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UNIVERSITÄT BERN

Call for Papers:

Is a Multilateral Investment Treaty Needed?

June 19, 2017
World Trade Institute (WTI) – University of Bern

ABSTRACT SUBMISSION DEADLINE: April 1, 2017

The World Trade Institute (WTI) of the University of Bern invites the submission of papers and abstracts for a conference entitled "**Is a Multilateral Investment Treaty Needed?**

Attempts at crafting a multilateral agreement on investment have proven repeatedly contentious. Early examples of such policy controversy could be found in the failed Havana Charter (1948) – whose Article 12 aimed to regulate "International Investment for Economic Development and Reconstruction", in the unsuccessful Abs-Shawcross Draft Convention of 1959 as well as in the failed OECD Draft Convention on the Protection of Foreign Property in 1962.

In the early 1960s, the World Bank initiated work on a Convention to establish the International Centre for Settlement of Investment Disputes (ICSID), an institution devoted to the settlement of disputes between investors and host States. At the Annual Meeting of the Board of Governors of the World Bank held in Tokyo in September 1964, a resolution was approved asking the Executive Directors to formulate the final text of the envisaged ICSID convention. For the first time in the Bank's history, a major resolution met with substantial opposition, as 21 countries voted against the proposal, including all Latin American countries, the Philippines and Iraq. A large majority of the above countries did not become parties to the ICSID Convention until the 1990s.

Between 1995 and 1998, a draft Multilateral Agreement on Investment (MAI) was negotiated between the members and a few observer states of the Organisation for Economic Co-operation and Development (OECD). When its incomplete draft became public in 1997, it brought widespread criticism from developing countries that were excluded from the negotiating process as well as from civil society groups concerned by the agreement's impact on host states' right to regulate in the public interest. Following an intense global campaign directed against the MAI, and the Government of France's explicit rejection of the proposals on offer, the negotiations were suspended in October 1998.

But international investment negotiations were also taken up at the WTO. Two WTO Agreements brokered during the Uruguay Round address investment-related matters: the TRIMs and the GATS, although both do so in limited terms. The first WTO Ministerial Conference, held in Singapore in December 1996, established a permanent working group on trade and investment,

Included as one of the negotiating topics of the Doha Round (2001), investment (alongside two of the other three so-called "Singapore Issues" of competition and transparency in public procurement) was subsequently dropped from the DDA agenda, following the August 1st, 2004 decision General Council's after several disagreements on the topic at the December 2003 Ministerial Conference held in Cancun.

The recent past has seen a revival of interest in multilateral rule-making on the investment front, notably in the wake of rules embedded in a growing number of preferential trade agreements, as well as following the EU's proposal for a standing investment court and an appellate tribunal as part of the pending negotiations of the Transatlantic Trade and Investment Partnership (TTIP) with the United States (since 2015), a process whose precedent had been set in recent EU trade agreements signed in 2016 with both Vietnam and Canada (Comprehensive Economic and Trade Agreement – CETA).

The World Economic Forum Global Agenda Council on Global Trade and FDI concentrated its work in 2012-2013 on assessing the case for a multilateral agreement on investment, considering foreign direct investment as a key driver for trade, growth and prosperity.

In December 2016, the European Commission and the Canadian Government announced that they were working together to establish a multilateral investment court. The ultimate aim of such efforts is to establish a single permanent body to decide investment disputes, thus moving away from the prevailing *ad hoc* system of investor-state dispute settlement (ISDS). This future body would be open to all interested countries and would adjudicate disputes under both existing and future investment treaties. The European Commission is also carrying out an impact assessment on this initiative and a 12-week public consultation process will shortly be launched and stakeholder meetings organised by February 2017.

