

Karl, Joachim

Research Report

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

Columbia FDI Perspectives, No. 115

Provided in Cooperation with:

Columbia Center on Sustainable Investment (CCSI) - A joint center of Columbia Law School and the Earth Institute, Columbia University

Suggested Citation: Karl, Joachim (2014) : The "spaghetti bowl" of IIAs: The end of history?, Columbia FDI Perspectives, No. 115, Columbia University, Vale Columbia Center on Sustainable International Investment (VCCI), New York, NY

This Version is available at:

<https://hdl.handle.net/10419/253949>

Standard-Nutzungsbedingungen:

Die Dokumente auf EconStor dürfen zu eigenen wissenschaftlichen Zwecken und zum Privatgebrauch gespeichert und kopiert werden.

Sie dürfen die Dokumente nicht für öffentliche oder kommerzielle Zwecke vervielfältigen, öffentlich ausstellen, öffentlich zugänglich machen, vertreiben oder anderweitig nutzen.

Sofern die Verfasser die Dokumente unter Open-Content-Lizenzen (insbesondere CC-Lizenzen) zur Verfügung gestellt haben sollten, gelten abweichend von diesen Nutzungsbedingungen die in der dort genannten Lizenz gewährten Nutzungsrechte.

Terms of use:

Documents in EconStor may be saved and copied for your personal and scholarly purposes.

You are not to copy documents for public or commercial purposes, to exhibit the documents publicly, to make them publicly available on the internet, or to distribute or otherwise use the documents in public.

If the documents have been made available under an Open Content Licence (especially Creative Commons Licences), you may exercise further usage rights as specified in the indicated licence.



Columbia FDI Perspectives

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

No. 115 February 17, 2014

Editor-in-Chief: Karl P. Sauvant (Karl.Sauvant@law.columbia.edu)

Managing Editor: Shawn Lim (shawnlw@gmail.com)

The “spaghetti bowl” of IIAs: The end of history?

by

Joachim Karl*

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

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

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

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

responsibility—or whether they think that *more fundamental changes* to the structure of the IIA regime are needed to make investment work better for sustainable development and inclusive growth.³

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

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

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

* Joachim Karl (joachim.karl@unctad.org), PhD, MPA (Harvard), is Chief of the Policy Research Section in UNCTAD, Division on Investment and Enterprise, Geneva, Switzerland. The author is grateful to Michael Gestrin, Pierre Sauvé and Stephan Schill for their helpful peer reviews. The views expressed by the author do not necessarily reflect the opinions of UNCTAD. **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 Francis Fukuyama, *The End of History and the Last Man* (New York: Free Press, 1992).

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

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

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

The material in this Perspective may be reprinted if accompanied by the following acknowledgment: “Joachim Karl, ‘The “spaghetti bowl” of IIAs: The end of history?’ Columbia FDI Perspectives, No. 115, February 17, 2014. Reprinted with permission from the Vale Columbia Center on Sustainable International Investment (www.vcc.columbia.edu).” A copy should kindly be sent to the Vale Columbia Center at vcc@law.columbia.edu.

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

The Vale Columbia Center on Sustainable International Investment (VCC), a joint center of Columbia Law School and the Earth Institute at Columbia University, is a leading applied research center and forum dedicated to the study, practice and discussion of sustainable international investment. Our mission is to develop and disseminate practical approaches and solutions, as well as to analyze topical policy-oriented issues, in order to maximize the impact of international investment for sustainable development. The Center undertakes its mission through interdisciplinary research, advisory projects, multi-stakeholder dialogue, educational programs, and the development of resources and tools. For more information, visit us at www.vcc.columbia.edu.

Most recent Columbia FDI Perspectives

- No. 114, Louis T. Wells, “Government-held equity in foreign investment projects: Good for host countries?” February 3, 2014.
- No. 113, Anthea Roberts, “Recalibrating interpretive authority,” January 20, 2014.
- No. 112, Sheng Zhang, “The China-United States BIT negotiations: A Chinese perspective,” January 6, 2014.
- No. 111, Barclay E. James and Paul M. Vaaler, “Minority rules: State ownership and foreign direct investment risk mitigation strategy,” December 23, 2013.
- No. 110, Gus Van Harten, “Beware the discretionary choices of arbitrators,” December 9, 2013.

All previous *FDI Perspectives* are available at <http://www.vcc.columbia.edu/content/fdi-perspectives>.