

# Is the international investment policy regime up to the tasks ahead?

With the gap between the richest and poorest countries widening and the world struggling to deal with ongoing crises, the investment community must consider whether it possesses the tools necessary to meet development objectives

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ne of the current pre-eminent policy challenges is how to foster responsible investment and reap the attendant development benefits. Today's investment environment is characterised by flows of foreign direct investment (FDI) that remain 15 per cent below their pre-crisis average and more than 35 per cent below their 2007 peak, despite the fact that companies' income from foreign investments is close to 2007 highs. This lack of private productive investment is particularly serious as public investment runs out of steam in one country after another.

The investment landscape is also experiencing fundamental changes. Last year was a landmark: for the first time, developing countries received more than half of global FDI flows in 2010. However, emerging markets are not only important recipients of FDI, but also increasingly large investors themselves, with their share of world outflows approaching 30 per cent. Clearly the patterns and types of investment by these new players on the scene are different – and so are their priorities. There is a growing risk of investment protectionism, given that the restrictive investment measures undertaken by governments each year have reached the highest level since 1992.

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All this is occurring at a time when the world is striving to deal with crises related to food, finance and climate change and when the development gap is widening, which particularly affects the least-developed countries and the poor and marginalised. These investment-related challenges, together with the broader debate about global economic governance, raise the question whether the international investment policy regime is sufficiently equipped for offering reliable global economic governance, successfully promoting responsible investment and effectively delivering on its development promise.

Harnessing the contribution of international investment agreements (IIAs) so as to effectively encourage sustainable investment is therefore a key priority for the investment community.

## The role of international investment agreements

As of June, the IIA regime comprised more than 6,100 treaties, including 2,830 bilateral investment treaties (BITs), 2,996 double taxation treaties and 314 other IIAs (such as free-trade agreements with investment provisions). Countries negotiate IIAs to protect and promote investment, at a pace of three agreements per year. The IIA universe has become highly fragmented and complex, with thousands of individual agreements lacking any system-wide coordination and coherence.

There are IIAs at the bilateral, regional, intra-regional, inter-regional, sectoral, plurilateral and multilateral levels. Moreover, they go beyond investment-specific provisions by including rules addressing related matters such as trade in goods, trade in services, intellectual property, labour issues or environmental protection.

However, there has been some consolidation at the regional level, with an increased focus on plurilateral free trade agreements (FTAs) with investment provisions. Important developments are also happening at the European level, where the Lisbon Treaty has shifted the responsibility for FDI from member states to the EU.

Today's development objectives and changes in the investment landscape, along with the evolving structure of the IIA regime, pose specific challenges to contributing to sustainable development.

While the IIA regime has become too large for states to handle, too complicated for firms to take advantage of and too complex for stakeholders to monitor, it is still too small to cover the whole investment universe. Despite continuous growth, IIAs offer comprehensive cross-sectoral post-establishment protection to only two-thirds of global FDI stock and cover only one-fifth of bilateral investment relationships.

## Bilateral relationships

Some FDI stock is subject to protection by two or more IIAs, but full coverage would require another 14,100 BITs. These treaties would cover, on the one hand, many bilateral relationships with little propensity to invest (where FDI flows are negligible) or to protect, such as between member states of the Organisation for Economic Co-operation and Development (OECD). On the other hand, they would include a few bilateral relationships with substantial FDI stocks not covered by any existing investment protection agreement.

Moreover, the IIA regime raises several concerns. There are few mechanisms for coordination between it and other parts of the global economic system (namely, trade, finance, competition or environmental policies) or other bodies of international law, such as international environmental or human rights law.

The regime's investor-state dispute settlement mechanism has raised concerns among numerous stakeholders. There are questions about the balance, or lack thereof, that IIAs establish between the rights and The world needs a so

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obligations of investors and governments and, in certain circumstances, between home and host countries.

In sum, today's global challenges and the changing landscape of international investment flows, together with the specificities of the IIA regime, suggest a need for a more coordinated, regulated approach to international investment issues, to ensure that the IIA regime contributes effectively to sustainable development and fits with other economic and non-economic policies.

While countries manage to address these challenges by adjusting individual investment treaties and domestic policy frameworks, the longer-term challenge lies in agreeing to a global approach to investment for development and a coherent global governance framework for investment. Above all, the world needs a sound international investment regime that effectively promotes sustainable development for all, based on a new investment-development paradigm.

