

The significance of international investment law



Karl P. Sauvant

ON the occasion of the 60th anniversary of the first bilateral investment treaty between Germany and Pakistan, it is appropriate to review the state of the international investment law and policy regime. After a slow start, the regime has expanded with extraordinary speed over the past few decades. But challenges remain.

From the beginning, the regime's explicit objective was to protect international investors, combined with the common assumption that this will increase investment flows that would substantially contribute to host countries' development.

Accordingly, the regime's

substantive provisions focus on investor protection, most importantly national treatment, most-favored nation treatment, fair-and-equitable treatment, and expropriation only with compensation. Roughly speaking, the protections are settled in favor of strong rights for investors, even though more recent treaties define protections in greater detail and limit certain abuses.

These rights are enforced through an effective dispute-settlement mechanism, with the designated form being arbitration.

The significant number of investor-state dispute-settlement cases, reaching over 70 new cases in 2018, and a very high compliance rate with awards, reflect this effectiveness.

The regime has served international investors well. Yet, it needs to serve host countries more to maintain its legitimacy.

Principal challenges include:

- The regime's objective needs to be broadened to encompass

explicitly the promotion of sustainable development, given that the UN Sustainable Development Goals have become the lodestar of international economic policy. Importantly, that additional objective should be operationalized in the text of investment treaties and their application.

- The regime's substantive provisions have to be rebalanced. Currently, the regime protects the rights of investors, without giving them responsibilities. To balance these rights, investment treaties need to include binding and actionable responsibilities for investors. Progress is being made, as reflected in the inclusion of (albeit voluntary) corporate social responsibility provisions in recent investment agreements and the explicit recognition of host countries' right to regulate. Only by creating such a balance can all stakeholders support the regime in the long run.

- The regime's dispute-settlement mechanism needs to be overhauled and made accessible

eventually to governments. Most importantly, the European Commission's proposal to create a multilateral investment court would substantially improve the current mechanism, increasing its legitimacy. Moreover, the proposed amendments to the procedural rules of the International Centre for Settlement of Investment Disputes incrementally improve aspects of the mechanism's efficiency. Both reforms should move forward expeditiously.

As before, the evolution of the investment regime will be driven by the interests of the principal countries, their foreign investors and civil societies.

Yet, the relative importance of change-driving stakeholders will shift. With over 170 economies reporting outward FDI stocks in 2017, their interest constellation is changing: The defensive interests of a growing number of developing countries as host countries are gradually complemented by their offensive interests as home countries; concurrently,

developed countries have become more aware of the risks they face as host countries.

Both developments contribute to blurring the North-South divide that has governed the past and, taken together, offer opportunities for advancing the global investment regime. While this eases the evolution of the regime, civil society will have to play a greater role in arguing for regime improvements.

The international investment law and policy regime is probably the strongest international regime existing today, in terms of its substantive provisions and enforcement.

However, to maintain its legitimacy and retain the support of key constituencies, the regime's objectives need to be broadened to embrace sustainable development. It needs to be balanced in substance and its dispute-settlement mechanism needs to be beyond reproach.

Karl P. Sauvant is resident senior fellow at the Columbia Center on Sustainable Investment.