The Need for An International Investment Consensus-building Process (also in Chinese)

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The need for an international investment consensus-building process

by Karl P. Sauvant and Federico Ortino

Discussions on a multilateral investment framework have recently seen a revival, as the International Chamber of Commerce, the World Economic Forum and various authors have called for negotiations on this subject. A growing number of countries have been reviewing and adapting their international investment policies. This reflects dissatisfaction with the current international investment law regime, and a desire to improve it.

Critical issues affecting the regime (consisting of over 3,000 international investment agreements) revolve around, for example, identifying the overall purpose of the regime, defining the notion of foreign “investment” and “investor”, giving content to open-ended investment protection standards, strengthening the legitimacy of the investor-State dispute-settlement system, and addressing the lack of a strong and coordinated institutional structure. Developments in treaty and arbitral practice may well address some of these issues and lead to the improvement of the regime.

It is not clear, however, how rapidly and to what extent these challenges will be addressed in the normal course of events. Allowing the regime to mature is time consuming. Moreover, there are widely diverging views among stakeholders about the extent to which changes are needed, what they should be and how they should be brought about. This is a complex situation that calls for a better understanding of the issues and bridge-building between various interested parties.

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See Sauvant and Ortino, op. cit., for references.
What to do?

It would be desirable to speed up the evolution toward a regime that reflects the interests of all stakeholders by finding, most importantly, the appropriate balance between strong investor protection and the right of governments to pursue legitimate public policy objectives. This in turn needs to take place on the basis of a modernized purpose of the regime, from which its substantive and procedural provisions flow.

However, there is no obvious institution that could move the investment issue forward, as the principal international organizations dealing with investment (UNCTAD, OECD) are not likely to receive a mandate to go far beyond what they are already doing expertly; besides, open discussions are difficult in intergovernmental forums, as government representatives always keep in mind that what they say in such forums could eventually be held against them in actual negotiations. The WTO might include investment in a new agenda if the Doha Round is concluded and a new agenda adopted – but that is a big “might” and a big “if”. Furthermore, all the most important players are engaged in bilateral or regional investment negotiations, and they might simply want to wait for the outcome of those before considering broader efforts.

Given this situation (and in light of past failed efforts in the United Nations, OECD and WTO), an independent, open-minded international investment consensus-building process is needed to examine the range of issues associated with international investment law, to determine systematically what the concerns are, to discuss how and where to address them, and to propose solutions. The impetus would need to come from smaller countries, as this would be more favorably received by others. To be credible, it would have to involve representatives of the principal stakeholder groups, including representatives of international and regional intergovernmental organizations dealing with international investment; in fact, representatives from these organizations perhaps could even (informally?) service this process. The best option is for one government, or better yet, a few governments from developed and developing countries, to initiate such an inclusive, informal, but structured multi-stakeholder consensus-building process – an incremental thought-, discussion- and confidence-building process on issues related to improving the international investment regime. The G-20 could help initiate such a process by encouraging interested countries to launch it. It is a promising sign that Finland has already begun consultations to launch such an initiative within the framework of the Helsinki Process for global governance that it chairs with Tanzania.

Such a process could undertake various activities (or encourage others to undertake them). The menu from which to choose could include: fact-finding (e.g., international hearings on the investment regime, a restatement of international investment law); dialogue roundtables between business and civil society; consensus-building working groups on substantive issues (e.g., the regime’s purpose, sustainable international investment, contents of norms, treaty shopping) and procedural issues (e.g., dispute settlement); a model bilateral investment treaty; specific mechanisms to improve the investment regime (e.g., an FDI protectionism observatory, an advisory center on international investment law, a recourse mechanism for a wider set of stakeholders); and establishing the desirability (or not) of a multilateral investment framework. It could also encourage greater cooperation by the international organizations already
working on investment. It could also identify “low-hanging fruits” (i.e., specific issues that command broad agreement on the need to tackle them, e.g., abusive treaty shopping, frivolous claims), backed by research, and suggest possible ways to deal with them to governments, for their consideration.