## Working to reap rewards

The United Nations Conference on Trade and Development (UNCTAD) is the focal point for issues related to investment and sustainable development, putting this objective at the forefront of its activities with investment stakeholders around the world.

By offering a platform for sharing experiences and best practice and building consensus, UNCTAD is advancing a broad understanding of issues to be addressed so that international investment policies function in a way that is more efficient and conducive to sustainable growth and development. UNCTAD's 2010 World Investment Forum (WIF) allowed high-level discussion and action on harnessing international investment as an engine of growth and development. The WIF's Ministerial Round Table – with more than 25 ministerial-level participants – and the WIF's IIA conference addressed challenges and the way forward for international investment policymaking.

UNCTAD offers cutting-edge and development-oriented legal and policy research on issues related to IIAs, including through its World Investment Reports (WIR) and specific publications on IIAs. It also provides policy advice, technical assistance and capacity-building, on issues such as improving investment policy frameworks nationally and internationally, harnessing corporate self-regulation to ensure responsible investment, fostering entrepreneurship and helping domestic enterprises create mutually beneficial business relationships with transnational corporations.

## Cooperating with the G20

Throughout its wide range of activities, UNCTAD works with investment and development stakeholders around the world, including the G20. UNCTAD appreciates the role that the G20, through its Cannes Summit, can play in fostering sustainable development in today's particularly challenging context.

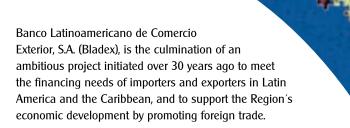
The contribution of investment is a common thread throughout the priorities identified for the summit, including building infrastructure, ensuring food security, promoting innovative financing – including a green climate fund – and encouraging private-sector development.

UNCTAD is already working with the G20, notably through monitoring G20 investment policies in a project undertaken jointly with the OECD. It has contributed to the G20 Development Working Group, including on options for promoting responsible investment in agriculture, determining indicators for measuring and maximising added economic value and job creation arising from private-sector investment in value chains, and promoting standards for responsible investment in value chains.

The G20 is a highly relevant forum for practical solutions to development issues through giving attention to the investment perspective. This is why UNCTAD is pleased to offer its specific contribution and assistance in these important endeavours. •

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In 1992, Bladex became the first Latin American bank to be listed on the NYSE, and that same year also became the first Latin American bank to obtain an investment grade rating. At present, Bladex has eight representative offices, in Argentina, Brazil, Colombia, United States, Mexico, and Peru, as well as an Agency in New York. The bank is headquartered in Panama.

Today, Latin America provides an important share of the goods and services that drive global economic growth. Bladex is at the heart of these activities, providing almost US\$1 billion per month in funding to the Region, supporting ever-increasing trade flows between Latin American countries and with the rest of the world.

The Bank deploys a team of skilled professionals, providing its customers a full range of products and services focused on foreign trade, including:

- · Short and medium term foreign trade credit
- Structured trade financing
- · Discounting and insurance coverage for export transactions
- Leasing

Bladex's commitment to excellence contributes to the steady growth of a dynamic and profitable business, and to the welfare of the Region as a whole.





## Rebalancing Asia requires a rethink

The importance of Asia's contribution to the global economy should not be underestimated. Rebalancing the continent's economies is necessary, but a focus on development can trigger innovative thinking and deflect a further downturn

By Yoginder K Alagh, chair, Institute of Rural Management Anand, and former minister, power, planning and science and technology, India ne reaction to the world's problems is to suggest, wistfully, that the fulcrum should shift to Asia. That is where the growth and the financial reserves are – and where the sound policies are. During the most recent recession, Sonia Gandhi called India's nationalised banks a source of strength. She was criticised in the Indian financial press, in spite of the run on a private Indian bank for its losses. What, exactly, is the role of the G20 in all this?

All serious work, including large statistical models, shows that the US and German economies remain much too big and powerful for such fashionable statements about an Asian fulcrum to be significant. The world has shrugged off the ratings by agencies, which have not exactly proved prescient since 2007. There will be an impact of the US downgrade on bond prices and the dollar in the short run, but the markets had already factored in the fundamentals, as Iwan Azis, head of the regional integration office of the Asian Development Bank (ADB), has pointed out. Exports from trading economies such as Thailand and Taipei may suffer, but the giants, such as Japan, China and India, are sufficiently diversified to avoid suffering substantially.

