IMPROVING THE INTERNATIONAL INVESTMENT LAW AND POLICY REGIME: OPTIONS FOR THE FUTURE

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FOREWORD

The global economy is driven, to a large extent, by international investment undertaken by multinational enterprises. As Dr. Karl P. Sauvant and Dr. Federico Ortino write in their report *Improving the international investment law and policy regime: Options for the future*, around 100,000 such enterprises control over 900,000 foreign affiliates worldwide, with average investment outflows of US$ 1.7 trillion annually during 2007-2011. A great number of these investments were made under more than 3,000 international investment agreements. Foreign direct investment has become the most important vehicle to bring goods and services to foreign markets.

This independent study offers an important contribution to the discussion on the international investment regime. The particular strength of the study lies in is its authoritative expert analysis of the current system, its strengths and weaknesses, and challenges to its development. Furthermore, the authors present reasoned proposals on possible options for improving the system, as well as ideas towards the development of a more coherent multilateral regime.

The study concludes that extensive support by key stakeholders is essential for any international regime to function properly. The Helsinki Investment Seminar – organized by the Ministry for Foreign Affairs of Finland in Helsinki in 2013, in the framework of the Helsinki Process – was an important step that sought to enhance such a dialogue. (A separate report on the Seminar is being published). The report at hand offered essential food for thought for the Seminar and is made available in this booklet to enrich the discussion on the international investment regime for years to come. We warmly thank the authors for this valuable contribution.

Helsinki, 15 December 2013

Erkki Tuomioja
Minister for
Foreign Affairs

Alexander Stubb
Minister for
European Affairs
and Foreign Trade

Pekka Haavisto
Minister for
International Development

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EXECUTIVE SUMMARY

The global economy is now driven, to a large extent, by international investment (and especially foreign direct investment) made by multinational enterprises. The nature and direction of this investment has evolved rapidly over recent decades, with new players, new mechanisms and new sectors becoming increasingly important. At the same time, the web of treaties, guidelines and policies dealing with international investment has grown quickly, and has become increasingly complex. The resulting international investment law and policy regime faces a number of critical issues, which could serve as catalysts for change and improvement, or could undermine the viability and legitimacy of the regime itself. In response to these challenges, stakeholders have advanced a variety of options for reform -- each with its own strengths and weaknesses, supporters and opponents.

The purpose of this paper is to outline the key features of the international investment regime, identify drivers of change, discuss critical issues, and describe some proposals for reform of the regime. It does not provide a comprehensive list of reform options, but instead presents a range of suggestions and focuses on the challenges facing their design and implementation.

The paper is divided into five sections; a brief summary of each is set out below.

a. Salient features of foreign direct investment

International investment, and especially foreign direct investment, has become the most important vehicle to bring goods and services to foreign markets and to integrate the national production systems of individual countries. Around 100,000 multinational enterprises control over 900,000 foreign affiliates worldwide, with average investment outflows of US$ 1.7 trillion annually during 2007-2011. Governments around the world seek to attract foreign investment as a tool to advance their economic growth and development. For this purpose, states have created investment promotion agencies, liberalized their regulatory frameworks and concluded a large number of international investment agreements.

b. Key features of the current international investment regime

In the past (and still today), the principal dual aims of the regime have been to promote and protect foreign investment. The scope of the regime's application has been as broad as the range of investments made by foreign entities, spanning many different types of economic interests, and protecting the interests of a broad range of "investors" – whether individuals or legal persons. However, the regime's thematic focus has been narrow – excluding, for the most part, public policy issues such as health, environment and labor considerations. The key standards promulgated in international investment agreements provide for the protection of established investments, including assurances on compensation and fair process where an investment is expropriated, fair and equitable treatment, full protection and security, and to treat investors no less favorably than national investors. Some agreements now also provide for "pre-establishment" commitments, so that foreign investors will have access to the parties' markets on the same terms as national investors. The primary mechanism relied on to enforce those standards and to settle disputes is investor-state arbitration, with a number of disputes referred to arbitral panels every year. The decisions of these tribunals, although not binding on one another, do form one source of the law that shapes the regime. Other sources of law include international investment agreements, customary international law in relation to the treatment of foreign persons, and the range of "soft law" standards that have emerged over the past fifty years. As each of these sources is constantly evolving in its own right, the regime as a whole is subject to change, although not always in a coherent manner. Further, the regime's light and fragmented institutional structure makes it difficult to co-ordinate the harmonization of standards and norms, or to direct international efforts.

c. Drivers for change: changing circumstances, constituencies, issues, and challenges

This section seeks to identify the most important changes that are driving the evolution of the international investment regime. In particular, as emerging markets are becoming important outward investors, the considerations that shaped international investment agreements in the past are changing. In line with the greater influence of emerging markets, the typical corporate structure, values and methods of investors have also changed. Notably, the growth of state-controlled entities as investors and concerns about national security have caused some developed countries to take a more nuanced approach to investment policy. Rather than viewing all foreign investment as a good thing, governments are becoming more nuanced in their approach. Increasingly, the focus is on how states can attract the right kind of investment for their circumstances, how best to secure its benefits and how to manage its risks. As such, a number of countries are reconsidering their national approach to foreign investment, including by reviewing, renegotiating or rescinding existing international commitments, and by introducing domestic measures. Of particular concern is the rising cost and frequency of treaty-based investment arbitrations. The significant increase in the number of disputes has, at least to a certain extent, been a product of the growth of the worldwide international investment volume, but it has also drawn attention to difficult issues of treaty interpretation and caused some governments to attempt to reduce (or eliminate) their potential scope of liability. In connection with this, a number of studies that seek to assess the effectiveness of investment agreements for attracting foreign investment have drawn uncertain conclusions, which has undermined one of the key rationales for the regime. Further, civil society groups continue to be an important voice in the debate surrounding the regime, and have contributed to shaping some of the "new" norms in international investment agreements. Finally, states too are taking an active, engaged role in the regime, including through the formation, adjustment and interpretation of investment agreements, but also through providing direct support for their firms that invest abroad.

d. Critical issues affecting the investment regime

The critical issues discussed in this Section reflect the features of the investment regime as outlined in Section B. The first set of critical issues relates to identifying what should be the purpose of the international investment regime and, in particular, whether states should continue to focus on the protection of investors, or whether this aim should be complemented with the promotion of sustainable international investment. Second, issues around the scope of investment agreements are discussed, including how to define "investment", how to identify an investor as "foreign", the protection of state-controlled entity investments, the temporal scope of treaties, and express sectoral or policy exclusions from international investment agreements. Third, several critical issues have arisen around the substantive content of investment norms, including the development of investment protection norms as open-ended "standards", the appropriate balance between investor protection and the right of the state to regulate, whether or not to incorporate pre-establishment investment liberalization commitments, and whether to incorporate disciplines on home countries and foreign investors within international investment agreements. Fourth, critical issues arise from the current framework for, and the dynamics of, investor-state arbitration. These issues relate to both the process and outcomes of investment arbitration, and threaten the legitimacy of investment arbitration from the perspective of states, investors and other stakeholders. Fifth, a number of issues arise from the interplay, inconsistency and overlap of the multiple legal sources that comprise the international investment regime. Finally, the lack of an institutional structure (whether at the bilateral, regional or multilateral levels) affects how the investment law and policy regime is set and implemented. In particular, the regime has so far put a substantial burden on ad hoc arbitral tribunals to determine how to interpret and implement investment agreements.

e. Options for the way forward

While each of these issues can be, to some extent, addressed by individual states on a progressive or ad hoc basis, there are also specific advantages that occur with a coordinated international approach. In order to make progress in this respect, there is a need to raise the awareness of policy decision-makers about the importance of international investment and the promise of regulatory reform. The final section of the paper outlines some of the options for improving the international investment regime and discusses their purposes, strengths and challenges.

Various fact-finding processes would allow stakeholders gain a more accurate and complete picture of the international investment regime, its legal norms and its impact on a broad range of constituents. International hearings could seek to gather information about the current state of the international investment regime, its strengths and flaws, as well as ideas for future reform from a large number of stakeholders. A restatement could also incorporate research and consultation with stakeholders, but could focus on producing a clear and comprehensive account of the legal norms contained in investment agreements, highlighting areas of inconsistency in arbitral decision-making and outlining options for resolving those issues. Once published, a restatement would need to be updated regularly to ensure that it remained a relevant resource for negotiators, policy-makers, arbitrators, and parties to investment disputes. These fact-finding approaches would require international collaboration, but could be facilitated by non-government organizations and the academic community. They would require substantial funding and time commitments, but could help to prepare a sound foundation for further reforms or initiatives.

Given their important but, historically, oppositional influence on the development of the international investment regime, any reform must engage meaningfully with both the business community and civil society organizations in different regions of the world. A dialogue roundtable between business and civil society could be a useful means to strengthen lines of communication and generate solutions to address key challenges facing the regime. Where contentious issues require more in-depth and focused effort, working groups could be a useful means to build consensus. Such working groups could address a broad range of substantive or procedural issues. Substantive questions that lend themselves to a working group process include: what are the appropriate purposes for the investment regime? How best to incorporate the concept of sustainable development into the regime? How should particular norms be interpreted and defined? And, how should states and tribunals address treaty shopping? Procedural issues revolve primarily around the dispute-settlement arrangements for international investors and the feasibility of various reform options. One proposal that might merit further attention is the creation of an appellate body to hear investor-state disputes (whether arbitrated in the first instance under ICSID or UNCITRAL, or under ad-hoc procedures). A working group could consider the policy arguments for and against an appeals mechanism, consider various options for institutional design and rules and assess the costs and benefits of such a mechanism. To ensure that their outcomes are robust and respected, these working groups would need to be composed of representatives of key stakeholder groups, from all regions, and be equipped with adequate resources to undertake consultation and research as necessary.

To help address the fragmentation of the international investment regime, a Model International Investment Agreement could be formulated, with guidance on the interpretation of, and possible variations to, common investment norms. Such a model could draw on existing models and frameworks developed by governments, inter-governmental organizations and civil society. It might present a more flexible option than a multilateral treaty, but would still enable states to work toward the harmonization of standards and to test and discuss new formulations (e.g., of "purpose" clauses).

A range of specific mechanisms could be introduced to improve the investment regime. These include a dedicated FDI Protectionism Observatory, to track, monitor and publicize regulatory policy changes made by states. Initiatives to facilitate access to dispute-settlement could lend greater legitimacy to the regime, for example, through providing technical and policy assistance to least developed countries in relation to their investment policy and investment disputes. A small claims settlement court might provide small and medium-sized enterprises with expedited, reduced-cost investment-dispute resolution. In addition to adversarial processes, it could promote negotiation and mediation between investors and the state. Another issue that could be addressed through a specific mechanism is preparing guidelines or rules for third-party funding of investment disputes.

Finally, intergovernmental processes play an important role in establishing lines of communication between states on key issues, and are essential to ensure greater co-ordination of the regime in the future. Although attempts to negotiate a multilateral framework on investment have failed in the past, there may now be pockets of opportunity and consensus within the international community that could form the basis of future cooperation. On the multilateral level, an informal meeting of ambassadors to the WTO could be a good way to raise awareness among decision-makers about investment issues, in light of a possible new WTO agenda. There are benefits and drawbacks to deal with investment in the WTO – or, for that matter, UNCTAD or the OECD - and these deserve careful analysis and debate. On the plurilateral level, an open, stand-alone intergovernmental process (perhaps serviced by staff from interested international organizations) could provide a means for states to build consensus on key issues; it could be launched by an existing international forum, such as the G-20. Whether multilateral or plurilateral, any negotiating process could be preceded by careful preparations. Independently of that, a number of significant bilateral and plurilateral investment agreements are currently under negotiation; these may well result in a de facto template for other bilateral or plurilateral negotiations, and for a multilateral framework.

In order to assess the various options for reform in further detail, and to direct a collaborative approach to their development, an International Investment Consensus-building Process could be initiated.

INTRODUCTION

In today's global economy, the importance of international investment (often referred to as "foreign direct investment") cannot be understated. As a consequence, any laws and policies affecting such investment are becoming the object of greater attention and controversy. The aim of the present paper is to lay out options to improve the international investment law and policy regime. The paper opens with a brief description of the salient features of foreign direct investment (section A) and the key features of the international investment regime (section B). In section C, the paper sets out the drivers for change, focusing on changing circumstances, constituencies, issues, and challenges. Section D identifies the critical issues with regard to the current regime, and section E presents several options for improving the overall regime, focusing on initiating inclusive processes involving various stakeholders, with the substantive outcomes to be decided by participants.

A few preliminary remarks are in order. First, while a wide range of contracts, national laws and international agreements (the "international investment regime") defines the relationship between international investors and governments,[1] the present paper focuses on the international dimension of the regime (although domestic policy measures and contracts are referred to on occasion). The international investment regime is actually very young. As Salacuse and Sullivan aptly noted when writing about the regime as it existed in the mid-1970s: "foreign investors who sought the protection of international investment law encountered an ephemeral structure consisting largely of scattered treaty provisions, a few questionable customs, and contested general principles of law."[2] Today, investor-state relations have moved a long way from a relationship defined by power toward one defined by law,

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[1] See Jeswald W. Salacuse, *The Three Laws of International Investment: National, Contractual, and International Frameworks for Foreign Capital* (New York: OUP, 2013).

[2] Jeswald W. Salacuse & Nicholas P. Sullivan, "Do BITs Really Work? An Evaluation of Bilateral Investment Treaties and Their Grand Bargain," 46(1) Harvard International Law Journal 67 (2005), p. 68.

with foreign investors benefitting from a regime that is stronger than it has ever been, including direct recourse to investor-state dispute settlement. Yet, the landscape is complicated and challenging, given the different perspectives that stakeholders have on the investment regime. While some stakeholders are basically satisfied with most of the current regime, others advocate various improvements, and again others seek a fundamental reorientation of a regime that they see as one-sided, beginning with its purpose, content and dispute-settlement mechanism.

Second, in light of its ultimate objective and the controversial nature of many aspects of the investment regime, this paper attempts to highlight the key controversial issues and various (often opposing) solutions suggested by various stakeholders. The paper does not advocate a particular position either with regard to what are the particular strengths and weaknesses of the current regime or with regard to which processes should be explored in the future in order to improve the regime. However, the underlying premise of the paper is that action is needed. Whether this action will involve minor adjustments, more substantial recalibration or a paradigm shift with regard to the international investment regime, is left for future discussion and reflection.

A. SALIENT FEATURES OF FOREIGN DIRECT INVESTMENT

Foreign direct investment (FDI) is the most important vehicle to bring goods and services to foreign markets and to integrate the national production systems of individual countries. While annual FDI outflows during the 1980s barely averaged about US$ 100 billion, they averaged US$ 1.7 trillion during 2007-2011; these flows peaked at US$ 2.2 trillion in 2007, the year before the Western financial and economic crises struck.[3] The world's outward FDI stock grew from US$ 2 trillion in 1990 to US$ 21 trillion by the end of 2011. This stock generated some US$ 28 trillion in sales, compared to world exports of US$ 22 trillion that year (annex table 1). The lion's share of the world's FDI is in the services sector (some two-thirds), followed by manufacturing (about one-quarter) and natural resources (less than one-tenth).

Foreign direct investment is undertaken by multinational enterprises (MNEs), i.e., firms that control assets abroad. At the end of 2010, there were at least 100,000 such firms worldwide, controlling at least 900,000 foreign affiliates. Obviously, many of these MNEs are small and medium-sized enterprises, although the largest of them control the bulk of FDI. To a considerable extent, they enter foreign markets through mergers and acquisitions (M&As) rather than greenfield projects. Increasingly, these firms slice up the value-added chain and locate the production of various parts of their goods and services where they can be produced best from the firm's point of view. The resulting portfolio of locational assets becomes itself a source of the international competitiveness of the outward investing firms, by providing them with better access to markets and various tangible and intangible assets required for the production process. It is for this reason that a number of home countries – especially developed countries – have a range of policy instruments in place that support their firms seeking to

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[3] As for over 20 years, FDI trends, their composition and their development impact have been discussed in UNCTAD's annual *World Investment Report* (*WIR*) series, all data, unless otherwise indicated, are from UNCTAD, *World Investment Report* (Geneva: UNCTAD, various years) [hereinafter UNCTAD, *WIR*].

invest abroad.[4] Moreover, there are many non-equity relationships (management contracts, franchising, etc.) that bring production abroad under the common governance of MNEs, further increasing the importance of these firms in the world economy. This, in turn, leads to the emergence of firm-level integrated international production networks that, at the aggregate level, integrate the production systems of individual countries. It is also within these production networks that roughly one-third of world trade takes place (as intra-firm trade), and a good part of especially tacit technology and skills are transferred. This makes FDI and the enterprises that undertake it important actors in national economies and international economic transactions.

Given the importance of FDI for bringing tangible and intangible assets to host countries, it is not surprising that governments around the world seek to attract such investment as a tool to advance their economic growth and development. As a result, the world market for FDI is highly competitive: virtually every country has an investment promotion agency, and many countries also have such agencies at the provincial and city levels. There may well be some 8,000 agencies worldwide that actively seek to attract FDI.[5] Among other things, these agencies provide information about investment opportunities, target investors, offer various incentives, help foreign investors to establish themselves in the host country, provide aftercare investment services, and engage in policy advocacy. But investors, too, compete to find profitable investment opportunities. The degree of firm competition varies across industries and reasons for investing abroad. For example, it is higher in scarce natural resource industries, while it is lowest in export-oriented industries, where firms are typically spoiled for choice.[6]

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4 See, Karl P. Sauvant, Persephone Economou, Ksenia Gal, Shawn Lim, and Witold P. Wilinski, " Trends in FDI, Home Country Measures and Competitive Neutrality", in Andrea Bjorklund, ed., *Yearbook on International Investment Law and Policy 2012-2013* (New York: OUP, forthcoming).

5 Millennium Cities Initiative, The Earth Institute at Columbia University, *Handbook for Promoting Foreign Direct Investment in Medium-Size, Low-Budget Cities in Emerging Markets* (New York: Columbia University, 2009), p. 1, available at http://mci.ei.columbia.edu/sitefiles/file/MCI-City-Investment-Promotion-Handbook-FINAL.pdf.

6 Countries often establish export-processing zones to attract FDI; however, most of these zones do not live up to expectations.

Also to attract FDI, countries have made their FDI regulatory frameworks more welcoming, both at the national and international levels. At the national level, the great majority (annex table 2) of all regulatory changes during 1991-2011 involved the facilitation of entry and establishment, better treatment of foreign affiliates and the easing of their operations, and stronger investment promotion and facilitation (including the offering of new incentives). At the same time, the share of policy changes that make the investment climate less welcoming has been rising to over one-quarter in the past five years (figure 1), involving, among other measures, the establishment of entry conditions, ownership restrictions and screening procedures and the reversal of incentives. This reflects, among other things, that the expectations of governments about the role of FDI are changing.[7]

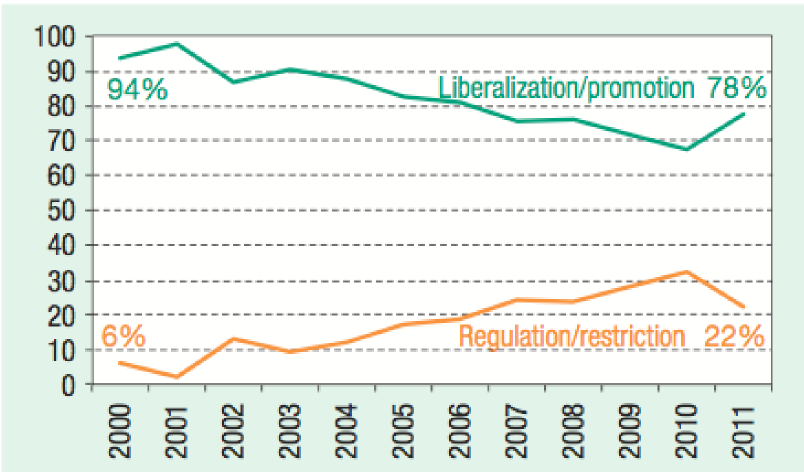

Figure 1. National regulatory changes, 2000-2011
Source: UNCTAD WIR 2012, Table III.1. National Regulatory Changes. p. 76.

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[7] For an elaboration, see the discussion in Section C on the greater recognition of the importance of sustainable international investment.

At the international level, the welcoming approach to international investment is reflected in the rise in the number of international investment agreements (IIAs), especially bilateral investment treaties (BITs), whose principal purpose is to protect this investment (figure 2);[8] in a number of cases, they also facilitate the operations of investors in their host countries. The salient features of this development are discussed in the next section.

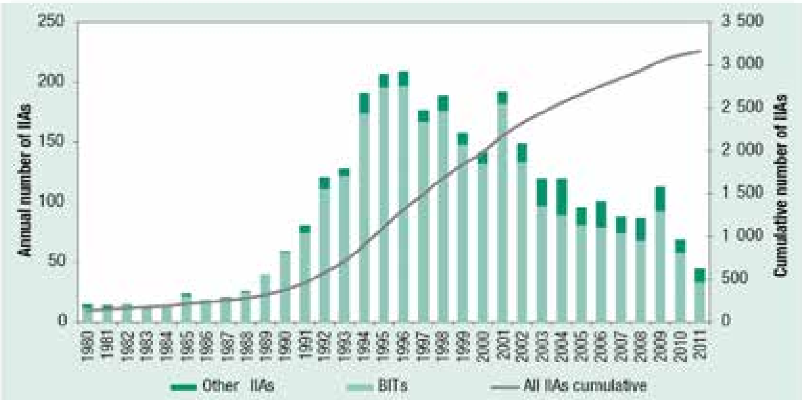

Figure 2. Trends of BITs and other IIAs, 1980 – 2011 (Number of treaties)
Source: UNCTAD, WIR 2012, Fig. III.2, p. 84.

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[8] As will be discussed below, IIAs typically use a broader definition of "investment" than the definition of "FDI." An equity capital stake of 10% or more of the ordinary shares or voting power for an incorporated enterprise, or its equivalent for an unincorporated enterprise, is normally considered as the threshold for the control of FDI assets. See IMF, *Balance of Payments Manual* (Washington: IMF, 2009), 6th ed., p. 86, available at http://www.imf.org/external/pubs/ft/bopman/bopman.pdf.

B. KEY FEATURES OF THE CURRENT INTERNATIONAL INVESTMENT REGIME

The international investment regime is characterized by the following key features: (i) the dual aims of the regime have traditionally been the promotion and protection of foreign investment, (ii) the regime has covered a broad spectrum of activities, including FDI and portfolio investment, (iii) investment protection standards are at the core of the regime, (iv) arbitration is the chosen mechanism to settle investment disputes, (v) the regime is composed of multiple legal sources, and (vi) the regime lacks a developed institutional framework. The aim of this section is briefly to explain each of these key features in order to set the ground for the more critical analysis in subsequent sections.

1. The promotion and protection of foreign investment are the traditional aims of the regime

In order to encourage capital flows across countries (promotion), IIAs have traditionally focused on protecting foreign investments (protection). Accordingly, IIAs have principally contained protection norms, as promotion of foreign investment was seen as a by-product of affording protection to foreign investment. This is particularly true of the earlier north-south BITs, which were founded on a grand bargain: "a *promise* of protection of capital in return for the *prospect* of more capital in the future."[9] Such a grand bargain would in turn lead to economic cooperation, economic development and mutual prosperity for parties to an agreement.[10]

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[9] Jeswald W. Salacuse, *The Law of Investment Treaties* (Oxford: OUP, 2010), p. 111.

[10] See section below on whether such prosperity has indeed materialized across the board.

2. The regime has a broad subject-matter coverage

The definition of foreign investment covered by IIAs has been quite broad. BITs have, for the most part, adopted an open-ended asset-based definition, including a broad variety of economic interests such as movable and immovable property, shares, claims to money, intellectual property rights, and business concessions. Similarly, a great number of IIAs have also adopted a broad definition of covered foreign investors, including nationals of either contracting party and legal persons incorporated or constituted under the law of either contracting party.[11]

More recently, some IIAs have used various techniques to narrow their subject-matter coverage. Equally, arbitral decisions have considered certain elements necessary in order for an investment to qualify for protection under an IIA, including: (i) a certain duration, (ii) an expectation of profit, (iii) an element of risk, (iv) a substantial commitment of capital, and (v) a contribution to the economic development of the host country.[12]

3. Investment protection standards are at the core of the regime

Another key feature of the international investment regime is its focus on providing a set of broad and open-textured standards for the protection of foreign investors and investments. Investment protection standards have principally imposed on host countries the obligations (a) to grant foreign investors "no less favourable treatment", both vis-à-vis domestic investors and other foreign investors;[13] (b) "fair and equitable treatment" and "full protection and security"; (c) not to impair the foreign investment by "arbitrary," "unreasonable" or "discriminatory" measures; and (d) to pay compensation to a foreign investor in case its property is, directly

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11 See generally UNCTAD, *Scope and Definition (A Sequel)* (Geneva and New York: UNCTAD, 2011), available at http://unctad.org/en/Docs/diaeia20102_en.pdf.

12 See the discussion in section D.2.a below on the notion of "investment" for purposes of establishing the jurisdiction of a tribunal under the ICSID Convention.

13 These are the national treatment and most-favored-nation treatment clauses, respectively.

or indirectly, expropriated. Additional clauses dealing with "transfer of funds," "entry of personnel" and "observance of undertakings" can commonly be found in IIAs.

Historically, international investment law only focused on post-establishment (or post-entry), leaving states full control over whether or not to admit foreign investments (see, for example, the BIT practice of Germany, Italy, the Netherlands, and the United Kingdom). However, more recently a few states have concluded agreements that, in addition to traditional investment protection standards, include binding commitments (subject to country-specific and sectoral or other exceptions)[14] with regard to pre-establishment, principally taking the form of non-discrimination obligations with regard to the admission of foreign investors and investments (e.g., Articles 1102 and 1103 NAFTA),[15] as well as performance requirements (a notable feature of most United States and Canadian treaties). Accordingly, these agreements include investment *liberalization* obligations in addition to more traditional investment *protection* obligations. Furthermore, a few IIAs focus principally on providing investment liberalization obligations. Usually mirroring the approach taken in the General Agreement on Trade in Services (GATS),[16] such obligations include market access and national treatment provisions subject to specific commitments, but do not include most of the typical investment protection guarantees.[17]

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14 For example, Mexico excludes investment in the petro-chemical industry and Canada has high thresholds that trigger review.

15 Among others, Canada, Japan and the United States have adopted this approach: See, for example, the 1997 Azerbaijan–U.S. BIT, art. II; the 1998 Canada–Costa Rica BIT, art. III; and the 2003 Japan–Vietnam BIT, art. 2.

16 The General Agreement on Trade in Services adopts a broad definition of "trade in services," including the provision of services via a "commercial presence" (i.e., foreign direct investment (defined here as entailing majority control)). General Agreement on Trade in Services (GATS), 15 April 1994, Marrakesh Agreement Establishing the World Trade Organization, (Marrakesh Agreement), Annex 1B, *The Legal Texts: The Results of the Uruguay Round of Multilateral Trade Negotiations*, (1999), 1869 U.N.T.S. 183, p. 285, art. I, para. 2(c), available at http://www.wto.org/english/docs_e/legal_e/26-gats.pdf.

17 For example, Article 60 of the 2008 CARFORUM-EC EPA expressly identifies the "progressive, reciprocal and asymmetric liberalization of investment and trade in services" as the core objective of Title II of the agreement. CARIFORUM-EC EPA, signed 15 October 2008, entered into force on December 29, 2008, art. 60, available at http://www.sice.oas.org/Trade/CAR_EU_EPA_e/EU_OJ_L289_30.10.2008_e.pdf.

Equally, international investment law does not usually impose express obligations on home countries, for example, for the promotion and encouragement of foreign investment; or on foreign investors, aside from conditioning an IIA's protection on the foreign investment's compliance with the laws of the host country.[18]

Historically, international investment law has been thematically rather narrow (i.e., insular), excluding any express consideration of other relevant public policies (such as public health, environmental protection, public morals, cultural diversity, labor rights), aside from a few clauses addressing "national security" or "balance-of-payments" concerns. However, recently, a few IIAs have included general exceptions clauses or provisions restricting a host country's ability to reduce the level of social and environmental protection.[19]

4. Arbitration is the chosen mechanism to settle investment disputes

A further key feature of the investment regime revolves around dispute settlement. International arbitration is the chosen mechanism to settle both state-to-state and investor-to-state disputes. Most IIAs include one and/or the other form of dispute settlement. Investor-state arbitration, which may take place within the specialized system of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention)[20] or according to other commercial arbitration rules (like the UNCITRAL Arbitration Rules), is by far the most used mechanism for the settlement of investment disputes.

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18 Investment tribunals have denied the protection of IIAs (including the right to arbitration) to those investors that have acted fraudulently or through corruption. See *Inceysa Vallisoletana S.L. v. Republic of El Salvador*, ICSID Case No. ARB/03/26 (El Salvador-Spain BIT), Award, August 2, 2006.

19 For a survey of recent IIA practice in this regard, see Kathyrn Gordon & Joachim Pohl, "Environmental Concerns in International Investment Agreements: A Survey" (2011) *OECD Working Papers on International Investment, No. 2011/1*, OECD Investment Division, online: www.oecd.org/daf/investment.

20 Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (ICSID Convention), signed March 18, 1965, entered into force on October 14, 1966, 575 U.N.T.S. 159.

The past two decades have witnessed an exponential growth of investment treaty arbitrations, mirroring to a certain extent the growth of FDI and of IIAs.[21] The first international arbitration based on a BIT commenced before an ICSID tribunal in 1987. The tribunal in *AAPL v Republic of Sri Lanka* issued its decision, together with a dissenting opinion by one of the three arbitrators, in 1990, awarding the claimant US$ 460,000 plus interest as compensation for the destruction of the claimant's shrimp farm by Sri Lanka's security forces during a military operation against local rebels.[22] By 2000, the number of known investment treaty arbitrations had reached 50 (with 20 arbitral decisions on jurisdiction or the merits having been rendered by investment tribunals); by the end of 2011, there were 450 known disputes brought on the basis of an investment treaty (with several hundred decisions rendered by investment tribunals) (figure 3),[23] and by the end of 2012, the number of known treaty-based disputes had reached 518.[24]

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21 See UNCTAD, "Recent Developments in Investor-State Dispute Settlement," *IIA Issues Note*, April 2013.

22 *AAPL v. Sri Lanka*, ICSID Case No. ARB/87/3, Final Award, June 27, 1990.

23 UNCTAD, "Latest Developments in Investor-State Dispute Settlement," *IIA Issues Note*, No. 1 (2012), p. 3, fig. 1, "Known investment treaty arbitrations (cumulative and newly instituted cases)," available at http://unctad.org/en/PublicationsLibrary/webdiaeia2012d10_en.pdf [hereinafter UNCTAD, *Latest Developments,* 2012]. Investment *treaty* arbitrations differ from investment *contract* arbitrations based on the different jurisdictional ground and cause of action: with regard to the former, an international investment treaty constitutes both the jurisdictional basis and cause of action, while with regard to the latter, a contract constitutes the jurisdictional basis and cause of action. ICSID has reported that it registered 48 arbitration cases under the ICSID Convention and the ICSID Additional Facility in 2012. In addition, the Centre registered two conciliation cases. This is consistent with the general trend of increasing numbers of investment dispute settlement cases. See ICSID, *The ICSID Caseload – Statistics,* Issue 2013-1 (Washington DC: ICSID, 2013), pp. 7-8.

24 UNCTAD, "Towards a New Generation of International Investment Policies: UNCTAD's Fresh Approach to Multilateral Investment Policy-Making" (Geneva: UNCTAD, 2013), p. 5.

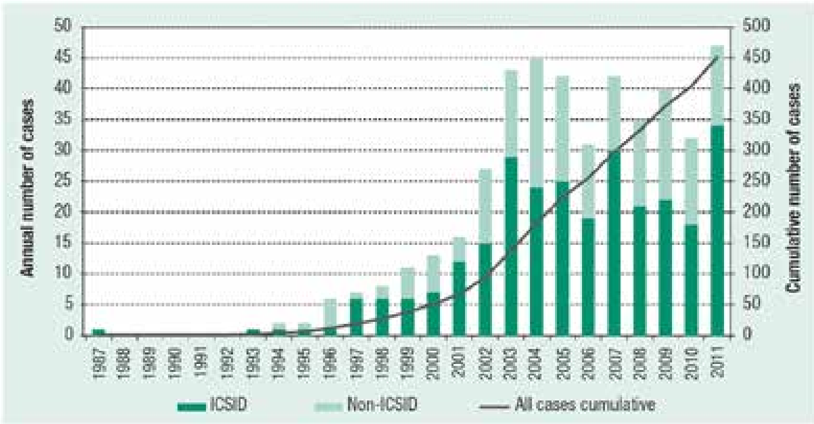

Figure 3. Known investor-state treaty-based disputes, 1987 – 2011
Source: UNCTAD, *WIR 2012*, Fig. III.4, p. 87.

Host country measures subject to review by investment tribunals on the basis of "national treatment," "expropriation" and "fair and equitable treatment" standards have included Canada's ban on hazardous waste exports,[25] Mexico's non-renewal of a hazardous industrial waste operating license,[26] California's state ban on the use or sale of a methanol-based gasoline additive,[27] Ecuador's denial of VAT refunds in the oil sector,[28] the Imposition by the Czech National Bank of the forced administration of a bank,[29] and Argentina's emergency legislation following the financial crisis of 2001-2002.[30]

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25 *S.D. Myers, Inc. v. Canada*, UNCITRAL, Partial Award, November 13, 2000.

26 *Tecmed v. Mexico*, ICSID Case No. ARB (AF)/00/2, Award, May 29, 2003.

27 *Methanex v. United States*, Final Award, August 3, 2005.

28 *Occidental v. Ecuador*, LCIA Case No. UNC3467, Award, July 1,2004; *EnCana v. Ecuador*, LCIA Case No. UN3481, Award and Partial Dissenting Opinon, February 3, 2006.

29 Saluka Investments B.V. v. Czech Republic, Partial Award, March 17, 2006.

30 See, for example, *CMS v. Argentina*, ICSID Case No. ARB/01/8, Award, May 12, 2005; *Enron and Ponderosa v. Argentina*, ICSID Case No. ARB/01/3, Decision on Jurisdiction (Ancillary Claim), August 2, 2004; *LG&E v. Argentina*, ICSID Case No. ARB/02/1, Award, July 25, 2007.

Each investment treaty tribunal is formally independent from any previous or future tribunal (even if adjudicating a dispute based on the same IIA). Although there are certain differences depending on whether arbitration is conducted on the basis of ICSID rules, like arbitration in general, investment treaty arbitration is characterized by the enhanced role of the disputing parties (e.g., in the appointment of the arbitral tribunal's members), flexible procedures, finality of the arbitral award (e.g., with limited possibility of review), and relative confidentiality of the entire process.

