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Toward a Multilateral or Plurilateral Framework on Investment

Wenhua Shan with *Comments* by Gary Hufbauer & Tyler Moran

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ABSTRACT

Against the backdrop presented by the growth of emerging market economies as major exporters and importers of investment capital and evolving debate on the Investor State Dispute Settlement (ISDS) feature of the international investment agreements, this think piece calls for the establishment of a Multilateral Framework on Investment (MFI), with a transitional plurilateral framework on investment (PFI) to start with. In particular, it addresses three fundamental questions: Why now? What kind of contents should such a framework include? And, how can this goal be achieved?

The paper considers that the MFI or PFI should be based on a systematic reform of the IIA regime "from root to rules," reflecting the fundamental shift of tension "from North-South divide to private-public debate." The outcome should be a balanced and liberal investment regime rectifying the deficiencies in current IIAs, from the preamble to definitions, from substantive to procedural rules, and from investment norms to relevant social clauses. The 2016 G20 Summit would provide a good opportunity for the proposals related to an MFI/PFI to be brought for consideration by world leaders. The WTO remains the best venue to negotiate such an MFI/PFI, while a trilateral investment or free-trade agreement between the US, the EU, and China could provide a solid stepping stone.

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LIST OF ABBREVIATIONS

AIIB	Asian Infrastructure Investment Bank
BIT	Bilateral investment treaty
CETA	Comprehensive Economic and Trade Agreement
CSR	Corporate social responsibility
DS	Dispute settlement
DSU	Dispute Settlement Understanding
EU	European Union
FDI	Foreign direct investment
FET	Fair and equitable treatment
GATS	General Agreement on Trade in Services
GDP	Gross domestic product
GVC	Global value chains
ICSID	International Centre for Settlement of Investment Disputes
IIA	International investment agreement
IEC	International Energy Charter
ILC	International Law Commission
ISDS	Investor-State Dispute Settlement
MAF	Matrix analytical framework (MAF)
MAI	Multilateral Agreement on Investment
MFI	Multilateral framework on investment
MFN	Most-favoured nation
MIGA	Multilateral Investment Guarantee Agency
MNC	Multinational corporation
MNEs	Multinational enterprises
NAFTA	North American Free-Trade Agreement
NGOs	Non-governmental organizations
NIEO	New International Economic Order
OECD	Organisation for Economic Co-operation and Development
OPEC	Organization of the Petroleum Exporting Countries
PFI	Plurilateral framework on investment
PFMs	Prospective Founding Members

RCEP	Regional Comprehensive Economic Partnership Agreement
SOE	State-owned enterprise
SWF	Sovereign wealth funds
TFTA	Trilateral free- trade agreement
TIA	Trilateral investment agreement
TiSA	Trade in Services Agreement
TPP	Trans-Pacific Partnership Agreement
TRIMS	Agreement on Trade-Related Investment Measures
TTIP	Transatlantic Trade and Investment Partnership Agreement
UN	United Nations
UNCITRAL	United Nations Commission on International Trade Law
UNCTAD	United Nations Conference on Trade and Development
US	United States
WTO	World Trade Organization

INTRODUCTION

The need for a multilateral framework on investment (MFI) has long been felt, but never as strong as it is today. The global network of international investment agreements (IIAs) continues to grow, and three mega-regional agreements are being actively negotiated — the Trans-Pacific Partnership Agreement (TPP), the Transatlantic Trade and Investment Partnership Agreement (TTIP), and the Regional Comprehensive Economic Partnership Agreement (RCEP). Meanwhile, new campaigns against the Investor-State Dispute Settlement (ISDS) feature of IIA regimes are emerging, particularly in the European Union (EU). The European Parliament just voted in favour of the TTIP in general, but on the condition that its ISDS mechanism will be modified.[1] Beyond Europe, similar reactions have been seen in the United States (US) (where objections to ISDS were part of the debate over fast track authorisation); Australia (where ISDS was rejected in some IIAs but not in the recent ones with South Korea and China);[2] Brazil (where three new bilateral investment treaties (BITs) have been signed after a decade of silence);[3] and India (where a more conservative model BIT has just been adopted).[4] Undoubtedly, the challenges for IIA regimes have reached global dimensions, which require an answer of global scale.

This think piece attempts to answer three fundamental questions related to an MFI: why now, what, and how? It first explores why a multilateral or plurilateral framework on investment (MFI/PFI) should be considered now, before analysing what kind of policy goals should be achieved and what kind of provisions should be included. It then discusses possible steps toward an MFI, proposing a PFI as a stepping stone. Finally, it assesses the possible venues for an MFI/PFI to be negotiated.

It concludes that the time is ripe to seriously consider an MFI, perhaps starting with a transitional PFI. The contents of the MFI or PFI should be based on a systematic reform of the IIA regime "from root to rules," reflecting the fundamental shift of tension "from North-South divide to private-public debate."[5] The goal of the reform should be a balanced and liberal investment regime rectifying the deficiencies in current IIAs, from the preamble to definitions, from substantive to procedural rules, and from investment norms to relevant social clauses. The 2016 G20 Summit would provide a good opportunity for the proposals related to an MFI/PFI to be brought for consideration by world leaders. The World Trade Organization (WTO) remains the best venue to negotiate an MFI/PFI, while a trilateral investment or free-trade agreement between the US, the EU, and China would provide a solid stepping stone. The International Centre for Settlement of Investment Disputes (ICSID) could make a significant contribution toward ISDS reform by establishing an appeal mechanism and perhaps a permanent court. Other venues, such as the United Nations (UN), the Organisation for Economic Co-operation and Development (OECD), the International Energy Charter (IEC) and the Asian Infrastructure Investment Bank (AIIB) may also have significant roles to play in this process.

A BETTER TIME FOR AN MFI

Investment and trade have been driving forces for world economic growth and development, with investment playing a rapidly rising role. Between 1970 and 2013, the ratio of foreign direct investment (FDI) stocks to global GDP rose from 6 percent to 34 percent, while the ratio of exports (goods and services) to global gross domestic product (GDP) rose from 14 percent to 29 percent.[6] The role of international investment is set to further increase as a conduit for improved technology and as the demand for infrastructure in OECD countries plus Brazil, Russia, China, and India requires about US$1 trillion each year over the next 15 years.[7]

1 Members of the European Parliament insisted a new ISDS system should be run by publicly appointed judges instead of a private arbitration. See European Parliament, Plenary highlights: Greece, TTIP, emission trading reform, 10 July 2015, available at, <http://www.europarl.europa.eu/news/en/news-room/content/20150706STO74853/html/Plenary-highlights-Greece-TTIP-emissions-trading-reform>(accessed on 19 July 2015)

2 For instance, the IIAs without ISDS provisions are the Australia-United States FTA (2004) and the Australia-Malaysia FTA (2011), while the IIAs with ISDS provisions are Australia-South Korea FTA (2013) and Australia-China FTA (2015).

3 Brazil recently signed three BITs separately with Mexico, Angola, and Mozambique, for analysis , see Pedro Martini, Brazil's New Investment Treaties: Outside Looking …out?, Kluwer Arbitration Blog, 16 June 2015, available at, <http://kluwerarbitrationblog.com/blog/2015/06/16/brazils-new-investment-treaties-outside-looking-out-2/>(accessed on 19 July 2015)

4 The text of the new Indian Model BIT is available at, <https://mygov.in/sites/default/files/master_image/Model%20Text%20for%20the%20Indian%20Bilateral%20Investment%20Treaty.pdf>(accessed on 19 July 2015)

5 Shan, Wenhua. "From 'North-South Divide' to 'Private-Public Debate': Revival of the Calvo Doctrine and the Changing Landscape, International Investment Law," *Northwestern Journal of International Law and Business*, 2007, 27(3):631-664,

6 Hufbauer, Gary and Tyler Moran. *Investment and Trade Regimes Conjoined: Economic Facts & Regulatory Frameworks*, E15 TFM1 Thinkpiece, 23-24 March 2015, p3.

7 The global spending on basic infrastructure currently amounts to $2.7 trillion a year when it ought to be $ 3.7 trillion. See Economist, The Trillion-dollar Gap, 22nd March 2014, available at, <http://www.economist.com/news/leaders/21599358-how-get-more-worlds-savings-pay-new-roads-airports-and-electricity>(accessed on 19 July 2015).

