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The Evolving International Investment Law and Policy Regime: Ways Forward

Policy Options Paper

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The Evolving International Investment Law and Policy Regime: Ways Forward

Karl P. Sauvant
on behalf of the E15 Task Force on Investment Policy

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Note

The policy options paper is the result of a collective process involving all members of the E15 Task Force on Investment Policy. It draws on the active engagement of these eminent experts in discussions over multiple meetings as well as an overview paper and think pieces commissioned by the E15Initiative and authored by group members and external contributors. Karl P. Sauvant was the author of the report. This paper reflects the author's views as Theme Leader of the E15 Task Force based on the discussions in that Task Force and his own overview paper. The discussions were wide-ranging and intense, but always constructive. Since this report was prepared under the responsibility of the Theme Leader, it does not reflect a consensus view among Task Force members; in fact, views within the Task Force on a number of issues discussed below varied widely. The views of those Task Force members invited to prepare policy papers are contained in the collection of think pieces. The list of group members and E15 papers are referenced. The text was finalized in August 2015.

The full volume of policy options papers covering all topics examined by the E15Initiative, jointly published by ICTSD and the World Economic Forum, is complemented with a monograph that consolidates the options into overarching recommendations for the international trade and investment system for the next decade.

The E15Initiative is managed by Marie Chamay, E15 Senior Manager at ICTSD, in collaboration with Sean Doherty, Head, International Trade & Investment at the World Economic Forum. The E15 Editor is Fabrice Lehmann.

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Jointly implemented by the International Centre for Trade and Sustainable Development (ICTSD) and the World Economic Forum, the E15Initiative was established to convene world-class experts and institutions to generate a credible and comprehensive set of policy options for the evolution of the global trade and investment system to 2025. In collaboration with 16 knowledge partners, the E15Initiative brought together more than 375 leading international experts in over 80 interactive dialogues grouped into 18 themes between 2012-2015. Over 130 overview papers and think pieces were commissioned and published in the process. In a fast-changing international environment in which the ability of the global trade and investment system to respond to new dynamics and emerging challenges is being tested, the E15Initiative was designed to stimulate a fresh and strategic look at the opportunities to improve the system's effectiveness and advance sustainable development. The second phase of the E15Initiative in 2016-17 will see direct engagement with policy-makers and other stakeholders to consider the implementation of E15 policy recommendations.

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- Investment Policy
- Regional Trade Agreements
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- Services
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Abstract

International investment needs are tremendous. This requires that the international investment regime constitutes a framework for increased flows of sustainable foreign direct investment for sustainable development. The international investment regime covers what has become the single most important form of international economic transactions and the most powerful vector of integration among economies: foreign direct investment and non-equity forms of control by multinational enterprises over foreign production facilities. Among the most striking features of the global investment landscape over the past decade has been the rise of developing economies as outward investors. Yet despite the economic importance of international investment, there is no overarching set of rules governing this subject matter. Instead, the regime consists of over 3,000 international investment agreements, the great majority of them bilateral investment treaties. The present paper examines the state of the international investment law and policy regime and how its governance might be enhanced. Following a thorough analysis of the background to rule-making in international investment, the paper puts forward a set of policy options with the overall objective of increasing sustainable investment flows, particularly to developing and least developed countries, within the framework of a widely accepted international investment law and policy regime. The interrelated policy recommendations fall under five main categories: expanding the purpose and updating the substantive and procedural provisions of international investment agreements; developing an international support programme for sustainable investment facilitation; addressing the challenge of managing and resolving disputes, especially by further institutionalizing the investor-state dispute-mechanism which lies at the heart of the regime; complementing this effort by establishing an Advisory Centre on International Investment Law; and initiating a process towards the negotiation of a comprehensive international framework on investment that would establish basic rules of engagement among principal stakeholders. The paper ends with a recommendation on procedural issues, namely the launch of an informal and inclusive consensus-building process to accompany and help efforts geared at reforming the international investment regime for increased flows of sustainable foreign direct investment.

Contents

Abbreviations

BIT	bilateral investment treaty
FDI	foreign direct investment
FTA	free trade agreement
G20	Group of Twenty major economies
GATS	General Agreement on Trade in Services
GVC	global value chain
ICSID	International Centre for Settlement of Investment Disputes
IIA	international investment agreement
ILO	International Labour Organization
IMF	International Monetary Fund
IPA	investment promotion agency
ISDS	investor-state dispute-settlement
M&A	merger and acquisition
MFI	multilateral framework on investment
MFN	most favoured nation
MNE	multinational enterprise
OECD	Organisation for Economic Co-operation and Development
OHCHR	Office of the High Commissioner for Human Rights
PFI	plurilateral framework on investment
TFA	Trade Facilitation Agreement
TiSA	Trade in Services Agreement
TPP	Trans-Pacific Partnership
TRIMs	Trade-Related Investment Measures
TTIP	Transatlantic Trade and Investment Partnership
UNCTAD	United Nations Conference on Trade and Development
UNEP	United Nations Environment Programme
UNGA	United Nations General Assembly
UNCITRAL	United Nations Commission on International Trade Law
WTO	World Trade Organization

Executive Summary

International investment needs are tremendous. All countries seek to attract investment because it involves resources that are central to creating employment, advancing growth and development and ultimately increasing prosperity for all. The public purse will have to finance a considerable share of these needs. But a substantial share will have to be mobilized by the private sector, including international investors. Moreover, not only more investment is needed, but it has to be sustainable investment.

International investment has already become the single most important form of international economic transactions and the most powerful vector of integration among economies. It has become more important than trade in delivering goods and services to foreign markets, and it interlocks national economies through increasingly integrated production networks and global value chains. The presence and commercial links of multinational enterprises (MNEs) across different international markets has led to a substantial share of international trade taking place within global value chains, thus tightly intertwining investment and trade. Emerging markets are increasingly participating in these developments, as both major recipients of foreign direct investment (FDI) and major outward investors. This new reality makes it all the more important to re-examine the governance of international investment.

As part of the E15 Initiative, ICTSD, in partnership with the World Economic Forum, convened a Task Force on Investment Policy to examine the state of the international investment law and policy regime and how its governance might be enhanced to encourage the flow of sustainable FDI for sustainable development. The regime covers the international investment typically undertaken by MNEs, primarily through FDI and various forms of non-equity modes of control, including management and supplier contracts, as well as portfolio investment. The discussions in the Task Force were future-oriented, looking ahead five to ten years—a daunting challenge in a fast-moving field in which some ideas that would have been cast aside as pipedreams only a few years ago are now on the international policy agenda, such as a world investment court.

The purpose of the Task Force was to identify key policy options to help meet the challenge of enhancing the investment regime. Since this report was prepared under the responsibility of the Theme Leader, it needs to be emphasized that it does not reflect a consensus view among Task Force members; in fact, views within the Task Force on a number of issues discussed below varied widely.

In reforming the investment regime, priority needs to be given to special efforts to promote substantially higher flows of sustainable FDI for sustainable development, particularly to developing and least developed countries, within an encouraging and generally accepted international investment framework. The policy recommendations as regards an enhanced investment regime focus on the need to expand the regime's purpose beyond the protection of international investment and the facilitation of efficient investor operations to encompass also the promotion of sustainable development (and allow for the pursuit of other legitimate public policy objectives) and further to institutionalize the regime's dispute-settlement mechanism, complemented by an Advisory Centre on International Investment Law. Negotiations of a multilateral/plurilateral investment agreement could provide an overall framework for international investment, preceded (or accompanied) by an informal consensus-building process.

The International Investment Regime

International investment needs require that the international investment regime constitutes a framework for increased flows of sustainable FDI for sustainable development.

Despite the economic importance of international investment, there is no overarching set of rules governing this subject matter. Instead, the international investment regime consists of over 3,000 international investment agreements (IIAs), the great majority of them bilateral investment treaties (BITs). The investment regime, in turn, increasingly provides the legal yardstick for national rule-making on investment. The international and national investment frameworks together regulate what international investors and governments can and cannot do.

Having the right international investment framework in place is not an objective in itself. In the face of prospects that the world economy may face a decade or more of slow growth, it is unfortunate that world FDI inflows declined substantially from their peak of US$2 trillion in 2007 as a result of the financial crisis. Flows need not only to recover, but surpass this earlier record. There is no economic reason why FDI flows could not be double or triple what they were in 2007, although the issue is not only more FDI, but more FDI that helps to put the world on a sustainable development path.

Mobilizing such investment requires, first of all, that the economic, regulatory and investment-promotion determinants in individual countries are in place. But the international framework dealing with the relations

of governments and international investors needs to be enabling as well: the framework needs to provide clear rules of the road and a suitable mechanism for resolving disputes between these two actors, should disputes arise. Moreover, the framework needs to provide international support to help all economies that are not members of the Organisation for Economic Co-operation and Development (OECD)—be they developing countries or economies in transition—become more attractive for international investors. An improved investment regime, with enhanced legitimacy, provides the enabling framework for increased flows of sustainable FDI for sustainable development.

The present report focuses on a limited number of topics that have *systemic* implications, with a view towards suggesting ways of enhancing the international investment regime. These topics are discussed separately for analytical reasons, but they are closely interrelated.

Policy Options and Recommendations

Updating the purpose of the regime…

Any discussion of strengthening the international investment regime needs to begin with the very purpose of the regime. 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 the operations of investors, seeking to encourage in this manner additional FDI flows and the benefits associated with them.

But this purpose alone is no longer sufficient—it needs to be expanded. In particular, IIAs need to recognize, in addition, the need to promote sustainable development and FDI flows that support this objective. Further objectives include the protection of public welfare and human rights, including public health, labour standards, safety, and the environment. Especially more vulnerable economies may require dedicated international support, including through IIAs, in pursuing some of these objectives, a situation further accentuated by the international competition for investment.

Promoting such an expanded purpose of the regime, in turn, necessitates that governments preserve a certain amount of policy space that gives them the right to regulate in the interest of legitimate public policy objectives, a right that needs to be acknowledged in a dedicated provision in IIAs. It also means that investors commit themselves to responsible business conduct. In turn, the contents of IIAs needs to reflect this broadened purpose.

…needs to be accompanied by a clarification of key concepts, interrelationships and investor responsibilities…

"Policy space" is a vague and sometimes politicized concept. Care needs to be taken that it is not interpreted as a *carte blanche* for governments to disregard international commitments such as non-discrimination.

This is similar to the challenge of ensuring that other key concepts and protections contained in IIAs are not interpreted too broadly. If IIAs contain language that refers to general principles and rules that leave excessive scope for interpretation, it may become difficult for international investors to know what treatment they can expect from host country governments, and for host country governments to know what they can or cannot do vis-à-vis international investors. Uncertainty, in turn, increases the probability of disputes. Legal certainty should be maximized.

Accordingly, an important aspect of enhancing the investment regime concerns clarifying the key concepts in IIAs, by providing tighter wording that defines as clearly as possible the sort of injuries for—and circumstances in—which investors can seek compensation, and the type of actions governments can and can not take. The development and generalized use of standardized wording would help in this regard. Clarifications are also needed concerning the interrelationships of the international investment regime with other substantive areas of international law, especially those pertaining to human rights, the environment, labour, and trade, as well as taxation and incentives.

Progress has been made on the above, but more needs to be done. This includes the difficult challenge of defining sustainability characteristics of international (and domestic) investments. A working group should be established to prepare, in a multi-stakeholder process, an indicative list of FDI sustainability characteristics that could be utilized by interested governments seeking to attract sustainable FDI.

There is also the question of the responsibilities of investors, to promote desirable corporate conduct and discourage undesirable behaviour. Host country governments, as sovereigns, can of course impose obligations on investors in their national laws and regulations, and have done so. Investors have to abide by them, making them liable for any infringements that might occur. Beyond that, various non-binding/mixed instruments designed, *inter alia*, by the OECD, the International Labour Organization (ILO) and the Office of the High Commissioner on Human Rights (OHCHR) address this issue, and these should be developed further.

But there is the question of the extent to which IIAs limit the ability of host countries to impose obligations on investors, or discourage them from doing so, for fear of transgressing on treaty provisions. The introduction of investor responsibilities in IIAs could remedy this situation by providing international standards, although it would not be easy to obtain broad consensus on such standards. Moreover, broad consensual international standards on this matter could also help countries with limited capacity to implement their own laws and regulations in this area, at least to a certain extent.

Expanding the purpose of IIAs, providing greater clarity of key concepts, acknowledging interrelationships with other legal regimes, and recognizing investor responsibilities should all be pursued going forward.

A working group consisting of leading international investment experts, including practitioners, could propose how the purpose and contents of IIAs could best be updated, in close consultation with principal stakeholders. Such a group could benefit from the support of a consortium of leading universities from all continents, as well as other interested stakeholder organizations. The results could be presented to governments, for their consideration in future investment rule-making.

…and a special effort to encourage the flow of sustainable FDI for sustainable development.

One particular aspect of the purpose and contents of the international investment regime deserves special attention, namely the efforts of virtually all governments to attract FDI and benefit from it as much as possible. But a number of governments, especially of the least developed countries, have weak capabilities to compete successfully for such investment in the world FDI market. For that reason, an international support programme for sustainable investment facilitation should be launched, focused on improving national FDI regulatory frameworks and strengthening investment promotion capabilities. Such a programme should concentrate on practical ways and means of encouraging the flow of sustainable FDI to developing countries and, in particular, the least developed among them. It should be geared towards strengthening the capacity of investment promotion agencies (IPAs) in developing countries. It would fully complement the various efforts to facilitate trade, notably those governed by the WTO-led Aid for Trade Initiative and the recently adopted WTO Trade Facilitation Agreement, by creating an integrated platform for promoting sustainable FDI.

In fact, one option to implement such a programme would be to extend the Aid for Trade Initiative to cover investment as well, and fully so, into an Aid for Investment and Trade Initiative. Another, medium-term, option would be to expand the Trade Facilitation Agreement to cover sustainable investment, turning it into an Investment and Trade Facilitation Agreement. A third option is for all—or a group of interested—countries to launch a Sustainable Investment Facilitation Understanding that focuses entirely on practical ways to encourage the flow of sustainable FDI to developing countries. Work on such an Understanding could be undertaken, in due course, in the WTO. It could also begin within another international organization with experience in international investment matters, perhaps UNCTAD or the World Bank or the OECD. Or, a group of the leading outward FDI countries could launch such an initiative. The impetus could come from the G20, which could mandate the initiation of such work.

The proposal's key premise is the importance—and urgency—of creating more favourable national conditions for higher sustainable FDI flows to meet the investment needs of the future. As governments and the private sector increasingly share this view, they need to muster the political will to put an international support programme for sustainable investment facilitation in place.

Any disputes need to be resolved through a dispute-settlement mechanism that is beyond reproach, …

Even if the investment regime's purpose is enhanced and its contents are clarified, disputes between international investors and host country entities can arise. Governments therefore need to develop national investor-state conflict management mechanisms that allow governments and investors to address their grievances well before they escalate into full-blown legal disputes.

But it is unavoidable that some disputes reach the international arbitral level. It may be possible to deal with some of them through alternative dispute-settlement mechanisms, and the use of such mechanisms needs to be encouraged further. But given the centrality of the investor-state dispute-settlement (ISDS) mechanism to the investment regime, that mechanism has to be beyond reproach. This is not only a technical matter, but also one that has implications for the very legitimacy of the international investment regime. A number of steps have already been taken to improve this mechanism, but more needs to be done.

The principal major reform would involve the establishment of appeals mechanisms for the current ad hoc tribunals or (as recently proposed by the European Commission) a world investment court as a standing tribunal making the decision in any dispute-settlement case, or a combination of both. Further institutionalizing dispute settlement in this manner could be a major step towards enhancing the investment regime, comparable to the move from the *ad hoc* dispute-settlement process under the GATT to the much-strengthened Dispute Settlement Understanding of the WTO. Institutional development in this direction could not ensure the full consistency of the application of IIAs, given that the underlying treaties are not uniform, even though these agreements share certain principles and recurrent core concepts. However, it could, over time, enhance consistency, help make the dispute-settlement process more accountable and develop a body of legally authoritative general principles and interpretations that would increase the coherence, predictability and, ultimately, the legitimacy of the investment regime.

Several arrangements are conceivable. For example, awards issued by the *ad hoc* panels currently used in IIA disputes could be appealed to *ad hoc* appellate bodies. Or one could envisage the establishment of a single permanent and independent world investment court. Or one could imagine an appellate mechanism for reviewing awards being established in the framework of a treaty between two or more parties, to review decisions of *ad hoc* tribunals; other states would be invited to opt in to make use of that mechanism as well, multilateralizing the appellate mechanism in this manner. Finally, since the International Centre for Settlement of Investment Disputes (ICSID) is the single most prominent dispute-settlement venue, one could think of a treaty updating the present Convention on the Settlement of Investment Disputes between States and Nationals of Other States—an ICSID II, so to speak. Such a new treaty could create a single world investment court (and appellate body) that would be available to all governments that have signed and ratified such a treaty.

Finally, there is the question of access to any dispute-settlement mechanism. In particular, if the contents of IIAs are expanded to include investor responsibilities, governments arguably should have direct access to the regime's dispute-settlement mechanism. The question would also arise—and this would be a profound and very ambitious change—whether the dispute-settlement process should then be opened up to other stakeholders too.

Steps in this direction would profoundly change the nature of the international investment dispute-settlement process by turning it from an *investor-state dispute-settlement mechanism* into an *investment dispute-settlement mechanism*. This, in turn, could dramatically modify the dynamics of the current international ISDS discussion.

However challenging the task of improving the current dispute-settlement mechanism may be in terms of overcoming numerous political and technical difficulties, embarking on the process of exploring how this could be done with a view towards developing a better mechanism would send a strong signal that governments recognize that this mechanism requires improvement. This is not merely a technical question but (as the public discussions of ISDS show) a matter of what is considered fair by public opinion.

Discussions of the range of issues relating to this matter are already underway in a number of governmental and non-governmental forums, ranging from the European Parliament to various academic conferences. These should be expedited. All interested stakeholders should be heard and all pertinent issues should be addressed.

… which would be helped by the creation of an Advisory Centre on International Investment Law.

A similar, and strong, signal demonstrating the will to enhance the legitimacy of the dispute-settlement process would be sent if the ability of vulnerable economies to defend themselves as respondents in investment disputes would be improved. Conversely, a dispute-settlement mechanism that does not provide a level playing field for the disputing parties can easily be seen as compromised, undermining its very legitimacy. Access to justice must not only be seen as fair, it has to be fair in its very *modus operandi*.

Least developed countries particularly do not generally have the human resources to defend themselves adequately. And many simply do not have the financial resources to hire the required expertise, which also does not help the efficiency and quality of the arbitration process. This puts many countries in an asymmetric situation whenever a dispute arises.

An independent Advisory Centre on International Investment Law would help to establish a level playing field by providing administrative and legal assistance to respondents that face investor claims and are themselves not in a position to defend themselves adequately. While a number of issues would have to be considered before establishing such facility, the experience of the Advisory Centre on WTO Law shows that it can be done—to the benefit of the world trading system.

