International Lawyer

Volume 33
Number 2 *International Legal Developments in Review: 1998*

Article 4

1999

International Investment, Development, and Privatization

Stephen H. Willard

Robert H. Edwards Jr.

Bonnie Weinstein

BUSINESS REGULATION

International Investment, Development, and Privatization

STEPHEN H. WILLARD, ROBERT H. EDWARDS, JR., AND BONNIE WEINSTEIN*

I. Introduction

The past year was one of extreme volatility in global financial markets. The first half of the year began on a solid footing with financial markets stabilizing and recovering from the Asian crisis that began in October 1997. This relatively stable condition succumbed to a dangerous decline in the developing world in the third quarter, the imposition of capital controls and repatriation restrictions, and a worldwide decline in markets. Renewed concern erupted over Asia, led by weakness in the region's financial institutions and attempts by the Latin American economies to avoid catching the "Asian Flu." Uncertainty led to a flight to quality, causing large capital outflows from U.S. equity markets and developing country markets and into the U.S. bond market. The result was a deep, although apparently temporary, decline in U.S. equity markets. Privatization opportunities expanded as financial realities forced asset divestiture to raise needed capital. Several countries suspended debt repayment, and flirted either with total control of currency transactions (Malaysia) or an abrogation of control by pegging their sovereign currency to a measure outside of their sovereign control (the Euro; Argentina). Also during 1998, new initiatives to integrate the capital markets and provide a fair opportunity for international investments in an atmosphere of disclosure and transparency missed an important deadline.

In this article, we will review: (i) the legal implications in the troubles sovereign borrowers and financial institutions faced in Asia and, to a lesser extent, in Latin America; (ii) the successful privatization of the Brazilian telephone in 1998 and the prospects for a significant increase in privatization activity, particularly asset sales, in 1999; (iii) international initiatives

*Stephen H. Willard is co-chairman of the International Investment, Development and Privatization Committee (IIDP Committee). He is Executive Vice President and General Counsel of Fuisz Technologies Ltd., an international pharmaceutical company. Robert H. Edwards, Jr. is a vice-chairman of the IIDP Committee and practices at Hunton & Williams in Washington, D.C., where he is a member of the Project Development Finance and Leasing team. Bonnie Weinstein is a member of the IIDP Committee and is in individual private practice in Washington, D.C.

to unify investment laws, and reduce bribery and corrupt practices; and (iv) the outlook for 1999.

II. Troubled Times in International Markets

A. Japan

Since the travails of the U.S. savings and loan industry in the late 1980s and early 1990s, commentators have noted the impending banking crisis in the developing world and urged action to address the issue promptly. As with the American crisis, very little was done in advance of a full-blown crisis, with resulting surprise as major problems were suddenly revealed.

Japanese banks earned the greatest attention in 1998, as the magnitude of their problems dwarfed the year's other banking problems.[1] In November 1998 the Japanese government allocated sixty trillion yen (about $500 billion) to bail out their troubled banks. Eighteen trillion yen was allocated to the bailout of Long Term Credit Bank, which was nationalized on October 23, 1998. On December 13, the Japanese government announced a further takeover, with the nationalization of the troubled Nippon Credit Bank Ltd. With the takeover, no exit strategy was announced. Rather, the Japanese government followed actions used by the U.S. government during its banking crisis to seize troubled banks, continue to run them under government ownership and supervision, and devise an optimal exit strategy over time. A third institution, Yasuda Trust & Banking Co., will be dismantled and its assets assumed by healthier institutions.[2] Other financial institutions also required public assistance. Seven mortgage lenders went bankrupt in 1998, requiring six billion yen of public assistance.

B. Russia

Russia was also responsible for major worldwide upheavals. The greatest cause of difficulty was the decision by the Russian government on August 17 not to pay debt service on Russian sovereign debt. Resultantly, Russian banks pleaded force majeure in order to avoid their obligations to pay debt service. More recently, as the year ended, Russia defaulted on about $26 billion of debts through negotiations with the London Club, an organization representing more than 600 Western creditors. As the year ended, the Russian bank Vnesheconombank was asking these creditors to accept approximately thirteen cents on the dollar for a $362 million payment, which came due on December 2, 1998.[3]

C. Indonesia

Indonesia, which was considered one of the greatest risks with respect to the banking crisis, has made the greatest progress. In fact, Indonesia has established the most prompt method of asset disposition of any emerging market. Recently, the IMF required the Indonesian government

1. *See* William Jefferson Clinton's 1999 State of the Union Speech, *quoted in State of the Union: Clinton Outlines His Vision for Nation's Transition to the 21st Century*, N.Y. Times, Jan. 20, 1999, at A22. President Clinton also commented that, "Today much of the world is in recession, with Asia hit especially hard. This is the most serious financial crisis in a half-century." "Asia has experienced a minor-key replay of the Great Depression." Paul Krugman, Fortune, Feb. 1, 1999, at 36.