One defining feature of contemporary international investment is that it is often intertwined with international trade to create global value chains (GVCs).[8] FDI by multinational enterprises (MNEs) determines to a significant extent the patterns of value added in GVCs.[9] If the older pattern of the international economy featured "made here and sold there," the current pattern features "made here and there and sold everywhere."[10]

The critical and growing importance of international investment in the global economy requires a sound global legal framework to guarantee secure and harmonious international relations. The emergence of GVCs makes the task more pressing. Yet, the global investment regime is far from satisfactory. Unlike trade, which has the world trading system led by the WTO and a large set of multilateral agreements, global investment is regulated by a "spaghetti bowl" of over 3000 IIAs.[11] Such a "spaghetti bowl" of bilateral and small regional IIAs provides protection to a considerable portion of international investment relationships, but it offers far less than comprehensive global coverage, and its rules are far from consistent, or consistently interpreted and applied by the hundreds of different arbitral tribunals specifically constituted for each case. Indeed, the challenges to the current international investment treaty regime, including its dispute settlement system have been so severe that it is sometimes termed a "legitimacy crisis."[12] The solution to such a crisis cannot be just piecemeal, mending on bilateral or regional basis. Investment protection is a global issue, which requires a global solution.

Unfortunately, no multilateral agreement on investment is in place despite a major effort in the OECD and a stillborn attempt in the WTO. The failure of the OECD in negotiating a Multilateral Agreement on Investment (MAI) in the late 1990s was attributable to several factors. On the one hand, the negotiating parties had conflicting interests on some issues that could not be solved, owing to lack of high-level political support. On the other hand, non-governmental organizations (NGOs) successfully waged a campaign against the MAI as a threat to the environment and other public policy goals.[13] The failure of the WTO in negotiating a similar investment agreement at the Cancun Ministerial Conference in 2003 was mainly due to the differing interests and priorities of the developed and developing states.[14]

However, a multilateral legal framework becomes even more desirable at the present stage, particularly given the economic downturn the world is currently experiencing and the interconnected nature of trade and investment in GVCs. As the OECD pointed out, "[M]ultilateral co-operation and co-ordination are needed to maintain the open and predictable international investment climate that has supported investment in GVCs."[15] And, the atmosphere for seriously reconsidering an MFI is now far better than it was 10 or 20 years ago mainly for three reasons.

First, the players in international investment have become much more mixed than before. International investment used to be dominated by advanced western states, which accounted for the vast majority of both inward and outward FDI. Now, the picture has significantly changed. Developing states not only attract more than half (55percent) of the world investment inflow (Figure 1), but also they represent one-third of the world investment outflow (Figure 4). This is a sharp contrast to 2002, the year before the WTO Cancun conference took place, when the developing states attracted less than a quarter of world FDI inflows and less than 20percent of world FDI outflows.[16] The rise of developing states in international investment, particularly in outward FDI, implies that they are starting to view the international investment regime from not only a capital importing or host state perspective, but also from a capital exporting or home state perspective. At the same, advanced economies, including the US and the EU, have started to consider their defensive interests as recipients of inward FDI in addition to their offensive interests as suppliers of outward FDI, particularly in light of the ISDS cases filed against the US and the EU member states. Such significant changes in the roles of both advanced and developing states mean that the two traditionally divided camps now find more common ground in the international investment regime.[17] This should, in particular, significantly help address the issue of the "north-south divide" that led to the collapse of the investment talks within the WTO at Cancun.

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8 OECD, WTO and UNCTAD, *Implications of Global Value Chains for Trade, Investment, Development and Jobs,* 6 August 2013, p.8, available at, <www.oecd.org/trade/G20-Global-Value-Chains-2013.pdf>(accessed on 19 July 2015). See also Gary Hufbauer and Tyler Moran, Investment and Trade Regimes Conjoined: Economic Facts and Regulatory Frameworks, E15 Investment Task Force, 14 May 2015.

9 OECD, Interconnected Economies: Benefiting from Global Value Chains, 2013, p.118.

10 Gary Hufbauer and Tyler Moran, *ibid.*

11 Until the end of 2014, there were 3271 , including 2926 BITs and 345 other IIAs. See UNCTAD, World Investment Report 2015: Reforming International Investment Governance, United Nations: New York and Geneva, June 2015, p.106.

12 Franck, Susan D. "The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law Through Inconsistent Decisions," *Fordham Law Review,* 2005, 73(4): 1521-1625.

13 PIIE: The MAI and the Politics of Failure: Who Killed the Dog? Available at: <http://www.piie.com/publications/chapters_preview/91/2iie2725.pdf> (accessed on 31 October 2015). See also Eric Neumayer, Multilateral agreement on investment: lessons for the WTO from the failed OECD-negotiations. Wirtschaftspolitische Blatter, (1999) 46 (6). pp. 618-628.

14 For further details, *see* Smythe, Elizabeth. From Singapore to Cancún: Knowledge, Power and Hegemony in the Negotiation of Investment Rules at the WTO (Paper presented at the annual meeting of the International Studies Association, Montreal, Quebec, March 18, 2004.

15 OECD. Trade Policy Implications of Global Value Chains, 2013. Available at,<www.oecd.org/sti/ind/Trade_Policy_Implicatipns_May_2013.pdf>(accessed on 19 July 2015)

16 United Nations Conference on Trade and Development, World Investment Report, United Nations, 2003, at pp.7 and 9.

17 Shan, Wenhua. "Towards a Balanced Liberal Investment Regime: General Report on the Protection of Investment for the XVIIIth International Congress of Comparative Law" 2010 Washington DC, ICSID Review: Foreign Investment Law Journal, 2010, 25(2): 421-497.

Second, the mixed roles of advanced and developing states have led to converging IIA practice, demonstrated by four general features:[18]

- Typically, the new-generation IIAs embrace investment liberalisation as well as investment protection.
- They adopt more clarified and balanced terms on key substantive provisions, such as investment definition, indirect expropriation, and fair and equitable treatment (FET).
- The dispute settlement provisions (ISDS) are more detailed and refined than before.
- Finally, certain social clauses addressing environmental, labour, and other concerns are included.

Such features suggest that a "global BIT 2.0"[19] is taking shape, which helps pave the way for a MFI. As a more balanced and more society-friendly IIA model, it should to a certain degree also help address the concerns of NGOs expressed during and after the MAI negotiations.

The third and final reason for suggesting that an auspicious MFI moment may be at hand is that the current IIA regime has now attracted global attention. Many governments, NGOs, scholars, and practitioners are debating the IIA regime, in particular its ISDS mechanism. As mentioned, the regime is somehow experiencing a "legitimacy crisis." However a crisis suggests opportunity as well as challenge. While some of the extreme criticisms might exert a negative impact on the future development of a MFI, the attention the debate has generated helps create the political and social momentum necessary for a MFI. For example, more and more voices are

18 Shan, Wenhua and Lu Wang. "The China–EU BIT and the Emerging "Global BIT 2.0", ICSID Review, Vol. 30, No. 1 (2015), pp. 260–267; Shan, Wenhua and Sheng Zhang. "Market Access Provisions in the Potential EU Model BIT: Towards a "Global BIT 2.0"? *Journal of World Investment and Trade,* 2014, 15(3): 422-453, p.453. *See* also UNCTAD, supra note 11, p 110-112; Cross, Karen H. "Converging Trends in Investment Treaty Practice," 38 *N.C. J. Int'l & Com. Reg*. 151 (2012); Feldman, Mark. The emerging harmonisation of the international investment law regime, E15 Blog, August 2015. Available at: <http://e15initiative.org/blogs/the-emerging-harmonisation-of-the-international-investment-law-regime/> (accessed 21 August 2015).