Investment arbitral tribunals play a crucial, yet increasingly controversial, role in the functioning of the regime: First, investment protection standards (whether treaty- or custom-based) are broad and open-textured and thus leave a great margin of interpretation to the adjudicator. Second, the several interconnections between international investment law and customary international law and between international investment law and other specialized areas of international law (such as trade, environment, human rights)[31] remain contested and thus are left to the adjudicator to resolve. Third, most IIAs (and, for that matter, the fora in which an arbitration takes place) do not always provide for detailed procedural rules (e.g., on the issue of available remedies for a violation of international investment law), and these are therefore left to be decided by arbitrators (if the applicable arbitration rules are silent on the matter).

5. The regime is shaped by a multiplicity of legal sources

IIAs represent the first set of norms that are central to the current international investment regime. Traditionally, IIAs took the form of BITs, the first of which was signed between Germany and Pakistan in 1959. As documented by UNCTAD's *WIR*s over time, the number of BITs grew from 370 at the end of the 1980s[32] to close to

[31] These interactions may involve question of applicable law (e.g., to what extent does an investment treaty provision replace an international customary norm?) and questions of interpretation (e.g., to what extent should human rights norms influence the interpretation of investment treaties?).

[32] Communication by UNCTAD, December 6, 2012. UNCTAD *Bilateral Investment Treaties 1959-1999* (New York and Geneva: UNCTAD, 2000), p. iii.

2,850 at the end of 2012.[33] In the past fifteen years, IIAs have also included more comprehensive economic integration agreements such as free trade agreements (FTAs); at the end of 2011, some 350 such agreements included investment rules.[34] The international regime governing international investment consists therefore of over 3,000 agreements. While there are substantial similarities among many of them, there are also substantial differences, making this treaty network a highly fragmented regime governing international investment.

A second set of relevant norms stems from the customary international law applicable to any foreign persons as developed in the past 150 years. For example, states are required under customary international law to accord aliens and their property the "minimum standard of treatment" revolving around notions such as "denial of justice," "due process," "due diligence," and "non-arbitrariness."[35] Equally, states are bound to provide appropriate compensation if they expropriate a foreign national's property.

A third type of source of investment law is represented by the many arbitral and judicial decisions that have been rendered by international tribunals in the past 150 years.[36] It is often up to these tribunals to determine the existence of customary law as well as to interpret the often vague provisions in investment treaties, and to assess the interaction between them.[37]

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33 UNCTAD, "Towards a New Generation", *op. cit*., p. 4. Each year, UNCTAD's *WIR* provides an update on the numbers of BITs and "other IIAs". Since 2010, this information is included in a dedicated chapter III on national and international investment policies. Between the annual *WIR*s, UNCTAD's quarterly *Investment Policy Monitors* offers regular updates on IIAs.

34 UNCTAD, "Towards a New Generation", *op. cit*., p. 4.

35 See Andrew Newcombe & Lluís Paradell, *Law and Practice of Investment Treaties: Standards of Treatment* (The Netherlands: Kluwer Law International), pp. 235-253.

36 According to Article 38(1) of the ICJ Statute, the ICJ shall apply judicial decisions as subsidiary means for the determination of rules of law. In addition, it should be noted that Article 38(1) also treats "the teachings of the most highly qualified publicists of the various nations" as subsidiary means. See Charter of the United Nations (UN Charter) and Statute of the International Court of Justice (ICJ Statute), 59 Stat. 1055, June 26, 1945.

37 Given the relevance of the decisions rendered under investment treaty arbitration, see the discussion in section B.3.

A fourth set of relevant norms consists of "soft law" instruments.[38] These may have different origins (governmental; intergovernmental; non-governmental, including academic) as well as different objectives (such as to codify existing norms or propose new ones). Given the lack of binding multilateral rules on foreign investment, several non-binding instruments have been developed in the past fifty years, principally by various intergovernmental organizations: these range from the 1967 OECD Draft Convention on the Protection of Foreign Property, the 1976 OECD Guidelines for Multinational Enterprises (revised several times), and the 1992 World Bank Guidelines on the Treatment of Foreign Direct Investment, to the 2012 UNCTAD Investment Policy Framework for Sustainable Development.[39]

It follows from the investment regime's multiplicity of legal sources that (i) it is difficult accurately to describe the regime, as it is not a monolithic creature; (ii) the regime itself is in a permanent state of flux, with new arbitral decisions being issued and new or revised IIAs being signed on a regular basis; and (iii) law-making and law-application lacks consistency.

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[38] See generally Andrea K. Bjorklund & August Reinisch (eds.), *International Investment Law and Soft Law* (Cheltenham: Edward Elgar Publishing Ltd., 2012).

[39] Examples of governmental soft law instruments include the various restatements by the American Law Institute (ALI) available at www.ali.org, and the several national model BITs. Examples of non-governmental instruments include: the International Law Association (ILA) resolutions, available at www.ila-hq.org, and the model treaty prepared by the International Institute on Sustainable Development, Howard Mann, Konrad von Moltke, Luke Eric Peterson & Aaron Cosbey, *IISD Model International Agreement on Investment for Sustainable Development* (Model Agreement for Sustainable Development) (Winnipeg: IISD, 2006), available at http://www.iisd.org/pdf/2005/investment_model_int_handbook.pdf. As noted above, authoritative scholarly writings may be subsidiary means of determining international law rules as per Article 38(1)(d) of the ICJ Statute, *op. cit*.

6. The regime has a light and fragmented institutional structure

A final key feature is the light and fragmented institutional structure underlying the international investment regime. Overall, the regime lacks strong, developed institutions (whether at the multilateral or bilateral level) in charge of setting, administering and implementing investment law and policy. The traditional BIT does not normally envisage any standing institutional framework, whether in terms of (regular) meetings of the contracting parties, in terms of specific tasks attributed to a standing secretariat or in terms of a dispute settlement body. A few of the more comprehensive economic integration agreements (like NAFTA and ASEAN) do however envisage some level of built-in policy-making activity (e.g., interpretative statements by the NAFTA contracting parties)[40] and administrative support (e.g., in the area of environmental and social policies).[41] The most developed institution is arguably the International Centre for Settlement of Investment Disputes (ICSID),[42] which exercises an important role in the administration of investor-State arbitrations; however it does not have a broader political role.

While there are several international organizations whose activities are relevant for the regulation of foreign investment (such as

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[40] North American Free Trade Agreement (NAFTA), signed December 17, 1992, entered into force on January 1, 1994, art. 2001 (establishing the NAFTA Free Trade Commission).

[41] North American Agreement on Environmental Cooperation (NAAEC), signed September 13, 1993, entered into force on January 1, 1994, art. 8 (establishing the Commission for Environmental Cooperation); see also Charter of the Association of South East Asian Nations (ASEAN Charter), November 20, 2007, art. 1 (stating that the Purposes of ASEAN include promoting greater "socio-cultural cooperation"); ibid. at art. 9 (establishing the ASEAN Community Councils, including the Socio-Cultural Community Council). ASEAN members have agreed to a number of environmental measures since the 1981 Manila Declaration on the ASEAN Environment (April 30, 1981), which adopted the ASEAN Environmental Programme. See generally ASEAN *Cooperation on Environment*, http://environment.asean.org (last visited February 26, 2013).

[42] ICSID was established by the 1965 Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the ICSID Convention). Many IIAs list ICSID Convention arbitration as one of the options available to claimants who see to challenge government measures as violations of an investment treaty.

the United Nations Conference on Trade and Development (UNCTAD), the World Bank Group, the World Trade Organization (WTO), the Energy Charter Treaty, and the Organisation for Economic Co-operation (OECD)), they do not provide a comprehensive and integrated multilateral institutional structure.[43] Furthermore, the various attempts over the past sixty years to provide for a multilateral structure (whether under the auspices of the International Trade Organization, the United Nations or as part of the negotiating agenda of the Doha Round within the WTO) all failed.[44]

As a consequence of the investment regime's very light and fragmented institutional structure, the level of formal participation of various stakeholders is generally very limited, and any activity linked with an IIA (whether in the area of treaty making or dispute settlement) is for the most part not formally monitored or publicized.

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In summary, the international investment regime has traditionally aimed at the promotion of foreign investment. The subject matter coverage of the regime has been rather broad, both in terms of covered "investments" and "investors." In terms of substantive disciplines, while the main object of the regime has historically

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[43] For example, the WTO's role in shaping foreign investment law and policy remains rather limited, despite the inclusion of some investment norms in the GATS, *op. cit.*, and the Agreement on Trade-Related Investment Measures (TRIMs), Marrakesh Agreement, *op. cit.,* p. 143 (1999), 1868 U.N.T.S. 186. Similarly, while it includes quite extensive norms on trade and investment in the energy sector signed by 52 contracting parties, the Energy Charter Treaty is a sectoral and regional agreement, signed December 17, 1994, entered into force on April 16, 1998, 2080 U.N.T.S. 95. The OECD, too, is the home of a number of binding instruments directly relevant to international investment, but they are limited in geographical scope.

[44] The document founding the ITO was to incorporate provisions on private investment, "Havana Charter for an International Trade Organization, including Annexes" (Havana Charter) in *United Nations Conference on Trade and Employment: Final Act and Related Documents*, E/CONF.2/78, March 24, 1948, art. 12, available at http://www.wto.org/english/docs_e/legal_e/havana_e.pdf. WTO, *Doha Ministerial Declaration* (Doha Declaration) WT/MIN(01)/DEC/1, November 20, 2001, paras. 20-22, available at http://www.wto.org/english/thewto_e/minist_e/min01_e/mindecl_e.htm; see also the OECD negotiations on the Multilateral Agreement on Investment (MAI), *The Multilateral Agreement on Investment: Draft Consolidated Text*, DAFFE/MAI(98)7/REV1, April 22, 1998, available at http://www1.oecd.org/daf/mai/pdf/ng/ng987r1e.pdf.

been the protection of foreign investment, there are growing demands for liberalization commitments as well as the recognition of the developmental implications of foreign investment. Investment treaty arbitration plays a crucial role in the development of the regime, particularly as it is through this mechanism that international investment law is actually interpreted and applied. Lastly, while the regime is characterized by a complex network of different norms developed over the past fifty years, it lacks strong, developed institutions in charge of coordinating the setting, administration and implementation of investment law and policy.

C. DRIVERS FOR CHANGE: CHANGING CIRCUMSTANCES, CONSTITUENCIES, ISSUES, AND CHALLENGES

It is against the background of the salient features of international investment and the regime governing it that the current discussion about the future of this regime needs to be seen. This section discusses some of the developments during the past fifteen years or so that are most likely to bear directly on the future evolution of that regime.

1. Emerging markets play an increasingly prominent role in the world FDI market

Among these developments, none is more important than the increasingly prominent role that *emerging markets* play in the world FDI market. More specifically, in the past few years, emerging markets (roughly all non-members of the OECD) have come to attract slightly more than half of all inward FDI flows (an average of US$ 776 billion during 2010-2012),[45] and in 2011 they hosted over one-third of the world's inward FDI stock; increasing amounts of this inward FDI comes from other emerging markets. Equally remarkable (and importantly), in 2009-2011 emerging markets accounted for somewhat more than one-quarter (an average of US$ 412 billion) of the world's outward FDI flows – compared to negligible amounts during the 1980s; their outward FDI stock had accumulated to over US$ 4 trillion by the end of 2011.[46] This stock had been created by at least

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45 UNCTAD, "Global FDI Recovery Derails" *Global Investment Trends Monitor*, No. 11, January 23, 2013 (New York and Geneva: UNCTAD, 2013), pp. 2-3. Note that, in this report, we include both "developing economies" and "transition economies" as "emerging markets."

46 For a discussion of the rise of emerging market MNEs, see, among others, Marin A. Marinov and Svetla T. Marinova (eds.), *Emerging Economies and Firms in the Global Crisis* (Houndmills: Palgrave Macmillan, 2013); Karl P. Sauvant and Geraldine McAllister, with Wolfgang A. Maschek (eds.), *Foreign Direct Investments from Emerging Markets: The Challenges Ahead* (New York: Palgrave Macmillan, 2010); and Ravi Ramamurtri and Jitendra V. Singh (eds.), *Emerging Multinationals in Emerging Markets* (Cambridge: Cambridge University Press, 2009).

30,000 MNEs headquartered in emerging markets.[47] Firms of each of the following economies invested an average of more than US$ 10 billion dollars abroad annually during 2010-2011: Hong Kong (China) (US$ 89 bn), China (US$ 67 bn), Russian Federation (US$ 60 bn), Singapore (US$ 23 bn), Republic of Korea (US$ 22 bn), Malaysia (US$ 14 bn), India (US$ 14 bn), Taiwan Province of China (US$ 12 bn), Mexico (US$ 11 bn), and Chile (US$ 11 bn).[48] For comparison, during the same period, only firms from France, Germany, Japan, Switzerland, the United States, and the United Kingdom invested more than Chinese firms abroad, and only firms from the United States invested more abroad than Hong Kong (China).

The implication of this structural change is that a rising number of emerging markets (and their firms), as new key active investors in the world FDI market, now have a stake in the international investment regime as *home countries* seeking to protect their firms abroad and facilitate their operations (including in other emerging markets). Nowhere can this changing interest-situation be seen more clearly than in the development of China's BITs.[49] For example, China now accepts investor-State dispute settlement and incorporates more comprehensive substantive provisions into its BITs, in line with the practice of other major capital exporting countries.[50] In recent BITs, China has also recognized the impor-

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47 A number of emerging market MNEs are state-owned enterprises (SOEs). However, if one analyzes the world's 100 largest non-financial MNEs and the 100 largest non-financial MNEs headquartered in emerging markets (both ranked in terms of foreign assets), the following results for 2010 are obtained: in terms of numbers, there were more SOEs from emerging markets (29) than developed countries (20); however, in terms of value, SOEs from developed countries controlled US$ 1.4 trillion, while those from emerging markets controlled US$ 0.4 trillion. See Karl P. Sauvant & Jonathan Strauss, "State-Controlled Entities Control Nearly US$ 2 Trillion in Foreign Assets," 64 *Columbia FDI Perspective* (2012), p. 2 (FDI by sovereign wealth funds (SWFs) has been negligible so far).

48 UNCTAD, UNCTADStat database, "Inward and outward foreign direct investment flows, annual, 1970-2011," available at http://unctadstat.unctad.org/TableViewer/tableView.aspx?ReportId=88 (last visited February 27, 2013). Tax havens are excluded.

49 Valentina Vadi, "Converging Divergences: The Rise of Chinese Outward Foreign Investment and Its Implications for International (Investment) Law" in Karl P. Sauvant (ed.), *Yearbook on International Investment Law & Policy: 2011-2012* (New York: OUP, 2013), pp. 705-724.

50 Ibid., p. 706.

tance of maintaining health, safety and environmental measures whilst promoting and protecting investment.[51]

As a result of investors from emerging markets becoming key players in the world FDI market, the traditional distinction between home and host countries, capital importing countries and capital exporting countries, and North and South is beginning to become less sharp – in this case from the perspective of traditional host countries, when emerging markets were overwhelmingly capital-importing countries. This blurring of the boundaries, in turn, changes the interest-situation of key actors among emerging markets concerning the future development of the international investment regime as more emerging markets can be expected to seek to balance their interest as host countries (to maintain national policy space) with their interest as home countries (in protections of their firms abroad, as well as liberal entry and operating conditions).

2. Non-traditional investors are playing a greater role in key developed countries

The rise of emerging markets as outward investors is, not surprisingly, mirrored by the increasing role of non-traditional investors in key *developed countries*, including in particular in the United States. Japanese firms led this process in the 1980s. In the second half of the 1980s, these firms began to invest in the United States on a large scale: their FDI inflows grew from an average of US$ 2 bn in 1980-1981 to US$ 16 bn in 1990-1991.[52] It was followed in the 2000s by firms from emerging markets: their FDI inflows into the United States grew from an average of US$ 19 bn in 2000-2001 to US$ 22 bn in 2010-2011.[53] Some of these investors have different approaches to doing business, are less transparent than

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[51] For example, see the preambles of the 2004 China-Trinidad and Tobago BIT, and the 2004 China-Guyana BIT. See discussion in Vadi, *op. cit.*, p. 712.

[52] Data calculated from information available from the U.S. Department of Commerce, Bureau of Economic Analysis, "Foreign Direct Investment in the United States: Country Detail for Capital Inflows," available at www.bea.gov/itable/.

[53] Data provided by the Division on Investment and Enterprise, United Nations Conference on Trade and Development, January 12, 2013, on file with author. "Emerging markets" include all countries that are not "developed countries."

the traditional ones and, in many instances, are state-controlled entities (especially state-owned enterprises (SOEs), but also sovereign wealth funds (SWFs), including from China) that are seen to pursue non-commercial interests.[54] Moreover, the United States experienced the trauma of the World Trade Center attacks in 2001, which made national security concerns of priority importance. At the same time, the number of treaty-based investment disputes in which the United States was a respondent rose.

The implication of these developments is that the United States – traditionally the most important home country – began to pay more attention to its (also traditional) role as a host country, i.e., a country that seeks to maintain sufficient policy space to protect its own legitimate interests. Thus, the rise of Japanese FDI led to the establishment of a national security review process for foreign investments in the United States in 1988, conducted by the Committee on Foreign Investment in the United States (CFIUS);[55] the rise of emerging market FDI then led to the strengthening of CFIUS through the Foreign Investment and National Security Act in 2007.[56] The changing interest-situation of the United States (including its responsiveness to other objectives and to other stakeholders) is reflected in its Model BITs. The 1984 US Model BIT (and the treaties based on it) arguably represented one of the most investor-friendly texts on record. The country's 2004 Model BIT,[57] on the other hand, exhibits a perceptibly more cautious approach. In particular, it defines "fair and equitable treatment" to consist of not more than the customary international law minimum standard of treatment, it circumscribes indirect expropriation, it drops

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54 See Karl P. Sauvant, Lisa E. Sachs & Wouter P. F. Schmit Jongbloed (eds.), *Sovereign Investment: Concerns and Policy Reactions* (New York: OUP, 2012).

55 See the Exon-Florio Amendment (50 U.S.C. App § 2170) of the Defense Production Act of 1950 (50 U.S.C. App. § 2601 *et seq.*). CFIUS was originally established by an Executive Order of President Ford in 1975.

56 Foreign Investment and National Security Act of 2007 (FINSA), Pub. L. 110-49, 121 Stat. 246, enacted July 26, 2007.

57 U.S. Department of State, *Model Bilateral Investment Treaty 2004* (U.S. Model BIT 2004) (Washington D.C.: USDS, 2004). For an analysis, see Kenneth J. Vandevelde, "A Comparison of the 2004 and 1994 U.S. Model BITs: Rebalancing Investor and Host Country Interests" in Karl P. Sauvant (ed.), *Yearbook on International Investment Law & Policy: 2008-2009* (New York: OUP, 2009), pp. 283-316. The 2012 Model BIT did not change much in the balance achieved in 2004. See Jamie Strawbridge, "Revised Model BIT Contains New Language on SOEs, Technology Transfer," 12(17) *Inside US – China Trade* (2012).

the umbrella clause,[58] it refines the definition of "investment," it excludes local government from national treatment and most-favored-nation treatment, it pays more attention to the question of environmental and labor standards and, above all, it contains a self-judging essential security clause.[59] This blurring of the sharp boundaries of the past – in this case, from the perspective of traditional *home* countries, when developed countries focused on their interests as capital-exporting (home) countries – changes the interest-situation of key actors among developed countries concerning the future development of the international investment regime. With the Lisbon Treaty[60] giving the European Union institutions the competence to deal with FDI matters, it remains to be seen how this new actor will define its approach to international investment law and policy.

As a result, the United States – traditionally the strongest proponent of IIAs with high-standards – can be expected to continue to seek to balance its interests as a home country with its interests as a host country. Other developed countries may well follow this approach in the future.[61] The changing interest-situation of emerging markets as traditional host countries (discussed earlier), together with the changing interest-situation of developed countries as traditional

[58] Though it (and the 2012 Model), each retain a "procedural umbrella clause" via specific coverage of "investment agreements" and consent to arbitrate disputes under "investment agreements" (as distinct from disputes arising under treaty obligations).

[59] The Peru-United States FTA, for example, contains a self-judging essential security clause (see art. 22.2, para. 2); furthermore, a footnote to that article affirms that, if a party invokes Article 22.2 in an arbitral proceeding (including an investment arbitration proceeding), the tribunal or panel hearing the matter shall find that the exception applies (see art. 22.2, para. 2, footnote 2). However, the subsequent 2012 United States Model BIT omits this footnote.

[60] Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community (Lisbon Treaty), 2007/C 306/01, signed December 13, 2007, entered into force on December 1, 2009, point. 157, 158.

[61] Japan, for example, has included a self-judging essential security clause in some of its recent BITs, for example, the 2008 Japan-Peru BIT, art. 19, the 2008 Japan-Uzbekistan BIT, art. 17, and the 2011 Japan-Colombia BIT, art. 15. The 2003 Canada BIT also includes a self-judging essential security clause, although the security interests covered by the clause are defined to relate to traffic in arms, ammunition and implements of war, supplies to military or security establishments, or to actions taken in times of war or international emergency as well as the non-proliferation of nuclear weapons (see art. 10, para. 4(b)); see also Katia Yannaca-Small, "Essential Security Interests under International Investment Law" in *International Investment Perspectives: Freedom of Investment in a Changing World* (Paris: OECD, 2007), p. 98.

home countries are the most important factors influencing the further development of the future international investment regime. A paradigm shift might well be taking place, toward a more balanced international investment regime.

3. Government expectations about the role of FDI are changing

The changing interest-situation of host and home countries needs to be seen against the background of changing expectations of governments regarding the role of FDI. For governments, especially in the case of inward FDI, the starting point is that this investment is but a tool to help them advance the economic growth and sustainable development of their countries. However, the consensus that all FDI is equally beneficial in this respect is fracturing. First, more governments consider (certain) M&As as less beneficial than greenfield investments, especially when they are being undertaken by state-controlled entities and the targets are in sensitive industries or are national champions. The principal reasons include that M&As do not add productive capacity (as opposed to greenfield FDI) and often may reduce employment levels, and because they can involve targets that are considered sensitive on account of national security,[62] or economic or cultural considerations. Second, governments are now actively encouraging and demanding more sustainable FDI, i.e., investment that makes a maximum contribution to economic, social and environmental development and takes place within mutually beneficial governance mechanisms while being commercially viable – sustainable FDI for sustainable development. In other words, governments are increasingly concerned with the quality of investment, not simply its quantity. This reflects, in part, the fact that markets and resources in developing countries are in demand now, giving developing countries more power to determine which investors they will, and will not, accept. Finally, governments are paying more attention to competing objectives, especially national interests, essential security, the promotion of national champions, and the protection of certain national industries.

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[62] This is reflected, for example, in the review mechanisms various countries have established to screen incoming M&As.

In addition, more investors recognize the need to adapt their investments to respond to the sustainable development needs of host countries. Indeed, more and more now incorporate such planning into the fabric of their investments, not simply as corporate social responsibility add-ons, but as core strategies and practices. IIAs today appear to lag behind this thinking, reflecting the lowest common denominator of enterprises that continue to have difficulties with this linkage, as opposed to those who promote it.

The implication is that the national approach (reflected also in the changing nature of some IIAs, as discussed earlier) toward FDI is under review in a number of countries. For example, such countries as Argentina, Australia, Bolivia, Democratic Republic of Congo, Canada, China, Germany, India, Sri Lanka, Russia, and the United States have strengthened or established screening mechanisms, or have passed laws restricting FDI in certain sectors or, more generally, have become less welcoming for foreign investors.[63] This is reflected, for example, in the fact that the share of national FDI policy changes worldwide that have made the investment climate less welcoming (which averaged around 5% during the 1990s) rose from 7% in 2001-2002, to 11% in 2003-2004, to 18% in 2005-2006, to 23% in 2007-2008, and to 27% in 2009-2011 (annex table 2). Also indicative is that the number of notifications to CFIUS rose from 72 in 2000,[64] to 111 in 2011 (with a high of 155 in 2008);[65] at the same time, the Committee's number of investigations grew

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[63] UNCTAD, *WIR 2012: Towards a New Generation of Investment Policies* (New York and Geneva: UNCTAD, 2012), available at http://www.unctad-docs.org/files/UNCTAD-WIR2012-Full-en.pdf, "Box III.4. Examples of FDI restrictions and regulations in 2011-2012."

[64] Edward M. Graham & David M. Marchick, *US National Security and Foreign Direct Investment* (Washington DC: Institute for International Economics, 2006), available at http://labhi.staff.umm.ac.id/files/2010/12/U.S.-National-Security.pdf, p. 57, tbl. 2.1: "CFIUS notifications and investigations, 1988-2005."

[65] Committee on Foreign Investment in the United States (CFIUS), *Annual Report to Congress: Report Period: CY 2011* (Washington DC: CFIUS, 2012), available at http://www.treasury.gov/resource-center/international/foreign-investment/Documents/2012%20CFIUS%20Annual%20Report%20PUBLIC.pdf, p. 3, tbl. I-1: "Covered Transactions, Withdrawals, and Presidential Decisions 2009-2011."; CFIUS, *Annual Report to Congress: Report Period: 2009 (Calendar Year)* (Washington DC: CFIUS, 2010), available at http://www.treasury.gov/resource-center/international/foreign-investment/Documents/CFIUS%20Annual%20Report%20to%20Congress%20for%20CY09.pdf, p. 3, tbl. B-1: "Covered Transactions, Withdrawals, and Presidential Decisions 2007-2009".

from 1 in 2000 to a high of 40 in 2011.[66] These numbers indicate that, in 2011, 36% of the filings went on to become investigations, compared to 1% in 2000. While these developments suggest that the investment climate is becoming less welcoming for MNEs and perhaps even harbors the possibility of a rise in FDI protectionism, the dominant approach remains to welcome FDI, protect it and facilitate the operations of investors (as reflected in table 2, but also in the fact that the number of IIAs continues to grow) – red tape has not replaced red carpet.

The result is that national approaches to FDI are becoming more nuanced in a number of countries and pay more heed to objectives other than the quantity of FDI inflows. As countries seek to protect their domestic approaches vis-à-vis their international commitments, this change in the expectations of governments regarding the role of FDI can be expected to be increasingly reflected in the purpose and contents of IIAs.

4. The number of treaty-based investment disputes is increasing

Reference has already been made to the rise of treaty-based investment disputes. While there had been (as noted earlier) few such disputes until the end of the 1990, their number had risen to 518 at the end of 2012,[67] with about a third of these disputes having arisen in the past five years.[68] Over the years, respondents have included 18 developed countries, 61 developing countries and 16 economies in transition.[69] The damages awarded in such disputes

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[66] Graham & Marchick, *op. cit.*, p. 57, tbl. 2.1; CFIUS, 2012, *op. cit.* p. 3, tbl. I.1.

[67] UNCTAD, "Towards a New Generation", *op. cit.*, p. 5.

[68] This number of disputes may not appear high; however, by comparison, there were 91 panel reports issued under Article XXIII of the GATT between 1948 and the end of 1994 (several panel reports were not adopted) General Agreement on Tariffs and Trade 1994 (GATT), Marrakesh Agreement, *op. cit.* There were also 24 panel reports issued under the Tokyo Round codes, of which many were also not adopted. See Karl P. Sauvant, "Driving and Countervailing Forces: A Rebalancing of National FDI Policies," in Sauvant, 2009, *op. cit.*, pp. 259-260. There is of course an important difference between disputes under the investment and trade regimes, namely that, in the latter, disputes can be brought only by governments.

[69] UNCTAD, *Latest Developments*, 2013, *op. cit.*, p. 4.

can be high. For example, in the case of *CME v Czech Republic*, the arbitral tribunal awarded US$ 269.8 million, plus 10% interest and costs, to the plaintiff; [70] the (October 5, 2012) award in *Occidental v. Ecuador* of US$ 1.76 billion (plus interest) is the highest to date. It has been calculated that, as of February 2011, the sum of all awards against Argentina amounted to US$ 430 million (after two committees had annulled awards amounting to over US$ 200 million), with the country currently facing approximately US$ 65 billion in outstanding ICSID claims.[71] In addition, the rise of investor-state disputes has also drawn attention to the costs and benefits of using arbitration as the mechanism to settle investment treaty disputes, including in terms of transparency, efficiency and cost of the process. For example, the length of investment arbitration proceedings can vary from as little as sixteen months to as long as eight years (not including possible review proceedings).[72] Also, the costs of litigating an investment treaty claim can be high (they can easily range between US$ 1-30 million, including the total of all arbitration costs and legal fees), with longer disputes possibly costing more.[73]

The implication of this greater assertiveness of investors in bringing treaty claims is twofold: On the one hand, the rise of treaty-based investment disputes seems to show that there is a need for IIAs and a dispute-settlement mechanism to deal with grievances by investors; on the other hand, more and more governments –

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70 *CME v. Czech Republic*, Final Award, March 14, 2003, available at http://italaw.com/documents/CME-2003-Final_001.pdf, p. 161, paras. 1-2. On May 16, 2003, the Czech Republic paid the amount awarded. Peter S. Green, "Czech Republic Pays $355 Million to Media Concern," *New York Times*, May 16, 2003, http://www.nytimes.com/2003/05/16/business/czech-republic-pays-355-million-to-media-concern.html.

71 Luke Eric Peterson, "Argentina by the Numbers: Where Things Stand with Investment Treaty Claims Arising Out of the Argentine Financial Crisis," *International Arbitration Reporter*, February 1, 2011, http://www.iareporter.com/articles/20110201_9; "Argentina Faces 65bn Dollars in Claims; Plans to Abandon International Litigations Court," *MercoPress*, November 28, 2012, http://en.mercopress.com/2012/11/28/argentina-faces-65bn-dollars-in-claims-plans-to-abandon-international-litigations-court. It should be noted, though, that tribunals seldom award the full amount to claimants even when arbitration claims are successful.

72 See UNCTAD, *Latest Developments*, 2012, *op. cit.*, p. 12.

73 UNCTAD, *IIA Monitor*, No. 1 (New York and Geneva: UNCTAD, 2009), available at http://unctad.org/en/Docs/webdiaeia20096_en.pdf, p. 11.

from developed countries, developing countries and economies in transition – are potentially respondents in treaty-based investment disputes and, again potentially, face substantial claims. This potential is defined not only by the number of IIAs with investor-state dispute-settlement provisions, but also by the fact that there are (as noted above) some 100,000 MNEs and at least 900,000 foreign affiliates, many of which (depending on the presence of an IIA and its provisions) may be able to initiate disputes. This makes it all the more important that the dispute-settlement process is a fair as possible and accepted by all major stakeholders.

As a result, governments from all country groups can be expected to seek clearer and more circumscribed definitions of their responsibilities to protect themselves against claims, if they do not seek to abandon the investor-state dispute-settlement mechanism altogether. Furthermore, there will be continuing pressure on improving the dispute-settlement process.

5. Questioning whether IIAs attract FDI

In the case of emerging markets, another consideration needs to be added, namely the role of IIAs (and especially BITs) in attracting FDI. To repeat the quote from Salacuse, a BIT between a developed and a developing country was founded on a grand bargain: "a *promise* of protection of capital in return for the *prospect* of more capital in the future."[74] However, it is not clear to what extent both sides of this "grand bargain" have materialized. While it is clear that the regime to protect foreign investors and investments is highly developed (and also facilitates their operations), it is less clear that IIAs per se are important to attract FDI. Intuitively, the protection that IIAs provide, and the signaling effect they can have, should encourage FDI flows. But the empirical studies that have been undertaken in this respect come, when taken together, to a mixed

74 Salacuse, *The Law of Investment Treaties*, *op. cit.*, p. 111.

result.[75] This is not surprising: After all, the regulatory framework (including IIAs) comprises only one set of factors determining the flow of FDI. Once it is enabling (which, basically, means that FDI is permitted), economic factors (such as market size and growth, the quality of the infrastructure, the presence of natural resources, the availability of skills and technology) determine whether or not investments actually take place. In other words, an enabling environment does nothing if the economic determinants are not in place. In addition, it is difficult to isolate the specific impact of (different facets of) IIAs on the flow of investments from other factors, including, in addition to economic factors, the presence or absence of, for example, liberalization measures undertaken unilaterally or in the context of trade agreements.

The implication – and result – of this situation is that the argument that IIAs are crucial to attract FDI is no longer necessarily persuasive. And this, in turn, undermines one important rationale for entering into such agreements (which, after all, tie the hands of governments in terms of treating foreign investors). There are of course other rationales for such treaties, such as to help policy makers implement domestic reforms and, most importantly, to develop a law-based regime governing international investment. But one of the bases of the "grand bargain" has become questionable, reducing the importance of this driver of the expansion of the investment regime.

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[75] Most of them are contained in Karl P. Sauvant and Lisa E. Sachs (eds.), *The Effect of Treaties on Foreign Direct Investment: Bilateral Investment Treaties, Double Taxation Treaties, and Investment Flows* (New York: OUP, 2009). Most BITs contain protection clauses only and do not, in particular, contain the market-opening provision of pre-establishment national treatment (although the number of countries whose BITs do is rising); free trade agreements, on the other hand, tend to liberalize entry. Opening an economy (or certain sectors) to FDI when the economic determinants are right most likely leads to additional investment inflows, regardless of whether such market-opening is done unilaterally or through treaty provisions. See also UNCTAD "The Rise of International Investment Agreements in Attracting FDI to Developing Countries", UNCTAD's *Series on International Investment Policies for Development* (Geneva: UNCTAD, 2009).

6. Greater influence of civil society

Civil society – especially non-governmental organizations (NGOs) and trade unions[76] – play an increasing role in the debate surrounding the evolution of the international investment law and policy regime. This role manifested itself dramatically in 1998 in the abortive negotiations, within the OECD, of a Multilateral Agreement on Investment. NGOs have continued to take an interest in the development of the international investment regime and, in particular, issues relating to IIAs.[77] They typically question an over-emphasis of the benefits of FDI, while at the same time supporting the quest of host country governments to maintain sufficient policy space to pursue legitimate public policy objectives.[78] In addition, they have been strong advocates of including provisions in IIAs that specify the responsibilities of MNEs to balance the rights that these firms have under these treaties; that increase transparency in the investor-state dispute-settlement process (or abandon this process altogether); and that pay more attention to sustainability issues.[79] Trade unions, for their part, have sought to enshrine

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76 The concept of "civil society" also includes local communities and indigenous peoples. These groups represent important stakeholders in the international investment regime as they may be fundamentally affected by investments, especially in natural resources; there is a growing recognition by governments, international organizations and the business community of their importance.