2. *See* Jathon Sapsford, *Tokyo Takes Over Another Big Troubled Bank*, Wall St. J., Dec.14, 1998, at A13.

3. *See* Mark Whitehouse, *Russia's Debt Crisis Deepens as Country Nears Default on Soviet-Era Obligations*, Wall St. J., Dec. 22, 1998, at A13.

to slow the pace of its asset sales in order to obtain better prices. Expect Indonesia to make rapid progress in asset sales and privatization in 1999. Indonesia is currently seeking bids on six government firms by April 1999, including port, airport, mining and telecommunications companies.[4] Large-scale sales of domestic banks are also planned.[5]

D. China

In China, the major news was the closing of Guangdong International Trust & Investment Corporation (GITIC), a financial institution created in the Deng Xiaoping era to be one of a select group of "champions of economic reform."[6] Of particular interest are the nature of loan guarantees in China and the application of the Chinese bankruptcy law. Virtually all of GITIC's foreign borrowing had the approval of the Chinese State Administration of Foreign Exchange. GITIC itself had guarantees of other ventures outstanding equal to five times its capital in 1997.[7] While the Bank of China, one of the four large state banks, has been appointed as administrator of GITIC, foreign creditors were stunned to learn that the Bank of China would not step in and make good on GITIC's debts.[8] Under Chinese law, GITIC's 25,000 individual creditors will get paid from provincial money, while investors will have junior creditor status under China's bankruptcy law.[9] While investors often strongly support the types of legal reforms discussed in this article, it may come as quite a shock to them in many economies when the rules begin to be applied as drafted.[10] China has also recently announced a program to sell troubled loans from its state banks.[11] Such sales may total as much as $240 billion of bad loans, initially through China Construction Bank.

E. Mexico

In Mexico, FOBAPROA, the state bank rehabilitation agency, has purchased 552 billion pesos of assets (some $70 billion) from troubled banks. It has been estimated that only thirty percent of these assets are collectible. The assets were bought with zero-coupon notes that the banks can present for repayment after ten years. FOBAPROA has yet to sell any assets. Although FOBAPROA began work to develop an asset sale system, such effort has been put on hold as the Mexican Congress voted in December to create a new independent Bank Savings Insurance Institute, with a board approved by the Mexican Senate. The new agency will replace FOBAPROA which, according to critics, "has lacked transparency and been plagued by favoritism."[12] Interestingly, the law specifies that the board of the new institute may not include any officials linked to the bank rescue process from 1995 to 1997, with the result that any knowledge

4. *See Indonesia Targets Next Phase of Sales*, Privatisation Int'l, (Privatisation International Ltd., U.K.) Dec. 1998, *available in* Lexis, 2ndary Library, Lglpub File.

5. *Id.*

6. *China. The Sleeve Unravels*, Economist, Oct. 10, 1998, at 80.

7. *See id.*

8. *See* Seth Faisom, *China Grows Impatient with Its Ailing Banks*, N.Y. Times, Oct. 8, 1998, at C4.

9. *See* Mark Landlers, *China Gives Foreign Creditors A Rude 1999 Awakening*, N.Y. Times, Jan. 12, 1999, at 4.

10. A large part of the international debt of GITIC was arranged in Hong Kong and had no guarantees other than letters of comfort from local governments in China. The failure of GITIC points out that investors often rely on undocumented "guarantees" from quasi-government sources that their lawyers will undoubtedly encourage them to reassess in light of the recent moves to accountability and the rule of law in foreign investment.

11. *See* Bloomberg News, *China Hopes to Sell Bad Loans at Discount*, N.Y. Times, Jan. 5, 1999, at 6.

12. Jonathan Friedland, *Mexican Congress Clears Bank Rescue*, Wall St. J., Dec. 14, 1998, at A14.

gained during the period will need to be redeveloped. The Mexican banking system also suffers from a weak bankruptcy law and difficulty in getting prompt and unbiased judicial adjudication of commercial disputes.

F. South Korea

South Korea has forced two of its largest banks to merge. This has created new opportunities for additional investment in Korea.[13] In December 1998 Lone Star Fund II, a U.S. real estate investor, won an auction for Korean non-performing loans with a face value of $474 million.[14] The South Korean banking agency currently holds more than $3 billion of non-performing loans, and has sold loans with a face value of approximately 200 million to Goldman Sachs, in addition to the sale to Lone Star Fund.[15] The success of this auction compared favorably with a December attempt by Thailand to sell non-performing loans with a face value of $10.5 billion, which yielded successful bids on less than ten percent of the proffered assets.[16]

This has created tremendous opportunities for acquirers. For example, GE Capital, America's largest non-bank commercial lender, has been on a one-a-month acquisition pace. Its acquisitions include a big Japanese life insurance firm, Tokyo Mutual, Thai auto and equipment finance firms and a credit card business, and Philippine Asia Life Assurance. It is projected that they will spend more than $20 billion in Asia in the next three years.