Is there a future for more trade and investment in Asia and within Asia? While a big rebalancing is obviously required, the baby should not be tossed out with the bath water. As the G20 continues to press for reform, Asia's contribution must be included from the start.

In June, the ADB organised a meeting with the Korea Institute for International Economic Policy to discuss 'assistance to Asian countries in building a regional macro-financial-trade policy framework', to coordinate efforts to rebalance policies addressing development issues. At that meeting, I stated that financial and trade policy reporting usually argues from an implicit comparative, static framework. This is also true of the rebalancing reporting, which concentrates on exchange rate changes and related issues. Volatility in these trends has, in fact, introduced greater uncertainty.

Development issues tend to be conceptually underplayed, even if they gain urgency in crisis situations. They have substantial implications for investment, human development and related trade and financial policy. This is particularly true for rebalancing, which, as with G20 initiatives, requires a medium-term framework in order to be meaningful.

A focus on development, with an emphasis on sectors with large employment and output consequences, can trigger innovative thinking on trade and move away from talk of a double-dip recession. Studies by the Food and Agriculture Organization (FAO) have shown the negative

impacts on diversification, spread of agricultural growth, employment and poverty outcomes of static trade policy prescriptions in meltdown periods in Asia. Agricultural trade is particularly relevant, with countries having very different agro-climatic characteristics and therefore differing possibilities for specialisation and trade. A medium-term framework for agricultural tariff policies would be beneficial. Similarly, policies for small and medium-sized enterprises are required in a stimulus phase, as in the US package, to trigger trade and development. Korea and Japan are good examples of this approach.

### Forming a base for development

A stable, medium-term trade policy with a rule-based regime and currency arrangements could lay the foundation for rebalancing and development. Newer financial products are needed to buttress such kinds of development. Models developed by the ADB, with the International Food Policy Research Institute (IFPRI), have shown that acceptable alleviation of poverty and hunger in Asia would not be possible without such reform. Policies requiring a medium-term framework need a macro policy and exchange-rate regime of the kind discussed at the G20's Seoul Summit in 2010. Azis himself has a computable general-equilibrium model of regional rebalancing, that starts with employment and safety-net objectives in a meltdown rather than with general admonitions on reform.

Big Asian countries have detailed agro-climatic inventories. Large Asian land masses in the Indonesian archipelago, Thailand, Myanmar and elsewhere in South Asia are rich in agro-climatic diversity and are 'worlds within the world'. This is a powerful argument for trade: each region should look for what it can do best. Agriculture and rural development can concentrate on specialisation, while food and fibre deficits and surpluses would be cleared with trade. Agricultural growth based on agro-climatic resource endowments is sustainable in the sense that it conserves water, energy and land.

Globally, this process would temper commodity instability, as growth of the large Asian economies would support the revival. When per-capita income rises by seven per cent annually in real terms, as in the case of the BRICS group (Brazil, Russia, India, China and South Africa), the income elasticity of demand of non-grain agricultural products is around two. Annual growth of 15 per cent would provide the world economy with the stability it needs. Although completing the Doha Development Agenda would be useful, designing concentric circles of cooperation could well be something the G20 could take on successfully.

Policy issues include diversification as a part of rebalancing in terms of consumption and demand trends,



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as well as a possible change in the structure of the labour force in fast-growing Asian economies. Also important are marketing, communication, first-stage processing, infrastructure, and knowledge and skills for accelerating the process of development and avoiding dislocations due to unanticipated sharp shifts – as seen in political conflicts in India and China – over land acquisition and insufficient facilities for migrants coming from rural to urban settings.

These issues would have implications for trade policies, including tariffs and incentives to promote the smooth functioning of markets in a medium-term framework. This, in turn, would need financial products and markets to be developed to support the market processes in diverse capital markets. Safety nets, such as employment guarantees and food security networks, would be required. Asian economies have once again reached a stage where advances are possible, and where security can provide powerful incentives for technological change.

Planting saplings in a ricefield in Gujarat, India. The various Asian countries differ widely in their agro-climatic characteristics The development of inter-regional profiles would provide a larger context in which such policies could be followed. Most of the inward-looking rebalancing literature on Asia flounders because models tend to be dominated by US and German outcomes. Given the importance of the large global economies, it is possible that the exploration of comparative, static Asian inter-regional flows might offer interesting complementary possibilities.

