BOOK REVIEW

Improving the International Law and Policy Regime: Options for the Future, by Karl P. Sauvant & Federico Ortino

Reviewed by Mark Feldman*

In 2013, the Ministry for Foreign Affairs of Finland organized a Helsinki Investment Seminar, held within the framework of the Helsinki Process on Globalization and Democracy, the global governance initiative launched in 2002. In support of the Helsinki Investment Seminar, Dr. Karl P. Sauvant, Resident Senior Fellow at the Columbia Center on Sustainable International Investment, and Dr. Federico Ortino, Reader in International Economic Law at King’s College London, prepared an independent study on the international investment regime. The Ministry for Foreign Affairs subsequently has made that study available as a booklet.1

As stated by the authors, the purpose of the study was “to outline the key features of the international investment regime, identify drivers of change, discuss critical issues, and describe some proposals for reform of the regime.”2 With respect to the existing international investment regime, the authors conclude that “action is needed,” although they do not take a position on whether such action should involve “minor adjustments, more substantial recalibration or a paradigm shift.”3 Specifically, the authors maintain that the international investment regime “must” be improved to “take into account the profound changes in the

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* Mark Feldman is Associate Professor of Law at the Peking University School of Transnational Law. He previously served as Chief of NAFTA/CAFTA-DR Arbitration in the Office of the Legal Adviser at the U.S. Department of State. The views expressed in this review do not necessarily reflect those of the U.S. Department of State or U.S. Government.


2 Id. at 7.

3 Id. at 16.
international investment law and policy landscape during the past fifteen years or so.”

Such profound changes, according to the authors, include the emergence of more nuanced policy views held by both developed and developing States. For example, many emerging market investors, which have become “key players in the world FDI market,” now consider not only their host country interest in preserving regulatory space, but also their home country interest in securing protections and market access for investments abroad. Developed States also are taking a more balanced approach with respect to home country and host country interests, due in part to the sharp increase in inbound investment from “non-traditional investors”: actors that often are less transparent, state-controlled, and perceived to be pursuing non-commercial ends. Policy views on inbound FDI also have become more complex, as governments increasingly consider not only the quantity, but also the quality, of FDI inflows.

Important changes also have been seen with respect to the number of investment treaty disputes (which has increased sharply), views on the existence of a causal relationship between investment treaties and FDI flows (which have become more skeptical), and the greater influence of civil society organizations and home State governments on the evolution of international investment law and policy regime.

Recognizing the many important, and recent, changes that have occurred within the international investment regime, the authors identify several “critical issues” to be addressed. Such issues include the difficulty in identifying the central purpose of the regime; for example, whether the regime primarily aims to protect foreign investment, promote the economic development of the contracting parties, promote the sustainable development of the contracting parties, or some alternative goal. Additional critical issues identified by the authors include the need to clarify the scope of international investment agreements (including

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4 Id. at 49.
5 Id. at 35.
6 Id. at 35–36.
7 Id. at 38.
8 Id. at 9.
9 Id. at 54.
definitions of foreign “investor” and “investment” in those agreements) and the content of substantive obligations (the precise scope of which remains “controversial”).

Having identified significant changes in the international investment regime and critical issues to be addressed, the authors turn to a “range of options” for improving the regime. Notably, the authors do not evaluate the merits of the respective options, but rather offer them as “a menu to assist in the identification of priority actions that could be pursued.”

The first option would be to hold consultations among a range of stakeholders, including “governments, the private sector, trade unions, other civil society organizations, and academia,” to discuss “concerns and considerations.” A small panel of eminent persons” could consider the respective submissions and then produce a report that, “at a minimum, would reflect the range of views” presented. This option recalls recent stakeholder consultations that have been held by the U.S. Government in connection with the development of the 2012 U.S. Model BIT, and by the European Commission in connection with the EU-China investment relationship and the potential inclusion of an investor-State dispute settlement mechanism in a Transatlantic Trade and Investment Partnership agreement (TTIP).

Providing a platform for the expression of divergent views on the international investment regime certainly can help to clarify key areas of disagreement among stakeholders. At the same time, however, the often polarized nature of such divergent views can leave policymakers with very few opportunities for compromise, much less consensus. As one example, in the context of the consultation process that led up to the 2012 U.S. Model BIT, some stakeholders maintained that the minimum standard of treatment obligation should apply only to a “few areas” of treatment (in particular, full protection and security and denial of justice), while other stakeholders maintained that the obligation...
should be “unqualified.” Ultimately, the U.S. Government made no adjustment to the minimum standard of treatment obligation in the 2012 U.S. Model BIT.