Of course, no mention of 1998's financial troubles would be complete without a passing reference to the averted collapse of Long Term Capital Management in the United States. While no government money was infused into LTCM, the auspices of the Federal Reserve, the United States' central bank, were used extensively to craft a deal. U.S. involvement in these types of crises make it more difficult for the United States to argue that other countries need to reduce their own government involvement in propping up troubled financial players.

III. Currency Controls, Devaluation, and Pegging

Another significant blow to international confidence in investing in emerging markets came from the Malaysian government which, on September 2, 1998, fixed the exchange rate between the dollar and the local currency and required a one-year investment in order to repatriate money offshore from the stock market.[17] This defensive move was the most extreme of many efforts made or considered by governments seeking to defend troubled currencies. At year-end, the controls were holding, although there were indications that some

13. Trouble with banks has led to a slowdown in the sale of troubled banks. In late 1997, the Czech finance ministry was insisting that the four largest Czech banks would be privatized by the end of 1998. This was put on hold as a result, it is believed, of far greater loan losses than previously disclosed. "These cases (the four banks) make a mockery of claims from Czech bankers that their loan books are not as bad as they look. Their reports show that nearly a third of all outstanding loans are delinquent and that provisions and collateral are woefully insufficient." *Czech Banks. Provisional Problem*, Economist, Jan. 17, 1998, at 70.

14. *See* Michael Schuman, *U.S. Fund Wins a Crucial Auction of Korean Loans*, Wall St. J., Dec. 22, 1998, at A13.

15. *See id.*

16. *See* Pichayaporn Utumporn, *Investors Snub Thai Bank Agency's Loan Sale*, Wall St. J., Dec. 17, 1998, at A18.

17. *See Malaysian Currency Controls Roil Asia Markets*, Wall St. J., Sept. 3, 1998, at A14.

investors were seeking to negotiate private arrangements with the Malaysian government for further investment.[18]

Chile has been hailed as a model for limiting short-term foreign investment. In 1991, Chile imposed a requirement that foreign investors deposit thirty percent of all investment in Chile in a non-interest-paying account with the Chilean central bank for one year.

Chile's method was not to try to prevent outflows (as in Malaysia), but rather to put a tax on inflows, in an effort to keep foreigners from profiting from high short-term interest rates.[19] According to a study by Sebastian Edwards of the University of California at Los Angeles, as reported in *Business Week*,[20] the program was successful in shifting the mix of investment in Chile to long-term funds, which were less affected by the costs of the capital controls. Chile lifted the controls in September 1998 with very little disruption in its capital markets and arguably significant success in checking the need to raise interest rates to retain foreign capital. Others, however, such as Salvador Valdes, a professor of economics at the Catholic University of Chile, argued that the capital controls in Chile had virtually no effect on the Chilean economy, since most large Chilean companies could raise money internationally in avoidance of the tax.[21]

The year 1998 saw a highly beneficial worldwide discussion about the best way for developing economies to handle currency fluctuations. Harvard University Professor Jeffrey Sachs received significant media attention for his work with developing countries in Asia, arguing that IMF requirements for restrictive monetary policy and high interest rates would destroy the developing economies.[22] Sachs believes that the greatest damper on emerging economies is pegging local currencies to the dollar[23] and that such currencies should be allowed to float freely. Meanwhile, the International Monetary Fund encouraged the use of currency boards, which tie local currencies to a fixed peg such as the dollar or the Deutchmark. Some countries, such as Argentina, have firmly pegged their currencies to the U.S. dollar, eschewing sovereign monetary policy in order to avoid the high levels of inflation that plagued them early in the decade. Finally, in the most comprehensive example of such linking, preparations were completed this year for the launch of the Euro, where the currencies of eleven countries were fixed to a common standard. These developments suggest a denationalization of monetary policy and further internationalization of world domestic economies, a prominent trend that we believe will continue to gain strength in the next few years.

IV. Privatization of Brazil's Telecommunications Sector

One of the largest and most successful privatizations of 1998 was the privatization of Brazil's state controlled telephone utility Telecomunicacoes Brasileiras S.A. (Telebrás). The privatization of Telebrás was the largest privatization in Latin American history.[24] In order to set the legal

18. *See* Douglas Appell, *Malaysia May Crack Open A Window to Allow Foreigners to Take Money Out*, WALL ST. J., Nov. 16, 1998, at A35.

19. *See* Stephen Fidler & Andrew Balls, *Capital Controls Turbulent Love Affair With International Capital That Can Bring Pain or Pleasure*, FIN. TIMES, Oct. 6, 1998, at 12.