The macro frameworks that were accepted at the Seoul Summit could provide a quantitative coordinating framework for exploring such possibilities. Counterfactuals exist, where structural change can take place in a benign framework and highlight the importance of policies. Indeed, according to a model that I have developed on the future of Indian agriculture, the poorest Indian would be richer by one-third in seven years, in a benign global scenario. Surely, such an outcome is worth working for. •

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## The importance of promoting long-term investment

ounded in 2009, the Long-Term Investors' Club (www.ltic.org) aims to bring together major worldwide institutions – including sovereign wealth funds, public-sector retirement funds, private-sector pension funds and development banks – to assert their common identity as long-term investors and to facilitate greater cooperation between members.

Today, the Club is composed of 14 major financial institutions and institutional investors from all over the world, in particular from the G20 countries, representing a combined balance sheet total of US\$3.2 trillion. Our message is that fostering the right conditions for long-term investment is key to ensuring international financial stability and sustainable economic growth.

In a world suffering from a deep imbalance between accumulated savings in some parts and large-scale unfunded investment needs elsewhere, cooperation and partnerships are among the best ways to allocate capital in a more efficient and equitable way, and to lay the basis for sustainable, shared growth.

Undoubtedly, the G20 is the forum to cooperate in creating the right conditions for long-term investment and shared growth.

For this reason, the Long-Term Investors' Club broadly supports the priorities of the French presidency of the G20.

Concerning infrastructure, the needs are huge in a context of climate change, demographic growth and rapid urbanisation.

Developing new infrastructures in emerging countries, and restoring those of the developed countries, implies massive investment. According to the Organisation for Economic Cooperation and Development (OECD), the worldwide need for infrastructure can be estimated at \$50 trillion by 2030:

- in the European Union, the European Commission estimates that €1.6 trillion still has to be spent just in the fields of transport and energy infrastructures between now and 2020;
- in India, infrastructure needs by 2017 are projected to be \$1 trillion. And by 2030, urban development alone will require \$1.2 trillion of investment in infrastructure;
- in the southern and eastern Mediterranean, the infrastructure pipeline is estimated at \$200 billion for the next five years.

We are all aware that infrastructure projects have specific financial features: long maturities; large capital commitments; specific risks (demand uncertainty, environmental risks, political and policy-related uncertainties, technological obsolescence) and, finally, a specific return profile (for example, for most transportation-related investments the return is low in the first decade, then grows).

Only very specific financial players can undertake these risks. Long-term investors are among them.

Nevertheless, we now have to operate in a very challenging environment. According to a McKinsey report<sup>1</sup>, the world is now entering a new era in which the desire to invest exceeds the willingness to save, putting upward pressure on real long-term interest rates. The gap between global saving and needed investments could range from \$1 trillion to \$2.4 trillion by 2030.

Moreover, the financial crisis has also led many long-term investors to reassess their ability to act as such. Indeed, according to a report presented at the Davos Forum<sup>2</sup>, while in 2009, long-

term institutional asset owners owned slightly under half of the world's professionally managed assets (\$27 trillion out of \$65 trillion), they allocated only 25 per cent of their assets (\$6.5 trillion) for long-term investing. The gap is also due to the combination of short-termist biases, in terms of both regulations (accounting and prudential standards) and market practices.

In a context in which most national budgets are constrained by the effects of the crisis and public investments have decreased, the priority is to find new ways to finance our economies' needs.

The Club members have made several proposals to adapt the international and European regulatory framework in order that the current reform of accounting and prudential standards better take into account the specificities of long-term investment.

Moreover, the Club has developed an active cooperation strategy and launched two infrastructure investment initiatives: the EU 27 Marguerite Fund³, to support strategic investments in the fields of energy, climate change and transport infrastructure in the EU's 27 member states; and the Mediterranean InfraMed Infrastructure Fund⁴ dedicated to long-term investments in sustainable transport, energy and urban infrastructures in the countries of the Mediterranean's southern and eastern shores.

These funds are prototypes of new platforms that allow public investors to join the private sector to finance long-term investments.

The support of the G20 members to promote long-term behaviour is critical. Investors and governments need to modify their behaviour in favour of long-term investment:

- Governments should better consider the impact of regulatory decisions on long-term investments. They also have a fundamental role in creating the conditions to encourage the flow of capital from savers to long-term investments; and
- Investors have to promote long-term strategies and align their decision-making structures with their long-term mandates, as well as actively cooperating with other long-term investors.