77 See, e.g., recent publications by a number of NGOs: Corporate Europe Observatory (CEO) and the Transnational Institute (TNI), *Profiting from Injustice* (Brussels/Amsterdam: CEO & TNI, 2012), available at http://corporateeurope.org/sites/default/files/publications/profiting-from-injustice.pdf; Nathalie Bernasconi-Osterwalder, "A Critical Opportunity for Transparency in Investor–State Disputes as Government Delegations and Arbitration Experts Meet in New York," *IISD Commentary* (2012), available at http://www.iisd.org/pdf/2012/critical_opportunity.pdf; Nathalie Bernasconi-Osterwalder, Aaron Cosbey, Lise Johnson & Damon Vis-Dunbar, *Investment Treaties and Why They Matter to Sustainable Development: Questions and Answers* (Winnipeg: IISD, 2012), available at http://www.iisd.org/pdf/2011/investment_treaties_why_they_matter_sd.pdf; Martin Khor "The Emerging Crisis of Investment Treaties," 69 *South Bulletin* 2, (2012), available at http://www.southcentre.org/index.php?option=com_content&view=article&id=1888%3Asb69&catid=144%3Asouth-bulletin-individual-articles&Itemid=287&lang=en.

78 CEO & TNI, *op. cit.*, p. 49.

79 As regards the last of these issues, see especially the pioneering model developed in the framework of IISD, the Model Agreement for Sustainable Development, *op. cit*.

workers' rights in IIAs, especially relating to core labor standards.[80] The influence of civil society is reflected, for example, in the United States Model BIT, which contains specific articles dealing with the environment[81] and social issues.[82] If anything, the role of civil society in future investment negotiations is likely to increase.

The implication – and result – of this development is that the further evolution of the international investment law and policy regime will increasingly involve, if not require, a multi-stakeholder process that takes into account the concerns of civil society. While this might make the process more complex, it reflects the pluralistic nature of modern societies.

7. A greater role for governments

Finally, governments (including home country governments) are also stakeholders in the investment relationship. Their role has several dimensions. One is that they are parties to IIAs. While the original intention of IIAs (and especially BITs) was to depoliticize the relationship between foreign investors and host country governments (via the investor-state dispute-settlement mechanism),[83] it may be that governments are slowly beginning to become re-engaged (and formally so[84]) in this relationship, e.g., through the

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80 See, for example, the discussion of labor union positions set out in a collective statement by Linda Andros, Owen Herrnstadt and others in Annex B of the *Report of the Subcommittee on Investment of the Advisory Committee on International Economic Policy Regarding the Model Bilateral Investment Treaty*, September 30, 2009, part IV, Recommendation 4, available at http://www.state.gov/e/eb/rls/othr/2009/131118.htm#b.

81 U.S. Department of State, *Model Biltateral Investment Treaty 2012* (U.S. Model BIT 2012) (Washington D.C.: USDS, 2012), available at http://www.state.gov/documents/organization/188371.pdf, art. 12: Investment and Environment. Not surprisingly, the Model BIT is a compromise and, therefore, does not reflect fully the views of neither civil society nor business.

82 *Ibid*., art. 13: Investment and Labor; Annex B: Expropriation, para. 4(b).

83 See discussion in R. Doak Bishop, James Crawford & W. Michael Reisman, *Foreign Investment Disputes: Cases, Materials and Commentary* (Alphen: Kluwer Law International, 2005), pp. 3-8.

84 David Schneiderman, "Revisiting the De-Politization of Investment Disputes" in Sauvant, 2011, *op. cit*., pp. 693-714.

issuance of interpretive statements[85] and the possible greater use of state-to-state dispute settlement.[86] The principal driving force for this re-engagement is the desire of governments to ensure that their intentions reflected in IIA provisions are properly understood and interpreted, especially in the context of claims that may involve substantial sums of money. The risk in such a re-engagement include that investment relationships may move from law-based relationships to power-based relationships.[87]

Another aspect of the role of countries in their capacity as home countries receiving increasing attention relates to the fact that

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[85] See, for example, NAFTA Free Trade Commission, "North American Free Trade Agreement Notes of Interpretation of Certain Chapter 11 Provisions," July 31, 2001, available at http://www.sice.oas.org/tpd/nafta/Commission/CH11understanding_e.asp. However, such government re-involvement is (still?) quite rare.

[86] Some states have opted to exclude investor-state dispute-settlement (ISDS) entirely from their BITs, particularly when those agreements are concluded with other developed economies (for example, the investment chapter of the 2004 United States-Australia FTA refers to future consultations on ISDS, if needed (art. 11.16), and the 2011 Australia-New Zealand Closer Economic Relations Investment Protocol provides merely for consultation between the parties (art. 25)). Other states are showing an increasing willingness to resort to state-state arbitration in the absence of an effective appeal mechanism for investor-state dispute awards (see, for example, Ecuador's initiation of proceedings against the United States pursuant to Article VII of the United States-Ecuador BIT. *Ecuador v. U.S.*, Request for Arbitration, June 28, 2011, available at http://www.pca-cpa.org/showfile.asp?fil_id=1878). The case sought to overturn the interpretation of Article II(7) of the BIT (requiring that states provide foreign investors with "effective means" of asserting claims and enforcing rights") adopted by the tribunal in *Chevron v. Ecuador*, Partial Award on the Merits, UNCITRAL, PCA Case No. 34877, March 30, 2010. The latter approach has been recommended by UNCTAD as part of their Investment Policy Framework for Sustainable Development, "... if a question about the meaning of a specific IIA obligation arises, and the Contracting Parties fail to resolve the uncertainty through consultations, a State-State arbitration can be a useful mechanism to clarify it. In this sense, State-State procedures retain their 'supportive' function for ISDS." UNCTAD, *Investment Policy Framework for Sustainable Development* (IPFSD) New York and Geneva: UNCTAD, 2012), p. 56; see also the recommendation that solely state-state arbitration be permitted in respect of pre-establishment issues, *ibid.*, p. 61.

[87] See in this context, for example the decision of the United States to withdraw Generalized System of Preference benefits from Argentina in relation to the country's non-payment of awards. USTR, "U.S. Trade Representative Ron Kirk Comments on Presidential Actions Related to the Generalized System of Preferences" (Washington D.C., March 26, 2012) available at http://www.ustr.gov/about-us/press-office/press-releases/2012/march/us-trade-representative-ron-kirk-comments-presidenti.

most governments of developed countries (and a rising number of those of emerging markets) typically support their firms that invest abroad in various ways. They do that through "home country measures," i.e., measures that governments of these countries take to support the international expansion of their firms through FDI.[88] Such measures can take the form of providing information about investment opportunities; finance; fiscal incentives; insurance; etc.[89] A discussion has begun (especially in the OECD and the negotiations of a Trans-Pacific Partnership agreement) on whether such measures, especially when they are available to state-controlled entities, represent a disregard of the "competitive neutrality" principle and hence might need to be disciplined.[90]

The underlying dilemma that home country governments face in relation to outward FDI and home country measures relates to the fact that governments know that, in an open world economy, they need internationally competitive firms headquartered in their territory. And being internationally competitive requires more and more that firms have a portfolio of locational assets, i.e., establish a network of foreign affiliates, in order to have better access to foreign markets and tangible and intangible resources of all kinds, and that firms seek to maximize the benefits of their investments in the framework of their global corporate networks. This, in turn, requires that a part of the investments of these firms is undertaken abroad, including by shifting (if need be) existing production capacities abroad, with the associated consequences for employment, trade, the conduct of research and development, the payment of taxes, etc. Thus, outward FDI is not necessarily always entirely favorable for home countries, whose governments seek to maximize the benefits of investments in the framework of their national economies. In other words, there is a tension between what may be good (from a

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88 See UNCTAD, *Home Country Measures* (New York and Geneva: UNCTAD, 2001), available at http://unctad.org/en/docs/psiteiitd24.en.pdf, pp. 8-11.

89 See, Sauvant et al., forthcoming.

90 See Antonio Capobianco & Hans Christiansen, "Competitive Neutrality and State-Owned Enterprises: Challenges and Policy Options," *OECD Corporate Governance Working Papers*, No. 1 (Paris: OECD, 2011), available at http://dx.doi.org/10.1787/5kg9xfgjdhg6-en.

micro-economic perspective) for firms (and may even be required to have internationally competitive firms) on the one hand, and what may be good (from a macro-economic perspective) for the economic development of home countries. It is an issue that surfaces from time to time in developed countries (e.g., in the context of "offshoring" and "delocalization"), and it is bound to do so in the future in emerging markets as well.

The implications – and results – of this situation are several-fold. For one, there may be a shift in the interpretive power of IIAs toward giving governments a greater role. In particular, it can be expected that home country governments will become more actively involved in the dispute-settlement process, for instance by providing more guidance to arbitral tribunals, reserving possibilities for the state-to-state resolution of disputes and/or perhaps even eventually establishing an appeals mechanism. There is also a possibility that separate disciplines may emerge, focused on a particular class of investors, namely state-controlled entities. (One such discipline, albeit of a soft-law nature, was adopted in 2008 under the aegis of the IMF, the "Generally Accepted Principles and Practices" relating to sovereign wealth funds.[91]) This raises the question of whether this might be the beginning of the fragmentation of the international investment law regime in terms of classes of investors. Finally, the fact that the governments of some home countries from time to time look with unease at outward FDI (and that more governments might do so in the future) introduces an uncertainty whose implications for the international investment regime (a slowing down of the liberalization of the outward FDI regime in a number of countries? The rise of outward FDI protectionism?) are not yet clear.

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[91] See generally International Working Group of Sovereign Wealth Funds, *Sovereign Wealth Funds: Generally Accepted Principles and Practice "Santiago Principles"* (Santiago Principles), (IWG, 2008), available at http://www.iwg-swf.org/pubs/eng/santiagoprinciples.pdf.

In spite of all these factors driving change in the international investment law and policy regime, few (if any)[92] question the need for a regime to govern international investment as the most important vehicle for international economic transactions. And this is in spite of the denunciation of their BITs by some governments,[93] the withdrawal of some countries from the ICSID Convention[94] and the expression of strong and general dissatisfaction in some academic circles[95] and among NGOs[96] with various aspects of the current regime.

It is clear, however, that the regime can – and must – be improved to take into account the profound changes in the international investment law and policy landscape during the past fifteen years or so. Moreover, a number of factors continue to be at work that are most likely to lead to further changes in the regulatory framework for international investment, both at the national and international levels. Various stakeholders are playing a more important role, and all seek to make sure that their interests are reflected in this evolving regulatory framework. As a result, the substantive content of the international investment regime is very likely to

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92 Even one of the strongest critics of this regime, M. Sornarajah, in the end argues for a (substantial) improvement of the regime, see his "Toward Normlessness: The Ravage and Retreat of Neo-Liberalism in International Investment Law" in Karl P. Sauvant (ed.), *Yearbook on International Investment Law & Policy* (New York: OUP, 2010), pp. 595-642.

93 For example, in April 2010 South Africa's Cabinet concluded that South Africa should refrain from entering into BITs in the future, except in cases of compelling economic and political circumstances, see "Speech delivered by the Minister of Trade and Industry Dr Rob Davies at the South African launch of the United Nations Conference on Trade and Development (UNCTAD) Investment Policy Framework for sustainable development at the University of the Witwatersrand," July 26, 2012, available at http://www.info.gov.za/speech/DynamicAction?pageid=461&sid=29391&tid=77861.

94 Including Bolivia, Ecuador and Venezuela. See ICSID News Releases: "Bolivia Submits a Notice under Article 71 of the ICSID Convention," May 16, 2007; "Ecuador Submits a Notice under Article 71 of the ICSID Convention," July 9, 2009; "Venezuela Submits a Notice under Article 71 of the ICSID Convention," January 26, 2012, all available at icsid.worldbank.org. See also the discussion below in section E.

95 Gus Van Harten, David Schneiderman, Muthucumaraswamy Sornarajah, Peter Muchlinski, and others, *Public Statement on the International Investment Regime: 31 August 2010* (Toronto, 2010), available at http://www.osgoode.yorku.ca/public-statement/documents/Public%20Statement%20%2528June%202011%2529.pdf.

96 CEO & TNI, Profiting from Injustice, op. cit.

change, as will procedural aspects, especially as regards the dispute-settlement mechanism.

The key question, therefore, is: What are options for this regime to evolve and, in particular, how should the various interests of the principal stakeholders be taken into account? Of particular importance here is the challenge of how to balance the needs for predictability, stability and transparency that are important for investors with the need of governments to maintain the policy space they require to pursue legitimate public policy objectives, as well as how to balance the rights and responsibilities of all principal stakeholders in the investment relationship. The legitimacy of the international investment law and policy regime depends on the manner in which it reflects the main interests of the principal stakeholders. Given that the international investment regime is in flux – in part because the European Union is defining its approach toward international investment and major investment treaty negotiations are taking place[97] – opportunities may exist to improve the current regime. The next section, section D, discusses some of the critical issues relating to the international investment law and policy regime, and section E then outlines options for moving forward.

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97 See the discussion at the end of section E.

D. CRITICAL ISSUES AFFECTING THE INTERNATIONAL INVESTMENT REGIME

There are several critical issues affecting the current international investment regime, which, mirroring the key features outlined in section B, can be grouped under the following six headings: (i) the purpose of the regime, (ii) the scope of IIAs, (iii) the substantive content of investment disciplines, (iv) investment arbitration, (v) managing multiple legal sources, and (vi) the institutional structure of the regime. This section discusses each category in turn, to identify and illustrate key challenges and present some of the options that have been suggested to address those challenges.

Two preliminary points should be made here. First, the order in which these critical issues are analyzed does not reflect their relative importance. While it would be difficult accurately to list them on a scale of "most critical" and "least critical," there appear to be some issues that are more controversial (e.g., investment arbitration) than others (e.g., the scope of IIAs). Second, despite the analytical usefulness of identifying these several categories, it is also crucial not to lose sight of the overall picture. It may be that the most critical aspect (and thus greatest challenge) of the international investment regime is not found in any of the six categories, but rather, the cumulative effect of the various components.

1. The purpose of the international investment regime

Given the multiplicity of legal sources (principally, the lack of a multilateral agreement), it is difficult to identify clearly the central purpose of the international investment law and policy regime. Even focusing (particularly in the context of this paper) on a bird's-eye view of the purpose of the 3,000 plus IIAs that have been signed in the past fifty years, there is clearly a controversy concerning the purpose of these agreements. For example, is the purpose of the 1991 *Treaty Between the United States and Argentina Concerning the Reciprocal Encouragement and Protection of In-*

vestments the promotion and protection of foreign investment? Or is it to intensify economic cooperation and increase the prosperity of both contracting states? Focusing on the title of the treaty, the *Azurix* tribunal stated simply that the purpose of the 1991 United States-Argentina BIT is "to encourage and protect investment."[98] On the other hand, the *LG&E* tribunal focused on the apparently broader language found in the preamble of the same BIT and noted that "[i]n entering the Bilateral Treaty as a whole, the parties desired to 'promote greater economic cooperation' and 'stimulate the flow of private capital and the economic development of the parties.'"[99] Alternatively, can it be argued that, as often reflected in the preamble, there are various purposes that, in a particular circumstance, may be conflicting or require a balancing of interests or values?

Given the open-textured nature of the various substantive standards provided in an investment treaty, the identification of a treaty's purpose represents a crucial element in imparting meaning to those standards.[100] Tribunals regularly rely on what they identify as the purpose or purposes of a treaty to interpret treaty terms. On the one hand, the *SGS v. Philippines* tribunal emphasized the promotion and protection of investment as the object and purpose of the Switzerland-Philippines BIT and thus found it "legitimate to resolve uncertainties in its interpretation so as to [favor] the protection of covered investments."[101] On the other hand, the *Saluka* tribunal emphasized that the protection of foreign investment is a necessary element alongside the overall aim of encouraging foreign investment and extending and intensifying the parties' economic relations. According to the *Saluka* Tribunal, this called for "a balanced approach to the interpretation of the Treaty's substantive provisions for the protection of investments, since an interpre-

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98 *Azurix v. Argentina*, ICSID Case No. ARB/01/12, Award, July 14, 2006, para. 307.

99 *LG&E v. Argentina*, ICSID Case No. ARB/02/1, Decision on Liability, October 3, 2006, para. 124.

100 For example, tribunals have relied on the object and purpose of the investment treaty in interpreting the "fair and equitable treatment" clause and the so-called "umbrella" clause as well as the notion of "investment" for purposes of determining the subject matter jurisdiction of ICSID tribunals.

101 *SGS v. The Philippines*, ICSID Case No. ARB/02/6, Decision on Jurisdiction, January 29, 2004, para. 116.

tation which exaggerates the protection to be accorded to foreign investments may serve to dissuade host States from admitting foreign investments and so undermine the overall aim of extending and intensifying the parties' mutual economic relations."[102]

Aside from being an important element in the interpretation of existing IIAs, the debate about the purpose of international investment law also plays a crucial role with regard to future law-making in this field. On one level, clearly identifying the purpose of future IIAs in the text of an agreement (often in the preamble) may facilitate both the interpretation of the agreement and the adjudication of future claims by investment tribunals called upon to settle an investment treaty dispute.[103] On another level, clearly identifying the purpose of future IIAs will enable the contracting parties to draft an agreement's substantive provisions so as to make sure that those purposes are actually and effectively achieved.

However, there may be different ways in which a specific purpose is pursued and thus it may be useful to distinguish between a treaty's "object" (i.e., what the treaty is about or contains) and "purpose" (i.e., what the treaty is for or seeks to achieve).[104] While a treaty may have, broadly speaking, several aims or objectives, it should be possible to identify whether those several aims stand on a hierarchy or are all equally important. In terms of clarity and predictability, an express hierarchy seems to be preferred, although it may be politically more difficult to achieve.

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[102] *Saluka Investments v. Czech Republic*, Partial Award, *op. cit*., para. 300. The Preamble of the Netherlands-Czech Republic BIT reads as follows: "Desiring to extend and intensify the economic relations between them particularly with respect to investments by the investor of one Contracting Party in the territory of the other Contracting Party, Recognizing that agreement upon the treatment to be accorded to such investments will stimulate the flow of capital and technology and the economic development of the Contracting Parties and that fair and equitable treatment is desirable."

[103] Andrés Rigo Sureda has explained that the purpose of a treaty is one criteria used by a tribunal to assess the "degree of legal merit" of a claim, where there is more than one acceptable interpretation of the treaty's provisions. Andrés Rigo Sureda, *Investment Treaty Arbitration: Judging Under Uncertainty* (New York: Cambridge University Press, 2012), pp. 7-8.

[104] "The object of a treaty is the instrument for the achievement of the treaty's purpose." Isabelle Buffard & Karl Zemanek, "The 'Object and Purpose' of a Treaty: An Enigma?," 3(3) *Austrian Review of International and European Law* 311 (1998), p. 326.

Accordingly, when it comes to deciding the (main or ultimate) purpose of future IIAs, policy-makers could well identify, for example, any of the following: (i) the protection of foreign investment, (ii) the promotion of the contracting parties' economic development or (iii) the promotion of the contracting parties' sustainable development. As noted above, the first two options broadly represent the two positions reflected in the practice of investment tribunals. The third option, however, has recently found some recognition in the practice of investment tribunals,[105] gained momentum as an option for future treaty-making[106] and is increasingly finding acceptance within the business community, too.[107]

Crucially, the choice of purpose (understood here as the main or ultimate objective of an agreement) influences the various features of an IIA, in particular the provisions dealing with the agreement's *scope of application*, *substantive obligations* and *dispute-settlement mechanism*. With regard to the subject matter scope, for example, an IIA may choose a broad or narrow definition of covered "investment." With regard to the substantive obligations, an IIA could include only some or all of the following provisions: investment protection guarantees, investment liberalization commitments, obligations on home countries, and obligations on foreign investments/investors. With regard to dispute settlement, an IIA may, for example, specify the particular qualifications and appointment processes for arbitrators that best support the ultimate purpose of an agreement. Accordingly, these provisions will most likely differ depending on an agreement's chosen purpose.

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105 *El Paso Energy International Co. v. Argentina*, ICSID Case No. ARB/03/15, Award, October 31, 2011, para. 361.

106 See the 2004 Canada Model investment treaty, available at http://italaw.com/documents/Canadian2004-FIPA-model-en.pdf; UNCTAD, *WIR*, 2012, *op. cit.* pp. 89-92; Commonwealth Secretariat, *Integrating Sustainable Development into International Investment Agreements: A Guide for Developing Country Negotiators* (London: Commonwealth Secretariat, 2012).

107 See the work carried under the auspices of the United Nations Special Representative for Business and Human Rights, John Ruggie: Human Rights Council, 17th Session, *Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises: Guiding Principles for Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework* (Principles on Business and Human Rights), U.N. Doc. A/HRC/17/31, March 21, 2011.

However, the means of implementing the same key purpose could also differ from one agreement to another. For example, in order to promote sustainable development, the contracting parties could choose either (1) simply to restrict an agreement's subject matter scope of application to cover exclusively foreign investment that contributes to the sustainable development of the contracting parties (to be verified through a sustainability impact assessment)[108] or (2) to keep the broad definition of covered investment but to include in the IIA certain disciplines on home countries and/or foreign investors in order to meet sustainable development objectives.[109]

To sum up, it is fundamental first clearly to identify the main or ultimate purpose of future treaty-making. Second, states will also need carefully to identify the specific provisions to be included in future IIAs that will most likely help to achieve the chosen purpose. While the chosen "purpose" will influence the choice about the "object" of a future IIA, the identification of the latter may depend on the contracting parties' specific political, economic and social factors. Third, future clarifications with regard to individual countries' objectives underlying their investment policies and treaties will directly affect the purpose of the overall investment regime.

2. Scope of international investment agreements

International investment agreements generally accord protections to "investors" who have made "investments"; these two criteria must be met before the protections of an investment agreement apply. The debate that has developed in the arbitral practice over the past twenty years mainly revolves around the definitions of foreign "investor" and "investment" covered by IIAs. Three additional critical issues that should be briefly noted deal with state-controlled entities, the temporal scope of application of IIAs and express exclusions.

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[108] See further discussion in section D.4.
[109] See further discussion in section D.3.

a. What is a foreign "investment"?

This question has arisen primarily in the context of determining the jurisdiction of an arbitral tribunal, partly because that is logically the first opportunity for the issue to arise, and partly because the ICSID Convention does not expressly include a definition of "investment" for purposes of establishing the jurisdiction of an ICSID tribunal (pursuant to Article 25 ICSID). As the express object of existing IIAs has mainly been the protection of foreign investment, the debate surrounding the definition of covered investment has closely mirrored the debate about the merits and extent of protection to be granted to foreign investment. Accordingly, the key question in this debate has to date been who the *beneficiaries* of the international investment regime are, with investors generally advancing a broader interpretation, and state respondents advancing a narrower one.

However, this debate may become more nuanced if future IIAs will provide foreign investment and investors with certain responsibilities, as well as rights. Thus, if future treaty-makers pursue the option of moving from a narrow investment promotion approach to a broader, "impact enhancing" approach that incorporates sustainability considerations and investment regulation, the terms of the debate will change; the key question would then be who are the *subjects* of the international regime.

The traditional open-ended definition of "investment" grants protection to all types of assets, including FDI, portfolio investment, contractual rights, and intellectual property rights; it is considered to have the strongest attraction effect (to the extent that the regulatory framework is an investment determinant[110]) in terms of promoting investment flows. This definition also benefits from clarity and thus tends to be one of the most predictable approaches with regard to identifying the subject-matter scope of application of IIAs. However, more recent IIAs have adopted stricter definitions of "investment" (e.g., the enterprise based approach), excluding short-term and speculative investments.[111]

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[110] But see the discussion in section C.

[111] UNCTAD, *WIR*, 2012, *op. cit*. Several IIAs also condition their protection on the basis that an investment is admitted in compliance of domestic laws; *ibid*., pp. 137, 144, 146.

Particularly in the context of interpreting the jurisdictional basis of an ICSID tribunal, some have argued that the notion of investment, while not defined in the Convention, includes certain elements such as (i) commitment of resources, (ii) a certain duration (iii) assumption of risk, (iv) expectation of a return, and (v) contribution to the host country's economic development.[112] While there is disagreement on exactly what elements should be taken into account, as well as whether these elements constitute strict requirements or mere identifying characteristics, this approach is premised on limiting the kinds of investments that should be protected by IIAs on the basis of a number of economic features. Of all the aforementioned elements, the question of contribution to the host country's economic development has been particularly controversial. Those supporting the relevance of this element in the definition of covered investment point toward the longer-term objective of IIAs (i.e., the promotion of economic development) as the main rationale for their position. On the other hand, critics argue that consideration of the contribution to a host country's economic development limits excessively the scope of the investment protection guarantees in IIAs and brings a level of uncertainty about the subject matter (or *ratione materiae*) scope of the application of IIAs, which undermines the very purpose of these agreements.[113]

In this context, one should highlight the increasing attention that is being given to sustainable development and in particular to "sustainable international investment" by states, international or-

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[112] See the "Salini test," developed in *Salini v. Morocco*, ICSID Case No. ARB/00/4, Decision on Jurisdiction, July 23, 2001, para. 52. In addition, see the decision of the tribunal *Romak v. Uzbekistan*, PCA Case No. AA280, Award, November 26, 2009, para. 207; *Alps Finance v. Slovak Republic*, UNCITRAL, Award, March 5, 2011, paras. 241-245; *Saba Fakes v. Turkey*, ICSID Case No. ARB/07/20, Award, July 14, 2010, paras. 103-114 (rejecting "economic development" as a criterion). See generally the discussion of the "Salini test" in Zachary Douglas, *The International Law of Investment Claims* (Cambridge: Cambridge University Press, 2009), pp. 161-232.

[113] Devashish Krishan, "A Notion of ICSID Investment," in Ian A. Laird & Todd J. Weiler (eds.), *Investment Treaty Arbitration and International Law* (New York: Juris, 2008); Julian Davis Mortenson, "The Meaning of 'Investment': ICSID's *Travaux* and the Domain of International Investment Law," 51(1) *Harvard International Law Journal* 257 (2010).

ganizations and civil society.[114] While it is a concept that is not yet well defined, principles of "sustainability" could be reflected in IIAs by using a definition of "investment" that includes "sustainability" as an integral part of it.[115]

b. When is an investor "foreign"?

The controversy regarding to whom IIAs apply (i.e., personal or *ratione personae* scope of application) has focused on the required "foreignness" of investors, as the traditional approach in IIAs with regard to the definition of legal persons has often been to use the place of incorporation as the relevant criterion. While this approach offers a high level of clarity and predictability, it also engenders "nationality planning" and "forum shopping."[116] Accordingly, two basic scenarios may be envisaged: First, it may be that a third country investor avails itself of the protections granted by an IIA through incorporation in the territory of one of the contracting parties to an IIA[117] and, second, it may be that a national of one of the contracting parties avails itself of the IIA protection vis-à-vis that same contracting party through incorporation in the territory of the other contracting party.[118]

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114 See above section C. This issue was already at the heart of the IISD Model, *op. cit*., and it is the guiding principle of the UNCTAD IPFSD, *op. cit*. See also Marie-Claire Cordonier Segger, Markus W. Gehring & Andrew Newcombe (eds.), *Sustainable Development in World Investment Law* (Alphen: Kluwer Law International, 2011) and Olivier De Schutter, Johan Swinnen & Jan Wouters, *Foreign Direct Investment and Human Development: The Law and Economics of International Investment Agreements* (London: Routledge, 2013).

115 As discussed by Brigitte Stern at the Seventh Columbia International Investment Conference organized by the Vale Columbia Center on Sustainable International Investment, New York (November 14, 2012). See section E below on how to tackle the vagueness of the concept of sustainability in this context.

116 Investment tribunals seem to accept the practice of structuring foreign investments in order to gain the benefits of an IIA (nationality planning), while they find an abuse of process the practice of restructuring the foreign investment after the disputed host country's conduct has been taken in order to provide the investor with a treaty remedy.

117 See, e.g., *Aguas del Tunari v. Bolivia*, ICSID Case No. ARB/02/3, Decision on Jurisdiction, October 21, 2005.

118 See, e.g., *Tokio Tokelés v. Ukraine*, ICSID Case No. ARB/02/18, Decision on Jurisdiction, April 29, 2004. There are a number of more complex scenarios – in particular where the shareholders have multiple nationalities, whether there is sufficient foreign ownership and control both in the case of locally incorporated companies and the parent company. See Martin J. Valasek & Patrick Dumberry, "Developments in the Legal Standing of Shareholders and Holding Corporations in Investor-State Disputes," 26(1) *ICSID Review* 34 (2011).

While "denial of benefits" clauses may in principle be able to address some of the concerns raised with regard to the personal scope of application of IIAs,[119] there is still controversy around the way in which they operate in practice. For example, while many treaties permit the denial of benefits to "sham" or "mailbox" investors, it is far from clear how that denial of benefits is meant to work in practice. For example, NAFTA article 1113 requires that one state party give prior notification to the other treaty party if it intends to deny benefits to an apparent investor.[120]

c. Coverage of state-controlled entities

The growth of state-controlled entities (SCEs) (including SOEs and, to a lesser extent, SWFs) as foreign investors[121] highlights the tensions that have arisen as a result of the changing world FDI landscape:[122] While SOEs headquartered in developed countries have long played an important role in their countries' outward FDI (and continue to hold the bulk of assets abroad controlled by SOEs worldwide), states that have traditionally been host countries are, through these entities, taking now too an active role in industries with political, economic and strategic significance, including in traditional home countries.[123] At present, most IIAs provide SCEs

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[119] Some IIAs also require that an investor has "substantial business activities" in the country of incorporation.

[120] See, e.g., Meg N. Kinnear, Andrea K. Bjorklund & John F.G. Hannaford, *Investment Disputes Under NAFTA: An Annotated Guide to NAFTA Chapter 11* (Alphen: Kluwer Law International, updated 2009), pp. 1113.1 – 1113.14.

[121] See Sauvant & Strauss, *op. cit.*, p. 1; see also Nilgün Gökgür, "Are Resurging State-Owned Enterprises Impeding Competition Overseas?" in Karl P. Sauvant & Jennifer Reimer (eds.), *FDI Perspectives: Issues in International Investment* (2nd edition, New York: Vale Columbia Center for Sustainable International Investment, 2012), pp. 26-27.

[122] In relation to SOEs, see generally UNCTAD, *WIR*, 2011, *op. cit.,* pp. 28-37. For an in-depth analysis of Chinese SOEs, see Li-Wen Lin & Curtis J. Milhaupt, "We Are the (National) Champions: Understanding the Mechanisms of State Capitalism in China," 65 *Stanford Law Review* (forthcoming).

[123] As Blyschak explains, "[b]ecause of their ties to home states, investments made by SWFs and [state-owned enterprises] raise different considerations among regulators compared to those raised when purely private enterprises pursue similar investments. Chief among these considerations is that in conducting their business, SOEs might consider subjugating market interests to political goals." Paul Blyschak, "State-Owned Enterprises and International Investment Treaties: When Are State-Owned Entities and Their Investments Protected?," 6(2) *Journal of International Law and International Relations* 1 (2011), pp. 7-8.

with the same level of protection as privately controlled entities from the same jurisdiction.[124] In some cases, this protection is expressly extended to government-owned or controlled entities, but in the vast majority of treaties, it is not.[125] However, some domestic regulators have responded to the growth of FDI by SCEs with more stringent standards for establishment or transaction approval.[126] Fears that such SCEs might pursue political (as opposed to commercial) objectives are contributing to a divergence in investment protection standards for state-controlled and privately owned entities.[127] In turn, there has been a debate over whether SCEs are entitled to seek resolution of disputes under the ICSID Framework,[128] and arbitral decisions on the matter have not provided clear guidance.[129] As has been pointed out, excluding SCEs from the ICSID framework could drive those entities toward alternative dispute resolution forums, and could serve to undermine the significance of ICSID in the long term.[130]

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124 Jo En Low, "State-Controlled Entities as 'Investors' Under International Investment Agreements," *Columbia FDI Perspectives*, No. 80 (2012). In a review of 852 investor-state dispute resolution clauses in 851 IIAs, only two excluded one party's state-controlled entities from the definition of investor: the 1983 Panama-Germany BIT, and 1983 Panama-Switzerland BIT. *Ibid*. For a fuller account, see Jo En Low, "The Status of State-Controlled Entities Under International Investment Law" in Andrea K. Bjorklund (ed.), *Yearbook on International Investment Law and Policy 2012-2013* (forthcoming 2013).

125 81 of the 851 IIAs surveyed expressly included a "state enterprise," or state-owned and controlled entities as an "investor," and 52 expressly stated that the contracting party itself may be an "investor" (and some treaties feature both provisions). Low, 2012, *op. cit*.

126 See, e.g., FINSA, *op. cit*.; see Blyschack, *op. cit*., pp. 10-14 (discussing domestic regulation on national security grounds in the United States and Canada); Sandy Walker, "A New Economic Nationalism? Lessons from the PotashCorp Decision in Canada," *Columbia FDI Perspectives*, No. 77 (2012).

127 See Sauvant & Strauss, *op. cit*., p. 2; see also Gökgür, *op. cit*., pp. 26-27.

128 In particular, the "Broches test" for jurisdiction (named for the principal drafter of the ICSID Convention) may exclude an entity that is "discharging an essentially governmental function" or "acting as an agent" of its home country. See Blyschak, *op. cit*., pp. 28-41; Mark Feldman, "The Standing of State-Owned Entities Under Investment Treaties" in Sauvant, 2011, *op. cit*., pp. 615-637.

129 *Československa Obchodní Banka, A.S. v. Slovak Republic*, ICSID Case No. ARB/97/4, Decision on Jurisdiction, May 24, 1999. See discussion in Blyschak, *op. cit*., p. 27ff.

130 Low, 2012, *op. cit*., pp. 2-3. This issue is discussed in further detail in section E.4.a below.

d. Temporal scope of treaties

With growing discontent about the impact of existing IIAs, the decisions by some governments to "opt out" of ICSID dispute settlement,[131] or of some of their BITs,[132] or out of the regime as a whole, have raised questions about when, and how, such "opt-out" might become effective.[133] One key issue is the effect of any "survival clause" (which typically guarantees that the provisions of the IIA will remain in effect for a number of years after termination of the treaty) and the ability of state parties to agree to override the "survival clause" in a treaty.[134] Where governments instead choose to withdraw from the ICSID Convention, there is the possibility that the consent to ICSID arbitration found in an IIA will be rendered meaningless. Article 72 of the ICSID Convention makes it reasonably clear that, if an investor has submitted a claim to ICSID prior to the denunciation's effectiveness, ICSID Convention arbitration will be available. What is not clear is whether Article 72 could be viewed as making ICSID arbitration applicable even if a claim has not been submitted prior to the denunciation date.[135]

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131 For example, Bolivia, Ecuador and Venezuela, as discussed above.

132 For example, in 2012 South Africa terminated its BIT with Belgium and Luxembourg, as part of its broader review of international investment law and policy; see Adam Green, "South Africa: BITs in pieces" *Financial Times* (October 19, 2012) available at http://blogs.ft.com/beyond-brics/2012/10/19/south-africa-bits-in-pieces/#axzz2NQ7g21cu.

133 See, e.g., UNCTAD, "Denunciation of the ICSID Convention and BITs: Impact on Investor-State Claims," *IIA Issues Note*, No. 2 (2010), available at http://unctad.org/en/Docs/webdiaeia20106_en.pdf.