20. *See* Mike McNamee, *How Chile Iced Hot Money*, BUS. WK, Jan. 11, 1999, at 34.

21. *See* Salvador Valdes, *Capital Controls in Chile Were a Failure*, WALL ST. J., Dec. 11, 1998, at 15.

22. *See* William Pesek Jr., *Quick Cure: Sachs Claims the IMF's Medicine Is Killing Patients*, BARRON'S, Oct. 5, 1998, at 23.

23. *See id.*

24. *See* Peter C. DuBois, *Brazil Rings Up a 64% Premium Over Minimum in Its Auction of Telecom Giant*, BARRON'S, Aug. 3, 1998, at MW8.

framework to successfully privatize Telebrás, the Government of Brazil (GOB) during the past several years enacted various constitutional, legal, and regulatory reforms allowing for private sector participation in the provision of telecommunication services formerly provided by Telebrás. Through the privatization of Telebrás and the related legal reforms designed to, among other things, promote competition, the GOB hopes to improve and modernize its telecommunications sector.[25]

A. Legal Framework—Creating Conditions For Privatization

1. *Structure of the Telecommunications Sector Prior to Legal Reform*

Since the early 1970s Brazil public telecommunications were provided by a group of government-owned companies.[26] The monopoly consisted of Telebrás and its subsidiary Empresa Brasileira de Telecomunicacoes A.A. (Embratel). Telebrás controlled all of Brazil's local telephone operations, while Embratel provided long-distance and international services. The two companies controlled twenty-seven regional operating subsidiaries, one for each state, which provided all local, long-distance, and cellular services.

2. *Changes to the Legal Framework for Telecommunications*

Between 1994 and 1997 Brazil amended its constitution and passed legislation setting out the legal framework for privatization of the telecommunications sector. In 1994, the Brazilian Congress amended the constitution permitting the government and the private sector to consider actions to restructure Telebrás and to move towards a competitive telecommunications system.[27] In 1995, Constitutional Amendment 8 was adopted, extinguishing the exclusive rights granted to the state-owned companies for the provision of public services.[28] In 1996, a "minimum law" on telecommunications was enacted, authorizing concessions for the provision of cellular telephone services using B Band.[29] In 1997, the General Telecommunications Law was passed. Among other things, the law set forth social, economic, and legal principles for the telecommunications sector, promoting competition and establishing procedures for the privatization of Telebrás.[30] The General Telecommunications Law also created a new regulatory body named Agencia Nacional de Telecomunicacoes (Anatel).[31] These steps provided the legal and normative framework for the restructuring and privatization of the Brazilian telecommunications sector.

---

25. Brazil has the eighth largest gross domestic product in the world and a population of 158 million people and is the largest economy in Latin America. While the telecommunications sector is quite large, it has not achieved the levels of service and efficiency that the GOB had desired. For example: there are only nine phone lines for every 100 people in Brazil as compared to 60 or more in the United States and Europe; and in certain areas customers would wait for up to one year to have a telephone installed. In its desire to improve the delivery and range of telecommunications services to Brazilians and to effectively compete in a global marketplace, the GOB decided to privatize Telebrás.

26. *See* Aileen A. Pisciotta, *Telecommunications Reform in Brazil*, 220 N.Y. L. J., Aug. 28 & Sept. 4, 1998, *available in* LEXIS, 2ndary Library, Lglpub File.

27. *See Telecommunications in Brazil: Restructuring and Privatization*, J. Project Fin., Spring 1998.

28. *See* Pisciotta, *supra* note 26.

29. *See id.*

30. Law No. 9.472, of July 16, 1997, the General Telecommunications Law.

31. Anatel has independent administrative authority and at the same time it is linked to the Ministry of Communications, which is controlled by the president. Anatel is made up of two bodies, a five-member board of directors who serve a five-year term and an advisory board whose members serve a three-year term. The five-member board is nominated by the president and confirmed by the Senate, while the advisory board is

B. The Road to Privatization

1. *First Steps to Privatization*

One of the first major steps to allow private participation in the Brazil telecommunications sector was taken in 1997 through the auction of the B-band cellular by the GOB services. Ten licenses for the provision of cellular services in various regions of the country were auctioned.[32] Bidders were allowed to receive up to two licenses, one in the primary markets of the south and one in the less-developed regions in the north. Bell South, Portugal Telecom, and Spain's Telefonica were some of the biggest winners in the B-Band auctions.

2. *Telebrás Privatization*

In order to facilitate the privatization of Telebrás, the GOB began the restructuring of Telebrás in 1997. Prior to restructuring, Telebrás was a holding company under which there were twenty-seven operating companies, one for each state in Brazil. Each of the operating companies controlled both the fixed telephony and cellular services in its respective state. Under the restructuring, each operating company first spun off its cellular operations. Then, Telebrás was broken up into twelve separate holding companies: three fixed telephony holding companies, eight A-Band cellular holding companies, and one long distance holding company. Shareholders of Telebrás received shares in each of the twelve newly created holding companies

Prior to the privatization of Telebrás, the government of Brazil owned 19.3 percent of the total shares of Telebrás and held approximately 51.8 percent of the common shares, giving the GOB control over Telebrás. During the auction process, the GOB sold the controlling interests that it held in each of the twelve holding companies to the winning bidders.