A second option identified by the authors would be to develop a restatement of international investment law, similar to the restatements developed by the American Law Institute (ALI) on many areas of U.S. law. Such a restatement could “become a source of inspiration and guidance for IIA negotiators” as well as “an authoritative second source of law for arbitrators.”

On two occasions, similar projects have been undertaken by the International Law Commission (ILC), but on a much narrower scale. In 1978, following years of work, the ILC adopted a set of draft articles on most-favored-nation clauses. Building on that earlier work, the ILC more recently established a Working Group (2007) and a Study Group (2008) on the “Most-Favored-Nation Clause,” and continues to study the topic. Thus, in both the 1970’s and over the past several years, the ILC has devoted a very significant amount of time to the relatively narrow issue of most-favored-nation provisions. That experience suggests that a project aimed at restating the entire body of international investment law would, at a minimum, require very substantial resources.

A third option for reform identified by the authors—establishing Working Groups aimed at reaching consensus on specific issues—could build on the recent success of the UNCITRAL Working Group on Arbitration and Conciliation. That Working Group, within a few years, was able to achieve consensus on a delicate and divisive issue: transparency in investor-State arbitration. The UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration took effect earlier this

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16 Sauvant & Ortino, supra note 1, at 95.
year. Notably, while the Transparency Rules provide strong guarantees with respect to public access to documents and public participation through written submissions, the Rules apply only to claims submitted under “future treaties,” i.e. treaties concluded on or after April 1, 2014, unless the disputing parties otherwise agree. As illustrated by the experience of the UNCITRAL Working Group on Arbitration and Conciliation, setting modest goals can significantly increase prospects for success, even with respect to contentious issues.

The authors also identify several “intergovernmental processes” that could be undertaken in pursuit of “a legally binding and enforceable multilateral instrument.” Such processes might include an informal meeting of WTO ambassadors, discussions hosted by UNCTAD or the OECD, and/or the initiation by G20 of a “stand-alone intergovernmental process” to consider options for a multilateral framework on investment. At the same time, the authors recognize that several ongoing bilateral and multilateral investment negotiations “could lead to a certain harmonization in the substantive content and procedural approaches of IIAs.”

The potential for such harmonization warrants close attention. Major investment negotiations continue to advance on many fronts, including negotiations of a Trans-Pacific Partnership (TPP) agreement, a Regional Comprehensive Economic Partnership (RCEP) agreement, a Transatlantic Trade and Investment Partnership (TTIP) agreement, a US-China BIT, and an EU-China BIT. If completed, those agreements, collectively, would cover a very substantial share of global foreign direct investment.

Those agreements also might help to establish what could be characterized as an emerging global consensus on key investment treaty provisions. As stated by the authors, the ongoing negotiations of several major investment agreements “could lead to a narrowing in the differences of key provisions,” including

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20 Sauvant & Ortino, supra note 1, at 126.
21 Id. at 130.
22 Id. at 134.
23 Id. at 138.
substantive and procedural issues as well as provisions “delineating the contours of the right to regulate.”

Although the authors do not attempt to identify the particular kinds of provisions that could be harmonized through a new generation of major investment agreements, a set of such provisions might include the following: (i) national treatment and most-favored-nation treatment obligations that include market access protections; (ii) a minimum standard of treatment obligation that is tied to customary international law; (iii) an expropriation obligation that includes both direct and indirect expropriation while recognizing that non-discriminatory regulatory actions, undertaken in the public interest, generally are not expropriatory; (iv) a mechanism authorizing the denial of treaty benefits to shell companies; (v) a negative list approach with respect to reserved sectors; and (vi) at least some opportunity for public access to documents and public participation through written submissions.

The outcome of TPP, RCEP, TTIP, US-China BIT, and EU-China BIT negotiations could have a very significant impact on the State of the international investment law regime. If consensus on the six points set out above were to be reflected in several major investment agreements covering a large share of global foreign direct investment, there almost certainly would not be a need for “substantial recalibration” of the international investment regime. Conversely, if these major agreements were to conclude with sharply inconsistent approaches to core substantive obligations, or not to conclude at all, the range of challenges to the international investment regime outlined by the authors would remain very significant.

The study undertaken by the authors provides a timely and comprehensive resource for addressing a dynamic, but embattled, area of international law. Given the scale of global foreign direct investment—which has ranged between $1.2 trillion and $2 trillion annually over the past decade—there is an unquestionable need for a stable, rules-based regime for resolving international investment disputes. With respect to that policy imperative, Sauvant and Ortino have made a very important contribution.

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24 Id. at 140–41.
25 Id. at 16.