134 See, e.g., *the* Ecuador-United States BIT, art. XII; UNCTAD, "Denunciation of the ICSID Convention," *op. cit.*, p. 3. There have been arguments made that, since IIAs generally and the "survival clause" in particular, are concluded for the benefit of a third-party (private investors), any agreement to amend its application would be ineffective.

135 Article 72 of ICSID provides that a denunciation notice given by a party to the Convention "shall not affect the rights or obligations under the Convention of that State or of any of its constituent subdivisions or agencies or of any national of that State arising out of consent to the jurisdiction of the Centre given by one of them before [the denunciation] notice was received by the depository."

At the other end of the treaty's life, a number of issues remain to be resolved including for example whether tribunals have jurisdiction to determine potential breaches that constitute continuing or composite acts that "straddle" the date when a treaty comes into force.[136]

e. Express exclusions from the scope of IIAs

As state parties gain a better understanding of the advantages and disadvantages of the international investment regime, there has been a debate about the need for express exclusions from the scope of IIAs (or, at least, of different substantive standards) for specific sectors, policies and public authorities.

Certain *sectors* may be excluded from the scope of an IIA temporarily or permanently, in order to address the demands of different stakeholders. For example, many of the concerns raised by public interest groups and civil society are directed at the potential detrimental effects of investment liberalization in specific sectors, such as essential social services or other similarly sensitive industries.[137]

Many of the more controversial actions taken by states recently relate to renegotiations, restrictions or expropriations with respect to investments in extractive industries.[138] In some cases, in order

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[136] See Nick Gallus, *The Temporal Scope of Investment Protection Treaties* (London: BIICL, 2009). A further temporal issue is the increasing number of renegotiated treaties, where states update their BITs (for example, vis-à-vis state conduct that temporally overlaps the two treaties).

[137] Sector-specific exclusions seem to be popular in those IIAs that include liberalization (i.e., pre-establishment) obligations. See, e.g., NAFTA Annex I for each of the contracting parties (reserving certain sectors to the state or limiting foreign participation). These exclusions are discussed in Kinnear et al., *op. cit.*, at 1108.1-1108.32.

[138] For example, Argentina's expropriation of 51% of the share capital of both YPF S.A. and Repsol YPF Gas S.A. under Law No. 26.741, *Official Gazette*, May 7, 2012; Ecuador's 2010 legislation compelling private oil companies to renegotiate service contracts to introduce a flat tax rate per barrel of oil: Ley Reformatoria a la Ley de Hidrocarburos y a la Ley de Régimen Tributario Interno, June 24, 2010; and Indonesia's requirement that foreign firms operating in coal, minerals and metals progressively to divest at least 51% of their holdings to private and public Indonesian investors under Presidential Decree No. 24/2012, February 21, 2012, each discussed in UNCTAD, *WIR*, 2012, *op. cit.*, p. 80.

to preserve their ability to give effect to such policy changes, states may choose to exclude extractive industries from the scope of investment liberalization provisions, or from investment protection provisions (for example, where management or ownership rights to the particular resources are in question).[139]

IIAs may exclude particular *policies* from their scope, such as taxation (usually addressed under a separate agreement), public procurement (addressed under the Agreement on Government Procurement[140]) or subsidies. Equally, in light of the possible "chilling" effect of IIAs vis-à-vis state decision-making processes regarding disenfranchised or indigenous groups,[141] IIAs may exclude, for example, measures taken by a state to provide redress or to restore customary rights to resources from the scope of application of IIAs (or at least their dispute-settlement mechanisms).[142]

In addition, there has been some debate as to whether the commitments of the state set out in an IIA should also protect the investor against actions of *public authorities* such as municipal or

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139 See, for example, the arguments made by, and on behalf of, indigenous claimants in New Zealand in relation to the effects of BIT commitments and the ability of the state to provide redress to recognize ownership of fresh water and geothermal resources. Waitangi Tribunal, *Brief of Evidence of Dr Penelope Ridings*, July 3, 2012, Wai 2358, #A94; Waitangi Tribunal, *Dr Jane Kelsey's Response to the Brief of Evidence of Dr Penelope Ridings*, July 6, 2012, Wai 2358, #A97.

140 Agreement on Government Procurement, Marrakesh Agreement, *op. cit.*

141 See, e.g., Note and Comments, Anne Debevoise Ostby, "Will Foreign Investors Regulate Indigenous Peoples' Right to Self-Determination?," 21(1) *Wisconsin International Law Journal* 223 (2003), p. 242 ff. (discussing the impact of investment protections under NAFTA in relation to the state's ability to effect self-determination by indigenous groups).

142 One possible response is to "carve out" state decisions in relation to indigenous rights. For example, New Zealand has included "safeguard" provisions in a number of its FTAs to maintain policy space to uphold its commitments to indigenous groups, and to address historic grievances - see e.g., the New Zealand – Australia CER Investment Protocol, art. 23, "Provided that such measures are not used as a means of arbitrary or unjustified discrimination against persons of the other Party or as a disguised restriction on investment, nothing in this Protocol shall preclude the adoption by New Zealand of measures it deems necessary to accord more favourable treatment to Maori in respect of matters covered by this Protocol including in fulfilment of its obligations under the Treaty of Waitangi."

provincial organs.[143] The position taken in the United States Model BIT confirms that a state party's obligations apply also to any entity that exercises any delegated regulatory or governmental authority (including local governments),[144] but also allows for local level governments to maintain, renew, continue, or amend non-conforming measures (so long as the change does not decrease the conformity of the measure), without complying with national treatment or most-favored-nation treatment standards.[145] In light of customary law on state responsibility, if an IIA does not provide otherwise, the agreement applies to any conduct of the state, whether at the central or territorial level.

While express exclusions are certainly a viable option to address specific or temporary concerns (for example, with regard to liberalization commitments and developing countries), there is a real risk that adopting overly broad exclusions could potentially undermine the very function of IIAs.

To sum up, there are several critical issues dealing with the reach of the international investment regime, in particular the scope of IIAs. While identifying the appropriate scope will depend primarily on the overall goal(s) of an agreement negotiated by the contracting parties, several complex and interconnected options are available to states to make sure that IIAs (and the regime more generally) are indeed effective in achieving those goals.

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143 See, e.g., Garba Ibrahim Malumfashi, "State Responsibility in Investment Arbitration: To What Extent Is the State Responsible for Contracts Concluded by State Enterprises and Sub-National Authorities?," 1 *Transnational Dispute Management* (2005).

144 United States Model BIT 2012, *op. cit.*, art. 2, para. 2(a).

145 *Ibid.*, art. 14. In addition, non-conforming measures are excluded from the application of Article 8 (Performance Requirements) and Article 9 (Senior Management and Boards of Directors).

3. The substantive content of investment norms

One can identify at least four distinct debates surrounding the substantive content of investment norms. First, the meaning of most of the traditional investment-protection standards remain controversial, both at the level of interpretation of existing IIAs (law-application) and at the level of devising future policies (law-making). Second, there is an intense debate as to whether current investment norms (as applied by investment tribunals) have reached the right balance between investment protection and states' right to regulate in the public interest. Third, the merits and extent of investment liberalization (so-called pre-establishment obligations) in IIAs remain controversial. Fourth, it is even more controversial whether, in addition to investment protection standards and investment liberalization commitments, IIAs should also include disciplines directed at home countries and foreign investors in order to strengthen the promotion of foreign investment and compliance with international norms.

a. Investment protection norms as "standards"

When it comes to traditional investment protection norms (such as expropriation, national treatment and fair and equitable treatment), the critical issue is that these norms have been drafted, invoked and applied over the past fifty years as "standards."[146] On the one hand, standards enjoy low administrative and political costs of formulation and have a higher flexibility in adapting to changing circumstances. On the other hand, the predictability of standards is very low, and thus enforcement costs are high. Equally, standards may enjoy a low democratic legitimacy as their content is often determined by a less representative body (a tribunal).

For example, the focus of investors' and host countries' arguments related to the *expropriation* provision has principally been on drawing the line between a compensable indirect taking (where

[146] The distinction between "rules" and "standards" revolves around the extent to which efforts to give content to the norm are undertaken before or after the conduct to which the norm is applied. Louis Kaplow, "Rules Versus Standards: An Economic Analysis," 42(3) *Duke Law Journal* 557 (1992), p. 557.

there is no formal transfer of title) and a regulatory measure pursuing a legitimate public policy, which has an adverse effect on the foreign investor's property.[147] In other words, the crucial issue surrounding the expropriation provision in investment treaties has been the definition of "indirect expropriation" or "any measure having equivalent effect to expropriation." Various doctrines have been advanced by parties and endorsed by the many investment tribunals, including the following three doctrines: a measure falls under the concept of indirect expropriation whenever it has substantially deprived a foreign investor of the benefit of its investment;[148] notwithstanding its adverse impact on a foreign investment, a measure cannot be defined as expropriatory if it pursues a non-discriminatory, bona fide and legitimate public purpose;[149] and a finding of indirect expropriation requires balancing various factors, including, principally, the measure's adverse effect on a foreign investment and the measure's public policy benefits.[150]

Leaving aside the issue of inconsistency, all of these doctrines evidence a standard-like use of the expropriation provision. The content of the prohibition of uncompensated expropriation is determined after the conduct has taken place and is principally in the hands of the investment tribunal called upon to settle a particular dispute and to apply the underlying treaty.[151]

The same can be said for the *national treatment* provision as it applies to measures that do not explicitly differentiate between foreign and domestic investors, so-called origin-neutral measures.[152] Whether an origin-neutral measure violates the national treatment provision depends on (i) how one identifies the domestic investors whose treatment will be compared with the treatment afforded to

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147 Newcombe & Paradell, *op. cit.*, p. 341.
148 *Metalclad v. Mexico*, ICSID Case No. ARB(AF)/97/1, Award, August 30, 2000, para. 103.
149 Methanex v. United States, op. cit., Part IV, Chapter D, p. 4, para. 7.
150 *Tecmed v. Mexico, op. cit.*, para. 122. See generally Ursula Kriebaum, "Regulatory Takings: Balancing the Interests of the Investor and the State," 8 *Journal of World Investment and Trade* 717 (2007).
151 *Chemtura Corporation v. Canada*, UNCITRAL, Award, August 2, 2010, para. 249.
152 Kenneth J. Vandevelde, *Bilateral Investment Treaties: History, Policy, and Interpretation* (New York: OUP, 2010), p. 377.

a foreign investor, (ii) the nature of the difference in treatment and (iii) whether the difference in treatment is justified by a public policy reason.[153] With regard to the object of the comparison, while the majority of tribunals have focused on whether the foreign and domestic investors operate at least in the same economic sector (if not in competition with each other), a few tribunals have taken either a much wider reading (e.g., comparing a foreign oil exporter with a domestic flower exporter) or a much stricter reading (e.g., limiting the comparison to identical investors). With regard to the nature of the difference in treatment, while several tribunals have relied on a measure's adverse effects on foreign investors only, a few tribunals have relied more or less expressly on a state's discriminatory intent in order to sustain a national treatment claim. With regard to the public policy justification, some tribunals have simply required that a non-discriminatory reason for the different treatment existed, while the majority have examined whether the measure under review was either capable of achieving the public policy objective or is the least restrictive alternative available to achieve such objective.[154]

Once again, notwithstanding the variety of different interpretations, the national treatment provision has functioned mainly as a standard, the normative content of which has been left to the *ex-post facto* determination of investment tribunals.[155]

Perhaps the clearest example of an investment treaty norm that has operated mainly as a standard is the *fair and equitable treatment* (FET) provision, which usually requires states to accord covered investments fair and equitable treatment. While there have

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[153] Salacuse, *op. cit.*, pp. 248-251; Andrea K. Bjorklund, "National Treatment" in August Reinisch (ed.), *Standards of Investment Protection* (New York: OUP, 2008), p. 29.

[154] F. Ortino, "Non-Discriminatory Treatment in Investment Disputes" in Pierre-Marie Dupuy, Francesco Francioni & Ernst-Ulrich Petersmann (eds.), *Human Rights in International Investment Law and Arbitration* (New York: OUP, 2009), p. 364.

[155] See Rudolf Dolzer & Christoph Schreuer, *Principles of International Investment Law* (New York: OUP, 2nd Ed. 2012), p. 199: "It is generally agreed that the application of the [national treatment] clause is fact-specific. [...] such statement cautions that the standard resists abstract definitions and that no hard-and-fast approach to interpreting the clause will be found."

been several formulations of this standard[156] and different approaches to the interpretation of a general and unqualified obligation of "fair and equitable treatment,"[157] there is little disagreement about two general characteristics of this standard. First, the FET standard "is a broad, overarching standard, that contains various elements of protection" including denial of justice, due process and arbitrariness, as well as "the protection of legitimate expectations, non-discrimination, transparency and protections against bad faith, coercion, threats, and harassment."[158] Second, the determination of whether there has been a breach of the FET standard "is highly fact and context dependent."[159] Accordingly, like any other standard, determining the applicability of this norm to a particular case requires a great deal of work mostly left to the dispute-settlement tribunal.[160]

While they have tried to adopt novel formulations of the traditional investment-protection guarantees, recent IIAs do not seem to have engendered a much higher level of clarity and predictability;[161] thus the meaning of most of the traditional investment protection standards remains controversial.

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[156] Vandevelde, *op. cit.*, pp. 192-195.

[157] Salacuse, *op. cit.*, pp. 222-228.

[158] Newcombe & Paradell, *op. cit.*, p. 279.

[159] Newcombe & Paradell, *op. cit.*, pp. 278; Meg Kinnear, "The Continuing Development of the Fair and Equitable Treatment Standard" in Andrea K. Bjorklund, Ian A. Laird & Sergey Ripinsky (eds.), *Investment Treaty Law: Current Issues III* (London: BIICL, 2009), pp. 209-240.

[160] See Federico Ortino, "Refining the Content and Role of Investment 'Rules' and 'Standards': A New Approach to International Treaty-Making," 28(1) *ICSID Review* (2013).

[161] With regard to expropriation, see, for example, art. 92 (and Annex 10) of the 2011 Japan-India Economic Partnership Agreement (EPA); art. 9.12 (and Annex 9B) of the 2011 Korea-Peru Free Trade Agreement; and art. 6 (and Annex B) of the 2012 United States Model BIT. While the formulation of the expropriation provision in both the 2011 Japan-India EPA and 2012 United States Model BIT may be successful in identifying the doctrine applicable in defining "indirect expropriation" under each agreement, both provisions will continue to operate as standards, in as much as its applicability to a particular case will still be left to the international arbitral tribunal. The same can be said with regard to FET as part of the minimum standard of treatment (see art. 12 of the 2011 Australian-New Zealand Investment Protocol and art. 5 and Annex A of the 2012 United States Model BIT).

b. Balancing investment protection and the right to regulate

A core debate affecting the current investment regime revolves around the following two key values: granting maximum protection to foreign investors and safeguarding host countries' right to regulate in the public interest (including the right to fit FDI into domestic economic and social development policies). In their recent joint Statement on Shared Principles for International Investment, the European Union and the United States expressly acknowledged the challenge facing the investment treaty regime: the recognition that "[g]overnments should provide the highest possible level of legal certainty and protection against discriminatory, arbitrary, and otherwise unfair or harmful treatment to all investors and investments in their territories" was accompanied by a statement of the conviction that "governments can fully implement these principles while still preserving the authority to adopt and maintain measures necessary to regulate in the public interest to pursue certain public policies."[162] While the debate about the right to regulate figures prominently across the entire investment regime, it relates specifically with the substantive content of investment norms (i.e., the obligations imposed on states in the exercise of their regulatory functions).

Among the options that have been suggested aimed at finding the right balance between investment protection and governments' right to regulate are: (i) to include public policy exceptions (such as "general exceptions," "security exceptions", "balance-of-payments exceptions") in IIAs, thus explicitly allowing measures (linked with legitimate public policy objectives) otherwise inconsistent with an

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[162] *Statement of the European Union and the United States on Shared Principles for International Investment* (EU-US Statement), available at http://trade.ec.europa.eu/doclib/docs/2012/april/tradoc_149331.pdf, p. 1; see also European Commission, Press Release, "EU and US Adopt Blueprint for Open and Stable Investment Climates," Reference: IP/12/356 (4 October 2012), http://europa.eu/rapid/press-release_IP-12-356_en.htm.

IIA's obligations,[163] (ii) to provide for more detailed explanations of the core investment protection standards (such as a definition of "indirect expropriation," "fair and equitable treatment" or "de facto discrimination") and (iii) to exclude certain investment-protection guarantees that may be perceived as limiting excessively governments' regulatory sovereignty (such as the so-called "umbrella clause"[164] or the unqualified FET standard).[165]

c. Investment liberalization commitments

The debate here revolves around whether investment-liberalization commitments should be included in an IIA. As noted above, only a few states (such as Canada, Japan, the United States) have regularly pursued such commitments to date in their investment-treaty negotiations. These commitments tend to include principally non-discrimination obligations with regard to the admission of foreign investors and investments (i.e., national treatment and most-favored-nation treatment with regard to pre-establishment), but also provisions on the admission of key personnel and performance requirements.

With regard to non-discrimination obligations applicable at the pre-establishment stage, it is often debated whether such obligations should be subject to a "positive" or "negative" list approach.[166] This issue finds a clear parallel in the trade-in-services negotiations within the WTO. Although those negotiations are limited to the service sector (including FDI in services), they emphasize the complexity and diversity of positions. In the current (plurilateral) negotiations on an International Services Agreement, some WTO members are pursuing a hybrid approach, whereby they would

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163 Depending on the public policy at issue, these exceptions may be subject to strict requirements (such as proportionality) or to very deferential conditions (such as good faith). See Andrew Newcombe, "The Use of General Exceptions in IIAs: Increasing Legitimacy or Uncertainty?" in Armand de Mestral & Céline Lévesque (eds.), *Improving International Investment Agreements* (New York: Routledge, 2013), pp. 267-283.

164 See, for example, the 2004 and 2012 United States Model BITs which omitted the umbrella clause, featured in previous models ,as well as in many IIAs concluded by the United States.

165 See in general UNCTAD, *WIR 2012*.

166 See above the section on "express exclusions."

adopt a negative list approach with regard to national treatment and a positive list approach with regard to market access.

Obligations imposed by host countries on investors to conduct their business in a prescribed manner (so-called “performance requirements”) have only been prohibited in IIAs concluded by a handful of countries (such as Canada and the United States). While some deem performance requirements to be undesirable as inconsistent with the principle of liberal markets, others see them as an essential component of a domestic development strategy.[167] While the use of certain trade-related investment measures is restricted by a specific WTO agreement,[168] states are in principle free to impose requirements relating to, for example, employment, domestic ownership, technology transfer, and R&D.[169] While developed countries have generally phased out performance requirements, many have implemented trade policy measures that achieve similar objectives, such as rules of origin, screwdriver regulations, voluntary export restraints, and anti-dumping measures.[170]

d. Disciplines on home countries and foreign investors

Some of the debate here is relatively recent. While it initially focused on correcting the asymmetry in the substantive content of existing IIAs (which traditionally imposed obligations only on host countries), it has evolved toward also exploring whether these

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[167] See generally Nagesh Kumar, “Use and Effectiveness of Performance Requirements: What Can be Learnt from the Experiences of Developed and Developing Countries?” in UNCTAD, *The Development Dimension of FDI: Policy and Rule-Making Perspectives,* Proceedings of the Expert Meeting held in Geneva from 6 to 8 November 2002 (New York and Geneva: UNCTAD, 2003), pp. 59-78; Dani Rodrik, “The Economics of Export-Performance Requirements,” 102(3) *Quarterly Journal of Economics* 633 (1987).

[168] Restricted measures include: requirements that an enterprise use particular levels of local procurement (“local content requirements”); company-level import restrictions, or export targets (“trade balancing requirements”); foreign exchange restrictions related to the inflows attributable to an enterprise, and export controls. The TRIMs Agreement, *op. cit.*, p. 143 (see the Illustrative List contained in the Annex).

[169] This will often depend on the applicable IIA. See generally UNCTAD, *Foreign Direct Investment and Performance Requirements: New Evidence from Selected Countries* (New York and Geneva: UNCTAD, 2003) [hereinafter UNCTAD, *FDI and Performance Requirements*].

[170] Ibid., pp. 12-13.

agreements can be used as instruments for the promotion of investment and/or sustainable development. Accordingly, in addition to investment-protection obligations (and investment-liberalization commitments), there is an argument for imposing a set of disciplines on both the home country (particularly to promote foreign investment to developing countries) and on foreign investors (particularly to strengthen investors' compliance with corporate social responsibility standards).

With regard to home country disciplines, IIAs could include provisions requiring, for example, home countries to provide their investors with financial and/or fiscal incentives, information about investment opportunities and/or insurance mechanisms. While such "home country measures" are provided by various states unilaterally, they are only rarely the subject of obligations in IIAs.[171] More recently, however, there are growing concerns that such home country measures may affect the "competitive neutrality" among investors.[172] In this sense, IIAs disciplines could be used to guarantee that home country measures do not upset the level playing field among investors of different origin.

The issue of including in IIAs disciplines on foreign investors is even more controversial, principally because this would extend the original purpose of IIAs, but also because it is technically more complex to include binding obligations on private parties in an international instrument. Not only are there difficult issues regarding governing law, but increasing the types of obligations found in treaties has the potential to increase the authority and reach of investor-state dis-

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171 International agreements have incorporated obligations relating to "home country measures" (HCMs) in a range of ways. These include, as discussed by UNCTAD: (i) those agreements with "specific provisions on HCMs," such as the Cotonou Agreement between the European Union and the ACP; (ii) IIAs that "contain cooperation provisions concerning technology transfer," which tend to be hortatory rather than binding, and (iii) "regional and multilateral investment insurance schemes (such as that of MIGA)." See UNCTAD, *World Investment Report 2003: FDI Policies for Development: National and International Perspectives* (New York and Geneva: UNCTAD, 2003), pp. 159-161.

172 See the discussion above with regard to SOEs, also below, in section E.

pute settlement as well.[173] This is one of the most polarized issues in the debate about the future of the investment regime, with civil society calling for the inclusion of investors' obligations (next to investors' rights),[174] and the business world remaining skeptical about the use of IIAs as a regulatory instrument in this respect.[175] There is also a more general skepticism within some parts of the business community about the usefulness of corporate social responsibility as a tool to encourage sustainable development.[176]

The spectrum of options that have been suggested is wide, ranging from best-endeavor provisions to binding obligations (imposed on inward investment or outward investment) to comply with universally recognized standards or existing international conventions. One middle-of-the-road option may be to condition the availability of certain protections or benefits to an investor's compliance with certain (pre-determined) corporate standards. For example, only those investors that comply (at the time of the entry or throughout the life of an investment) with such corporate standards would be able to avail themselves of (all or some of) the investment-protection guarantees provided in the applicable IIA

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173 See Andrea K. Bjorklund, "The Role of Counterclaims in Rebalancing Investment Law," 17 *Lewis & Clark Law Review* (forthcoming 2013) (noting the potential for the aggrandizement of investment tribunals and difficulties with respect to applicable law).

174 IISD Model International Agreement on Investment for Sustainable Development, *op. cit*.

175 Although no concrete obligations on investors are contained in the 2012 United States Model BIT, the model does include provisions to ensure that state parties do not weaken or derogate from their existing environment and labor standards in order to attract investment (arts. 12 and 13, respectively). Further, the parties agree to meet for consultations regarding any matter arising under these articles (arts. 12(6) and 13(4)). See Mark Kantor, "Little Has Changed in the New US Model Bilateral Investment Treaty," 27(2) *ICISD Review* 335 (2012); Peter T. Muchlinski, *Multinational Enterprises and the Law* (2nd ed., New York: OUP, 2007), pp. 82-85.

176 See, e.g., "Corporate Social Responsibility: Where's the Beef?," *News Scan* 12, 14 (2003) ("CEOs want more proof linking CSR [Corporate Social Responsibility] performance to financial and market performance."); David Henderson, "Misguided Virtue: False Notions of Corporate Social Responsibility," *New Zealand Business Roundtable* (2001), pp. 63-80, available at http://www.nzbr.org.nz/site/nzbr/files/publications/publications-2001/misguided_virtue.pdf; Michael Blowfield & Jedrzej George Frynas, "Critical Perspectives on Corporate Social Responsibility in the Developing World," 81(3) *International Affairs* 499 (2005), pp. 504-506 (criticisms of corporate social responsibility programs generally and in the context of developing countries/economies).

(such as the prohibition of performance requirements or the right to investor-state arbitration). Similarly, IIAs could require home countries to condition the various incentives and mechanisms that are available to investors on compliance with best practices, human rights criteria or impact-assessment obligations.[177] IIAs could also provide that host countries grant preferential admission treatment to foreign investors that comply with such practices, criteria or obligations.[178] Difficulties with all these options revolve around (i) identifying the specific corporate standards as well as (ii) envisaging effecting enforcement and/or monitoring mechanisms (e.g., certification of firms providing impact-assessment services). Such mechanisms, for example, may require more elaborated treaties or the establishment of an institutional framework capable of implementing these various provisions.

4. Investment arbitration

There are few (if any) issues that receive more attention in international investment discussions than the dispute-settlement mechanism.[179] For its staunchest supporters, investment arbitration represents the most important investment-protection guarantee (much superior to diplomatic protection or to recourse to domestic courts), while for its strongest critics investment arbitration fails with regard to the basic standards of openness, accountability and independence.

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177 Ibid., pp. 45, 58. Note also, for example, that the criteria for eligibility for IFC funding include that a proposal be economically beneficial to the developing country community and meet IFC standards for social and environmental policy; see IFC, World Bank Group, *International Finance Corporation's Policy on Environmental and Social Sustainability*, 1 January 2012, available at http://www1.ifc.org/wps/wcm/connect/7540778049a792dcb87efaa8c6a8312a/SP_English_2012.pdf?MOD=AJPERES.

178 Principles on Business and Human Rights, *op. cit*.

179 By end of 2012, the number of known investment treaty arbitrations has reached almost 500. See UNCTAD, *ISDS Monitor* (2013). For comparison (although the situation is different), the International Chamber of Commerce received 796 requests for arbitration (including principally commercial disputes), and 508 awards were rendered in 2011. International Chamber of Commerce, "Arbitration Statistics," available at http://www.iccwbo.org/Products-and-Services/Arbitration-and-ADR/Arbitration/Introduction-to-ICC-Arbitration/Statistics/.

Ultimately, this debate revolves around the issue of the legitimacy of investment arbitration.[180] While IIAs often provide for both investor-state and state-state arbitration, it is the former that has been employed as the almost exclusive dispute-settlement mechanism and thus has attracted a greater level of scrutiny. One can look at the legitimacy debate over investor-state arbitration in two ways. The first perspective focuses on the object of the legitimacy concerns, that is, what are the features of investor-state arbitration that are problematic? In this context, legitimacy concerns focus both on the "process" and "outcome" of investment arbitration.[181] The second perspective focuses on the subjects (or interests) expressing the legitimacy concerns, that is, who are the parties (or interests) for whom investor-state arbitration is problematic? In this second context, one should include not only the principal users of investor-state arbitration but also any other stakeholders.

a. Concerns about the "process" and "outcome" of investment arbitration

A first set of *process-type concerns* relate to issues such as (i) participation in, transparency of, and due process in investment arbitration proceedings, and (ii) arbitrator selection, independence and impartiality.[182] More specifically, these concerns focus on the ability of third parties to be aware of the proceedings, to attend the hearings and/or to submit *amicus curiae* briefs. Equally, these concerns

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[180] For a critical review, see Khor, *op. cit.*, pp. 2-3; Howard Mann, "Conceptualizing International Investment Law: Its Role in Sustainable Development," *Lewis & Clark Law Review* (forthcoming 2013).

[181] Susan D. Franck, "The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law Through Inconsistent Decisions," 73(4) *Fordham Law Review* 1521 (2005), p. 1585 ("The issue facing investment arbitration is whether a neutral arbitral tribunal composed of private individuals, such as public international law experts who may be chosen by the parties, can and actually does apply investment rights in a *correct* and *coherent* manner." (emphasis added)).

[182] Van Harten has criticized the model of private *ad hoc* arbitration used to adjudicate investment disputes as lacking accountability, openness, coherence, and independence. Gus Van Harten, *Investment Treaty Arbitration and Public Law* (New York: OUP, 2007), p. 152; see also Benedict Kingsbury & Stephan W. Schill, "Investor-State Arbitration as Governance: Fair and Equitable Treatment, Proportionality and the Emerging Global Administrative Law," IILJ Working Paper 2009/6 (2009), available at http://iilj.org/publications/documents/2009-6.KingsburySchill.pdf, p. 43.

focus on (the perception of) conflicts of interests of arbitrators, as well as the emergence of a "club" of individuals who serve as counsel, arbitrators and experts in investment arbitrations (the so-called "triple-hat" issue), often obtaining repeated appointments.[183] There is also a lack of diversity (in terms of gender, nationality, expertise) of the arbitrators who sit on investment tribunals.

Furthermore, process-type concerns relate to (i) the potential for contrasting decisions on the same (or very similar) issues of fact or law, undermining the predictability of investment law, as well as to (ii) high arbitration costs and the increasing length of arbitration proceedings (for example, because an arbitral award may be subject to annulment proceedings or reviews by domestic courts).

Outcome-type concerns center principally on investment tribunals' ability to interpret and apply treaties, taking into account multiple (and at times diverging) values, as well as on the quality of the legal reasoning displayed in their decisions.[184] For example, some have argued that:

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[183] UNCTAD, *WIR*, 2012, *op. cit*., p 88. In their report *Profiting from Injustice,* CEO and TNI argue that the arbitration industry, driven by financial and professional self-interest, plays an "active" role in defending the international investment regime against reform. See CEO & TNI, *op. cit*., pp. 8, 43ff. Although the potential for conflicts of interest is regulated by both formal arbitration rules (e.g., UNCITRAL, ICSID, SCC, ICC) and informal guidelines (e.g., the IBA Guidelines on Conflicts of Interest in International Arbitration and the Burgh House Principles on the Independence of the International Judiciary), the lack of any institutional or established monitoring and enforcement body undermines the effectiveness of these "ad hoc" mechanisms to address the "dual role" of arbitrator and counsel. See Nathalie Bernasconi-Osterwalder, Lise Johnson & Fiona Marshall, "Arbitrator Independence and Impartiality: Examining the Dual Role of Arbitrator and Counsel," *IV Annual Forum for Developing Country Investment Negotiators,* Background Papers (New Delhi, October 27-29, 2010), p. 51.

[184] Ruti Teitel & Robert Howse, "Cross-Judging: Tribunalization in a Fragmented but Interconnected Global Order," 41 *International Law and Politics* 959 (2009), p. 981; Kingsbury & Schill, *op. cit.,* pp. 44-45; U. Petersmann, "Human Rights, Constitutionalism, and 'Public Reason' in Investor-State Arbitration" in C. Binder, U. Kriebaum, A. Reinisch & S. Wittich (eds.), *International Investment Law for the 21st Century: Essays in Honour of Christoph Schreuer* (Oxford: OUP, 2009), pp. 892-893.

> "the reasoning of awards and indeed of judicial decisions in investment arbitration disputes should reflect a quality of publicness in law – it should speak not only to the parties to enable them to understand the *ratio decidendi* of the award, but also to the interests and engagements of non-represented and non-participating stakeholders. In particular, to the extent that it affects general principles of international investment law and arbitration, the reasoning should engage with these wider and systemic issues."[185]

While the record is mixed, there is generally reluctance on the part of investment tribunals to take into account a wider set of values going beyond the protection of individual investors.[186] With regard to the quality of the legal reasoning, there is also an ongoing debate around the appropriate scope and criteria for the annulment of ICSID awards.[187]

There is a clear connection between process-type and outcome-type concerns. A more (or less) transparent and inclusive adjudicatory process may in turn engender a more (or less) balanced and accurate outcome.[188]

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185 Kingsbury & Schill, *op. cit.*, p. 45.

186 Cf. Toby Landau, "Saving Investment Arbitration from Itself," *International Arbitration* (forthcoming).

187 Sebastian Perry, "Does ICSID Need an Overhaul?," 7(5) *Global Arbitration Review*, November 7, 2012; Promod Nair and Claudia Ludwig, "ICSID Annulment Awards: The Fourth Generation?," 5(5) *Global Arbitration Review*, October 28, 2010; George Kahale, III, "Is Investor-State Arbitration Broken?" 9(7) *Transnational Dispute Management* (2012), pp. 16-19.

188 Teitel & Howse, *op. cit.*, p. 981 ("The overall outcome of tribunalization under these conditions is unclear as yet. One result might be, in a spirit of anti-fragmentation, a global movement for a new international investment law that embodies what is perceived as a just, humanity-oriented balance of rights and obligations. This could be underpinned by the perceived interpretative space of tribunals to take into account the law of human rights in their decisions. Another more pessimistic prognosis would be the general delegitimization or at least further under-legitimation of investment law, as the gulf between its perceived aims and effects and the humanity norm becomes ever more apparent, and as the response of tribunals to this problem makes the jurisprudence increasingly less coherent and predictable.").

b. Concerns by the principal users of investment arbitration and by any other stakeholders

Focusing on the parties (or interests) raising concerns about investment arbitration, one can distinguish between concerns regarding internal and external legitimacy.[189] *Internal legitimacy* concerns center on the views and interests of investors and governments, as the principal users of investment arbitration. In this context, both investors and governments have demonstrated concerns with the efficiency (particularly in terms of costs[190] and delays linked with investment arbitration proceedings) and predictability of investment arbitration (particularly in terms of inconsistent decisions). Equally important is the issue that all investors (including small enterprises) and governments (including developing and least developed countries) have an opportunity to make use of and take part on equal terms in the dispute-settlement system.

Concerns about the fairness of the system as a whole have driven some states to denounce their commitments. For example, the nature of investor-state dispute settlement means that states are necessarily required to defend themselves against claims made by investors. While a decision in favor of an investor can impose a significant penalty for the state, where a decision is issued in favor of the state party, this can hardly be described as a "victory." In most cases, at least some of the costs associated with a dispute are borne by the state party. Moreover, unless a state can file a counterclaim, the best a state can hope for in a case is not to lose; it cannot "win."[191] As such, state parties bear the principal burden of the dispute-settlement system.

Furthermore, some governments have pointed out the disparity between domestic and foreign investors, as only the latter are

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[189] Cf. J.H.H. Weiler, "The Rule of Lawyers and the Ethos of Diplomats: Reflections on the Internal and External Legitimacy of WTO Dispute Settlement," 13 *American Review of International Arbitration* 177 (2002).
[190] Often, costs associated with an arbitration are borne equally by the two disputing parties, regardless of whether the claim is ultimately successful or not.
[191] Bjorklund, "The Role of Counterclaims in Rebalancing Investment Law," 2013, *op. cit.*

able to benefit from an additional dispute-settlement system,[192] or have raised concern regarding a real or perceived bias of arbitrators[193] or the systemic effects of the third-party financing of investment treaty claims.[194]

A related issue is the conduct of mass claims, where many investors are similarly affected by the conduct of a host country, for example, through significant regulatory reform or financial crises.[195] This issue has gained prominence since, in August 2011, an ICSID tribunal determined that it had jurisdiction to hear a large-scale litigation under the 1990 Argentina-Italy BIT relating to defaulted Argentine debt, where the number of claimants is now estimated to be 60,000.[196] Issues relate to when claims should be classified as "mass" or large-scale litigation,[197] how consent should be determined[198] and how such mass claims should be administered from both a legal and technical perspective.[199]

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[192] See, for example, Australia and South Africa regarding their recent policy change with regard to investor-state arbitration (discussed below at Section E.2.c).

