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The need for an international investment consensus-building process

by

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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.¹ 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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¹ 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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