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The case for a framework agreement on investment

by
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In *Columbia FDI Perspectives*, No. 102, Axel Berger claimed that the debate over a multilateral framework for investment is futile. We disagree. Following its achievements at the 9th Ministerial Conference in Bali, Indonesia, the World Trade Organization (WTO) should launch negotiations to draft a 21st century Investment Framework Agreement (IFA).

The context today is completely different from the late 1990s, when the OECD's Multilateral Agreement on Investment (MAI) crashed and burned. Emerging economies, led by China, Brazil and India, are now major investors. In fact, developing countries accounted for about half as much outward foreign direct investment (FDI) in 2012 as developed countries ($426 billion versus $909 billion). The North-South divide on investment issues is closing. These changes make the WTO, not the OECD, the right forum for the IFA.

The IFA should start life as a plurilateral agreement. While the WTO has 159 member countries and customs territories (think of Hong Kong), only willing nations would be signatories of the agreement. Initially, only IFA members would be entitled to IFA rights—in other words, the most-favored-nation (MFN) principle would not apply to WTO members that are not signatories. Over time, the great majority of WTO members might join the IFA and, at some point, all IFA rights might be extended on an unconditional basis to all WTO members, including the holdouts.

The IFA would not supersede bilateral investment treaties (BITs) or investment chapters in free trade agreements (FTAs)—they would coexist. In disputes, complainants could seek remedies under whichever agreement was most favorable. Quite often, as between pairs of countries, their BIT or FTA rights would be more extensive than their IFA rights. But complainants should not be allowed to "forum shop," for example, by bringing a case first under the IFA, and then under an FTA.

Like BITs and most FTAs, the IFA should provide for state-to-state dispute settlement. In addition, as a voluntary sub-chapter, willing signatories to the IFA could agree to investor-state arbitration. All arbitration and dispute-settlement

decisions should be published, adding to the body of customary international law in the FDI realm.

What would the advantages of the IFA be? First is the matter of negotiating economy. Between 159 WTO members, the maximum possible number of BITs is 25,122 (159x158). While there are some 3,000 existing BITs, they represent only an eighth of the theoretical maximum. It would make sense for many small states to rely on the IFA rather than spend time negotiating and ratifying new BITs between themselves.

The second advantage follows from a central fact of modern commercial life: FDI is driving global value chains (GVCs), both in goods and services. Despite their name, GVCs have to date been mostly regional, and are centered in Asia, North America and Europe, leaving many parts of the world in the cold. By establishing minimum standards for "outsider" countries, the IFA would make them more attractive for FDI nodes, enabling them to link up with GVCs.

Third, the stark reality is that a great many WTO members are not (and will not, in the foreseeable future) become members of the new mega-regional trade agreements under negotiation—the Trans-Pacific Partnership, the Transatlantic Trade and Investment Partnership or the Regional Comprehensive Economic Partnership. The IFA will help give multinational enterprises confidence to invest in these "outsiders" by providing needed guarantees and long-term certainty.

Finally, an IFA will make the WTO more relevant to business. Just as the Trade in Services Agreement negotiations have brought life to the dormant but critical area of services, the IFA would burnish the WTO's credentials by setting minimum standards for investment.

With these advantages in mind, we believe that the IFA should include the following substantive provisions:

- Both investors and covered investments should be afforded national treatment and MFN treatment in all phases of the investment cycle: establishment or acquisition, management, operation, expansion, and disposition.
- Justifiable reasons for expropriation should be limited, and "prompt, adequate and effective compensation" should be paid when expropriation occurs.
- Investment-related funds should be transferable across borders, without delay and using a market rate of exchange.
- Performance requirements should be prohibited or restricted. However, the least developed countries might be allowed a reasonable period of time (such as a decade) to phase out their performance requirements.
- Foreign firms should be guaranteed the right to employ top managerial personnel, regardless of their nationality.
- Proposed laws and regulations that affect investment should be published in advance, with firms given an opportunity to comment.

Business firms around the world need multilateral disciplines and market access guarantees. In the FDI realm, these have not yet been provided by the WTO. The world today is a very different place compared to the late 1990s, when the MAI

collapsed. GVCs are the most economical way to serve customers worldwide, and the investment driving these chains should be at the center of the WTO's agenda since investment is already at the center of 21st century trade. The current patchwork of investment disciplines in FTAs and BITs leaves many countries out. An investment framework agreement with modern disciplines is both necessary and overdue.

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