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The case for a multilateral or plurilateral framework on investment

by

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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.

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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>.

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