19 Shan and Wang, ibid; Shan and Zhang, Ibid.

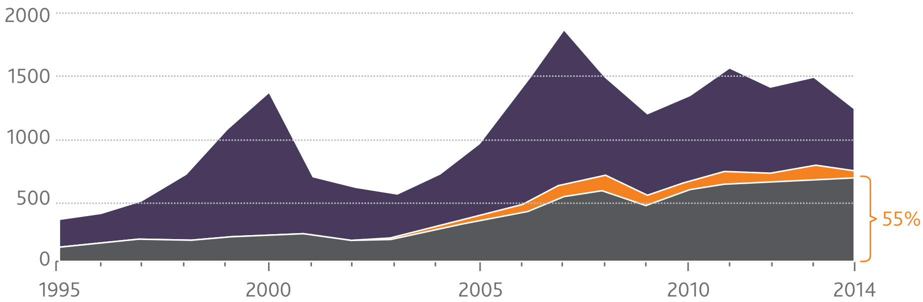

FIGURE 1:

FDI inflows, global and by group of economies, 1995-2014 (Billions of dollars)

LEGEND:

- Developed economies
- Transition economies
- Developing economies
- World total

Source: UNCRAD, FDI/MNE database (www.uncrad.org/fdistatistics).

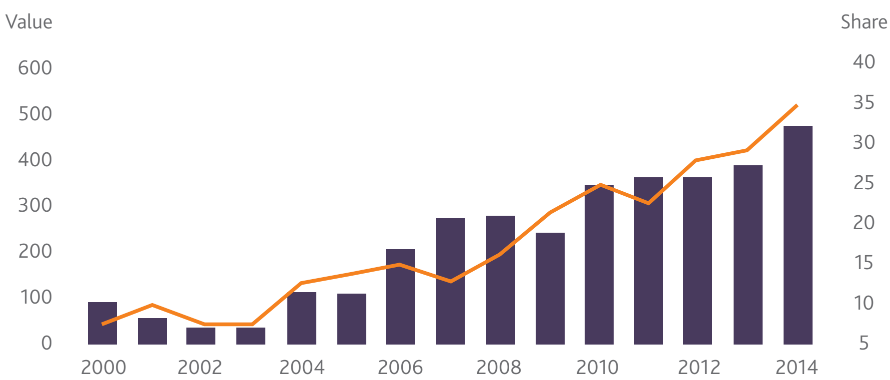

FIGURE 2:

Developing economies: FDI outflows and their share in total world outflows, 2000-14 (Billions of dollars and percent)

LEGEND:

- Developing economies
- Share in world FDI outflows

Source: UNCTAD, FDI/MNE database (www.unctad.org/fdistatistics).
Note: Excludes Caribbean offshore financial centers.

heard on the desirability of a permanent appeal mechanism for ISDS awards,[20] which affirms the need for a MFI, as it would not be reasonable to expect a separate mechanism to be set up for each of the more than 3000 IIAs. Indeed, IIAs have often become topics of addresses by — and conversations among — top leaders of the world, which helps to build up high-level political support for a sound global investment regime — something that was lacking in the MAI negotiations.

The aforementioned three changes, taken together, constitute a fundamental change in present circumstances compared with those of the late 1990s or early 2000s, when the OECD and the WTO made similar attempts. The key to a successful MFI, nevertheless, is of course to design an instrument that reflects the interests of and therefore appeals to all stakeholders concerned. The question then arises: what would such an MFI look like?

THE NEED FOR A BALANCED AND LIBERAL REGIME

A balanced and liberal MFI would best serve the interests of all stakeholders.[21] The regime has to pursue investment liberalisation to meet the needs of GVCs. As noted above, FDI plays a critical role in supporting GVCs, which in turn are essential for world economic growth and development. Accordingly, the general policy of an MFI should be geared toward investment liberalisation, rather than investment restriction. This is confirmed by the fact that states around the world are still adopting more liberal investment measures than restrictive ones, as Figure 9 illustrates. Some 31 additional IIAs were signed in 2014, while nearly 90 countries are involved in the five ongoing regional IIA negotiations, including the TPP, the TTIP, and the RCEP.[22] Clearly the world is generally following a path of investment liberalisation, rather than the other way around.

However, the generally liberal path does not mean the current IIA regime is almost perfect. On the contrary, the current IIA regime is undergoing significant reform. And, the general theme of reform is "balancing." The original template for the IIA regime was "unbalanced," in the sense that it emphasised investment protection and promotion against the background of the "North-South divide," with little regard for preserving the regulatory space of the host state. For example, in an editorial published in 1960 on the Draft Convention on Investments Abroad, the first global investment pact proposed, the background of the draft convention was explained as follows:

20 In a recent concept paper sent to the European Parliament and to the Council, Commissioner Cecilia Malmström of the European Commission proposed creating a permanent investment court to replace the ISDS mechanism. The concept paper further considered an appeal body with permanent members directly within the TTIP as a medium step toward a permanent multilateral court. *See* European Commission. Concept Paper: Investment in TTIP and beyond—the path for reform. Available at, <http://trade.ec.europa.eu/doclib/docs/2015/may/tradoc_153408.PDF>(accessed on 19 July 2015)

21 Shan, Wenhua, *supra* note 17.

22 UNCTAD. *World Investment Report 2015: Overview,* United Nations: New York and Geneva, June

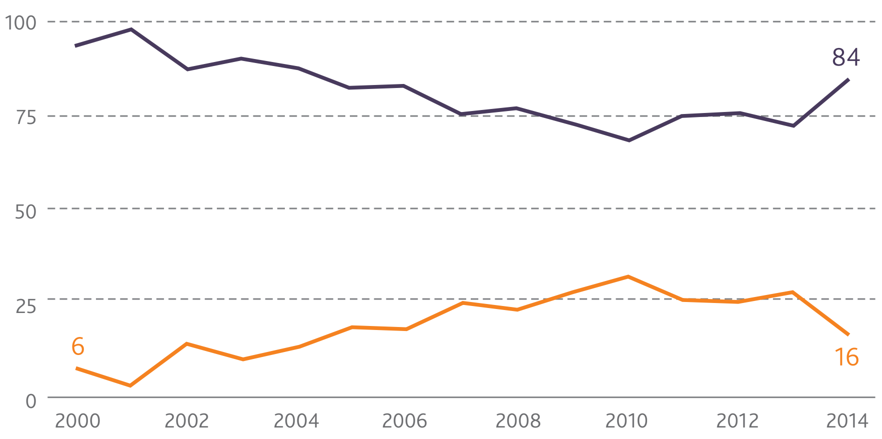

FIGURE 3:

Changes in national investment policies, 2000-14

LEGEND:

Liberalisation/Promotion
Restriction/Regulation

Source: UNCTAD, Investment Policy Monitor.

> "Since it is now widely recognised that major steps must be taken to buttress the economic position of the free-world nations, both as a measure against Soviet moves and as a means of resolving some of the demands being made by the peoples of the underdeveloped nations of the world, the notion of greater protection under international law takes on added importance."[23]

Vandevelde, in his monograph on US investment treaties, wrote this about the background of the US BIT programme:

> "The BIT Program began in 1977 as a reaction to a large number of expropriations of foreign investment that had occurred in the post-war world and to the growing number of states that questioned whether customary international law required payment of full compensation for expropriated foreign investment...The United States hoped to provide treaty protection beyond that accorded by customary international law, to develop a body of state practice in support of protection of foreign investment, and to establish a mechanism whereby its investors could obtain compensation from host states for unlawfully injured investment, without the involvement of the U.S. government."[24]

These authoritative accounts clearly demonstrate that investment treaties were originally designed as "swords" of the advanced capital exporting states in the "North-South struggle" that took place after the Second World War. Their purpose was to safeguard the interests of the capital exporting states and their investors by strengthening their positions under international law (both treaty and customary law) and by creating a depoliticised ISDS mechanism. This was part of the reaction of the advanced world to the New International Economic Order (NIEO) movement that was crystallised by the adoption of UN General Assembly Resolution 1803 (Permanent Sovereignty over Natural Resources, adopted in 1962) and Resolution 3281 (Charter of Economic Rights and Duties of States, adopted in 1974). These resolutions, particularly Resolution 3281, essentially denied the legitimacy of an international minimum standard espoused by advanced countries, especially regarding the standard of compensation in the event of expropriation.[25]

Hence, it can be said the NIEO was a thick "shield" erected by developing nations (together with Soviet countries) to protect state sovereignty in regulating foreign investment and multinational enterprises, while the IIAs were sharp "swords" to safeguarding the interests of advanced countries and their investors abroad. Effectively, the NIEO instruments constituted the "counterbalance" of the IIAs. Taken separately, neither of them would be balanced, as the IIAs ignore the regulatory space of the host states, while the NIEO resolutions deny international minimum standards. Taken together, however, they maintain a balance of the system of the international investment regime as a whole.

