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Is the Time Right for a Multilateral Investment Treaty?

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The world has witnessed significant developments in the field of investment protection and dispute settlement in the past decades. This includes both investment treaty negotiations as well as investor-state dispute settlement (ISDS) practices. This field of law has also been subject of a heated debate and a desire for reform. In view of these developments, this blog post intends to analyze the feasibility of multilateral investment treaty (MIT) negotiations.

The idea of a MIT is not new – it is actually quite old and precedes the practice of bilateral investment treaties (BIT). In fact, the reason why states decided to regulate investment protection on a bilateral basis is the number of failed attempts at developing a multilateral framework on substantive treaty guarantees. The last failed attempt was made in April 1998, when governments launched negotiations for a multilateral agreement on investment (MAI) within the Organization for Economic Cooperation and Development (OECD). Back then, the states failed to find consensus on a MAI due to several reasons, but mainly because the draft was negotiated in secret by OECD members, and developing countries were neither privy to these negotiations nor had much say on the draft text later. Furthermore, the developing countries found the proposed MAI to be very asymmetrical and imbalanced in that it would provide for heightened investor protection while disregarding host states' interests and rights. Finally, further liberalization of investment proposed under MAI was seen as a threat to national sovereignty and democracy.

What Has Changed Since the 1990s?

It has been over two decades since the OECD draft MAI; the world we live in today is quite different in many aspects. Is the time right for a MIT then? We can certainly observe several positive developments that can facilitate the successful negotiation of MIT. Some of the most appealing developments are discussed below:

1. **The Divide Bridged Between the Capital-Exporting and Capital-Importing Countries**

Toward the end of the 1990s, when the last attempt was made to negotiate the OECD MAI, FDI was exclusively flowing from developed to developing countries. At present, a substantial amount of FDI is moving in both directions, and therefore, one-sided interests of protecting one's investors abroad or, conversely, being protective of one's sovereign and domestic interests as a host state is no longer a reality. China and its Belt and Road Initiative (BRI) is a good example of this

significant change. BRI is a massive economic initiative in terms of its ambitious goals, the geographical coverage and the resources and funds poured into the initiative. Today, 149 countries (including China) are involved in the BRI. The majority of investment projects under the BRI, however, are carried out by Chinese state-owned enterprises and private entities. In this new reality, the vast majority of Chinese BITs are first-generation protection type BITs, which offer limited protection to foreign investors, including when it comes to the most important remedy – international investment treaty arbitration. Under the majority of Chinese BITs, an arbitral tribunal's jurisdiction does not cover substantive treaty breaches and is limited to issues of compensation for expropriation. In terms of a new reality of having become a powerful capital-exporting country, China should be interested in putting in place international legal framework that provides more prudent protection for its investors and their investments abroad.

2. **Greater Consensus Among States on Issues of Investment Protection**

We can argue that there is an in-principle consensus among states around the world on investment protection and dispute settlement. This consensus is manifested in several forms: firstly, unlike the end of the 1990s when there were only couple hundred investment protection treaties in place, at present, there is a network of over 3,200 (UNCTAD IIA Navigator counts 3,275 treaties) BITs and treaties with investment provisions (TIP). This certainly indicates that there is a consensus on the need for an investment protection and dispute settlement system. Secondly, there is a consensus that the current system of investment protection and dispute settlement has major problems that need to be resolved. The discussions at Working Group III of the United Nations Commission on International Trade Law (UNCITRAL) (UNCITRAL WGIII) is a clear demonstration of such consensus, even though the approaches of states on actual reform options might vary.

3. **A Possibility of More Inclusive Discussions**

In today's world, there is a possibility of more inclusive discussions and deliberations than previously. The WGIII is again a perfect example of such a change. All states, whether developed or developing, whether member or observer to UNCITRAL as well as governmental organizations, may participate in the deliberations on an equal basis. Interestingly for the discussion here, WGIII had considered the idea of a multilateral instrument on ISDS reform (MIIR), which could provide a framework for implementing reforms adopted by WGIII.