The auctions for the twelve holding companies were held on July 29, 1998, at the Rio de Janeiro stock exchange. The auctions consisted of sealed bidding, with bidders relying largely on the GOB's asking price and the results from earlier bids for the B-Band licenses to formulate their bid amounts. In addition, pursuant to the newly passed General Telecommunications Law, if bidders were within five percent of each other's offer, the sealed bidding turned into live bidding. One such case involved MCI and Sprint, which were within five percent of each other's bid for the long-distance carrier Embratel. In the subsequent live bidding contest, MCI won but ended up paying $100 million above its initial sealed offer.[33]

The biggest winner in the auction was Spain's Telefonica, considered the leader in Latin American telecom, which with its consortium members paid about $4.9 billion for the fixed line company in Sao Paulo, considered one of the most profitable areas, and $1.15 billion for a cellular operator in Rio de Janeiro. The other big winners were MCI, which acquired the long-distance carrier Embratel for $2.26 billion, and Portugal Telecom, which acquired a cellular operator for $3.03 billion. A summary of the results of the Telebrás privatization is provided below.

---

appointed by the executive and legislative branches. Anatel's function is to issue guidelines for service provision, execute concession contracts, supervise service rendering, manage the radio frequency spectrum, control and define tariff reviews, issue norms and standards for equipment, and issue certification of products.

32. The B-Band licenses were designed to promote competition in cellular services by allowing companies to compete with the A-Band license holders who were already providing cellular services in their relevant markets.

33. *See Brazil Sells Telebrás; Telecom Giant Fetches $18.9B In Largest Latin Privatization*, Sun-Sentinel, July 30,1998, at 1D.

Privatization Results Chart[34]

Operator	Winner	Winning Price (US $$)
Telesp	Telefonica Consortium	4.9 billion
Tele Centro Sul	Solpar	1.75 billion
Tele Norte Leste	AG Telecom	2.91 billion
Embratel	MCI/Unibanco	2.26 billion
Telesp Celular	Portugal Telecom	3.03 billion
Tele Sudeste Celular	Telefonica Consortium	1.15 billion
Telemig Celular	Telpart	640.68 million
Tele Celular Sul	UGB Part./Bitel Part. (Telecom Italia e Uniao Globo Bradesco)	593.22 million
Tele Nordeste Celular	Telecom Italia e Uniao Globo Bradesco	559.32 million
Tele Leste Celular	Telefonica Consortium e Iberdrola	362.71 million
Tele Centro Oeste Celular	BID Consortium (Splice do Brasil)	372.88 million
Tele Norte Celular	Telpart	159.32 million

In the end, the auctions were successful, as the GOB sold its controlling stakes in the twelve Telebrás subsidiaries for about $19 billion, which was sixty-four percent higher than the minimum asking price.[35] The timing was excellent for the GOB as virtually immediately following the auction, the country turned south economically.[36] According to experts, Brazil has tremendous potential as a telecom market. In the event Brazil emerges from its current financial challenges, tremendous new investment and privatization is on tap.[37]

The Brazilian privatization was notable for its focus not just on receipt of the greatest proceeds, but also for the desire to promote competition and the establishment of more readily available phone service in Brazil. To that end, the Brazilians plan to auction four "mirror" license concessions in order to create direct competition with the winning bidders of the Telebras companies.[38] The Brazilian government has announced that seventy percent of the value of the bids for the "mirror" concessions will be evaluated based on the committed investment that the bidder will guarantee to make in developing the license, and only thirty percent on

34. *See Platforms International Announces Brazil's Telecommunications Auction Results*, BRAZIL TELECOM (Global Information, Inc.) Aug. 1998.

35. *See id.*

36. The auction took place on July 29, 1998, at which time the price for the Telebrás ADR's trading on the NYSE was approximately $120. The next day, the ADR's price fell sharply and by early September the price was below $60. *See id.*

37. Brazil has become a model for privatization, as significant sales of the country's oil and electricity industries are contemplated. *See Darkness and Light in Brazil*, ECONOMIST, Feb. 14, 1998, at 33 (describing Brazilian privatization efforts for electricity and oil). In the past two years, more than a dozen local energy distributors have been privatized. Three large generating companies are on the block. Gas is flowing from Bolivia along a $2 billion pipeline and gas from the new Caisea field in southern Peru may become available. Some believe a single energy market could be created spanning southern South America. *See id.* at 34.

