21 May 2016

China, the G20 and the international investment regime

by

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(The final version will be published in Andrea Goldstein and Alessia Amighini, eds., *Towards the 2016 G20: Global Analyses and Challenges for the Chinese Presidency*, special issue of *China and the World Economy*.)

Abstract

China has become a major home country for outward foreign direct investment (FDI) flows. As a result, the country is increasingly concerned with protecting its outward FDI and facilitating the operations of its firms investing abroad and creating a strong universal international investment law and policy regime. This article reviews briefly the emergence of China as an outward investor. It continues with an analysis of some policy issues related to the rise of FDI from emerging markets. A brief discussion of issues central to the future of the international investment law and policy regime follows, before focusing on several outcomes that could be pursued under China's G20 leadership: non-binding shared principles that could outline the architecture of a universal framework on international investment; an international support program for sustainable investment facilitation; and the creation of an additional intergovernmental platform that would allow for a continued systematic intergovernmental process to discuss the range of issues related to the governance of international investment, preferably paralleled by an informal, inclusive and result-oriented consensus-building process that takes place outside intergovernmental settings.

Introduction

The world's investment needs are tremendous. Meeting the Sustainable Development Goals alone will require trillions of additional dollars annually.

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Domestic resource mobilization from the public and private sectors will have to finance a considerable share of these investment needs. But foreign direct investment (FDI), too, can make an important contribution by bringing capital, skills, technology, access to markets and other tangible and intangible assets to host countries. In fact, FDI flows will have to grow substantially if future investment needs are to be met. It is for this reason that all countries seek to attract such investment and maximize its development impact and that the issues surrounding these efforts are key global concerns.

At the same time, a broad discussion is underway about how the international investment regime—within which investment flows take place—needs to be reformed to reflect adequately the requirements of our time. In particular, all governments have subscribed to the Sustainable Development Goals and committed to fight climate change. Against this background, there is a need to broaden the regime's purpose to encourage explicitly the flow of substantially higher amounts of sustainable FDI in the framework of a widely-accepted enabling framework that regulates the relationships between governments and international investors in a balanced manner: sustainable FDI for sustainable development.

China, as the President of the G20 this year, has an opportunity to advance the discussion of these issues. The country has taken a special interest in international investment, judging from the decision to create the G20's Trade and Investment Working Group. This reflects both the role of FDI in the China's own development and especially its recent rise as an important global investor.

This article discusses briefly, in Section A, the emergence of China as an outward investor, embedded in the rise of emerging markets as home countries of multinational enterprises (MNEs). Section B contains an analysis of some policy issues related to this rise of FDI from emerging markets. A brief discussion of issues central to the future of the international investment law and policy regime follows in Section C, including the idea of a statement of non-binding shared principles, outlining the architecture of a comprehensive framework on international investment. Section D, then, focuses on a concrete proposal for a sustainable investment facilitation program that could be launched under China's leadership.

A. China's rise as an outward FDI country

While, in the past, FDI originated overwhelmingly in developed countries, one of the fundamental changes in the FDI landscape—and indeed in the global economy—during the past decade or so has been the rise of emerging markets,[2] and in particular China, as major MNE home countries. More specifically, more than half of all emerging markets reported FDI outflows during at least one of the five years between 2009-2013, and there are now more than 30,000 MNEs headquartered in these economies. FDI from emerging markets averaged about 2% of a rough annual average of US$50 billion world FDI outflows during 1980-1985, compared to 38% of US$1.4 trillion world FDI outflows during 2014.[3] In absolute amounts, FDI outflows from emerging markets have risen from about US$1 billion during 1980-1985, to US$531 billion in 2014 (US$468 billion from developing countries and US$63 billion from transition economies[4])—the latter figure being more than ten times *world* outflows three decades ago. Since 2004, outward FDI flows from emerging markets have been over US$100 billion annually; in 2014, seven of the top 20 home economies were emerging markets. MNEs from emerging markets have become important players in major global industries and in the word FDI market in general.

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[2] Defined as all non-OECD countries.

[3] See, UNCTAD, *World Investment Report 2015: Reforming International Investment Governance* (Geneva: UNCTAD, 2015) and earlier editions of that publication, as well as *UNCTAD Stat*, http://unctadstat.unctad.org/ReportFolders/reportFolders.aspx. All data in this article are from these sources, unless otherwise indicated.

[4] As defined in annex table 1 of UNCTAD's *World Investment Reports*, available at http://unctad.org/en/Pages/DIAE/World%20Investment%20Report/World_Investment_Report.aspx.

Among emerging markets, China is the star performer.[5] The country's outward FDI flows grew from US$7 billion in 2001 to US$123 billion in 2014,[6] for an accumulated stock of US$730 billion. This made China the single most important *home* country among *all emerging markets*, and the second largest among *all* home countries in 2014.[7] In fact, China's outward FDI flows have caught up with China's inward FDI flows: in 2001, outward FDI flows were equal to 15% of inward FDI flows; in 2014, the ratio had reached 96%; in 2016, outflows are likely to be considerably higher than inflows.[8]

By the end of 2014, China's 18,500 MNEs had established about 30,000 foreign affiliates in 186 countries and territories.[9] Chinese firms have invested substantially in both developed and developing countries, increasingly using mergers and acquisitions (M&As) as a mode of entry. Chinese's FDI distribution across sectors and geographic regions is difficult to ascertain, however, as more than two-thirds of the country's non-financial sector outflows are channeled via financial centers and tax havens; consequently, the precise amounts, countries and sectors in which funds are ultimately invested are unknown. It seems likely, however, that services and natural resources are the most important sectors.[10]

These figures should not disguise, however, that, globally, China's average shares in world FDI outflows and world FDI stock were quite low: in terms of flows, China's share averaged only 8% during 2012–2014, while the country's share in the world's outward FDI stock was 3% in 2014.

