

SYNTHESIS OF THE POLICY OPTIONS

No.

14

**THE EVOLVING INTERNATIONAL
INVESTMENT LAW AND POLICY
REGIME: WAYS FORWARD**

The Evolving International Investment Law and Policy Regime: Ways Forward

Synthesis of the Policy Options*

January 2016

* Sauvant, Karl P. 2016. *The Evolving International Investment Law and Policy Regime: Ways Forward*. E15 Task Force on Investment Policy - Policy Options Paper. E15Initiative. Geneva: International Centre for Trade and Sustainable Development (ICTSD) and World Economic Forum.

NOTE

The policy options presented in this synthesis are 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. While a serious attempt has been made on the part of the author to take the perspectives of all group members into account, it has not been possible to do justice to the variety of views; in fact, views within the Task Force on a number of issues discussed in the paper varied widely. The analysis and policy recommendations should therefore not be considered to represent consensus; they remain the responsibility of the author. The list of group members and E15 papers are referenced.

The full volume of policy options papers covering all topics examined by the E15Initiative, jointly published by ICTSD and the World Economic Forum, and launched at the Forum's Annual Meeting at Davos-Klosters in 2016, is complemented with a monograph that consolidates the options into overarching recommendations for the international trade and investment system for the next decade.

E15 INITIATIVE

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 its 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.

For more information on the E15Initiative:
www.e15initiative.org

ACKNOWLEDGEMENTS

WITH THE SUPPORT OF



Schweizerische Eidgenossenschaft
Confédération suisse
Confederazione Svizzera
Confederaziun svizra

Swiss Confederation

Federal Department of Economic Affairs,
Education and Research EAER
State Secretariat for Economic Affairs SECO



And ICTSD's Core and Thematic Donors:



Government of the Netherlands



Norwegian Ministry
of Foreign Affairs

PUBLISHED BY

International Centre for Trade and Sustainable Development
(ICTSD)

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Website: www.ictsd.org

Publisher and Chief Executive: Ricardo Meléndez-Ortiz

World Economic Forum

91-93 route de la Capite, 1223 Cologny/Geneva, Switzerland

Tel: +41 22 869 1212 • E-mail: contact@weforum.org

Website: www.weforum.org

Co-Publisher and Managing Director: Richard Samans

CITATION

Sauvant, Karl P. 2016. *The Evolving International Investment Law and Policy Regime: Ways Forward. Synthesis of the Policy Options*. E15Initiative. Geneva: International Centre for Trade and Sustainable Development (ICTSD) and World Economic Forum.

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OBJECTIVES AND OUTPUT

The E15 Task Force on Investment Policy had six objectives

- Analyse the 21st century landscape of foreign direct investment (FDI) and multinational enterprise (MNE) activities, as well as the structure of the investment law and policy regime.
- Identify options to enhance the international investment law and policy regime and its legitimacy to increase significantly the flow of sustainable FDI for sustainable development.
- Suggest an international approach to increase the flow of sustainable FDI (especially to developing countries) to meet international investment needs.
- Identify possibilities for strengthening the institutionalization and legitimacy of the investment regime's dispute-settlement mechanism, currently very much questioned.
- Provide recommendations on how to address the growing interlinkages between trade and investment, and between the investment regime and other international law regimes.
- Examine the question of a multilateral/plurilateral framework on international investment.

Overarching questions and issues the Task Force was tasked to consider

- What are the strengths and weaknesses of the current international investment regime? How can the regime's legitimacy be improved to encourage increased flows of sustainable FDI?
- Are the purposes served by the regime as originally devised still adequate?
- How should the various standards contained in international investment agreements (IIAs) be updated?
- Does the balance of the rights and responsibilities of the principal actors in international investment need adjustment?
- Does the current investor-state dispute-settlement (ISDS) mechanism meet 21st century challenges? Is the institutional infrastructure of the current regime satisfactory? What are the avenues for reform?
- Is it desirable to multilateralize the investment regime? If so, how?