These most recent initiatives emerge in the context of - and against the backdrop of - an important backlash against investment treaties in general and ISDS in particular, questioning the very ability of IIAs to induce foreign investment activity. Critics of the current investment regime bemoan the fact that it allows, through ISDS procedures, the contracting out the judicial function in public law through private arbitrators deciding on the legality of sovereign acts. Concerns have been raised over the qualifications and independence of arbitrators, the propensity towards frivolous claims, 'nationality-planning' and treaty-shopping, the prohibitive costs of ISDS, the lack of transparency and legal coherence of arbitral awards, the expansive or inconsistent interpretation of treaty provisions, erroneous arbitral decisions, 'regulatory chill' effects affecting the State's 'right to regulate', and a growing perception of an overall lack of systemic legitimacy. The above criticisms have taken root not only in developing but also in developed countries, as witnessed during the negotiation of 'mega-regional' agreements like the Trans-Pacific Partnership (TPP), CETA and the TTIP.

The question of whether a multilateral investment agreement is needed, desirable or politically feasible is thus of considerable policy salience. Even if one believes that a strong case can yet be made in favour of such an agreement – whether on substantive grounds or for the needed

settlement of investment disputes, the question remains what kind of agreement should be proposed.

This call for papers and ensuing conference plans to debate the many important questions emerging from the negotiation of a possible multilateral framework agreement on investment. Potential topics to be taken up at the conference include:

- Do investment agreements – whether bilateral, plurilateral or multilateral – promote foreign investment? If so, what type of investment?
- What are the benefits and disadvantages of a multilateral agreement compared to bilateral or plurilateral approaches?
- If needed or deemed feasible, what level of multilateral negotiation is desirable? Should a multilateral treaty focus solely on the protection of investor and host state rights? Should it also address liberalization matters? Or should it solely focus on the means to settle investment disputes? Can we have a multilateral investment court without a multilateral investment agreement?
- Does the fact that investment flows from developing countries have increased in recent years, affect the chances of a successful negotiation of a multilateral investment treaty?
- Who should be responsible for the conduct and implementation of such multilateral agreement(s)? What would be the most desirable and legitimizing negotiating settings?
- Should countries seek an agreement on a relatively smaller scale (such as the OECD's failed MAI), or should they aim to involve the larger number of countries that are members of the WTO or some other global bodies, like the UN?
- What are the main differences between a standing investment court system and the ad hoc ISDS process? Does the investment court system properly address the shortcomings of ISDS? Or does it create another type of 'bias' in favour of States? Are any of these systems necessary at all?

Please submit paper proposals (abstracts) on substantial, original, and unpublished research related to all aspects of a possible multilateral investment agreement, including but not limited to the topics suggested above.

The conference aims to address issues from an interdisciplinary perspective combining law, economics, political science and other relevant disciplines in gaining a better understanding of the reasons for and against a multilateral investment agreement. We encourage submissions of interdisciplinary research in any relevant field of study. Rather than following the format of a typical panel, the conference foreseen will follow a less scripted format that will allow both experts and participants to engage in a lightly moderated but productive conversation.

Abstract submissions must be between 300-500 words in length and should be accompanied by a short CV. Please submit your proposals to Rodrigo Polanco (Rodrigo.Polanco@wti.org).

Papers selected for the conference are expected to be published as part of an edited volume. Scholars who have their abstracts accepted are expected to have a first draft submitted by June 15, 2016. Each abstract and subsequent paper submitted should be original and not been published in a prior work.

Key Dates

Abstract Submission Deadline: April 1, 2017
Notification of Acceptance of an Abstract: April 21, 2017
Submission of a Draft Paper: June 15, 2017
Conference Date: June 19, 2017

Conference Venue

The World Trade Institute (WTI) was established in 1999 and conducts advanced studies in international trade and investment at the University of Bern. The WTI combines graduate-level education, interdisciplinary research and specialised advisory services into a unique and dynamic institution.

We recruit students, researchers, faculty and employees from around the world, creating a diverse and engaging environment. Research is conducted in close collaboration with the NCCR Trade Regulation funded by the Swiss National Science Foundation. The WTI's main objective is to push the boundaries of teaching and research in the law, economics and politics of international trade and investment governance.

Contact

If you have any questions regarding this call for papers, please e-mail Rodrigo Polanco (Rodrigo.Polanco@wti.org).
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