This background powerfully explains why the original investment treaties were so unbalanced as to the rights and obligations of host states and foreign investors: the lack of express reference to host states' right to regulate foreign investment in the preamble; the widest possible definition of "investment" to cover "every kind of assets" regardless of the "characters of investment;" the undefined and unqualified FET standard; the "adequate, prompt and effective compensation" requirement for expropriation or any act of expropriation, direct or indirect; and finally the widest possible access to an international tribunal initiated only by the foreign investor. IIAs were intentionally designed as one-sided instruments, protecting the interests of foreign investors, with little or no attention paid to the regulatory rights of host states. To uphold their regulatory rights, host states had to resort to the NIEO instruments, which many developing states asserted as reflecting new customary international law.[26] The original imbalance in the IIAs can be termed a "birth defect" of the IIA system, which still impacts IIA treaty-making and interpretation today.

Since NIEO instruments provide the counterbalance to the IIAs, it might seem legitimate to take the NIEO instruments into account when interpreting IIAs. This implies that, in case of doubt or ambiguity, IIA provisions should be interpreted in favour of the host state, because, as a default rule, the host state is entitled to regulate foreign investment.[27] In practice, Resolutions 1803 and 3281 were referred to in at least one case in support of the tribunal's determination of the position of the host states.[28]

However, foreign investors might continue to argue for a pro-investor presumption in case of doubt or ambiguity on the ground that the purposes of the treaties are expressed in preambles, sometimes in combination with treaty titles. This view has been accepted by some tribunals.[29]

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23 The Editors. *The Proposed Convention to Protect Private Foreign Investment: A Roundtable, Journal of Public Law,* 1960, 6:115-124, p.115.

24 Vandevelde, Kenneth J. *US International Investment Agreements,* Oxford University Press, 2009, p.1.

25 Article 2.2(c) of Resolution 3281 provides that (each state has the right) "To nationalize, expropriate or transfer ownership of foreign property, in which case appropriate compensation should be paid by the State adopting such measures, taking into account its relevant laws and regulations and all circumstances that the State considers pertinent."

26 Some also argued that the NIEO may bring about the development of new rules of customary international law. *See* Joyner Christopher C. (ed.), *The United Nations and International Law,* Cambridge University Press, 1997, p.263.

27 Indeed on occasion the World Court has referred to sovereign rights as a basis for a restrictive interpretation of treaty obligations. *See* e.g., Wimbledon (1923) PCIJ Ser A No 1, 24. See also Crawford, James. *Brownlie's Principles of Public International Law*, 8th Edition, Oxford University Press, p. 450.

28 There is at least one investment treaty arbitration case in which the tribunal has referred to the NIEO resolution to ascertain the general positions of the host state concerned on investment protection. *See Yaung Chi Oo Trading PTE Ltd. v. Government of the Union of Myanmar*, ASEAN I.D. Case No. ARB/01/1, Award, 31 March 2003,para. 21.

29 *Tradax Hellas SA v Albania* (1996) 5 ICSID Reports 43, 68-9; *Frapport AG Frankfurt Airport Services Worldwide v Republic of the Philippines,* Award, 16 August 2007, para.80.

It is difficult to offer an absolute answer to such questions of treaty interpretation. Instead, they have to be answered on a case-by-case basis in accordance with the treaty language and the surrounding circumstances. In general, it seems reasonable to argue that rules contained in the IIAs ("internal rules") should carry more weight than rules contained in other albeit closely related instruments ("external rules"). In other words, host states might not find much support of their positions by referring to the NIEO instruments when defending their cases against foreign investors. This, in turn, confirms the need for an investment regime that is internally balanced.

Indeed, much of the effort at reforming the current IIA regime goes in the direction of internal "self-rebalancing": the narrowing down of the "investment" definition; the restrictive definition of key terms, such as FET and "indirect expropriation"; the exclusion of most-favoured nation (MFN) from jurisdictional or procedural rights; to name the most important. On the surface, this appears to have happened because western capital exporting countries suddenly discovered that the BITs, or the investment chapters in FTAs, were "double-edged": they can "bite" advanced countries in the same way they "bite" developing states. The deeper reason was the fundamental shift of tension and attention in international investment law that has taking place since 1990s, from "North-South divide" to "private-public debate."[30]

In the 1990s, when neo-liberalism ruled the world, almost all countries embraced FDI and IIAs, including even Latin American states, home of the Calvo Doctrine.[31] States entered into IIAs not only with countries of the other camp, i.e., North-South IIAs, but also with countries from the same camp, i.e., South-South or North-North IIAs. No longer were there debates on the standard of compensation in the event of expropriation, as most BITs explicitly or implicitly followed the same prototype requiring "adequate, effective, and prompt" compensation. Evidently, the North-South divide became blurred.

Instead, the world's attention shifted towards the balance of the rights and obligations of the two key stakeholders in an IIA, the foreign investor and the host state. Not only developing states pay attention to the preservation of the regulatory space under IIAs; advanced countries also have started to do so, particularly after they were sued under the North American Free-Trade Agreement (NAFTA) or other IIAs. Meanwhile, some developing states, such as China, Russia, Singapore, and South Korea have become keen on protecting their investors abroad as their overseas investments gained more significance. The mixed roles of both leading advanced and developing states in international investment, as noted above, has led to converging IIA practices, concentrating on balancing rights and interests between foreign investors and the host state. To a certain extent, this helps to pave the way toward a balanced and liberal MFI.

TOWARDS A BALANCED AND LIBERAL MFI: BASIC CONTENT

The negotiation of an MFI provides a perfect opportunity for a systematic review and reform of the IIA regime "from root to rules." The "root" refers to the underlying spirit of the investment regime: no longer should it be a "one-sided" instrument ("sword") focused on the interests of foreign investors and the capital exporting countries with little or no regard to the regulatory space of the host state; rather, it should be a self-balanced system ("scale") that more evenly and proportionately serves the interests of both foreign investors and host states, or both capital exporting and importing countries.

The new spirit should be reflected in the preambular language of the MFI and guide the crafting of each and every provision of the treaty, including scope of coverage, investment liberalisation, substantive protections, social clauses, and dispute settlement. Below is a sketchy discussion of how the contents of the treaty might be formulated. In fact, many of the proposed changes to be included in the MFI have already been achieved in recent IIAs. Still, it is necessary to take a more systematic approach toward the needed reforms.

PREAMBULAR LANGUAGE

The importance of preambular language cannot be underestimated, as the words stipulate the object and purpose of the treaty, providing important assistance in treaty interpretation. The fundamental rule of treaty interpretation, as codified in Article 31.1 of the Vienna Convention on the Law of Treaties, requires that a treaty shall be interpreted in good faith in accordance with the ordinary meaning of the terms in their context and "in the light of its object and purpose."

To achieve a balanced and liberal investment regime, the preamble of the MFI should continue to highlight the critical role of foreign investment in promoting economic growth and development, as well as the importance of a sound legal framework for the promotion and protection of such investment. At the same time, it should also highlight the

30 Shan, Wenhua, *supra* note 5.

31 Shan, Wenhua. "Is Calvo Dead?" *American Journal of Comparative Law*, 2007, 55(1): 123-163, pp.130-142.

host state's inherent right to regulate foreign investment unless overriding commitments are undertaken by the host state under international law. Arguably, this is a default rule of international law and need not to be expressly stated. However, given the historical background of IIAs, as discussed above, and the fact that many arbitrators in ISDS arbitration come from non-public international law backgrounds,[32] it is necessary to highlight the customary rule in the preamble to prevent misguided interpretation.

In addition, the preamble should address social concerns, making sure that the MFI will not negatively affect the promotion of environmental (and perhaps also labour) standards. As well, it might encourage foreign investors to become "responsible investors" by embracing corporate social responsibility (CSR). Equally important, the fundamental political and economic systems chosen by the host state should not be negatively affected by the investment agreement. Finally, as a multilateral instrument, the MFI needs to appreciate the special needs of least-developed states and give them greater room to adapt to the multilateral investment system.

SCOPE OF COVERAGE

To begin with, the MFI should protect only proper investments, rather than assets that do not possess the characteristics of investments. The characteristics should include, for example, the contribution of capital, the expectation of return, and the assumption of risk.