The challenges we face go beyond our borders and require the pooling of all available resources to finance our economies' needs. They also require the full, united participation of all the players, notably the emerging countries and their sovereign wealth funds.

Globalisation is not behind us; it stands in front of us. It contains risks and major opportunities. If we want to overcome these risks and seize these opportunities, we must cooperate.

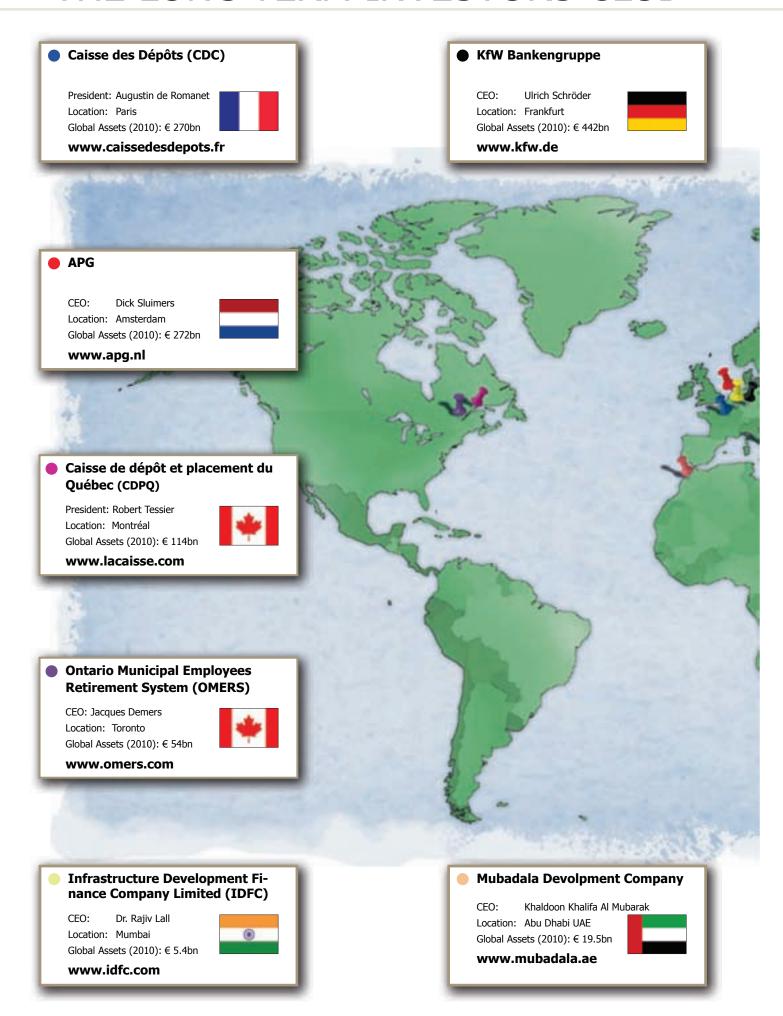
## Footnotes

- 1. McKinsey Global Institute: Farewell to Cheap Capital? The Implications of Long-Term Shifts in Global Investment and Saving, December 2010
- 2. World Economic Forum: The Future of Long-Term Investing, January 2011
- 3. www.margueritefund.eu
- 4. www.inframed.com