[193] George Kahale, III summarized the issue as follows: "In truth, the problem goes beyond the question of whether bias in the system actually exists. On this issue, perception matters as much as reality. States are not likely to continue to play in a game they sense, justifiably or not, is rigged against them. Since it takes two to tango, the growing dissatisfaction of states with the international arbitral process looms as a major problem in investor/state relations and requires a critical assessment of the future of international arbitration as a means of settling investment disputes." George Kahale, III, "A Problem in Investor/State Arbitration," 6(1) *Transnational Dispute Management* (2009), p. 1.

[194] See discussion at section E(4)(b), below.

[195] Brian King & Alexander Yanos, "Mass Claims in International Investment Arbitration," *The Deal*, 18 January 2012, http://www.thedeal.com/content/restructuring/mass-claims-in-international-investment-arbitration.php.

[196] *Abaclat and Others v. Argentine Republic,* ICSID Case No. ARB/07/5, Decision on Jurisdiction and Admissibility, August 4, 2011. A dissenting opinion, written by Professor Georges Abi-Saab, was issued on October 28, 2011. For discussion of the implications of the case, see: Hans van Houtte & Bridie McAsey, "Abaclat and Others v Argentine Republic: ICSID, the BIT and Mass Claims," 27(2) *ICSID Review* 231 (2012); Karen Halverson Cross, "Investment Arbitration Panel Upholds Jurisdiction to Hear Mass Bondholder Claims Against Argentina," 15(30) *ASIL Insights* (2011), available at http://www.asil.org/insights111121.cfm.

[197] van Houtte & McAsey, *op. cit*.

[198] Andrea Marco Steingruber, "Abaclat and Others v Argentine Republic: Consent in Large-Scale Arbitration Proceedings," 27(2) *ICSID Review* 237 (2012).

[199] Donald Francis Donovan, "Abaclat and Others v Argentine Republic: As a Collective Claims Proceeding," 27(2) *ICSID Review* 261 (2012).

Concerns regarding *external legitimacy* focus, on the other hand, on the views and interests of a plethora of other stakeholders (such as national political actors, NGOs, local communities) directly or indirectly affected by international investment law and arbitration.[200] In this context, one key concern of these wider stakeholders centers on the lack of transparency and accountability of the arbitration process. These concerns are linked for example, to the ad hoc nature of arbitral tribunals, whose members are appointed and paid by the parties to the dispute, rather than being appointed strictly on the basis of their qualifications and paid through an independent mechanism. As parties are, in any given case, motivated by their desire to have a decision made in their favor, tribunals are composed with regard to the particular issues and arguments at stake, and not exclusively with regard to whether they are able to interpret international investment law in the most independent, detached and neutral manner.

200 Toby T. Landau, "Reasons for Reasons: The Tribunal's Duty in Investor-State Arbitration" in Albert Jan van den Berg with the assistance of the Permanent Court of Arbitration (eds.), *ICCA Congress Series*, No. 14 (2008), p. 196: "[T]he investor-State tribunal's audience comprises not only the immediate parties, but all other entities that may be affected by the decision. As explained above, depending on the issues at stake, this could well include broad sections of a given population. A dispute, for example, between a foreign investor and a State over the exercise of the State's emergency powers (e.g., an urgent decision to nationalize a major bank, in order to alleviate a rapid economic slowdown or "credit crunch") could well be as critical for the domestic population as it is for the foreign investor. There may also be other non-parties with a legitimate interest in the substantive matters at stake, such as NGOs, international policy and funding institutions (such as the World Bank) or even other governments."

Another key concern in this context is linked to the fear that decisions by investment tribunals may undermine a government's proper exercise of its public functions. For example, criticism has been advanced with regard to the almost exclusive focus on the award of damages as the remedy *par excellence* in investment arbitration.[201]

The connection between internal and external legitimacy concerns is more complex than the connection between process-type and outcome-type concerns. While the interests of the principal users of investment arbitration may at times be in unison with those of other stakeholders (for example, regarding consistency of investment tribunals' decisions), there are often cases in which those interests diverge dramatically (for example, relating to participation in, and transparency of, the investment arbitration proceedings).[202] The issue of appointing arbitrators is a clear illustration of this tension: While states (and investors) may be comforted by the control

[201] For a discussion of the dominance of monetary awards, and of alternative remedies, see: Carole Malinvaud, "Non-Pecuniary Remedies in Investment Treaty and Commercial Arbitration" in Jan van den Berg, *op. cit.*, pp. 209-230; Christoph Schreuer, "Non-Pecuniary Remedies in ICSID Arbitration," 20(4) *Arbitration International* 325 (2004); Anne van Aaken, "Primary and Secondary Remedies in International Investment Law and National State Liability: A Functional and Comparative View" in Stephan W. Schill (ed.), *International Investment Law and Comparative Public Law* (New York: OUP 2010), pp. 721-754; see also Michael Schneider, "Non-Monetary Relief in International Arbitration – An Overview of Principles and Arbitration Practice" in Michael E. Schneider & Joachim Knoll (eds.), *Performance as a Remedy: Non-Monetary Relief in International Arbitration*, ASA Special Series No. 30 (Huntington: JurisNet, 2011) (dealing primarily with commercial arbitration, but also with specific issues relating to non-pecuniary remedies in investment arbitration).

[202] Cf. Federico Ortino, "External Transparency of Investment Awards," paper presented at SIEL Inaugural Conference (Geneva, July 2008).

afforded through selecting a panel member,[203] other stakeholders believe that arbitrators assigned in accordance with a predetermined roster, or selected by an institution, would achieve greater coherence and neutrality.[204]

Many options have been pursued or put forward to deal with the various legitimacy issues in investment arbitration. For example, despite the apparent lack of enthusiasm expressed by several state representatives, UNCITRAL arbitration rules have just recently been modified to include transparency provisions specific to investor-state arbitrations.[205] Furthermore, states such as Canada and the United States have opted to incorporate public disclosure requirements in all of their post-2001 IIAs, and the NAFTA parties used the Free Trade Commission process to issue a note of interpreta-

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203 Eugene I. Farber discusses several arguments that are made in favor of party-appointed arbitration generally, including that (i) "drafters of arbitration clauses do not fully understand the arbitration process and feel more secure in having their own arbitrator"; (ii) "parties fear the irrational neutral arbitrator and therefore the rulings of a "problem" neutral can be overruled by the two party- appointed arbitrators voting together"; and (iii) "parties feel that they have more direct input in the deliberation if they have appointed one of the three arbitrators." Eugene I. Farber, "The Role of the Neutral in Party-Appointed Arbitrations," *New York Law Journal*, 13 September 2002, col. 4. In addition, Seth H. Lieberman pointed out that, in the context of international arbitration, the party-appointed arbitrator also plays an important role as "translator" – both of language and of legal norms and culture. See Seth H. Lieberman, "Something's Rotten in the State of Party-Appointed Arbitration: Healing ADR's Black Eye that is 'Nonneutral Neutrals,'" 5(2) *Cardozo Journal of Conflict Resolution* 215 (2004), p. 222, referring to Andreas F. Lowenfeld, "The Party-Appointed Arbitrator in International Controversies: Some Reflections," 30(1) *Texas International Law Journal* 59 (1995), p. 65.

204 For example, Jan Paulsson, "Moral Hazard in International Dispute Resolution," 8(2) *Transnational Dispute Management* (2011), p. 6; Albert Jan van den Berg, "Dissenting Opinions by Party-Appointed Arbitrators in Investment Arbitration" in Mahnoush H. Arsanjani et al. (eds.), *Looking to the Future: Essays on International Law in Honor of W. Michael Reisman* (Boston: Martinus Nijhoff Publishers, 2011). However, some commentators have argued that even such new rules and guidelines would be insufficient to "challenge the pro-investor bias in the system" or "to solve all possible conflicts of interest," CEO & TNI, *op. cit.*, pp. 45, 49.

205 UNCITRAL's Working Group II had, since 2008, been tasked to prepare a legal standard on transparency in treaty-based investor-state arbitration (granted at the 41st session, New York, June 16 – July 7, 2008, and affirmed at the 43rd session, New York, June 21 – July 9, 2010). The Working Group, composed of all states members of the Commission, agreed to the new rules at the 58th session from February 4-8, 2013, in New York.

tion regarding transparency in NAFTA Chapter 11 proceedings.[206] Although both measures can contribute to a greater external legitimacy of the international investment regime, it is important to maintain a clear distinction between measures to provide greater transparency in respect of investment-treaty arbitration and measures that facilitate greater public (and third-party) participation.[207] The latter have potentially a greater structural impact on the manner in which investor-state (and potentially also state-state) dispute-settlement is currently conducted.[208]

Another example deals with the question of ensuring quality and a level of consistency of investment decisions. Options advanced range from the setting up of a roster of eminent individuals from which arbitrators would be selected,[209] to the establishment of a

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[206] For example, the 2012 United States Model BIT, *op. cit.,* art. 29; FTAs with Singapore (May 6, 2003, art. 15.20), Chile (June 6, 2003, art. 10.20), the Dominican Republic and CAFTA nations (May 28, 2004, art. 10.21); Morocco (June 15, 2004); BITs with Uruguay (November 4, 2004) and Rwanda (February 19, 2008). Cf. Canada's FIPA, *op. cit*., art. 19, and the FTA with Peru. See discussion in Andrea J. Menaker, "Piercing the Veil of Confidentiality: The Recent Trend Towards Greater Public Participation and Transparency in Investor-State Arbitration" in Katia Yannaca-Small (ed.), *Arbitration Under International Investment Agreements: A Guide to the Key Issues* (Oxford: Oxford, 2010), p. 139. According to Parra, the time may have come for ICSID "to reverse the general rules regarding access to documents and attendance at hearings in arbitration cases" and, more particularly, "ICSID might amend its Regulations and Rules to provide for the publication of all documents generated in proceedings, unless or to the extent decided otherwise by the arbitrators, and for tribunals to have full authority to allow third parties to attend or observe hearings (eliminating a party's right to veto such attendance or observance of hearings)." Antonio Parra, *The History of ICSID* (Oxford: OUP, 2012), pp. 323-324.

[207] See Menaker, *op. cit*., pp. 129-160.

[208] See Andrea K. Bjorklund, "The Promise and Peril of Precedent: The Case of *Amici Curiae*" in A Hoffmann (ed.), *ASA Bulletin Special Series*, No. 34 (2010), p. 165

[209] See the roster created in the European Union-Korea FTA with regard to the state-state dispute settlement mechanism and the draft of the European Union-Canada FTA with regard to investor-state dispute settlement.

hierarchical appeals mechanism,[210] to the creation of an International Investment Court.[211] In terms of greater consistency and predictability, one of the concerns is that all these options may simply replicate (rather than solve) the existing difficulties in the arbitration system, particularly in light of the multiplicity of relevant legal sources.

Finally, in order to address legitimacy concerns with regard to investment arbitration, some have suggested a wide range of options to limit the overall role of investor-state arbitration in the regime. These have included (i) strengthening the role of the treaty parties themselves in dispute settlement, (ii) making use of alternative dispute-resolution mechanisms (and, for that matter, national conflict-management mechanisms) especially during the cooling-off period foreseen in IIAs, (iii) allowing for a certain gate-keeping role for governments regarding the initiation of such disputes (e.g., raising the threshold for access to investor-state dispute settlement), and (iv) excluding investor-state dispute settlement from IIAs, while providing for a state-state mechanism.

As the primary enforcement mechanism within the international investment regime, investor-state arbitration faces a diversity of (at times conflicting) critiques from a variety of stakeholders, ranging

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[210] Within the ICSID system, some have also suggested the introduction of a "permanent consultative body" from which any ICSID tribunal could request guidance about legal issues (possibly based on the preliminary ruling procedure of Article 267 of the Treaty on the Functioning of the European Union, pursuant to which national courts of Member States request interpretative rulings from the Court of Justice of the EU). See G. Kaufmann-Kohler, "Annulment of ICSID Awards in Contract and Treaty Arbitrations: Are There Differences?", in E Gaillard and Y Banifatemi (eds.), *Annulment of ICSID Awards* (2004),p. 221. See also Parra, *The History of ICSID*, p. 325.

[211] One of the principal proponents of an international investment court has been Gus Van Harten, who has presented arguments for an independent, permanent adjudicative tribunal in various articles, books and presentations. See, e.g., Van Harten, 2007, *op. cit.*, pp. 180ff (arguing for the creation of a permanent court with full jurisdiction over international investment disputes, and state-appointed judges); "A Case for an International Investment Court," *Society of International Economic Law Inaugural Conference Paper* (Geneva: SIEL, 2008) (arguing that, as a form of international public law adjudication, international investment disputes require an international court that operates in accordance with principles of judicial decision-making, including openness and independence).

from lacking effectiveness and finality to being too effective and restrictive of host countries' regulatory powers. While investment arbitration cannot, and will not, be "all things to all stakeholders," it is crucial that any reform process takes into account and balances the diverse needs and preferences of participants and civil society. A key challenge will be to find solutions that reach a compromise to strengthen, rather than undermine, dispute-resolution processes within the regime. Efforts to address the purpose, scope and content of investment agreements will be of little consequence if concerns about the process, outcome and legitimacy of investment arbitration are not also given sufficient attention.

5. Managing multiple legal sources

The issue here is one of the overall coherence of the international investment regime, and it plays itself out in two parallel contexts. First, the current regime is characterized at its core by more than 3,000 IIAs principally aimed at protecting foreign investment. As noted above, the regime has grown, rather organically but also haphazardly, over several decades, beginning with customary international law and later with a complex and overlapping network of treaties, including BITs, investment chapters in FTAs, regional agreements, and the GATS.

Accordingly, the multiplicity of IIAs creates a number of problematic issues. For example, the great number of separate instruments with often substantial similarities but also often with substantial differences (even if only in important nuances) makes it difficult for a clear and uniform international investment law and policy regime to emerge. Therefore, it is difficult for governments to assess the full range of commitments that they have entered into, how those commitments interact or conflict with one another and the liabilities they may be subject to in cases of infringements. It is equally difficult to establish the transparency and predictability that international investors need for long-term investment decisions. This situation is further accentuated by the fact that various instruments have different strength in terms of sources of investment law (as they range from mandatory to entirely voluntary) and the nature of a dispute-settlement process in which tribunals are stand-alone institutions and are not (at least formally)[212] bound by the decisions (and their underlying reasoning) of preceding tribunals.

Similarly, there is incongruence between IIAs and the reality of today's foreign investment. While most IIAs involve bilateral relationships, the phenomenon of international investment typically involves firms that control economic assets in a number of jurisdictions, under the common governance of headquarters. As a result, the regulatory reach of most IIAs is narrower than the operational reach of many international investors, which can result in "underlaps" in jurisdiction. This incongruence is further accentuated by the reality that firms seek to maximize the benefits of their international investments on a firm-wide global level, while governments seek to maximize the benefits of this investment on the national level. As noted above, "nationality planning" and "forum shopping" are a consequence of the current regime.

Second, the issue of overall coherence of the international investment regime is also relevant within a broader context going beyond the world of traditional IIAs. As noted above, while governments do not typically go beyond the protection of investors (and, in some cases, liberalization requirements) in IIAs, they are prepared to address some issues related to certain negative externalities of international investment in voluntary instruments (such as the ILO Declaration, the OECD Guidelines, the restrictive business practices code, the consumer protection code). Equally, international organizations have issued instruments that can be used as guidelines (e.g., the World Bank, SADC, the Commonwealth Secretariat, and, most recently, UNCTAD).[213] Business itself has issued guidelines regarding the international behavior of firms.[214] Noteworthy also are efforts by NGOs to offer contributions for the

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[212] In reality, tribunals do refer to earlier decisions of other tribunals, but they do not need to follow their reasoning if they prefer a different logic. See Andrea K. Bjorklund, "Investment Treaty Arbitral Decisions as *Jurisprudence Constante*" in Colin B. Picker, Isabella D. Bunn & Douglas W. Arner (eds.), *International Economic Law: The State and Future of the Discipline*, pp. 265-280.
[213] See discussion at section E.3 below.
[214] ICC, *ICC Guidelines for International Investment* (Paris: ICC, 2012) available at http://www.iccwbo.org/Advocacy-Codes-and-Rules/Document-centre/2012/2012-ICC-Guidelines-for-International-Investment/.

improvement and rebalancing of investment law. Among these, the best known is the IISD Model International Agreement on Investment for Sustainable Development. Accordingly, the issue of coherence of the investment regime may also be assessed in a broader context, requiring a level of coordination between different legal institutions and instruments broadly affecting international investment.

One option to address the problems linked with the multiplicity of IIAs is to encourage harmonization – whether through a model international investment treaty or through a multilateral investment agreement.[215] Achieving greater overall coordination may also require reaching beyond IIAs, to involve "human rights" or "sustainability impact assessments" of IIAs. States may need to consider their human rights obligations or challenges stemming from domestic constitutional provisions or international conventions,[216] for instance, where investments can have adverse impacts on the local population's access to essential goods such as water.[217] In order for states to clarify and harmonize competing objectives, a number of United Nations committees and reports have called upon states to prepare human rights impact assessments of

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215 See further section E below.

216 At the ICCA's 50th anniversary conference, in June 2011, Judge Bruno Simma of the International Court of Justice argued that human rights considerations should be considered during investment treaty negotiations and built into the text of any investment contract. See Sebastian Perry, "Arbitrators and Human Rights," *Global Arbitration Review*, June 13, 2011. Such an approach may be necessary where states wish to introduce human rights standards into the international investment regime, given the various arguments launched by practitioners and arbitrators against "broadening the interpretive canvas" at the dispute-settlement stage to take human rights obligations into account, see Perry, *op. cit*., and further discussion below.

217 P. Thielborger, "The Human Right to Water Versus Investor Rights: Double-Dilemma or Pseudo-Conflict?" in Dupuy, Petersmann & Francioni, *op. cit*., pp. 487-510.

the trade and investment agreements they negotiate.[218] Similarly, "sustainability impact assessments" have been prepared in relation to a number of trade policies and negotiations, particularly by the European Commission.[219] Such assessments completed *ex ante* (and particularly if combined with wide public participation) provide a policy tool to measure the economic, social and environmental implications of treaty commitments. Sustainability impact assessments of IIAs present one option for states to integrate sustainability considerations at an earlier stage of international investment policy-making.[220]

Given the haphazard evolution of the international investment regime and the diverse interests and priorities of different stakeholders, there is a risk that further developments could merely add to the complexity and fragmentation of international investment law. States, investors and other stakeholders are now recognizing the need to develop mechanisms that move toward greater coherence. Mechanisms may be needed to achieve a greater alignment of voluntary and binding rules, to address overlapping and "underlapping" jurisdictions and to balance investment protection alongside broader concerns about the impact and effectiveness of international investment as a contributor to development.

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[218] See, for example, United Nations Special Rapporteur on the Right to Food, Olivier De Schutter, *Guiding Principles on Human Rights Impact Assessments of Trade and Investment Agreements*, U.N. Doc. A/HRC/19/59/Add.5, and recommendations by: the Committee on Economic, Social and Cultural Rights, *Concluding Observations Regarding Ecuador*, U.N. Doc. E/C.12/1/Add.100, para. 56; Committee on the Rights of the Child, *Concluding Observations: El Salvador*, U.N. Doc. CRC/C/15/Add.232, para. 48; Committee on the Elimination of Discrimination against Women (CEDAW), *Concluding Comments: Colombia*, U.N. Doc. CEDAW/C/COL/CO/6), para. 29; CEDAW, *Concluding Comments: Philippines*, U.N. Doc. CEDAW/C/PHI/CO/6, para. 26; CEDAW, Concluding Comments: Guatemala, U.N. Doc. CEDAW/C/GUA/CO/7, para. 32; Report of the Special Rapporteur on the Right to Food, Olivier De Schutter, *Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development*: *Mission to the World Trade Organization*, U.N. Doc. A/HRC/10/5/Add.2, paras. 37-38.

[219] See, for example, ECORYS, "Trade Sustainability Impact Assessment in Support of Negotiations of a DCFTA [(Deep and Comprehensive Free Trade Area)] between the EU and the Republic of Armenia: Final Inception Report," prepared for European Commission, DG Trade (January 10, 2013), and the general discussion on the European Commission website, "Sustainability Impact Assessments," http://ec.europa.eu/trade/analysis/sustainability-impact-assessments/ (last visited 9 March 2013).

[220] See M. Gehring, "Impact Assessment of Investment Treaties" in Segger, Gehring & Newcombe, *op. cit.*, p. 145.

6. Institutional structure

As noted above, the traditional IIA did not envisage a standing institutional structure, whether in terms of (regular) meetings of the contracting parties, a standing secretariat with specific tasks (e.g., compliance monitoring, capacity building, interpretation of obligations) or the establishment of a permanent dispute-settlement body. This institutional lacunae effectively delegates substantially all treaty interpretation and implementation to dispute settlement (and in particular to investment-treaty tribunals). However, more IIAs (often in the context of economic integration agreements) have started to include provisions for permanent institutional arrangements that perform a number of specific functions. For example, agreed interpretation can help ensure consistency in arbitral awards and maximize the effectiveness of IIAs. Similarly, deliberations can ensure informed decision-making on further investment liberalization, or prolonging or amending IIAs. Furthermore, a standing institutional structure provides the mechanism "to reach out to other relevant investment stakeholders including investors, local community representatives and academia."[221] There are clearly costs involved in strengthening the institutional structure, particularly in light of the fact that most IIAs are concluded on a bilateral level.

The institutional issue may also be assessed at a more centralized level. As noted above, while there are several international organizations whose activities are relevant for the regulation of foreign investment (such as UNCTAD, the World Bank Group, the WTO, the OECD), they do not provide a comprehensive and integrated institutional structure.[222] The disconnect between different agencies can lead to inefficiencies.

Although each of the issues discussed above can be addressed by individual state parties on a progressive or ad hoc basis (e.g., through IIA negotiations or domestic regulation), options that involve a permanent institution of some sort or another to monitor, address and respond to the challenges of the international invest-

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[221] UNCTAD, IPFSD, *op. cit.*, p. 60.
[222] See *supra* section B.

ment regime have specific advantages (and disadvantages). As well as acting as a venue for comprehensive, “big picture” analysis and reform, well designed, inclusive institutional structures (whether centralized, regional or bilateral) could contribute to coherence and consistency, and lend greater legitimacy to the regime.

In light of its thin and fragmented institutional structure, the investment regime lacks the necessary effectiveness. In order to strengthen its ability to achieve its underlying objectives (whatever stakeholders decide they should be), improving the regime’s institutional framework should be seriously considered.

E. OPTIONS FOR THE WAY FORWARD

Although, as discussed in section A, international investment has become the most important vehicle to bring goods and services to foreign markets and, in addition, to integrate the production systems of individual economies through global value chains and other mechanisms, issues related to the international investment regime for such investment do not have high political saliency on the international policy agenda. This contrasts strongly with the international trade area, in that trade issues have a clear national and international institutional focus, namely in trade ministries of individual countries and the WTO, as well as a constituency associated with these issues and institutions. This difference has arisen primarily because, in the past, trade was seen as the primary driver of globalization, making international investment "the neglected twin of international trade."[223] Now, as patterns of international production and direct investment capital flows have a growing role in shaping economic development, the time may well have come to address the regulatory framework on investment in a comprehensive manner. This is not an easy matter because of the large number of mostly bilateral treaties that make up the international investment regime and the regime's light and fragmented structure. However, as will be discussed below, a number of initiatives could be undertaken to improve the international investment regime.

Still, it is a basic challenge to raise the level of awareness among decision-makers about the importance of international investment, to encourage the strengthening of national and international institutions dealing with international investment issues and to support the building of national (and international) investment constituencies. This requires a process involving all stakeholders to understand the main concerns about the current regime, to identify options of how these concerns can be addressed and to raise awareness, while, at the same time, making progress in clarifying or reframing a number of key issues.

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[223] DeAnne Julius, "Foreign Direct Investment: The Neglected Twin of Trade," *Group of Thirty, Occasional Papers*, No. 33 (Washington D.C.: Group of Thirty, 1991).

This section discusses a range of options for improving the international investment regime, from less to more ambitious approaches: (i) engaging in fact finding processes, (ii) establishing consensus-building Working Groups on key issues, (iii) formulating an International Model Investment Agreement(s), (iv) building specific mechanisms to improve the regime, and (v) commencing intergovernmental processes. Under each heading, options are outlined, with a discussion of the purpose, challenges and feasibility of each. The presentation of these options is meant to constitute a menu to assist in the identification of priority actions that could be pursued. Given the purpose of this paper, the options focus on initiating inclusive processes that involve all stakeholders, with the substantive outcomes to be decided by participants.

1. Engaging in fact finding processes

As illustrated in section D, there are some issues within the international investment regime that can be (and are being) resolved by individual states in the context of negotiating their own IIAs. However, there are other issues that require an international approach. In particular, given the decentralized nature of the regime, formalized fact-finding processes could be of assistance, to identify and analyze the strengths and weaknesses of the regime and to provide an authoritative account of the current situation. Such processes, to be credible, would require input from a broad range of stakeholders across national and regional boundaries. Two options, international hearings and undertaking a stocktaking of the law, are outlined here. Their scope would cover the entire range of issues related to the international investment law and policy regime, including the principal areas discussed in section D. Each of these processes could be pursued independently, or in parallel with one another.

a. Holding international hearings

To begin with, given the range of stakeholders involved and the range of concerns they have, one option is to have international hearings on the entire range of issues related to the international investment regime.[224] Consultations of this kind would ensure that the voices of all stakeholders (including those from governments, the private sector, trade unions, other civil society organizations, and academia) are heard and that all concerns and considerations are put on the table. A small panel of eminent persons (consisting of representatives of key stakeholder groups) could conduct such hearings. On the basis of written submissions, the panel would explore with invitees from stakeholder groups from around the world their concerns and proposed solutions, beginning with the need for a regime and its reform, as well as its purpose. The results of such hearings could be summarized in a report that, at a minimum, would reflect the range of views on the current state of international investment law and policy and, in addition, contain a menu of proposals made by stakeholders on how to move forward. Such hearings could therefore be an important part of a transparent consensus-building process as to what concerns need to be considered in relation to the current regime, and they would identify a wide range of options regarding what to do next. They could also contribute to raising awareness about the importance of the international investment *problematique*.

A consortium of universities from around the world could organize such hearings, perhaps in cooperation with international organizations with competence in this area and in conjunction with an established international investment event, such as the World Investment Forum. The advice of an advisory committee consisting of representatives of stakeholders could help guide the preparations for such an event.

Organizing international hearings and recording their results would require the agreement of a number of eminent persons to participate in them as panelists, as well as stakeholders to participate as witnesses. The organization of such an effort would also require substantial resources (perhaps provided by one or several governments), including funds to ensure that the process is accessible to stakeholders in different regions and well publicized.[225]

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[224] If hearings were to be conducted, this could be done on a regional basis or as one overall international hearing.
[225] The Ruggie process, described below, may offer one template.

b. Undertaking a restatement

Another (ambitious) option that could be pursued in conjunction with, or following up on, international hearings is to undertake a restatement of the principles and norms contained in IIAs and related instruments.[226] A restatement could determine and explain "the law as it now stands (from a positive perspective) and how we should think about it (normatively)."[227] More specifically, it could examine what (if anything) is "black letter" international investment law, i.e., provisions that are widely accepted in the international investment law community; on which issues there is no consensus and why this is so; and what alternative approaches could be considered for unresolved issues, what their advantages and disadvantages are and what the legal implications are of alternative approaches. Such a restatement could also establish the

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[226] Such a stocktaking would be akin to the "restatements" undertaken since 1923 by the American Law Institute (ALI), primarily for domestic law areas, except that the stocktaking as envisaged here would also need to be forward-looking. ALI has published "Restatements of the Law," a series of treatises that codify significant case law decisions into principles and rules organized by topic. The Restatements have become a persuasive secondary source for academics, practitioners and judges in the United States, because of their broad scope and their thorough drafting process. Each Restatement is prepared over the course of several years by a primary Reporter, in consultation with a panel of experts, ALI members and the ALI Council (composed of judges, professors and lawyers). A project is currently underway to prepare a Restatement of the U.S. Law of International Commercial Arbitration, now in its second tentative draft status. See American Law Institute, *Restatement (Third) U.S. Law of International Commercial Arbitration*, Tentative Draft No. 2, November 2, 2012. This Restatement covers a range of topics, including a separate section dealing with investment arbitration as it intersects with United States courts, in order to reflect the distinct procedural issues and treatment that arise under United States law. However, substantive standards such as "fair and equitable treatment" or the definition of "expropriation" are not being addressed in this Restatement. See George A. Bermann, Jack J. Coe Jr., Christopher R. Drahozal & Catherine A. Rogers, "Restating the U.S. Law of International Commercial Arbitration" in Thomas E. Carbonneau & Angelica M. Sinopole (eds.), *Building the Civilization of Arbitration* (London: Wildy, Simmonds & Hill, 2010), p. 327. The Reporter is George A. Bermann. For a full list of persons involved, see "Current Projects: Restatement Third, The U.S. Law of International Commercial Arbitration," available at http://www.ali.org/index.cfm?fuseaction=projects.members&projectid=20.

[227] Petros C. Mavroidis, "All Clear on the Investment Front: A Plea for a Restatement" in José E. Alvarez & Karl P. Sauvant, with Kamil Gérard Ahmed & Gabriela del P. Vizcaíno (eds.), *The Evolving International Investment Regime: Expectations, Realities, Options* (New York: OUP, 2011), p. 103.

issues that are not typically (or at all) reflected in IIAs, but have been suggested for inclusion in such agreements by various stakeholder groups, how they could be included and what the arguments for and against their inclusion are. In other words, it could be forward-looking and innovative, by including sounder principles and provisions. A restatement could also address issues relating to interrelationships with other international legal regimes and the implications of such interrelationships for the future of the international investment regime. At a minimum, a restatement (if successful) would establish what is accepted in the area of international investment law and policy.[228]

The outcome of a restatement could potentially become a source of inspiration and guidance for IIA negotiators[229] and an authoritative secondary source of law for arbitrators, who have to negotiate and arbitrate, respectively, under circumstances in which such a broadly accepted inventory does not exist. It could also become a starting point for negotiating bilateral, regional and plurilateral investment agreements, or even a multilateral framework on investment, should governments wish to do so.

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[228] In the context of a Restatement on International Trade Law, annual "stocktaking" and analyses of decisions by WTO adjudicating bodies are being prepared. These reports are published as *The American Law Institute Reporters Studies on WTO Law* by Cambridge University Press, and incorporate critical discussions of key developments in WTO jurisprudence. Studies are submitted for discussion to the annual meeting of ALI members. The two appointed Reporters are Petros C. Mavroidis and Henrik Horn. See, e.g., Petros C. Mavroidis & Henrik. Horn (eds.), *The WTO Case Law of 2010* (Cambridge: Cambridge University Press, 2012). In addition to the annual reviews, a series of background materials have been prepared. See, e.g., Douglas A. Irwin, Petros C. Mavroidis & Alan O. Sykes, *The Genesis of the GATT* (Cambridge: Cambridge University Press, 2008); Petros C. Mavroidis & Henrik Horn (eds.), *Legal and Economic Principles of World Trade Law* (Cambridge: Cambridge University Press, forthcoming 2013).

[229] Various organizations convene events for IIA negotiators, *inter alia*, to facilitate an exchange of experience and inform them about recent trends. UNCTAD, for example, has done so for a number of years, as has the South Centre (in cooperation with the International Institute for Sustainable Development and others). See Mariama Williams, "Challenges Posed by BITs to Developing Countries," 69 *South Bulletin* (2012), pp. 13-15, reporting on the sixth such event. Technical assistance for developing countries (and especially the least developed among them) is an important matter as it is in the interest of all stakeholders that IIA negotiators from all parties are in the best possible position to undertake negotiations.

There is of course the possibility that such a restatement would be inherently "conservative" as it could reflect primarily what is, as opposed to what could be. Therefore, it would be important to ensure that a restatement, were it to be undertaken, would in addition do two other things: First, it would need to take into account how the law has developed over time so as to establish trends; second (as already mentioned), the undertaking would also need to be forward-looking, i.e., one would need to make sure that it fully reflects proposals that go beyond the status quo, beginning with the purpose of the regime (and, in this manner, give new options to negotiators). Moreover, given the dynamic nature of developments in international investment law, a restatement would need to watch closely new IIAs and arbitral decisions. In any event, a restatement would be an ambitious undertaking; an alternative may therefore be an approach that focuses on specific areas (see below, under "Consensus-building Working Groups").

To be credible, such a restatement would have to be prepared by an international group of prominent scholars in international investment law,[230] drawn from all continents. The group would have to make sure that the views of all stakeholders are fully taken into account, including the views of governmental officials negotiating IIAs, as they have the actual experience of negotiating such agreements, know best why they have made certain choices regarding specific issues and would be the potential beneficiaries of a stock-taking. One would also have to recognize that, in each stakeholder group, there are likely to be different views as to what needs to be done. A consortium of universities from around the world could organize such an effort, benefitting from the advice of an advisory committee consisting of representatives from stakeholder groups.

[230] Conducting such an effort in an intergovernmental context would be very difficult, as government representatives could easily consider this to be a negotiating effort. The International Law Association has convened a working group studying the feasibility of drafting a soft-law instrument, possibly along the lines of a restatement, with special attention to whether the field is ripe for such an endeavor. See Christian Tietje & Emily Sipiorski, "The Evolution of Investment Protection Based on Public International Law Treaties: Lessons to be Learned" in Bjorklund & Reinisch, *op. cit.*, pp. 192-237.

Organizing such a restatement would require the agreement of a number of international experts to participate in such an effort. Judging from past experience, a restatement would take a substantial amount of time, might require regular updating and, therefore, demand substantial resources.

2. Establishing consensus-building Working Groups

The multiplicity of sources of law of the current international investment law and policy regime, its light and fragmented institutional structure and a number of issues related to the precise meaning of various concepts raise a range of questions whose solutions cannot be "discovered" through a fact-finding process alone. Some of these are of a relatively focused nature (e.g., how to deal with the question of capital controls[231]) and can be addressed in a specific manner, as illustrated in section D. Others are more challenging and central to the investment regime, requiring substantial analysis and discussion, with a view toward arriving at a widely shared consensus.

Establishing Working Groups can be a useful step toward consensus building on specific issues. In the investment context, working groups or roundtables could be convened to address both substantive and procedural matters[232] – but they can also be useful to foster a dialogue among stakeholders and build confidence. The topics identified below are examples of subject areas in which such Working Groups could be of particular importance. (Other areas, relating to more specific contexts, are mentioned elsewhere in this section.)