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[5] In the following, no adjustments are made for "round-tripping" that leads to an overestimation of China's international investment position.

[6] MOFCOM, National Bureau of Statistics of China and State Administration of Foreign Exchange, *2014 Statistical Bulletin of China's Outward Foreign Direct Investment* (Beijing: China Statistics Press, 2015).

[7] Not counting Hong Kong.

[8] See, *UNCTAD Stat*, http://unctadstat.unctad.org/ReportFolders/reportFolders.aspx.

[9] MOFCOM et al., *2014 Statistical Bulletin*, op. cit.

[10] Judging from the data provided in MOFCOM et al., *2014 Statistical Bulletin*, op. cit.

A distinguishing characteristic of China's outward FDI is the very important role played by state-owned enterprises (SOEs). By the end of 2014, these enterprises controlled over half of China's outward FDI, a share that has been decreasing.[11]

B. Policy issues

Outward FDI from emerging markets faces a number of constraints, partly due to its dynamics, and the changing climate for FDI may stymie the outward expansion of firms headquartered in emerging markets. In particular, China's outward FDI attracts considerable attention and rising skepticism.[12] This skepticism stems from the speed with which this investment has grown; the leading role of SOEs in China's outward FDI; potential negative effects associated with FDI;[13] the fear that host countries do not benefit fully from this investment; and the suspicion that Chinese outward investors receive various benefits from their governments, benefits that lead to unfair competition by putting Chinese SOEs into a competitive advantage vis-à-vis their private counterparts headquartered in other countries when investing abroad.

A particular concern in a number of (especially developed) host countries focuses on the fear that China's outward FDI might compromise their national security, given the central role of SOEs and the question of whether China's outward FDI serves purposes other than commercial ones. Not surprisingly, therefore, these concerns have led to the creation or strengthening of regulatory review processes of incoming M&As, especially in critical infrastructure industries.

[11]MOFCOM et al., *2014 Statistical Bulletin*, op. cit. .

[12] See, Sauvant and Nolan, op. cit.

[13] Fears include that such investment can crowd out domestic firms; that research-and-development capacities are being transferred out of the host country; that transfer prices and taxes may be calculated to the disadvantage of the host country; that local sourcing (and hence backward linkages) may be limited; and that restrictive business practices may be employed.

Regulatory attention has focused primarily on M&As by SOEs. This is reflected in the strengthening or creation of review mechanisms for inbound M&As in a number of countries, led by the United States.[14] For example, the Foreign Investment and National Security Act of the United States[15] establishes the presumption that a national security investigation needs to be undertaken by the Committee on Foreign Investment in the United States (CFIUS) if a merger or acquisition in the United States is undertaken by a foreign state-controlled entity. Not surprisingly, deals involving firms based in China accounted for the largest number of CFIUS filings during the period 2012-2014 (nearly 20% of all cases).[16] Furthermore, 52 of the 147 notices received in 2014 by CFIUS proceeded to a second-stage investigation (following a 30-day review).[17] While CFIUS does not identify the percentage of investigations by home country, "it almost certainly is the case that a disproportionate percentage of those [second-stage] reviews have involved Chinese acquirers."[18] President Obama's September 2012 veto of a Chinese windmill project near a military base in Oregon—the first such veto in 22 years—is emblematic of these concerns.[19] Such trends and occurrences underline the importance of the principle of non-discrimination for China.

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[14] For a discussion, see, Karl P. Sauvant, "Driving and countervailing forces: a rebalancing of national FDI policies", in Karl P. Sauvant, ed., *Yearbook on International Investment Law and Policy 2008-2009* (New York: Oxford University Press, 2009), pp. 215-272.

[15] The Foreign Investment and National Security Act of 2007 (FINSA), Public Law No. 110-49, 121 Stat. 246 (2007), available at http://www.treasury.gov/resource-center/international/foreign-investment/Documents/FINSA.pdf.

[16] See, Committee on Foreign Investment in the United States, *Annual Report to Congress. Report Period: CY 2014* (Washington, D.C.: Government Printing Office, 2016), p. 19.

[17] Ibid., p. 2.

[18] See, Covington &Burling LLP, "Reflections on the CFIUS Process: New CFIUS report underscores growth of Chinese investment in the United States" (Washington, D.C.: Covington & Burling, February 22, 2016), p. 4.

[19] See, "In rare move, Obama unwinds Chinese acquisition of U.S. wind farms", *Inside U.S. Trade*, 12 (39), pp. 16-17.

With China becoming a net outward investor, the country's government is becoming more interested in protecting its outward investments than protecting its own firms from inward FDI in certain sectors. This is reflected in the changing orientation of China's 129 bilateral investment treaties (BITs) and 19 other international investment agreements (IIAs).[20] Although these treaties were originally concluded with FDI *in* China in mind, they increasingly provide protection to the assets of Chinese investors abroad and seek to facilitate their operations. In line with this development, China and the United States reached a watershed accord in July 2013 (in the context of the United States-China Strategic and Economic Dialogue) to continue their negotiations of a BIT on the basis of pre-establishment national treatment and the negative list approach to exceptions from such treatment.[21] Both changes had long been resisted by China and hence pinpoint the shift in emphasis in the country's investment perspective from a host country to a home country. It also has implications for China's broader approach to the international investment regime. In fact, at their 2015 Strategic and Economic Dialogue the two governments used the even more ambitious expression "high-standard bilateral investment treaty".[22]

Furthermore, China's evolving approach to IIAs needs be seen in the broader context of the changing global FDI landscape. With the number and size of MNEs from emerging markets growing rapidly, the constellation of national interests has changed profoundly over the past decade, in a manner that favors a multilateral

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[20] As of March 2016; see, http://investmentpolicyhub.unctad.org/IIA.

