instead that the WTO Working

Group established in 1997 continue to study the relationship between international trade and investment, and its implications for economic growth and development. They fear that any multilateral agreement is likely to add to their obligations. The caution of the developing countries probably flows from their perception that the balance of advantage from the Uruguay Round of trade talks was not in their favor.

Their concerns must be addressed sufficiently in the next round of trade talks. At Doha, a compromise was struck whereby the members of the WTO agreed to negotiations on a “multilateral framework to secure transparent, stable and predictable conditions for long-term cross-border investment, particularly foreign direct investment.”<sup>12</sup> However, such negotiations are to begin only after the Fifth Ministerial Conference in two years and on the basis of a decision to be taken by “explicit consensus” at that Session on the modalities of the negotiations. This implies, under the WTO’s decision-making rules, that, at the Fifth Ministerial Conference, any one State can, in theory, block further work on the proposed multilateral instrument. In the meantime, in the period before the Fifth Ministerial Conference, the WTO Working Group on the Relationship Between Trade and Investment is to continue with its task of study and analysis.

It would thus appear that there is a good chance that the WTO may be the forum for the settling of multilateral rules on private investment across national borders. The Doha Declaration explicitly states that: “Any framework should reflect in a balanced manner the interests of home and host countries, and take due account of the development policies and objectives of host governments as well as their right to regulate in the public interest.”<sup>13</sup>

## II. National Law Dimensions of Facilitation and Regulation

### A. *Government as Facilitator: The Role of Law*

#### 1. Provision of an Adequate Legal Infrastructure for the Private Sector

Governments provide and maintain the legal systems which are the necessary framework for the making of private investment decisions. Those parts of a legal system needed by private enterprises for the making of their private investments may be referred to as the legal infrastructure of private investment. It behooves governments to monitor and assess the continued adequacy of their legal infrastructure for private

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12. Doha Declaration, *supra* note 6, at ¶ 20.

13. *Id.* at ¶ 22.

investment. In the eighties and nineties, with the wave of privatizations in many countries and particularly in the so-called transition (socialist to market) economies, governments began to carry out overviews of their legal systems to determine which aspects needed reform or adaptation to meet the needs of the newer, more market-oriented economies. A few such diagnostic studies have been done for African States. I was fortunate to be the leader of a Commonwealth Secretariat team which, from 1995 to 1996, carried out a diagnostic survey of Ghanaian laws affecting private sector development.

Among the team's recommendations were as follows:

1. Before private capital is invited to invest in the provision of those services previously provided by Government, there should be a thorough review of the law applicable to each of the sectors in which Government has had a monopoly, and an appropriate regulatory framework should be put in place for such services, sector by sector.
2. The law on insolvency must be enacted for Ghana.
3. There should be a strengthening of transparency in the exercise of discretionary authority relating to the authorizations required for private enterprise activities.
4. Steps should be taken to expedite the process for the delivery of judicial decisions in order to remove the perception among business people that the judicial process in Ghana is unduly dilatory.

This sampling of the recommendations of the Commonwealth Secretariat team is recited here to illustrate the infrastructural role of law in relation to private investment. All of the recommendations mentioned above were intended to result in the law serving as a better instrument for enabling private entrepreneurs to invest. For instance, private investors cannot invest in privatized public utilities without an adequate enabling and regulatory framework. Again, the absence of any law on individual insolvency in Ghana is an impediment to private investment. Indeed, as far back as 1961, this was recognised in the *Report of the Commissioners Appointed to Enquire into the Insolvency Law of Ghana* which affirmed that:

The evidence we have received leaves us in no doubt that insolvency legislation is badly needed and, if introduced, would be widely welcomed. With a unanimity that has at times surprised us, witnesses have affirmed that the present law of debtor and creditor is gravely deficient and is unduly weighted in favor of the debtor. Moreover, it now seems to be generally realized that, by restricting the amount of credit that is given, the lack of effective machinery for the settlement

of debts and of a modern insolvency law is proving an increasingly serious handicap to the economic development of the country.<sup>14</sup>

Finally, the provision of an effective, efficient, and expeditious process for the judicial resolution of business disputes is an essential feature of the State's role in facilitating private investment.

## 2. National investment codes as a facilitating mechanism

Many host States, which want to facilitate the entry of private foreign investment into their economy, have adopted foreign investment codes, that is to say, national legislation aimed at reassuring foreign investors of the security of their investment and which is also intended to encourage them to invest in that particular jurisdiction. Of course, customary international law recognizes the authority of host States to regulate the admission of foreign investment into their territory and to apply national law to it, subject to any applicable international law. The older foreign investment codes tended to be quite regulatory and had a screening function. With the increased competition for foreign capital in more recent times, investment codes have been liberalized and have become more facilitating than regulatory. Indeed, in one example of these modern statutes, the Namibian Foreign Investment Act, no screening mechanism exists. Foreign investors have a right to invest in Namibia without any need for administrative authorization. It is only if the investor seeks certain fiscal incentives and other benefits on offer that the investor need apply to the Namibian Investment Centre. Similarly, the Ghana Investment Promotion Centre Act of 1994<sup>15</sup> allows foreign investors to invest in all sectors of the Ghanaian economy, other than the mining and petroleum sectors, without any prior approval by the Ghana Investment Promotion Centre (GIPC). Foreign investors only need to register with the GIPC information on the actual minimum capital they have invested in their enterprises.