38. Jennifer L. Rich, *What Happens Next?*, LATIN FIN., Sept. 1, 1998, at 29.

the proceeds offered to the government. This virtually unprecedented move will be watched eagerly as a potential "new wrinkle" in privatizations worldwide.

The year 1998 was also a strong year for privatization worldwide and in Europe in particular. Estimates for worldwide privatization topped $115 billion.[39] Spain sold its remaining shares in the banking group Argentaria ($2.4 billion), tobacco giant Tabacalera (1.85 billion), and the energy firm Endesa ($7.6 billion). France sold shares in the banking group CIC ($2.2 billion), and two insurance groups, GAN ($2.9 billion) and CNP ($1 billion). The Italian government raised $7.2 billion for shares of ENI, the Portuguese government garnered $2.5 billion for shares in the electrical utility EdP, and the Swiss privatized Swisscom for approximately $6.4 billion. Total transactions for 1998 in Western Europe topped $50 billion, an amount greater than that raised in privatization globally in any year prior to 1993 and two-thirds of the record $75 billion achieved by Western Europe in 1997.[40] It is noteworthy that this strength in privatization is maintained despite the largely center-left governments that currently dominate Western Europe.

The next great wave in privatization will likely be done on a disaggregated basis as the troubled assets held by the Asian financial sector are put on the block. A tremendous backlog of assets are being accumulated in bank guarantee agencies and these assets will need to be sold off in the coming years. Even more troubled assets are still owned by failed and failing banks and there will need to be a sale of these assets. This creates tremendous opportunities for acquirers of distressed assets and the advisors who serve them.[41]

V. Efforts to Increase Globalization of Investment and Reduce Bribery and Corrupt Practices

The year 1998 saw efforts to complete the Multilateral Agreement on Investment fail, despite the efforts of the twenty-nine members of the Organization for Economic Cooperation and Development (OECD). In September 1995, negotiators began to work on a rationalization agreement modeled on the omnibus agreements developed for trade agreements: a set of global rules, which would replace a patchwork of approximately 1,600 bilateral investment treaties.[42] Although the negotiators set an agreed deadline of April 27, 1998, no action has been taken as of the date of this article and further progress is uncertain.[43]

39. *See* Mark Baker, *Western Europe Dominates the World in Privitization*, ACQUISITIONS MONTHLY, Dec. 1998, at 74.

40. Oliver Letwin, *Western Europe's Bumper Year*, PRIVATISATION INT'L, Jan. 1999, *available in* 1999 WL8865898, PRVINT database. The Swiss privatization was particularly noteworthy, occurring in October 1998 during the greatest period of market turmoil this year. *See id.*

41. Other significant privatizations in 1998 included the sale of 20% of Air France. *See* Bruce Crumley, Thomas K. Grose & Nina Planck, *Privitization-French Style*, TIME INT'L EDITION, Mar. 9, 1998, at 22. The equity sale valued Air France at $3.3 billion. *See Spanish Banks, Final Helpings*, ECONOMIST, Feb. 7, 1998, at 72 (noting that the Argentaria privatization was done with a "golden share." This is a fig leaf first used in the British privatizations of the 1980s and it gives a veneer of nationalism to the decision to sell assets with perceived nationalistic importance). In Australia, the privatization of 30% of the local telecommunications giant Telstra resulted in a seismic jump in share ownership to more than 40% of all Australian citizens, up from 17% a decade ago, creating an economic democracy effect similar to that caused by the British privatizations in the 1980s. The privatization was followed by privatizations of insurance company AMP and the N.S.W. Totalisator Agency Board, the state gaming monopoly, that were also strong successes. *See* Tom Dusevic, *Australians Take Stock*, TIME INT'L EDITION, June 29, 1998, at 46.

42. *See Does The WTO Need Special Rules for Direct Foreign Investment?*, ECONOMIST, Oct. 3, 1998, at S10 [hereinafter *Special Rules*]. WTO Director-General Renato Ruggiero called the MAI "the constitution for a single global economy." Douglas Mattern, *Democracy or Corporate Rule*, HUMANIST, July/Aug. 1998, at 5.

43. *See* Lori Wallach, *Multinational Madness*, TIKKUN, May 15, 1998, at 12.

The need for such rationalization is clear. Problems with the MAI agreement include the fact that very few developing countries have participated in the drafting of the MAI. According to some, "the governments of developing countries increasingly see MAI as an exercise in neo-colonialism, designed to give rich world investors the upper hand."[44] Domestic political considerations in each country have also led to proposed exemptions to protect favored industries, labor issues, and the environment, all of which defeat the purpose of an omnibus agreement. One need only recall the issues faced in the U.S. ratification of NAFTA to understand the gamut of issues raised by the MAI effort.