[21] See, J. Li, "China, US 'pragmatic about pact'", *China Daily*, January 16, 2014, available at http://www.chinadailyasia.com/business/2014-01/16/content_15112679.html. This is reflected in the (shorter) negative list for the China (Shanghai) Pilot Free Trade Zone; see https://www.omm.com/resources/alerts-and-publications/publications/shanghai-ftz-unveils-2014-version-of-negative-list/ Agreement. Still, the China-United States negotiations on the length and breadth of China's negative list are difficult: see, "China misses deadline for 'negative list' investment offer to U.S.", *Reuters*, 1 April 2016, available at http://uk.reuters.com/article/us-usa-china-trade-idUKKCN0WY5OU.

[22] See, http://www.state.gov/r/pa/prs/ps/2015/06/244153.htm, accessed 3 April 2016.

approach toward investment. When earlier efforts at the international level were undertaken, most notably the 1995-1998 OECD negotiations of a Multilateral Agreement on Investment and the subsequent discussions in the WTO, there was a clear distinction between home and host countries, typically along North-South lines. Now, emerging markets (and particularly the biggest among them) define their policy interests no longer only defensively as host countries, but also offensively as home countries interested in protecting their investors abroad and facilitating their operations. This can be exemplified (as just pointed out) by China's change in approach to continue negotiating a BIT with the United States on the basis of pre-establishment national treatment and the negative list approach to exceptions from such treatment.

Similarly, traditional capital-exporting countries are acknowledging that they are also important host countries, including for more and more investors headquartered in emerging markets, and that they are increasingly respondents to international arbitration claims. The implication is that they define their policy interest no longer only offensively as home countries, but also defensively as host countries interested in preserving adequate policy space and hence the government's ability to regulate in the public interest. This can be exemplified by the change of approach by the United States when, in its revised 2004 and 2012 model BITs, it narrowed protections afforded to foreign investors—a significant change for a country that had long led efforts to provide full protection to investors and facilitate their operations.

The convergence of policy interests between home and host countries, as well as between developed countries and a growing number of emerging markets, should facilitate reaching a universal agreement—if there is the political will to pursue such an objective.

It is also significant that governments (including China's) continue to show a great willingness to make rules on international investment, as reflected in the proliferation of bilateral, regional and mega-regional IIAs. In particular, a number of important on-going and finished negotiations are likely significantly to advance a more harmonized approach to investment rule-making: "recent treaty practice by states negotiating the TPP [Trans-Pacific Partnership], the RCEP [Regional Comprehensive Economic Partnership], and the U.S.-China BIT, as well as the recent Pacific Alliance agreement, creates a significant opportunity for the harmonisation of the international investment law regime at a regional, Pacific Rim level".[23] The negotiations of a number of BITs between important countries (in addition to the China-United States BIT),[24] as well as the negotiations of the Transatlantic Trade and Investment Partnership between the European Union and the United States, could lead to a more harmonized approach to investment rule-making and, de facto, to common rules on international investment.

Together, these negotiations represent significant opportunities—which should be fully utilized—to shape the investment regime by narrowing the substantive and procedural international investment law and policy differences between and among the principal FDI host and home countries. They could set standards that might considerably influence future investment rule-making in general and that would be in the interest of China's growing outward FDI. If this should occur, the result of these negotiations could become important stepping-stones toward a subsequent universal investment instrument.

C. China and the reform of the international investment regime

Given these developments, China's Presidency of the G20 provides an opportunity to lay the groundwork for a process that could eventually lead to a multilateral

[23] Mark Feldman, Rodrigo Monardes Vignolo and Cristian Rodriguez Chiffelle, "The role of Pacific Rim FTAs in the Harmonisation of International Investment Law: Towards a Free Trade Area of the Asia-Pacific"" (Geneva: International Centre for Trade and Sustainable Development (ICTSD) and World Economic Forum, E15Initiative, 2016), p. 12.

[24] These include the negotiations of BITs between China and the European Union, the European Union and India, the European Union and Japan, and India and the United States.

framework on investment, perhaps with an open plurilateral agreement as a first step.

In fact, a broad discussion is underway—in academic circles, among governments and now increasingly also in the OECD, UNCTAD and since 2016 the G20—about how the international investment regime can be improved. To a certain extent, some of the regime's weaknesses are a legacy issue. The investment regime was framed at a time of significant power asymmetries between capital-exporting and capital-importing countries, and long involved overwhelmingly unidirectional (i.e., North-South) FDI flows. Today, however, the regime exists in an environment marked by the imperative to promote sustainable development, including the need to halt climate change; growing economic inequality; far greater economic and political interdependence, with FDI a genuine two-way street; far greater public involvement in policy- and rule-making, which has become singularly more contestable, and hence more democratic; and a desire for the preservation of policy space, which was by far not as constrained when developed countries were themselves growing their economies. The reformist quest for carefully balancing the regime so as to reflect changing circumstances should be welcomed as a sign of greater maturity and fairness in international economic relations. This is so even as this quest complicates the search for consensus in rule-making—but it would enhance the legitimacy of the international investment regime and of global governance more broadly.

