International Institute for Sustainable Development
Institut international du développement durable

International Investment Law at a Crossroads: What role for China?

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In April 2013 the International Institute for Sustainable Development (IISD) and its local partner, the Global Environmental Institute (GEI), convened a roundtable workshop in Beijing, China, to discuss how to address the institutional and systemic challenges in the investment treaty framework in order to find a balance between investors' interests and states' policy space. In the context of the evolving and intertwined international legal and policy framework, and given China's position as both host state and home state, the quest for more balance and sustainable development is particularly relevant. Participants from the Chinese government, academia and selected enterprises attended the workshop.

Challenges and Emerging New Approaches to International Investment Law

International investment law is in flux. No other area of international law has evolved as quickly over the past 10 years, or continues to evolve as quickly. **Countries and regions are assessing developments over the past decade and have begun designing new approaches in international investment law to address some of the challenges that have emerged**. From a host state perspective, states are becoming more concerned about the uncontrolled evolution of the investment arbitration system, and the impacts on regulatory and policy space. Moreover, they are exploring different treaty models and regimes that better promote investments that support their sustainable development. At the same time, home states are looking at effective ways to access markets and resources and to protect their investors from expropriation and arbitrary measures by the host government. How can these different means be reconciled? How can investors enjoy protection under treaties, while allowing for sufficient regulatory space in the host state and promoting genuine long-term benefits for the host state and its people? Experts at the meeting concluded that the new approaches should and can **strike a balance between investors' interests and states' policy space, and incorporate sustainable development elements.**

China's Overall Stance

Participants generally agreed that **China's dual role as home state and host state provides a solid basis for China to endorse the balanced approach and sustainable investment in international investment law**. Regarding how international investment law and its dispute settlement system should move forward, participants expressed their preference for China to contribute actively to **reforming the system** rather than abandoning it altogether, as some states have begun to do.

Sustainable Development in Investment Law

In order to promote sustainable development in international investment, participants suggested that **environmental protection** be enhanced through investment laws and regulations, including investment treaties, home states' laws and soft law instruments regulating their outward investment. In the context of environmental protection and ensuring policy space, participants noted that **exception clauses** in investment treaties play a supplementary role and cannot replace drafting more limited and targeted substantive host state obligations in the first place.

One participant stressed that it was also important for host states to undertake obligations in investment treaties and commit to not weakening their domestic laws to attract unsustainable investment. To elaborate, the expert noted: "**it is only when host states start to 'select' rather than simply 'attract' inward investment, that the sustainable development objective can be realized.**"

Improvement of Investment Protection Standards

Extensive discussion was devoted to the **Fair and Equitable Treatment (FET) provision, which requires a host state to treat foreign investors "fairly and equitably."** Seemingly unharmful, investors have invoked this investment protection standard most frequently in claims against states, which has opened a Pandora's box of issues. Significantly, its imprecise meaning and scope pose significant challenges to states' policy space. Participants pointed to the fact that Chinese investment treaties embody different types of FET formulations commonly known in treaties. There was general agreement that all of those formulations were too broad and vague, leading to divergent interpretations of arbitral tribunals. In this context, participants discussed **whether China should accept the FET clause as incorporated in the U.S. 2012 Model Bilateral Investment Treaty during the negotiation with the United States. That clause, like some others in Chinese bilateral investment treaties, links the standard to customary international law in an attempt to limit the standard's overall scope**. However, experts concluded that the minimum standard of customary international law was also not clear enough. Therefore, it was proposed that China develop its own FET formulation, which defines the FET standard through an exhaustive list of components relating to non-discrimination, due process and denial of justice.

Participants also discussed the provision on expropriation. This provision typically requires that states compensate investors in cases of direct and so-called "indirect" expropriation. Indirect expropriation covers situations where there is no transfer of ownership but the investor is nevertheless negatively affected by a government measure. Because this type of expropriation may be understood to cover public welfare measures, one expert speaker proposed a compensation standard based on what can be considered "appropriate" in light of the circumstances, rather than the "fair market value" standard.

Reforms to Investor-State Dispute Settlement

Participants agreed that **the central problem of the current investor-state dispute settlement system is that the disputes involving public interests are resolved by the mechanism envisaged for resolving commercial disputes**. One expert put forward the idea to **re-politicize the system** by allowing more involvement through states. It was also noted that **transparency and consistency** should be strengthened and that time-consuming and costly proceedings should be avoided. One speaker referred to arbitrators as **"kings with three hats,"** as the arbitration system allows one individual to act as arbitrator, legal counsel and expert witness in concurrent investment proceedings. In order to address the problem of the independence and impartiality of arbitrators, this "three-hat problem" has to be fixed. Other possible reform measures put forward by participants included encouraging **Alternative Dispute Resolution (ADR)**, introducing **an appeal mechanism**, establishing **a permanent investment court** and creating an **advisory facility** for developing countries. In addition, participants called for **a united and uniform force at a global level** to advance reform. Lastly, participants pointed to the importance of differentiating investment liberalization and investment protection in terms of the applicable dispute settlement mechanism.

Global Environmental Institute's full report of the event can be found here: http://www.geichina.org/index.php?controller=News&action=View&nid=196

Comments are welcome in English to Nathalie Bernasconi (nbernasconi@iisd.org), or in Chinese or English to IISD's Investment and Sustainable Development program (investmentlaw@iisd.org).

IISD's Investment and Sustainable Development program can be found at www.iisd.org/investment.

