May 21, 2012

The Times They Are A-changin’ -- Again -- in the Relationships between Governments and Multinational Enterprises: From Control, to Liberalization to Rebalancing (also in Chinese)

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The times they are a-changin’ -- again -- in the relationships between governments and multinational enterprises: From control, to liberalization to rebalancing

by

Karl P. Sauvant*

Governments seek to attract foreign direct investment (FDI) undertaken by multinational enterprises (MNEs) because it contributes to the growth of their economies; they seek to maximize the benefits of this investment in the framework of their national economies. Firms undertake FDI because it improves their access to markets and resources and hence increases their international competitiveness; they seek to maximize the benefits of this investment in the framework of their global corporate networks. This difference in objectives and frameworks gives rise to tensions that play themselves out in the approach governments take in national FDI policies and bilateral investment treaties (BITs). During the late 1960s and the 1970s, the dominant approach was to control MNEs. During the 1990s, it was liberalization -- and the approach is again changing.

Consider:

- During the 1990s, 95% of 1,035 national FDI policy changes worldwide¹ made the investment climate more welcoming for MNEs.

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¹ UNCTAD, World Investment Report (Geneva: UNCTAD, various years).

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• National FDI screening agencies were replaced by investment promotion agencies (IPAs) -- red carpets replaced red tape.
• Reflecting this national approach, the number of BITs -- geared entirely toward protecting foreign investors and, in this manner, hoping to attract more FDI -- rose from 370 in 1989 to 1,719 in 1999.\(^2\)

Thus, by the end of the 1990s, FDI was widely regarded as part of the solution to advancing economic development. Virtually all governments had liberalized their FDI regulatory frameworks, established IPAs and signed BITs. Since then, countervailing considerations are asserting themselves.

Consider:

• The share of national FDI policy changes worldwide that made the investment climate less welcoming rose from 6% in 2001-2002, to 12% in 2003-2004, to 20% in 2005-2006, to 23% in 2007-2008, and to 32% in 2009-2010.\(^3\)
• A number of countries (particularly developed ones) have strengthened their screening mechanisms of incoming mergers and acquisitions (M&As), in the process also distinguishing between types of investors by singling out state-controlled entities (SCEs). For example, the number of investigations by the Committee for Foreign Investment in the United States rose from 1 in 2000 to 35 in 2010.\(^4\)
• The investment regime seems to be fragmenting as well, with separate rules emerging for SCEs.
• Reflecting the new approach at the national level, the international investment regime itself is becoming less protective of MNEs. In particular, the US (but not yet many other countries) has narrowed certain substantive protections of foreign investors, especially fair and equitable treatment and indirect expropriation; abandoned the umbrella clause; and strengthened the essential security interest clause (which allows governments to disregard BIT commitments under certain circumstances).

Thus, a growing number of governments are now taking a more nuanced approach to the role of FDI in their economies. While they continue to liberalize their FDI policies and conclude BITs, there is a clear trend to make the investment climate less welcoming and less predictable.

What explains this change in approach?

• The consensus that all FDI is equally beneficial is changing as more governments consider (certain) M&As as less beneficial than greenfield investments; conversely, in the future they may encourage more sustainable FDI, i.e. investment that makes a maximum contribution to economic, social and environmental development and takes place within mutually beneficial governance mechanisms while being commercially viable.

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\(^2\) Ibid.
\(^3\) Ibid.
• Governments pay more attention to competing objectives, especially national interests/essential security, the promotion of national champions and the protection of national industries.
• Pressure from civil society.
• The growth of FDI from emerging markets brings new players into the global FDI market, and their competition is not welcome by all, especially if they are SCEs.
• The cumulative number of treaty-based investment disputes brought by firms rose from 38 in 1999 to 450 in 2011, involving 89 governments. Importantly, a number of developed countries have become respondents and therefore seek to protect themselves against far-reaching interpretations of international investment law and from losing arbitrations (even if that means weakening important elements of BIT protections).
• Finally, it is unclear how important BITs are to help attract FDI, while it is clear that they restrict the policy space of governments.

What does all this add up to? For all governments, FDI is a tool. To the extent it serves their objectives, it will be promoted or restricted. We are thus moving toward a regulatory approach that is more protective of sovereigns by allowing more policy space for governments to regulate FDI in the public interest, at the national and international levels. This is being helped by the fact that more and more countries are simultaneously home and host countries.

Rebalancing the investment regime to take into account the interests of both host countries and investors is a welcome development as it strengthens the regime’s legitimacy and puts the relations between governments and MNEs on a more solid footing. The challenge is to find the right balance between the rights and responsibilities of governments and MNEs -- a challenge central to the future of the investment regime.

