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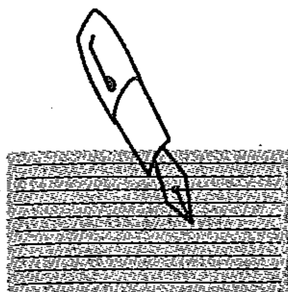

The Future of the International Investment Law and Policy Regime: Options for Improvement

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[Abstract] The international investment regime faces broader challenges, as reflected especially in the discussions regarding the investor-state dispute-settlement mechanism and the quest to make the international investment regime more oriented toward sustainable development objectives and to strengthen disciplines for the behavior of multinational enterprises. A number of options of how the regime can be improved are laid out in this article, including engaging in fact finding processes; establishing consensus-building working groups; formulating a model international investment agreement; building specific mechanisms to improve the investment regime; and commencing intergovernmental processes. An international investment consensus-building process is advocated to facilitate the improvement of the international investment regime.

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Introduction

In today's global economy, international investment, and especially foreign direct investment (FDI), 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 (IIAs).[①]

A few key features have traditionally characterized the international investment regime. 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

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① 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*].

referred to arbitral tribunals every year. While the decisions of these tribunals are not binding, they nonetheless 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. Further, the regime is characterized by a very light and fragmented institutional structure.

There are a few key changes that are driving the evolution of the international investment regime today. First, as emerging markets are becoming important outward investors, the considerations that shaped international investment agreements in the past are changing. Second, 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 international investors and related concerns about national security, have caused some developed countries to take a more balanced approach to investment policy. Third, 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 reviewing, renegotiating or rescinding existing international commitments, and introducing domestic measures. Moreover, a number of studies that seek to assess the effectiveness of investment agreements for attracting foreign investment have arrived at mixed results, which has undermined one of the key rationales for the regime. Fourth, of particular concern is the rising cost and frequency of treaty-based investor-state 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. Civil society groups continue to be an important voice in the debate surrounding the regime (and particularly the investor-state dispute settlement mechanism), and have contributed to shape some of the "new" norms in international investment agreements. Finally, states are taking an active, engaged role in the regime, including through the for-

mation, adjustment and interpretation of investment agreements, but also through providing direct support for their firms that invest abroad.

The current debate about the international investment regime revolves around a few critical issues. 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, several questions around the scope of investment agreements have been put forward, 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. A third set of critical issues have arisen around the substantive content of investment norms, including finding 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.

The objective of the paper is to highlight some proposals for reform of the international investment regime. It does not aim to provide a comprehensive list of reform options, but instead presents a range of suggestions and focuses on the challenges facing their design and implementation. Today, investor-state relations have moved a long way from a relationship defined by power toward one defined by law, with foreign investors benefitting from a regime that is stronger than it has ever been, including direct re-

course 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 yet others seek a fundamental reorientation of a regime that they see as one-sided; beginning with its purpose, content and ultimately its dispute-settlement mechanism. Accordingly, the paper does not advocate a particular position either with regard to what the particular strengths and weaknesses of the current regime are 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.

The paper is divided into five sections discussing a range of options for improving the international investment regime, from less to more ambitious approaches: (1) engaging in fact finding processes, (2) establishing consensus-building Working Groups on key issues, (3) formulating an International Model Investment Agreement(s), (4) building specific mechanisms to improve the regime, and (5) commencing intergovernmental processes. Each section includes a discussion of the purpose, challenges and feasibility of each option suggested. The presentation of these options is meant to constitute a menu to assist in the identification of priority actions that could be pursued. Thus, the options identified focus on initiating inclusive processes that involve all stakeholders, with the substantive outcomes to be decided by participants.

1. Engaging in Fact Finding Processes

While there are some issues that can be (and are being) resolved by individual states in the context of negotiating their own IIAs, 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 critical issues related to the international investment law and policy regime that were mentioned above. 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.② 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

② If hearings were to be conducted, this could be done on a regional basis or as one overall international hearing.

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.

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.③ A restatement could determine and explain "the law as it now stands (from a positive perspective) and how we should think about it (normatively)." 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 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

③ 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. 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.