Similar considerations apply to small and medium-size enterprises, as these too typically do not have the expertise and resources to bring claims. They too require support. Costs and delays could become even more of an obstacle if an appeals mechanism were to be established. A small-claims settlement mechanism, with an expedited process, set deadlines and sole arbitrators, could be of help in this regard.

Independently of these two institutions (the Centre and the small-claims mechanism), and as a low-cost alternative dispute-settlement mechanism of potential value to both governments and (in particular small) firms, an International Investment Ombudsperson could be designated, cooperating with an *ad hoc* ombudsperson in a respondent state.

The process of clarifying the issues surrounding the creation of an Advisory Centre on International Investment Law should begin now, with a view towards bringing it into being in a short period of time. It would be very desirable if a few governments particularly concerned about the legitimacy of the international investment regime would assume a lead role in establishing such a Centre and small-claims settlement mechanism. They could be supported by a non-governmental organization with a track record of work on the international trading system, and they could seek to draw on the experience of intergovernmental organizations with an interest in this subject.

A comprehensive international framework on investment would establish basic rules for the relations between principal stakeholders,

The discussion so far has focused on individual—but key—aspects of the international investment regime and how they could be improved. But one could also take a holistic approach to the governance of international investment, namely to negotiate a comprehensive universal framework on international investment, preferably a multilateral framework on investment (MFI), possibly starting with a plurilateral framework on investment (PFI) that would be open for future accessions by other states. Such a framework would have to start from the need to promote sustainable FDI for sustainable development. The convergence of policy interests that has been underway between home and host countries with the growth of outward FDI from emerging markets could facilitate reaching such an objective.

Moreover, it is significant that governments continue to show a great willingness to make rules on international investment, as revealed in the proliferation of IIAs. This is particularly reflected in the negotiation of BITs between key countries, as well as in the negotiation of mega-regional agreements with investment chapters. Together, these negotiations represent significant opportunities to shape the investment regime by narrowing the substantive and procedural investment law differences between and among the principal FDI host and home countries. If this should occur, the result of these negotiations could become important stepping stones towards a subsequent universal investment instrument. Still, the negotiation of such an instrument, especially a high-standards one, would face significant challenges, in light of the unsuccessful efforts of the past and the wide range of views and the considerable passion surrounding IIAs.

Given these and other challenges, it would be desirable to begin a process of exploring the possibility of negotiating an international framework on investment, ideally of a multilateral nature. This may be particular pertinent in light of the July 2015 decision by the Third International Conference on Financing for Development to mandate UNCTAD to work with member states to improve IIAs, and the experience of that organization in this area, not least in its comprehensive recent effort to facilitate the formulation of a new generation of investment policies through its Investment Policy Framework for Sustainable Development.

On the other hand, the WTO offers the best platform for the trade and investment regimes to be combined and consolidated, as a unified system providing systematic legal and institutional support for the future growth of global value chains, turning that organization into a World Investment and Trade Organization. If this course were to be pursued, the WTO's Working Group on the Relationship between Trade and Investment could be reactivated in due course, or a new working group could be established. Another alternative is to build on existing agreements, especially the WTO's General Agreement on Trade in Services, to cover other types of investment and obligations. There might also be the possibility that the international investment court and appellate mechanism sought by the European Commission could become a stepping stone towards a permanent multilateral system for investment disputes, which, in turn, could become the nucleus around which a universal framework could be built.

If a truly universal and comprehensive strong investment framework is out of reach at this time, a plurilateral framework on international investment could serve as a first step in that direction. Following the example of the Trade in Services Agreement, it could be an agreement negotiated by interested parties that would be open for future accessions by other states. The situation may be favourable for such an initiative, in particular if the China-United States BIT should be concluded expeditiously. If that should occur, the most important home and host countries among developed and developing countries would have negotiated an agreement that could serve as a template that could be taken forward. The 2016 G20 summit in China could initiate such a process.

Next Steps: An Informal and Inclusive Consensus-Building Process

This effort towards building a comprehensive international framework on investment should be accompanied and helped by an informal consensus-building process.

As the public debate about the investment regime and the debate within the international investment law community suggest, improving the regime has become a matter of urgency. Improvements in the regime should be sought subject area by subject area, when negotiating individual IIAs. Where new initiatives need to be taken, they should be launched as soon as possible. Finally, preparations for the negotiation of a multilateral/plurilateral investment agreement should be seriously considered. In the end, any systematic process to improve the investment regime needs to be government-led and -owned.

However, considering the range of stakeholders involved in international investment matters, it would be advisable to launch an (accompanying) informal but inclusive confidence-, consensus- and bridge-building process on how the international investment law and policy regime can best be enhanced. Such an informal process should take place outside an intergovernmental setting, to stimulate and encourage a free and open discussion of all the issues involved. It should be a process organized by a trusted institution, perhaps with the support of a few individual countries particularly interested in this subject. It should take a holistic view of what needs to be done, drawing on the important work carried out in recent years by established international organizations. It should identify systematically any weaknesses of the current regime and advance concrete proposals on how to deal with them—not only regarding the relationship between governments and investors, but also with a view towards increasing sustainable FDI flows and the benefits of these flows. It would have to be an inclusive process that involved the principal stakeholders to ensure that all issues are put on the table and all key interests are taken into account.

The outcome of such a process could be a draft agreement that could be made available to governments to use as they see fit. In any event, the outcome should be made available widely, to help governments improve the international investment law and policy regime as the enabling framework for increased flows of sustainable FDI for sustainable development.

1. Introduction

As part of the E15 process, a Task Force on Investment Policy composed of leading experts examined the state of the international investment law and policy regime and how it might be enhanced to encourage the flow of sustainable foreign direct investment (FDI) for sustainable development. The regime covers the international investment typically undertaken by multinational enterprises (MNEs—firms that control assets abroad for the purpose of making a profit), primarily through FDI and various forms of non-equity modes of control, including management and supplier contracts, as well as portfolio investment.[1] International investment involves resources—the tangible and intangible assets embodied in investment—that are central to the creation of employment and, more generally, the promotion of economic growth and development.[2] All countries seek to attract these resources.

The Task Force met at a time when issues relating to the international investment regime had been receiving attention far beyond the confines of the group of investment *cognoscenti* within which they have traditionally been discussed, namely a small group of investment negotiators, practitioners, legal counsels of firms, and academics, with the sporadic involvement of non-governmental organizations. To illustrate, public consultations by the European Commission in the context of the Transatlantic Trade and Investment Partnership (TTIP) yielded a great number of replies on investment protection and investor-state dispute-settlement (ISDS), the mechanism at the heart of the investment regime (European Commission 2015b). Newspapers and leading opinion makers dedicated articles to ISDS in mass media outlets, alerting public opinion to issues few outside the small group of investment experts had heard about until then. No less than the President of the United States, Barack Obama, explained in considerable detail what ISDS was all about in a conference call with reporters (Sargent 2015). And the President of Ecuador, Rafael Correa, critically addressed the issue in his 2014 Prebisch Lecture (Correa 2014).

Such growing policy attention is justified. As will be documented briefly below, the international investment regime covers what has become the single most important form of international economic transactions and the most powerful vector of integration among economies: FDI and non-equity forms of control by MNEs over foreign production facilities. These have become more important than trade in delivering goods and services to foreign markets, and they interlock national economies through their production networks: the sales of foreign affiliates alone amounted to US$36 trillion in 2014, compared to world exports that year of US$23 trillion.[3] The presence and commercial links of MNEs across different international markets has led to a substantial and rising share of international trade taking place within global value chains and as intra-company transactions, thus tightly intertwining investment and trade. Furthermore, developing countries have emerged as both major recipients of FDI and major outward investors, through their own MNEs. As a result, FDI and non-equity forms of control integrate not just national markets through trade but also national production systems through investment.

Yet, despite the economic importance of international investment, there is no overarching and unified set of rules governing this subject matter. Instead, the investment regime consists in the main of over 3,000 international investment agreements (IIAs). The great majority of these agreements are bilateral investment treaties (BITs), but virtually all recent bilateral and regional free trade agreements also feature comprehensive investment chapters. Both types of instruments deal primarily with the treatment of international investors by host countries. These agreements, furthermore, are supplemented by contracts between states and individual investors, as well as a number of voluntary, soft law, instruments that address primarily various aspects relating to international investors, such as corporate social responsibility and anti-competitive conduct.

[1] "Foreign direct investment" is formally defined as "an investment involving a long-term relationship and reflecting a lasting interest and control by a resident entity in one economy (foreign direct investor or parent enterprise) in an enterprise resident in an economy other than that of the foreign direct investor (FDI enterprise or affiliate enterprise or foreign affiliate)" (UNCTAD 2015b, 3, Methodological Note). Definitions in international investment agreements are normally broader and include any kind of assets of foreign investors.
[2] For a comprehensive discussion of the role of FDI in development and its various aspects, see UNCTAD's *World Investment Report* series, various years.
[3] The data reported in this paper are from UNCTAD, *WIR2015*, op. cit., or earlier editions of this publication, unless otherwise indicated. The estimated sales number reported here represents a minimum, as it is based on FDI figures. In other words, it does not include sales of other entities that are under the common governance of the parent firms of MNEs, especially through various non-equity forms.

Having the right international investment framework in place is not an objective in itself. In the face of prospects that the world economy may face a decade or more of slow growth, it is unfortunate that world FDI inflows almost halved from a high of some US$2 trillion in 2007 to US$1.2 trillion in 2009 as a result of the financial crisis. Flows need not only to recover, but surpass this earlier record. In 2014, FDI inflows as a percentage of world gross domestic capital formation stood at 6.5%, although it was much higher in a number of developed and developing countries. There is no economic reason why this share could not be double or triple, although the issue is not only more FDI, but more FDI that helps to put the world on a sustainable development path.

The world is awash in capital, and the world's investment needs are tremendous. Mobilizing such investment requires, first of all, that the economic, regulatory and investment-promotion determinants in individual countries are favourable. But the international framework dealing with the relations of governments and international investors needs to be enabling as well: it needs to provide clear rules of the game and a suitable mechanism for resolving disputes between these two main actors, should such disputes arise. And the framework needs to provide international support to help emerging markets become more attractive for international investors.

Given the importance of international investment for economic growth and development, the patchwork nature of the regime governing it and, in particular, the operation of the regime's dispute-settlement mechanism, it is not surprising that public attention focuses on the regime's strengths and weaknesses. In light of this, the E15 Task Force on Investment Policy examined a number of key policy challenges related to the governance of international investment and, in particular, the evolving interaction between international investors and governments, with a view towards identifying policy recommendations. The discussions were future-oriented, looking ahead five to ten years—a daunting challenge in a fast-moving field in which some ideas that would have been cast aside as pipedreams only a few years ago are now on the international policy agenda, such as a world investment court.

In reforming the investment regime, priority needs to be given to special efforts to promote substantially higher flows of sustainable FDI for sustainable development, particularly to developing and least developed countries, within an encouraging and generally accepted international investment framework. The policy recommendations as regards an enhanced investment regime focus on the need to expand the regime's purpose beyond the protection of international investment and the facilitation of efficient investor operations to encompass also the promotion of sustainable development (and allow for the pursuit of other legitimate public policy objectives such as public welfare and human rights) and further to institutionalize the regime's dispute-settlement mechanism, complemented by an Advisory Centre on International Investment Law. Negotiations of a multilateral/plurilateral investment agreement could provide an overall framework for international investment, preceded (or accompanied) by an informal consensus-building process.

2. Background to Rule-Making on International Investment

2.1 The Rise of International Investment: Needs, Determinants and Growth

The world's investment needs are tremendous: to upgrade the physical infrastructure for the 21st century; to build the science, technology and innovation capacity required to advance the frontier of knowledge; to transition to a low-carbon world economy to halt climate change; to meet the Sustainable Development Goals; and, ultimately, to create employment, advance growth and development, and increase prosperity for all. This will require, annually, trillions of dollars of new investment. To illustrate these needs, consider one of the infrastructure-related Sustainable Development Goals, the financing requirements for water infrastructure in the developed countries, Brazil, Russia, India, and China. Over the next 10-15 years alone, such requirements are estimated at US$770-1,040 billion per year, with another US$100 billion needed for all other developing countries, compared to present annual spending of about US$550 billion (Brabeck-Letmanthe 2015).

The public purse will have to finance a considerable share of these investment needs. Official development assistance will also have a role to play, especially in the case of the least developed countries. New and innovative sources of finance have potential. But a substantial share of future investment needs will have to be financed by the private sector, using a variety of equity and non-equity modes. In the great majority of countries, the domestic private sector will by far have to assume the leading role. But international investors can play an important role as well. They can do so by complementing and catalysing domestic investment by deploying a range of tangible and intangible assets, including finance, technology, skills, and access to markets. Increasing and maximizing the contribution that international investment can make, be it through equity participation, non-equity relationships or the creation of locally grounded global value chains, requires that the investment determinants are right.[4]

Among these determinants (that is, the conditions on the basis of which firms decide where to invest), the economic ones are crucial, as they determine to a large extent the attractiveness of a particular location and the ability of investors (be they domestic or foreign) to be productive and contribute to the growth and development of the economies in which they are located, while also being profitable. Particularly important among these economic determinants are the size and growth of markets, the quality of the physical and technology infrastructure, and the availability of skilled human resources. While the economic determinants are not everything, everything is nothing if the economic determinants are not favourable. Across the world, considerable progress has been made in recent years in strengthening the economic determinants of investment.

Another important determinant is the FDI regulatory framework, including the institutional/legal infrastructure, which has to be enabling, while allowing host countries to maximize the benefits of FDI. There, too, considerable improvements have been made over the past two decades, though more can be done, benefitting both domestic and foreign investors.

Finally, as the FDI regulatory framework has become comparable across countries, investment promotion assumes increasing importance in influencing the locational choices of investors. Today, virtually every country has an investment promotion agency, and many have such agencies also at the sub-national level. However, their effectiveness in terms of attracting FDI and benefitting from it differs greatly, putting those countries with weak agencies at a disadvantage in the highly competitive world FDI market.

International investors have responded to the improvement of the investment determinants. From an annual average of US$50 billion during the first half of the 1980s, FDI inflows reached (after having declined in light of the financial crisis) US$1.2 trillion in 2014, for an aggregate FDI stock of US$26 trillion. More than 100,000 MNEs control at least one million foreign affiliates. Some 70,000 of these MNEs are headquartered in the member countries of the OECD, while some 30,000 hail from non-OECD economies. Regardless of whether MNEs are rooted in OECD or non-OECD countries, they have invested in virtually all sectors and throughout the world. The services sector alone accounts for nearly two-thirds of the world's investment flows and stock, and natural resources for almost one-tenth. Traditionally, the OECD countries attracted most FDI flows, but now non-OECD economies attract more than half of these flows (US$729 billion in 2014). Much FDI takes the form of mergers and acquisitions (M&As), regardless of whether parent firms are headquartered in OECD or non-OECD markets. While the biggest MNEs

[4] The focus is here narrowly on FDI determinants. Naturally, the business climate in general, and in particular the quality of institutions in host countries, is of key importance as well, not only for foreign investors but especially also for domestic investors.

control the lion's share of the world's FDI stock, most MNEs are small or medium-size enterprises. These often have limited capabilities to access finance and information about investment opportunities, staff international operations and deal with difficulties in host countries when these arise.

Among the most striking features of the global investment landscape over the past decade has been the rise of non-OECD economies as outward investors. Firms headquartered in these economies accounted for US$531 billion of world FDI outflows in 2014, some two-fifths of the world total that year. This is more than ten times the world's FDI flows during the first half of the 1980s. Firms headquartered in 138 non-OECD economies on which data were available had an accumulated stock of outward FDI in 2013, and 75 of these economies reported FDI outflows for every year during the period 2009-2013. At the same time, though—and as in the case of the developed countries—a limited number of economies account for the bulk of these outflows. Emerging market MNEs have become important players in the world FDI market, although, if economic conditions deteriorate in their home countries, this role may be affected negatively.

2.2. The Emergence of an Integrated International Production System and the Interrelationship Between Investment and Trade

Another salient feature of the past two decades is that MNEs increasingly locate specific activities wherever it is best for them to increase their efficiency as wealth-creators, while of course fostering their profitability. This concerns not only the production of "nuts and bolts," so to speak, but also increasingly various components of service activities and, indeed, various headquarter functions. The digital revolution is driving this development (Eden 2015). This evolution in corporate strategies and structures involves tight interactions between investment and trade, leads to a deep integration of national economies, and raises a number of policy issues.

Firms are moving towards an international intra-firm division of labour and distribution of functions and competences by building corporate networks of foreign and domestic affiliates that specialize in the production of various parts and components that, eventually, are assembled in any location in the world best suited for this purpose. Moreover, firms that are not tied to particular parent firms through ownership arrangements are becoming part of the production networks of these firms through various non-equity arrangements—which makes such contractual arrangements important assets of international investors. The resulting value chains are often regionally centred, especially in Asia (although they are typically referred to as "global" value chains). Within these networks, "the main value contributed by the MNC is not physical investments, but rather knowledge, organization for an efficient flow of information, trust, etc." (Oberhänsli 2015, 2). More generally, while parent firms remain the ultimate decision-makers in value chains, the role of headquarters increasingly becomes that of deciding where various production activities should take place, organizing a highly complex network, providing key tangible and intangible assets (for example, finance, brand names, research and development), orchestrating information and knowledge flows within the network, and ensuring that profits are maximized globally for the enterprise as a whole. The efficiency of these arrangements, part of the emerging digital economy, becomes an important source of wealth-creation that, if policies are right, can benefit host and home countries, including consumers worldwide.

At the same time, the emergence of such complex networks coordinated by headquarters makes it difficult at times to identify the boundaries of a particular firm, assigning origin for purposes of determining eligibility for preferential treatment or to determine liability in case of, for instance, gross negligence. It also means that the distinction between host and home countries is losing its sharpness. This, in turn, has implications, for example, for questions related to taxation, for where to put legal titles for patents and trademarks, and for determining corporate nationality (important, among other things, for the question of standing in international investment disputes and for determining accountability in cases of human rights violations for instance).

But there are also challenges for firms. For example, when an MNE acquires another MNE, the acquisition may have to go through a merger review in a number of countries, each with its own criteria and time frames, potentially seriously delaying an intended acquisition (Gestrin and Novik 2015). Thus, "in the absence of cooperation and consistent enforcement, international investors are faced with heightened uncertainty over their investment plans" (Gestrin and Novik 2015, 6). Greater coordination among competition authorities will become increasingly necessary. More generally, integrated international production systems require "[r]educing government barriers to complex integration;" in other words, a "key focus must be the need to reduce the costs of firms and households engaging in cross-border transactions. As natural market imperfections continue to fall in the digital economy (frictionless, virtual trade), the barriers to trade and FDI flows generated by government policies become more visible and important" (Eden 2015, 13).