Task Force analysis and policy proposals were submitted in two forms

1. Critical issues studied through an overview paper and think pieces commissioned for the E15 Initiative. These papers are referenced on page 15 and can be accessed at <http://e15initiative.org/publications/>.
2. Policy options presented in this synthesis and compiled in the summary table. The options fall under six main categories:
 - Updating the objective and content of international investment agreements
 - Establishing an international support programme for sustainable investment facilitation
 - Addressing the challenge of preventing, managing, and resolving investment disputes
 - Establishing an advisory centre on international investment law
 - Initiating an exploratory process towards a comprehensive multilateral/plurilateral framework on investment
 - Launching an informal consensus-building process

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FOREWORD

Foreign direct investment (FDI) has become the most important vehicle to bring goods and services to foreign markets. It interconnects the national production systems of individual countries, while creating an integrated international production system through investments in global value chains. Multinational enterprises undertake the lion's share of FDI, commonly defined as investment that involves control over foreign assets. The services sector alone accounts for around two-thirds of the world's investment flows and stock, with developed countries traditionally positioned at both ends of FDI, inbound and outbound. However, in recent years this trend has been shifting, as now emerging markets are receiving more than half of FDI flows, while their firms have also risen as outward investors. These changes, and the advent of these value chains, especially in Asia, have created new challenges for the international regime that seeks to regulate cross-border investment.

Today, the international investment regime is at a crossroads, highlighted by the explosion in the number of investor-state dispute settlement (ISDS) cases brought in the past 20 years. Critics sense the system is unbalanced, biased towards foreign investors and undermining national rights to regulate, while costs of arbitration are overwhelming.

Discussions in recent mega-regional negotiations—such as the Trans-Pacific Partnership and especially the Transatlantic Trade and Investment Partnership—have brought unprecedented attention to the ISDS mechanism, with civil society voices and a number of governments calling for reform. However, countries have not come to a uniform vision on provisions that extend beyond investment protection (and, to a certain extent, liberalization), and differ on how to address sustainable development concerns.

The policy options presented in this report seek to address the most pressing challenges of the international investment regime, covering measures and policies that can be pursued both at the national and the international levels, with the question of sustainable FDI for sustainable development at its centre. These challenges come in many forms, such as for example tensions between foreign and domestic ownership, investor protection and state rights to regulate, and domestic provisions and international regulatory frameworks. The options seek to be responsive to the requirements of the world as it is emerging in light of the further growth of FDI, the proliferation of multinational enterprises and their foreign affiliates, the emergence of an integrated international production system, and the imperative to move to a sustainable

THE EVOLVING INTERNATIONAL INVESTMENT LAW AND POLICY REGIME: WAYS FORWARD

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 IS *MORE* INVESTMENT 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 the 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 needs
are tremendous...

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. Negotiation of a multilateral/plurilateral investment agreement could provide an overall framework for international investment, preceded (or accompanied) by an informal consensus-building process.

BACKGROUND TO RULE-MAKING ON INTERNATIONAL INVESTMENT

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 policy options focus 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.

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

POLICY OPTIONS: SUSTAINABLE FDI FOR SUSTAINABLE DEVELOPMENT

UPDATING THE PURPOSE AND CONTENTS OF IIAs

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.¹

POLICY OPTION 1 - Broaden the regime's purpose to promote sustainable development

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.

POLICY OPTION 2 - Recognize the need for adequate policy space

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 article in IIAs. It also means that investors commit themselves to responsible business conduct. The contents of IIAs needs to reflect this broadened purpose.

“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.

POLICY OPTIONS 3 TO 5 - Clarify key concepts and interrelationships

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.

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.²

POLICY OPTION 7 - Recognize the responsibilities of investors in IIAs

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 arbitrators and 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.

DEVELOPING AN INTERNATIONAL SUPPORT PROGRAMME FOR SUSTAINABLE INVESTMENT FACILITATION

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,

Updating the purpose of the regime needs to be accompanied by a clarification of key concepts, interrelationships, and investor responsibilities.

POLICY OPTION 6 - Establish a working group to prepare a list of FDI sustainability characteristics

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 issue 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

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.

POLICY OPTIONS 8 TO 11 - Choose an option to implement such an international support programme

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. Detailed substantive work will be necessary to flesh out what aspects of “investment facilitation” could be included in every of the above options.

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.

ADDRESSING THE CHALLENGE OF PREVENTING, MANAGING AND RESOLVING DISPUTES

POLICY OPTIONS 12 & 13 - Develop national investor-state conflict management mechanisms

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.

Disputes should be settled at the national level...

POLICY OPTION 14 - Establish ISDS appeals mechanisms or a world investment court

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.

...but if they reach the international level, the dispute-settlement mechanism needs to be beyond reproach,...

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.

POLICY OPTION 15 - Allow governments direct access to ISDS as claimants

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.

POLICY OPTION 16 - Consider, long-term, turning ISDS into an investment dispute-settlement mechanism

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 array 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.

ESTABLISHING 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.