Some predict that the MAI will be transferred to the World Trade Organization (WTO) for completion. The WTO has experience in crafting complicated multilateral agreements,[45] it involves far more countries than the OECD (132 nations), and it has an adjudication mechanism for disputes already in place. Predictions are that a final agreement is still years off,[46] but the pressures for such an agreement will increase.[47]

A number of countries made significant efforts during the year to lure foreign investment by dropping barriers to foreign ownership and introducing new laws to promote property rights and freedom of capital. For example, Thailand introduced a new Foreign Investment Law that reversed the draconian Alien Business Law, allowing foreigners to own up to seventy-five percent of domestic businesses and opening up thirty-three business sectors previously off-limits to non-Thai companies. New bankruptcy and foreclosure laws were also implemented.[48] In India, efforts were made to introduce a greater role for foreign investment, particularly in insurance, although a key vote on opening the insurance industry was deferred in December.[49]

Efforts to reduce bribery and other corrupt practices were a major initiative of 1998. A recent U.S. Department of Commerce study revealed that "U.S. companies lost 100 foreign contracts worth $45 billion to overseas rivals as a result of bribes paid to government officials."[50] For almost twenty years, the U.S. Foreign Corrupt Practices Act (FCPA) has been in effect, which despite problems in enforcement has gone a long way toward reducing corrupt practices by members of the U.S. business community.

A major step has been taken by the Organization for Economic Cooperation and Development through its enactment and soon to be effective anti-bribery statute, similar to the FCPA. Considered a significant indication of European and international commitment to discourage pervasive corrupt practices, the OECD Convention on Combating Bribery to Public Officials in International Business Transactions is scheduled to go into effect on February 15, 1999. Among other things, the convention provides a broad definition of bribery and requires signatory nations to adopt coordinated national legislation to punish instances of bribery paid to foreign public officials.

On December 17, 1997, after ten years of negotiation and much U.S. prodding, representatives of thirty-four nations, including all twenty-nine OECD member countries, as well as

44. *Finance and Economics: The Sinking of the MAI*, ECONOMIST, Mar. 14, 1998, at 81 [hereinafter *Sinking of the MAI*].

45. The WTO has handled, in addition to trade, complex bargaining over information technology, telecommunications, and financial services. *See Leaders: The Talking FDI Blues*, ECONOMIST, Mar. 14, 1998, at18.

46. *Id.*

47. *See Special Rules*, *supra* note 42.

48. *See* Ron Corben, *Thailand Makes Big Noise About Its Quiet Revolution*, J. COM. & COM., Aug. 31, 1998, at 3A.

49. *See Vote on Indian Reforms Put Off Until Next Year*, FIN. TIMES, Dec. 16, 1998, at 8.

50. JBC International, *Bribery (by any other name) Is Giving Non-U.S. Firms Advantage in Global Deals*, J. COM., Apr. 1, 1998, at 11C.

Argentina, Brazil, Bulgaria, Chile, and the Slovak Republic, signed the convention. Through the end of 1998, many signatory nations ratified the convention.[51] It has been suggested that the new convention may prove more effective than the FCPA, which despite the specter of onerous sanctions in cases of a wide range of corrupt practices by U.S. business representatives, has numerous loopholes and problems with enforcement. The most recent statistics available indicate that a mere eleven cases were investigated between 1994 and 1996, and none of these were prosecuted by the Department of Justice.[52]

The new convention requires countries to assist each other in their prosecutorial efforts. There is also built-in enforcement incentive, because each country will have interest in its counterpart's activities to prevent unfair advantage. It also has been suggested that corporations may reduce their illegal practices and take the convention seriously since it has been endorsed by so many nations.

The World Bank also has made reduction of corrupt practices a priority. For the first time, anti-corruption language has been added to the bank's procurement guidelines, the rules that bidding entities must follow to compete for the hundreds of bank projects available. Bank representatives repeatedly emphasize their commitment to cancel project loans in instances of bribery or other improper practices. While proving these practices is always difficult, in the last year, the bank has had a number of instances, several quite publicized, of loan cancellations or, as they are called, "misprocurements." The bank also instituted a telephone hotline for callers to call in suspicions of illegal activity. This past year also has seen the issuance of the first of its kind, new World Bank "Procedures for Dealing with Allegations against Bidders, Suppliers, Contractors, or Consultants." While the procedures are not as detailed as many statutory schemes or as many would like, their issuance must be viewed a significant reform.

As with many new rules, there are concerns about enforcement. One of the shortcomings cited is that the procedures allow the government under review to investigate the alleged corruption itself, undoubtedly resulting in conflicts of interest. The procedures do, however, provide that outside investigators and auditors must be requested by the complaining party. Another source of concern is that investigations are to be conducted according to the laws of the country in question. Since developing countries may have limited legal and enforcement mechanisms by international standards, inadequate prosecution may result. As is generally the concern in cases of this sort, there is the overwhelming evidentiary problem. Bribery is difficult to prove. Nonetheless, the promulgation of these procedures is an indication of World Bank commitment to reform. It will be interesting to track investigations and results under the procedures, and to see the effects. The bank is also preparing a second set of guidelines to address potential fraud by borrower countries.

