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The "spaghetti bowl" of IIAs: The end of history?

by
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In his famous book, "The End of History and the Last Man", published in 1992, Francis Fukuyama argued that Western democracy represents the end point of the socio-cultural evolution of humanity and the final form of government.[1]

While Fukuyama's forecast proved to be wrong, one wonders whether his prediction could be more accurate for the evolution of the structure of the universe of international investment agreements (IIAs). Has the existing composition of the IIA regime, characterized by thousands of bilateral, regional, sectoral, and plurilateral treaties—supplemented by numerous non-binding investment principles and guidelines—reached its final form, notwithstanding the on-going discussions about the substantive content of IIAs? In other words, is the idea of a multilateral investment agreement that crowns all previous IIA rulemaking a dream that will never come true?

Over many decades, all attempts to establish a multilateral investment treaty have failed. In addition, the IIA regime has lost part of its dynamism. Fewer new treaties are being signed, signaling that the IIA networks of many countries are becoming saturated. There is also a small, but growing, number of countries that have terminated existing IIAs or denounced their membership in the International Centre for Settlement of Investment Disputes (ICSID).[2]

What, then, could still push the move toward a multilateral investment regime? A look at history shows that milestones in multilateralism may result from extraordinary catalytic events – such as the end of the Second World War, which paved the way for the foundation of the United Nations and the Breton Woods institutions, or the termination of the East-West confrontation in the late 1980s that created an atmosphere conducive to the establishment of the World Trade Organization and the Energy Charter Treaty. In "normal" times, the basic question is whether countries feel comfortable with on-going, limited "repair work" *within the existing structure* of the IIA regime—such as giving more weight to the social and environmental aspects of investment, clarifying and delimiting the content of individual treaty provisions, fine-tuning dispute settlement provisions, adopting principles on corporate social responsibility—or whether they think that *more fundamental changes* to the structure of the IIA regime are needed to make investment work better for sustainable development and inclusive growth.[3]

Much of the criticism of the current IIA regime can be addressed within its existing structure. This is the case, for instance, with regard to concerns about an undue reduction of national governments' policy space as a result of IIAs, the substantial increase in investor-state disputes, or demands to strengthen the sustainable development dimension of IIAs.[4] To the extent that one aims at further investment liberalization, it can be achieved more easily between a limited number of countries at the bilateral or regional level. More generally, the prospects for a multilateral investment treaty decrease when more countries aim for an ambitious treaty dealing with all policy facets of FDI.

Thus, the value added by a new multilateral undertaking would not lie primarily in its substantive content, but in other aspects, such as strengthening the bargaining position of developing countries, efficiency gains through multilateral treaty coverage, the achievement of greater policy coherence, and the possible avoidance of investment distortions.

For many years now, these considerations have not been strong enough to trigger a move toward a multilateral investment treaty. The recent trend toward more regional investment treaties may further reduce the impetus to move toward multilateralism. On the other hand, if regional treaties were to have similar content and broad coverage, they would de facto come close to a multilateral approach. In any case, it seems that the existing spaghetti bowl of IIAs, with all its complexity, will continue to exist, even grow. But, then, nothing is more difficult than to forecast the future.

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[1] Francis Fukuyama, *The End of History and the Last Man* (New York: Free Press, 1992).

[2] For example, Bolivia, Ecuador and Venezuela have denounced the ICSID Convention, and South Africa is in a process of reviewing and terminating bilateral investment treaties.

[3] This consideration is the starting point for UNCTAD's new Investment Policy Framework for Sustainable Development (IPFSD). *See* UNCTAD, *World Investment Report 2012* (New York/Geneva: United Nations, 2012).

[4] *See also,* Karl P. Sauvant, "The times they are a-changin' -- again -- in the relationships between governments and multinational enterprises: From control, to liberalization to rebalancing," *Columbia FDI Perspectives*, No. 69, May 21, 2012; Karl P. Sauvant, "The regulatory framework for investment: Where are we headed?" in Ravi Ramamurti and Niron Hashal, eds., *The Future of Foreign Direct Investment and the Multinational Enterprise* (Emerald Group Publishing, 2011), pp. 407-433.

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