China has an opportunity to advance this broad discussion in the framework of the G20's Trade and Investment Working Group, created in January 2016. The areas in which improvements can be made in the international investment regime are numerous, as outlined briefly in the following.[25]

[25] For a detailed discussion, see, Sauvant, "The Evolving International Investment Law and Policy Regime", op cit.

Any discussion of the reform of the international investment regime needs to begin with the regime's very purpose. Given the origin of IIAs, it is not surprising that its principal purpose has been, and remains, to protect foreign investors and, more recently, to facilitate their operations, seeking to encourage in this manner additional FDI flows and the benefits associated with them—a concern China shares fully. But this purpose alone is no longer sufficient: it needs to be expanded. In particular, IIAs must recognize, in addition, the need to promote sustainable development and, in line with this objective, the encouragement of higher flows of *sustainable FDI*.[26] Broadening the purpose of the investment regime, moreover, has implications, among other things, in terms of recognizing explicitly a carefully-defined right to regulate, as well as a clearer definition of key concepts used in IIAs. It also raises the question of the responsibilities of investors.

Even if the investment regime's purpose is broadened and its key concepts are clarified more precisely, disputes between international investors and host countries can—and will—arise. Naturally, every effort needs to be made to prevent and manage such disputes at the national level. But if they reach the international level, it is important that the investment regime's dispute-settlement mechanism is beyond reproach. A major reform would be the establishment of a world investment court as a standing tribunal with an appeals mechanism, as suggested by the European Commission.[27] While establishing such an Investment Court System faces many obstacles, it would institutionalize dispute settlement and represent a major step toward enhancing the legitimacy of the investment regime. It is therefore encouraging that this concept is already incorporated in the Canada-European Comprehensive Economic and Trade Agreement and the European-Vietnam Free Trade Agreement. If broadly accepted, such a move would be comparable to the

[26] There is of course the issue of defining "sustainable FDI", i.e., to identify the sustainability characteristics of foreign direct investment, a task that could perhaps be undertaken by a multi-stakeholder working group established for this purpose.

[27] See, European Commission, "Investment in TTIP and beyond: the path for reform. Concept paper", 12 May 2015.

move from the ad hoc dispute-settlement process under the GATT to the much-strengthened Dispute Settlement Understanding of the WTO.

Even if a widely-accepted Investment Court System were to be established, however, it would not alleviate another shortcoming of the present regime, namely, that poor countries (and especially the least developed among them) typically do not have the human and financial resources to defend themselves adequately as respondents in international investment disputes. And any dispute-settlement process that does not provide a level playing field for the disputing parties is compromised, undermining its very legitimacy and, with that, the legitimacy of the international investment regime.

The solution to this problem is obvious, and it has been pioneered by the WTO: we need to establish an Advisory Center on International Investment Law. It could be patterned on the Advisory Center on WTO Law. Its main function should be to advise eligible countries as regards prospective disputes and, if need be, provide administrative and legal assistance to respondents that face investor claims and are not in the position to defend themselves adequately. This is a straight-forward proposal, and the G20—or any of its individual members—could easily take the initiative in the interest of enhancing the legitimacy of the investment regime.

The discussion so far has dealt with individual aspects of the present investment regime. But governments could also take a holistic approach to the governance of international investment, namely by negotiating a comprehensive framework on international investment, preferably a Multilateral Framework on Investment, perhaps beginning with a plurilateral agreement open to future accession by any other interested government. Obviously, this is not an easy road to take, given the experience of past efforts in this regard. But, as mentioned before, there are a few important developments since earlier efforts had taken place that augur well for a renewed initiative to take the multilateral path. Moreover, governments have shown a great appetite to negotiate IIAs, not only bilaterally, but also in the context of regional agreements. The mega-regional agreements (including the Regional Comprehensive Economic Partnership agreement, in the negotiations of which China participates and which the negotiators aim to complete in 2016), in particular, could already lead to a certain harmonization of the substantive and procedural aspects of international investment law. The Investment Court System could, in fact, become the nucleus of a multilateral/plurilateral agreement. Most importantly, as discussed earlier, the constellation of national interests has changed profoundly over the past decade, preparing—at least in principle—the way for a consensus approach.

China's evolving approach to IIAs (discussed earlier) reflects this changing interest constellation. Its leadership of the G20 in 2016 provides that country with the opportunity to initiate a systematic intergovernmental discussion regarding the desirability and feasibility of a multilateral/plurilateral investment framework, should the other members of the Group agree. It could be a process that looks at the strengths and weaknesses of the present regime, a diagnostic, fact-finding stock-taking that would also have to pay special attention to the interrelationships between trade and investment, a topic currently on the agenda of the G20's Trade and Investment Working Group.

Naturally, such a process could not be accomplished in one year, but rather would have to be continued, in one form or another, beyond China's current leadership of the G20. This could be done in the G20's Trade and Investment Working Group (assuming that the mandate of this Working Group is extended), or an intergovernmental organization such as UNCTAD or the WTO. UNCTAD continues to examine the whole range of matters related to IIAs and has an established competence in this area. As to the WTO, the Organization created a Working Group on the Relationship between Trade and Investment during its Singapore Ministerial Meeting in 1996, but this Working Group was suspended during the WTO's Ministerial Meeting in Cancun in 2003. The WTO members are of course free to reactivate this Working Group. Alternatively, they could establish a new Working

Group (which would free it from the "baggage" of the suspended Working Group), focussing on the coherence of trade and investment policies in the age of global value chains. In fact, regardless of what happens elsewhere, the WTO may need to have a discussion on the interface and overlap between trade and investment policies and regimes, including the various types of treaty instruments involved in both areas, and without any prejudice to what further joint action WTO members might take. In any event, the G20 could invite governments to do more work to explore the nexus of investment and trade.