Finally, money laundering laws, which are important in international law enforcement, and the prevention of corrupt practices, became a bit more visible in late December 1998, when Citibank was subject to formal criticism from the U.S. General Accounting Office (GAO), the investigative arm of the U.S. Congress. In a stinging report, the GAO criticized Citibank for unwittingly assisting Raul Salinas, brother of a former Mexican president, funnel $100 million in alleged illegal drug money from Mexico into bank accounts in Switzerland.[53] The GAO

---

51. Through the end of 1998, the following signatory nations deposited instruments of ratification of the convention: Iceland, Japan, Germany, Hungary, the United States, Finland, the United Kingdom, and Canada. *See* Sue Kendall, *International Anti-bribery Pact to Enter Into Force in February*, AGENCE FRANCE PRESSE, Dec. 18, 1998.

52. *See* Nancy Dunner, *U.S. Presses Drive Against Business Bribery*, FIN. TIMES, Feb. 24, 1999, at 7.

53. *See* Tim Golden, *U.S. Report Says Salinas' Banker Ignored Safeguards*, N.Y. TIMES, Dec. 4, 1998, at A8.

concluded that, among other things, Citibank failed to verify the source of the money, did not investigate irregularities in procedure, and did not follow its own internal procedures against money laundering. The case is currently under investigation by the U.S. Department of Justice. Members of the Senate have expressed strong concern over the inadequacy of bank procedures to handle problems of this sort. Calls for Senate investigation may be heard in 1999.

VI. Trends for the Future

Predicting the future is undoubtedly one of the greatest of follies. Even Nostradamous appears to have gotten the trends right, but the dates wrong, so the following is offered with the deepest humility.

Globalization will continue at a remarkable rate.[54] Uniform securities law disclosure will receive a substantial drive forward as investors will likely refuse to invest in countries that do not have open economies.[55] This will parallel increasing efforts at multinational regulation of banks and other financial institutions. This means a reduction in sovereignty in exchange for perceived greater financial stability. This has the potential to create civil unrest, however, as the economic tools of governments will be reduced substantially.

If this internationalization is to be achieved, unification of accounting standards is critical, even though very few investors to date seem to have been concerned about the lack of transparency in international accounts and the fact that some accounting systems are a lot more reliable than others.[56] In 1998, the London-based International Accounting Standards Committee published a complete set of uniform accounting guidelines. The accounting bodies in both the U.S. and Japan must approve these rules, however.

With globalization, the friction in the movement of capital between countries will be reduced substantially, resulting in potential massive, immediate swings of capital in and out of countries at will. The inability of business to plan for these swings may create significant economic costs for the industrial sectors of a variety of countries, leading to political instability[57] and efforts to reduce the velocity of capital. As with all technology, however, it may be difficult to get the genie back into the bottle once he has been released. Lawyers will face significant new challenges in advising their clients through the financial changes that will come and additional challenges in advising governments how to open their markets and their processes without disturbing the fragile compact between governments and the people they serve.

---

54. The annual flow of cross-border investment has more than doubled since 1992 to an estimated $350 billion in 1998. *See Sinking of the MAI, supra* note 44. International institutional efforts to create global financial agreements and institutions include the establishment of the WTO, the passage of multinational trade agreements like NAFTA, and the expansion of the role of the International Monetary Fund.

55. *See* Jeffrey Sachs, *International Economics: Unlocking the Mysteries of Globalization*, FOREIGN POL'Y, Apr. 15, 1998, at 152 (discussing global investment, the reasons for and limitations on such investment, and reviewing scholarly literature on the topic).

56. *But see* Bernard Condon, *Global Dondeesta Earnings? Bargains in Berlin? Seals in Seoul? Better Bone Up On Germany and Korean Accounting Before Buying*, FORBES, June 15, 1998, at 234. "Foreign accounting can be inscrutable and a trap for the unwary. . . . In a recent study of 25 Japanese multinationals, for example, Morgan Stanley concluded that an average of 20% of each company's shareholder equity would be instantly wiped out if the companies correctly accounted for their costs." *Id.*

57. *See* Wallach, *supra* note 43. "Over the past several decades, the power of democratic institutions has been undermined, deepening multinational corporate power. . . . The globalization agenda is like a political Dracula." *Id.* Lori Wallach, author of the article, is Director of the Global Trade Watch division of Ralph Nader's consumer group Public Citizen. Brent Blackwelder, president of Friends of the Earth, has said with reference to the MAI treaty, "The MAI would give unprecedented power to directly challenge government, environmental, health, labor and other safeguards. The MAI would be a dagger through the heart of democracy." Mattern, *supra* note 42, at 5.