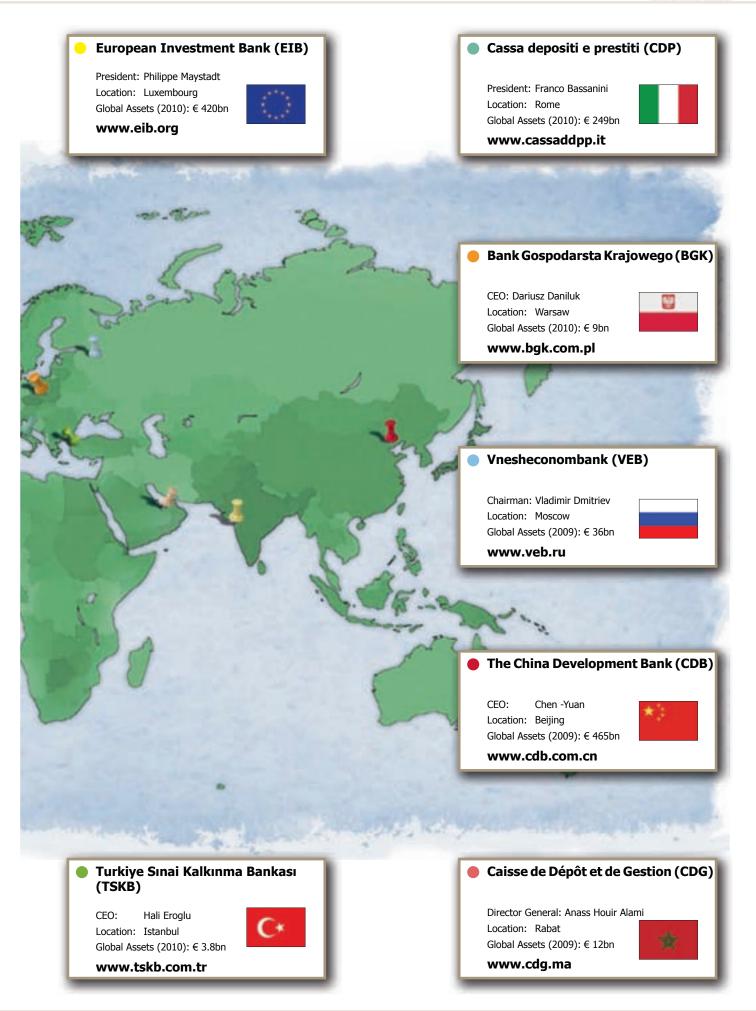


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## THE LONG-TERM INVESTORS CLUB







## Project finance, risk management and economic development

As developing economies expand, the challenge of satisfying their increasing needs creates opportunities for investors. However, initiatives are necessary to encourage international funding against a background of local risk and instability

**By** Julia Czarniak and Jelena Madunic, Skadden, Arps, Slate, Meagher & Flom LLP lobal demand for energy and other natural resources is expected to increase dramatically over the long term as emerging economies in Asia and the Indian subcontinent continue to expand. This increase will exert enormous pressure on existing infrastructure and capacity, leading to scarcity and upward price trends. While innovative green technologies can alleviate some of this pressure, untapped energy resources located in developing countries present valuable development opportunities to meet everexpanding global and domestic resource needs.

However, conflict-affected and fragile (CAF) states – and developing countries to a lesser extent – are characterised not only by the risk of political violence and social instability, but also by a lack of structural predictability, which makes them unattractive to foreign investors. With underdeveloped capital markets, legal frameworks and institutions, and limited availability of skilled human resources, the development and financing of large-scale infrastructure projects (including energy projects) in CAF and other developing countries are challenging.

## Easing the flow of capital

The unique features of project finance have led to its increased popularity for such large, capital-intensive projects. Project finance typically involves the use of limited or non-recourse syndicated loans to special-purpose vehicles, in which sponsors take an equity stake. In the absence of developed capital markets, project finance facilitates the flow of international capital into developing countries. It is particularly well suited for large-scale infrastructure projects, for which capital needs often surpass the investment capacity of any single investor.

Additionally, for certain large-scale infrastructure projects in developing countries and particularly for those with a public focus (such as building roads, railways or power plants to serve domestic markets), project finance is often the only means of accessing capital.

The non-recourse nature of project finance lending means that, once the project is completed, lenders look primarily to its assets and revenues, not to its sponsors, for fulfillment of the loan obligations. Consequently, one key consideration is the allocation and minimisation of risk, often achieved through the use of political risk insurance (PRI) and guarantees, certain tailored contractual arrangements (including the allocation of

completion and operating risk), the syndication of loans and the involvement of multilateral agencies. In CAF and developing states, where political risk is most acute, these risk-management capabilities make project finance a particularly effective method of financing.

## Political risk deters investors

According to the World Bank's Multilateral Investment Guarantee Agency (MIGA), political risk is the foremost constraint to foreign direct investment (FDI) in CAF and developing countries over the next three years, in spite of short-term concerns over the global financial crisis. As reported in MIGA's publication 2010 World Investment and Political Risk, the type of political risk that most concerns corporate decision-makers is government intervention that adversely affects the financial viability of their investment, such as changes in regulation, breach of contract, expropriation and restriction on currency conversion. MIGA also reports that investors consider the most effective tools for mitigating risk to be PRI, along with government and local community engagement, risk analysis and the use of joint venture structures.

In the fiscal year ending 30 June 2011, MIGA issued a record high of \$2.1 billion in new investment guarantees (insurance), representing a 43 per cent increase from the previous year. While FDI has picked up since the height of the financial crisis, recent social and political upheaval in the Middle East and North Africa has resulted in a renewed awareness of political risk, further underscoring the role of PRI in promoting private lending and attracting capital.