Second, all covered investments should be equally protected without discrimination. It does more harm than good to create separate rules for different categories of investment, such as hedge funds or investments by state-owned enterprises (SOEs) or sovereign wealth funds (SWFs). The latter approach would not only further fragment the investment regime; but also it could prevent constructive dialogue between major players for a more desirable investment regime. A better approach to address concerns related to certain categories of investment is to establish generally applied rules for all investors to observe. For instance, for SWF investment, the "Santiago principles" prove to be rather useful rules.

Finally, a "denial of benefits" rule might be included, particularly if the definition of covered investment does not require substantial business connections of the investor with the home state.

INVESTMENT LIBERALISATION

Investment liberalisation should be included in the MFI, not only because it conforms to the worldwide trend of investment liberalisation as a critical component of economic globalization, but also because it provides a crucial incentive for countries (especially capital exporting states) to enter into IIAs, including the MFI, particularly after investment rules have become more balanced or "neutralised." As states become increasingly interdependent, continuous investment liberalisation should be encouraged. This becomes ever more important at a time of global economic downturn. Studies indicate that treaties with market access provisions result in more FDI inflows.[33] The proposed MFI should play a significant role in facilitating investment access.

Investment liberalisation might be achieved by either the "negative" or the "positive" list approach. Both approaches seek to promote transparency and predictability in investment access, features which should be welcomed. The difference between the two is technical, depending primarily on the degree of openness in the investment market and resources for its governance. Admittedly, the first time a list is compiled, either negative of positive, the country may require technical assistance from a neutral international organisation (such as an "investment advisory centre").[34] But, it is not "mission impossible" for most countries to prepare such a list. Also, it might be desirable to give developing states or at least the LDCs more leeway, by for instance allowing them to use a positive list on market access to start with. An example in point is the market access commitments on trade in services between China and Australia, in which Australia adopted a negative list while China adopted a positive list.[35]

SUBSTANTIVE PROTECTIONS

Much has been written on the reform of the substantive protections for investment protection, and many reform measures have already been implemented in IIA practice.[36] For example, the FET standard has been clarified under the NAFTA, and the clarification has been accepted in most recent

32 Roberts, Anthea. "Power and Persuasion in Investment Treaty Interpretation: The Dual Role of States," *American Journal of International Law,* 2010, 104(2):179-225, p.207, note 134.

33 Saches, Lisa E. and Karl P. Sauvant, 'BITs, DTTs, and FDI Flows: An Overview', in *The Effect of Treaties on Foreign Direct Investment: Bilateral Investment Treaties, Double Taxation Treaties and Investment Flows*, edited by Sauvant Karl P. and Lisa E. Sachs (OUP, Oxford 2009): xxvii- lxii, lvi. See also Berger, Axel, et. al. "Do trade and investment agreements lead to more FDI? Accounting for key provisions inside the black box,", *International Economics and Economic Policy*, 2013, 10(2): 247-275, 268.

34 For a proposal for such a centre, *see* e.g., Joubin-Bret, Anna. Establishing an International Advisory Center on Investment Disputes, Thinkpiece for the Second Task Force Workshop on Investment Policy, 9-10 June 2015. Although it mainly target on ISDS support, it can also provide other technical supports.

35 See Chapter 8 "Trade in Service" of the 2015 China-Australia FTA, available at, < http://fta.mofcom.gov.cn/Australia/annex/xdwb_08_en.pdf>(accessed on 19 July 2015)

36 *See* e.g., Sauvant, Karl P. and Federico Ortino, Improving the International Investment Law and Policy Regime: Options for the Future, published by the Finnish Ministry of Foreign Affairs, particularly part 3, pp65-73. See also, Ortino, Federico. Substantive Provisions in IIAs and Future Treaty making: Addressing Three Challenges, First Task Force Workshop Thinkpiece 23-24 march 2015.

IIAs. This standard has been further narrowed in the recently signed Comprehensive Economic and Trade Agreement (CETA) between the EU and Canada.[37] As a result, it can be said that most of the substantive provisions under IIAs have already been reformulated to achieve a better balance between the needs of investment protection and the needs of regulation.

What is needed is a more systematic review of all the patchy measures of reform to establish a coherent set of rules for substantive investment protection. Key questions include, for example, what would be the best approach to express abstract standards, such as FET and the international minimum standard? More precisely, how can a balance be achieved between predictability and flexibility in the standard? Should general exceptions be included, and if so, what is the best wayto ensure they work well with other terms of the treaty? How should amplifying provisions, such as the MFN clause and the umbrella clause, be reformulated or replaced to exclude an unnecessary expansion of treaty obligations? These are all important questions, the answers to which require further more comprehensive studies.

SOCIAL CLAUSES

It is now almost impossible to conclude an IIA without addressing social concerns, notably environment and labour protection, given the increasingly loud voices from NGOs. And, it is legitimate that the MFI should address such issues, as they have become part and parcel of global public goods. It is also reasonable to require foreign investors to become good corporate citizens in the host state, embracing the norm of corporate social responsibility.

However, social clauses should be treated with caution and proportionality in IIAs. While such matters can and should be addressed in any IIA, they should not be the main purpose of such treaties. After all, IIAs are "investment" treaties, and their primary task is for investment protection and promotion. True, IIAs should not promote investment at the expense of fundamental environment, labour or other standards. But, equally, they cannot be expected to undertake the tasks of proper environment or labour agreements. Social issues are better dealt with by local rules. Investment treaties can certainly help to promote social standards in general terms, but they are not the best forum to provide concrete rules. Accordingly, the principle of complementarity should be observed when drafting an MFI or IIA. Social clauses should be necessary complements to the main body of obligations and rights embodied in the investment treaties, rather than parallel provisions.

DISPUTE SETTLEMENT

Dispute settlement, particularly the ISDS system, is now the hottest topic in international investment law. Much has been written on it,[38] and there is no need or possibility to provide a comprehensive review here. Rather, it is useful to highlight two systemic implications.

First, it is necessary to take a systematic view of the dispute settlement (DS) system as a whole, rather than focusing on

37 Article X.9 "Treatment of Investors and of Covered Investments" of the 2014 EU-Canada CETA.

38 UNCTAD, Reform of the IIA Regime: Four Paths of Action and a Way Forward, IIA Issue Note, No 3, United Nations: New York and Geneva, 2014; A. Joubin-Bret and J.E. Kalickied., TDM Special issue on "Reform of Investor-State Dispute Settlement: In search of a Roadmap", TDM 1 (2014), Available at,<http://www.transnational-dispute-management.com/journal-browse-issues-toc.asp?key=52> (accessed on 19 July 2015); Stephen Shill, Improving Investor-State Dispute Settlement (ISDS): Conceptual Framework and Options for the Way Forward, Thinkpiece for the Second Task Force Workshop on Investment Policy, 9-10 2015.

Political / Disputes / Social	High	Low
High	Red Zone (for both politically sensitive and socially influential disputes)→ No ISDS (Local remedy or State-State DS)	Blue Zone (for socially influential but politically less sensitive disputes)→ Local remedy or socially monitored ISDS
Low	Yellow Zone (for politically sensitive but socially less influential disputes)→ State Controlled ISDS or State-State DS	(Green Zone, for low political and social sensitivity disputes)→ ISDS

TABLE 1:

Matrix analysis of investor-state disputes and their settlements the ISDS mechanism only. For this purpose, it is helpful when drafting such provisions to introduce a matrix analytical framework (MAF) to ascertain which DS method, ISDS, state-state arbitration, or local remedies, are best fit for each category of investment disputes. The framework is based on the assumption that each investment dispute potentially involves three main dimensions: economic, political, and social. Every investment dispute has to have economic implications to establish a case, so the matrix analyses only the political and social dimensions of disputes.