A less ambitious alternative than dealing with a comprehensive framework on international investment would be for the G20 to issue a non-binding declaration on shared principles that would provide overall political guidance by laying out the principal considerations that should guide international investment policy in general and, in due course, the negotiation of a multilateral/plurilateral framework.[28] It is promising that the idea of such a declaration is on the agenda of the G20's Trade and Investment Working Group. Such a declaration could recognize, for example, that the present regime can be improved; it could indicate the purposes that IIAs should serve; it could underline the guiding role of sustainable development considerations and the need to promote sustainable FDI (including, e.g., the desirability of an investment support program—see below); it could confirm the importance of protection; it could affirm a number of core principles, such as non-discrimination, fair and equitable treatment, the right to regulate, transparency, and the need for responsible business conduct; and it could underline

[28] Suggested, for the G20, in Karl P. Sauvant and Federico Ortino, *Improving the International Investment Law and Policy Regime: Options for the Future* (Helsinki: Ministry for Foreign Affairs of Finland, 2013), pp. 135-136. See also, Wenhua Shan, "The case for a multilateral or plurilateral framework on investment", *Columbia FDI Perspective*, no. 161, November 23, 2015, p. 2. Such a declaration could be patterned on the "Statement of the European Union and the United States on Shared Principles for International Investment", available at http://trade.ec.europa.eu/doclib/docs/2012/april/tradoc_149331.pdf.

the need for a dispute-settlement mechanism that is beyond reproach (without necessarily going into details).[29]

Desirable as such a declaration would be, one should not underestimate the difficulty of reaching agreement on a meaningful consensus text. If the text is very general, it may not represent much value-added in terms of being of use to policy makers and IIA negotiators. On the other hand, if a declaration lays out a number of key principles, governments seeking strong and clear principles (e.g., to protect their position in on-going negotiations) may clash with governments that may be less inclined to do that (e.g., regarding non-discrimination at the pre-establishment stage of an investment), or that may not want to mention certain principles at all (e.g., investor-state dispute settlement). (Given the attention and rising skepticism that China's outward FDI is experiencing, the principle of non-discrimination—which is, in any event, central to the investment regime—should be of particular importance to China.) Finally, remaining silent on key (controversial) principles may be a difficult option for some governments, as silence could be interpreted that these principles have lost importance for erstwhile proponents.

All this does not necessarily imply that agreement on a meaningful declaration cannot be reached. Rather, it presents a challenge for the G20 to find the right common ground for convergence and muster the willingness to compromise in a very short period of time and within a group of countries holding quite disparate views on key principles. Given China's interest in having a concrete deliverable in the investment area, it should employ all its diplomatic skills to bring about such a compromise. This would be a desirable step toward outlining the architecture of a comprehensive framework on international investment.

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[29] A consensus on a few of these points had already been reached in 2009, at the conclusion of the Heiligendamm Dialogue Process between the G8 and the G5 (Brazil, China, Mexico, India, South Africa). See, "Concluding Report of the Heiligendamm Process", available at http://www.g8italia2009.it/static/G8_Allegato/06_Annex_1__HDP_Concluding.pdf.

Finally, regardless of whether or not systematic intergovernmental efforts aimed at improving the international investment regime take place, it would be very desirable to initiate an informal, inclusive and result-oriented consensus-building process that takes place outside intergovernmental settings and, preferably, is led by a respected non-governmental organization. It would have to be informal and off-the-record to make sure that all governmental and non-governmental participants feel free to speak up, and that they have the opportunity not only to make statements, but actually to discuss the issues. It would have to be inclusive to make sure that all stakeholders are being heard. And it would have to be result-oriented to make sure not only that problems are identified, but also that solutions (or alternative solutions) are proposed. In doing so, such a process would also help to build bridges among various groups of stakeholders. There may be members of the G20 (or other countries) that might be interested in promoting such a process. After all, a great number of issues are on the table, the improvement of the international investment law and policy regime is a long-term process and all stakeholders need to be on board to move this process forward.

In spite of the attractiveness of beginning a process of discussing, in an intergovernmental body, the desirability and feasibility of a multilateral/plurilateral investment framework and the systemic issues associated with such an endeavor, it is quite likely that key governments may not be interested in doing that at this point in time. One of the principal reasons for such hesitancy could be that key players involved in the negotiation of important bilateral and/or regional agreements with investment chapters may wish to wait until these negotiations are concluded before considering a multilateral/plurilateral approach. Dealing with this issue is therefore a long-term challenge. It is in China's own interest to face this challenge of improving the international investment regime, given the rise of its own outward FDI and the reception it receives in a number of host countries, and to meet this challenge in both intergovernmental and non-governmental settings.

D. A concrete proposal and opportunity: An International Support Program for Sustainable Investment Facilitation

Beyond the question of a non-binding declaration on shared principles, there is one practical area in which it may be possible to make concrete progress in the near- or medium-term future, with a view toward having eventually an important deliverable initiated during China's G20 Presidency. It involves the promotion of higher FDI flows to developing countries, and especially the least developed among them, in light of the need, discussed earlier, to mobilize substantially more resources to meet the investment needs of the future. This calls for an International Support Program for Sustainable Investment Facilitation.[30] Such an investment support program is in the interest of host countries (i.e., all countries) that seek to attract such investment to advance their growth and development, as well as of all home countries that seek to strengthen the international competitiveness of their firms by helping them to establish a portfolio of locational assets as an important source of such competitiveness.[31] China has an opportunity to prepare the launch of such a program during the time when it leads the G20 (and the idea is on the agenda of the G20's Trade and Investment Working Group)—which would also embed its own approach toward supporting the country's outward FDI in an international consensus.