The emergence of an integrated international production system defined by global value chains puts to rest the old question of whether FDI leads to trade or trade leads to FDI. Rather, the question becomes: where do firms locate their production facilities, be it for manufacturing or services? If the location is at home, it is domestic investment; if the location is abroad, it is foreign direct investment. As production becomes more dispersed, the locational outcome may involve multiple facilities, and the resulting transactions may comprise domestic sales, sales by affiliates overseas and the intermediate trade of products, parts and components within corporate networks. Foreign direct investment and trade are necessary complements for integrated international production.

The intertwining of investment and trade has policy implications (Hufbauer and Moran 2015). This was recognized in the WTO Agreement (within the Uruguay Round package) on Trade-Related Investment Measures (TRIMs), which addresses restrictive and distorting effects that certain investment measures may have for trade in

goods; additional measures, which may also be targeted at services, are prohibited in other IIAs, especially bilateral investment treaties. On the other hand, a number of "investment-related trade measures" can distort cross-border investment flows. Particularly important here are rules of origin and tariff escalation. Unlike trade-related investment measures, the latter have received little attention in multilateral disciplines.

The integration of trade and investment activities also raises challenging dispute-settlement issues, given that the existing international law regimes for resolving trade and investment disputes are based on different models. International trade disputes are resolved on a state-to-state basis, with no direct right of access to relief for companies, while international investors typically possess such a direct right of access to resolve international investment differences under investor-state dispute-settlement procedures. With increasing frequency, companies are pursuing relief within the investment dispute-settlement system for what could be characterized as trade activities, such as transactions involving the international sale of goods or cross-border services.[5] Pursuing such relief based on the integrated nature of a company's trade and investment activities can raise difficult issues of standing, for example, when a claim is brought by a company in its capacity as an investor, or, alternatively, in its capacity as an exporter or cross-border services provider. Integrated trade and investment activities can further raise challenging damages issues in investment disputes, for instance, when damages arising from a decrease in the sales of goods or cross-border services are recoverable under investment treaties if they "relate to" an investment in the host country. If left unaddressed, such uncertainties arising from the integration of trade and investment activities could ultimately expose host country governments to greater levels of risk under investment treaties.[6]

2.3. Investment Rule-Making in the Context of Various Tensions

As mentioned earlier, FDI flows would have to rise considerably to help meet the world's investment needs and thus make a substantial contribution to global economic growth and sustainable development. This requires a further enhancement of the economic determinants, as well as of the regulatory framework and investment promotion. Given the focus of the work of the E15 Task Force on Investment Policy, the subsequent discussion will focus on the international regulatory framework for international investment. The international investment law and policy regime increasingly sets the parameters, and provides the legal yardstick, for national policy-making on investment. Trends in national FDI laws and regulations, in turn, are important because they foreshadow the orientation of international investment rules, as governments seek to promote and protect their national policy objectives in this area. Together, the national and international frameworks regulate what international investors can and cannot do, and they determine, to an important extent, the distribution of benefits between international investors and host countries.

International and national rule-making on international investment takes place against the backdrop of distinct sets of tensions that governments need to reconcile when seeking to attract FDI and benefit from it as much as possible, even if some of these tensions do not necessarily involve objectives that are opposite to each other. Such tensions can include: the global corporate interests of MNEs vs. the national development interests of countries; foreign vs. domestic ownership, especially in sensitive industries; policies to attract FDI vs. policies to maximize the domestic benefits and minimize any negative effects of such investment; a country's interests as host vs. home country for investment; and, the constraints of the emerging integrated international production system, a globalizing world economy and international investment law vs. the need to preserve policy space in pursuit of legitimate public policy objectives.

To illustrate two of these tensions: MNEs evaluate the benefit of their FDI projects in relation to maximizing their own competitiveness and profitability within the framework of their global corporate networks, while governments seek to maximize the benefits of the same projects within their own territorial boundaries—for them, FDI is but a tool to advance their countries' economic growth and development. Or, as host countries, governments seek to maintain policy space to pursue their own legitimate public policy objectives, while, as home countries, governments seek to protect the investment of their own firms abroad and facilitate their operations by limiting the policy space of host countries.

The above tensions create dilemmas for policy-makers, who typically need to consider various (often conflicting) objectives in the context of contradictory pressures from various stakeholder interests. Among stakeholders, non-governmental organizations have become vocal and important actors at the national and international levels, and their views need to be taken into account.

These dilemmas and pressures impose limitations on the formulation of national laws and regulations and affect the terms of entering into IIAs (IIAs also include certain WTO agreements, notably the General Agreement on Trade in Services (GATS) and the TRIMs Agreement).[7] In view of the underlying tensions in the relationship between foreign investors and host countries outlined above, the task of policy-makers is to maximize the positive effects of FDI (and, for that matter, investment in general) in their countries and minimize any negative ones. Hence, national policies regarding FDI, and the international regulatory framework within which national policies are formulated, are of key importance for host countries to attract FDI and benefit from it.

[5] For a discussion of several NAFTA cases involving the intersection of trade and investment, see Feldman (2014).
[6] One way to address this issue may be by examining whether a claimant has undertaken a transaction in its capacity as investor. See ibid. for a discussion.
[7] Roughly two-thirds of FDI consists of services FDI; the "commercial presence" provisions of the GATS are therefore of immediate relevance for the lion's share of FDI.

2.4. National Rule-Making on International Investment

The national regulatory framework for FDI defines whether and under what conditions foreign investors can enter a host country, operate in it and exit it. It is therefore of central importance to both host countries seeking to attract FDI and benefit from it, and to MNEs seeking to establish a portfolio of locational assets that serves their international competitiveness best. At the same time, the broader national regulatory framework, as well as the business climate in general, is also of key importance to domestic investors: typically, what is good for foreign investors is also good for domestic investors.

Over time, national FDI frameworks have changed considerably, inspired often by policy benchmarking (Oberhänsli 2015). After not being welcoming towards foreign investors during the 1960s, 1970s and early 1980s[8] (a policy stance frequently enforced through national screening agencies), host country policies turned decisively welcoming during the 1990s.[9] During that decade, some 95% of national FDI policy changes that UNCTAD recorded worldwide went in the direction of making the investment climate more hospitable for foreign investors. Governments liberalized economic sectors to FDI, removed caps on investments or raised ownership ceilings for such investment. They generally facilitated the operations of MNEs and their foreign affiliates in host countries by, among other measures, relaxing performance and approval requirements and simplifying business registration procedures. They marketed their countries to investors. They offered incentives to attract FDI, with locational competition unleashing fiscal wars at the sub-national level in some countries. They assisted incoming investors in various ways, including by offering information, coordinating investor visits and providing after-investment services. They liberalized the repatriation of earnings and other capital. And they codified various protections in national regulations, laws or even constitutions. In the 1990s, countries also began to establish investment promotion agencies whose specific aim was (and remains) to attract as much FDI as possible. Red carpet had replaced red tape.

Since the turn of this century, however, national approaches towards incoming FDI have become more nuanced and guarded, primarily in OECD countries. This is so even as the majority of policy changes continue to go in the direction of making the investment climate more welcoming, in particular in non-OECD economies. However, the number of regulatory changes that do the opposite has risen considerably since 2000, reaching between 20-30% of total national investment policy changes during the past few years,[10] often to correct market failures and address negative externalities, and in line with a broader trend towards regulatory precaution. Many of the latter measures are directed at entry conditions for foreign investors, particularly in natural resources (including agriculture) and the services sector. A number of host country governments also have come to treat some M&As differently from greenfield investments. While the latter are universally welcome (creating, as they do, additional production capacity), M&As are at times regarded with suspicion. This is especially the case when M&As raise competition concerns, take place in politically sensitive industries, are undertaken by state-controlled entities and, in particular, are seen as posing a threat to national security (however defined, and including national economic security). This can be seen in the strengthening of the investment-review mechanisms in such countries as Australia, Canada, China, Germany, and the United States.

The challenge for national FDI policy-makers is to find the right balance among instituting policies to attract FDI and seeking to increase its benefits to their economies, on the one hand, and regulating FDI inflows in pursuit of legitimate national public policy objectives, on the other, without compromising the investment climate and deterring foreign investors. Achieving this balance is made more difficult by pressures from various constituencies, including constituencies that may favour policies that could lead to more FDI protectionism, and because national policy objectives can change over time. National FDI policy-making is, thus, a dynamic process.

2.5. International Rule-Making on International Investment

Alongside efforts to make the national investment climate more hospitable, governments have concluded IIAs (mostly BITs) at a rapid pace. The number of BITs exploded from 371 at the end of the 1980s to 2,926 at the end of 2014, to which 345 other IIAs (especially free trade agreements with investment chapters) need to be added, to arrive at a universe of about 3,300 IIAs (UNCTAD 2015b, 106). The principal purpose of these treaties was—and remains—to protect the assets of investors abroad and, more recently, facilitate[11] the operations of these investors in host countries, seeking to induce in this manner additional investment flows and the benefits associated with them.[12] Accordingly, IIAs have traditionally been primarily concerned—particularly from the perspective of capital exporting countries—with constraining the ability of host countries to take discriminatory action against investors, and to avoid perceived national court biases in the event of disputes.

[8] It was during that time that the United Nations Code of Conduct on Transnational Corporations was negotiated (Sauvant 2015). Later on, too, attitudes in selected countries were critical of incoming investment from some countries, for instance during the 1980s, when Japanese FDI was on the rise in the United States.
[9] For a discussion of the reasons for this change, see, ibid.
[10] See, UNCTAD, *World Investment Report*, various years.
[11] For discussion of the expanding role of investment liberalization in recent treaty practice, see Feldman et al. (2015).
[12] This is also reflected in the titles of BITs ("Agreement for the promotion and reciprocal protection of foreign investment between _____ and _____").

In line with the principal purpose of IIAs, key treaty concepts and the protections enshrined in them were traditionally very broad. To begin with, "investors" were generally defined as any individuals and legal persons having assets abroad. "Assets", in turn and as a rule, refer (in an open-ended manner) to any kind of assets,[13] including portfolio investment, intellectual property rights and certain contractual arrangements (important to MNEs that control global value chains). Similarly, key protection standards to be observed by host countries, such as fair and equitable treatment (which has become the basis of many investor claims) and indirect expropriation, were typically not defined precisely. Protection, furthermore, can be expanded through most-favoured-nation (MFN) commitments, umbrella clauses and the possibility of treaty shopping. At the same time, IIAs did not traditionally impose obligations neither on foreign investors nor, as a rule, on home country governments. And they rarely pay hard law (that is, enforceable) attention to other public policy objectives, such as sustainable development, human rights and the environment.

Matters are further complicated because the international investment regime consists of a multiplicity of legal sources and instruments. These include the multitude of IIAs, customary international law, the decisions of arbitral tribunals, state-investor contracts, various voluntary governmental, intergovernmental and non-governmental guidelines, as well as mixed voluntary/mandatory instruments.[14] Moreover, national law has a role to play as well. While there are many substantive similarities among (especially) IIAs, these instruments do not add up to a coherent whole. As a result, the regime governing international investment is highly fragmented, difficult to describe, hard to navigate, and exhibits instances of inconsistent lawmaking[15] and law-application.[16] Moreover, it is in constant flux. Its fragmented institutional infrastructure further exacerbates these challenges, although there are also elements of coherence (see e.g. Schill and Jacob 2013).

Finally, a crucial characteristic of the investment regime, noted above, is that investors enjoy a private right to action when seeking redress under the ISDS mechanism enshrined in the majority of IIAs, that is, they can initiate arbitration proceedings against the authorities of a host country without having to go through any government. From the perspective of international investors, this is a strong and positive, often essential, feature of the investment regime, because governments do at times infringe on treaty obligations and investors can therefore have real and legitimate grievances about the behaviour of host country governments. In such cases, ISDS makes investors independent of their home country governments when they wish to bring a claim (unlike in the WTO). It also, significantly, makes investors independent of the judicial systems of host countries, a number of which investors may not trust fully or prefer not to use for various reasons (for example, the lack of an independent judiciary).

For host countries, however, the ISDS mechanism can potentially entail considerable risks (although it moves, at least in principle, the resolution of disputes from power-based settings to a rules-based mechanism). These begin with the fact that, while aggrieved investors have a choice between seeking remedy either under the domestic law of a host country or the applicable IIA (or both), host countries do not enjoy such a choice, as only investors can initiate the ISDS mechanism when disputes between investors and host countries arise.[17] And such disputes are inevitable, considering the growth of inward FDI (now amounting to a stock of US$26 trillion); the number of international investors; the number of their foreign affiliates and the number of investors in such affiliates (all of which, depending on the applicable IIA, may have a right to initiate arbitration proceedings); the intrusiveness of FDI, involving, as it does, a wide range of interactions relating to the production process over the entire life-cycle of a project; and the various tensions within which national policy making in this area proceeds. Add to that the rising number of IIAs; their proclivity towards broad definitions of the terms "investors" and "investments"; the broad formulation of investors' protections contained in these agreements; and the fact that violations of investor rights can take place by different branches of governments and at any administrative level (that is, not only the national level), increasing in this manner the possibilities of actions that can give rise to disagreements. The potential for conflicts of all kinds between host countries and MNEs and their foreign affiliates is therefore considerable.

Not surprisingly, the number of treaty-based investment disputes—many of them based on legitimate claims, many not—has risen markedly over the past decade, although the total remains small in light of the potential for disputes discussed earlier. Their cumulative number had reached 608 known treaty-based cases at the end of 2014, involving the governments of 99 countries from across the world (UNCTAD 2015b, 112).[18] Between 2003 and 2014, the number of new cases roughly averaged 40 a year, implying that the ratio of the number of cases to the stock of FDI has

[13] However, some IIAs place limitations on the kinds of assets that fall within the scope of treaty protections.
[14] For an example of a mixed instrument, see the ILO (2006) Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy.
[15] For instance, the manner in which fair and equitable treatment is formulated in some IIAs, that is, with or without reference to customary international law.
[16] For instance, how the MFN clause has been interpreted by tribunals to extend (or not) to procedural matters.
[17] Host country governments can however bring counter claims against treaty claims under IIAs, although they have so far not been successful in this respect. Arguably, in many cases a host country government may not need to have access to international arbitration to achieve a certain goal, as it can exercise its sovereign powers and require investors to take required action.
[18] To be sure, FDI flows have also grown considerably since the end of the 1990s, when the number of treaty-based investment disputes became considerably higher. By that time (say, 1999), the world's FDI stock stood at nearly US$5 trillion, with few treaty-based investment disputes recorded. Moreover, after reaching a peak of about US$2 trillion in 2007, world FDI flows fell to US$1.1 trillion and still have not recovered, while the number of disputes remained roughly at the same level. This may suggest that there is no direct relationship between the size of FDI stocks/flows and the number of disputes; rather, other factors are at work, such as the propensity of investors to utilize the dispute-settlement mechanism.

become relatively smaller (since that stock grew substantially during this period). Moreover, only a small minority of IIAs has so far been the basis of disputes, although some treaties have been the basis of more than one dispute. However, as disputes are resolved in favour of investors (although many are not[19] and a substantial number are settled), more claims might well be brought in the future, especially if third-party financing becomes more widely available.[20] On the other hand, as disputes are resolved against investors and filters are established to deal, for instance, with frivolous claims, the number of disputes might well decline. In any event, awards against responding host countries can be high, as can be the costs of arbitration, averaging around US$10 million.[21]

As a result, no aspect of the international investment regime is more in the public's eye than the regime's arbitration dispute-settlement mechanism. Recurrent concerns include "inconsistencies in [arbitral] decision-making, insufficient regard by some arbitral tribunals to the host State's right to regulate in interpreting IIAs, charges of bias of the system in favour of foreign investors, concerns about the lack of independence and impartiality of arbitrators, limited mechanism to control arbitral tribunals and to ensure correctness of their decisions, and increasing costs for the resolution of investment disputes" (Schill 2015, 1). Some of these concerns may well be overstated, some are more troubling than others, and a number do not reflect a consensus view. Moreover, several of these concerns have been addressed in more recent IIAs. Yet all of them bear, rightly or wrongly, on the perceived legitimacy of the ISDS process and, thus, on that of the international investment regime itself.

A key challenge, therefore, is to prevent disputes from arising at the national level and, when they do, to resolve them at that level—and hence avoid escalation into international arbitral disputes. But even if this can be accomplished, it does not negate the need to address various weaknesses of the ISDS mechanism, or the need to improve the international investment law and policy regime in other ways. The objective should be to have a regime that is characterized by the rule of law, is aimed at the proper purpose, is considered legitimate by key stakeholders, provides for the stability and predictability[22] that investors and host country governments require, and thus helps meet the world's investment and sustainable development needs in the decades ahead.[23]

[19] And, in many cases, the awards were far below the damages sought.
[20] Third-party funding is typically not available to respondents (that is, states), as financial awards are granted only to claimants.
[21] According to Hodgson (2015, 749): "The average Party Costs for Claimants and Respondents are in the region of U.S. $ 4.4 million and U.S. $ 4.5 million respectively. To this can be added average Tribunal Costs of around U.S. $ 750.000. The average 'all in' costs of an investment treaty arbitration are therefore just short of U.S. $ 10 million. The median figure is notably lower, but still substantial, at around U.S $ 6 million."
[22] "Stability and predictability" are not used here to mean that the law applying to foreign investors should never change over the life of an investment -- and no investor should expect that. Rather, this term is used here in the sense that changes in laws should not be arbitrary and constant, that they should be transparent, and done in accordance with the rule of law for making changes in the law.
[23] In addition, the regime could also make a contribution to other global objectives, such as environmental protection and respect for human rights—or at least it could help to make sure that FDI is not inconsistent with such objectives.

3. Policy Options: Sustainable FDI for Sustainable Development

The international investment law and policy regime, in its current form, is a relatively young construct.[24] It has evolved, and continues to do so, in response to experience, pressures and changing interests.[25] And it has shown its impact through its investor-state dispute-settlement mechanism. Not surprisingly, the regime's strengths and shortcomings are the object of a far-reaching and, at times, passionate debate among a wide range of stakeholders. Positions range from support for the status quo on the one hand and calls for the abolition of the regime on the other, with many focussing on the need for reform—and all positions were voiced in the E15 Task Force. As to the reform approach, UNCTAD's World Investment Report 2015 has most recently developed a comprehensive action menu for IIA reform, both in terms of substance and process. More specifically, that organization identified five main challenges and outlined options to address them: safeguarding the right to regulate for pursuing sustainable development objectives; reforming investment dispute settlement; promoting and facilitating investment; ensuring responsible business conduct; and enhancing systemic consistency (UNCTAD 2015b).

To a certain extent, some of the regime's perceived weaknesses are a legacy issue. The regime was framed at a time of significant power asymmetries between capital exporting and capital importing countries, and long involved overwhelmingly unidirectional (that is, North-South) FDI flows. Today, however, it 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 yearning 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.

