VALE COLUMBIA CENTER
ON SUSTAINABLE INTERNATIONAL INVESTMENT
A JOINT CENTER OF COLUMBIA LAW SCHOOL AND
THE EARTH INSTITUTE AT COLUMBIA UNIVERSITY

Columbia FDI Perspectives

Perspectives on topical foreign direct investment issues by
the Vale Columbia Center on Sustainable International Investment

No. 102 August 26, 2013

Editor-in-Chief: Karl P. Sauvant (Karl.Sauvant@law.columbia.edu)
Managing Editor: Shawn Lim (shawnlwk@gmail.com)

The futile debate over a multilateral framework for investment

by
Axel Berger[*]

One of the recurrent debates on international investment rule-making relates to the question whether it is possible to establish a multilateral framework for investment (MFI). Proponents argue that growing foreign direct investment (FDI) from emerging countries, especially China, contributes to a new consensus on global investment rules.[1]

The crucial question however, should not be whether it is possible to negotiate an MFI (function follows form) but whether an MFI would be the right institutional form to align investment rule-making with sustainable development (form follows function).

If we follow the latter logic, we may realize that we already have elements of a multilateral investment law on the basis of bilateral investment treaties (BITs),[2] which decreases the need for a formal treaty. Furthermore, an MFI may not necessarily be the best institutional fix to tackle the most pressing challenges in the current investment regime. These include the ineffectiveness of BITs to promote FDI, their undue restrictiveness on host countries' policy space and the incoherence of investment rules.[3]

First, an MFI would only lead to more FDI – as a result of lower transaction costs for foreign investors – if it supplants existing BITs. As this consolidation seems unlikely, an MFI would merely add another layer to an already complex and fragmented system. Second, it seems unlikely that an MFI would help to increase host countries' policy space to enhance the contribution of FDI to national development. Even if developing countries could use their collective voice in a multilateral forum to establish development-friendly investment rules, this might lead to a pullback by capital-exporting countries. Potential confrontations at the multilateral level could undermine policy changes already underway at the regional level. Third, a standalone MFI would not lead to greater coherence of investment rules in relation to other economic as well as public policies. Finally, with the WTO in deep crisis and unable to integrate investment into a comprehensive set of new trade rules, it remains uncertain in which forum an MFI could be negotiated.

Against this background, policymakers should instead focus on the regional level to address the shortcomings of the international investment regime. The regionalization of investment rule-making is already in full swing and has reached a new level with the negotiations of major preferential trade and investment treaties (PTIAs) such as the Trans-Pacific Partnership, the Regional Comprehensive Economic Partnership among ASEAN+6 countries and the Transatlantic Trade and Investment Partnership.

The combination of investment, trade, service, and intellectual property rights disciplines in PTIAs better reflects current economic realities in which business is increasingly conducted in the framework of complex value chains. The embedding of investment rules increases the potential to increase coherence across different disciplines. PTIAs often include more balanced obligations and establish exceptions, which encompass environmental and labor protections and enhance host countries' policy space. Furthermore, most of these agreements entail market access provisions to improve the agreements' effectiveness in promoting FDI flows.[4]

Of course, moving the negotiation of investment rules from the bilateral to the regional level alone is no panacea. It must be ensured that the increasing number of PTIAs leads to a consolidation of substantive and procedural investment rules. Traditional capital-exporting countries and emerging markets need to agree on the right balance between the protection, liberalization and regulation of FDI flows, investment by state-owned enterprises, and the integration of sustainability standards.

In view of the institutional crisis of the WTO and past failures of the OECD and the United Nations, the current global governance system seems ill-equipped to forge a global consensus on the above-mentioned topics. Fresh thinking about consensus-building processes is needed. The *Perspective* by Karl P. Sauvant and Federico Ortino is a good starting point for such a debate.[5]

---

[*] Axel Berger (axel.berger@die-gdi.de) is a researcher in the Department for World Economy and Development Finance at the German Development Institute/Deutsches Institut für Entwicklungspolitik (DIE). The author is grateful to Gary Hufbauer, Stephan Schill and Kimmo Sinivuori for their helpful peer reviews. **The views expressed by the author of this *Perspective* do not necessarily reflect the opinions of Columbia University or its partners and supporters. *Columbia FDI Perspectives* (ISSN 2158-3579) is a peer-reviewed series.**

[1] *See e.g.*, World Economic Forum, "Foreign direct investment as a key driver for Ttade, growth and prosperity: The case for a multilateral agreement on investment", available at: http://www3.weforum.org/docs/GAC13/WEF_GAC_GlobalTradeFDI_FDIKeyDriver_Report_2013.pdf.

[2] Stephan Schill, *The Multilateralization of International Investment Law* (Cambridge: Cambridge University Press, 2009).

[3] *See* Axel Berger, "Do we really need a multilateral investment agreement?," German Development Institute (DIE) Briefing Paper 9/2013 (Bonn: DIE, 2013), available at: http://www.die-gdi.de/CMS-Homepage/openwebcms3.nsf/%28ynDK_contentByKey%29/ANES-96PAL3/$FILE/BP%209.2013.pdf.

[4] Axel Berger, Matthias Busse, Peter Nunnenkamp, and Martin Roy, "Do trade and investment agreements lead to more FDI? Accounting for key provisions inside the black box," *International Economics and Economic Policy* (April 2012), DOI: 10.1007/s10368-012-0207-6.

[5] "The need for an international investment consensus-building process," *Columbia FDI Perspectives*, No. 101, August 12, 2013.

For further information, including information regarding submission to the *Perspectives*, please contact: Vale Columbia Center on Sustainable International Investment, Shawn Lim, shawnlwk@gmail.com or shawn.lim@law.columbia.edu.

The Vale Columbia Center on Sustainable International Investment (VCC), led by Lisa Sachs, is a joint center of Columbia Law School and the Earth Institute at Columbia University. It is the only applied research center and forum dedicated to the study, practice and discussion of sustainable international investment, through interdisciplinary research, advisory projects, multi-stakeholder dialogue, educational programs, and the development of resources and tools.

Most recent Columbia FDI Perspectives

- No. 101, Karl P. Sauvant and Federico Ortino, "The need for an international investment consensus-building process," August 12, 2013.
- No. 100, Baiju S. Vasani and Anastasiya Ugale, "Cost allocation in investment arbitration: Back toward diversification," July 29, 2013.
- No. 99, Jonathan S. Kallmer, "The global significance of transatlantic investment rules," July 15, 2013.
- No. 98, Byungchae Jin et al., "Do host countries really benefit from inward foreign direct investment?," July 1, 2013.
- No. 97, Abdoul' Ganiou Mijiyawa, "Myopic reliance on natural resources: How African countries can diversify inward FDI," June 17, 2013.
- No. 96, Louis T. Wells, "Infrastructure for ore: Benefits and costs of a not-so-original idea," June 3, 2013.
- No. 95, Terutomo Ozawa, "How do consumer-focused multinational enterprises affect emerging markets?," May 20, 2013.
- No. 94, Stephan Schill and Marc Jacob, "Common structures of investment law in an age of increasingly complex treaty-making," May 6, 2013.
- No. 93, Xiaofang Shen, "How the private sector is changing Chinese investment in Africa," April 15, 2013.
- No. 92, Vid Prislan and Ruben Zandvliet, "Labor provisions in bilateral investment treaties: Does the new US Model BIT provide a template for the future?," April 1, 2013.