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Research Report

From investment promotion and protection to investment regulation

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From investment promotion and protection to investment regulation*

by

Crina Baltag**

Karl P. Sauvant, in his [Perspective](#) of March 2019, reviewed the state of the international investment law and policy regime on the occasion of the 60th anniversary of the first bilateral investment treaty (BIT). He concluded that the regime's substantive provisions must be re-balanced to reflect the principle of sustainable development, while the regime's dispute-settlement mechanism needs to be overhauled and governments allowed to use it for their benefit as well.

Currently, the framework of international investment law is, indeed, shaped by the objective to promote and protect foreign investments. Since the first BIT referenced above—the 1959 Germany-Pakistan BIT—substantive provisions have endorsed a balance tilted in favor of the promotion and protection of investment. This objective reflects the history of the vulnerability of foreign investors in host countries and the fact that BITs are remedial instruments intended to ensure that the treatment of foreign investment is subject to the rule of law.¹

Nevertheless, and perhaps incentivized by current initiatives (such as UNCITRAL's Working Group III) to reform investor-state dispute resolution (ISDS) mechanisms, there is visible, but modest, progressive reform taking place in international investment law (including ISDS). It is meant to rebalance the investment regime.² In fact, we are witnessing a shift from investment protection and promotion to investment regulation. In this context, the words of the arbitral tribunal in *Sempra v. Argentina* are even more forceful: "the Government also had many expectations in respect of the investment that were not met or were otherwise frustrated. Apart from the question of investment risk, it is alleged that there was, inter alia, the expectation that the investor would bear any losses resulting from its activity, work diligently and in good faith, not claim extraordinary earnings exceeding by far fair and reasonable tariffs, resort to local courts for dispute settlement, dutifully observe contract commitments, and respect the regulatory framework."³

Countries appear to begin to focus not only on providing investment-protection standards and measures to stimulate investment flows, but increasingly on addressing the conditions for the entry of investment into their territories, the obligations of investors and their investments once established, as well as the regulatory powers of governments over such investments. The new generation of treaties with investment protection, such as the [2019 EU-Vietnam Investment Protection Agreement](#)

and the [2019 Australia-Uruguay BIT](#), are beginning timidly to address environmental protection, corporate social responsibility and accountability for foreign investors. Seeking a balance between domestic and international legal frameworks regulating investment is shaping this new direction. UNCTAD, in its recent overview of ISDS reform, refers to the rebalancing of international investment law and ISDS by focusing on achieving sustainable development goals (with a focus on the [UN 2030 Agenda for Sustainable Development](#)) and emphasizes that pursuing this objective implies “changes to international investment policymaking, including IIAs [international investment agreements].”⁴

The investment regime’s adaptation to this new direction of investment regulation is likely to take time. The issues to be harmonized are complex, and dealing with investors’ obligations beyond the legality of their investments might require a completely new approach. One must also properly take into consideration the fact that, while some countries and regional economic organizations are at the forefront of this direction, others are mindful of the fact that investment frameworks are crafted with a view of specific factors, including both legal and policy objectives.

While there are already certain measures being implemented at national or [regional](#) levels addressing foreign investment regulation, the key issue is how to advance a comprehensive and feasible international framework that promotes the interests of both investors and countries, with a view toward developing a proper investment regulatory framework, addressing both substance and procedure. Further, such framework, if adopting a balanced approach, would likely address the impact of international investment law (including ISDS) on societal interests at large, currently limitedly addressed by way of *amici curiae* participation in ISDS. The [OECD Guidelines for Multinational Enterprises](#) are a sound starting point for developing such a framework—but one could perhaps consider as well developing this in the UNCITRAL Working Group, perhaps based on the model of the Mauritius Convention. A congruent and inclusive approach will likely ensure an effective outcome.

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¹ Kenneth J. Vandewelde, *Bilateral Investment Treaties. History, Policy, and Interpretation* (Oxford: OUP, 2010), 1–2.

² See also this author reflecting upon a possible re-balancing of the system in Crina Baltag, “Reforming the ISDS system: In search of a balanced approach?,” *Contemporary Asia Arbitration Journal*, vol. 12 (2019), pp. 279–312.

³ *Sempra v. Argentina*, ICSID Case No. ARB 02/16, para. 289.

⁴ UNCTAD, “Reforming investment dispute settlement: A stocktaking,” *IIA Issues Note*, Mar. 2019, p. 4.

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