### *B. Government as Regulator: The Role of Law*

The part that law plays in a developing State's role as regulator is best understood through illustrations from some of the areas of established regulatory practice. Prominent among these areas are the regulation of banking and other financial services, the regulation of public utilities, the regulation of the securities market, and the regulation of anti-competitive behavior.

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14. Report of the Commissioners Appointed to Enquire into the Insolvency Law of Ghana, ¶ 16.

15. Ghana Investment Promotion Centre Act, 1994 (Act 478) available at <http://www.gipc.org.gh/> (last visited May 17, 2003).

### 1. Regulating Public Utilities

In the wake of the widespread privatizations of the 1980s and 1990s, the responsibility of the State to regulate privatized public utilities has a special significance. While a firm with a natural monopoly is in public ownership, the public interest is protected through the Government's control of its corporate policies. Accordingly, any private corporation's entrepreneurial inclination to abuse its monopoly can be checked by the government. When the enterprise has been privatized, it becomes necessary for the government to adopt measures such as the regulation of output prices and the deployment of enforcement mechanisms for obligations relating to the coverage and quality of the services provided and the investment performance of the service provider. The law must provide for an appropriate framework within which such measures can be fashioned and implemented. Most governments aim to achieve fairness for both their consumers and their public utility service providers and to promote efficiency in the provision of the service concerned. Fairness to consumers implies arrangements which deliver to them fair prices and a good quality of service. Efficiency implies giving the service providers an opportunity to earn a return on their investment that is sufficient to compel them to invest in the technology, capital equipment, and skilled human resources needed for an efficient operation.

These twin objectives of fairness and efficiency lead to different balances of interests in different national legislation on the regulation of public utilities. One view of the balance of interests in this area is to be found in the Public Utilities Regulatory Commission Act, 1997 (Act 538) of Ghana. Section 16(2) of this Act provides that the Commission is to prepare and provide to public utilities guidelines on rates to be charged by the public utilities for their services. Section 16(3) states that:

In preparing the guidelines, the Commission shall take into account:

- (a) consumer interest;
- (b) investor interest;
- (c) the cost of production of the service; and
- (d) assurance of the financial integrity of the public utility.<sup>16</sup>

This Ghanaian statute thus eschews a hierarchy, or prioritization, of the interests to be taken into account.

This approach may be criticized as too ambivalent. It may be desirable in many jurisdictions for the relevant legislation to state what interest should be accorded primacy. Is primacy to be accorded to ensuring that the producer is able to finance the provision and expansion of the service, or is it to be given to protecting the interest of the consumer?

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16. Public Utilities Regulatory Commission Act, 1997 (Act 538), § 16(3).

The governments of countries at different stages of development may respond differently to this issue. A host government from a developing country may, for instance, determine that in the medium term it will accord primacy to providing an incentive to producers to invest in its privatized utilities in order to expand the coverage and quality of the service. However, for a developed country with a mature utilities sector, emphasis on protecting consumer interests, rather than expanding the system, may be a preferable policy option. Each government must make its policy choice in the light of its perception of national need.

Monopoly providers of public utility services in all countries are subject to some form of regulation. The regulation may be carried out from within the mainstream machinery of the Government, or it may be separated from Government and devolved to an agency with a defined degree of autonomy. Such independence in the regulator has come to be regarded as useful for the successful functioning of the regulatory system. Where such independence is provided for, the respective roles of Ministers and regulators is an important matter to be settled in the interest of predictability and transparency of the regulatory regime. The establishment of a credible, independent regulator has been a common feature of the privatization of public utilities in Europe, Latin America, and increasingly, Asia. Independence for regulators is essential for giving confidence to private investors in the utilities sector that the terms governing their investment will not be arbitrarily changed to their disadvantage. The insulation of the economic regulation of public utilities from *ad hoc* political involvement reduces regulatory risks for private investors and thus, the cost of capital. Private investors are likely to increase the rate of return they require on their investment if the regulatory context is uncertain. At the same time, an independent regulator can provide reassurance to consumers that their interests will be protected.

The legal and institutional framework for regulating particular privatized utilities will depend on the kind of regulation chosen by the Government. For instance, rate of return regulation of a privatized public utility has ordinarily, in many jurisdictions, implied the establishment of a tribunal to serve as a forum for proceedings to determine the enterprise's costs, revenues, and rate of return. Designing the institutional framework for regulating privately-owned public utility companies in a particular jurisdiction therefore involves a series of related choices.

## 2. Regulating Financial Services

The twin objectives of most national financial regulatory authorities are monetary and financial stability. To achieve these twin objectives, the legal system must give these authorities adequate legal powers to monitor the performance of banks and non-bank financial institutions

and to take measures to prevent potential disturbances to the financial and monetary system.

