



Columbia FDI Perspectives

Perspectives on topical foreign direct investment issues

No. 161 November 23, 2015

Editor-in-Chief: Karl P. Sauvant (Karl.Sauvant@law.columbia.edu)

Managing Editor: Maree Newson (mareenewson@gmail.com)

The case for a multilateral or plurilateral framework on investment

by

Wenhua Shan*

It is now time seriously to reconsider a multilateral framework on investment (MFI), perhaps with a transitional plurilateral framework (PFI) involving the major home and host economies. The 2016 G20 summit provides a good opportunity to table the case for consideration by world leaders. The World Trade Organization (WTO), the United Nations (UN) and/or the World Bank could be venues for discussions or negotiation of its key components.

The conditions are much better than 10 or 20 years ago when similar attempts were made within the OECD and the WTO. Developing countries now attract more than half (55%) of global investment inflows and represent one third of global investment outflows.¹ This confirms that the structure of the world investment order is no longer determined by a north-south divide, but more by a private-public debate, in which private interests of foreign investors have to be balanced against public interests of host states.²

Further, international investment agreement (IIA) practice has been converging in recent years, demonstrating four general features: investment liberalization plus protection; more clear and balanced key substantive provisions; more detailed and refined investor-state dispute-settlement (ISDS) provisions; and social clauses addressing health, safety, environmental, and other concerns. This suggests that a global bilateral investment treaty (BIT) 2.0 is taking shape, which helps pave the way for a MFI/PFI.³

Finally, current debates about the investment regime have generated the political and social momentum necessary for a MFI/PFI. Although not every opinion expressed is supportive of the investment regime, in general terms the debate helps construct a more balanced, and hence legitimate and sustainable, investment regime.

A PFI might be an essential stepping-stone toward the ultimate MFI. Such a PFI might start with a tripartite investment agreement among the big-three, namely the United States, the European Union and China. It would quickly become the blueprint for a global

MFI. A more representative PFI might be negotiated among the world's top five capital exporting and importing countries, the recent treaty practices of which generally follow the trend toward a global BIT 2.0.

Negotiating a MFI/PFI could involve a standalone process that could be modeled on certain precedents.⁴ Otherwise, a MFI/PFI could be negotiated within the framework, or with the support, of existing institutions, such as the G20, WTO, UN, or the World Bank.

The G20 could play a significant role, given that it represents both the developing and developed worlds. It could initiate an exploratory process for a MFI/PFI, assessing its desirability and feasibility. It could go further to provide certain political guidelines, indicating the purposes that IIAs should serve and certain core principles such as the importance of protection and liberalization, the right to regulate, the need for responsible business conduct, and the need to have an adequate dispute settlement mechanism.⁵ Indeed, it would be a great idea if China could propose to include the MFI/PFI initiative in the G20 2016 agenda when she chairs the G20 summit.⁶

The WTO remains a best forum for MFI talks, with its global membership and its successful dispute-settlement mechanism. In particular, it might be possible to launch PFI negotiations in Geneva in a manner similar to the Trade in Services Agreement talks. Over time, it might be possible for the WTO to establish a system combining the strengths of the current trade and investment regimes, providing unified legal and institutional support for the future growth of global value chains (GVCs). Within the UN system, the United Nations Conference on Trade and Development, the International Law Commission and the UN Commission on International Trade Law all have the potential to be a forum for MFI/PFI discussions, drafting and negotiations. The World Bank could, most realistically, lead the reform of the world ISDS system, particularly by establishing an appeals mechanism or a permanent court on the basis of the International Centre for Settlement of Investment Disputes system.

International investment law has arrived at a crossroads. Reflection, review and reform efforts have reached a global scale, which demands a global response. Given the critical role investment plays in GVCs, a MFI/PFI would not only consolidate and significantly improve the currently fragmented investment regime, but would have the potential to advance world economic governance as a whole.