A reformist agenda includes many issues, some more specific, and some broader in nature. Issues mentioned in the Task Force by one member or another included: the role and nature of contractual arrangements between international investors and host countries and dispute-settlement issues relating to them; alternative dispute-resolution procedures; providing a greater role for governments in the interpretation of the treaties signed by them (including during on-going arbitrations); the need to diversify the pool of arbitrators; conflict of interests for arbitrators; consolidation of claims; clarification of which entities in a global supply chain can bring a claim against a host country;[26] the contribution of high-standard investment agreements to equitable economic growth and sustainable development; the liberalization of entry conditions for foreign investors; the liabilities of international investors, especially in cases of egregious failings; treaty shopping; the scope of damages; the range of investors that can bring claims; the role of home country governments; and, clarification of corporate nationality.

Other issues could easily be added, and a number of them are mentioned below. A basic one concerns improved statistics on international investment. These have always been difficult to interpret, given that countries do not necessarily follow the reporting guidelines provided by the IMF, UNCTAD and the OECD. More recently, moreover, the rise of "special purpose entities" has become a major issue, as these entities primarily serve the purpose of managing the liquid assets of MNEs by channelling investment flows from one country to another; in other words, these flows

[24] Although the International Centre for Settlement of Investment Disputes (ICSID) had already been established in 1966, and the first BIT had been concluded in 1959.
[25] For an overview of the history and components of international investment law and how it operates as a complex adaptive system, see Pauwelyn (2014).
[26] A host country can bring a claim in its national courts only against the entity located in its territory.

do not reflect productive investment in the reporting host countries. In principle, such entities can be located in any country. Moreover, firms from a number of countries (including Brazil, China, Russia) channel a substantial share of their FDI flows through tax havens or financial centres, making it difficult (if not impossible) to determine the final location and sector of such flows. Finally, "round-tripping" continues to present a statistical problem.[27] Auspiciously, UNCTAD and the OECD have begun to receive data from countries that host special purpose entities (for example, Luxembourg, Hungary, the Netherlands), as well as from tax havens (especially in the Caribbean), and to correct and report the data accordingly. But this correction does not yet cover all countries, and important distortions remain. These institutions have therefore recommended that all countries report data with and without special-purpose-entity transactions.

A basic policy recommendation is thus to encourage countries to follow these reporting guidelines. It would be equally desirable if all countries reported inward FDI flows on the basis of the location of the ultimate parent firms. Implementing these recommendations—if need be with the help of technical assistance programmes undertaken by international organizations—would correct major distortions in international investment statistics. As a result, it would be easier to evaluate the all-important impact of FDI on sustainable development and hence provide a more solid basis for informed policy-making.[28]

The text that follows does not elaborate on the above-mentioned issues, even though they all would merit a full discussion. Moreover, the text does not deal (with a few exceptions, namely where there is a direct link to the international level) with *national* policies and efforts to attract international investment and benefit from it, as the Task Force met within an E15 project on "Strengthening the *global trade and investment system* for sustainable development." As described in section 2 above, national policies are very important, of course, as the principal FDI determinants for the locational decisions of investors are found at the national level (World Economic Forum 2013). Rather, the text focuses on a limited number of topics that have *systemic* implications. They are discussed without going into technical details, with a view towards suggesting ways of enhancing the international investment regime to increase the flow of sustainable FDI for sustainable development—always keeping in mind that the international regulatory framework for investment (once enabling) is, as a rule, not the key determinant for the locational decisions of investors.[29]

The analysis that follows begins with a discussion of principles and rules, namely the purpose and contents of the international investment law and policy regime, as reflected in IIAs (section 3.1), and the facilitation of sustainable FDI flows (section 3.2). A clear purpose and clear substantive and procedural provisions are needed to reduce the likelihood of conflicts between the principal actors, specifically governments and international investors. But since conflicts can occur in any relationship, the manner in which conflicts can be prevented, managed and resolved is crucial. Accordingly, the text continues with two institutional arrangements that deserve further consideration, namely the dispute-settlement mechanism and the establishment of an Advisory Centre on International Investment Law (sections 3.3 and 3.4). So far, issues relating to objectives, contents and dispute settlement have been dealt with in individual IIAs, and improvements too can be made in each area separately. The question arises, however, whether a global phenomenon—international investment—requires a global approach, namely a multilateral/plurilateral framework on investment, a question addressed next (section 3.5). The report ends with a discussion of procedural issues, namely regarding consensus-building towards improving the international investment law and policy regime. Suggestions for action are made at the end of each section.

All these topics are discussed separately for analytical reasons, but they are closely interrelated. For example, for some, support and acceptance of an (improved) dispute-settlement mechanism depends, to a large extent, on the purpose of the regime and the rules established by it. More importantly, these topics are all central to improving the international investment regime, fostering trust in it and, ultimately, furthering its legitimacy. However, since this report was prepared under the responsibility of the Theme Leader, it needs to be reiterated that it does not reflect a consensus view among Task Force members; in fact, views within the Task Force on a number of issues discussed below varied widely.

3.1. Updating the Purpose and Contents of IIAs

It is encouraging that the investment regime already offers telling signs of adaptive change, moving in the direction of an expanded purpose and updated substantive and procedural provisions of IIAs, even if this process proceeds at a pace that many would like to see accelerated. Moreover, national IIA practice varies widely: a number of countries have, over the past 15 years, significantly reformed their IIA practices and model texts, while other major countries still employ texts virtually unchanged from years ago. At the same time, many IIAs are now at a stage where they could be terminated or renegotiated, and this may create opportunities for improvements. In any event, reform has to be balanced with the need to maintain the predictability of the regime as a protection device. It must also build on those elements of the regime that have been shown to work.

[27] For a discussion, see OECD (2015). "Round-tripping" refers to a situation in which a firm in country A establishes a foreign affiliate in country B that, in turn, subsequently invests in country A.

[28] Note that these corrections would lead to more accurate FDI statistics on the basis of the traditional balance-of-payments approach to such statistics. However, these corrections do not capture other important aspects relating to the measurement of FDI. For example, the statistics do not capture investment made on the basis of MNEs raising funds in the financial markets of host countries or in international financial markets outside their home countries. They also do not capture non-equity forms of control utilized by firms in regard to enterprises located abroad. Hence, FDI data substantially underestimates the share of production under the common governance of MNEs. To address these issues, governments should support initiatives that would enhance economic statistics by better capturing foreign investment and ownership.

[29] Moreover, it needs to be recognized that what are major concerns for one group of stakeholders do not necessarily rank as highly for other stakeholders.

3.1.1. Updating the purpose

3.1.1.1. The need for updating

Any discussion of strengthening the international investment regime needs to begin with the very purpose of the regime (see in this context, Ortino 2015). 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 the operations of investors, seeking in this manner to encourage additional FDI flows and the benefits associated with them. Arbitrators, in turn, tend to interpret these agreements accordingly.

The question is whether this relatively narrow focus can—and, for that matter, should—be maintained. The rising chorus of criticism levelled at the regime shows that reform is needed; as do the facts that a number of governments are pulling out of the regime (while others are strengthening it through the conclusion of new IIAs) or are otherwise reviewing their approach to IIAs. In particular, the quest of governments to pursue legitimate public policy objectives being perceived as transgressing on investor rights highlights that a broadening of the regime's purpose is required.[30] The same applies to the continuing call that foreign investors, like their domestic counterparts, also have responsibilities. Unless the regime can be made more holistic, achieves a better overall balance and reflects the interests of all principal stakeholders, it risks losing legitimacy.

Expanding the regime's purpose means that IIAs, apart from protecting international investment and facilitating the efficient operation of international investors, also recognize the need to promote sustainable development[31] and FDI flows that support this objective: there is little doubt that the quest for sustainable development will remain the dominant challenge on the international economic agenda in the years ahead. Additional objectives include the protection of public welfare and human rights, including public health, labour standards, safety, and the environment. In fact, especially countries with weak institutions may require dedicated international support, including through IIAs, in pursuing some of these objectives, a situation further accentuated by the international competition for investment.[32]

Promoting such an expanded purpose of the regime, in turn, necessitates that host and home country governments preserve a certain amount of policy space that gives them the right to regulate in the interest of legitimate public policy objectives, a right that needs to be acknowledged in a dedicated provision in IIAs. It also means that investors commit themselves to responsible business conduct. In turn, the substantive and procedural provisions of IIAs need to reflect this broadened purpose.

3.1.1.2. Progress in updating the purpose

Encouragingly, the preambles of IIAs increasingly recognize objectives other than investment protection and, through it, the promotion of FDI flows. They also reaffirm the sovereign right to regulate. Governments are furthermore beginning to recognize the importance of sustainable FDI, that is, commercially viable investment that makes a maximum contribution to the economic, social and environmental development of host countries and takes place in the context of fair governance mechanisms, as concretized by host countries and reflected for instance in the incentives they may offer—*sustainable* FDI for *sustainable* development.

The challenge remains of course—and it is a difficult challenge—to define sustainability characteristics of international (and domestic) investments: the more precision can be brought to the vague concept "sustainable FDI" the better.

A working group could be established to prepare, in a multi-stakeholder process, an indicative list of FDI sustainability characteristics that could be considered by interested governments seeking to attract sustainable FDI (including, for example, CO_2-neutral foreign affiliates). The identification of such characteristics would also be helpful for governments seeking to encourage sustainable domestic investment.[33] A definition of "sustainable FDI" is also increasingly required for the resolution of investor-state disputes, as arbitral tribunals take the development impact of investments into account—as they should—when considering claims before them and, for that purpose, need criteria to evaluate such impacts. The same applies to the drafting and interpretation of IIAs, as a growing number of them make reference to "sustainable development" (Gordon et al. 2014). Norway's 2015 model BIT, in fact, speaks specifically about "sustainable investments" when it declares in its preamble: "Recognising that the promotion of sustainable investments is critical for the further development of national and global economies as well as for the pursuit of national and global objectives for sustainable development…"[34] And the preamble of India's 2015 model BIT seeks to "align the objectives of Investment with sustainable development and inclusive growth of the Parties."[35]

[30] Such broadening beyond protection has already taken place when a number of IIAs moved beyond protection and towards liberalization, most notably by including pre-establishment national treatment.
[31] "Sustainable development" is understood as "development that meets the needs of the present without compromising the ability of future generations to meet their own needs" (UN 1987, 43). For a most recent articulation, see the Sustainable Development Goals, as agreed, on 1 August 2015, by all governments for adoption by the United Nations General Assembly during its 25-27 September 2015 session (UNGA 2015).
[32] In the longer run, both of these concerns could be addressed through, respectively, the strengthening of domestic institutions and a multilateral agreement on investment incentives. It should be noted that one reason advanced for including ISDS in IIAs is precisely the weakness of domestic institutions.
[33] UNCTAD's Investment Policy Framework for Sustainable Development, the ILO Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy, the Human Rights Council's Guiding Principles on Business and Human Rights, the United Nations Global Compact, and the OECD Guidelines for Multinational Enterprises could provide inspiration in this regard.
[34] "Agreement between the Kingdom of Norway and … for the promotion and protection of investments", draft version 13 May 2015. The Joint Committee foreseen in that draft has, among its responsibilities (Art. 23): "where relevant, discuss issues related to corporate social responsibility, the preservation of the environment, public health and safety, the goal of sustainable development, anticorruption, employment and human rights." See also the recent Brazil-Mozambique bilateral investment treaty, which provides in its preamble: "Acknowledging the essential role of investment in the promotion of sustainable development, economic growth, poverty reduction, job creation, expansion or productive capacity and human development" and proceeds to say, in Article 10, entitled "Corporate Social Responsibility": "The investors and investments shall strive to carry out the highest level possible of contributions to the sustainable development of the host State and the local community, by means of the adoption of a high degree of socially responsible practices, taking as a reference the voluntary principles and standards defined in Annex II—'Corporate Social Responsibility'." The Annex then spells out in some detail these principles and standards.
[35] India 2015 Model BIT.

The working group could also identify what mechanisms could be used, at both the national and international levels, to encourage the flow of sustainable investment, that is, mechanisms that go beyond those used to attract FDI in general and benefit from it. At the national level, special incentives could be one of the tools used by governments for this purpose. At the international level, the working group could examine, among other things, what can be learned from various instruments established in the context of the United Nations Framework Convention on Climate Change, such as the Clean Development Mechanism, the Technology Mechanism and the Clean Technology Fund. With the adoption of the Sustainable Development Goals by the international community, this matter has acquired additional urgency.

3.1.2. Updating substantive and procedural provisions

3.1.2.1. Clarifying key concepts

As discussed earlier, IIAs contain concepts that are not always defined precisely. Reference has just been made to "policy space" and "right to regulate." These are elastic and sometimes politicized concepts. Care needs to be taken that the legal consequences and limits of these concepts are understood so that they are not interpreted as a *carte blanche* for governments to disregard international commitments such as non-discrimination.

Similarly, care needs to be taken that other key concepts and protections contained in IIAs are not interpreted too broadly.[36] If these agreements contain language that refers to general principles and rules that are open-ended, imprecise and leave excessive scope for interpretation, it may become difficult for international investors to ascertain what treatment they can expect from host countries, and for host country governments to know what they can or cannot do. Uncertainty, in turn, can increase the probability of disputes. Legal certainty—clarity of the law—should be maximized, even if the quest for eliminating all room for interpretation is obviously futile. But the less room there is for unwarranted interpretations, the better.

Accordingly, an important aspect of improving the investment regime concerns clarifying the key concepts found in IIAs, including their substantive protections (especially national treatment, fair and equitable treatment, most-favoured-nation treatment, full protection and security, expropriation), by providing tighter wording that defines as clearly as possible the sort of injuries for—and circumstances in—which investors can seek compensation, and the type of actions governments can and can not take. Such a clarification process could also make it clear under what circumstances state-controlled entities are covered by IIAs and how to deal with special advantages they may obtain and that distort competitive neutrality, a subject that has recently won prominence as a result of the growing role of state-owned enterprises in world FDI flows.[37] The development and generalized use of standardized wording would help in this regard.

3.1.2.2. Clarifying interrelationships

A related issue concerns the interrelationships of the international investment regime with other substantive areas of international law. International investment can have a profound impact in each of these areas.

A. Human rights, environment, labour, trade

Traditionally, interrelationships between the international investment regime and the international regimes dealing with human rights, environment, labour, and trade have received considerable attention (Burke-White 2015). After all, the investment regime is not a closed law system that stands in isolation from other international regimes—it is part and parcel of international law in general.[38] Guidance on how such linkages are to be recognized[39] and any conflicts between regimes are to be reconciled should be built into IIAs. Hence, it would be advisable for governments, when drafting new agreements, clearly to indicate how investment law relates to other international legal rules. A strong approach to this issue would be to condition the availability of protections in applicable IIAs on investors' compliance with certain other rules of international law (and, for that matter, domestic law). If that were an objective, "consideration should be given to the incorporation of a 'clean hands defence' in bilateral investment treaties, where such a defence is triggered only by a manifest breach by the investor" (Burke-White 2015, 15).[40]

B. Taxation, investment incentives

But there are also other important areas of international law that are closely linked to international investment and, in the future, need to be taken more into account, with a view towards at least coordinating approaches. Particularly relevant here are the interrelationships between investment and taxation and between investment and incentives.

As regards the former, for instance, the worldwide approach to taxing foreign affiliates can lead MNEs to refrain from repatriating the income of these affiliates if corporate tax rates in the home country are higher than elsewhere. Lowering taxes can play a role in efforts to attract FDI. Still, international tax matters remain a separate field of

[36] This issue could also be approached at the national level, by clarifying the ambit of national laws and regulations.
[37] See, OECD Secretariat (2015). The authors suggest (p. 19) that "[i]t would therefore seem desirable to reach some form of mutual international agreement" on state-owned enterprises in the context of competitive neutrality. Since competitive neutrality can also be infringed upon in relation to private enterprises (for instance, when they receive incentives that help their outward FDI), the question arises whether such a "mutual international agreement," if and when negotiated, should not also cover private enterprises investing abroad. For a discussion see, Sauvant et al. (2014).
[38] See in this context Article 31(3)(c) of the Vienna Convention on the Law of Treaties which requires that "any relevant rules of international law applicable in the relations between the parties" be taken into account in the interpretation of a treaty provision.
[39] In the case of multi-purpose agreements (and modern free trade agreements are of this type), it is in any event almost inevitable that interrelationships need to be addressed.
[40] It should be noted that elements of a "clean hands" approach were advocated in the model treaty prepared by the International Institute on Sustainable Development (Mann et al. 2006) and are contained in the 2012 South African Development Community Model Bilateral Investment Treaty Template, the 2015 Indian Model Text for the Indian Bilateral Investment Treaty and the European Union-Canada Comprehensive Economic and Trade Agreement.

international law with its own instruments, namely more than 3,500 bilateral tax treaties (OECD 2013), the OECD and United Nations Model Tax Conventions, tax information exchange agreements, and related instruments, such as the OECD transfer-pricing guidelines. Accordingly, IIAs generally exclude tax matters from their scope of application, or exclude them from the application of certain provisions (for example, national treatment and most-favoured-nation treatment).

Even under these conditions, however, tax matters have arisen in relation to IIAs, as reflected in the decisions of a number of investment tribunals. This has occurred primarily because "substantive clauses under international investment treaties can offer a better protection of the investors/taxpayers' rights when it involves tax disputes" (Chaisse 2015) than double taxation treaties do. And it has occurred primarily in relation to the application of the national treatment and fair and equitable treatment standards, expropriation provisions, umbrella clauses, and performance requirement provisions.[41] The intersection of these two legal regimes is likely to generate more policy challenges that will have to be dealt with in the future, including through provisions in IIAs that delineate more clearly the borderline between these two regimes.[42] At the moment, though, the main focus is on a qualitatively different set of issues, namely the G20/OECD efforts to halt the use of tax havens and achieve a better balance between avoiding double taxation and avoiding double non-taxation, as reflected in the G20/OECD project on base erosion and profit shifting.[43]

As to the interrelationships between investment and incentives, there is a general recognition that incentives do not constitute, as a rule, important FDI determinants (Sauvé and Soprana 2015). Yet, virtually all countries and, in many instances, sub-national units within countries, offer financial, fiscal or other incentives in the hope of influencing the locational decisions of firms. The empirical evidence shows that incentives are typically icing on the cake, at least in most instances and for most types of FDI (except, perhaps, for efficiency-seeking FDI)—unless all other country investment determinants are the same.[44] Policy-makers nevertheless regard incentives as a tool to attract larger investment projects, making incentives competition a global phenomenon. Not surprisingly, therefore, "host countries—both developed and developing—have repeatedly and steadfastly expressed a collective preference for regulatory inaction and the preservation of full policy immunity in respect of investment-related subsidy practices. Accordingly, neither the WTO nor international investment agreements currently feature a credible set of disciplines on the distortive effects of investment incentives" (Sauvé and Soprano 2015, 12-13).[45]

Given these circumstances, the best that can be done for the time being is to encourage international institutions with an interest in FDI to undertake empirical research and firm-level data gathering on the incidence and effectiveness of FDI incentives, identifying also which type of incentive may be most appropriate under what conditions, and to strengthen their technical assistance capacity in this area to advise interested governments (Sauvé and Soprana 2015, 12-13). Such an effort would also increase transparency. It may be possible, however, to arrive at basic disciplines in a regional context, as has been achieved within the European Union. Finally, as discussed in the E15 Task Force on Rethinking International Subsidies Disciplines, further reform of the WTO Agreement on Subsidies and Countervailing Measures could offer opportunities to deal with certain locational investment incentives (Horlick and Clarke 2015).