As the matrix below shows, if the dispute involves few political or social complications — in other words, if it is not a politically or socially sensitive dispute — such as a case involving an individual act of direct expropriation ("Green Zone" cases), the case is suitable for a conventional ISDS mechanism. However, if the dispute is both politically and socially sensitive, involving essential security or national emergency rules ("Red Zone" cases), it makes more sense to exclude it from ISDS and leave it to other venues, such as local remedies or state-state dispute resolution mechanisms under investment treaties or general international law. For disputes that are politically highly sensitive, but socially insensitive, such as individual taxation measures or prudential measures of financial regulation ("Yellow Zone" cases), they might be subject to stronger state control by relying on state-state dispute settlement rather than ISDS. The last category encompasses cases that are socially but not politically sensitive, such as cases involving environmental or human health measures ("Blue Zone" cases). Such cases are better dealt with through local remedies or by introducing stronger social monitoring in the ISDS system. Social monitoring measures might include transparency requirements, *amicus curie* briefs, etc.[39]

Second, it is crucial to "de-commercialize" the ISDS mechanism to enhance its legitimacy under public law, since almost all investment cases question, to some degree, public authority. Perhaps one clear exception is a pure commercial contract between the host state government and a foreign investor covered by the "umbrella clause" under an IIA. Another exception may be the determination of the amount of compensation in case of expropriation, as stipulated in many earlier Chinese BITs.[40] However, even in an expropriation case a tribunal may decide that it has the competence to look into the question whether there is an expropriation at the first place,[41] which is clearly an issue of public law. Since most ISDS cases involve public law matters, the ISDS process should be conducted in a way that meets fundamental public law requirements, such as accountability, openness, coherence, and independence.[42] Reform measures adopted in some recent IIAs, such as qualification requirements, roster systems, codes of conduct for arbitrators, transparency rules, detailed procedural rules, appeal mechanisms, and suggestions for a permanent court for international investment all point in a public law direction. Among them, the appeal mechanism and permanent court proposals are most significant and would require a multilateral platform to guarantee its effectiveness and efficiency.

39 For further details, see Shan, Wenhua. A Matrix Analysis on ISDS Reform: Preliminary Considerations, paper presented at the 24th Energy Charter Ministerial Conference held at Cyprus in December 2013, available at, <http://www.encharter.org/fileadmin/user_upload/Conferences/2013_Dec_5-6/4-3_Shan.pdf> (accessed on 19 July 2015).

40 Norah Gallagher and Wenhua Shan, Chinese Investment Treaties: Policies and Practice, OUP, 2009, pp.253-298.

41 See, for instance, Tza Yap Shum v. Republic of Peru, ICSID Case No. ARB/07/6, July 7, 2011.

42 Gus van Harten, Investment Treaty Arbitration and Public Law, OUP, 2007, pp. 153-174.

TOWARDS A BALANCED AND LIBERAL MFI/PFI: A PFI THEN AN MFI?

Although the desirability of an MFI is beyond doubt and its feasibility has significantly increased over the past decade, an MFI of global reach might not be realistic in one go. Instead, a PFI might provide an essential stepping stone toward the ultimate MFI.

Undoubtedly, the mega-regional pacts, the TPP, the TTIP, and the RCEP, along with the super-bilaterals such as the CETA, and the Chinese BITs with the US and EU currently under negotiation, will play significant roles in the development of the PFI and ultimately the MFI. A PFI might start with a tripartite investment agreement between the "big-three," namely the US, the EU, and China. Currently, the three parties are separately negotiating bilateral investment (and trade in the case of the TTIP between the US and the EU) agreements with each other. It would make

Table 2: Converging treaty practices of top five investor and host economies

* According to the China-Australia FTA, pre-establishment obligation is only imposed on Australia for now, but it can be extended to China in the future.

Representative Investment Agreements	2015 TPP Investment Chapter (US, Japan, Singapore)	2015 China-Australia FTA (China)	2014 EU-Canada CETA (EU)
Refined definition of investment	Yes (Art 9.1)	Yes (Art 9.1)	Yes (Art X.3)
Market Access or Pre-establishment NT	Yes (Art 9.4)	Yes * (Art.9.3(1))	Yes (Art X.4 & 6)
FET standard clarified by reference to CIL or a list of factors	Yes (Art 9.6)	(to be negotiated)	Yes (Art X.9)
Exclusions of dispute settlement from the MFN clause	Yes (Art 9.5(3))	Yes (Art 9.4(2))	Yes (Art X.7)
Clarification on the constitution of indirect expropriation	Yes (Art 9.7 & Annex 9-B)	(to be negotiated)	Yes (Art X.11 & Annex X.11)
A carve-out for prudential measures	Yes (Art.9.3(3 (3))	Yes (Annex 8-B)	Yes (Art X.12 and Chapter 15)
Performance Requirements	Yes (Art.9.9)	(to be negotiated)	Yes (Art X.5)
Denial of Benefits	Yes (Art 9.14)	Yes (Art 9.6)	Yes (Art X.15)
Omission of Umbrella Clause	Yes	Yes	Yes
Senior Management	Yes (Art 9.10)	(to be negotiated)	Yes (Art X.8)
Public Policy Exceptions	Yes (Preamble & Art 9.15)	Yes (Arts 9.8 & Art.9.11(4))	Yes (Preamble & Annex X.43.1)
Elaborate rules on ISDS	Yes (Section B)	Yes (Section B)	Yes (Section 6)
Disposing 'frivolous' claims	Yes (Arts 22 & 28 (4))	Yes (Arts 9.11-14)	Yes (Art X.29)
Consolidation of claims	Yes (Art 9.27)	Yes (Art 9.21)	Yes (Art X.41)
Transparency of Arbitral Proceedings	Yes (Art 9.23)	Yes (Art 9.17)	Yes (Art X.33)
Joint interpretation	Yes (Art 9.25)	Yes (Arts 9.7(3) & 9.18)	Yes (Art X.27)
Appellate mechanism	Yes (Art .22(11))	Yes (Art 9.23)	Yes (Art X.42)

sense to consolidate such divided efforts to negotiate a trilateral agreement on investment (or better still on both investment and trade). The three economies represent not only developed and developing countries, but also more than half of world GDP. Such an agreement would be a like a "super NAFTA," involving two advanced economies and one developing economy, even more so if the treaty covers non-investment matters, like the NAFTA. Such a trilateral investment agreement (TIA) or trilateral free-trade agreement (TFTA) would quickly become the blueprint for a global MFI or FTA. Given that the three parties are coming closer to each other in general investment treaty practice,[43] concluding such an agreement is not only desirable, but also possible.

A more representative PFI might be negotiated among the top five capital exporting and importing states in the world, which together accounted for 53.2 percent of world FDI inflow and 76.1 percent of outflow, as well 66.3percent of total world GDP in 2014.[44] A survey of the recent treaty practices by these countries reveals a general convergence, exhibiting features of the "Global BIT 2.0" mentioned above. (Table 2) This confirms that a PFI is indeed not too far away.

TOWARDS A BALANCED AND LIBERAL MFI/PFI: POSSIBLE VENUES

The MFI or PFI could not succeed without a proper venue. There are two broad possibilities: launch a stand-alone negotiating process for an MFI/PFI, or make use of an existing multilateral mechanism, such as the OECD or the WTO to conduct studies and perhaps negotiations.

A STAND-ALONE PROCESS

A stand-alone process is appealing, given the failure of multilateral investment initiatives in both the OECD and the WTO. Similar international stand-alone negotiations serve as useful precedents.[45] For instance, when the UN General Assembly established in 1990 the Intergovernmental Negotiating Committee for a Framework Convention on Climate Change and adopted the Convention in May 1992, the negotiations were serviced by an independent interim secretariat that was not part of the UNstructure. Also, the Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction was originally launched by a group of countries. Dissatisfied with the lack of progress in the Geneva-based Conference on Disarmament, they established in 1996 a negotiating process on the convention, independent from the Conference on Disarmament. A more recent example is the Trade in Services Agreement (TiSA), which involves a process independent from the WTO. A conditional plurilateral agreement is being negotiated by interested parties that would be open for future accessions by other states. Obviously, a stand-alone process requires leadership to provide momentum. In this respect, the G20 could play a significant role, as discussed below.

EXISTING ORGANISATIONS AND MECHANISMS

Although similar attempts have failed in the OECD and the WTO, it remains possible for an MFI or PFI to be negotiated and concluded under the framework or with the support of existing institutions. Such institutions and mechanisms include the G20, the WTO, the World Bank, the UN, the OECD, the IEC, and the AIIB, which are briefly discussed in turn below.