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[231] See, e.g., Manuel F. Montes, "Capital Controls, Investment Chapters and Asian Development Objectives" in *Capital Account Regulations and the Trading System: A Compatibility Review*, Pardee Center Taskforce Report (Boston: Boston University, 2013) available at http://www.bu.edu/pardee/files/2013/02/Pardee-CARs-and-Trade-TF-March2013-copy.pdf.

[232] For example, a working group of UNCITRAL has been meeting since October 2010 on the question of transparency, with the sixth meeting having taken place in February 2013. UNCITRAL, Report of Working Group II (Arbitration and Conciliation) on the work of its fifty-eighth session (New York, 4-8 February 2013), A/CN.9/765 (February 13, 2013) available at http://daccess-ods.un.org/TMP/4706465.60192108.html. The UNCITRAL transparency negotiations are indicative of how difficult it is to arrive at a consensus as states had widely divergent views on this subject.

a. Convening a Dialogue Roundtable between business and civil society

Among stakeholders, the difference in opinion and approach regarding a wide range of issues relating to the investment regime has nowhere been greater than between some members of civil society and some members of the business community. Simplified, while representatives of the business community often begin from the premise that all foreign investment is the basis of economic growth and development and its encouragement and protection is therefore key, representatives of civil society often begin from the premise that foreign investment is not necessarily a good thing – that, in fact, it can do harm – and therefore needs to be controlled and tightly supervised to make sure that it contributes as much as possible to a host country's sustainable development. Accordingly, in the past, the approach of both groups to the international investment regime has been quite different. Naturally, this stylized description is a simplification: the landscape now features a broad range of attitudes and approaches within both civil society and the business community and there is significant common ground and growing instances of productive cooperation. Increasingly, there is a shared view that the regime needs improvement, but the question is how this can best be done.

However, important differences in opinion and approach persist among some segments of each group. On the grounds that more communication, understanding and cooperation are useful for the investment regime, it may be desirable to convene one or more informal, off-the-record Dialogue Roundtables between representatives of these two groups of stakeholders. Such roundtables would seek to bring about a better understanding of the concerns and solutions each group advocates and, more generally, seek to build confidence between them. While the primary focus could be on these two groups, one might also want to invite representatives of governments (e.g., from investment promotion agencies, especially from emerging markets) to add the views and experiences of host countries. It may be possible to interest one of the many foundations concerned with development issues (e.g. the Friedrich Ebert Stiftung) to organize and finance such an event (or a series of such events), especially if it takes place in the context of a broader process.

b. Addressing substantive issues: purpose, sustainable international investment, contents of norms, treaty shopping

In light of the discussion in section D of this paper, four substantive issues may deserve particular attention from consensus-building Working Groups: the purpose of international investment agreements, the question of sustainable international investment, the scope and content of norms prescribed by IIAs, and the specific question of treaty shopping.

- The first concerns the **purpose of IIAs**, as the content of these agreements flows from their purpose. The parties to an IIA may agree to pursue a range of different objectives through an agreement – from a purely investor protection focus, through to the promotion of sustainable development. As discussed in section D, the purpose identified and expressed by the parties will not only act as an interpretive aid for tribunals, but also determines aspects of an agreement's scope of application, substantive obligations and dispute-settlement mechanism. A broadening of the purpose of IIAs from a focus on investment protection to include also sustainable development – not only in the preamble of IIAs but also in their body -- would represent a paradigm shift in international investment law.[233] Accordingly, a Working Group on the purpose of IIAs would aim at building consensus around the general purpose(s) of IIAs, as well as identify the necessary components of IIAs necessary to achieve that purpose
- A second key substantive issue (also giving an orientation to the contents of agreements) that deserves dedicated analysis

[233] Arguably, at least part of the discussion is already shifting in this direction: Witness UNCTAD's new framework, the Commonwealth Secretariat Guide to investment negotiations from a sustainable development perspective and the SADC Model Bilateral Investment Treaty: UNCTAD, *IPFSD*, *op. cit.*; J. Anthony Van Duzer, Penelope Simons & Graham Mayeda, *Integrating Sustainable Development into International Investment Agreements: A Guide for Developing Country Negotiators* (London: Commonwealth Secretariat, 2013); Southern African Development Community (SADC), *SADC Model Bilateral Investment Treaty Template with Commentary* (Gaborone: SADC, 2012), available at http://www.iisd.org/itn/wp-content/uploads/2012/10/SADC-Model-BIT-Template-Final.pdf. [hereinafter SADC Model BIT]; Mann, *op. cit.*, pp. 16-23.

involves the increasing attention that is being given to sustainable development and, with that (in the particular context of this paper), to **sustainable international investment**. However, it is a concept that is not yet well defined. IIAs have traditionally been meant to contribute to one accepted core element of "sustainable international investment," namely "economic development" – via the (by now debated) assumption that these agreements per se help to increase FDI flows and the equally debated assumption that, the more FDI a country attracts, the more of a contribution to development will be obtained automatically.[234] Still, IIAs are meant to contribute to development, and this is beginning to be recognized by arbitrators.[235] But treaty-makers and arbitrators are hampered by the absence of a test as to what "sustainable international investment" is.[236] Using evidence-based research and multi-stakeholder consultations, a working consensus of what constitutes "sustainable international investment" could be elaborated, taking into account the different conditions that exist in various jurisdictions, and formulations could be found to reflect this concept in IIAs[237] (e.g., as men-

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[234] See the discussion in section C, above.

[235] See especially the *Salini* criteria discussed above ("The doctrine generally considers that investment infers: contributions, a certain duration of performance of the contract and a participation in the risks of the transaction [...]. In reading the Convention's preamble, one may add the contribution to the economic development of the host State of the investment as an additional condition." *Salini v. Morocco*, *op. cit.*, para. 52, *discussed in Malaysia Historical Salvors.v. Malaysia*, ICSID Case No. ARB/05/10, May 17, 2007, para. 78.

[236] Alternatively, if there were well defined and specific obligations that go toward ensuring that the elements of sustainable development are reflected in the making of investments, this may be sufficient. Some of these elements are already reflected in existing instruments, e.g., in the outcome of the work of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, see Resolution adopted by the Human Rights Council, 17/4 Human rights and transnational corporations and other business enterprises, A/HRC/RES/17/4 (July 6, 2011) available at http://daccess-dds-ny.un.org/doc/RESOLUTION/GEN/G11/144/71/PDF/G1114471.pdf?OpenElement.

[237] See in this context the UNCTAD, IPFSD, *op. cit.* (referring to the concept of "sustainable development friendly investment") and the IISD Model, *op. cit.*, which provide directions in this respect for IIAs. There is no question that it is very difficult to arrive at a definition of "sustainable international investment." Among other things, there may be trade-offs among the different dimensions of this concept, some may be difficult to measure and different local communities may come to very different decisions about what this concept means for them.

tioned earlier, by using a definition of "investment" that makes "sustainability" an integral part of it[238]). Such a delineation of this concept could also help investment promotion agencies in their work when seeking to attract FDI; many of them already keep at least some sustainability elements in mind (especially economic development) that could be core elements of a sustainable international investment definition, but largely ignore what could be other core elements, for example, social issues (including labor).[239] An effort to develop a working definition of this concept – difficult as this would be – that lays out criteria/provides a check-list that could be used to assess whether, in a particular situation, an investment is a "sustainable international investment," could therefore help to clarify this particular issue and, in the process, help to promote sustainable development.

- A third key substantive issue that requires special attention concerns the substantive **content of the norms contained in IIAs**. The role of a Working Group on this subject could include the clarification of a number of standards contained in IIAs to provide a clear and preferably unambiguous indication of the commitments governments undertake;[240] an assessment of whether any standards should be dropped;[241] and an analysis

[238] As discussed by Brigitte Stern at the Seventh Columbia International Investment Conference organized by the Vale Columbia Center on Sustainable International Investment, New York (November 14, 2012). For example, treaty partners could provide in the definition of "investment" in IIAs that an investment is an "investment" under the terms of a treaty if it is made in accordance with the OECD Guidelines for Multinational Enterprises (Paris: OECD, 2011) available at http://www.oecd.org/daf/inv/mne/48004323.pdf.
[239] Vale Columbia Center (VCC) and World Association of Investment Promotion Agencies (WAIPA), *Investment Promotion Agencies and Sustainable FDI: Moving Toward the Fourth Generation of Investment Promotion* (New York and Geneva: VCC and WAIPA, 2010), available at http://www.vcc.columbia.edu/files/vale/content/IPASurvey.pdf, p. 4.
[240] Greater clarity in this respect could itself reduce the incidence of investment disputes.
[241] For example, the 2004 (and 2012) United States Model BIT dropped the conventional umbrella clause from the various investment protection obligations (*"Each Party shall observe any obligation it may have entered into with regard to investments"*) in favor of an explicit provision allowing claims based on a breach of an investment agreement (and not a contract) to be subject to arbitration. See Katia Yannaca-Small, "Interpretation of the Umbrella Clause in Investment Agreements," *Working Papers on International Investment*, No. 2006/3 (Paris: OECD, 2006), p. 14.

of whether any standards need to be added. Among the last of these, pre-establishment national treatment, home country measures and issues related to the responsibilities of home country governments and investors are particularly relevant.

- Finally, the issue of **treaty shopping** (or "nationality planning") requires attention, as the practice of obtaining the protection of IIAs via the incorporation of certain types of foreign affiliates (which often are not more than simple offices) in countries that have IIAs with a host country in which an investment is to be made may extend the protections of a given treaty in a manner that the treaty partners may not have anticipated when concluding the treaty. Since this is a specific issue (and it is recognized that treaty shopping can be used opportunistically),[242] it might be relatively easy to find a consensus formulation for a model clause through which treaty partners can protect themselves against this practice (or certain aspects of it) in the future if they so desire; [243] perhaps it would even be possible to find ways to clarify this matter in regard to past treaties that are not clear in this respect (e.g., through a joint statement of interested governments).[244]

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[242] See, e.g., *Saluka Investments v. Czech Republic*, Partial Award, *op. cit.*, para. 240 (where the panel expressed "some sympathy for the argument that a company which has no real connection with a State party to a BIT, and which is in reality a mere shell company controlled by another company which is not constituted under the laws of that State, should not be entitled to invoke the provisions of that treaty. Such a possibility lends itself to abuses of the arbitral procedure, and to practices of 'treaty shopping' which can share many of the disadvantages of the widely criticized practice of 'forum shopping.'"), *discussed in* Rachel Thorn & Jennifer Doucleff, "Disregarding the Corporate Veil and Denial of Benefits Clauses: Testing Treaty Language and the Concept of 'Investor'" in Michael Waibel, Asha Kaushal, Kyo-Hwa Chung & Claire Balchin (eds.), *The Backlash Against Investment Arbitration: Perceptions and Reality* (Alphen: KluwerLaw International BV, 2010), pp. 18-21. For a critical report of the practice of treaty shopping, see Roos van Os & Roeline Knotterus, "Dutch Bilateral Investment Treaties: A Gateway to 'Treaty Shopping' for Investment Protection by Multinational Companies" (Amsterdam: SOMO, 2011), available at http://www.s2bnetwork.org/fileadmin/dateien/downloads/Dutch_Bilateral_Investment_Treaties.pdf.

[243] But all may not so desire. See e.g., Nikos Lavranos, "In Defence of Member States' BITs Gold Standard: The Regulation 1219/2012 Establishing a Transitional Regime for Existing Extra-EU BITs -- A Member State's Perspective," 10(2) *Transnational Dispute Management* (2013).

[244] While such a joint statement may not be determinative of the outcome of a concrete dispute due to concerns about abuse of process if a defendant can intervene in a dispute to which it is a party, it could nevertheless signal state practice and potentially influence tribunals.

c. Addressing procedural issues: dispute settlement

As discussed earlier, investor-state dispute settlement is one of the critical areas for all stakeholders, given the central role it occupies in modern IIAs, the costs that these disputes can involve, the role of arbitrators and others in the process, the trend toward an increasing number of disputes, questions of consistency, and the potential that the great number of IIAs that contain an investor-state dispute-settlement clause (combined with the great number of foreign investors and investments) could give rise to many more disputes.[245] Opposition to the current arrangements among a small but growing number of countries seems to be hardening, as reflected, for example, by the following recent developments: (i) Australia's is now opposed to including investor-state dispute settlement in its IIAs, (ii) three countries (Bolivia, Ecuador, Venezuela) have denounced the ICSID Convention,[246] (iii) South Africa has decided that most of its BITs "are now open for either review

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[245] For comparison (although the situation is different), the ICC received 796 requests for arbitration, and 508 awards were rendered in 2011. International Chamber of Commerce, "Arbitration Statistics," *op. cit*.

[246] Reportedly, Argentina is considering doing the same, and has introduced a bill to that effect; the text of the draft bill (March 21, 2012) is available at http://www1.hcdn.gov.ar/proyxml/expediente.asp? fundamentos =si& numexp=1311-D-2012. At the date of writing, Argentina remained a signatory of ICSID. See ICSID, "Membership Database," available at https://icsid.worldbank.org/ICSID/FrontServlet?requestType=ICSIDDataRH&reqFrom=Main&actionVal=ViewContractingStates&range=A~B~C~D~E (last visited March 13, 2013); ICSID, "List of Contracting States and Other Signatories," July 25, 2012, available at https://icsid.worldbank org/ICSID/FrontServlet?requestType=ICSIDDocRH&actionVal= ContractingStates& ReqFrom=Main. For discussion, see: "Argentina Faces 65bn Dollars in Claims," *op. cit*. (explaining that "Argentina is considering stepping down from ICSID," and instead bringing investment disputes to domestic courts or to a regional mechanism, discussed below); Nicolas Boeglin, "Argentina: Towards a Possible New Withdrawal from ICSID?," Committee for the Abolition of Third World Debt, May 4, 2012, available at http://cadtm.org/Argentina-towards-a-possible-new. However, note that, even if Argentina does choose to withdraw from ICSID, its denunciation will come into effect six months after the World Bank receives notice. See Daniel E. González, Michael Davison, Richard C. Lorenzo, Jonathan T. Stoel, H. Deen Kaplan & Mark S. McConnell, "If Argentina Withdraws from the ICSID Convention: Implications for Foreign Investors," February 4, 2013, available at http://www.lexology.com/library/detail.aspx?g=080c79bc-cce7-485f-97aa-27a5b2bdec5c.

or termination,”[247] (iv) India has put its BIT talks on hold (triggered by concerns with the dispute-settlement mechanism),[248] (v) the Parliament of Argentina has adopted a resolution calling for the denunciation of the country’s BITs,[249] and (vi) there is a call to establish a Latin American Centre for Investment Dispute Settlement with its own rules.[250] In sum, while IIAs with robust dispute-settlement provisions continue to be concluded (as alternatives -- such as state-to-state dispute settlement mechanisms or recourse to local courts -- are perceived by investors as much less effective means of dispute settlement), there is dissatisfaction with the cur-

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[247] Republic of South Africa, Department of Trade and Industry, “Policy Statement: The South African Government’s Approach to Future International Investment Treaties,” September 18, 2010, p. 3, available at http://www.jadafa.co.za/LinkClick.aspx?fileticket=9A6eXZstRl0%3D&tabid=432.

[248] Sujay Mehdudia, “BIPA Talks Put on Hold,” *The Hindu*, January 21, 2013, http://www.thehindu.com/business/Economy/bipa-talks-put-on-hold/article4329332.ece; “India Places All BIT Talks on Hold, Pending Review of Own Model Deal,” 31(5) *Inside U.S. Trade*, February 1, 2013, p. 1.

[249] “Argentina Faces 65bn Dollars in Claims,” *op. cit.*; González et al., *op. cit.*

[250] The Union of South American Nations (UNASUR) seeks to establish a regional forum for the settlement of investment (and other commerce-related) disputes in 2013, to replace ICSID for the region. The proposal was originally put forward by Ecuador in 2009. (UNASUR members are Argentina, Bolivia, Brazil, Chile, Colombia, Ecuador, Guyana, Paraguay, Peru, Suriname, Uruguay, and Venezuela.) See “Declaration of the 1st Ministerial Meeting of the Latin American States Affected by Transnational Interests,” April 22, 2013 (http://cancilleria.gob.ec/wp-content/uploads/2013/04/22abr_declaracion_transnacionales_eng.pdf), supporting the constitution and implementation of regional organisms for settling investment disputes, ensuring fair and balanced rules when settling disputes between corporations and States and encouraging UNASUR in the approval of a regional mechanism currently under negotiation. See also Ewan Robertson, “Unasur Creates Electoral Council, Moves toward Greater Economic Cooperation,” *Venezuelanalysis.com*, December 3, 2012, http://venezuelanalysis.com/news/7518 (stating that, following a November 2012 meeting, representatives agreed to continue work on a South American forum for investment disputes that could begin operating in 2014); Silvia Karina Fiezzoni, “UNASUR Arbitration Centre: The Present Situation and the Principal Characteristics of Ecuador’s Proposal,” *Investment Treaty News*, January 12, 2012, http://www.iisd.org/itn/2012/01/12/unasur/; Silvia Karina Fiezzoni, “The Challenge of UNASUR Member Countries to Replace ICSID Arbitration,” 2(3) *Beijing Law Review* 134 (2011); Ignacio A. Vincentelli, “The Uncertain Future of ICSID in Latin America,” 16(3) *Law and Business Review of the Americas* 409 (2010), pp. 454-455.

rent dispute-settlement regime, and pressure on it is increasing.[251] Accordingly, a Working Group could also be convened to build consensus relating to the dispute-settlement process.

i. Establishing a Working Group on the dispute-settlement process

As discussed in section D, the key challenge in relation to this topic is how best to ensure the legitimacy of dispute settlement, from the perspective of all stakeholders. The focus of a Working Group on this subject could include one or more of the following:

- Exploring a number of questions relating to the *process* and *outcomes* of investor-state dispute settlement system, and its *internal* and *external legitimacy* (discussed in detail in section D), beginning with the rationale of the dispute-settlement process itself. Specific issues might include clarifying the roles of arbitrators and others in dispute settlement, examining whether the exhaustion of domestic remedies could or should be re-invigorated, strengthening the role of the treaty partners in dispute settlement (including, e.g.,

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[251] As Charles N. Brower observed in an interview with *Arbitration Trends* (2013), available at http://quinnemanuel.com/media/371211/arbitration%20trends%20-%20winter%202013%20-%20final.pdf, pp. 12-13, in response to the question "Some arbitration practitioners, corporate counsel, and government officials have expressed dissatisfaction with recent investor-state awards and annulment decisions. Do you think this 'backlash' against investor-state arbitration is real or overstated?" the following: "Of course it is real. It exists, though the degree to which it exists is debatable. Definitely a couple of recent ICSID annulments of awards have caused great, and in my view justified, concern. And to anyone it is unsatisfactory that different tribunals take different views of essentially the same issues because that militates against the predictability that investors and host countries both undoubtedly desire. The cure for that has not yet been found, however." For specific proposals to improve investor-state arbitration see Antonio Parra, *The History of ICSID* (Oxford: OUP, 2012). See also UNCTAD, Reform of Investor-State Dispute Settlement: In Search of a Roadmap", *IIA Issues Note*, no. 2 (May 2013). It might be argued that, compared to substantive treaty norms, the recalibration of dispute-settlement norms in investment treaties has proceeded at a slower pace.

through interpretive statements),[252] allowing for a certain gate-keeping role for governments regarding the initiation of such disputes (e.g., by requiring notifications before a dispute is launched, instituting a public interest check,[253] raising the threshold for access to investor-state dispute settlement, allowing the treaty partners first to seek to resolve a dispute), exploring the greater use of counter-claims, giving a great role to ICSID to screen disputes[254] (especially regarding frivolous suits[255]), and considering the implications of excluding investor-state dispute settlement from IIAs.

[252] For a discussion of the role of the state in treaty interpretation and an analysis of various ways in which that role could be strengthened (including through "interpretive dialogue") in the dispute-settlement process, see Anthea Roberts, "Power and Persuasion in Investment Treaty Interpretation: The Dual Role of States," 104(2) *American Journal of International Law* 179 (2010); see also UNCTAD, "Interpretation of IIAs: What States Can Do," *IIA Issues Note*, No. 3 (2011), available at http://unctad.org/en/Docs/webdiaeia2011d10_en.pdf.

[253] NAFTA, for example, has a screening process for certain types of claims (i.e., taxation measures).

[254] However, for ICSID to screen claims would still mean to investigate the facts and examine the law -- which can require substantial resources.

[255] Third-party funders, whose own resources are at stake, seem to have a rigorous screening process before they decide to finance a claim. See, in relation to third-party funding for both commercial and investment arbitration generally, Bernardo M. Cremades, Jr., "Third Party Litigation Funding: Investing in Arbitration," 8(4) *Transnational Dispute Management* (2011), pp. 15-16.

- Investigating to what extent alternative dispute-resolution mechanisms (and, for that matter, national conflict-management mechanisms[256]) could be used more, especially during the cooling-off period foreseen in IIAs.
- Considering the interface between domestic and international law and dispute resolution. For example, there is the question as to what extent foreign investors should have more rights than domestic ones by having access to international dispute settlement;[257] and, conversely, whether, if foreign investors have access to international dispute settle-

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[256] There is evidence that conflict-management mechanisms have proven useful in relations between private investors in certain sectors, in particular in the construction/infrastructure/concessions areas. See Lee L. Anderson Jr. & Brian Polkinghorn, "Managing Conflict in Construction Megaprojects: Leadership and Third-Party Principles," 26(2) *Conflict Resolution Quarterly* 167 (2008). In the context of investor-state relations, investors and host country governments would seek to address any possible conflicts at a very early stage, well before disagreements have escalated into full-blown disputes, i.e., before any legal claims for compensation for alleged damages derived from an alleged wrongful act by the government of a host country are brought. Such mechanisms could include the fostering of greater intra-agency coordination to respect the rule of law, early neutral evaluation, the establishment of dispute-settlement boards, and the institution of fact-finding procedures. Several years ago, Peru instituted a process that incorporates elements of this approach. Peru's structure follows a dispute prevention policy, and the government implemented a dispute-prevention mechanism that promotes alternative dispute resolution. See UNCTAD, "Best Practices in Investment for Development: How To Prevent and Manage Investor-State Disputes: Lessons from Peru," *Investment Advisory Series, Series B, No. 10* (New York and Geneva: UNCTAD, 2011); see also Ricardo Ampuero Llerena, "Peru's State Coordination and Response System for International Investment Disputes," *Investment Treaty News*, January 14, 2013, http://www.iisd.org/itn/2013/01/14/perus-state-coordination-and-response-system-for-international-investment-disputes/ (describing the work of this System). The use of such mechanisms is being explored by the Investment Climate Department of the World Bank Group and would include the provision of technical assistance.

[257] This is one of the reasons for round-tripping (i.e., when a firm establishes an affiliate abroad, and this affiliate then invests in the home country), which was particularly important in China, but is also relevant for other countries.

ment, domestic investors should have the same option.[258] In addition, issues relating to coordination with domestic systems could be considered, including questions of applicable law and exhaustion of local remedies.

ii. Creating an appellate body

A broader consideration concerns the justification for, and feasibility of, an independent appellate body for the decisions taken by ad hoc tribunals. ICSID's annulment process is being used increasingly, but it, too, is of an ad hoc nature and is undertaken on the basis of narrowly defined criteria. This raises the question of whether this approach could be improved, or whether there is a need for a hierarchical appeals mechanism.[259] This would of course be a major step, akin to the movement, within the WTO, from an ad hoc dispute-settlement process during the GATT to the Dispute Settlement Understanding in the WTO.[260] (In the trade system, this step took place after 101 panel reports were adopted,[261] providing

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[258] The Ghana Investment Promotion Center Act of 1994 "guarantees the right to international arbitration not only for foreign investors, but all investors covered by the Act (i.e., including those local investors registered with the GIPC)." UNCTAD, *Investment Policy Review: Ghana* (Geneva: UNCTAD, 2002), p. 28. UNCTAD continues: "Guaranteeing nationals the right to international arbitration (at their choice) is uncommon." *Ibid*. See the Ghana Investment Promotion Center Act, 1994, Section 21(1): Establishment of enterprises, which provides that the act applies to enterprises established in accordance with law except mining and petroleum enterprises, and Section 29: Dispute settlement procedures, which provides for recourse to arbitration (e.g. under UNCITRAL rules) for all "investors." Note, however, that the Act does not apply to mining and petroleum enterprises. Ibid, Section 17.

[259] For a discussion of the pros and cons of an appeals mechanism, see Karl P. Sauvant with Michael Chiswick-Patterson (eds.), *Appeals Mechanism in International Investment Disputes* (New York: OUP, 2008).

[260] "Understanding on Rules and Procedures Governing the Settlement of Disputes" (WTO DSU), Annex 2 of the WTO Agreement, available at http://www.wto.org/english/tratop_e/dispu_e/dsu_e.htm. See the discussion in Erin E. Gleason, "International Arbitral Appeals: What Are We So Afraid Of?," 7(2) *Pepperdine Dispute Resolution Law Journal* 269 (2007), pp. 273-286 (arguing that the WTO Appellate Body could provide a model for an investor-state appeals mechanism within ICSID), *discussed in* Irene M. Ten Cate, "International Arbitration and the Ends of Appellate Review," 44(4) *N.Y.U. Journal of International Law and Politics* 1109 (2012), p. 1199.

[261] WTO, "Adopted Panel Reports Within the Framework of GATT," available at http://www.wto.org/english/tratop_e/dispu_e/gt47ds_e.htm (last visited March 10, 2013).

sufficient experience to undertake such a step; under the investment regime, over 500 treaty-based disputes had been initiated by the end of 2012.) Proponents argue that a permanent appeals mechanism could provide a focal point for resolving widespread and difficult questions of law and interpretation and would lend greater legitimacy to the regime as a whole.[262] However, there are also concerns that an appeals mechanism would undermine the "finality" of the arbitral award,[263] "re-politicize" the process,[264] and that the added "layer" of an appeals mechanism would simply replicate (rather than solve) the existing difficulties in the arbitration system. Issues such as perceived bias or conflicts of interest could persist, even with a permanent court. The cost of disputes could continue to rise, unless access to an appeals mechanism were to be granted on very limited grounds.[265] While some matters could be addressed with a careful and inclusive process of institutional design,[266] others relate to the essential features of the regime at present such as, for example, a "harmonization" of the substantive

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262 See Gleason, 2007, *op. cit.*; Doak Bishop, "The Case for an Appellate Panel and Its Scope of Review" in Federico Ortino, Audley Sheppard & Hugo Warner (eds.), 1 *Investment Treaty Law: Current Issues* 15 (BIICL, 2006), p. 17; James Crawford, "Is there a Need for an Appellate System?" in Ortino et al., 2006, *op. cit.*, p. 13, *cited in* Ten Cate, *op. cit.*, p. 1112.

263 See, e.g., ICSID Secretariat, "Possible Improvement of the Framework for ICSID Arbitration," *Discussion Paper*, October 22, 2004, para. 21, available at https://icsid.worldbank.org/ICSID/FrontServlet?requestType=ICSIDPublicationsRH&actionVal=ViewAnnouncePDF&AnnouncementType=archive&AnnounceNo=14_1.pdf (raising the question of whether ICSID should seek to create an appeals mechanism); see also ICSID Secretariat, "Suggested Changes to the ICSID Rules and Regulations," *Working Paper*, 12 May 2005, available at https://icsid.worldbank.org/ICSID/FrontServlet?requestType=ICSIDPublicationsRH&actionVal=ViewAnnouncePDF&AnnouncementType=archive&AnnounceNo=22_1.pdf, para. 4 (concluding that the creation of an appellate mechanism within the ICSID framework was "premature" at that time). See the discussion of ICSID Secretariat reasoning in Ten Cate, *op. cit.*, pp. 1183-1185.

264 Jan Paulsson, "Avoiding Unintended Consequences" in Sauvant with Chiswick-Patterson, *op. cit.*, pp. 241, 258-262, *cited in* Ten Cate, *op. cit.*, p. 1170.

265 Ilija Mitrev Penusliski argues that, given the additional cost of an appeal is marginal once preparation has been done for the initial arbitration, an appellate body could risk creating a "permanent two-tier review system." See Ilija Mitrev Penusliski, "A Dispute Systems Design Diagnosis of ICSID" in Waibel et al., *op. cit.*, pp. 530-31.

266 David A. Gantz, "An Appellate Mechanism for Review of Arbitral Decisions in Investor-State Disputes: Prospects and Challenges," 39(1) *Vanderbilt Journal of Transnational Law* 39 (2006), p. 74 (emphasizing that staffing and structure are crucial to improve decision-making outcomes), *cited in* Ten Cate, *op. cit.*, p. 1112.

investment protection standards is difficult (if not impossible) in the absence of a common text, such as a multilateral framework on investment.[267]

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To be credible, any Working Group that would be established would need to consist of the best international minds dealing with the issues under examination. Its work would need to be open and transparent and, in particular, take into account the views of all stakeholders. It would also have to draw on the expertise of the premier institutions dealing with international investment, including UNCTAD, the OECD and, as appropriate, ICSID and regional institutions. Universities with a recognized capacity in the respective areas (or international organizations) could provide back-stopping to such a Working Group, in the framework of an overall coordination mechanism. The findings of such a Working Group could be made available widely to those negotiating, interpreting and adjudicating IIAs, as a source of inspiration and guidance.

Naturally, organizing and servicing an international Working Group of this kind (or several of them), and recording their results, would require the agreement of key international experts to participate in them, as well as a substantial effort and therefore a substantial commitment of resources.

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[267] Barton Legum, "Visualizing an Appellate System" in Ortino et al., 2006, *op. cit.*, p. 121; Asif H. Qureshi & Shandana Gulzar Khan, "Implications of an Appellate Body for Investment Disputes from a Developing Country Point of View" in Sauvant with Chiswick-Patterson (eds.), *op. cit.*, p. 272 (arguing that given the bilateral, "disorganized" nature of investment arbitration, with an absence of consensus on substantive issues, the case for an appeals mechanism is unclear), *discussed in* Ten Cate, *op. cit.*, p. 1173. For a cautionary note about harmonization, see A. Bjorklund, "Practical and Legal Avenues to Make the Substantive Rules and Disciplines of International Investment Agreements Converge" in P. Sauvé & R. Echandi (eds.), *New Directions and Emerging Challenges in International Investment Law and Policy* (CUP, forthcoming 2013).

3. Formulating a Model International Investment Agreement

Another (very ambitious) approach could be to prepare a global Model International Investment Agreement.[268] Today, no international model investment agreement exists, although individual countries have their own templates. Past practice suggests that countries would make use of a Model IIA if it existed: In 1967, the OECD published a "Draft Convention on the Protection of Foreign Property."[269] Although the Council of the OECD never formally adopted the draft, treaty makers used it as a basis for negotiating BITs, since no other model existed that could serve as guidance. By now, however, the Draft Convention (which was written solely by representatives of capital-exporting countries and at a time when FDI was discouraged by the threat of confiscation) is out of date. A new model could therefore conceivably be of considerable help to investment treaty negotiators, especially those from least developed and developing countries that do not have their own model treaties to refer to when negotiating with partner countries that often do. (In the international taxation area, such models – pre-

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[268] A variation of this approach (which would have to reflect that a growing number of countries are both host and home countries) is to prepare, in addition to *one* model, two additional ones: one reflecting the interests of capital exporting countries and one reflecting the interests of capital importing countries. This approach was used by the Asian-African Legal Consultative Organization (AALCO), which published three draft BITs, reflecting different models of investment liberalization and protection. The models are published at (1984) 23 ILM 237.

[269] OECD, *Draft Convention on the Protection of Foreign Property,* C(67)102 (1967), available at http://www.oecd.org/dataoecd/35/4/39286571.pdf (While the Draft Convention carries a 1967 date on the OECD Legal Directorate page, there are also other versions with earlier dates. As a 1963 comment by the Council of Europe (COE) on the draft shows, some of its key elements, notably in relation to dispute settlement, were as controversial back then as they are today. See Parliamentary Assembly, *Opinion No. 39 on the OECD Draft Convention on the Protection of Foreign Property* (1963), available at http://assembly.coe.int/Main.asp?link=/Documents/AdoptedText/ta63/EOPI39.htm). The OECD Draft Convention appeared to have been used at least until 1990, when the Czech Republic negotiated its BIT with Canada. See Filip Cerny & Jaroslav Heyduk, "Report: New Czech-Canadian BIT Concluded" in Alexander J. Bělohlávek & Naděžda Rozehnalová (eds.), *Czech Yearbook of International Law* (New York-Huntington: Juris Publishing, 2010), p. 342.

pared by the United Nations and the OECD – are being used;[270] the same applies to investment contracts.[271])

Like any model treaty, it would provide a baseline, i.e., be an ideal type that would identify the desirable content of an international investment treaty (or investment chapters in free trade agreements), reflecting and balancing, among other things, the interests of host and home countries, and on which negotiating parties could build in light of their specific interests. Explanatory notes could indicate alternative options for specific articles; in any event, the legal implications of various options would need to be spelled out. UNCTAD's Investment Policy Framework for Sustainable Development,[272] the OECD's Policy Framework for Investment,[273] the SADC Model BIT Template,[274] the Commonwealth guide on integrating sustainable development,[275] and the IISD Model International Agreement on Investment for Sustainable Development[276] could well serve as starting points for such an effort – all of which are of great value for IIA negotiators, but not all of which are actual models or the result of broad, formalized consultative processes.[277]

The timing for such a Model may be right, given the accumulated stock of agreements and the confluence of a number of important negotiations (see below). On the other hand, it may make sense to wait until these important negotiations are concluded and potentially have set new data points.

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270 United Nations, Department of Economic & Social Affairs, United Nations Model Double Taxation Convention between Developed and Developing Countries (New York: United Nations, 2011); OECD, Model Tax Convention on Income and on Capital (Paris: OECD, 2010).

271 See especially the Model Mine Development Agreement, *described in* Luke J. Danielson & Mark D. Phillips, "The International Bar Association Model Mine Development Agreement Project: A Step Toward Better Practice and Better Development Results" in Sauvant, 2013, *op. cit.*, pp. 185-248. This Model also reflects sustainable international investment principles.

272 *Op. cit.*

273 OECD, *Policy Framework for Investment* (PFI) (Paris: OECD, 2006).

274 SADC Model BIT, *op. cit.*

275 Van Duzer, Simons & Mayeda, *op. cit.*

276 Mann et al., 2005, *op. cit.*

277 Which is not to say that no consultations took place in these cases. UNCTAD, for example, consulted a wide range of experts and has invited stakeholders to comment on the outcome of its work. The Commonwealth Secretariat had several sets of consultations in London and regionally.

Preparing a Model IIA involves some of the same issues discussed above with regard to a restatement, in particular such challenges as conservatism, credibility, participation, and resources.