POLICY OPTION 17 - Establish an Advisory Centre on International Investment Law

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. While a number of issues would have to be considered before establishing such a facility, the experience of the Advisory Centre on WTO Law shows that it can be done—to the benefit of the world trading system.

POLICY OPTION 18 - Create a small-claims court for small and medium-sized enterprises

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.

NEGOTIATING A MULTILATERAL/PLURILATERAL FRAMEWORK ON INVESTMENT

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, possibly starting with a plurilateral framework on investment 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.

POLICY OPTION 19 - Initiate an exploratory process towards a comprehensive universal investment framework

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 particularly 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.

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

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

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.

... and this effort should be accompanied and helped by an informal consensus-building process.

POLICY OPTION 20 - Launch an informal consensus-building process

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.

ENDNOTES

1. A basic recommendation is to encourage all countries to provide better data for the evaluation of the impact of FDI.
2. These instruments include the OECD Guidelines for Multinational Enterprises, the OHCHR Guiding Principles on Business and Human Rights, and the ILO Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy.

TABLE SUMMARY 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.
4. 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.
5. 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.
6. 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.
7. 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.

TABLE SUMMARY OF MAIN POLICY OPTIONS (continued)

POLICY OPTION	CURRENT STATUS AND GAP	HOW TO GET THERE
Developing an international investment support programme for sustainable development		
<p>8. Turn the Aid for Trade Initiative into an Aid for Investment and Trade Initiative.</p>	<p>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.</p> <p>The key premise is the importance of creating more favourable conditions for higher <i>sustainable</i> FDI flows to meet the investment needs of the future.</p>	<p>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.</p> <p>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.</p>
<p>9. Expand the Trade Facilitation Agreement (TFA) to cover sustainable investment, making it an Investment and Trade Facilitation Agreement.</p>	<p>Same as above.</p> <p>(This is a more ambitious medium-term option)</p>	<p>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.</p>
<p>10. Urge a multilateral organization to launch a Sustainable Investment Facilitation Understanding focusing on ways to encourage sustainable FDI flows to developing countries.</p>	<p>Same as above.</p> <p>(This is a long-term option)</p>	<p>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).</p> <p>A group of the leading outward FDI countries could also launch such an initiative (which would be a plurilateral approach).</p> <p>The impetus could come from the G20, which could mandate the initiation of work on the development of an Understanding.</p>
<p>11. Conduct detailed substantive work to flesh out what aspects of “investment facilitation” could be included in the above options.</p>	<p>Same as above.</p>	<p>This could be done by the organizations mentioned above or by a credible NGO or by a balanced group of experts and practitioners.</p> <p>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.</p>
Addressing the challenge of preventing, managing, and resolving disputes		
<p>12. Establish investor-state conflict management mechanisms at the national level to help prevent, manage, and resolve disputes.</p>	<p>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.</p> <p>Institutional infrastructure needs to be developed to engage in regular government-private sector dialogues and to monitor conflicts and resolve these.</p>	<p>Institutions such as national investment ombudspersons and inter-ministerial committees that vet conflicts when they arise are helpful here.</p> <p>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.</p> <p>National investment promotion agencies could be assisted to conduct IIA impact assessments and to advise on the implementation of treaty commitments.</p>
<p>13. Provide assistance to low-income countries negotiating large-scale contracts.</p>	<p>Same as above.</p>	<p>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.</p>

POLICY OPTION	CURRENT STATUS AND GAP	HOW TO GET THERE
<p>14. Further institutionalize ISDS through the establishment of an appellate mechanism and/or a world investment court (e.g. through an ICSID II agreement).</p>	<p>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.</p> <p>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.</p>	<p>Several different arrangements are conceivable:</p> <p>a) Awards issued by the <i>ad hoc</i> panels currently used in IIA disputes could be appealed to <i>ad hoc</i> appellate bodies (the members of the appellate bodies could be chosen from a predetermined list of experts, preferably by an independent third party).</p> <p>b) The establishment of a single permanent and independent world investment court could be envisaged.</p> <p>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 <i>ad hoc</i> tribunals; other states would be invited to opt in, multilateralizing the appellate mechanism in this manner.</p> <p>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.</p>
<p>15. Allow governments direct access to ISDS as claimants.</p>	<p>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.</p>	<p>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.</p> <p>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.</p>
<p>16. Consider, long-term, turning ISDS into an investment dispute-settlement mechanism and opening it to other stakeholders.</p>	<p>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).</p>	<p>Same as above.</p>
<p>Establishing an Advisory Centre on International Investment Law</p>		
<p>17. Establish an independent Advisory Centre on International Investment Law (ACIIL).</p>	<p>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.</p> <p>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.</p> <p>An independent ACIIL would help to establish a level playing field by providing administrative and legal assistance to low-income country respondents.</p>	<p>The process of clarifying the issues surrounding the creation of an Advisory Centre on International Investment Law should begin now.</p> <p>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.</p> <p>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.</p>
<p>18. Create a small-claims court for SMEs and designate an International Investment Ombudsperson.</p>	<p>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.</p>	<p>A small-claims settlement mechanism, with an expedited process, set deadlines and sole arbitrators, could be of help.</p> <p>As a low-cost alternative dispute-settlement mechanism of potential value, an International Investment Ombudsperson could be designated, cooperating with an <i>ad hoc</i> ombudsperson in a respondent state.</p>