Such a consensus-building process might eventually solidify into an international investment steering group that could seek to influence the broader intergovernmental discourse. It is within the framework of this discourse that decisions would eventually have to be made about the future evolution of the international investment law regime, whether at the bilateral, regional or multilateral level.

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多边投资框架的相关讨论近期出现复苏，因为国际商会、世界经济论坛以及许多学者都提议对该议题进行谈判。越来越多的国家已经审查并调整其国际投资政策，反映出它们对当前国际投资法律体制的不满，并期望能对其加以改善。

影响国际投资法律体制（包括3000多项国际投资协议）的关键问题围绕以下几个方面：例如明确国际投资法律体制的总体目标、确定外国“投资”及“投资者”的概念、赋予开放式投资保护标准新的内容、加强投资者—国家争端解决机制的法律化、解决体制结构缺乏高度协调性的问题。条约和仲裁实践的发展或许能解决某些上述问题，并促进体制不断完善。

但是，这些问题在常规情况下将会以多快的速度、在何种程度上加以解决尚不清楚。体制走向成熟是费时的，而且利益相关者针对多大程度上的改变是必要的、应该是什么以及如何做出改变这三方面存在广泛的意见分歧。这是一种复杂的局面，需要更好地理解问题并增进不同利益相关方之间的友好关系。

该怎么做？

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1 参看Sauvant和Ortino，见前引书。
可取的做法是，通过在有力的投资者保护与政府权利间实现适当平衡，加快制度向着体现所有利益相关者的方向演变，从而实现合理的公共政策目标。这反过来又需要建立在体制的现代化目标之上，而这种体制源于实质性和程序性条款。

然而，并不存在明显的制度能推动投资议题取得进展，因为处理投资问题的主要国际组织（UNCTAD，OECD）不大可能得到授权，做超出其已经很熟练范围的事情。而且政府间论坛的公开讨论是困难的，因为政府代表始终牢记，他们在该类论坛发表的言论最终可能会在实际谈判中受到攻击，如果多哈回合能够结束并采用一项新议程，WTO 可能会将投资纳入一项新的议程中——但是在很大程度上这只是“可能”和“如果”。此外，所有最重要的参与者都从事双边或区域投资谈判，他们可能只是想等待结果，然后才考虑付诸更广泛的努力。

鉴于这种情况（以及联合国、OECD 和 WTO 过去努力的失败），需要达成一项独立、开放的国际投资共识来审查与国际投资法相关问题的范围、系统地查明存在的问题、探讨该如何解决这些问题并提出解决方案。推动力可能需要来自较小国家，因为这更容易被其他国家接受。可以确信的是，将会涉及主要利益相关者集团的代表，包括与国际投资相关的国际和区域政府间组织的代表；实际上，来自这些组织的代表甚至可能会（非正式）服务于这一过程。最好的做法是，一国政府或来自发达国家和发展中国家的一些政府达成这一包容性的、非正式但结构化的多方利益相关者共识——就与改善国际投资体制相关的议题进行讨论、形成增值思维并构筑信心。G-20 能鼓励利益相关国启动该进程。芬兰已经开始磋商在与坦桑尼亚全球治理的赫尔辛基进程的框架下启动该计划，这是一个好迹象。

这一进程将包含多种活动（或鼓励其他人参与），可供选择的范围包括：实情调查（例如对投资体制的国际听证会、重申国际投资法）、企业与民间社会间的圆桌会议、就实质性议题（如体制目标、可持续投资、规则内容、税收协定）以及程序性议题（争端解决）达成共识、双边投资条约范本、完善投资体制的特定机制（例如FDI 保护主义观测所、国际投资法律咨询中心、更广泛的利益相关者追索机制）、确立多边投资框架的吸引力。还可以加强国际组织在投资方面的合作。在研究的支撑下，还能确定“容易实现的目标”（即需要就解决方法达成广泛一致共识的特殊议题，如滥用采购协议及不重要的索赔），并出于政府的考虑找到解决这些目标问题的方式。

这一达成共识的过程最终可能固化为一个试图影响更大范围政府间对话的国际投资指导小组。正是在这种对话的框架下，将不得不就国际投资法律体制的未来发展在双边、区域或更多边层面做出决策。

(南开大学国经所陈丽翻译)

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