* Wenhua Shan (ws218@cantab.net) is Senior Fellow at the Lauterpacht Centre for International Law at the University of Cambridge, Dean and Yangtze River Chair Professor of International Economic Law (by the Ministry of Education) at Xi'an Jiaotong University School of Law, and Professor of Law at the University of New South Wales, Australia. This *Perspective* is based on Wenhua Shan, with comments by Gary Hufbauer and Tyler Moran, "Toward a multilateral or plurilateral framework on investment", prepared for the International Centre for Trade and Sustainable Development/World Economic Forum E15 Task Force on Investment Policy (at www.e15initiative.org/). The author would like to thank Zheng Zhang for his assistance in preparation of the paper, and Gary Hufbauer and other colleagues of the E15 Task Force on Investment Policy for their helpful comments, suggestions and discussions. He also would like to thank Alejandro Jara, Miguel Rodriguez Mendoza and Jeswald Salacuse for their very helpful peer reviews. **The views expressed by the author of this *Perspective* do not necessarily reflect the opinions of**

Columbia University or its partners and supporters. *Columbia FDI Perspectives* (ISSN 2158-3579) is a peer-reviewed series.

¹ UNCTAD, *World Investment Report 2015* (Geneva: UNCTAD, 2015).

² Wenhua Shan, “From ‘north-south divide’ to ‘private-public debate’: Revival of the Calvo Doctrine and the changing landscape in international investment law”, *Northwestern Journal of International Law and Business*, vol. 27, (2007), pp. 631-664.

³ Wenhua Shan and Lu Wang, “The China–EU BIT and the emerging ‘global BIT 2.0’”, *ICSID Review*, vol. 30, (2015), pp. 260–267.

⁴ Karl P. Sauvant and Federico Ortino, *Improving the International Investment Law and Policy Regime: Options for the Future*, (Helsinki: Finnish Ministry of Foreign Affairs, 2013), p. 134, available at http://works.bepress.com/cgi/sw_config.cgi?context=karl_sauvant/112, note 335.

⁵ *Ibid*, pp. 135-136.

⁶ See e.g., Justin Yifu Lin, “China’s G-20 agenda: Call for a multilateral investment framework for development”, July 2015, available at

<http://e15initiative.org/blogs/chinas-g-20-agenda-call-for-a-multilateral-investment-framework-for-development/> and Wenhua Shan, “China in the WTO at 15th: Changing China whilst reshaping the world”, *Legal Daily*, July 14, 2015, p. 10, available at <http://epaper.legaldaily.com.cn/fzrb/content/20150714/Article10001GN.htm>.

The material in this Perspective may be reprinted if accompanied by the following acknowledgment: “Wenhua Shan, ‘The case for a multilateral or plurilateral framework on investment,’ Columbia FDI Perspectives, No. 161, November 23, 2015. Reprinted with permission from the Columbia Center on Sustainable Investment (www.ccsi.columbia.edu).” A copy should kindly be sent to the Columbia Center on Sustainable Investment at ccsi@law.columbia.edu.

For further information, including information regarding submission to the *Perspectives*, please contact: Columbia Center on Sustainable Investment, Maree Newson, mareenewson@gmail.com.

The Columbia Center on Sustainable Investment (CCSI), a joint center of Columbia Law School and the Earth Institute at Columbia University, is a leading applied research center and forum dedicated to the study, practice and discussion of sustainable international investment. Our mission is to develop and disseminate practical approaches and solutions, as well as to analyze topical policy-oriented issues, in order to maximize the impact of international investment for sustainable development. The Center undertakes its mission through interdisciplinary research, advisory projects, multi-stakeholder dialogue, educational programs, and the development of resources and tools. For more information, visit us at <http://www.ccsi.columbia.edu>.

Most recent *Columbia FDI Perspectives*

- No. 160, Mélida Hodgson, “The Trans-Pacific Partnership investment chapter sets a new worldwide standard,” November 9, 2015.
- No. 159, Nicolás M. Perrone and Gustavo Rojas de Cerqueira César, “Brazil’s bilateral investment treaties: More than a new investment treaty model?” October 26, 2015.
- No. 158, Blerina Xheraj, “A reading of intra-EU BITs in light of recent developments of EU law,” October 12, 2015.
- No. 157, Kathryn Gordon, Joachim Pohl and Marie Bouchard, “Investment treaty law, sustainable development and responsible business conduct: A fact-finding survey,” September 28, 2015.
- No. 156, Robert Milbourne, “The case for harmonizing the international regulation of mining,” September 14, 2015.

All previous *FDI Perspectives* are available at <http://ccsi.columbia.edu/publications/columbia-fdi-perspectives/>.