G20

The G20 is now the premier forum for global economic cooperation and decision-making. It represents a wide spectrum of large countries. The Group has paid close attention to international investment matters. For example, the first G20 Trade and Investment Promotion Summit held in November 2012 concluded that participants "agreed to establish a platform for the regular exchange of experiences and good practices in trade investment promotion and policy advocacy."

43 Shan and Wang, ibid, note 18 above, pp 260-267; Shan and Zhang, note 18 above, p.453.

44 According to *World Investment Report 2015,* the top five investor economies include the US; Hong Kong, China; China; Japan; and Germany, while the top five home economies are China; Hong Kong, China; the US;the UK; and Singapore. As Germany and the UK can be represented by the EU, Hong Kong can be represented by China, the top five investor and home economies group can actually be represented by five economies, namely the US, the EU, China, Japan, and Singapore. Together they accounted for 53.2 percent of world FDI inflow and 76.1 percent of outflow, as well 66.3 percent of total world GDP in 2014.

45 Sauvant, Karl P and Federico Ortino, supra note 40, p.134 note 335.

46 UNCTAD, G20 Fosters Synergies Between Trade and Investment Promotion, November 12, 2012, available at , <http://unctad.org/en/pages/newsdetails.aspx?OriginalVersionID=351>(accessed on 19 July 2015). See also UNCTAD, Joint UNCTAD-OECD Reports on G20 Investment Measures, available at,<http://unctad.org/en/Pages/DIAE/G20/UNCTAD-OECD-reports.aspx>(accessed on 19 July 2015).

The G20 could initiate an exploratory process for a plurilateral/multilateral framework on investment, assessing its desirability and feasibility. It could go further and give overall political guidelines: For example, it could indicate the purposes that IIAs should serve; and it could confirm certain core principles, such as the importance of protection, the right to regulate, the need for responsible business conduct, and the need to have adequate dispute-settlement.[47]

In short, although not an organisation itself, the G20 could certainly play an important role in launching the MFI/PFI process, particularly if it takes the stand-alone approach. Given the time is now ripe for the consideration of an MFI or PFI, it would be a great idea if China could table the MFI/PFI initiative on the G20 2016 agenda when she chairs the G20 summit.[48]

WTO

Despite the failure to launch investment negotiations at the Cancun Ministerial Conference, the WTO remains the best forum for MFI/PFI talks, given its global membership and its successful dispute settlement mechanism.[49] Also, with its broad mandate over trade and investment matters, the WTO offers a forum that is more conducive than others for discussions on those topics.[50] The successful conclusion of the General Agreement on Trade in Services (GATS) and the Agreement on Trade-Related Investment Measures (TRIMS) suggests that such an MFI can be achieved within the WTO.

Indeed, the WTO offers the best platform for trade and investment regimes to be combined and consolidated, as a unified system providing systematic legal and institutional support for the future growth of GVCs. Thus, the substantive investment rules could be negotiated and included as a new multilateral agreement of the WTO, perhaps with some adjustments on the existing investment-related agreements, most notably the TRIMs and the GATS. Indeed, the current TRIMs could be replaced, since its contents are most likely to be covered by the performance requirements provisions under the investment agreement. Likewise, mode 3 "commercial presence" might be removed from the GATS to avoid duplication with the new investment agreement (the schedule of commitments should be modified accordingly). Investment disputes could be settled in accordance with the current Dispute Settlement Understanding (DSU) or under a parallel ISDS regime to be negotiated and accepted by like-minded WTO members as a plurilateral arrangement. It would also be possible and indeed more appealing if the DSU could be reformed by combining the strengths of both the DSU in the WTO and the ISDS under investment treaties, so that private traders might directly access the dispute settlement system, while all cases, including investor-state cases, could be heard by a permanent appellate body to maintain consistency and predictability.[51] A less ambitious but easier alternative would be to negotiate a separate investment agreement within the WTO with distinct substantive and procedural norms, operating in parallel to the existing trade rules.

However, the weakness of the WTO system is the converse of its strength. Its global membership combined with a consensus decision-making practice makes it difficult for the WTO to move quickly to adapt to the rapidly changing world. As a result, it is hard to make progress even on traditional trade matters, as shown by the continuous delay of Doha round negotiations. Perhaps, it is unrealistic to expect the WTO to take up the MFI/PFI initiative in the very near future. Nevertheless, it might be possible for the WTO to foster a PFI negotiation in Geneva in a manner similar to the TiSA talks mentioned above.

World Bank

The World Bank has historically played a key role in global investment institutions, most notably by establishing the Multilateral Investment Guarantee Agency (MIGA) and the ICSID. The ICSID, in particular, has served as the central forum for international investment dispute resolution, as it handles over half the investment cases worldwide.[52]

It is, therefore, natural to expect that the Bank to play a significant role in the negotiation of an MFI/PFI. The Bank might initiate MFI/PFI negotiations, as it did for the ICSID Convention and the MIGA Convention. It could also, perhaps more realistically, lead the reform of the world ISDS system by updating the ICSID Convention to better serve foreign investors and host states alike, particularly by establishing an appeal mechanism or a permanent court system. However, to do this, the Bank probably would have to adjust itself to the changed world, particularly by giving the emerging countries a larger say in its decision processes. Otherwise, it would be difficult to find favour for the Bank's initiative from the developing world.

47 Sauvant, Karl P. and Federico Ortino, *supra* note 40, pp.135-136.

48 See e.g., Shan, Wenhua. "China in WTO at 15th: Changing China whilst Reshaping the World," *Legal Daily,* 14 July 2015, p. 10. Available at,<http://epaper.legaldaily.com.cn/fzrb/content/20150714/Articel10001GN.htm> (accessed on 19 July 2015). *See* also Yifu Lin, Justin. China's G-20 agenda: Call for a multilateral investment framework for development, July 2015. Available atat,<http://e15initiative.org/blogs/chinas-g-20-agenda-call-for-a-multilateral-investment-framework-for-development/> (accessed on 19 July 2015).

49 González, Anabel. Executive Summary, in World Economy Forum, Foreign Direct Investment as Key Driver for Trade, Growth and Prosperity: The Case for a Multilateral Agreement on Investment, 2013, p.8.

50 Dattu, Riyaz. "A Journey from Havana to Paris: The Fifty-Year Quest for the Elusive Multilateral Agreement on Investment," *Fordham International Law Journal,*2000, 24(1):275-316, p.203.

51 *See* e.g., Hufbauer, Gary and Tyler Moran. Investment and Trade Regimes Conjoined: Economic Facts & Regulatory Frameworks, E15 TFM1 Thinkpiece, 23-24 March 2015.

52 As of 2014, there were 608 known ISDS cases, and more than 300 were solved through ICSID . See UNCTAD, Investor-State Dispute Settlement: Review of Development in 2014, IIA Issue Note, No.2, May 2015, available at, <http://investmentpolicyhub.unctad.org/Upload/Documents/UNCTAD_WEB_DIAE_PCB_2015_%202%20IIA%20ISSUES%20NOTES%2013MAY%20.pdf>(accessed on 19 July 2015)

United Nations

As the most representative international organisation in the world, the UN certainly has a role to play in the MFI/PFI process. Indeed, the United Nations Conference on Trade and Development (UNCTAD) has done tremendous work in the field, particularly by compiling databases on investment and relevant rules and by providing monitoring and analytic services. Recently it has tried to establish a multilateral mechanism on investment policy-making.[53] Modelled on the Investment Policy Framework for Sustainable Development launched in 2012, UNCTAD is seeking to develop a potential multilateral consensus-building institution on foreign investment. Also, the United Nations Commission on International Trade Law (UNCITRAL) has successfully concluded a convention on transparency in ISDS arbitration. The International Law Commission (ILC) has also done notable work on relevant issues, including in particular the Vienna Convention on the Law of Treaties and the ILC Draft Article on State Responsibility.

However, since the function of UNCTAD mainly focuses on policy commentary, advisory reports, and technical assistance, it lacks the mandate to push forward a binding multilateral investment agreement. It may also be difficult to reach consensus among such a huge membership. As a way forward, the UNCTAD, the ILC, and UNCITRA might work together to set up a joint task force on an MFI/PFI, and open a draft agreement for signature when a broader consensus has been established.

OECD

The OECD has long been committed to investment liberalisation and has achieved significant outcomes, notably the Draft Convention on the Protection of Private Investment, the Code of Liberalisation of Capital Movements, and the Code of Liberalisation of Current Invisible Operations. In 1995, the OECD initiated unsuccessful negotiations on the MAI. In recent years, it has generated a wealth of working papers and other studies in the investment field.