1. Aligning investment- and trade-support policies

As noted earlier, all governments seek to attract FDI and benefit from it as much as possible. IIAs are meant to help these efforts in an *indirect* manner by protecting the

[30] For a discussion of the rationale of such a program, see Karl P. Sauvant and Khalil Hamdani, "An International Support Programme for Sustainable Investment Facilitation", available at https://works.bepress.com/karl_sauvant/397/.

[31] China, in fact, has a "going out" strategy reflecting precisely these objectives; see Karl P. Sauvant and Victor Zitian Chen, "China's regulatory framework for outward foreign direct investment," *China Economic Journal*, vol. 7 (2014), pp. 141-163.

investments made. However, evidence about the extent to which IIAs *per se* induce greater FDI flows in this manner is mixed.[32] This is not surprising given the importance of the economic FDI determinants, the role of the national FDI regulatory framework and the importance of investment facilitation and promotion to attract such investment. In any event, IIAs themselves typically do not require *active and direct* efforts to encourage FDI flows and to help host countries benefit from them as much as possible. This is crucial in particular for developing countries, and especially the least developed among them, since most of them simply do not have the capacity to compete successfully in the highly competitive world market for FDI.[33] They need assistance—not only to obtain *more* FDI, but *sustainable*[34] FDI.

What is required, therefore, is an International Support Program for Sustainable Investment Facilitation, focused on improving *national* FDI regulatory frameworks and strengthening investment promotion capabilities. Such a program would concentrate on practical ways and means—the "nuts and bolts"—of encouraging the flow of sustainable FDI to developing countries and, in particular, the least developed among them.[35] It would be situated in a context in which all countries

[32] See, Karl P. Sauvant and Lisa Sachs, eds., *The Effect of Treaties on Foreign Direct Investment: Bilateral Investment Treaties, Double Taxation Treaties and Investment Flows* (New York: Oxford University Press, 2009); for more recent studies, see, for example, Arjan Lejour and Maria Salfi, "The regional impact of bilateral investment treaties on foreign direct investment", 2015 *CPB Discussion Paper* 298, available at http://www.cpb.nl/en/publication/the-regional-impact-of-bilateral-investment-treaties-on-foreign-direct-investment; Byung S. Min, Sudesh Mujumdar and Jong C. Rhim, "Bilateral investment treaties and foreign direct investment", *Global Business and Finance Review*, Spring 2011, pp. 75-87, available at http://www98.griffith.edu.au/dspace/bitstream/handle/10072/41281/70462_1.pdf;jsessionid=F50A523049AAD2387A7B901088757C35?sequence=1; and Laura Gómez-Mera, Thomas Kenyon, Yotam Margalit, José Guilherme Reis, and Gonzalo Varela, *New Voices in Investment: A Survey of Investors From Emerging Countries* (Washington: World Bank, 2015). The empirical evidence is particularly mixed in the case of BITs, but (logically) different in the case of investment chapters in preferential trade and investment agreements, as these enhance both protection and liberalization and link trade to investment.

[33] See, IFC, *Global Investment Promotion Best Practices 2012* (Washington: World Bank, 2012), available at https://www.wbginvestmentclimate.org/uploads/Global%20Investment%20Promotion%20Best%20Practices_web.pdf.

[34] See footnote 26.

[35] See in this context also the United Nations Sustainable Development Goals: United Nations General Assembly, *Transforming Our World: The 2030 Agenda for Sustainable Development,* available at

seek to attract FDI in general, typically through national investment promotion agencies (but increasingly also through a growing number of sub-national agencies), but it would focus specifically on *sustainable* FDI.

Such a program would complement the WTO-led Aid for Trade Initiative and the WTO Trade Facilitation Agreement (TFA—which focuses on practical issues related to trade and does not deal with such contentious issues as WTO-committed access conditions for agricultural and other products). In a world of global value chains, these two instruments address one side of the equation, namely the trade dimension. An international support program for sustainable investment facilitation would address the other side of the equation, namely the international investment dimension.[36] It would be unrealistic to expect that, in today's world economy characterized by global value chains, trade facilitation alone would achieve the benefits that are being sought without investment facilitation. If anything, the interface of trade and investment calls for a close alignment of investment and trade policies.

Analogously to the WTO efforts (and in support of them), an investment support program would be entirely technical in nature, focusing on practical actions to encourage the flow of sustainable investment to developing countries, and in particular the least developed among them.

2. Coverage

An investment support program could address a range of subjects, beginning with transparency:

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https://sustainabledevelopment.un.org/post2015, Goal 17: "Strengthen the means of implementation and revitalize the global partnership for sustainable development" with target 17.5: "Adopt and Implement investment promotion regimes for least developed countries."

[36] It should be noted, however, that an investment support program as advocated here places special emphasis on the promotion of sustainable FDI and maximizing its benefits.