Would a Multilateral Investment Agreement be Useful?

MIT could be a good solution to some of the important problems encountered within the current system of investment protection and dispute settlement. Many of these problems have emerged due to the current fragmented system formed by a network of over 3,200 BITs and TIPs. Thus, MIT could be an answer to many concerns currently discussed by the international community at large. Such concerns include, but are not limited to, the following:

1. Inconsistent and conflicting treaty interpretations;
2. Multiple, parallel proceedings;
3. Nationality planning and treaty and forum shopping;
4. Lack of uniform understanding of procedural norms, legal principles and decision-makers' inherent powers in dealing with various aspects of ISDS; and
5. Lack of multilateral approach and difficulty to settle important new issues such as the right to

regulate, environment, climate change, sustainable development, corporate governance, etc.

What Are the Challenges in Negotiating MIT?

Although MIT might sound like a timely and useful development, it would be a challenging project. Achieving consensus on substantive and procedural aspects of investment protection would not be an easy task due to several factors that are discussed here:

1. **Policy approaches of the Governments Vary Widely**

Many countries are still willing to commit to high-standard international investment agreements. However, some other governments seem willing to only accept a much lower standard of protection. There are a few other countries who are ill-disposed to any international investment agreements; take, for example, Brazil, who has no investment treaty in place, and take other countries like Ecuador, Bolivia, Venezuela, South Africa, and India, who are terminating their BITs and withdrawing from instruments like the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention) (Bolivia, Ecuador and Venezuela withdrew; India and Brazil have never even signed the ICSID Convention).

2. **Consensus on Substantive Treaty Guarantees and Procedural Norms**

Those countries who are in favor of robust international investment protection, which are luckily the majority, do not necessarily share the same approach and understanding of various investment treaty guarantees. New generation BITs no longer mirror the provisions of the old generation BITs. The new BITs differ significantly from one another in terms of the level of protection, content of various clauses, the legal wording of the provisions, dispute settlement procedures, etc. Countries try to deal with the bad experiences accumulated over time and deficiencies of the system in their own ways, which are largely driven by specific experiences of individual states, their economic and foreign policies, public policy considerations, etc.

3. **Consensus on Environmental, Social and Corporate Governance (ESG) Issues**

Although the distinction between the capital-exporting and capital-importing states has faded significantly, the countries around the world are still at very different levels of political, economic, and social development. The levels of rule of law, democracy, and legal and institutional development vary among jurisdictions, which would make it challenging to find consensus on some of the important issues of investment protection. The menu of proposed treaty guarantees, rights and obligations is expanding, introducing exotic topics such as environment, climate change, sustainable development, responsible business conduct, etc. These are areas where the commitments from sovereigns would require significant resources and sacrifices. Not all countries might be ready for this commitment just yet. Look at how things developed on the ECT Modernization negotiations. In this author's personal view and based on her own experience as one of the negotiators in the ECT modernization negotiations, when it comes to investment protection and ISDS, ECT member states were able to achieve an impressive result in terms of the negotiated text that was modern and comprehensive, striking a right balance between the sovereign interests and the investment protection. It was due to these new important topics, particularly environmental protection and climate change (exclusion of fossil fuel from protected investment), that made it difficult for all participating states to find consensus and led to the sabotaging of the modernization

process and the ECT as a whole. This illustrates how important ESG-related issues have become in the context of investment protection, and this may be the area where finding consensus might prove difficult.

4. **Fate of the Existing Network of Investment Treaties**

The important question is what to do with over 3,200 BITs and TIPs that will remain in force for a long time in parallel with MIT. What will be the relationship between MIT and the existing instruments? How will they coexist? These are important questions that need to be addressed. UNCITRAL's approach in relation to the MIIR might be interesting; WGIII has discussed the possibility of including in MIIR "a compatibility/conflicts clause" that would clarify the relationship with prior investment agreements.

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This entry was posted on Saturday, January 6th, 2024 at 8:57 am and is filed under ISDS, ISDS

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