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. ④.

The outcome of a restatement could potentially become a source of inspiration and guidance for IIA negotiators⑤ 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.

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, be-

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④ 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 and 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 and Alan O. Sykes, *The Genesis of the GATT* (Cambridge: Cambridge University Press, 2008); Petros C. Mavroidis and Henrik Horn (eds.), *Legal and Economic Principles of World Trade Law* (Cambridge: Cambridge University Press, 2013).

⑤ 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). 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.

ginning 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 law⑥, 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 stocktaking. 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.

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 the number of issues related to the precise meaning of various concepts

⑥ 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.

raise a range of questions whose solutions cannot be "discovered" through a fact-finding process alone. While some of these are of a relatively focused nature (*e. g.*, how to deal with the question of capital controls) and can be addressed in a specific manner, 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 Consensus-building Working Groups can be a useful step toward finding common ground on specific issues. In the investment context, working groups or roundtables could be convened to address both substantive and procedural matters[⑦], 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 Consensus-building Working Groups could be of particular importance.

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 depart 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

⑦ 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. 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.

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

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. 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.⑧ Accordingly, a Consensus-building Working Group on the purpose of IIAs would aim at building consensus around the general purpose(s) of IIAs, as well as identify the 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 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. Still, IIAs are meant to contribute to development, and this is beginning to be recognized by arbitrators. But treaty-makers and arbitrators are hampered by the absence of a test as to what "sustainable international investment" is.⑨ 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,

⑧ 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.

⑨ 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) at http://daccess-dds-ny.un.org/doc/RESOLUTION/GEN/G11/144/71/PDF/G1114471.pdf? OpenElement.

and formulations could be found to reflect this concept in IIAs[10] (e. g., as mentioned earlier, by using a definition of "investment" that makes "sustainability" an integral part of it[11]). 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). 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 Consensus-building 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[12]; an assessment of whether any stand-

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[10] See in this context the UNCTAD, *IPFSD* (referring to the concept of "sustainable development friendly investment") and the IISD Model BIT, which provide directions in this respect for IIAs; Howard Mann, Konrad von Moltke, Luke Eric Peterson and Aaron Cosbey, *IISD Model International Agreement on Investment for Sustainable Development* (Model Agreement for Sustainable Development) (Winnipeg: IISD, 2006). 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.

[11] 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) at http://www.oecd.org/daf/inv/mne/48004323.pdf.

[12] Greater clarity in this respect could itself reduce the incidence of investment disputes.

ards should be dropped[13]; and an analysis 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)[14], 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[15]; 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).[16]

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[13] For example, the 2004 (and 2012) United States Model Bilateral Investment Treaty 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.

[14] See, *e. g.*, *Saluka Investments B. V. v. Czech Republic*, Partial Award, March 17, 2006, 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'".

[15] 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).

[16] 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 mentioned 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. Some argue that, compared to substantive treaty norms, the recalibration of dispute settlement norms in investment treaties have proceeded at a slower pace. Furthermore, 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 has been skeptical to include investor-state dispute settlement in its IIAs, (ii) three countries (Bolivia, Ecuador, Venezuela) have denounced the "ICSID Convention"[17], (iii) South Africa has decided that most of its BITs "are now open for either review or termination"[18],

[17] Convention on the Settlement of Investment Disputes Between States and Nationals of Other States-International Centre for Settlement of Investment Disputes (ICSID Convention). 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 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. For discussion, see: "Argentina Faces 65bn Dollars in Claims; Plans to Abandon International Litigations Court," *MercoPress*, November 28, 2012, at http://en.mercopress.com/2012/11/28/argentina-faces-65bn-dollars-in-claims-plans-to-abandon-international-litigations-court (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, 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 and Mark S. McConnell, "If Argentina Withdraws from the ICSID Convention: Implications for Foreign Investors", *Lexology* (February 4, 2013), at http://www.lexology.com/library/detail.aspx? g = 080c79bc-cce7-485f-97aa-27a5b2bdec5c.