国际投资法处在十字路口：对中国的意义？

2013年4月24日 北京

2013年4月，国际可持续发展研究院（IISD）与其本地合作伙伴全球环境研究所（GEI）在中国北京召开圆桌会议，探讨国际投资协定框架中的机构性及系统性挑战，以寻求平衡投资者利益与国家政策空间的途径。鉴于国际法律政策框架不断演变且相互影响，以及中国既是投资东道国也是投资者母国，实现利益平衡与可持续发展就显得尤为重要。来自中国政府、学术界和有选择的企业的代表参加了研讨会。

国际投资法的挑战与新模式

国际投资法正经历着不断的演变。在过去十年里，其变化之大超过了任何一个国际法分支领域，并且这种变化还在继续。**世界各国家和地区都在高度关注国际投资法的演变，并开始尝试以新的思路和模式来应对新形势、新挑战**。投资东道国越来越关注其在国际投资仲裁中频频被诉的失控情况，以及国际投资仲裁制度对政府的法律、政策空间所产生的限制。同时，他们也积极探求新的投资协定范本和机制以吸引更多利于本国可持续发展的外国投资。与此相对，投资者母国正努力寻求东道国市场准入的有效途径，以及保护其海外投资者免受东道国政府的征收或不公正待遇。如何兼顾这两方的利益？如何既实现投资者有效进入东道国市场、提升国际竞争力、降低营运风险并最终实现长期投资收益；同时确保东道国有充分的政策空间以服务于当地的社会福祉？参会专家做出总结：**新模式应该并且能够在投资者利益与国家政策空间之间取得平衡，并纳入可持续发展元素。**

中国的总体立场

参会专家认为**中国既是投资东道国也是投资者母国，这种双重身份为中国支持旨在实现利益平衡与可持续投资的国际投资法新模式提供了坚实基础。**关于国际投资法及其争端解决机制的未来发展，参会专家表达了他们的倾向，即中国应积极致力于**改革此体制**，而并非如一些国家对此体制全盘否定。

投资法中的可持续发展

为推动国际投资的可持续发展，参会专家建议，投资法律法规（包括国际投资协定、投资者母国规范境外投资的法律及软法工具）应当加强**环境保护**。为了加强环境保护与确保政策空间，参会专家指出最为关键的是要在投资协定中起草更为限缩且有针对性的东道国实体义务，同时**例外条款**可起到补充作用。

一位参会专家强调，同样重要的是，东道国应当在国际投资协定项下承担不降低其本国法律要求以吸引不利于可持续发展的外国投资的义务。为详尽阐述，该专家指出：**“只有当东道国开始‘选择’而非简单地‘吸引’外国投资时，可持续发展目标才能实现。”**

投资保护标准的改进

参会专家就公平**公正待遇（FET）条款展**开了深入探讨，该条款要求东道国应当“公平并公正”地对待外国投资者。看似无害，此投资保护标准已成为投资者向东道国索赔最常用的法律依据。这一标准开启了“潘多拉魔盒”，因其不明确的定义与范围，对东道国政策空间提出重大挑战。参会专家指出，中国的投资协定包含了当前国际投资协定中存在的所有公平公正待遇的定义方式。普遍认为，无论哪种方式，其均为定义过于宽泛、模糊，从而导致了仲裁庭的不同解释。在此背景下，**参会专家讨论了中国在与美国谈判过程中，是否应接受2012美国双边投资协定范本规定的公平公正待遇条款。该条款，与一些中国双边投资协定的规定一样，通过国际习惯法的外国人最低待遇标准来定义公平公正待遇。然而，专家们指出，国际习惯法的最低标准本身就是内涵不够明确**。于是，参会专家提议，中国应发展出自己的定义方式，即通过一个封闭的清单列举出公平公正待遇的内涵：无歧视待遇、正当程序及无拒绝司法。

参会专家也探讨了**征收条款**。此条款要求国家应就直接或所谓的“间接”征收对投资者进行补偿。间接征收是指虽然投资者财产的所有权不发生转移，但投资者遭受了政府措施的负面影响。由于涉及公共福利的政府措施可被认定构成此类征收，一位发言嘉宾提出，间接征收应当采取“适当”补偿标准，而非“合理市场价值”的补偿标准。

投资者-东道国争端解决机制的改革

参会专家一致认为**当前投资者-东道国争端解决机制所存在问题的核心是涉及公共利益的争议采取了商事纠纷的争端解决机制**。其中一位专家指出解决问题的办法在于通过让国家更多地介入来实现该争端解决机制的重新政治化。此外，**透明度和一致性**需要得到进一步加强，耗时且昂贵的程序需要避免。一位发言嘉宾指出仲裁员就如同“**三帽之王**”，因为投资者-东道国仲裁制度允许某一个人拥有仲裁员、代理律师以及专家证人三个不同角色。为了保证仲裁员独立且中立，“三帽之王”的现象必须得到遏制。参会专家提出的其他改革方案包括促进**选择性争端解决方法**的采用，引入**上诉机制、建立常设国际投资法院**，设立服务于发展中国家的**咨询机构**。另外，参会专家也提出应**在全球层面上统一且协调一致地推进改革**。最后，参会专家指出区别对待投资自由化规定与投资保护规定，使其采用不同的争端解决机制也很重要。

全球环境研究所的报告全文请参照：http://www.geichina.org/index.php?controller=News&action=View&nid=196

欢迎用英文向Nathalie Bernasconi (nbernasconi@iisd.org) 提出意见，或用中文或英文向国际可持续发展研究院中国项目（investmentlaw@iisd.org）提出意见。

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