The OECD could restart a negotiation on a renamed MAI; but, to succeed it would have to open the negotiations to non-member states, making sure that their voices are heard and interests reflected in the final outcome.

International Energy Charter

The IECTreaty established a multilateral framework for energy, albeit with a limited geographical reach. Recent statistics confirm the significance of the Charter, as the most cited investment treaty in international investment arbitration. In May 2015, the Charter moved to a second phase of modernisation and globalisation.[54] A few new countries, including China, signed the new political Charter. Iran, an important member of the Organization of the Petroleum Exporting Countries (OPEC), attended the IEC conference.

If successful, the IEC could become a genuinely global and modern system of energy governance, which could inform and inspire the MFI/PFI. However, its industrial limits might prevent it from playing a wider role in global investment governance.

AIIB

The AIIB is an international financial institution focused on supporting infrastructure construction in the Asia-Pacific region. The bank was proposed by China in 2013, and the Articles of Agreement were signed by 51 Prospective Founding Members (PFMs), including Brazil, France, Germany, Russia, and the United Kingdom.

Although its name suggests a regional scope, its membership actually has a global reach with representatives from both developing countries and advanced countries. On this basis and given its mandate as an investment bank, it has the potential to provide a platform for the negotiation of an MFI/PFI. However, given that it is still in an early stage of development, it cannot be expected to launch such a major project in the near future.

CONCLUSION

The prominence of investment in the global economy requires a global legal framework thatprovides an opportunity for systemically reviewing and reforming the current IIA regime. The mixed role of major economies and the converging treaty practices have paved the way for an MFI, while the global debate on the IIA regime helps build political and social momentum for its launch.

Given the “birth defect” or the unbalanced origin of IIAs, the reform of the IIA regime has to take a thorough “from root to rules” approach, reflecting the fundamental shift of tension from a “North-South divide” to a “private-public

53 UNCTAD. Towards A New Generation of International Investment Policies: UNTAD's Fresh Approach to Multilateral Investment Policy-Making, United Nations: New York and Geneva, April 2013.

54 After many years of planning, discussion, diplomatic efforts and negotiations, the International Energy Charter was adopted at a High-level Ministerial Conference in May 2015. European Commission, New International Energy Charter adopted, 21 May 2015, available at, <https://ec.europa.eu/energy/en/news/new-international-energy-charter-adopted>(accessed on 19 July 2015).

debate." The key to improving the substantive provisions is to rebalance private-public interests, while the key to ISDS reform is to restructure investment dispute settlement mechanisms and de-commercialise the current ISDS system. Certain social clauses may be included to address social concerns, but only on a complementary basis, to ensure that the regime is viable and focused, while paying due deference to local authorities and local norms.

To restructure the currently fragmented IIA system, a PFI represents the best first step forward. A PFI could bring together top players in international investment to achieve a reasonably high-standard agreement. To this end, it would be most effective to consider a trilateral investment agreement between the US, the EU and China, which could provide a significant stepping stone toward an MFI/PFI. The WTO is best positioned to start a PFI negotiation, while the G20 could build a political consensus for this venture. An appeal mechanism or a permanent court might be established within the ICSID regime, which would significantly enhance the legitimacy of the ISDS system. Other venues such as the UN, the OECD, the IEC, and the AIIB also have the potential to play roles in this process, particularly when a wider consensus matures.

COMMENTS BY GARY HUFBAUER & TYLER MORAN

Professor Wenhua Shan covers a large swath of investment territory in his fine essay. We agree with a substantial majority of his themes. In this short *Comment*, however, we highlight areas of disagreement, both because those will be of greatest interest to readers and because clear differences are more informative than fuzzy compromises.

Professor Wenhua Shan describes why advanced capital-exporting countries pursued international investment agreements (IIAs) after a surge in expropriations during the first two decades following the Second World War. The US and Western European nations sought to protect their firms that invested abroad. But, for North-South IIAs, that is only half the story. During the 1960s and 1970s, many developing countries were either non-aligned in the geopolitical contest known as the Cold War, or aligned themselves with the Soviet Union. In short, developing countries were perfectly able to pursue their own political and economic fates, and ignore the entreaties of advanced nations.

The fact that many North-South IIAs were signed in those decades and since proves, we think, that the agreements were not one-sided, or as Professor Wenhua puts the matter, "unbalanced." If 20th century IIAs were simply a "sword," to use Professor Wenhua's description, no one could have expected that more than 3000 would be in existence today. Even small developing countries don't willingly create weapons for advanced powers to use against them.

In our view, developing country signatories were eager to attract FDI, and national leaders realised the reputations of their local institutions gave multinational corporations (MNCs) ample reasons to invest elsewhere. BITs and investment chapters in FTAs accordingly served as quick "reputation enhancers."

A country might instead have built investor confidence over time by not expropriating and by giving fair treatment to MNCs. But, that's a slow process. Projects, such as mines, power plants, auto factories, and even banks can take more than a decade to cover their upfront costs, so a few years of good behaviour may not prove sufficient to ease the fears of foreign investors. IIAs, therefore, can serve as shortcuts. For this reason, we contend that twentieth century IIAs were "balanced."

Accordingly, we reject the proposition that UN General Assembly Resolutions 1803 and 3281 — products of the NIEO era — were needed as "shields." To be sure, the resolutions expressed the ideological views of their proponents, but they were not needed to defend against oppressive IIAs. The fact that, in the 21st century, new provisions are finding their way into IIAs reflects a reaction against certain arbitral awards and, probably more important, extensive, but as yet undecided, claims of some MNCs. The most important new provisions ensure that regulations to protect health, safety, and the environment cannot be challenged unless they outrageously discriminate against foreign firms. Moreover, the total magnitude of actual awards from the 600-odd decided and settled cases handled by ICSID is very likely less than US$50 billion, a sum that is trivial compared with the US$26 trillion of global FDI stock.

Under customary international law, countries have nearly complete sovereignty over investment within their borders. The vast majority of investment disputes are litigated under IIAs that were freely negotiated, ensuring investor protection beyond the norms of customary international law. NIEO doctrines of the 1970s are largely forgotten today, because rejecting international investment is poor economic policy. MNCs have no desire to pump billions of dollars into a country that proudly proclaims it will treat foreign investors however it pleases.

Like Professor Wenhua Shan, we welcome greater transparency in ISDS deliberations and decisions, along with the possibility of creating *ad hoc* appellate mechanisms and even a permanent international court. However, it may be no easier today to create multilateral oversight of international investment than it was in Havana in 1948 or in the OECD in 1998. We agree that conditions could be auspicious for a fresh attempt, owing to the more balanced configuration of inward and outward FDI as between advanced and developing countries. We further agree that, in the near term, a plurilateral agreement seems far more likely than a multilateral agreement. Finally, in our opinion, the WTO is the right forum for a fresh attempt.

But, we offer three notes of caution. First, in the foreseeable decade of lethargic growth, poor productivity, and enormous unmet infrastructure requirements, the overwhelming need in the world economy is more FDI, not less. In 2014, FDI was only US$1.4 trillion, barely 60 percent of its peak in 2007, some US$2.2 trillion. The world needs at least US$3 trillion of FDI annually over the next decade. Any multilateral or plurilateral framework on investment (MFI or PFI) should be framed with the overriding goal of boosting investment flows, not retarding them.

Second, given the existence of more than 3000 IIAs, any MFI or PFI should supplement, not override the existing IIAs. To be sure, new conventions (perhaps as part of a PFI) might fill gaps in existing agreements, such as procedural transparency (in the spirit of the 2014 UNCITRAL Mauritius Convention) or an optional appellate mechanism under ICSID auspices. But, care should be taken not to excite opposition to a PFI by seeming to indirectly override existing IIAs. And a PFI should stay far away from contentious international tax issues of the sort raised by the OECD in its project on “Base Erosion and Profit Shifting.”

Third and finally, we think a PFI should be launched with a small number — perhaps not more than a dozen — WTO members that are both large home countries for outward FDI and large host countries for inward FDI. A small group of this nature is more likely to reach agreement, while fairly representing the interests of host countries, home countries, and MNCs.

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