[18] 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, at http://www.jadafa.co.za/LinkClick.aspx? fileticket = 9A6eXZstRl0%3D&tabid = 432.

(iv) India has put its BIT talks on hold (triggered by concerns with the dispute-settlement mechanism)[19], (v) the Parliament of Argentina has adopted a resolution calling for the denunciation of the country's BITs[20], and (vi) there is a call to establish a Latin American Centre for Investment Dispute Settlement with its own rules.[21] 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, in particular, as a much less effective means of dispute settlement), there is dissatisfaction with the current dispute-settlement regime, and pressure on it is increasing.[22] Accordingly, a Consensus-

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[19] Sujay Mehdudia, "BIPA Talks Put on Hold", The Hindu, January 21, 2013, at 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.

[20] 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, at http://www.lexology.com/library/detail.aspx?g=080c79bc-cce7-485f-97aa-27a5b2bdec5c.

[21] 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, at 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.

[22] As Charles N. Brower observed in an interview with Arbitration Trends (2013), 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* (New York: Oxford University Press, 2012). See also UNCTAD, "Reform of Investor-State Dispute Settlement: In Search of a Roadmap", *IIA Issues Note*, No. 2 (2013).

building Working Group could also be convened to build consensus relating to the dispute-settlement process.

i. Establishing a Consensus-building Working Group on the Dispute-settlement Process

One of the key challenges in relation to investor-state dispute settlement is how best to ensure the legitimacy of investment arbitration, from the perspective of all stakeholders. The focus of a Consensus-building 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*, 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.*, through interpretive statements)[23], 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, 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 greater role to ICSID to screen disputes[24] (especially regarding frivolous suits)[25], and considering the implications of excluding investor-state dispute settlement from IIAs.
- Investigating to what extent alternative dispute-resolution

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[23] 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).

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

[25] Third-party funders, whose own resources are at stake, seem to have a rigorous screening process before they decide to finance a claim.

mechanisms (and, for that matter, national conflict-management mechanisms[26]) 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[27]; and, conversely, whether, if foreign investors have access to international dispute settlement, domestic investors should have the same option.[28] In

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[26] 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. and 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, at 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.

[27] 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.

[28] 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." 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.

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. This would of course be a major step, akin to the movement, within the World Trade Organization (WTO), from an ad hoc dispute-settlement process during the General Agreement on Tariffs and Trade (GATT) to the Dispute Settlement Understanding in the WTO. (In the trade system, this step took place after 101 panel reports were adopted, providing sufficient experience to undertake such a step; under the investment régime, almost 600 treaty-based disputes had been initiated by the end of 2013.) 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. However, there are also concerns that an appeals mechanism would undermine the "finality" of the arbitral award, "re-politicize" the process, 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. While some matters could be addressed with a careful and inclusive process of institutional design, others relate to the essential features of the regime at present such as, for example, a "harmonization" of the substantive investment protection standards is difficult (if not impossible) in the absence of a common text, such as a multilateral framework on investment.

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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 Organisation for Economic Co-Operation and Development (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 Consensus-building 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 Consensus-building 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.

3. Formulating a Model International Investment Agreement

Another (more ambitious) approach could be to prepare a global Model International Investment Agreement.[29] 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". 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

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[29] 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.

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-prepared by the United Nations and the OECD-are being used; the same applies to investment contracts.

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, the OECD's Policy Framework for Investment, the SADC Model BIT Template, the Commonwealth guide on integrating sustainable development, and the IISD Model International Agreement on Investment for Sustainable Development 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.[30]

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.

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.

[30] 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.

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 (*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[31] a "hidden" form.[32] 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.

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[31] 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".

[32] 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 (Washington DC: World Bank, 2009), p. 7.

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 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.[33] 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.[34] 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[35] (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". 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.[36]

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[33] See, for example, the U. S. Foreign Investment and National Security Act of 2007 (FINSA), Pub. L. 110-49, 121 Stat. 246, enacted July 26, 2007, § 2. Similar review mechanisms exist in other countries, including Australia, Canada and Germany.