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政府与跨国公司关系的变化：从控制、自由化到再平衡

Karl P. Sauvant

政府设法吸引跨国公司（MNEs）进行外商直接投资（FDI）是因为此类投资有助于国家经济的增长；政府力求在现有国民经济框架内使得该投资利益最大化。而企业进行
FDI 投资的原因是 FDI 有助于其进入市场获取资源从而增强国际竞争力；企业寻求的投资利益最大化是在企业全球网络体系下实现的。正是这种目的和框架的不同，引起了二者关系的紧张，主要体现在政府对待国家 FDI 政策以及双边投资协定（BITs）的态度。20 世纪 60 年代末至 70 年代期间，政府对跨国公司主要是采取限制。到了 90 年代，则取消限制实现了自由化，而现在又有了新的变化。

依据如下：

- 在 20 世纪 90 年代，世界各国共调整 1035 项 FDI 政策，其中 95% 旨在改善投资环境。

- 国家 FDI 审查机构为投资促进机构 (IPAs) 所取代，欢迎投资取代了限制投资。

- BITs 的协定数目从 1989 年的 370 项升至 1999 年的 1,719 项，也反映出国家完全转向保护外国投资者并希望通过这种方式来吸引更多的 FDI。²

由此，在 20 世纪 90 年代末，FDI 作为促进经济发展方案的一部分而被广泛接受。事实上几乎所有的政府都放宽了他们的 FDI 规制，成立投资促进机构（IPAs）并签署 BITs。从那时起，各国都站在自己的立场谈论反补贴问题。

依据如下：


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1 UNCTAD, 世界投资报告 (Geneva: UNCTAD, various years).
2 Ibid.
3 Ibid.
• 一些国家（特别是发达经济体）已经加强了外来企业并购（M&As）审查机制，同时在这一过程中通过选出国有控股企业（SCEs）来区分投资者类型。例如，在美国，接受外商投资委员会调查的企业数量从2000年的1家上升到2010年的35家。

• 因为各国针对国有控股企业（SCEs）出台的规章相对独立，投资管理体系显得较为松散。

• 从国家层面上看，既有的国际投资机制对跨国公司（MNEs）的保护力在下降。特别是，美国（许多其他国家还没有）已经缩小了对外国投资者的实质性保护范围，尤其在公平对待与间接征用方面，并废弃保护伞条约，同时增加必要的安全利益条款等方面（允许政府在特殊环境下不遵从BIT条约）。

由此，对于FDI在本国经济发展中扮演的角色，越来越多的政府持有一种更为微妙的态度。虽然它们进一步开放FDI政策并签署BITs，但投资环境有着明显恶化且难以预料的趋势。

如何解释近期的变化？

• 伴随着越来越多的政府认为（某种）M&As投资没有绿地投资收益大，认为所有FDI利益均等的观点正在改变。相反，在未来政府也许会鼓励更可持续的FDI，例如对经济、社会和环境的发展有最大贡献，在互利的治理机制范围内同时具有商业可行性的投资。

• 政府更加关注竞争目的（特别是涉及国家利益/基本安全的），推进国家龙头企业发展与保护民族工业。

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3 Ibid.
• 民间团体的压力。

• 新兴市场 FDI 的增长将许多新生力量带入了全球 FDI 市场，它们的参与并非受到所有国家的欢迎，尤其当它们是国有控股企业（SCEs）时。

• 由企业引发的投资争端累计数从 1999 年的 38 起上升到 2011 年的 450 起，涵盖 89 个国家政府。重要的是，一些发达国家成了被告，因而致力于回避国际贸易法的深层解读与避免败诉（即使这意味着削弱 BIT 保护条款中的重要内容）。

• 最后，BITs 对吸引 FDI 所起的作用尚不明确，但其限制了政府的政策空间，这一点是肯定的。

这些加起来说明了什么？对于所有的政府，FDI 是一种工具。政府为了达到它们的目的，促进或限制 FDI。因此在国家和国际层面，我们通过给予政府更多的政策空间来规范公共利益领域的 FDI 以更有效地保护自身主权益。越来越多的国家同时兼具母国与东道国的身份，这一事实将有助于上述措施的实行。

投资管理机制的再平衡考虑了国家与投资者双方的利益，加强了机制的合法性并为政府和 MNES 间的关系建立更为稳固的基础，这是一大可喜的发展。但政府和 MNES 权责的恰当平衡是一大挑战，这也是投资机制未来发展的核心问题。

(南开大学国经所段然、胡倩翻译)

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5 UNCTAD, 国际内部审计协会问题笔记, no. 1, 2012.
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