The broad policy objectives of formulating a regulatory framework for financial services may be identified as: stability, efficiency and fairness. Stability is an important prerequisite for the smooth functioning of the whole financial sector since this is required to boost the confidence of depositors and other investors, whose trust is critical for the functioning of the financial system. The confidence of the public that financial institutions are safe and well supervised by a credible regulator is crucial. The objective of stability implies the need for rules on prudential control of financial institutions. Among such rules are those, for instance, on capital adequacy and those permitting rigorous supervision of deposit-taking institutions. The regulatory framework also must promote the efficient operation of financial institutions, which usually implies allowing competition in the provision of their services. Finally, the regulatory framework must promote fairness to users of the financial market. These objectives have informed the formulation of legislation on banking and non-bank financial institutions, usually with a central bank or a monetary authority at the apex of the regulatory regime.

Above the national regulatory system are international institutions which formulate international standards for regulatory and supervisory structures over financial services. For instance, in relation to banking supervision, the Basle Committee on Banking Supervision of the Bank for International Settlements has issued *Core Principles for Effective Banking Supervision*, which central banks and other apex regulators are expected to enforce. Also, in relation to money laundering, the Financial Action Task Force in Paris has promulgated its Forty Recommendations which are used as a benchmark by the international community for assessing the adequacy of national regulatory regimes in combating money laundering.

These remarks relating to the regulation of financial services are made in order to illustrate the role that law needs to play in order to deliver the macro-economic stability that private investors need in order to make their investments. Ghana, for instance, has in place legislation on central banking, banking, non-bank financial institutions, and insurance. There is no need to consider the mechanics of the regulatory regime embodied in them, except to observe that they all resort to licensing control as a regulatory technique both to control market entry and as leverage in enforcing standards of performance and probity in the industry. (In other words, market entry is not permitted without a license from the appropriate authority and serious misfeasance can lead to a license being withdrawn.) The licensing control is complemented with authority for public officials to engage in active supervision of the activities of financial ser-

vices providers. It is enough here to note that the relevant pieces of legislation do provide a regulatory regime and that this provision is an important support for private investment.

### 3. Regulating Anti-Competitive Behavior

Competition legislation is a further illustration of the regulatory role that law must play in order to enable private enterprise to thrive. Competition law responds to the risk that, when markets are liberalized, private enterprises operating in the “free markets” may seek to set up barriers to competition in the form of cartels or restrictive agreements or engage in anti-competitive conduct. Competition policy and law are therefore meant to underpin the measures of economic liberalization which many developing countries have introduced. Indeed competition policy and law should lie at the heart of any market economy. When markets fail to work competitively, the general public suffers detriment. Competition legislation provides the means for government to intervene to prevent anti-competitive conduct or to change non-competitive market structures.

With the increasing adoption of economic liberalization policies in developing countries, several African countries have enacted competition laws. These include: Algeria, Tunisia, Kenya, Zambia, Zimbabwe, Tanzania, Cameroon, Cote d’Ivoire, and Gabon. Namibia is actively considering a proposed competition statute and South Africa has recently amended its existing competition law. Ghana, however, has no competition statute. The absence of a competition statute in States such as Ghana represents a glaring regulatory gap.

Some States have been endeavoring to use the WTO to obligate all States to plug the kind of regulatory gap that exists in Ghana. However, many developing countries are suffering from an overload of regulatory reform and are resisting pressure to carry out such reform within deadlines set by the WTO. In the Doha Ministerial Declaration of November, 2001, a compromise was struck between the developing countries opposed to the inclusion of competition policy in the next round of trade talks and European Union countries, which had been pressing for its inclusion. It was agreed that a decision, “by explicit consensus,” was to be taken at the Fifth Session of the Ministerial Conference on the modalities of negotiations for a multilateral framework to enhance the contribution of competition policy to international trade and development.

The WTO has a Working Group on the Interaction between Trade and Competition Policy. The Group’s goal is to clarify the principles of competition policy to be applied nationally. Currently, before the Fifth Session, the Working Group is clarifying:

core principles, including transparency, non-discrimination and procedural fairness, and provisions on hardcore cartels; modalities for



voluntary cooperation; and support for progressive reinforcement of competition institutions in developing countries through capacity building. Full account shall be taken of the needs of developing and least-developed country participants and appropriate flexibility provided to address them.<sup>17</sup>

### III. Conclusion

The instrumental role of law in relation to private investment is one that governments of developing countries must be reminded of to ensure that they give due attention to it. An appreciation of this role should lead such governments to engage in law reform to enable their domestic legal system to better perform its role of facilitating and regulating private investment. Law reform alone is, of course, not a sufficient condition for attracting private capital into a particular economy. Other factors, such as good governance and macro-economic stability, are also taken into account by investors. Law reform to fashion a legal infrastructure that supports private investment is, however, a necessary condition for the healthy development of the private sector in most jurisdictions.

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17. World Trade Organization, Working Group on the Interaction between Trade and Competition Policy, *available at* [http://www.wto.org/English/tratop\\_e/comp\\_e/comp\\_e.htm](http://www.wto.org/English/tratop_e/comp_e/comp_e.htm) (last visited May 17, 2003).