3.1.2.3. Progress in updating substantive and procedural provisions

A. Conceptual clarifications

As in the case of the purpose of the regime, progress has also been made with regards substantive and procedural provisions of IIAs. For example, some governments have updated the definition of "investment" by clarifying its scope. They have also clarified certain protections (for example, fair and equitable treatment, indirect expropriation). They have provided for consultations between the parties regarding the promotion of investment and other issues. And they are affording a greater role to treaty partners about the joint interpretation of clauses they have negotiated. Governments that have not yet done so might wish to consider whether they should do the same.

B. Investor responsibilities

There is also movement regarding the question of the responsibilities of investors, in the interest of promoting desirable corporate conduct and discouraging undesirable behaviour.

To begin with, host country governments, as sovereigns, can of course impose obligations on investors (both domestic and foreign), and have done so in their national laws and regulations, as well as through investor-state contracts.[46] Investors have to abide by them, making them liable for any infringements that might occur. Linked with this is, for example, the need for investors to undertake due diligence as part of human rights and environmental risk management. Similarly, investors have to comply with international law obligations established in specific areas, for example, corruption.[47]

[41] For a discussion of these cases see, Chaisse (2015b).
[42] For a recent discussion of the intersection of the international investment and tax regimes, see UNCTAD (2015b).
[43] With regards a clarified delineation between investment and taxation regimes, the first set of issues has to do primarily with the impact of traditional investment protection guarantees on a government's ability to tax. The second one has to do with the fact that, under current domestic/international legal norms, companies (including foreign investors) may avoid paying taxes in particular countries—that is, it involves a situation of under-regulation. In terms of the future, one can deal with the first issue by clarifying the outcome of the overlap (that is, for example, should fair and equitable treatment limit a host country's power to tax?), and one can deal with the second by either strengthening the regulatory work, potentially even in the context of IIAs.
[44] Incentives may influence the location of investment projects *within* countries.
[45] The GATS at least provides for an element of discipline in terms of most-favoured-nation and national treatment for subsidies, and many GATS schedules only contain relatively limited national treatmen limitations in committed sectors.
[46] For a discussion of issues surrounding the incorporation of human rights in state-investor contracts, see OHCHR 2015.
[47] Disregarding them could become the basis for counter claims or trigger a "clean hands" defence.

But there is the question of the extent to which IIAs limit the ability of host countries to impose obligations on investors, or discourage them from doing so, for fear of being accused of transgressing on treaty provisions. The introduction of investor responsibilities—for investors from both traditional and non-traditional capital-exporting countries—in IIAs could remedy this situation by providing international standards, although it would of course not be easy to obtain broad consensus on such standards. In fact, "investors should be comforted by the prospect that at least some of the investment-related obligations may be subject to international law and institutions, should the host State opt to take its grievances to the international plane" (Bottini 2015). Moreover, broad consensual international standards on this matter could be helpful to countries with limited capacity to implement their own laws and regulations in this area, at least to a certain extent.[48]

The matter is indeed being taken up in IIAs, by including responsibility clauses and, separately and complementarily, by strengthening and developing various voluntary instruments that operate largely on the basis of naming and shaming.

For instance, the recent Netherlands-United Arab Emirates BIT enjoins the parties to promote the OECD Guidelines for Multinational Enterprises. There are also stronger ways of addressing the responsibilities of investors in IIAs (Bottini 2015). For example, future or amended IIAs could condition the availability of investor protections on compliance with applicable national and/or international instruments defining investor responsibilities when making an investment, including anti-corruption laws, as the recently concluded Comprehensive Economic and Trade Agreement between Canada and the European Union does. (This approach may also raise the interest of investors in uniform international investor responsibilities.) The 1976 OECD Guidelines for Multinational Enterprises offer an example of how a voluntary set of guidelines can be significantly strengthened over time.[49] Another example are the Guiding Principles on Business and Human Rights, adopted by the United Nations Human Rights Council in 2011.[50]

All the above are promising approaches towards finding a balance in the rights and responsibilities of international investors and governments, if not in one single instrument, then at least across several. They need to be explored further.

3.1.3. Options for moving forward

In brief, expanding the purpose of IIAs, providing greater clarity of key concepts where possible, acknowledging interrelationships with other legal regimes, and recognizing investor responsibilities should be part of a reform agenda. The best approach would be a combination of clarifying "the content and scope of the traditional substantive provisions of IIAs," fine-tuning or recalibrating "the kinds of protection afforded to investors by traditional provisions" and "addressing the limited object of IIAs" (Ortino 2015, 10). Such a process would be helped by the fact that the great majority of IIAs contain certain principles and basic concepts that are sufficiently similar across treaties.[51]

As to the stock of existing IIAs, the Mauritius Convention on Transparency (opened for signature in March 2015; it will enter into force when ratified by three states) offers one possible solution by superimposing changes on existing treaties. For instance, governments could seek to negotiate a convention on the precise meaning of fair and equitable treatment or certain investor responsibilities, and states could sign up to it, making the agreed-upon text binding for them and their treaty partners, provided the latter have signed and ratified the convention as well.[52]

A working group consisting of leading international investment experts, including arbitrators and practitioners, could explore these matters in depth and propose how the purpose and contents of IIAs could best be updated, in close consultation with principal stakeholders. Such a group could benefit from the support of a consortium of leading universities from all continents, as well as other interested stakeholder organizations. The results could be presented to governments, for their consideration in future investment rule-making.

3.2. An International Support Programme for Sustainable Investment Facilitation

3.2.1. Aligning investment- and trade-support policies

One particular aspect of the broadened purpose and contents of the international investment regime deserves special attention, namely the efforts of virtually all governments to attract FDI and benefit from it as much as possible. International investment agreements are meant to help these efforts in an *indirect* manner by protecting the

[48] Including investor responsibilities in IIAs can also serve another function, namely, depending on circumstances, as a shield against investor claims.
[49] For some details, see the discussion below in the section on dispute settlement.
[50] Retroactively turning instruments that were designed and negotiated as voluntary instruments, such as the OECD Guidelines, into binding ones, or conditioning benefitting from IIA protections on compliance with voluntary instruments, needs to be approached with great care.
[51] This is what Schill (2009) described as the multilateral structures underlying international investment law.
[52] Pursuing this approach for transparency might have been helped by the fact that relatively few IIAs contained transparency provisions at the time the Convention was negotiated and that "transparency" is a relatively stand-alone provision. This is a situation quite different from, say, fair and equitable treatment (but not necessarily regarding investor responsibilities). There is also the issue that some of the protection standards are interlinked; hence it might be more difficult to agree on the clarification of any one standard only. Observed UNICITRAL: "The question of transparency in treaty-based investor-State arbitration is a topic of a procedural nature, and very clearly defined. In addition, very few treaties have provisions on the topic, as the trend in favor of transparency in arbitral proceedings is a relatively recent one. Those characteristics have made it easier to embark on the preparation of the Convention. If issues to be addressed are wider, substantive in nature, and already addressed at length and with variations in existing treaties, the task of preparing a convention may be more delicate. In particular, the risk of creating discrepancies by adding a new possibly 'more modern' regime to those already in existence should not be under-estimated" (UNCITRAL 2015, 3).

investments made. However, evidence about the extent to which IIAs induce greater FDI flows in this manner is mixed (Sauvant and Sachs 2009).[53] This is not surprising given the importance of the economic FDI determinants, the national FDI regulatory framework and investment 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 important 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 (IFC 2012). They need assistance—not only to obtain *more* FDI but *sustainable* FDI.

What is required, therefore, is an international support programme for sustainable investment facilitation, focused on improving *national* FDI regulatory frameworks and strengthening investment promotion capabilities (Sauvant and Hamdani 2015).[54] Such a programme 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.[55] It would be situated in a context in which all countries seek to attract FDI in general, typically through national investment promotion agencies (IPAs—but increasingly also through a growing number of sub-national agencies), but it would focus specifically on sustainable FDI.

Such a programme would complement the various efforts to facilitate trade, notably those governed by the WTO-led Aid for Trade Initiative and the recently adopted WTO Trade Facilitation Agreement (TFA—which focuses on practical issues related to trade and does not deal with yet contentious issues such as the WTO-committed access conditions for agricultural and other products). In fact, in a world of global value chains, the Aid for Trade Initiative and the TFA address one side of the equation, namely the trade dimension, while an international support programme for sustainable investment facilitation would address the other side of the equation, namely the international investment dimension.[56] It would be unrealistic to expect that, in today's world economy, 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 ongoing WTO efforts (and in support of them), a sustainable investment support programme 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, with a view towards contributing to their economic growth and sustainable development. All these efforts, in turn, require stepped-up official development assistance to strengthen basic economic FDI determinants.

3.2.2. Coverage

A sustainable investment support programme could address a range of subjects, beginning with transparency:

- *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.
- *Multinational enterprises*, in turn, could make comprehensive information available on their corporate social responsibility programmes and any instruments they observe in the area of international investment, such as the ILO Tripartite Declaration and OECD Guidelines and the United Nations Global Compact.
- Both *host countries and MNEs* could commit to making investor-state contracts publicly available.
- From the perspective of investors, moreover, 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 (through a designated focal point) could commit to making comprehensive information available to their foreign 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. Some of these measures are particularly important for small and medium-size enterprises.

[53] For more recent studies, see, for example, Lejour and Salfi (2015); Yackee (2010); Min et al. (2011); and Gómez-Mera et al. (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.
[54] The following text draws on that Think Piece
[55] See in this context also the United Nations Sustainable Development Goals (UNGA 2015). 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."
[56] It should be noted, however, that a sustainable investment support programme as advocated here places special emphasis on the promotion of sustainable FDI and maximizing its benefits.

On the national institutional side, IPAs, as one-stop shops, could be the focal points for matters related to a sustainable investment support programme, possibly coordinating with the national committees on trade facilitation to be established under the WTO's Trade Facilitation Agreement.[57] Within a country's long-term development strategy, IPAs could undertake various activities to attract sustainable FDI and benefit from it as much as possible.[58] They could, among other things:

- Improve the regulatory framework for investment by drawing lessons from best practices in countries that have successfully attracted sustainable FDI projects. Policy benchmarking could help in this respect.
- 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 the country in global value chains and targeting these.
- Promote backward and forward linkages between foreign investors and domestic firms.
- And—very importantly—find ways and means to increase the sustainable development impact of FDI in host countries.

Investment promotion agencies could also play a role in the development of investment risk-minimizing mechanisms badly needed to attract investment into, especially, various types of infrastructure. They could also have a role in the prevention and management of conflicts between investors and host countries (to be discussed below), including through 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 arise, 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 Aid for Trade Initiative and the Trade Facilitation Agreement, 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 a sustainable investment support programme. 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 trade reviews or OECD 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 the sustainable investment support programme and the central country institutions to attract FDI and increase its benefits.

3.2.3. Avenues that could be pursued

There are several ways in which a sustainable investment support programme could be moved forward. One option would be to extend the Aid for Trade Initiative to cover investment as well, and fully so (it has already been expanded to cover infrastructure and some elements of investment), 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. It would also be in tune with already existing international frameworks such as the WTO's General Agreement on Trade in Services (as indicated earlier, transactions falling under Mode 3 of the GATS—"commercial presence"—account for nearly two-thirds of the world's FDI stock). The initial emphasis could thus be on investment in services, with a focus on sectors key to promoting sustainable development, such as environmental services, energy, transportation, and professional services. Relevant initiatives might require a broader interpretation of the current Aid for Trade mandate. This approach could also benefit from the OECD's Creditor Reporting System that monitors where aid goes, what purposes it serves and what policies it aims to implement. The matter could be taken up at a 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; but, given the close linkages between trade and investment, this would be a second-best solution.

Another, more ambitious, and medium-term option would be to expand the Trade Facilitation Agreement 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 Trade Facilitation Agreement 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 Trade Facilitation Agreement. Apart from such a module complementing the Trade Facilitation Agreement, such an approach could also build on the WTO's GATS and, more specifically, its commercial presence provisions.

[57] In some countries, the trade and investment promotion functions are combined in one agency. Even in the absence of an investment support programme, it would make sense for the trade and investment focal points at the national level to cooperate.
[58] See in this context also OECD (2015b).

However, it is uncertain when the required two-thirds majority of the WTO membership will have ratified the Trade Facilitation Agreement. (Hopefully, the ratification of that Agreement will take place in the near future.) It is also uncertain how the Trade Facilitation Agreement Facility (which is linked to the Trade Facilitation Agreement and was launched in July 2014) 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. Moreover, member states would presumably wish to gather some experience with the operation of the Agreement before expanding it, especially since such an expansion would involve a subject matter—investment—that has a track record of policy controversy in the WTO.

A third, and also ambitious, option is for all—or a group of interested—countries to launch a Sustainable Investment Facilitation Understanding that focuses entirely on practical ways to encourage the flow of sustainable FDI to developing countries. It could be inspired by, and complement, the Trade Facilitation Agreement. Work on such an Understanding could be undertaken, in due course, in the WTO. It could also begin within another international organization with experience in international investment matters, perhaps UNCTAD or the World Bank or the OECD.[59] Or, a group of the leading outward FDI countries could launch such an initiative (which would, in effect, be a plurilateral approach); for instance, the top ten outward FDI economies (which include four non-OECD economies) accounted for four-fifths of world FDI outflows in 2014. The impetus could come from the G20, which could mandate the initiation of such work, should it be judged desirable to put such an Understanding in place.

Finally, the objectives of a support programme for sustainable investment facilitation can also be reached if its elements were to be incorporated in international investment agreements. Some of these agreements contain commitments by the treaty partners to consult on the promotion of investment flows between them. But few contain binding commitments in this respect. Notable exceptions are the 2015 Brazilian investment treaties with Angola and Mozambique: among other things, they mandate the establishment of "thematic agendas" for cooperation and investment facilitation, as well as dispute prevention, and the development of an institutional infrastructure, including a joint committee and ombudspersons, to implement the agreements (Brauch 2015). This is an approach that should be emulated in other IIAs, going forward—but it would be a piecemeal approach.

Every one of the above options would require careful study, discussions and consultations—much detailed substantive work still needs to be done to flesh out what aspects of "investment facilitation" could be included in such an agreement. This could be done by any of the organizations mentioned in the preceding paragraphs, or by a credible non-governmental organization or by a balanced group of experts and practitioners along the lines of the E15 Task Force. Moreover, it would be desirable if a knowledge bank jointly organized by intergovernmental organizations with a track record in the various aspects of international investment could be established, as a depository for information and experiences available to developing countries seeking to attract sustainable FDI and benefit from it as much as possible.

3.2.4. Options for moving forward

The issues mentioned for possible inclusion in an international support programme for sustainable investment facilitation, as well as the options outlined on how such a programme could be put in place, are merely illustrative. Some issues may not need to be included, while others might need to be added, and all of them need to be seen against the background of the importance of economic FDI determinants—if these determinants are unfavourable and investments are not commercially viable, even the best support programme is likely to have little effect. Concomitant productive capacity building is therefore critical.

The proposal's key premise is the importance—and urgency—of creating more favourable national conditions in host and home countries for sustainable FDI flows to meet the investment needs of the future. As governments and the private sector increasingly share this view, they need to muster the political will to put an international support programme for sustainable investment facilitation in place. A coalition of countries would need to take the initiative to move this proposal forward, perhaps prodded by interested civil society groups. Regional development banks, too, could take the initiative, considering in particular that many global value chains are regional in nature.

3.3. The Challenge of Preventing, Managing and Resolving Disputes

Updating the purpose and contents of IIAs and securing greater substantive clarity could reduce the importance of one source of ISDS instances. However, if disputes can be prevented, better managed and resolved at the national level, this would obviously lead to fewer disputes submitted to international arbitration.

3.3.1. At the national level

Disputes between international investors and host country entities can arise for many reasons, because of actions taken (or not taken) by international investors or by governments. Disputes can be very costly for both host countries and international investors, and they can be disruptive. Sometimes, it may simply be a lack of knowledge on the part of decision-makers at the national or sub-national levels about the obligations the country has entered into. In some instances, disputes might be based on minor irritants that could be resolved relatively easily if they were brought to the attention of the proper authorities in a timely manner. However, if governments are not aware of such disputes early on and fail to manage them, they can evolve into international disputes.

[59] There are also other international organizations that could bring their expertise to such an effort, for example the ILO with its important focus on decent work and inclusive growth, as well as its experience with its Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy (ILO 2006); the Office of the High Commissioner for Human Rights with its work on the Guiding Principles for Business and Human Rights (UN OHCHR 2011); and UNEP with its experience in environmental matters.

Parties therefore "need to develop investor-State conflict management mechanisms that can enable governments and investors to address their grievances well before they escalate into full blown legal disputes" (World Bank Group 2015). For that purpose, they need the institutional infrastructure to engage in regular government-private sector dialogues and to monitor conflicts and resolve these, preferably during an early stage. Institutions such as national investment ombudspersons and inter-ministerial committees (as, for example, in the Republic of Korea and Peru, respectively) that vet conflicts when they arise, with a view towards settling them amicably at an early stage, are helpful here.[60] The World Bank has begun to help countries to establish such conflict-management mechanisms, an effort that ought to be made available to as many countries as possible.

Investment promotion agencies, too, can play an important role, as part of their after-investment services, or—as part of their policy-advocacy function—by conducting IIA impact assessments and advising on the implementation of treaty commitments. Other practical and non-judicial mechanisms, such as alternative dispute-resolution approaches (for example, mediation), have a role to play as well and should be explored more in future IIAs, including by allowing respondent states to initiate such approaches.

Moreover, steps need to be taken to reduce the likelihood that contracts between international investors and host countries, including their implementation, become sources of disputes.[61] Such contracts can be found in particular in the natural resource and infrastructure sectors.[62] They may be poorly negotiated and may not reflect the best possible deal a host country could obtain had it (like, typically, its international investor counterpart) the multi-disciplinary world-class team of experts negotiating on its behalf. Contracts that are, or are seen to be, unbalanced in favour of investors are likely to give rise to conflicts when governments unilaterally take action to rectify what they consider contractual deficiencies and, in this manner, impinge on investor rights; ultimately, such actions may lead to international arbitration. Well-negotiated contracts are also of benefit to investors in that they create conditions of mutual trust and help ensure that commitments are being kept. One response to this situation is the creation of an investment negotiation support facility currently being considered by the G7 (with the encouragement of the least developed countries)[63]—not only as a way to arrive at well-negotiated contracts, but also as a means to reduce the likelihood that disputes arise.[64] This initiative should come to fruition as soon as possible.