TABLE SUMMARY OF MAIN POLICY OPTIONS (continued)

POLICY OPTION	CURRENT STATUS AND GAP	HOW TO GET THERE
Negotiating a multilateral/plurilateral framework on investment		
<p>19. 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.</p>	<p>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.</p> <p>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. Trans-Pacific Partnership).</p> <p>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.</p> <p>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.</p> <p>The July 2015 decision by the Third International Conference on Financing for Development has mandated UNCTAD to work with member states to improve IIAs.</p>	<p>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.</p> <p>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.</p> <p>Another alternative is to build on existing agreements, especially the GATS, to cover other types of investment and obligations.</p> <p>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.</p> <p>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.</p> <p>The G20 is a potential forum to launch the exploratory process.</p>
Launching an (accompanying) informal and inclusive consensus-building process		
<p>20. Encourage a credible NGO to launch and organize an informal process to encourage a free and open discussion of all the issues involved.</p>	<p>Any systematic process to improve the investment regime needs to be government-led and -owned.</p> <p>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.</p>	<p>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.</p> <p>It should identify systematically any weaknesses of the current regime and advance concrete proposals on how to deal with them.</p> <p>It should be inclusive and involve the principal stakeholders to ensure that all issues are discussed and all key interests are taken into account.</p> <p>The outcome could be a draft agreement that could be made available to governments to use as they see fit.</p>
Additional recommendation		
<p>Provide better data</p>	<p>Countries do not necessarily follow the reporting guidelines provided by IMF, UNCTAD, and OECD.</p> <p>Implementing these guidelines would correct major distortions in international investment statistics.</p>	<p>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.</p> <p>Technical assistance programmes undertaken by IGOs could help.</p>

TASK FORCE PAPERS AND THINK PIECES

The papers commissioned for the E15 Task Force on Investment Policy can be accessed at <http://e15initiative.org/publications/>.

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

E15 INITIATIVE: EXPERT GROUPS AND TASK FORCES

In the quest for effective responses to the challenges faced by the global economy at this time, foremost experts were invited to contribute to 15 thematic groups as well as three task forces addressing horizontal issues. The groups met regularly between 2012 and 2015 with the goal of delivering a set of policy options for the tenth ministerial conference of the WTO and on the occasion of the organization's 20th anniversary. These options are intended to animate discussions and feed the present and future international trade and investment policy agenda for sustainable development. The full volume of policy options papers, jointly published by ICTSD and the World Economic Forum, and launched at the Forum's Annual Meeting in Davos-Klosters in 2016, is complemented with a monograph that consolidates the options into overarching recommendations for the international trade and investment system for the next decade. The second phase of the E15 Initiative in 2016–17 will see direct engagement with policy-makers and other stakeholders to consider the implementation of E15 policy recommendations.

E15 INITIATIVE THEMES

- 1 – Agriculture and Food Security
- 2 – Clean Energy Technologies
- 3 – Climate Change
- 4 – Competition Policy
- 5 – Digital Economy
- 6 – Extractive Industries
- 7 – Finance and Development
- 8 – Fisheries and Oceans
- 9 – Functioning of the WTO
- 10 – Global Trade and Investment Architecture*
- 11 – Global Value Chains
- 12 – Industrial Policy
- 13 – Innovation
- 14 – Investment Policy
- 15 – Regional Trade Agreements
- 16 – Regulatory Coherence
- 17 – Services
- 18 – Subsidies

* Policy options to be released in late 2016

Implemented jointly by ICTSD and the World Economic Forum, the E15Initiative convenes world-class experts and institutions to generate strategic analysis and recommendations for government, business and civil society geared towards strengthening the global trade and investment system for sustainable development.



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