- *Host countries* could commit to making comprehensive information promptly and easily available (online) to foreign investors on their laws, regulations and administrative practices directly bearing on *incoming* FDI, beginning with issues relating to the establishment of businesses and including any limitations and incentives that might exist. Information about investment opportunities, as well as help in project development, would also be desirable. Host country governments, be they of OECD or non-OECD economies, could also provide an opportunity for comments to interested stakeholders when changing the policy and regulatory framework directly bearing on FDI or when introducing new laws and regulations in this area. At the same time, they would of course retain ultimate decision-making power.

- Home countries, too, can increase transparency. From the perspective of investors, transparency is not only important as far as host countries are concerned, but also as regards support offered to outward investors by their *home countries*. Thus, home countries could commit to making comprehensive information available to their outward investors on the various measures they have in place, both to support and restrict *outgoing* FDI. Supportive home country measures include information services, financial and fiscal incentives and political risk insurance.[37] Some of these measures are particularly important for small and medium-size enterprises.

- *Multinational enterprises*, in turn, could make comprehensive information available on their corporate social responsibility programs and any instruments they observe in the area of international investment, such as the Human Rights Council's Guiding Principles on Business and Human Rights, the ILO's Tripartite Declaration, the OECD's MNE Guidelines, the OECD's due

[37] For a detailed discussion of home country measures, see Karl P. Sauvant, Persephone Economou, Ksenia Gal, Shawn Lim, and Witold P. Wilinski, "Trends in FDI, home country measures and competitive neutrality", in Andrea K. Bjorklund, ed., *Yearbook on International Investment Law & Policy 2012-2013* (New York: Oxford University Press, 2014), pp. 3-107.

diligence guidance in different sectors, and the United Nations Global Compact.

- Both *host countries and MNEs* could commit to making investor-state contracts publicly available.

Investment promotion agencies (IPAs), as one-stop shops, could be an investment support program's focal points, possibly coordinating with the national committees on trade facilitation to be established under the WTO's TFA. Within a country's long-term development strategy, IPAs and other appropriate national institutions could undertake various activities to attract sustainable FDI and benefit from it as much as possible.[38] They could, among other things:

- Improve the regulatory framework for investment.
- Establish time-limited and simplified procedures for obtaining permits, licenses, etc., when feasible and when these do not limit the ability of governments to ensure that the regulatory procedures can be fully complied with by investors and government officials.
- Identify and eliminate unintended barriers to sustainable FDI flows.
- Engage in policy advocacy (part of which could relate to promoting the coherence of the investment and trade regulatory frameworks).
- Render after-investment services.
- Facilitate private-public partnerships.
- Identify opportunities for inserting a country in global value chains.
- Promote backward and forward linkages between foreign investors and domestic firms.

[38] See in this context also "Investment promotion and facilitation", in OECD, *Policy Framework for Investment* (Paris: OECD, 2015), pp. 45-54, available at http://www.oecd.org/daf/inv/investment-policy/Policy-Framework-for-Investment-2015-CMIN2015-5.pdf.

- And—very importantly—find ways and means to increase the sustainable development impact of FDI in host countries.

IPAs could also play a role in the development of investment risk-minimizing mechanisms badly needed to attract investment in general and into various types of infrastructure in particular. They could moreover have a role in preventing and managing conflicts between investors and host countries, including by providing information and advice regarding the implementation of applicable IIAs and the preparation of impact assessments to avoid that liability arises under these agreements. If conflicts occur, they could seek to resolve them before they reach the international arbitral level. Institutionalized regular interactions between host country authorities and foreign (as well as domestic) investors would be of particular help in this respect.

Finally, as in the WTO's trade instruments mentioned before, donor countries could provide assistance and support for capacity building to developing countries (especially the least developed countries) in the implementation of the various elements of an investment support program. This could begin with a holistic assessment of the various elements of the investment policy framework—economic determinants, FDI policy framework, investment promotion, related policies—and how it is anchored within the broader context of countries' overall development strategies. The Investment Policy Reviews undertaken by UNCTAD—or the WTO's trade reviews or the OECD's investment reviews—could provide a useful tool that could be made available to more countries. Support could focus on strengthening the capacity of national IPAs as the country focal points for the implementation of an investment support program.

3. Avenues that could be pursued

There are several ways in which an investment support program could be moved forward. One option would be to extend the Aid-for-Trade Initiative to cover investment as well, and fully so,[39] creating an integrated platform for promoting sustainable FDI. This would be a logical and practical approach that recognizes the close interrelationship between investment and trade. Its initial emphasis could be on investment in services, given the WTO's General Agreement on Trade in Services: transactions falling under its Mode 3—"commercial presence"—account for nearly two-thirds of the world's FDI stock. The matter could be taken up at the next Global Review on Aid for Trade, as a first step in an exploratory examination of the desirability and feasibility of this approach—an Aid for Investment and Trade Initiative. Alternatively, the current Aid-for-Trade Initiative could be complemented with a separate Aid-for-Investment Initiative.

Another option would be to expand the TFA to cover sustainable investment as well, to become an Investment and Trade Facilitation Agreement. This could conceivably be done through an interpretation of that Agreement or through amending that Agreement; in either case, member states would have to agree. A subsidiary body of the Committee on Trade Facilitation (to be established in the WTO when the TFA enters into force) could provide the platform to consult on any matters related to the operation of what would effectively be a sustainable investment module within the TFA.

A third option is for all—or a group of interested—governments to launch a Sustainable Investment Facilitation Understanding that focuses entirely on practical ways to encourage the flow of sustainable FDI to developing countries—and, for that matter, to developed countries. The WTO could work on such an Understanding, as part of a post-Doha agenda. Work could also begin within another international organization with experience in international investment matters, especially UNCTAD, or the World Bank or the OECD. Or leading outward FDI

[39] It has already been expanded to cover infrastructure and some elements of investment.

countries could launch such an initiative, with the G20 (or a number of its members) at its core.[40]

Every one of these options requires careful study, discussions and consultations, organized by any of the organizations just mentioned, or by a credible non-governmental organization or by a group of experts and practitioners. IPAs should play a central role in this process, as they know best what would be needed to create an effective investment support program.