3.3.2. At the international level

It is unavoidable, though, that some disputes reach the international arbitral level. It may be possible to deal with some of them through alternative dispute-settlement mechanisms, and the use of such mechanisms needs to be encouraged further. But given the centrality of the ISDS mechanism to the investment regime, that mechanism has to be beyond reproach, and it needs to be responsive to the expanded purpose of the regime. This is not only a technical matter, but also one that has implications for the very legitimacy of the international investment regime. A number of steps have already been taken to improve this mechanism, including by enhancing its transparency, considering a code of conduct for arbitrators, dealing with frivolous claims through various filtering mechanisms, and reducing the possibility of abusive treaty shopping.

Other changes could be considered, some without fundamentally altering the current nature of the investor-state dispute-settlement mechanism, while others would lead to substantial changes. A number of them are already been pursued, especially in more recent IIAs. For example, one could require the (time-limited) recourse to domestic remedies (while making these, where necessary, a more viable option for investors) before taking recourse to international arbitration. One could give governments greater rights to issue binding joint interpretations of the IIAs they have concluded and under which claims are being brought. One could give governments the right to initiate arbitrations.[65] One could provide host countries access to the judiciaries of home countries under certain circumstances (for instance, in cases of bribery). One could reserve certain well-defined areas (say, issues relating to the environment) for state-to-state dispute settlement. One could abandon ISDS altogether, at least in certain contexts, such as in the case of disputes between countries with well-developed judicial systems. Or, one could expand access to this mechanism to domestic investors (perhaps using a filter).[66] Each of these variations poses its own challenges and opportunities, and governments would be well advised to consider a number of them with careful scrutiny and consult fully with key stakeholders.

[60] See, for example, UNCTAD (2011). The discussion here focuses on alternative dispute-settlement mechanisms. If any disputes were to be brought in the national court system, a concern of investors would be the independence of that system from the government.
[61] As of early 2015, some 18% of the cases registered under the ICSID Convention and Additional Facility Rules were registered on the basis of contracts (ICSID 2015, table 4, "Basis of Consent Invoked to Establish ICSID Jurisdiction in Registered ICSID Cases").
[62] Nearly 30% of the 515 cases registered between 1972 and June 2015 with ICSID under the ICSID Convention and the Additional Facility Rules concerned natural resources (including agriculture), and another 43% involved infrastructure (ICSID Case Search Portal. https://icsid.worldbank.org/apps/ICSIDWEB/cases/Pages/AdvancedSearch.aspx).
[63] See, "Leaders' Declaration, G7 Summit, 7-8 June 2015," p. 20, "CONNEX". See also the Knowledge Portal developed by the Columbia Center on Sustainable Investment in connection with this project, available at www.negotiationsupport.org.
[64] The relationship between investment contracts and IIAs has to be carefully considered. Otherwise, any improvements in the drafting of investment contracts may have little impact because of the treaty structure existing "above" them.
[65] But this would require that governments have a basis for a claim. On the other hand, governments have the right to initiate arbitrations and have done so when they qualify as investors under a treaty; in particular, state-owned entities have brought claims.
[66] The treatment prescribed in IIAs for foreign investors constitutes also good treatment of domestic investors—which, therefore, could benefit from a sort of "trickle-down" effect.

Apart from the above options, fundamental improvements to the structure of the dispute-settlement mechanism need to be envisaged. Two are singled out here, one relating to the question of further institutionalizing the dispute-settlement process, and the other relating to who should have access to it.

3.3.2.1. Further institutionalizing dispute settlement

The question of further institutionalizing dispute settlement arises because the current approach to dispute settlement by arbitral tribunals involves a fundamental tension: on the one hand, it is a party-owned process undertaken in an *ad hoc* manner by private individuals focused on solving individual disputes; on the other hand, these private individuals exercise quasi-public law functions in that arbitrators determine whether certain actions by governments are consistent with international obligations (sometimes even general measures affecting many actors) and, more broadly, contribute to the further development of international investment law. But they do so within a system that currently affords little ability to review decisions to correct judicial errors and ensure consistency in arbitral awards.[67]

In particular, a topical and urgent question is whether appeals mechanisms for the current *ad hoc* tribunals, a world investment court as a standing tribunal making the decision in any dispute-settlement case, or a combination of both should be established. Views on these questions, including within the Task Force, vary widely. Institutionalizing dispute settlement in this manner could be a major step towards improving the investment regime, comparable to the move from the *ad hoc* dispute-settlement process under the GATT to the much-strengthened Dispute Settlement Understanding of the WTO, although it needs to be taken into account, among other things, that the WTO model is based on a single set of multilateral commitments (as opposed to the multitude of diverse IIAs) and that only states—and not private actors—have access to the WTO's dispute-settlement mechanism. Such an institutional innovation could not ensure the full consistency of the application of IIAs, given that the underlying treaties are not uniform, even though these agreements share certain principles and recurrent core concepts. However, it could, over time, enhance consistency, help make the dispute-settlement process more accountable and develop a body of legally authoritative general principles and interpretations that would increase the coherence, predictability and, ultimately, the legitimacy of the investment regime.

A. Different modalities

Several configurations and arrangements are conceivable.[68] For example, awards issued by the *ad hoc* panels currently used in IIA disputes could be appealed to *ad hoc* appellate bodies to correct serious errors of law and perhaps even assessments of facts made by the first-instance arbitral tribunals. Such appellate bodies could be constituted in the context of particular disputes and in a manner similar to the way in which the first-level *ad hoc* panels were established, but with a broader mandate than that of the *ad hoc* annulment committees of ICSID (which are empowered to annul only on the specific grounds of Art. 52 of the ICSID Convention). In a variation, the members of the appellate bodies could be chosen from a predetermined list of experts, preferably not by the parties to a dispute but by an independent third party. In either case, appeals could proceed under whatever arbitration rules have been chosen. One advantage of such an approach would be that appeals mechanisms could be added to the current *ad-hoc* regime.[69] A disadvantage is that such an approach would not necessarily increase the consistency and predictability of arbitral decisions, although, if arbitrators were to be chosen from a relatively limited pool, consistency could perhaps increase. And, of course, any appeals mechanism could, at least in the short term,[70] add costs and delays to processes already criticized by many as overly slow and costly.

At the other end of the spectrum, one could envisage the establishment of a single permanent and independent world investment court, staffed by tenured, professional judges and supported by a permanent secretariat made up of highly qualified investment lawyers.[71] It would serve as the first and sole instance for any dispute, replacing the current decentralized *ad hoc* dispute-settlement regime. It could be supplemented, in due course, with a standing appellate body. (Or such a standing body could serve for both purposes, namely a standing first-instance court for some treaties and an appellate body for others.) Decisions rendered by any of these bodies would be precedential. One advantage of such an approach would be that it would increase the consistency and predictability of decisions and in this manner help consolidate international investment law. Depending on the structure adopted, a disadvantage might be that such an approach could be seen as establishing a relatively elaborate, costly and potentially time-consuming structure in a specialized field of international economic law, although it would not necessarily be more so than the current decentralized system.

[67] To a large extent, this tension derives from the fact that ISDS is patterned on commercial arbitration where the two parties to a dispute are of the same nature, while in the case of ISDS, one party is a state.

[68] For a discussion, see Schill (2015) approaching the ISDS discussion from a comparative constitutional law perspective. For various options and suggestions, see also Kalicki and Joubin-Bret (2015).

[69] But there is the question of what would happen to the review mechanisms currently in existence: review under UNCITRAL's Model Law and ICSID's Additional Facility, as well as annulment under ICSID Convention cases. In the case of UNCITRAL's Model Law, this may not present major difficulties, as the Explanatory Note to the Model Law provides in para. 45 ("Application for setting aside"): "Article 34 [of the Model Law] is limited to action before a court (i.e., an organ of the judicial system of a State). However, a party is not precluded from appealing to an arbitral tribunal of second instance if the parties have agreed on such a possibility (as is common in certain commodity trades) (UNCITRAL 2008, 35, "Explanatory Note").

[70] If, however, a well functioning appeals mechanism system should succeed in establishing legally authoritative general principles and interpretations, both first instance and appeals proceedings may become shorter in the longer run.

[71] Note that the WTO's dispute-settlement mechanism does not go that far. But involvement of the WTO Secretariat's Legal Affairs Division helps ensure an element of consistency over time.

Naturally, there are variations between these two approaches. For instance, one could imagine an appellate mechanism for reviewing awards being established in the framework of a treaty between two or more parties, to review decisions of *ad hoc* tribunals. Other states would be invited to opt in to make use of that mechanism as well. In this manner, such a mechanism could be expanded in the framework of the negotiation of mega-regionals[72] and, eventually, be multilateralized. Any new arrangement could, in principle, be made applicable to the stock of IIAs by taking a Mauritius Convention-type approach.[73]

While ambitious, it is not inconceivable that any such institutional improvements in the investment regime's dispute-settlement system could be made. After all, virtually all IIAs concluded by the United States since 2002 foresee the possibility of an appellate body (although no action has been taken yet towards establishing or even discussing such a body).[74] The European Commission, in agreements with Canada and Singapore, has explored this approach, as reflected in the recent Comprehensive Economic and Trade Agreement and the European Union-Singapore Free Trade Agreement. Moreover, the European Commission is facing acute political pressure to improve the ISDS mechanism, notably in the context of negotiating a Transatlantic Trade and Investment Partnership (TTIP) agreement with the United States.[75] Importantly, the European Commission has responded to such pressure by announcing in 2015 that it seeks to introduce an appeals mechanism, in a move towards a dispute-settlement approach that would function similarly to traditional court systems.[76] Beyond that, the European Commission is also working towards the establishment of an international investment court and appellate mechanism that would apply to multiple agreements, and which would be a stepping-stone towards a permanent multilateral system for investment disputes (European Commission 2015, 2015c).

B. Challenges to be overcome in considering different modalities

Any of the institutional improvements outlined above would involve significant challenges, requiring substantial research, multi-stakeholder consultations and extensive negotiations. Issues that would need to be considered include:

- What can one learn from the experience of similar arrangements in other areas, especially trade?
- What would be the costs and benefits of ad hoc appeals mechanisms vs. a permanent world investment court?
- What would the architecture of such an institution look like and how would such an institution be organized?
- How would such an institution be created and its independence from national governments be ensured?
- What would be the relationship of such an institution with existing annulment remedies?
- How would judicial appointments be made? In particular, how could it be ensured that the members are selected based on demonstrated competence on investment issues, to ensure the up-to-date technical expertise required to deal with complex international investment law matters? Related to that, how to ensure that members have expertise in related areas of the law, such as human rights and environmental law?
- For arbitrators/judges serving on an appellate body/permanent court, what level of deference would they be required to accord to joint interpretations of the parties to the applicable treaty?
- What would be the scope for appellate review (facts, law, procedure) and the scope for a standing body in the absence of harmonized rules and standards?
- Would parties to the applicable treaty have the power to reject decisions of an appellate body/permanent court through joint statements/joint interpretations?
- How would such an institution be financed?
- How would such an institutional innovation be made applicable to disputes arising under existing IIAs?
- Should such an institution be a stand-alone body or be associated with an existing institution and, if so, which one?

For example—just to mention one possibility in relation to the last of these questions—since ICSID is the single most prominent dispute-settlement venue, one could think of a treaty updating the present Convention on the Settlement of Investment Disputes between States and Nationals of Other States—an ICSID II, so to speak. It would preserve enforceability, but update any features in the current rules that might require modernization (including, for instance, expanding the possibility for counter-claims). Most importantly, such a new treaty could create a single world investment court (and appellate body) that would then be available to all governments that have signed and ratified such a treaty.[77]

[72] This approach seems to be foreseen in the Trans-Pacific Partnership Agreement.

[73] As few IIAs to date contain references to an appeals mechanism, it may—in principle—be relatively easy (as in the case of transparency) to pursue a Mauritius Convention-type approach—provided, of course, the political will is present to establish such a mechanism. Observed UNCITRAL: "Depending on the manner in which an appeal mechanism or an investment court would be set up, a convention could indeed be an appropriate solution" (UNCITRAL 2015, 4).

[74] Agreements by other countries, too, contain provisions to the effect that the parties may consider the idea of an appellate mechanism in the future. See, for example, the 2014 Canada-Korea Free Trade Agreement and the 2014 Canada-Honduras Free Trade Agreement. The investment chapter in the Free Trade Agreement between the Government of Australia and Government of the People's Republic of China requires the parties (Art. 9.23), within three years of entry into force, to "commence negotiations with a view to establishing an appellate mechanism."

[75] So far, however, there is no sign of United States interest in the recent European Union position on an appeals mechanism.

[76] See, European Commission (2015). On 8 July 2015, the European Parliament adopted a resolution that, among other things, supported the European Commission in its efforts "to replace the ISDS system with a new system for resolving disputes between investors and states which is subject to democratic principles and scrutiny, where potential cases are treated in a transparent manner by publicly appointed, independent professional judges in public hearings and which includes an appellate mechanism, where consistency of judicial decisions is ensured, the jurisdiction of courts of the EU and of the Member States is respected, and where private interests cannot undermine public policy objectives" (European Parliament 2015, operating para. 2.(d)(xv)). See also European Commission (2015c).

[77] Another alternative would be to modify certain parts of the ICSID Convention between certain of the parties only, as per Art. 41 of the Vienna Convention on the Law of Treaties, op. cit.

3.3.2.2. Access to dispute settlement for governments and other stakeholders

Earlier in this paper, the point was made that the contents of IIAs need to be expanded to include responsibilities of foreign investors,[78] and it was shown that a number of such agreements are moving in that direction. If this should indeed become more common, governments arguably should have direct access to the regime's dispute-settlement mechanism, and not only by way of counter-claims. The question would also arise—and this would be a profound, challenging and very ambitious change—whether the dispute-settlement process should then be opened up further to other stakeholders too.

With regards to opening up to other stakeholders, something similar (although by far not as consequential) occurred in the context of the implementation of the voluntary OECD Guidelines for Multinational Enterprises, addressed to MNEs operating in or from adhering countries. The responsible OECD Committee has the mandate to monitor the implementation of the Guidelines and to clarify them in the light of concrete cases brought to its attention. Although the Committee cannot pronounce itself on the behaviour of individual enterprises, it can take cases as illustrations of issues that need a clarification of the meaning of the Guidelines, thereby giving strength to the implementation of the instrument. This clarification process has always been open to governments, the business community (via the Business and Industry Advisory Committee to the OECD) and trade unions (via the Trade Union Advisory Committee to the OECD). During the 2011 review of the Guidelines, the consultative status with the Investment Committee was extended to OECD Watch, the OECD Investment Committee's recognized representative of civil society organizations. As a result, non-governmental organizations (via OECD Watch), as well as other stakeholders, can now bring cases to the attention of the OECD's Investment Committee, for the purpose of clarifying the Guidelines (OECD 2011). However, the key mechanism for the implementation of the Guidelines remains the National Contact Points established in each country that adheres to the Guidelines. This mechanism has been profusely used by civil society and trade unions: more than 300 complaints have been submitted to the national contact points since 2000.[79] The implementation process of the OECD Guidelines is now open to all key stakeholders, enhancing in this manner its effectiveness, transparency and legitimacy.

Such an extension of the investment regime's dispute-settlement mechanism—be it to allow governments to be claimants but especially to give other stakeholders more access to this mechanism—would raise many questions that would have to be examined carefully. But steps in this direction would profoundly change the nature of the international investment dispute-settlement process by turning it from an *investor-state dispute-settlement mechanism* into an *investment dispute-settlement mechanism*.[80] This, in turn, could dramatically modify the dynamics of the current international ISDS discussion, with major implications for enhancing the legitimacy of the regime in the eyes of important stakeholders, while building on what has already been established.

3.3.3. Options for moving forward

In brief, however challenging the task of improving the current dispute-settlement mechanism may be in terms of overcoming numerous political and technical difficulties, embarking on the process of exploring how this could be done with a view towards developing a better mechanism would send a strong signal that governments recognize that this mechanism requires improvement. This is not merely a technical question but (as the public discussions around ISDS show) a matter of what is considered fair by public opinion.

Discussions of the range of issues relating to this matter are already underway in a number of governmental and non-governmental forums, ranging from the European Parliament to various academic conferences. These should be expedited and, hopefully, will lead to a fruitful conclusion. All interested stakeholders should be heard and all pertinent issues should be addressed. In-depth discussions in informal forums can make valuable inputs into governmental deliberations.

3.4. An Advisory Centre on International Investment Law

3.4.1. Rationale

A similarly strong signal demonstrating the will to enhance the legitimacy of the dispute-settlement process—and, with it, the investment regime—would be sent if the ability of more vulnerable countries to defend themselves as respondents in investment disputes would be improved.[81] Conversely, a dispute-settlement mechanism that does not provide a level playing field for the disputing parties can easily be seen as compromised, undermining its very legitimacy. Access to justice must not only be seen as fair, it has to be fair in its very *modus operandi*.

Claims against host country governments can reach hundreds of millions of dollars, host country regulations may be challenged and the reputation of a country as an investment location may be at stake. And, as noted, the annual number of claims is substantial, and litigating them is expensive, especially as disputes are becoming more complex. There is also the risk that governments may have to assume the litigation costs of the claimants if they lose a case. The advent of third-party funding further accentuates the imbalance for more vulnerable countries, as such funding provides an additional source of finance to potential claimants.

[78] Presumably, the responsibilities of national investors would be the same or quite similar. See in this context for example the Guiding Principles on Business and Human Rights (UN OHCHR 2011).
[79] See, http://mneguidelines.oecd.org/database/ as of 5 May 2015.
[80] Conceivably, such a mechanism could also have the function to issue, upon request, advisory opinions. The International Court of Justice has such a function. Although such opinions are not binding "the advisory opinions of the Court nevertheless carry great legal weight and moral authority." See, http://www.icj-cij.org/jurisdiction/index.php?p1=5&p2=2.
[81] This matter is dealt with separately here, as it is not so much a matter of access to the dispute-settlement mechanism, but rather a matter of being able to utilize it properly.

Least developed countries, in particular, typically do not have the in-house legal expertise to defend themselves adequately—in fact it may not be the best use of scarce resources to build such expertise, as few countries need to defend themselves in more than one or two cases at a time. At the same time, such countries often lack the experience of how to handle disputes, including the specific requirements of the ISDS mechanism. And many simply may not have the financial resources to hire the required expertise, which also does not help the efficiency and quality of the arbitration process—an important consideration since the bulk of the litigation costs typically relate to counsel and expert witnesses.

This puts many countries in an asymmetric situation whenever a dispute arises, beginning with a possible proclivity to settle disputes in which they could potentially prevail, or knowing when to settle during an early stage of a dispute when they usefully could do so, simply because they do not have the required sophistication or the resources to defend themselves.