4. Building specific mechanisms to improve the investment regime

There are a number of options that can be pursued in a concrete manner to improve the international investment law and policy regime and help ensure that its stakeholders benefit from it. In fact, it is a key challenge for the legitimacy of the investment regime to see to it that governments remain bound by their international commitments, that the policy measures they take are transparent and that justice is available to all parties. For example, the rise of **FDI protectionism** (including a possible movement to establish separate rules for different classes of investors) and **facilitating the use of, and access to, the dispute-settlement process** are issues that require attention in this respect

a. Monitoring FDI protectionism

It is one thing for governments to make the national regulatory framework less welcoming for international investors (as observed in section C, e.g., by abolishing incentives). It is another thing if national FDI regulatory and policy measures, including in developed countries, have protectionist purposes or at least protectionist effects, be it overtly so or in what UNCTAD calls[278] a "hidden" form.[279] For example, at times it appears that investors from emerging markets are particularly affected by such measures (e.g., through national screening mechanisms), hindering in the process also the integration of these economies into the world economy and not furthering the rule of law in the international investment field.

Similarly, as regards the development of separate rules for different classes of investors, it appears that state-controlled entities are formally accorded the status of a separate class of investors in some

[278] See UNCTAD, *WIR*, 2010, *op. cit.*, p. 80. For more than two decades, UNCTAD has monitored policy changes in the investment area, including discriminatory changes, and explicitly warned against "a considerable risk of countries resorting to protectionist investment measures." UNCTAD, *WIR*, 2012, *op. cit.*, p. 82; see also UNCTAD, *WIR*, 2011, *op. cit.*, pp. 98, 110. The concept of "hidden protectionism" is analogous to the concept of "murky" protectionism used in the trade area; see Richard Baldwin & Simon Evenett (eds.), *The Collapse of Global Trade, Murky Protectionism, and the Crisis: Recommendations for the G20* (London: Centre for Economic Policy Research, 2009). For definitions of different types of "investment protectionism," see UNCTAD, *WIR*, 2012, *op. cit.*, pp. 83, 101; see also Efraim Chalamish, "Protectionism and Sovereign Investment Post Global Recession," *Paper Presented the OECD Global Forum on International Investment* (2009). This work was undertaken on the basis of a mandate given by the Group of 20 which, in communiqués starting in 2008, has warned against the rise of protectionist measures in the area of trade and investment: "We are firmly committed to open trade and investment, expanding markets and resisting protectionism in all its forms [...]." G20, *The G20 Los Cabos Summit Declaration* (Los Cabos, 18-19 June 2012), available at http://www.consilium.europa.eu/uedocs/cms_Data/docs/pressdata/en/ec/131069.pdf, para. 26.

[279] UNCTAD, *WIR*, 2010, *op. cit.*, p. 80. The rise of FDI protectionism has been noted by Karl P. Sauvant, who identifies two key situations that qualify as "FDI protectionism": First, in the context of inward FDI, when public authorities take new measures to prevent or discourage foreign direct investors from investing, or staying, in a country; second, in the context of outward FDI, when measures are "directed at domestic companies that require them to repatriate assets or operations to the home country or discourage certain types of new investments abroad." See his "FDI Protectionism is On The Rise," *Policy Research Working Paper*, No. 5052 (World Bank, 2009), p. 7.

countries, for example, when there is a presumption in statutory provisions that mergers and acquisitions by them are subject not only to notifications but investigations before approval can be given or denied.[280] These measures are then carved out (or are otherwise reflected) in IIAs (e.g., via exemptions for non-conforming measures such as national screening mechanisms) or even lead to separate regulatory regimes (e.g., for sovereign wealth funds), fragmenting in this manner the overall regime and (potentially) undermining equal treatment. The Santiago Principles for sovereign wealth funds, although voluntary, are one step in this direction.[281] If the identification of separate classes of investors and the promulgation of rules for them gain currency, other classes of investors may also become targets, e.g., hedge funds or private equity funds[282] (for example, because their investments often are not of a long-term nature).

The approach of distinguishing different classes of investors can also be observed in the discussions on "competitive neutrality."[283] Here, it is asserted that state-controlled entities (especially state-owned enterprises), because of their nature (and for other reasons), have an advantage over their private counterparts when investing abroad and, therefore, require special disciplines to level the playing field. Such advantages can include financial and fiscal measures, the provision of information and the availability of insurance for outward investments.[284]

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[280] See, for example, the United States FINSA, *op. cit.*, § 2. Similar review mechanisms exist in other countries, including Australia, Canada and Germany.
[281] International Working Group of Sovereign Wealth Funds, *Santiago Principles*, *op. cit*.
[282] Special rules for hedge funds and private equity in the European Union were introduced in 2010, in an attempt to establish common requirements for authorization and supervision, and to ensure greater stability in the financial markets. Directive 2011/61/EU of the European Parliament and of the Council, *Alternative Investment Fund Managers and Amending Directives*, June 8, 2011.
[283] For a discussion of this issue, see Capobianco & Christiansen, *op. cit*.
[284] One argument is that governments may tolerate a lower rate of return on capital than private investors, and that SOEs benefit from favorable borrowing terms, see Gökgür, *op. cit*.

These issues are discussed in the OECD and in the Trans-Pacific Partnership negotiations, where a text to this effect has been tabled.[285] One approach mooted is to leverage the work already done in this area by incorporating the Santiago Principles[286] into more formal arrangements.[287] However, such an approach has advantages and disadvantages – states must be satisfied that the principles represent an appropriate standard for domestic purposes.[288] Crucially, however, those advantages typically are not available to state-controlled entities only, but also extend to private outward investors.[289] The crucial issue here is that protectionism and distinguishing among different classes of investors tend to judge form over substance – it is not only state-controlled entities that receive support from gov-

[285] The United States State Department and other parties to the Trans-Pacific Partnership (TPP) have been working informally on how to address the conduct of state-owned enterprises; the United States has tabled a proposal for binding international disciplines within the TPP. See "State Capitalism and Competitive Neutrality," Remarks by Deborah A. McCarthy, United States Principal Deputy Assistant Secretary, Bureau of Economic and Business Affairs, at APCAC 2012 U.S.-Asia Business Summit (Washington D.C., March 2, 2012), available at http://www.state.gov/e/eb/rls/rm/2012/181520.htm; "USTR Under the Gun To Generate Draft TPP Language Dealing with SOEs," 29(28) *Inside U.S. Trade*, July 15, 2011; "U.S. Efforts To Craft State Capitalism TPP Rules Raise Defensive Interests," 29(17) *Inside U.S. Trade*, April 29, 2011; see also discussion of United States efforts to press for rules within the OECD, "China Update: State Department Official Lays Out U.S. Strategy to Battle 'State Capitalism,'" 30(12) *Inside U.S. Trade*, March 23, 2012.

[286] International Working Group of Sovereign Wealth Funds, *Santiago Principles*, *op. cit*.

[287] Anna Gelpern notes that, while no express mention was made to the Santiago Principles, some members of the United States Congress have suggested that CFIUS regulations should provide guidance on factors relevant to review, in order to place constructive pressure on SWFs to comply with "best practices." Press Release, House Financial Services Committee, "Frank, Maloney, Gutierrez Call on Treasury to Address Sovereign Wealth Funds in FINSA Regulations," March 13, 2008, *discussed in* Anna Gelpern, *Hard, Soft, and Embedded: Implementing Principles on Promoting Responsible Sovereign Lending and Borrowing* (New York and Geneva: UNCTAD, 2012), p. 30, n.109.

[288] As identified by Gelpern, the Santiago Principles were originally formulated as non-binding because of the absence of "leverage" -- since "SWF sponsors had no need for official funding, conditionality was not available as a lever to change individual SWF behavior." However, formalizing the guiding principles could be counter-productive -- it could "undermine the Principles' legitimacy in the home countries, and scuttle cooperation between new and old powers and institutions." Gelpern, *op. cit*., pp. 29-31.

[289] See Persephone Economou & Karl P. Sauvant, "FDI Trends in 2010–2011 and the Challenge of Investment Policies for Outward Foreign Direct Investment" in Sauvant, 2013, *op. cit*., pp. 3-39, and Sauvant et al., *op. cit*., forthcoming.

ernments, but also other enterprises that invest abroad. Therefore, if there is indeed a need to level the playing field in the area of outward investment, it would appear that the discussions and negotiations should address advantages given to all kinds of enterprises investing abroad, regardless of ownership characteristics.

In light of the possible rise of FDI protectionism and the possible development of separate rules for different classes of investors, it may be worthwhile to consider the creation of an **FDI Protectionism Observatory** to analyze national investment laws, regulations and policies, with a view toward establishing whether they have protectionist implications and publishing the results on a regular basis. Such an Observatory (which could perhaps be partly patterned on the WTO's trade policy review mechanism) could also provide a locus for meetings at which governments and other stakeholders could exchange experiences and discuss ways of satisfying legitimate national policy objectives (such as protecting national security, protecting public health and the environment, promoting development, maintaining public order), without unduly restricting the flow of investment across borders. Such an Observatory could therefore provide an objective, nongovernmental focal point for stocktaking and analyzing governmental actions at a time when measures to restrict FDI appear to be on the increase in the face of threats, perceived or actual, to national security and national economic well-being from terrorism, global economic crises and the emergence of new investors (including state-controlled entities) from emerging markets. However, its "power" would merely lie in the credibility of its research and reporting (which could also be submitted to the investment committees of intergovernmental organizations) and its ability "to name and shame."[290]

An FDI Protectionism Observatory could be established as a separate research and reporting activity dedicated entirely to regulatory developments regarding international investment, or as a

[290] For a suggestion on how to deal with FDI protectionism in the context of the global trade regime, see Gary Hufbauer and Jeffrey Schott, *Payoff from the World Trade Agenda 2013* (Washington: Person Institute for International Economics, April 2013), pp. 50-51.

substantial extension of the current Global Trade Alert[291] which focuses on trade, but also takes investment measures into account, at least to a certain extent.[292] The resources required for such an effort could come from public institutions (both, national and multilateral ones) and/or from the private sector (which, after all, is most affected by these developments).

b. Facilitating the use of, and access to, the dispute-settlement mechanism

To a large extent, the legitimacy of the international investment regime is not only grounded in the regime reflecting the needs and interests of all stakeholders, but also in establishing an approach that allows all parties affected by the regime to benefit from it. A particularly important issue here is that parties have a fair opportunity to use its dispute-settlement mechanism if they feel aggrieved or if they need to defend themselves if they are respondents. If this is not the case and only, say, (relatively) big enterprises or (relatively) rich countries can de facto use the dispute-settlement mechanism effectively, the very legitimacy of the investment regime is at stake.[293] (Similar considerations played a

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[291] Global Trade Alert (GTA) is a reporting service that provides information about governmental measures, with a focus on those policies that are potentially detrimental to foreign commerce. Its monitoring includes investment measures, such as restrictions on foreign ownership of land, tax treatment, listing rules, international payments, as well as establishment restrictions. GTA is coordinated by a London-based think tank, the Centre for Economic Policy Research, and the analysis is provided by a number of different research institutes located around the world. Funding is provided by the World Bank, the Trade Policy Unit of the United Kingdom Government, the Centre for International Governance Innovation (a think tank based in Canada), the German Marshall Fund of the United States, and the International Development Research Center (a Canadian Crown corporation).

[292] Although the OECD's "Freedom of Investment Roundtable" process (involving the OECD members and a number of observers), as well as the G20-mandated monitoring procedure for both trade and investment measures undertaken by the WTO, the OECD and UNCTAD, are relevant here, both efforts are constrained by their intergovernmental nature.

[293] There is also the question of access by others, e.g., to submit *amicus* briefs. Relevant here are also issues relating to counterclaims.

role when the Advisory Center for WTO Law was established.[294]) However, the regime's current dispute-settlement structure – apart from the problems addressed earlier – entails several access issues for parties from poorer countries and small or medium-sized enterprises. As discussed above, the costs of arbitration can be prohibitively high – and those costs are greater for parties located in jurisdictions without an established arbitration center or qualified arbitrators and practitioners. As ICJ President Guillaume observed some time ago: "Access to international justice should not be impeded by financial inequality."[295] Furthermore, as international investment is increasingly affecting a wider set of stakeholders, serious consideration should be given to providing greater voice and rights of recourse to these stakeholders.

Several options exist to address these issues, including through the creation of an independent Advisory Center, the establishment of a small claims tribunal, dealing with third-party financing, and the establishment of a recourse mechanisms for a wider set of stakeholders.

i. Establishing an Advisory Center on International Investment Law

To enable relatively poor countries and countries that do not have many claims (and therefore no particular interest in having a strong in-house team) to defend themselves effectively against claims, an independent Advisory Center on International Investment Law

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[294] See, for example, the Preamble to the Agreement Establishing the Advisory Centre on WTO Law, December 1, 1999, available at http://www.acwl.ch/e/documents/agreement_estab_e.pdf ("*Recognising further* that the credibility and acceptability of the WTO dispute settlement procedures can only be ensured if all Members of the WTO can effectively participate in it[.]").

[295] Speech by H.E. Judge Gilbert Guillaume, President of the International Court of Justice, to the General Assembly of the United Nations (New York, October 30, 2001) (calling on member states of the United Nations to make further contributions to a trust fund established in 1989 to assist developing countries to bring disputes to the ICJ), *cited by* Pieter H. F. Bekker, note presented at the "Roundtable on States and State-Controlled Entities as Claimants in International Investment Arbitration," hosted by the Vale Columbia Center on Sustainable International Investment (New York, March 19, 2010).

could be established.[296] It could provide state parties with legal and administrative assistance to respond to investor claims,[297] including pre-dispute advice (such as, for example, whether a claim brought by an investor is strong and, therefore, whether it might be advisable for the respondent state to seek settlement). It could also encourage the usage of alternative dispute-resolution mechanisms (such as mediation or conciliation) and help countries build dispute prevention and conflict-management mechanisms. A broader mandate could incorporate assistance to developing countries on the negotiation of IIAs and state contracts and the strengthening of local dispute-settlement capacity, as well as training in this respect.[298] An Advisory Center of this kind could be modeled on the Advisory Centre on WTO Law, based in Geneva,[299] bearing in mind the differences between state-state disputes based on multilateral rules and investor-state disputes based on a multitude of bilateral and regional treaties.

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[296] This option was proposed by Eric Gottwald, "Leveling the Playing Field: Is It Time for a Legal Assistance Center for Developing Nations in Investment Treaty Arbitration?," 22(2) *American University International Law Review* 237 (2007); Thomas W. Wälde, "Improving the Mechanisms for Treaty Negotiation and Investment Disputes: Competition and Choice as the Path to Quality and Legitimacy" in Sauvant, 2009, *op. cit.*, p. 563 (describing the absence of any "legal aid facility" as a "serious deficiency" of the regime), *discussed by* Karl P. Sauvant, "Multinational Enterprises and the Global Investment Regime: Toward Balancing Rights and Responsibilities," *Initiative for Policy Dialogue Working Paper Series* (New York: Initiative for Policy Dialogue, 2011), pp. 4-5.

[297] Such an Advisory Center may also be of use for counterclaims and in cases involving contracts.

[298] Even independently from the existence of such an Advisory Center, technical assistance (in particular training) of especially representatives of developing countries in matters related to investment disputes -- and, for that matter, the negotiation of IIAs -- is an important matter that deserves more attention.

[299] The WTO Advisory Centre is a "legal aid" center in the form of an independent intergovernmental organization, established in 2001 in accordance with the "Agreement Establishing the Advisory Centre on WTO Law" *op. cit.* The Centre, which is independent from the WTO, provides legal services and training to developing country members or members with economies in transition, and to any member country or acceding country designated as a least developed country by the United Nations (Ibid., Annex III). The assistance provided includes pre-dispute advice and representation of states in dispute settlement proceedings. The services are provided free, or at discounted rates depending on the type of advice, level of economic development of the state and whether or not the state is a "member" of the Advisory Centre (Ibid., Annex IV). The Centre also runs a secondment program for trade lawyers to contribute to the capacity-building of developing country officials. For further information, see the Advisory Centre website, www.acwl.ch.

A modest effort in this direction in the trade sector has been undertaken at the regional level through The Office of the Chief Trade Adviser to the Pacific Forum Island Countries.[300] Moreover, discussions were also held to establish an Advisory Facility on International Investment Law and Investor-State Disputes for Latin American countries.[301] However, the negotiations on an intergovernmental agreement creating such a facility, its financial aspects and an action plan have, so far, not come to fruition. More recently, UNASUR launched an initiative for an advisory facility in conjunction with a new regional arbitration center (as an alternative to ICSID), when a working group chaired by Peru tabled several proposals in this respect at a meeting in Asuncion on October 10-11, 2012.[302] This facility would provide "legal guidance, technical assistance, research, specialized studies and legal representation in terms of investment disputes."[303]

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[300] The Office of the Chief Trade Adviser (OCTA) was established in the Pacific Island region to provide independent advice and support to the Pacific Forum Island Countries in the negotiations of the Pacific Agreement on Closer Economic Relations (PACER) Plus agreement with Australia and New Zealand (which is likely to include an investment chapter). Initial arrangements provided for annual funding of AU$ 500,000 and NZ$ 650,000 by Australia and New Zealand, respectively, for the first three years of the arrangement. However, negotiations have continued as Australia has sought to limit its funding of OCTA's work to matters relating specifically to PACER Plus. See http://www.octapic.org (last visited March 11, 2013). Moreover, it appears that this facility does not cover investment disputes.

[301] The increase in investor-state disputes has been particularly significant in Latin America. Argentina and Venezuela account for a significant number of those cases, but many other countries have become respondents as well, including Central American countries. On request of several countries in the region, an effort was therefore initiated in 2007 by UNCTAD, the Inter-American Development Bank, the Organization of American States, the Vale Columbia Center on Sustainable International Investment at Columbia University and Academia de Centroamerica (located in Costa Rica) to establish a regional Advisory Facility on Investor-State Disputes. A number of meetings and consultations were held in the framework of this project, and an in-depth feasibility study was prepared. See UNCTAD, *Consultation Report on the Feasibility of an Advisory Facility on International Investment Law and Investor-State Disputes for Latin American Countries*, (Geneva: UNCTAD, February 2, 2009). Participating countries agreed in principle about the feasibility of establishing an Advisory Facility.

[302] According to press reports, Ecuador's Undersecretary of Public Investment predicted that the arbitration facility could begin operating later in 2013; see *Wall Street Journal*, April 16, 2013.

[303] UNASUR, Proposed Operating Rules of UNASUR Arbitration Centre, art. 2, *discussed in* Fiezzoni, 2011, *op. cit.*, p. 142.

As the experience with the WTO Advisory Center demonstrates, it is possible to establish such a facility (or multiple regional facilities) if a few countries pursued this effort with determination. The views of stakeholders would have to be ascertained, including those of private law firms (who might consider such a facility unwanted competition, although there may be ways to associate them with such a facility). Establishing such a facility would of course involve a number of practical issues, such as funding, staffing and how to ensure its independence, efficiency and effectiveness.[304] If this option were to be pursued, a scoping exercise would have to be carried out to determine the needs and preferences of developing countries and to map the existing support structures in place, to make sure that an eventual new institution filled important gaps. In particular, regional centers (with staff that speak regional languages) could specialize in addressing the concerns of their constituents.

ii. Considering a small claims settlement court

To facilitate "access to justice" for smaller enterprises that feel aggrieved, consideration could perhaps be given to the establishment of a small claims settlement court/facility/procedure tailored to adjudicate small claims in a cost-effective and timely manner, akin to small claims courts in many national jurisdictions. Such a process could take the form of an expedited or "fast-track" arbitration, and could be coordinated around regional centers. This approach could also incorporate alternative dispute-resolution mechanisms, such

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[304] Lessons can also be drawn from approaches to funding developing country access to the International Court of Justice (ICJ) and the International Tribunal for the Law of the Sea (ITLOS). For example, Cesare P. R. Romano has observed that the ICJ Trust Fund the fund has only occasionally been used. This is partly due to the complex procedure required for developing countries to benefit from the fund, and because of the limited contributions made by donors. More importantly, however, the funds cannot be accessed when a dispute has been brought unilaterally by a party. By contrast, the voluntary fund established to facilitate access to the ITLOS has less stringent access requirements. See the discussion in Cesare P. R. Romano, "International Courts and Tribunals: Price, Financing and Output" in Stefan Voigt, Max Albert & Dieter Schmidtchen (eds.), *International Conflict Resolution* (Tübingen: Mohr Siebeck, 2006), pp. 198-199. Any financial or technical assistance provided to state parties in the international investment context would need to ensure that the process for application is straightforward, that conditions for access do not undermine its effectiveness or indirectly discriminate against particular states and that an adequate provision of funds to support the service is secured in advance.

as mediation; conflict-management mechanisms (such as those described earlier in reference to Peru) could be particularly helpful here. In its favor, a facility tailored for smaller entities could provide an independent mechanism for those who need it the most – small and medium-sized enterprises that cannot marshal the political influence or financial resources to address unfair treatment through existing means. On the other hand, it could be argued that a small claims settlement process may further the diversion of judicial activities from local courts, undermining the development of local capacity and decision-making. Moreover, having such a facility could lead to an increase of claims, overwhelming the court; governments may therefore not be interested in establishing it.

iii. Dealing with third-party financing

Larger companies, often for reasons of opportunity costs,[305] may not always take advantage of international arbitration when they feel that they have a claim.[306] Here, the rise of third-party financing of claims has opened an opportunity for enterprises in such a position.[307] At the same time, and for similar reasons as in a domestic court context, this development has been controversial.[308] As a third-party funder generally has no direct interest in the substantive issues in the arbitral proceedings, there are concerns that the

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305 See the discussion by Eric De Brabandere and Julia Lepeltak: Even where (larger) MNEs have the resources to use the investor-state dispute-settlement system, they "may be unwilling to allocate their own resources to finance such lengthy and costly proceedings, and instead prefer to invest in other new opportunities within their normal business activities," and "the inherent uncertainty [of gaining the award] ... may warrant a transfer of the risk of the proceedings to a third party." "Third-Party Funding in International Investment Arbitration," 27(2) *ICSID Review* 379 (2012), p. 379.

306 Third-party funding is typically not available to smaller enterprises as these normally have smaller claims; hence financial calculations may not make it interesting for third-party funders to back claims by smaller firms.

307 Lisa Bench Nieuwveld & Victoria Shannon, *Third-Party Funding in International Arbitration* (Alphen: Kluwer, 2012).

308 Susanna Khouri, Kate Hurford & Clive Bowman, "Third-Party Funding in International Commercial and Treaty Arbitration -- A Panacea or a Plague? A Discussion of the Risks and Benefits of Third-Party Funding," 8(4) *Transnational Dispute Management* 1 (2011); Joseph M. Matthews & Maya Steinitz, "Editorial: TDM Special Issue: Contingent Fees and Third Party Funding in Investment Arbitration Disputes," 8(4) *Transnational Dispute Management* 1 (2011); CEO & TNI, *op. cit.*, pp. 56-63.

profit motive will override the normal factors that might encourage parties to resolve a dispute through negotiations (reducing risk, maintaining relationships, etc.).[309] Others point out the potential for third-party funding to increase access to justice, to manage risks better and to contribute expertise for the assessment of a claimant's prospects and the conduct of a claim itself.[310] They emphasize that domestic third-party funding has been accepted in many jurisdictions, where it is supported by legal or regulatory frameworks that mitigate some of its detrimental effects.[311] One example may be to require that all third-party funding arrangements be disclosed to panels and to counterparties. This could help to address the potential influence of funders on the conduct of disputes. However, since arbitrators generally do not have powers to issue orders against third parties, regulating the conduct of funders of international investment disputes will require action by states – and a cohesive framework would require multilateral cooperation.[312] The situation is complicated and may require an international working group of interested stakeholders, to identify the key risks of third-party funding and to formulate a coherent response to those risks (e.g., through model BIT provisions, a code of conduct or guidelines for domestic regulation of funders).

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309 National Association of Mutual Insurance Companies (NAMIC) State & Policy Affairs Department, "Third-Party Litigation Funding: Tipping the Scales of Justice for Profit" (2011), *discussed in* Khouri, Hurford & Bowman, *op. cit.*, p. 2.

310 Khouri, Hurford & Bowman, *op. cit.*, pp. 3-5.

311 Ibid., p. 2.

312 Ibid., p. 10. Action could also be taken by the funders themselves, or indirectly through the procedural and substantive requirements of dispute-settlement provisions. Investor-state dispute-settlement provisions could also require that the key terms of any funding agreement be disclosed to the tribunal, and taken into account (or not) by arbitrators when awarding costs. Note that a failure to disclose participation of a funder in an arbitration may be a breach of the procedural good faith implied as part of an agreement to arbitrate. However, no tribunal has gone that far yet, and it is difficult to identify or distinguish the types of third-party funding that might warrant disclosure and the types that might not. In many cases, this would require access to a third-party funding contract, assuming one exists. De Brabandere & Lepeltak, *op. cit.*, p. 2, suggest that it may be necessary for "tribunals to be involved in and discuss the influence and power of a third-party funder, for instance when deciding on the allocation of costs." See also Khouri, Hurford & Bowman, *op. cit.*, pp. 9-11. But see the decisions of the ad hoc committee in *RSM Production v. Grenada*, ICSID Case No. ARB/05/14, Award, March 13, 2009, para. 68, and of the tribunal in *Ioannis Kardassopoulos and Ron Fuchs v. Georgia*, ICSID Case Nos. ARB/05/18 and ARB/07/15, Award, March 3, 2010, para. 691, stating that they knew of no principle requiring that a third-party financing arrangement be taken into consideration when determining the allocation of costs in an arbitration.

iv. Recourse mechanism for a wider set of stakeholders

In order to give greater voice and participation to a wider set of stakeholders, consideration could be given to the establishment of a recourse mechanism for anyone who may be affected by international investment activities. The Inspection Panel of the World Bank, the public submission process of the North American Agreement on Environment and Cooperation (NAAEC) within the context of NAFTA and the complaint system under the OECD Guidelines on Multinational Enterprises (MNEs), provide examples of such mechanisms.[313] These mechanisms are normally linked to a variety of policies, obligations or guidelines that may be imposed on international organizations, states or MNEs. For example, the Inspection Panel of the World Bank is linked to specific policies and procedures imposed on the Bank in order to ensure that Bank-financed operations avoid and minimize social and environmental harm. The NAFTA public submission process permits NGOs to submit claims alleging that a NAFTA Party is failing to effectively enforce its own environmental laws. The OECD complaint process allows members of the public to submit enquiries or complaints with "national contact points" established by governments to deal with specific instances of business conduct that may not be in line with the norms of conduct set out in the OECD Guidelines on MNEs. Accordingly, while establishing a recourse mechanism would increase the voice and participation of a wider set of stakeholders in international investment activities, it would require the identification of the relevant norms, processes and institutions.

Overall, and to conclude this set of options, having access to transparent and impartial information about the regulatory measures being promulgated by states, having access to justice and being able to defend oneself are important dimensions of the legitimacy of any regulatory regime. Hence, making sure that this is the case -- and that all parties benefit from the international investment regime -- is an important consideration bearing on its future evolution.

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313 See, Peter Lallas "International investment activities: Giving affected people a greater voice and rights of recourse", in J Nakagawa (ed.), *Transparency in International Trade and Investment Dispute Settlement* (Routledge, 2013), at pp. 159 et seq.

5. Commencing intergovernmental processes

Intergovernmental negotiations relating to international investment are being held on a continuous basis at the bilateral and regional levels, in the context of negotiating IIAs. Governments can do a number of things at these levels to change the substantive content and procedural aspects of their IIAs and, in this manner, influence the overall character of the regime. For example, they can take new developments into account when negotiating new agreements (e.g., clarifying specific concepts), they can issue clarifications or engage in an "interpretive dialogue"[314] and they can renegotiate agreements (instead of simply extending existing ones).[315] All this is part and parcel of the process of putting intergovernmental investment relations into the framework of law.

But negotiators still face the challenge that, as was pointed out earlier, international investment does not receive the kind of attention by decision-makers that it deserves and that bilateral or even regional agreements may not do justice to a global phenomenon. Some developments (such as the rising number of disputes, especially costly ones, and the denunciation of IIAs mentioned earlier) are raising the profile of the investment issue, and some of the options presented in other parts of this section (e.g., international hearings) conceivably could help to do the same. At the same time, though, the international investment issue is a complicated one, for a number of reasons. As noted above, some problems are linked to the "underlaps" and "overlaps" in investment regulation (between states and across subject matters), compared to the opera-

[314] Roberts, *op. cit*., pp. 194ff.

[315] For example, UNCTAD undertakes, upon request, (confidential) reviews of countries' IIAs to identify inconsistencies, gaps and overlaps and to provide recommendations. Based on its investment framework, *op. cit*., possible follow-up work includes assisting in the drafting of model clauses, modernizing model treaties and helping address the challenges of formulating new IIAs and their implementation. These IIA-specific reviews also include recommendations about possible ways to foster dispute prevention policies and alternative dispute resolution.

tional reach of international investors.[316] Other issues arise from the multiplicity of legal sources, including the legal effects of binding IIAs that exhibit significant similarities, but also have important differences. In both cases, while the origin of these issues is international, the complexity they create threatens to undermine key aims of the regime – an individual state's ability to establish and maintain, domestically, the transparency and predictability that international investors need for long-term investment decisions, while maintaining the state's right to regulate to pursue legitimate public policy objectives. The underlying question, therefore, is whether a global phenomenon calls for a global solution.

If the answer to this question is "yes," one needs to look for options at the multilateral and purilateral levels. This, too, is not an easy task as the current regime has grown on the basis of its own momentum and, not surprisingly, shows therefore a path dependency that is difficult to overcome – unless and until, perhaps, there is an imminent threat that the regime itself could unravel, whether wholly or partially.

In the end, of course, it is for governments to decide whether or not they want to engage in multilateral or plurilateral negotiations on investment and, if so, how and where they want to do that.

a. At the multilateral level: Organizing an informal meeting of ambassadors to the WTO

If history is any guide, negotiating a **multilateral framework on investment** would be a challenging task under any conditions: All past efforts have come to naught. (The concept of "framework" has been chosen here deliberately as it leaves open whether such an agreement would merely constitute a framework with minimum rights and obligations that needs to be filled out through further negotiations, or whether it would be a treaty covering the range of in-

[316] The recent debate on issues related to the taxation of multinational enterprises testifies to the saliency of this issue. See, e.g., George Osborne, Pierre Moscovici & Wolfgang Schäuble (respectively Ministers of Finance of the United Kingdom, France and Germany), "We Are Determined that Multinationals Will Not Avoid Tax," Letter to the Editor, *Financial Times*, February 16, 2013.

ternational investment issues.[317]) Moreover, the WTO's Doha Round currently dominates multilateral economic policy-making.[318] Until this Round has come to an end, it is not likely that countries will be prepared to launch another effort, especially one that involves a controversial issue and would involve parties that are likely to approach negotiations with different levels of ambition. Also, it would have to be established that a multilateral framework is needed and that it would provide (for all countries and especially smaller ones) a more favorable arrangement than bilateral or regional agreements; it would also have to be clear what its purpose(s) should be, since (just as for bilateral IIAs) the substantive contents of such an agreement would flow from its purpose(s). Finally, and learning from past efforts, any multilateral negotiations would need to be undertaken on a transparent and consultative basis. However, at the present time, there seems to be no interest in the WTO to address the full spectrum of investment issues.[319] Moreover, seeking to move forward on the multilateral level and not succeeding to do so could prejudice a similar effort at a later date.

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317 As, for example, in the case of the United Nations Framework Convention on Climate Change (UNFCCC) (Nairobi and Geneva: UNEP/WMO Information Unit on Climate Change, 1992).

318 Beyond that, key countries are preoccupied with the negotiation of major regional or plurilateral trade agreements with investment chapters (especially the Trans-Pacific Partnership Agreement and International Services Agreement), as well as major bilateral investment agreements. See the discussion below.

319 Interviews by the authors in Geneva in January 2013. This echoes UNCTAD's assessment from several years ago. As UNCTAD concluded in its *International Investment Rule-Making: Stocktaking, Challenges and the Way Forward* (New York and Geneva: UNCTAD, 2008), pp. 4-5: "Existing challenges are largely due to *system-immanent deficiencies* inherent in the IIA universe. As long as it continues to be highly atomized, there is limited prospect for achieving a substantially higher degree of homogeny, transparency and recognition of legitimate development concerns. There is a risk that the system eventually degenerates into an increasingly non-transparent hodgepodge of diverging rules that countries, especially capacity-constrained developing countries, find more and more difficult to cope with. These deficiencies could be effectively addressed only by an evolution of the IIA system itself. Therefore, an international investment framework remains an important goal, although there is currently little prospect to make substantial progress in this area." UNCTAD reiterated this assessment in 2013: "There is currently no appetite for negotiating a binding multilateral framework for investment." See, UNCTAD, "Towards a New Generation", *op. cit.*, p. 6.

On the other hand, a few informal discussions seem to be beginning about a new WTO agenda, and such an agenda could conceivably include investment,[320] as also advocated in some quarters.[321] Several of the changing circumstances discussed in section C may influence the outlook of a number of countries on a multilateral framework on investment, including especially the rise of a number of emerging markets as important outward investors, the efforts of key traditional home countries to circumscribe investment protections that lend themselves to expansive interpretations (potentially restricting the right to regulate) and changing expectations concerning the role of international investment in sustainable development. This may make it opportune to convene an **informal meeting of ambassadors to the WTO** to discuss, away from Geneva, the range of issues related to international investment rule-making, to obtain their views about this issue and to put them in a better position to take decisions on this subject in the future.

Then there is the question of the intergovernmental forum for informal exchanges of views and/or negotiations on investment. There are three intergovernmental organizations – the WTO, UNC-

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[320] Interviews by the authors in Geneva in January 2013.

[321] See a report to the ICC Research Foundation, released in April 2013, in which the authors observed that "the WTO can do useful work preparing the ground for a multilateral framework" for investment; see, Gary Hufbauer and Jeffrey Schott, *Payoff from the World Trade Agenda 2013* (Washington: Person Institute for International Economics, April 2013), p. 50. During the same month of April, the ICC adopted during its 2013 World Trade Agenda Summit in Doha its "Business Priorities". This agenda included as one of five priorities, in a section that looked beyond the WTO Doha Round, the folowing recommendation: "Encourage moving towards a high-standard multilateral framework for international investment to support economic growth and development, while preserving the level of protection provided under existing internaional agreements". See, ICC, "Business Priorities", available at footnote 22, available athttp://www.iccwbo.org/Advocacy-Codes-and-Rules/Document-centre/1999/World-business-priorities-for-a-new-round-of-multilateral-trade-negotiations/http://www.iccwbo.org/Data/Documents/Global-Influence/World-Trade-Agenda/ICC-WTA-Draft-Trade-Recommendations/. Similarly, the World Economic Forum Global Agenda Council on Trade and Foreign Direct Investment released, in June 2013, a report entitled *Foreign Direct Investment as a Key Driver for Trade, Growth and Prosperity: The Case for a Multilateral Agreement on Investment* (Geneva: WEF, 2013) which, as its title indicates, calls for a multilateral agreement on investment. While not all national chapters of the ICC may support this approach equally strongly, the statement does seem to signal that the international business community, a key stakeholder, is in support for a multilateral framework for investment.