There are of course challenges to address. While few (if any) governments are likely to object to an investment support program as such, the proposal made here to focus in particular on "sustainable" FDI may create the impression (especially in the private sector) that there is "desirable" FDI and "non-desirable" FDI. This is not the intention. Rather, the idea is that, when seeking to attract sustainable FDI and benefit from it as much as possible, investment that has certain sustainability attributes might benefit, for example, from various incentives. In that sense, the approach is not different from the approach taken toward, for instance, encouraging renewable energies.

Another issue that needs to be considered concerns any financial implications the implementation of an investment support program might have. At the present time, a number of bilateral, regional and multilateral organizations undertake, on their own, various types of technical assistance meant to help countries attract FDI, and governments dedicate a substantial amount of financial resources to this objective. A basic characteristic of an investment support program as proposed here is that it goes beyond what individual countries or organizations are doing, by putting in place a systematic, well-organized international program that is based on a comprehensive blueprint. Such a program, internationally agreed upon, would still

[40] The top ten outward FDI economies, which include four emerging markets, accounted for about four-fifths of world FDI outflows in 2014.

be financed by individual governments, as well as regional and multilateral organizations. This could be done if the Aid-for-Trade Initiative (which is already funded) were broadened to cover investment as well. Or one could follow the model of the TFA: if a country fails to attract funding from other sources, it may approach the Trade Facilitation Agreement Facility (launched in July 2014)[41]—as a source of finance of last resort—to obtain project implementation grants related to the realization of the TFA. More generally, in the same manner as it is recognized that reaching the Sustainable Development Goals will require additional finance, promoting higher flows of sustainable FDI would deserve support, as it directly strengthens the productive capacity of host countries.

To conclude, the proposal's key premise is the importance—and urgency—of creating more favorable national conditions in host and home countries to encourage substantially higher sustainable FDI flows to meet the investment needs of the future. All countries should have an interest in this objective, as all countries seek to attract such investment, and many countries (including China) support their firms investing abroad. The impetus for moving such a project forward could come from the G20, which could encourage—or lead—the initiation of work leading to an International Support Program for Sustainable Investment Facilitation.

Conclusions

It is important that China has put the issue of the governance of international investment on the agenda of the G20, as this is an area that requires global attention. As intergovernmental discussions and negotiations, as well as the reaction of civil society, have shown, it is a very difficult subject. Hence one should not be overambitious in terms of what can be achieved in one year, 2016, the year in which China has the Group's Presidency. As discussed briefly earlier, a number of bilateral

[41] It is however uncertain how the Trade Facilitation Agreement Facility (which is linked to the TFA) will function in its quest to act as a financing facility to support those developing countries that are unable to access funds from other funding agencies.

and regional negotiations are underway between and among important countries, and it must be expected that these countries would first want to resolve key issues among themselves before addressing the same issues in a much wider context. Above all, there is the shortness of time: under normal circumstances, the G20 Ministerial on 9-10 July 2016 should consider a draft outcome, to be adopted by the G20 Summit of Heads of State and Government, 4-5 September 2016. After the Ministerial, and again under normal circumstances, attention is likely to shift toward fine-tuning the outcome text in light of any directives the Ministers will provide. The implication is that most of the substantive discussions will have to take place between the April 2016 meeting of the Trade and Investment Working Group and the next meeting of that Working Group, 9-10 July 2016. This is very little time indeed,[42] especially if key players might not be too keen to reach a substantial agreement.

Hence perhaps all that might be expected as a deliverable of China's Presidency of the G20 is something fairly general like a broad statement of non-binding shared principles; still, it would be a desirable step toward outlining the architecture of a comprehensive framework on international investment. Moreover, China's Presidency could lay the groundwork for something concrete, relatively non-controversial and in the interest of everyone, like an International Support Program for Sustainable Investment Facilitation. Most importantly, if the G20 should decide (as seems very likely) to maintain the Trade and Investment Working Group (even if not at the ministerial level), a valuable additional intergovernmental platform would have been created. It would allow for a continued systematic intergovernmental process to discuss the range of issues related to the governance of international investment—preferably paralleled by an informal, inclusive and result-oriented consensus-building process that takes place outside intergovernmental settings.

[42] There may of course be opportunities in-between for discussions, in particular, during a meeting of the Working Group on 31 May-1 June 2016 at the margins of the OECD Ministerial, 2-3 June 2016. Fine-tuning might take place at the margins of UNCTAD's World Investment Forum, 17-21 July 2016.

China's influence was limited when the international trade and financial regimes were created. The country, moreover, was not party to the Uruguay Round, as it joined the WTO only in December 2001, after fifteen years of negotiations. Now, China—as the 2016 leader of the G20—has the opportunity to initiate and help shape a process that could eventually lead to the creation of an international regime that encourages explicitly the flow of substantially higher amounts of sustainable FDI in the framework of a widely accepted enabling investment framework that regulates the relationships between governments and international investors in a balanced manner, while, at the same time, reflecting China's own interests. It is however a process that will take time, patience and the involvement of a wide range of stakeholders. It therefore has to continue far beyond China's current Presidency of the G20—but China can this year lay the groundwork for such a process to be set in motion.