An independent Advisory Centre on International Investment Law would help to establish a level playing field by providing administrative and legal assistance to respondents that face investor claims and are not in a position to defend themselves adequately (Joubin-Bret 2015). The WTO experience provides useful inspiration: when, after the creation of the WTO, the number of disputes brought before this institution rose, the (independent) Advisory Centre on WTO Law was established in 2001—the principal outcome of the tumultuous Seattle WTO Ministerial Meeting. It advises its developing country members on all issues relating to WTO law, including by assisting its members through all stages of the WTO's regular panel and Appellate Body proceedings as complainants, respondents and third parties. The Advisory Centre provides its services through its own staff or through outside counsel at reduced rates.

Similar considerations apply to small and medium-size enterprises, as these too typically do not have the expertise and resources to bring claims. They too require support. Costs and delays could become even more of an obstacle if an appeals mechanism were to be established. A small-claims settlement mechanism, with an expedited process, set deadlines and sole arbitrators, could be of help in this regard.

Independently of these two institutions (the Centre and the small-claims mechanism), and as a low-cost alternative dispute-settlement mechanism of potential value to both governments and (in particular small) firms, an International Investment Ombudsperson could be designated, cooperating with an *ad hoc* ombudsperson in a respondent state. Such persons would have to be independent and highly esteemed by both governments and the private sector, to command the respect that would be needed to arrive at an informal settlement of a dispute.

3.4.2. Issues

Establishing such a Centre in the investment field would require answers to a number of questions (Joubin-Bret 2015). For example:

- Which countries should be able to benefit from its services—all non-OECD economies or only the least developed countries? Or also OECD countries? (Governments in all regions have been respondents.)
- Should the Centre establish working relations with national conflict management mechanisms?
- Should advice include assistance in evaluating whether a particular claim is strong and the government should therefore settle?
- Should the Centre play an active role during the cooling-off period and during mediation procedures?[82]
- Should the Centre's mandate include supporting—or even representing—respondents in actual dispute-settlement proceedings or only supporting and advising on international investment law and dispute-settlement procedures?
- Should any support cover both investor-state and state-state disputes?
- Should the Centre provide technical assistance to governments, for example, for capacity building through legal training in matters related to ISDS or, broader, the negotiation of IIAs with dispute-settlement provisions?
- Should it offer alternative dispute-settlement services, including mediation?
- At what price should its services be made available? [83]
- How would costs be covered?

There are more issues that need to be considered—and the closer any assistance comes to actual participation in litigation, the more difficult it may become for some countries to support the establishment of such a Centre. At the same time, the central challenge is to identify broadly acceptable ways that gives all countries a fair chance to defend themselves adequately in disputes to which they are party.

3.4.3. Options for moving forward

In conclusion, the WTO Advisory Centre has done valuable work, contributing its share to enhancing the legitimacy of the international trading system. An Advisory Centre on International Investment Law—which would suitably complement the reform of the ISDS mechanism—could do the same thing for the international investment regime. To make this happen, "it is essential for a couple of champion-countries to get together to launch an initiative at the right time and with the right level of political support. The current turmoil around investment arbitration could provide the opportunity for like-minded countries to work together towards establishing such an advisory centre, inviting all other countries to join them in their initiative" (Joubin-Bret

[82] Close to a third of all known disputes have been settled before a final award had been rendered.
[83] Maximum charges of the Advisory Centre on WTO Law for a complainant or respondent for consultations, panel proceedings and appellate body proceedings amount to (in Swiss Francs) between CHF138,000 (US$141,000) and CHF277,000, depending on the category of member country requesting assistance; for least developed countries, that amount is 34,000; see, http://www.acwl.ch/e/disputes/Fees.html. These fees are also binding for external counsels, in case they are in conflict. Minimum free market rates for litigating a relatively simple WTO dispute through to the basic panel report stage may range from US$250,000 to US$750,000 (Bown and Reynolds 2015).

2015, 21). The process of clarifying the issues surrounding the creation of an Advisory Centre on International Investment Law should begin now, with a view towards bringing it into being in a short period of time.

It would be very desirable if a few governments particularly concerned about the legitimacy of the international investment regime would assume a lead role in establishing such a Centre and a small-claims settlement mechanism for small and medium-size enterprises. They could be supported by a non-governmental organization with a track record of work on the international trading system, and they could seek to draw on the experience of intergovernmental organizations with an interest in this subject.

3.5. A Multilateral/Plurilateral Framework on Investment

The discussion so far has focussed on individual—but key—aspects of the international investment law and policy regime and how they could be improved. But one could also take a holistic approach to the governance of international investment, namely to negotiate a comprehensive universal framework on international investment, preferably a multilateral framework on investment (MFI), possibly starting with a plurilateral framework on investment (PFI) that would be open for future accessions by other states. Circumstances may be propitious for such an undertaking (Shan 2015, with comments by Gary Hufbauer and Tyler Moran).

3.5.1. Changing interests

Most importantly, the constellation of interests of countries has changed profoundly over the past decade, and in a manner that favours a more universal approach. When earlier efforts at the multilateral level were undertaken, there was a clear distinction between home and host countries, typically along North-South lines. Now, as documented earlier, firms in a rising number of non-OECD economies (and particularly the biggest among them) are becoming important and dynamic outward investors. The implication is that emerging markets 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 by the change in approach of China when, in the context of the United States-China Strategic and Economic Dialogue, the country agreed in July 2013 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. Both approaches had long been resisted by China.

Similarly, traditional capital-exporting countries have "rediscovered" 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 maintaining adequate policy space to be able to pursue legitimate public policy objectives. This can be exemplified by the change of approach by the United States when, in revising its model BIT, it narrowed protections afforded to foreign investors—a significant conversion 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.

Moreover, it is significant that governments continue to show a great willingness to make rules on international investment, as reflected in the proliferation of IIAs. (In this context, it would be desirable to establish a formal international repository of IIAs where countries would deposit their agreements of this kind.[84]) In particular, a number of ongoing important IIA 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], RCEP [Regional Comprehensive Economic Partnership], and U.S.-China BIT, as well as the recent Pacific Alliance agreement, creates a significant opportunity for the harmonization of the international investment law regime at a regional, Pacific Rim level" (Feldman et al. 2015, Conclusions). The negotiations of a number of BITs between important countries (in addition to the China-United States BIT),[85] 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. If this should occur, the result of these negotiations could become important stepping-stones towards a subsequent universal investment instrument.

3.5.2. Challenges

A multilateral/plurilateral framework on investment would seek to define, in a coherent and transparent manner, the relationship between governments and international investors and provide the predictability and stability that long-term investment needs, with a view towards facilitating the flow of sustainable FDI for sustainable development. Global rules for a global economy: "In a globalising economy, industry needs a truly global framework for investment, set up in a forward looking and strategic manner and able to cope with a diverse and constantly changing reality" (Oberhänsli 2015, 6).

[84] To date, UNCTAD has the most extensive collection of IIAs, and countries could easily build on that resource.
[85] These include the negotiations of BITs between China and the European Union, India and the United States, the European Union and India.

Starting from the need to promote sustainable FDI for sustainable development draws attention to the most comprehensive recent effort in this respect, UNCTAD's Investment Policy Framework for Sustainable Development.[86] It consists of national policy guidelines, options for IIAs negotiations and an action plan for promoting investment in sustainable development; it has been developed to facilitate the formulation of a new generation of investment policies and constitutes a "tool-box" that can be used by negotiators (UNCTAD 2012).[87] Be it multilateral or plurilateral in character, a framework would need to establish a strong basic set of rights and obligations to be observed by all signatories, be they small or big countries. If achievable, it could avoid the difficulties that arise from a fragmented regime that consists of a multitude of IIAs, both for international investors that operate in a multitude of jurisdictions (each with its own varying commitments in IIAs), and for governments that may see some of their objectives frustrated by treaty shopping on the part of some international investors.[88] Such a framework could also reduce the need of negotiating separate agreements that, together with the existing agreements, would eventually amount to a holistic framework on international investment.

Naturally, negotiating a universal framework would face considerable challenges, given the unsuccessful efforts of the past,[89] the wide range of views and the considerable passion surrounding IIAs; this could be particularly the case if some stakeholders anticipated that the result would merely be a lowest-denominator agreement. These challenges include determining the advantages and disadvantages of a universal framework and the challenges involved in crafting a high-standards agreement among a multiplicity of potential signatories.

There are also the questions of what would constitute the right balance of rights and responsibilities that various stakeholder groups might wish to see, and of where such a framework could be negotiated.[90] One would furthermore have to consider whether there could be, to begin with, different obligations based on the level of development (an approach pursued, for example, in the context of the WTO's Trade Facilitation Agreement). And there would be the question of whether a plurilateral/multilateral agreement would supersede, for signatories, their investment commitments in existing IIAs, or merely provide a commitment-floor for all signatory countries (and possibly fill gaps in older IIAs), including for those countries that do not have IIAs. Similarly, there is the question of how such a framework would coexist with existing multilateral disciplines, for instance under the GATS in the WTO. A great number of additional issues would require clarification if governments should decide to embark on negotiating a plurilateral or multilateral investment framework.

Overall, a multilateral/plurilateral framework on investment would establish consistent, transparent and predictable governance of the relations between international investors and governments. It would build not only on old IIAs between and among developed and developing countries, but also on newer ones involving these countries (including the biggest developing countries), on IIAs between and among developing countries themselves, and on IIAs between and among developing countries and economies in transition—firmly establishing in this manner the rule of international investment law.

3.5.3. Options for moving forward: how to do it?

Given these and many other questions, it would be desirable to begin a process of exploring the possibility of negotiating an international framework on investment, ideally of a multilateral nature. This may be particular pertinent in light of the July 2015 decision by the Third International Conference on Financing for Development to mandate UNCTAD to work with member states to improve IIAs[91] and the experience of that organization in this area, not least in its comprehensive recent effort to facilitate the formulation of a new generation of investment policies through its Investment Policy Framework for Sustainable Development.

On the other hand, "the WTO offers the best platform for trade and investment regimes to be combined and consolidated, as a unified system providing systematic legal and institutional support for the future growth of GVCs [global value chains]" (Shan 2015, 20. See also, González 2013, 8), turning that organization into a World Investment and Trade Organization. If this course were to be pursued, the WTO's Working Group on the Relationship between Trade and Investment could be reactivated in due course,[92] or a new working group could be established. Another alternative is to build on existing agreements, especially the WTO's General Agreement on Trade in Services, to cover other types of investment and obligations; for example, Mode 3 could be taken out of that Agreement and made the core of a separate agreement, capitalizing on the GATS' core disciplines relating to, in particular, national treatment and most-favoured-nation treatment and the specific market-access commitments already agreed upon. Or one

[86] For an earlier effort, see the model treaty, referred to supra, prepared by the International Institute on Sustainable Development (Mann et al. 2006).
[87] The Framework was updated in 2015 with two new components: an action plan for investing in the sustainable development goals and a new pre-establishment section in the IIA part (UNCTAD 2015).
[88] For instance, if some governments introduce certain changes in their bilateral agreements, investors that are not comfortable with these could conceivably bypass these changes by investing from a third country.
[89] Recall the unsuccessful effort among the like-minded members of the OECD to negotiate a Multilateral Agreement on Investment about 20 years ago, when negotiators were unable to reach agreement on fundamental principles for such an agreement. Similarly, subsequent efforts in the WTO were abandoned.
[90] Negotiations would not necessarily have to take place in one of the existing institutions. One precedent is the negotiations of the Framework Convention on Climate Change: the negotiations did not take place in the framework of UNEP, but rather were serviced by a stand-alone independent interim secretariat that was not part of the United Nations structure.
[91] See para. 91 of the Addis Ababa Action Agenda (UN 2015), which states: "We request UNCTAD to continue its existing programme of meetings and consultations with Member States on investment agreements."
[92] This would require a reversal of a decision taken on 1 August 2004, by the WTO General Council (item 1.(g)): "Relationship between Trade and Investment, Interaction between Trade and Competition Policy and Transparency in Government Procurement: the Council agrees that these issues, mentioned in the Doha Ministerial Declaration in paragraphs 20-22, 23-25 and 26 respectively, will not form part of the Work Programme set out in that Declaration and therefore no work towards negotiations on any of these issues will take place within the WTO during the Doha Round" (WTO 2004).

could begin negotiating in an area for which it might be relatively easier to reach consensus, such as sustainable investment facilitation. There might also be the possibility that the international investment court and appellate mechanism sought by the European Commission could become a stepping-stone towards a permanent multilateral system for investment disputes, which, in turn, could become the nucleus around which a universal framework could be built.

If a truly universal and comprehensive strong investment framework is considered out of reach at this time, a plurilateral framework on international investment negotiated in a transparent manner could serve as a first step in that direction.[93] Following the example of the Trade in Services (TiSA) Agreement, it would be an agreement negotiated by interested parties that would be open for future accessions by other states.[94] There could be transition periods with support provided to those countries that wish to reach the standards over time, with the main principles of the framework being recognized as useful building blocks for national, regional and global regimes.

The situation may be favourable for such an initiative, in particular if the China-United States BIT should be concluded expeditiously. If that should be the case, the most important home and host countries among developed and developing countries would have negotiated an agreement that could serve as a template that could be taken forward. For example, the 2016 G20 summit in China would then "provide a good opportunity for the issue of [a] MFI/PFI to be tabled for consideration by world leaders" (Shan 2015, 2).[95] (China will chair the G20 in 2016.) A critical mass of countries would be needed to begin such an effort.

Depending on the arrangements, a process that could lead to a comprehensive universal framework could be serviced (individually or together) by the secretariats of a number of international organizations having relevant expertise, including those of UNCTAD, the WTO, the World Bank, UNCITRAL, and the OECD, as well as perhaps some regional institutions such as the Asia-Pacific Economic Cooperation forum. Wherever such a process should take place, it should be a structured process, undertaken with input from the principal stakeholders. It could focus on an examination of the range of issues that would need to be addressed in a universal framework (including by comparing and analysing key provisions in major recent IIAs), with a view towards recommending how it could be brought about. The clarifications that such an effort could generate would also be helpful for improving investment rule-making at the regional and bilateral levels.

[93] See, Hufbauer and Moran (2015, 6), who suggested to "[c]onsider launching negotiations for a plurilateral Investment Facilitation Agreement (IFA) that would supplement (not supersede) provisions in BITs and bilateral FTAs. Among other subjects, the IFA would address minimum standards for IPR [intellectual property rights], pre-establishment, national treatment, and compensation for expropriations." According to them, a plurilateral agreement "should be launched with a small number—perhaps not more than a dozen—WTO members that are both large home countries for outward FDI and large host countries for inward FDI. A small group of this nature is more likely to reach agreement, while fairly representing the interests of host countries, home countries, and MNCs." See Hufbauer and Moran comments in Shan (2015, 25). Echoed Shan: "the time is ripe to seriously consider a MFI, perhaps starting with a transitional plurilateral framework on investment (PFI)" (Shan 2015, 2)

[94] The negotiations of the Trade in Services Agreement were not serviced by the WTO Secretariat. Moreover, while these negotiations were plurilateral, they were not plurilateral in the sense of plurilateral agreements covered by the Marrakesh Agreement (such plurilateral agreements would need to be accepted by consensus by all WTO members, without however creating either rights or obligations for members that have not accepted them); rather, TISA will be presented in the WTO as a free trade agreement under Art. V of GATS. For a discussion of this agreement, see Sauvé (2014).

[95] See in this context also Lin (2015). The author suggests that China, which is taking over the leadership of the G20 in 2016, should seek consensus "on a working framework for achieving this multilateral investment agreement for development. This framework could lay out a concrete timeline for achieving specific milestones. For example, one milestone could be the achievement of a non-binding investment facilitation framework. Most importantly, the core of the agreement should include a non-binding principle while highlighting inclusiveness, and emphasize an overarching commitment to fostering economic growth for developing."

4. Next Steps: An Informal and Inclusive Consensus-Building Process

The growth of FDI and MNE activities, the emergence of an integrated international production system and the state of the international investment law and policy regime have given rise to a number of challenges that will need to be addressed in future investment rule-making. As the public debate about the investment regime and the debate within the international investment law community suggest, this has become a matter of urgency. Enhancements in the regime should be sought subject area by subject area, when negotiating individual IIAs. Where new initiatives need to be taken, they should be launched as soon as possible. Finally, preparations for the negotiation of a comprehensive universal investment framework should be seriously considered.

In the end, any systematic process to enhance the international investment law and policy regime needs to be government-led and -owned.

However, considering the range of stakeholders involved in international investment matters, it would be advisable to launch an (accompanying) informal but inclusive confidence-, consensus- and bridge-building process on how to address the fundamental issues confronting the international investment community, a number of them analysed in this report. Such a process should take place outside an intergovernmental setting, to encourage a free and open discussion of all the issues involved.[96] It could be a process organized by a credible non-governmental organization with a track record on work on the global trade and investment system, perhaps in cooperation with a consortium of academic institutions from all continents and the support of a few individual countries particularly interested in this subject. It should take a holistic view of what needs to be done, drawing on the important work carried out in recent years by established international organizations. It should identify systematically any weaknesses of the current regime and advance concrete proposals on how to deal with them—not only regarding the relationship between governments and investors, but also with a view towards increasing sustainable FDI flows and the benefits of these flows. It would have to be an inclusive and transparent process that involved the principal stakeholders to ensure that all issues are put on the table and all key interests are taken into account.

The outcome of such a process could be a draft framework that could be made available to governments to use as they see fit. In any event, it should be made available widely, to help governments to enhance the international investment law and policy regime as the broadly accepted enabling framework for increased flows of sustainable FDI for sustainable development.

Conclusions

The international investment law and policy regime is in flux. Like any regime, it can be improved, in a careful and constructive process that builds on what has worked. This presents challenges and opportunities. Serious thought needs to be given to how the regime governing the relations between governments and international investors in an area that constitutes the most important form of international economic transactions in the globalizing world economy can be updated and enhanced. The regime needs to be more responsive to the requirements of today's world. It also needs to be responsive to the requirements of the world as it is emerging in light of the further growth of FDI, the proliferation of MNEs and their foreign affiliates, the emergence of an integrated international production system, and the imperative to move to a sustainable model of development. Ultimately, it needs to be responsive to the expectations that its key stakeholders have regarding the regime.

At the end of this process of enhancement, such an effort should yield a regime in which multilateral investment law regulates with a clear purpose and well-defined rules the relations between governments and international investors, each with their own rights and responsibilities, and in harmony with other international regimes addressing other important objectives. Such a regime should be at the service of sustainable development, with special support for developing countries (and especially the least developed among them) to help them attract sustainable FDI and benefit from it as much as possible—substantially higher FDI flows are needed to meet the investment needs of the future and support the growth of the world economy. While governments respect property rights, they maintain the sovereign right to regulate in pursuit of legitimate public policy objectives. An institutionalized, inclusive and credible dispute-settlement mechanism would enforce the regime, with assistance available to countries in need for such assistance and special arrangements made to provide enhanced access to justice for small and medium-size enterprises.

Developing the regime in this direction is not only important for the regime to remain useful, but also to increase its legitimacy and, more generally, promote the rule of international law in a manner that reflects the interests of all key investment stakeholders.

