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

Managing Editor: Marion A. Creach (marion.creach@sciencespo.fr)

The state of the international investment law and policy regime*

by

Karl P. Sauvant**

On occasion of the 60th anniversary year of the first bilateral investment treaty,¹ 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 it faces challenges.

From the beginning, the regime's explicit objective was to protect international investors, combined with the common assumption that this will lead to increases in 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. *Grosso modo*, the protections are settled in favor of strong rights for investors, even though more recent treaties define protections in greater detail (e.g., fair-and-equitable treatment) and limit certain abuses (e.g., by requirements curtailing treaty shopping).

These rights are enforced through an effective dispute-settlement mechanism (to which only investors have access), with the designated form being arbitration. The significant number of investor-state dispute-settlement (ISDS) cases, reaching over 70 new cases in 2017, and a very high compliance rate with awards, reflect this effectiveness. Moreover, this mechanism is being improved in response to some criticisms, e.g., by increasing transparency and limiting process abuse.

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 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. Accordingly, arbitrators should recognize—and heed when deliberating specific cases—that investments should contribute meaningfully to the economic development of host countries.² They could do so by using widely accepted FDI sustainability characteristics, requiring more from investors than not doing harm. The latter, moreover, suggests that access to effective remedy is required.

- The regime’s substantive provisions have to be re-balanced. 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. Another way to rebalance the regime is to limit investment protections through exceptions, although care needs to be taken that exceptions do not afford too much leeway, given the rise of self-judging essential security clauses; ways need to be found to protect the investment regime against their potential abuse.
- 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](#) (being discussed in the United Nations Commission on International Trade Law) would substantially improve the current mechanism, increasing its legitimacy (including by addressing perceived arbitrator bias and inconsistency concerns). 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. Additionally, an independent Advisory Center on International Investment Law should ensure equality of arms for under-resourced developing country respondents in ISDS cases.³ It may also become necessary to determine under what condition an exhaustion of local remedies might be required, if only to ensure that the regime is not overwhelmed by disputes.

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 (e.g., to preserve policy space) are gradually complemented by their offensive interests as home countries (e.g., to protect their investors and afford them dispute settlement); 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.

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** Karl P. Sauvant (karlsauvant@gmail.com) is Resident Senior Fellow at the Columbia Center on Sustainable Investment, a joint center of Columbia Law School and the Earth Institute at Columbia University. The author wishes to thank Mark Feldman and Federico Ortino for their feedback on a draft and Manfred Schekulin, Stephen Schwebel, Wenhua Shan, and Gus Van Harten for their helpful peer reviews.

¹ The [1959 German – Pakistan BIT](#).

² See [Salini v. Morocco, ICSID Case No Arb/00/04, Decision on jurisdiction \(July 23, 2001\)](#).

³ [Robert W. Schwiuder, "Lessons for a future advisory center on international investment law," *Columbia FDI Perspectives*, no. 241, December 17, 2018.](#)

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For further information, including information regarding submission to the *Perspectives*, please contact: Columbia Center on Sustainable Investment, Marion A. Creach, marion.creach@sciencespo.fr.

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