COLUMBIA UNIVERSITY
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Memo

Improving the International Investment Regime: priorities for the new U.S. Administration

To: **Office of the President, Secretary of State, Secretary of the Treasury, Director of the National Economic Council, and United States Trade Representative**
From: **Karl P. Sauvant, Executive Director of the Vale Columbia Center on Sustainable International Investment, and other colleagues at Columbia University**[1]
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The international investment regime has grown rapidly over the past two decades, along with foreign direct investment (FDI) flows, which reached $1.8 trillion in 2007. Even in the absence of a single comprehensive multilateral investment treaty or institution, that regime is governed by principles and rules enshrined in some 2,600 bilateral investment treaties and another 250 free trade agreements that contain substantial investment provisions. These treaties are supplemented by a number of other relevant multilateral agreements and customary international law, along with complementary principles applied by international financial institutions such as the World Bank and the International Monetary Fund, that cover aspects of the activities of multinational enterprises as well as how states regulate them.

The great majority of international investment agreements (IIAs) have been formulated with a view toward protecting investors and facilitating their operations, and to attracting capital that can contribute to the economic growth and development of host countries. Since the majority of IIAs allow for investor-state dispute settlement, the regime is enforced by private investors through ad-hoc arbitration systems; the number of known treaty-based international investment disputes now exceeds 300 and over half of these disputes have been adjudicated during the past five years. As this suggests, foreign investment is now covered by a fairly robust system that, in many respects, is comparable in effectiveness to the international trade regime.

The legitimacy and effectiveness of the international investment regime hinges on its ability to serve the interests of all its principal stakeholders and hence to maintain its global acceptance. Helping to ensure the stability of that regime, particularly at a time when global capital flows are critical to stemming the ravages of a severe global

[1] The Vale Columbia Center on Sustainable International Investment is a joint undertaking of Columbia Law School and The Earth Institute at Columbia University. Its objectives are to provide students with a challenging learning environment, analyze important, topical and policy-oriented issues related to FDI and develop and disseminate practical approaches and solutions. For more information, see www.vcc.columbia.edu. This letter represents the views of the individuals listed below and not those of any of the institutions named or affiliated with Columbia University.

recession, should be a priority for the United States, as well as for all other countries that seek to attract foreign investment or permit or encourage outward investment.

While the current international investment regime has been heralded as a great success, the speed with which it has developed has led to imperfections that need to be addressed to maintain and strengthen its legitimacy and effectiveness. In particular:

- Several governments, investment law practitioners and scholars have criticized the system for seemingly favoring the interests of investors over those of host countries, and are therefore advocating rebalancing the rights and responsibilities of private and public interests.
- In the absence of a governing multilateral treaty, the growing number of international instruments dealing with investment matters has resulted in inconsistent provisions and/or inconsistent interpretations of the relevant rules. The lack of appellate review in investor-state arbitration has similarly resulted in inconsistent decisions, threatening the predictability and cohesiveness of investment law for investors and governments alike.
- The increasing number and complexity of international investment disputes raise questions about whether investor-state dispute settlement has truly "leveled the playing field" for all interests involved. Some believe that defendant states, particularly poor developing countries, need technical assistance to handle investor complaints and that the international arbitration community is not in the best possible position to deal with these new demands.
- Finally, there are signs that individual countries are becoming more circumspect toward FDI (or certain types of FDI, such as M&As). Rising FDI protectionism may put the domestic foundation for an open international investment regime at risk.

The United States, as the largest home and host country of FDI, has the most at stake in the preservation and strengthening of the international investment regime. Fortunately, the United States is also in a position to consider a number of actions to ensure that the regime continues to serve the interests of investors and governments alike. There are a number of actions that the new Administration might consider, including but not limited to the following five:

1. Encourage a group of leading academic institutions in all parts of the world to prepare a **Restatement of International Investment Law** (similar to the restatement approach of the American Law Institute) in order to determine which principles can be considered to represent 'black letter' law and what are the principal contending interpretations for other important provisions typically found in IIAs, including with a view toward striking a proper balance between public and private interests. Such a restatement would further the emergence of a coherent international investment law and could become a source of guidance for negotiators of future IIAs as well as assist international investment dispute arbitrators.

2. Examine in a multilateral context the desirability and feasibility of an **appeals mechanism** for arbitral decisions in international investment disputes in terms of whether such a mechanism would contribute to the further development of harmonious international investment law.

3. Support, together with other interested countries, the establishment of an **Advisory Center for International Investment Law** to provide a range of services to under-resourced developing countries with respect to negotiating IIAs, and implementing IIAs, as well as providing assistance to parties in dealing with investor-state disputes. This idea, which is already being explored in Latin and Central America, and exists within the WTO regime, would enable all countries to secure the greatest benefit from the regime and enhance its legitimacy globally.

4. Encourage the international arbitration community to formulate **guidelines for arbitrators** and others involved in the international arbitral process that would further elaborate all its participants' rights and duties, especially with respect to perceived conflicts of interest.

5. Extend the **standstill on FDI protectionist measures** agreed upon by the G20 in November 2008, both in terms of time and the number of countries involved.

We believe that these actions could be beneficial to the international investment regime. Under the auspices of the Vale Columbia Center on Sustainable International Investment, we are prepared to facilitate a detailed discussion of these and other possible actions, through discussions with your staff, workshops with scholars and practitioners in the relevant areas, research reports on the proposals, or other kinds of assistance that you might find useful.

Signed:

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