[96] As the saying goes concerning any intervention of government officials in international organizations: "Anything you say in an intergovernmental forum can be held against you later on."

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Annex 1: Summary Table of Main Policy Options

Policy option	Current status and gap	How to get there
Updating the purpose and contents (substantive and procedural provisions) of IIAs		
1. Broaden the regime's purpose to include promoting sustainable development and other key public policy objectives, including the protection of public welfare and human rights.	- The principal purpose and narrow focus of the international investment regime has been and remains to protect foreign investors and, more recently, to facilitate the operations of investors, seeking in this manner to encourage additional FDI flows.	- Constitute a working group of leading international investment experts, including practitioners and arbitrators, to propose how the purpose and contents of IIAs could best be updated, in close consultation with principal stakeholders, supported by a consortium of universities from all continents as well as other interested stakeholder organizations. - Present the results to governments for their consideration in future investment rule-making.
2. Recognize, in a dedicated article in IIAs, the need for adequate policy space and the right to regulate.	Same as above.	Same as above.
3. Clarify key concepts in IIAs, including their substantive protections.	- Concepts such as "policy space" are elastic. Care needs to be taken that the legal consequences and limits of these concepts are understood. - There is a need for tighter wording that clearly defines the sort of injuries for (and circumstances in) which investors can seek compensation, and the type of actions governments can and cannot take. - Key substantive provisions to be clarified include national treatment, fair and equitable treatment, most-favoured-nation treatment, full protection, and security.	Same as above.
4. Clarify interrelationships with other international law regimes (e.g. human rights, environment).	- Guidance on how such linkages are to be recognized and any conflicts between regimes are to be reconciled should be built into IIAs. - The adoption of a "clean hands" defence should be considered in investment treaties.	Same as above.
5. Delineate more clearly the borderline between the investment and tax regimes.	- The intersection of these two legal regimes is likely to generate more policy challenges that will have to be dealt with in the future.	Same as above.
6. Encourage empirical research and firm-level data gathering on the incidence and effectiveness of FDI incentives.	- There is a general recognition that incentives do not constitute, as a rule, important FDI determinants. Yet virtually all countries (and many sub-national units) offer financial, fiscal, or other incentives in the hope of influencing the locational decisions of firms.	Same as below.

Policy option	Current status and gap	How to get there
7. Establish a working group to prepare in a multistakeholder process an indicative list of sustainable FDI characteristics.	- With the adoption of the Sustainable Development Goals by the international community, this matter has acquired additional urgency. - Governments seeking to attract sustainable FDI could use the indicative list. It could also be of use to arbitrators.	- The working group could identify what mechanisms could be used, at both the national and international levels, to encourage the flow of sustainable investment – i.e. mechanisms that go beyond those used to attract FDI in general and benefit from it. - At the national level, special incentives could be one of the tools. - At the international level, the working group could examine, among other things, what can be learned from various instruments established in the context of the UNFCCC, such as the Clean Development Mechanism.
8. Recognize the responsibilities of investors and address them in IIAs, in the interest of promoting desirable corporate conduct and balancing rights and responsibilities between investors and governments.	- Various non-binding/mixed instruments address this issue and could be developed further (e.g. OECD Guidelines, OHCHR Guiding Principles on Business and Human Rights, ILO Tripartite Declaration). - Responsibility clauses could be included in IIAs that condition the availability of investor protections on compliance with applicable national or international instruments defining investor responsibilities.	- Constitute a working group of leading international investment experts, including practitioners and arbitrators, to propose how the purpose and contents of IIAs could best be updated. - Present the results to governments for their consideration in future investment rule making.
Developing an international investment support programme for sustainable development		
9. Turn the Aid for Trade Initiative into an Aid for Investment and Trade Initiative.	- Virtually all governments seek to attract FDI and benefit from it. But a number of governments, especially of the LDCs, have weak capabilities to compete successfully in the world FDI market. - The key premise is the importance of creating more favourable conditions for higher *sustainable* FDI flows to meet the investment needs of the future.	- Such an effort could be pursued in the short term through the Global Review on Aid for Trade. It would include WTO members and other international organizations. - The new initiative should cover investment fully, create an integrated platform for promoting sustainable FDI, improve national FDI regulatory frameworks, and strengthen investment promotion capabilities, especially in LDCs and other developing countries.
10. Expand the Trade Facilitation Agreement to cover sustainable investment, making it an Investment and Trade Facilitation Agreement.	Same as above. (This is a more ambitious medium-term option.)	- 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.

Policy option	Current status and gap	How to get there
11. Urge a multilateral organization to launch a Sustainable Investment Facilitation Understanding focusing on ways to encourage sustainable FDI flows to developing countries.	Same as above. (This is a long-term option.)	- Work on such an Understanding could be undertaken (in due course) in the WTO. It could also begin within another IGO with experience in international investment matters – e.g. UNCTAD, the World Bank, or the OECD (ILO, UNEP and OHCHR could also bring their expertise). - A group of the leading outward FDI countries could also launch such an initiative (which would be a plurilateral approach). - The impetus could come from the G20, which could mandate the initiation of work on the development of an Understanding.
12. Conduct detailed substantive work to flesh out what aspects of "investment facilitation" could be included in the above options.	Same as above.	- This could be done by the organizations mentioned above or by a credible NGO or by a balanced group of experts and practitioners. - A knowledge bank jointly organized by IGOs with a track record in the various aspects of international investment could be established, as a depository for information and experiences available to developing countries seeking to attract sustainable FDI.
Addressing the challenge of preventing, managing, and resolving disputes		
13. Establish investor-state conflict management mechanisms at the national level to help prevent, manage, and resolve disputes.	- Governments need to develop national investor-state conflict management mechanisms that allow governments and investors to address their grievances before they escalate into full-blown legal disputes. - Institutional infrastructure needs to be developed to engage in regular government-private sector dialogues and to monitor conflicts and resolve these.	- Institutions such as national investment ombudspersons and inter-ministerial committees that vet conflicts when they arise are helpful here. - The World Bank has begun to help countries to establish such conflict-management mechanisms, an effort that ought to be made available to as many countries as possible. - National investment promotion agencies could be assisted to conduct IIA impact assessments and to advise on the implementation of treaty commitments.
14. Provide assistance to low-income countries negotiating large-scale contracts.	Same as above.	- Support the creation of an investment negotiation support facility currently being considered by the G7 (with LDC backing), not only to arrive at well-negotiated contracts but also to reduce the likelihood that disputes arise. This initiative should come to fruition as soon as possible.

Policy option	Current status and gap	How to get there
15. Further institutionalize ISDS through the establishment of an appellate mechanism and/ or a world investment court (e.g. through an ICSID II agreement).	- It is unavoidable that some disputes reach the international arbitral level. Given the centrality of the investor-state dispute-settlement (ISDS) mechanism to the investment regime, that mechanism has to be beyond reproach. - This is not only a technical matter, but also one that has implications for the very legitimacy of the international investment regime. A number of steps have already been taken to improve this mechanism, but more needs to be done.	- Several different arrangements are conceivable: a) Awards issued by the *ad hoc* panels currently used in IIA disputes could be appealed to *ad hoc* appellate bodies (the members of the appellate bodies could be chosen from a predetermined list of experts, preferably by an independent third party). b) The establishment of a single permanent and independent world investment court could be envisaged. c) An appellate mechanism for reviewing awards could be established in the framework of a treaty between two or more parties, to review decisions of *ad hoc* tribunals; other states would be invited to opt in, multilateralizing the appellate mechanism in this manner. -Since ICSID is the single most prominent dispute-settlement venue, one could think of a treaty updating the present Convention—an ICSID II. It would preserve enforceability, but update any features in the current rules that might require modernization. Such a new treaty could create a single world investment court (and appellate body) that would then be available to all governments that have signed and ratified the treaty.
16. Allow governments direct access to ISDS as claimants.	- There is the question of access to any dispute-settlement mechanism. In particular, if the contents of IIAs are expanded to include investor responsibilities, governments arguably should have direct access to the regime's dispute-settlement mechanism and not only by way of counter-claims.	- Embarking on the process of exploring how the current dispute-settlement mechanism could be improved would send a strong signal that governments recognize the need to develop a better mechanism. - Discussions of the range of issues relating to this matter are already underway in a number of governmental and non-governmental forums, ranging from the European Parliament to various academic conferences. These should be expedited. All interested stakeholders should be heard and all pertinent issues should be addressed.
17. Consider, long-term, turning ISDS into an investment dispute-settlement mechanism and opening it to other stakeholders.	- Following option 15, the question would also arise whether the dispute-settlement process should then be opened up further to other stakeholders too (this would be a profound, challenging, and very ambitious change).	Same as above.

Policy option	Current status and gap	How to get there
Establishing an Advisory Centre on International Investment Law		
18. Establish an independent Advisory Centre on International Investment Law (ACIIL).	- A strong signal demonstrating the will to enhance the legitimacy of the investment regime would be sent if the ability of vulnerable countries to defend themselves in disputes would be improved. - LDCs particularly do not generally have the human resources to defend themselves adequately, and many do not have the financial resources to hire the required expertise. This puts many countries in an asymmetric situation whenever a dispute arises. - An independent ACIIL would help to establish a level playing field by providing administrative and legal assistance to low-income country respondents.	- The process of clarifying the issues surrounding the creation of an Advisory Centre on International Investment Law should begin now. - Persuade a few governments concerned about the legitimacy of the international investment regime to assume a lead role in establishing such a Centre, supported by an NGO with a track record of work on the international trading system and drawing on the experience of IGOs. - The WTO Advisory Centre has done valuable work, contributing to enhancing the legitimacy of the international trading system. An Advisory Centre on International Investment Law (which would suitably complement the reform of the ISDS mechanism) could do the same thing for the international investment regime.
19. Create a small-claims court for SMEs and designate an International Investment Ombudsperson.	- Similar considerations as above apply to SMEs, as they typically do not have the expertise and resources to bring claims. They too require support. Costs and delays could become even more of an obstacle if an appeals mechanism were to be established.	- A small-claims settlement mechanism, with an expedited process, set deadlines and sole arbitrators, could be of help. - As a low-cost alternative dispute-settlement mechanism of potential value, an International Investment Ombudsperson could be designated, cooperating with an *ad hoc* ombudsperson in a respondent state.
Negotiating a multilateral/plurilateral framework on investment		
20. Initiate an exploratory process towards negotiating a comprehensive universal framework on international investment, preferably a multilateral framework on investment, possibly starting with a plurilateral framework on investment that would be open for future accessions by other states.	- The convergence of policy interests that has been underway between home and host countries with the growth of outward FDI from emerging markets could facilitate reaching such an objective. - Governments continue to show a great willingness to make rules on international investment. This is reflected in the negotiation of bilateral investment treaties between key countries (e.g. US-China BIT), and in the negotiation of mega-regional agreements with investment chapters (e.g. TPP). - These negotiations represent opportunities to shape the investment regime by narrowing the substantive and procedural investment law differences among the principal FDI host and home countries.	- A universal framework would have to start from the need to promote sustainable FDI for sustainable development. The most comprehensive recent effort in this respect is the UNCTAD Investment Policy Framework for Sustainable Development. - The WTO offers the best platform for trade and investment regimes to be combined and consolidated, as a unified system providing systematic legal and institutional support for the future growth of GVCs, turning that organization into a World Investment and Trade Organization. The WTO Working Group on the Relationship between Trade and Investment could be reactivated or a new working group could be established.

Policy option	Current status and gap	How to get there
	- The negotiation of a multilateral instrument (especially a high-standards one) would face major challenges in light of the unsuccessful efforts of the past and the wide range of views surrounding IIAs. - The July 2015 decision by the Third International Conference on Financing for Development has mandated UNCTAD to work with member states to improve IIAs.	- Another alternative is to build on existing agreements, especially the GATS, to cover other types of investment and obligations. - There might also be the possibility that the international investment court and appellate mechanism sought by the European Commission could become a stepping stone towards a permanent multilateral system for investment disputes, which, in turn, could become the nucleus around which a universal framework could be built. - If a multilateral framework is out of reach at this time, a plurilateral framework could serve as a first step. It could be an agreement negotiated by interested parties that would be open for future accessions. It could also build on recent bilateral and mega-regional agreements (e.g. Pacific Rim) in a process of sequential multilateralization. - The G20 is a potential forum to launch the exploratory process.
Launching an (accompanying) informal and inclusive consensus-building process		
21. Encourage a credible NGO to launch and organize an informal process to encourage a free and open discussion of all the issues involved.	- Any systematic process to improve the investment regime needs to be government-led and -owned. - However, considering the range of stakeholders involved in international investment matters, it would be advisable to launch an (accompanying) informal but inclusive confidence-, consensus- and bridge-building process on how the international investment law and policy regime can best be enhanced.	- A trusted institution, perhaps with the support of a few countries and in cooperation with an international consortium of academic institutions, should organize the process outside an intergovernmental setting. - It should identify systematically any weaknesses of the current regime and advance concrete proposals on how to deal with them. - It should be inclusive and involve the principal stakeholders to ensure that all issues are discussed and all key interests are taken into account. - The outcome could be a draft agreement that could be made available to governments to use as they see fit.
Additional recommendation		
Provide better data	- Countries do not necessarily follow the reporting guidelines provided by IMF, UNCTAD and OECD. - Implementing these guidelines would correct major distortions in international investment statistics.	- Encourage all countries to report FDI flows with and without special-purpose-entity transactions and on the basis of the location of the ultimate parent firm, to provide better data for the evaluation of the impact of FDI. - Technical assistance programmes undertaken by IGOs could help.

Annex 2: Members of the E15 Task Force

Karl P. SAUVANT – Theme Leader
Resident Senior Fellow, Columbia Center on Sustainable Investment (CCSI)

Pedro ROFFE – Convener
Senior Associate, International Centre for Trade and Sustainable Development (ICTSD)

Jose ALVAREZ
Herbert and Rose Rubin Professor of International Law, New York University Law School

George A. BERMANN
Professor of Law and Director of the Center for International Commercial and Investment Arbitration (CICIA), Columbia Law School

Nathalie BERNASCONI-OSTERWALDER
Group Director, Economic Law & Policy, International Institute on Sustainable Development (IISD)

Gabriel BOTTINI
Adjunct Professor of Public International Law, University of Buenos Aires

William BURKE-WHITE
Richard Perry Professor and Inaugural Director, Perry World House, University of Pennsylvania

Shaun DONNELLY
Vice President, Investment and Financial Services, United States Council for International Business

Lorraine EDEN
Professor of Management, Texas A&M University

Ana ESCOBEDO
Director of International Government Affairs, ArcelorMittal

Mark FELDMAN
Associate Professor of Law, Peking University School of Transnational Law

Anabel GONZÁLEZ
Senior Trade and Competitiveness Director, World Bank

Nicolle GRAUGNARD
Policy Manager, Trade and Investment, International Chamber of Commerce (ICC)

Gary Clyde HUFBAUER
Reginald Jones Senior Fellow, Peterson Institute for International Economics (PIIE)

Hiroyuki ISHIGE
Chairman and CEO, Japan External Trade Organization (JETRO)

Anna JOUBIN-BRET
Principal, Joubin-Bret Cabinet d'Avocats

Gabrielle KAUFMANN-KOHLER
Partner, Lévy Kaufmann-Kohler

Meg KINNEAR
Secretary General, International Centre for Settlement of Investment Disputes (ICSID), World Bank

Robert Z. LAWRENCE
Albert L. Williams Professor of Trade and Investment, John F. Kennedy School of Government at Harvard University

James LOCKETT
Vice-President, Head of Trade Facilitation and Market Access, Huawei Technologies

Abdel-Hamid MAMDOUH
Director of the Trade in Services Division, World Trade Organization (WTO)

Howard MANN
Senior International Law Advisor, International Institute for Sustainable Development (IISD)

Rodrigo MONARDES
Head of the Services, Investment and Air Transport Division, Ministry of Foreign Affairs of Chile

Corinne MONTINERI
Legal Officer, UNCITRAL Secretariat, United Nations Office of Legal Affairs

Ana NOVIK
Head of the Investment Division, OECD

Herbert OBERHÄNSLI
Vice President and Head Economics and International Relations, Nestlé

Federico ORTINO
Reader in International Economic Law, King's College London

Habib OUANE
International Consultant / Former Energy and Water Resources Minister of Mali

Joost PAUWELYN
Professor of International Law, Graduate Institute of International and Development Studies

Githa ROELANS
Head, Multinational Enterprises and Enterprise Engagement Unit, International Labour Organization (ILO)

Pierre SAUVÉ
Director of External Programmes and Academic Partnerships, World Trade Institute (WTI), at the University of Bern

Stephan W. SCHILL
Professor of International and Economic Law and Governance, University of Amsterdam

Wenhua SHAN
Yangtze River Chair Professor of International Economic Law, Xi'an Jiaotong University

Muthucumaraswamy SORNARAJAH
CJ Koh Professor of Law, National University of Singapore

Surya P. SUBEDI
Professor of International Law, University of Leeds

James ZHAN
Director of the Investment and Enterprise Division, United Nations Conference on Trade and Development (UNCTAD)

Cristian RODRIGUEZ CHIFFELLE – Group Manager
Lead, Trade and Investment Policy, World Economic Forum

Other contributing authors:

Julien CHAISSE
Associate Professor, The Chinese University of Hong Kong

Michael GESTRIN
Senior Economist, Directorate for Financial and Enterprise Affairs, OECD

Khalil HAMDANI
Visiting Professor, Lahore School of Economics, Pakistan

Susan MATHEWS
Human Rights Officer, Right to Development Section, Development and Economic and Social Issues Branch/ Research and Right to Development Division, Office of the United Nations High Commissioner for Human Rights (OHCHR)

Tyler MORAN
Research Analyst, Peterson Institute for International Economics (PIIE)

The following experts also attended and participated actively in the Task Force meetings

John EVANS
General Secretary, Trade Union Advisory Committee (TUAC) to the Organisation for Economic Co-operation and Development (OECD)

Pierre HABBARD
Senior Policy Coordinator, Trade Union Advisory Committee (TUAC) to the Organisation for Economic Co-operation and Development (OECD)

Renaud SORIEUL
Director, International Trade Law Division (ITLD), United Nations Office of Legal Affairs and Secretary of the United Nations Commission on International Trade Law (UNCITRAL)

The experts all participated in their personal capacity. The views and recommendations expressed in the policy options paper are not attributable to any institution with which members of the E15 Task Force are associated.

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The E15 Initiative

www.e15initiative.org

International Centre for Trade and Sustainable Development
International Environment House 2
Chemin de Balexert 7-9
1219 Châtelaine
Geneva
Switzerland

Phone: +41 22 917 84 92
Fax: +41 22 917 80 93
Email: info@ictsd.ch

www.ictsd.org

World Economic Forum
91–93 route de la Capite
CH-1223 Cologny/Geneva
Switzerland

Tel.: +41 (0) 22 869 1212
Fax: +41 (0) 22 786 2744

contact@weforum.org
www.weforum.org