TAD and the OECD – that are potential venues for this purpose, and each has certain advantages and disadvantages.

Assuming that the desired outcome is to arrive at a legally binding and enforceable multilateral instrument, the WTO would be one of the most suitable organizations in which to negotiate. This might be supported by the Organization's capacity both for multilateral negotiations as well as the enforcement of treaty obligations. It is certainly true that the Doha Round negotiations have faced enormous difficulties; however, these seem to have been due mainly to the specifics of the agenda itself and how it is structured, rather than the Organization's capacity to conduct negotiations. Moreover, when it comes to enforcement, the WTO has a good record.[322] The possibility of cross-sectoral retaliation in the framework of the Organization's Dispute Settlement Understanding[323] provides a deterrent against non-compliance with legal obligations – but precisely this possibility may be of concern to a number of members of the Organization, as could be the possibility on the part of some countries that access to markets in, say, developed countries could be conditioned on investment access in, say, emerging markets. Furthermore, this would not be the first instance in which the WTO would address investment-related issues. The Agreement on Trade-Related Investment Measures (TRIMs) deals with one specific aspect of investment and, more importantly, the General Agreement on Trade in Services (GATS) already contains legal obligations regarding some aspects of international investment, insofar as they relate to the supply of services through commercial presence (mode 3).[324] In addition, while the Doha Round negotiations on the relationship between trade and investment were discontinued as the result of a WTO decision in the aftermath of the Cancún Minis-

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[322] One of the main reasons why the TRIPS Agreement was negotiated within the multilateral trading system was the effectiveness of the Organization's enforcement of international treaty obligations.

[323] WTO Agreement, *op. cit*.

[324] It should be noted in this context that nearly two-thirds of the world's FDI inward stock and flows were in the services sector in 2010. See UNCTAD, *WIR*, 2012, *op. cit*., Annex Tables 24, 26. For a comparison of BITs and the GATS, see Rudolf Adlung & Martin Molinuevo, "Bilateralism in Services Trade: Is There Fire Behind the (BIT-)Smoke?," 11(2) *Journal of International Economic Law* 365 (2008).

terial Conference in 2003,[325] the early WTO process on investment would provide a useful information base and could be a helpful starting point in considering what might be a sound way forward, should member states decide to take up the subject again.[326] Having said that, it should be noted that the Organization's expanding (although not universal) membership, combined with shifts in geo-political forces, have added to the complexity of negotiations in the WTO; in any event, until the Doha Round is concluded in one way or another, it is not likely (as mentioned earlier) that new issues will be taken up. Moreover, introducing investor-state dispute-settlement into the WTO would be a challenge for an organization that is based on state-to-state dispute resolution. A further difficulty is to distinguish between having informal "preliminary discussions" and starting actual negotiations: If a dialogue starts in the WTO, it could well be perceived as a first step in negotiations and, in this manner, inhibit free discussions.

UNCTAD, for its part, is the United Nations focal point for all matters dealing with investment and development, including IIAs. It benefits from an established intergovernmental consensus-building process, through its World Investment Forum and its Investment Commission. Its Investment Division has a stock of research and a critical mass of expertise accumulated over the past four decades covering the full spectrum of investment issues. It has an extensive technical assistance and capacity-building program (which constitutes an important part of rule-making and implementation), a large network of development stakeholders (which is indispensable as part of a multilateral consensus building) and, most importantly, long standing credibility in the international investment community in both developing and developed countries. Moreover, even in the absence of multilateral negotiations, UNCTAD has already embarked on building consensus through its recently launched Investment Policy Framework for Sustainable Development,[327] which provides guidance for formulating investment policies at the national,

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325 WTO, Decision Adopted by the General Council on August 1, 2004, WT/L/579, (August 2, 2004) para. 1(g), available at http://www.wto.org/english/tratop_e/dda_e/ddadraft_31jul04_e.pdf.

326 Strictly speaking, the WTO Working Group on Trade and Investment, while dormant, could be revived if member countries so decide.

327 IPFSD, *op. cit*.

bilateral and regional levels, and could be one basis for consensus at the multilateral level. However, there is skepticism by a number of developed countries negotiating investment issues in the realm of the United Nations. This, however, does not necessarily imply that preliminary discussions, consensus-building and pre-negotiation capacity building could not be undertaken in UNCTAD, considering in particular its core competencies mentioned earlier.

The OECD, too, has played an important role with respect international investment in general and investment agreements in particular. Its 1967 OECD Draft Convention on the Protection of Foreign Property[328] was the template for the first generation of BITs. In the late 1980s and early 1990s, it hosted negotiations on a Multilateral Agreement on Investment, which produced a wealth of information regarding possible investment rules reflecting changing circumstances, although no agreement was achieved in the end. Since then, its Investment Committee -- and, more recently, its Freedom of Investment Roundtable -- have resulted in substantial work on various aspects of investment rules, including provisions on dispute settlement, most-favored-nation treatment, national security, fair and equitable treatment, and indirect expropriation. The Organisation also has a comprehensive set of guidelines on responsible business conduct[329] and due diligence in minerals supply chains,[330] which include innovative dispute-resolution mechanisms through national contact points. OECD membership has, and continues, to expand; the number of non-members adherents to its investment instruments is growing; and its Freedom of Investment Roundtable includes active participation by Brazil, China, Russia, South Africa, and other non-member countries. Nonetheless, the OECD is not a universal membership organization and is perceived in some quarters to be attuned primarily to the interests of developed economies -- which would raise doubts whether it alone could host negotiations.

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328 OECD, Draft Convention, *op. cit*.

329 OECD, Guidelines for Multinational Enterprises, *op. cit*.

330 OECD, *Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas* (2nd ed., preliminary version, Paris: OECD, 2012), available at http://www.oecd.org/daf/inv/mne/GuidanceEdition2.pdf.

It might, however, be an option to have a process serviced by a group of intergovernmental organizations, [331] although this is not always easy to do effectively. Such a group could consist not only of representatives of the above-mentioned three organizations (and, for that matter, ICSID), but also from such regional efforts dealing with international investment matters as, for example, ASEAN,[332] MERCOSUR[333] and SADAC.[334] (This assumes of course that the organizations involved would receive a mandate from their respective governing bodies to support such an effort, although informal arrangements may also be conceivable.) Together, these organizations could provide a "comfort zone" for investment discussions and ensure universal, inclusive and transparent participation by all countries and stakeholders, so as to establish legitimacy and development focus.

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331 Note that the UNCTAD, WTO and OECD Secretariats are cooperating in preparing reports for the G20 on investment policies, *op. cit*.

332 ASEAN Comprehensive Investment Agreement, February 26, 2009, Cha-Am, Thailand, available at http://www.asean.org/22244.htm.

333 Protocol of Colonia for the Promotion and Reciprocal Protection Of Investments in Mercosur (January 17, 1994) MERCOSUR/CMC/DEC No 11/93, available at http://www.cvm.gov.br/ingl/inter/mercosul/coloni-e.asp.

334 SADC, Protocol on Finance and Investment (August 18, 2006) available at http://www.sadc.int/files/4213/5332/6872/Protocol_on_Finance__Investment 2006.pdf.

b. At the plurilateral level: Launching an open stand-alone intergovernmental process

The lack of a compelling forum to conduct multilateral discussions and/or negotiations does not exclude, as another option, that one or two countries – or a group of interested (preferably developed and developing) countries – initiate an open stand-alone intergovernmental process[335] to explore the desirability and feasibility of a plurilateral approach (which may eventually turn into a multilateral approach), beginning with the purpose of such an approach. Apart from any newly created ad hoc group, the G8 and the G20 could be potential candidates for launching such a process (or encouraging its launch). The G8, however, has the disadvantage that it does not include any developing countries; any initiative by it,

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[335] Such an approach is not new. For example, in 1996 a group of governments, later to be known as the Core Group (initially composed of Austria, Belgium, Canada, Ireland, the Philippines, Mexico, the Netherlands, Norway, South Africa, and Switzerland, but later also including Brazil, Colombia, France, Malaysia, New Zealand, Portugal, Slovenia, the United Kingdom, and Zimbabwe), dissatisfied with the lack of progress in the Geneva-based Conference on Disarmament, took the lead in establishing, independently from the Conference on Disarmament, a negotiating process on a mine-ban convention (and they underwrote the budget). Many other governments joined later, culminating in more than 100 delegations attending the signing ceremony of the Ottawa Treaty in 1997 (Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction, signed December 3, 1997, entered into force on March 1, 1999, Ottawa, Ontario, Canada), even though such key countries as China, Egypt, Russia, and the United States did not sign the Convention. See the discussion of the influence of the Core Group in Steffen Kongstad, "The Continuation of the Ottawa Process: Intersessional Work and the Role of Geneva," 4 *Disarmament Forum* 57 (1999), p. 58. Similarly, while the United Nations General Assembly established in 1990 the Intergovernmental Negotiating Committee for a Framework Convention on Climate Change and adopted the Convention in May 1992, the negotiations were serviced by a stand-alone independent interim secretariat that was not part of the United Nations structure. One of the reasons the negotiations proceeded so rapidly was that governments could draw on earlier preparatory work undertaken by the Intergovernmental Panel on Climate Change. UNFCCC, *op. cit.*, p. 1. It should be noted, however, that the Framework Convention was, as its name implies, only a "framework"; more specific commitments (e.g., on emission limitations) followed later. The International Services Agreement being mooted in Geneva also seems to involve a process independent from the WTO, whereby a conditional plurilateral agreement would be negotiated by interested parties, and lodged for future accessions by other states. See Chakravarthi Raghavan, "The Plurilateral Service Agreement Game at the WTO," 47(43) *Economic and Political Weekly* (2012).

therefore, is not likely to find favor with developing countries.[336] The G20, on the other hand, includes a wide spectrum of important countries from all groups of countries;[337] together, they accounted for about 70% of the world's inward FDI flows and about 80% of its outward FDI flows during 2010-2011.[338] Moreover, the Group has addressed the international investment issue in its communiqués.[339] If the G20 were to take up this issue, it could simply encourage the initiation of an exploratory process as to

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[336] However, the G8 had established the Heiligendamm process on investment. In its framework, a number of important developing countries participated in investment discussions with representatives of the G8, to explore, among other things, whether there is common ground regarding rule-making in the investment area. The last meeting in the framework of this process had taken place (as of May 13, 2013) in April 2012.

[337] One drawback of the G20 may be that it consists of Finance Ministers, and these are not necessarily responsible for international investment in all countries -- part of the problem that international investment does not have a ministerial-level institutional focus in most countries.

[338] The Members of the G20 are Argentina, Australia, Brazil, Canada, China, France, Germany, India, Indonesia, Italy, Japan, the Republic of Korea, Mexico, Russia, Saudi Arabia, South Africa, Turkey, the United Kingdom, the United States plus the European Union, which is represented by the President of the European Council and by Head of the European Central Bank.

[339] During the first G20 Trade and Investment Promotion Summit held in Mexico City on November 5-6, 2012, participants "agreed to establish a platform for the regular exchange of experiences and good practices in trade-investment promotion and policy advocacy." UNCTAD, *G20 Fosters Synergies Between Trade and Investment Promotion*, November 12, 2012, available at http://unctad.org/en/pages/newsdetails.aspx?OriginalVersionID=351. One strength of the G20 is its role as a platform not only for states, but also for the business community. On December 12, 2012, the Russian Union of Industrialists and Entrepreneurs hosted the first meeting of the Business 20 Working Group on Investment and Infrastructure, which focused on the potential for joint investments between G20 members' governments and multinational enterprises as a catalyst for economic growth and recovery. Russia G20, "Moscow Hosted a Meeting of the Business 20 Working Group on Investment and Infrastructure," December 12, 2012, available at http://www.g20.org/news/20121212/781066016.html; see also the earlier discussion in the context of investment protectionism: During its many Summits, the G20 has consistently noted its commitment "to resisting protectionism in all its forms" and individual countries have taken many "investment and investment-related measures made in response to this mandate." OECD and UNCTAD, *Eighth Report on G20 Investment Measures* (2012), available at http://unctad.org/en/PublicationsLibrary/unctad_oecd2012d8_en.pdf; see also UNCTAD, *Joint UNCTAD-OECD Reports on G20 Investment Measures*, available at http://unctad.org/en/Pages/DIAE/G20/UNCTAD-OECD-reports.aspx. The main G20 event for 2013 will be the summit held in St. Petersburg on September 5-6, 2013. Russia G20, *Leaders' Summit 2013*, available at http://www.g20.org/docs/summit/summit_2013.html.

the desirability and feasibility of a plurilateral/multilateral framework on investment. Going further, it could give some overall political guidance (as the European Union and the United States did in respect to their own negotiations).[340] For example, it could recognize that the present regime can be improved; it could indicate the purpose(s) that IIAs should serve; and it could confirm, for instance, a number of core principles such as the importance of protection, the right to regulate, the need for responsible business conduct, and the need to have an adequate dispute-settlement process.[341] This could set an intergovernmental process in motion (perhaps serviced by staff from international and regional organizations with competence in the investment area) in which other countries could participate and that could lead, for example, to the clarification of key concepts in IIAs, issues related to dispute settlement and issues related to the institutional framework of the international investment regime – even if it does not lead to the creation of a multilateral framework on investment.[342]

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Any intergovernmental negotiating process, whether undertaken on a multilateral or plurilateral level, could be supported (or preceded) by an international consensus-building process similar to the one pursued in the preparations of the "Guiding Principles for Business and Human Rights"[343] (and which could include a number of the options mentioned earlier). The Guiding Principles were de-

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340 See their "Statement on Shared Principles for International Investment," which lists seven broad principles for investment liberalization and protection. See European Commission, Press Release, "EU and US Adopt Blueprint for Open and Stable Investment Climates," *op. cit.*; EU-US Statement, *op. cit*.

341 The EU-US Statement, *op. cit*., for example, affirmed that both parties would pursue: (i) open and non-discriminatory investment climates, (ii) a level playing field, (iii) strong protection for investors and investments, (iv) fair and binding dispute settlement, (v) robust transparency and public participation rules, (vi) responsible business conduct and (vii) narrowly-tailored reviews of national security considerations.

342 Anders Åslund suggested that the "G-20 should give the necessary political impetus to an MIA [Multilateral Investment Agreement] negotiation at its St. Petersburg Summit in September 2013"; in his view, "an MIA would have to be a plurilateral agreement within the framework of the WTO and not a universal one." Anders Åslund, "The World Needs a Multilateral Investment Agreement," *Policy Brief*, No. PB13-01 (2013), p. 7.

343 Principles on Business and Human Rights, *op. cit.*

veloped during the second phase of the Special Rapporteur's mandate on Business and Human Rights, with a focus on supporting the "Protect, Respect, and Remedy" Framework already developed. A broad and extensive program of stakeholder consultations helped to ensure a robust set of principles, and also to gather support and buy-in.[344] In fulfilling the mandate to prepare the Guiding Principles, 47 international consultations were held (on all continents), and "the Special Representative and his team [visited] business operations and local stakeholders in more than 20 countries."[345] In addition, some of the principles were "road-tested" through pilot programs, for example, to establish effectiveness criteria for non-judicial grievance mechanisms involving business enterprises and communities.[346] This process benefitted, among other things, from the low profile that this particular undertaking had at the beginning – an advantage that any undertaking on a plurilateral/multilateral investment framework most likely would not have. Still, the success of this process has established a template for multi-stakeholder consensus-building in the investment area.

c. A template might be emerging from key negotiations

The key question is, therefore, whether governments are ready for the major step of engaging themselves in broader intergovernmental processes, especially in having intergovernmental negotiations on investment, even within a limited framework and in an informal forum, and whether important stakeholder groups support such an endeavor. Or should the focus be more modest for the time being and explore other options, such as ascertaining the views of stakeholders on investment issues and the solutions they propose (e.g., in the framework of international hearings); seeking to prepare a model international investment agreement; establishing various international Working Groups to build consensus on key issues; and/or establishing specific mechanisms to improve the investment

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[344] Useful lessons may also be learned from the several review processes that individual countries have recently undertaken with regard to their international investment law and policy programs (such as South Africa, Australia, the United States).

[345] Ibid., para. 8.

[346] Ibid., para. 11.

regime. Each of these latter activities would also be of immediate relevance to ongoing bilateral and regional investment negotiations – and ultimately also to a multilateral or plurilateral approach.

Any decision on the foregoing must also consider that a number of important countries are currently (as of May 2013) engaged in bilateral and regional investment negotiations, suggesting not only that the investment regime is in flux (including because these negotiations offer opportunities to introduce changes), but also that these negotiations could lead to a certain harmonization in the substantive content and procedural approaches of IIAs – resulting perhaps in a de facto model approach.[347] Particularly relevant are here the Trans-Pacific Partnership negotiations;[348] the Regional Comprehensive Economic Partnership Agreement in Asia,[349] the FTA negotiations of Canada with the European Union (which also cover

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[347] This may also occur in the context of the renegotiation of existing IIAs, which are becoming more frequent, because a great number of old treaties are reaching their termination date. But renegotiations can also take place in other contexts, e.g., when both parties agree to do so (as in the case of the United States-Uruguay BIT, which was renegotiated in 2005 prior to Uruguay's ratification, *discussed in* Salacuse & Sullivan, *op. cit*., p. 78. Moreover, BITs can be terminated if both parties agree, although the survival clause may apply. See Martin Shabu, "Czechs Face Uphill Battle To Cancel US Investment Treaty," *CzechPosition.com*, April 7, 2011, http://www.ceskapozice.cz/en/news/politics-policy/czechs-face-uphill-battle-cancel-us-investment-treaty?page=0%2C2%2C1). For example, the Australia-Chile BIT was terminated when the two countries concluded a free trade agreement. See Australia-Chile FTA, Annex 10-E.

[348] See the leaked draft of the Trans-Pacific Partnership (TPP) investment chapter: Citizens Trade Campaign, "Newly Leaked TPP Investment Chapter Contains Special Rights for Corporations," June 13, 2012, http://www.citizenstrade.org/ctc/blog/2012/06/13/newly-leaked-tpp-investment-chapter-contains-special-rights-for-corporations/. See also Julien Chaisse "The regulation of investment in the TPP : Towards a defining international agreement for the Asia-Pacific region" in J Calamita (ed.) *Current Issues in Investment Treaty Law V* (London: British Institute of International and Comparative Law, 2013)

[349] Involving the ASEAN countries, as well as Australia, China, India, Japan, New Zealand and the Republic of Korea; the agreement is meant to cover investment issues and is epected to be concluded at the end of 2015. See, UNCTAD, *Investment Policy Monitor*, no. 9 (March 2013), p. 8.

investment),[350] India and Japan; the BIT negotiations of China with the United States[351] and possibly the European Union;[352] the European Union negotiations with India and Japan,[353] as well as the United States on a Transatlantic Trade and Investment Partnership;[354] and the BIT negotiations of India with the United States.[355] Notwithstanding this activity, note that Brazil is not negotiating BITs, that South Africa has declared that it would "refrain from entering into BITs in future, except in cases of compelling economic and political

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[350] At the beginning of 2013, Canada and the European Union were in the process of agreeing on a Comprehensive Economic and Trade Agreement, which will include an investment chapter. See EC Trade, "Canada," available at http://ec.europa.eu/trade/creating-opportunities/bilateral-relations/countries/canada/ (last updated January 15, 2013).

[351] China and the United States began negotiating a bilateral investment treaty in June 2008. See Karl P. Sauvant & Huiping Chen, "A China-US Bilateral Investment Treaty: A Template for a Multilateral Framework for Investment?," 85 *Columbia FDI Perspectives* (December 17, 2012) for a brief discussion of the main issues.

[352] See the "Roadmap" released by the European in March 2012: DG Trade, *ROADMAP: EU-China Investment Relations*, (2012), available at http://ec.europa.eu/governance/impact/planned_ia/docs/2012_trade_03_china_investment_agreement_en.pdf.

[353] EU Member States agreed to begin negotiations for an agreement with Japan on 29 November 2012. See EC Trade, "Japan," available at http://ec.europa.eu/trade/creating-opportunities/bilateral-relations/countries/japan/. European Commission, "EU-Japan Free Trade Agreement: Commissioner De Gucht Welcomes Member States' Green Light To Start Negotiations," November 29, 2012, available at http://trade.ec.europa.eu/doclib/press/index.cfm?id=847; see also European Commission, EU Trade, "Overview of FTA and Other Trade Negotiations," February 5, 2013, available at http://trade.ec.europa.eu/doclib/docs/2006/december/tradoc_118238.pdf, pp. 3-4.

[354] Memorandum, European Commission, "Statement from United States President Barack Obama, European Council President Herman Van Rompuy and European Commission President José Manuel Barroso," MEMO/13/94, February 13, 2013, available at http://europa.eu/rapid/press-release_MEMO-13-94_en.htm; European Union Memorandum, "European Union and United States To Launch Negotiations for a Transatlantic Trade and Investment Partnership," MEMO/13/94, February 13, 2013, available at http://trade.ec.europa.eu/doclib/press/index.cfm?id=869.

[355] Anirban Bhaumik, "India, US Set To Sign Bilateral Investment Treaty," *Deccan Herald* (New Delhi), October 1, 2012, http://www.deccanherald.com/content/282459/india-us-set-sign-bilateral.html (quoting Nirupama Rao, Ambassador of India to the United States, who explained that the two countries were working toward progressing a bilateral agreement that would "enhance transparency and predictability for investors, and support economic growth and job creation in both countries").

circumstances”,[356] and that India has suspended (triggered by difficulties with the dispute-settlement process) all BITs negotiations until a review of the country’s Model BIT has been carried out and completed.[357] In addition, the European Union is in the process of establishing its own approach to international investment negotiations in light of the provisions of the Lisbon Treaty.[358]

These negotiations, if successful, could create important data-points for future negotiations. Conceivably, they could lead to a narrowing in the differences for key provisions (including, for example, the clarification of central protection standards, delineating the contours

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[356] “Speaking Notes for Minister [Robert Davies, Minister of Trade and Industry] at the Discussion of UNCTAD’s Investment Policy Framework for Sustainable Development (IPFSD), Geneva, Switzerland, 24 September 2012,” mimeo., p. 5, *reprinted in* 69 *South Bulletin* (21 November 2012), pp. 7-8. The same statement says that the Cabinet “Instructed that all ‘first generation’ BITs which South Africa signed shortly after the democratic transition in 1994, many of which have now reached their termination date, should be reviewed with a view to termination, and possible renegotiation on the basis of a new Model BIT to be developed.” Xavier Carim, “Speech on A South African Perspective on International Investment Agreements,” *reprinted in* 69 *South Bulletin* (November 21, 2012), p. 9.

[357] Mehdudia, *op. cit.*; “India Places All BIT Talks on Hold, Pending Review of Own Model Deal,” 31(5) *Inside U.S. Trade*, February 1, 2013, p. 1.

[358] Since 2009, in accordance with the Lisbon Treaty, investment policy has been the domain of the European Commission, rather than of individual member states. See Treaty of Lisbon, *op. cit.*, art. 2B, which provides in para. 1(e) that the Union shall have exclusive jurisdiction to set “common commercial policy,” and art. 188C, which provides for FDI policy as part of the “common commercial policy.” Implementation of these provisions has been gaining momentum. See Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions, *Towards a Comprehensive European International Investment Policy* (Brussels: European Commission, July 7, 2010), available at http://trade.ec.europa.eu/doclib/docs/2011/may/tradoc_147884.pdf; European Parliament, *European Parliament Resolution of 6 April 2011 on the Future European International Investment Policy* (Strasbourg: European Parliament, April 6, 2011), available at http://www.europarl.europa.eu/sides/getDoc.do?type=TA&reference=P7-TA-2011-0141&language=EN (describing the scope of the European Union’s competence, outlining key priorities and standards for the new investment policy and addressing future IIAs, dispute resolution and sustainable development); see also *Proposal for a Regulation of the European Parliament and of the Council Establishing Transitional Arrangements for Bilateral Investment Agreements Between Member States and Third Countries* (Brussels: European Commission, July 7, 2010), available at http://trade.ec.europa.eu/doclib/docs/2010/july/tradoc_146308.pdf, pp. 2-3 (describing the role of the European Union in assuming regional responsibility for FDI regulation).

of the right to regulate, answering some sustainable international investment questions, and resolving some dispute-settlement issues[359]) in key IIAs. As a result, an approach may be emerging for future international investment agreements. Moreover, until some or most of these negotiations are concluded, it may well be that key countries would not be interested in beginning a broader intergovernmental negotiating process on investment, preferring to wait until they have found solutions to key issues with principal partners.

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[359] Relatively recent United States IIAs contain, for example, a provision that calls for an appeals mechanism (although no action has been taken on this matter). See, e.g., the 2005 United States-Uruguay BIT, art. 28, paras. 9(b) and 10. UNCITRAL's work on transparency is relevant here as well, with finalized rules agreed in February 2013. See UNCITRAL, "Report of Working Group II (Arbitration and Conciliation) on the Work of Its Fifty-Eighth Session (New York, 4-8 February 2013)," U.N. Doc. A/CN.9/765, 13 February 2013, available at http://daccess-dds-ny.un.org/doc/UNDOC/GEN/V13/808/19/PDF/V1380819.pdf?OpenElement; Luke Eric Peterson, "UN Working Group Finalizes UNCITRAL Transparency Rules, But They Won't Apply Automatically to Stockpiles of Existing Investment Treaties," *Investment Arbitration Reporter*, February 14, 2013, http://www.iareporter.com/articles/20130215_4.

CONCLUDING REMARKS: THE NEED FOR AN INTERNATIONAL INVESTMENT CONSENSUS-BUILDING PROCESS

Foreign direct investment has become the most important vehicle to bring goods and services to foreign markets and, beyond that, integrate national production systems. Yet, while trade – another important form of international economic transactions -- is governed by a coherent multilateral trade regime and enforced through a respected dispute-settlement mechanism, international investment relations among countries are characterized by a regime whose hallmarks are an almost exclusive orientation toward the protection of investment, on the basis of a broad subject-matter coverage, with investment standards at its core, arbitration as the chosen mechanism to settle disputes, shaped by a multiplicity of legal sources, and serviced by a light and fragmented institutional structure.

While the great majority of governments are party, in one way or another, to the international investment law and policy regime (consisting of over 3,000 IIAs, an indication that governments want international rules for international investment), it is widely acknowledged that the current regime can be improved. Calls for changes range from tweaking the current regime, to repairing it, to transforming it fundamentally. In other words, there are widely diverging views among stakeholders about the extent to which changes are needed, in what direction they should go and how they should be brought about. More specifically, many in the business community (and many international arbitration practitioners) are reluctant to contemplate drastic changes, although a growing number of individual firms and practitioners appear to become more flexible in this respect. On the other end of the spectrum are various civil society organizations that typically seek fundamental changes, although there too is a wide range of opinions concerning the precise nature of the changes that are needed. Governments, for their part, are actively and overwhelmingly continue to build the regime, although some are withdrawing from it and many are introducing new elements that may, cumulatively and over time, change the nature of the regime. Together, this makes for a complex situation in which none of the stakeholder groups holds monolithic views, but in which bridges need to be built between various stakeholders. While a modernization and reform of the regime is possible, this will require a careful process that seeks to accommodate a range of different interests.

Developments in treaty and arbitral practice may well contribute to an improvement in the international investment law and policy regime. In many ways, a number of the challenges that the regime faces reflect a "*crise de croissance* – a teenager's crisis,"[360] resulting from the fact that the regime is very young and has grown rapidly.

But there are fundamental challenges that the regime faces, requiring, at least to a certain extent, a paradigm change.

It is not clear, how rapidly these various challenges will be addressed in the normal course of the maturing of the regime, or to what extent fundamental issues such as the purpose and content of the regime will be addressed in this process. Allowing the regime to mature is a time-consuming process.

What to do in this situation? What could be the way forward?

To begin with, it would be desirable to speed up the evolution toward a regime that reflects the interests of all stakeholders by finding, most importantly, the right balance between strong investor protection and the right of governments to pursue legitimate public policy objectives, in the overall framework of a modernized purpose of the regime, from which its substantive and procedural provisions would flow.

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[360] Brigitte Stern, "The Future of International Investment Law: A Balance Between the Protection of Investors and the States' Capacity to Regulate" in Alvarez et al., *op. cit*., p. 175. In an interview with *Arbitration Trends*, Winter 2013, *op. cit*., p. 13, she added: "Of course, the teenager is now in his twenties and should become more reasonable. In fact, in my view, he does."

However, given the light and fragmented institutional structure of the international investment regime,[361] there is no obvious agency that could take the lead in moving the investment issue forward. For sure, the principal international organizations active in this area – especially UNCTAD, the OECD and ICSID -- should continue, if not intensify, their valuable work. At the same time, though, it does not seem likely that governments will give any of these organizations a mandate in the foreseeable future to go far beyond what they are already doing; besides, open discussions are difficult in intergovernmental forums, as government representatives always need to keep in mind that, what they say in such forums, could eventually be held against them in actual negotiations. If the WTO Doha Round is being brought to conclusion and a new agenda is being agreed upon, it might include investment (building on the work already done in that Organization in relation to the GATS agreement and earlier work on investment) – but that is a big "if" and a big "might". Furthermore, all the most important players are engaged in bilateral and/or regional investment negotiations, and they might simply want to wait for the outcome of those negotiations before considering any broader efforts.

Given this situation (and in light of past failed efforts in the United Nations, OECD and WTO), an independent, open-minded **International Investment Consensus-building Process** is needed to examine the range of issues associated with international investment law and policy, to determine systematically what the concerns are, to discuss how and where to address them, and to propose solutions. To be credible, such a process would have to involve representatives of the principal stakeholder groups, including representatives of international and regional intergovernmental organizations dealing with international investment; in fact, representatives from these organizations perhaps could even service this process, at least in an informal manner. The impetus would need to come from smaller countries, as this would be more favorably received by others. The best option is for one government

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[361] As mentioned earlier, this fragmentation can also be found at the national level, where various ministries (and other offices and organizations) are responsible for various aspects of international investment, making it sometimes difficult for governments to agree on the international organization that should be entrusted with a particular task.

– or better yet, a few governments, from developed countries and emerging markets -- to initiate such an inclusive, informal, but structured multi-stakeholder consensus-building process -- an incremental thought-, discussion- and confidence-building process on issues related to improving the international investment regime. The G20 could help initiate such a process by encouraging interested countries to launch it. It is a promising sign that Finland has already begun consultations to launch such an initiative within the framework of the Helsinki Process for global governance that it chairs with Tanzania.

Such a process could undertake various activities (or encourage others to undertake them). The menu from which to choose could include any of those mentioned earlier in this paper (as well as others that may become desirable in the course of its deliberations): fact-finding (e.g., international hearings on the investment regime, a restatement of international investment law); dialogue roundtables between business and civil society; consensus-building working groups on substantive issues (e.g., the regime's purpose, sustainable international investment, contents of norms) and procedural issues (e.g., dispute settlement); a model bilateral investment treaty; specific mechanisms to improve the investment regime (e.g., an FDI protectionism observatory, an advisory center on international investment law, a recourse mechanism for a wider set of stakeholders); and establishing the desirability (or not) of a multilateral investment framework. It could also encourage greater cooperation by the international organizations already working on investment. Furthermore, it could identify "low-hanging fruits" (i.e., specific issues that command broad agreement on the need to tackle them, e.g., abusive treaty shopping, frivolous claims), backed by research, and suggest alternatives to deal with them, for governments to consider.

Such a consensus-building process might eventually solidify into an international investment steering group that could seek to influence the broader intergovernmental discourse. It is in the framework of this discourse that decisions would eventually have to be made about the future evolution of the international investment law and policy regime, whether at the bilateral, regional or multilateral level.

ANNEX

Annex table 1. Selected indicators of FDI and international production, 1990-2011
(Billions of dollars, value at current prices)

Item	1990	2005-2007 pre-crisis average	2009	2010	2011
FDI inflows	207	1 473	1 198	1 309	1 524
FDI outflows	241	1 501	1 175	1 451	1 694
FDI inward stock	2 081	14 588	18 041	19 907	20 438
FDI outward stock	2 093	15 812	19 326	20 865	21 168
Income on inward FDI	75	1 020	960	1 178	1 359
Rate of return on inward FDI	*4.2*	*7.3*	*5.6*	*6.3*	*7.1*
Income on outward FDI	122	1 100	1 049	1 278	1 470
Rate of return on outward FDI	*6.1*	*7.2*	*5.6*	*6.4*	*7.3*
Cross-border M&As	99	703	250	344	526
Sales of foreign affiliates	5 102	20 656	23 866	25 622	27 877
Value added (product) of foreign affiliates	1 018	4 949	6 392	6 560	7 183
Total assets of foreign affiliates	4 599	43 623	74 910	75 609	82 131
Exports of foreign affiliates	1 498	5 003	5 060	6 267	7 358
Employment by foreign affiliates (thousands)	21 458	51 593	59 877	63 903	69 065
Memorandum:					
GDP	22 206	50 411	57 920	63 075	69 660
Gross fixed capital formation	5 109	11 208	12 735	13 940	15 770
Royalties and licence fee receipts	29	156	200	218	242
Exports of goods and non-factor services	4 382	15 008	15 196	18 821	22 095

Source: UNCTAD, *World Investment Report 2012: Towards a New Generation of Investment Policies* (Geneva: UNCTAD, 2012), p. 24 (footnotes omitted).

Annex table 2. National regulatory changes, 1991-2011*

Item	1991	1992	1993	1994	1995	1996	1997	1998	1999
Number of countries that introduced changes in their investment regimes	35	43	57	49	64	65	76	60	63
Number of regulatory changes	82	79	102	110	112	114	151	145	140
of which:									
More favorable to FDI [a]	80	79	101	108	106	98	135	136	131
Less favorable to FDI [b]	2	-	1	2	6	16	16	9	9
Neutral/Indeterminate	...	...	...	...	...	...	...	...	...

Source: UNCTAD, based on national sources, *World Investment Report 2000: Cross-border Mergers and Acquisitions and Development* (Geneva: UNCTAD, 2000), p. 6; UNCTAD, Investment Policy Monitor Database, *World Investment Report 2012: Towards a New Generation of Investment policies* (Geneva: UNCTAD, 2012), p. 76.

[a] Includes liberalizing changes or changes aimed at strengthening market functioning, as well as increased incentives.

[b] Includes changes aimed at increasing control, as well as changes reducing incentives.

*The methodology was changed as of 2000.

2000	2001	2002	2003	2004	2005	2006	2007	2008	2009	2010	2011
45	51	43	59	80	77	74	49	41	45	57	44
81	97	94	126	166	145	132	80	69	89	112	67

75	85	79	114	144	119	107	59	51	61	75	52
5	2	12	12	20	25	25	19	16	24	36	15
1	10	3	-	2	1	0	2	2	4	1	-

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