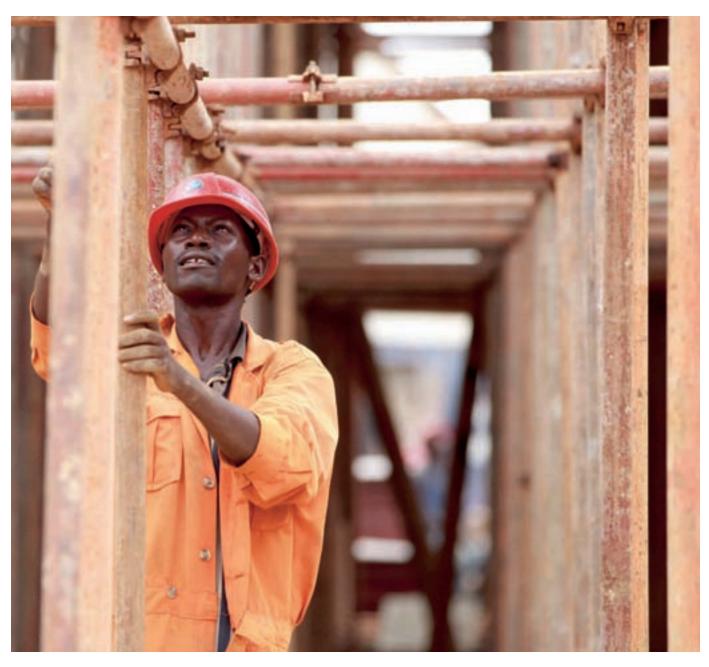
Multilateral providers of PRI include MIGA, the African Trade Insurance Agency, the Arab Investment and Export Credit Guarantee Corporation, and the Asian Development Bank. Other providers are national insurers, including export credit agencies such as the Overseas Private Investment Corporation and the Export-Import Bank of the United States, the Export Credits Guarantee Department in the United Kingdom, the Japan Bank for International Cooperation and France's Compagnie Française d'Assurance pour le Commerce Extérieur. These institutions play a vital role in diversifying the types of available PRI coverage, mobilising additional insurance capacity and promoting PRI products to new investor groups. In doing so, multilateral and national PRI providers encourage investment in developing countries by attracting investors that may otherwise be too risk averse to enter the targeted markets.

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The type of political risk that most concerns corporate decision-makers is government intervention that adversely affects their investment



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In addition to attracting international capital, multilateral and national PRI providers can leverage their political or diplomatic relationships with host governments to mediate disputes between investors and host governments. Since its inception in 1988, MIGA has received 60 claims relating to \$22.4 billion of guarantees issued for projects worldwide, but has only paid out \$16.2 million in five such claims. This is because the vast majority of reported claims were resolved through mediation with host governments, which were often unwilling to jeopardise their relationship with MIGA (or the World Bank) and preferred to settle the disputes.

### Projects lead to growth

In light of the continuing credit crunch, project finance and PRI will continue to help spur economic growth in developing countries. Large-scale infrastructure projects generate cash flow, which, although initially directed to satisfy loan repayment obligations, is later funnelled to project sponsors to be reinvested in the local economy. These large-scale projects spur job growth and training, lead to the development of local transportation infrastructure and generate government revenues that can be used to promote sustainable social and economic development.

To ensure that foreign investment in such projects meets international business standards, G20 leaders should work to further develop, monitor and promote adherence to international guidelines, such as the Equator Principles for determining, assessing and managing environmental and social risk in project finance transactions and the Organisation for Economic Co-operation and Development Guidelines for Multinational Enterprises, which set forth voluntary standards for responsible corporate conduct.

Political pressure must also be exerted to ensure that states, in particular resource-rich CAF countries, do not fall prey to the so-called resource curse – where increased cash flows generated from energy and mineral projects lead to corruption, political instability and social turmoil. Imposing tailored conditionalities and developing innovative structures for internationally funded projects can ensure that revenues serve public-interest purposes, thus promoting good governance and encouraging sustainable economic development.

With global demand for energy and other natural resources curving ever upwards, and international financial markets in turmoil, project finance is set to remain a strong driver of social and economic development worldwide.

Many construction and infrastructure projects in developing nations are dependent upon foreign funding, but negative local factors are a cause of concern for investors

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