[34] International Working Group of Sovereign Wealth Funds, Sovereign Wealth Funds: Generally Accepted Principles and Practice "Santiago Principles" (Santiago Principles), (IWG, 2008).

[35] 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.

[36] 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 Nilgün Gökgür, "Are Resurging State-Owned Enterprises Impeding Competition Overseas?" in Karl P. Sauvant and Jennifer Reimer (eds.), *FDI Perspectives: Issues in International Investment*, 2nd ed. (New York: Vale Columbia Center for Sustainable International Investment, 2012).

These issues are discussed in the OECD and in the Trans-Pacific Partnership negotiations, where a text to this effect has been tabled.[37] One approach mooted is to leverage the work already done in this area by incorporating the Santiago Principles into more formal arrangements.[38] However, such an approach has advantages and disadvantages-states must be satisfied that the principles represent an appropriate standard for domestic purposes.[39] Crucially, however, those advantages typically are not available to state-controlled entities only, but also extend to private outward investors. 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 governments, 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

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[37] 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 DC, March 2, 2012), at http://www. state. gov/e/eb/rls/rm/2012/181520. htm et al.

[38] 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.

[39] 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."

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"[40].

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 substantial extension of the current Global Trade Alert[41] which focuses on trade, but also takes investment

[40] 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, *Person Institute for International Economics*, 2013, pp. 50-51.

[41] 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).

measures into account, at least to a certain extent. [42] 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. [43] (Similar considerations played a role when the Advisory Center for WTO Law was established.) 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. 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." [44] Furthermore, as international

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[42] 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.

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

[44] 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).

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 could be established. It could provide state parties with legal and administrative assistance to respond to investor claims[45], 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.[46] An Advisory Center of this kind could be

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

[46] 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.

modeled on the Advisory Centre on WTO Law, based in Geneva[47], 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.

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.[48] Moreover, discussions were also held to establish an Advisory Facility on International Investment Law and Investor-State Disputes for Latin American countries.[49] 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,

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[47] 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". 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.

[48] 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 htp://www.octapic.org. Moreover, it appears that this facility does not cover investment disputes.

[49] 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.

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. [50] This facility would provide "legal guidance, technical assistance, research, specialized studies and legal representation in terms of investment disputes".

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. [51] 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.

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[50] 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.

[51] 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 and 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.

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 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[52], may not always take advantage of international arbitration when they feel that they have a claim.[53] Here, the rise of third-party financing of claims has opened an opportunity for enterprises in such a position. At the same time, and for similar reasons as in a domestic court context, this development has been

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[52] 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". Eric De Brabandere and Julia Lepeltak, "Third-Party Funding in International Investment Arbitration", 27(2) *ICSID Review* 379 (2012), p. 379.

[53] 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.

controversial. As a third-party funder generally has no direct interest in the substantive issues in the arbitral proceedings, there are concerns that the profit motive will override the normal factors that might encourage parties to resolve a dispute through negotiations (reducing risk, maintaining relationships, etc.). 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. 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. 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.[54] 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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[54] 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. 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." 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. [55] 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 non-governmental organizations (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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[55] See Peter Lallas, International Investment Activities: Giving Affected People a Greater Voice and Rights of Recourse, in Junji Nakagawa (ed.), *Transparency in International Trade and Investment Dispute Settlement* (London: 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", and they can renegotiate agreements (instead of simply extending existing ones).[56] 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 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 sections of this paper (*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. Some problems are linked to the "underlaps" and "overlaps" in investment regulation (between states and across subject matters), compared to the operational reach of international investors.[57] Other issues arise from the multiplicity of

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[56] 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, 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.

[57] 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 and 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.

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 in pursued of 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. Note that 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 international investment issues.[58] Moreover, the WTO's Doha Round currently dominates multilateral economic policy-mak-

[58] 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).

ing.[59] 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.[60] Moreover, seeking to move forward on the multilateral level and not succeeding to do so could prejudice a similar effort at a later date.

On the other hand, a few informal discussions seem to be beginning about a new WTO agenda, and such an agenda could conceivably include

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[59] 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, Transatlantic Trade and Investment Partnership, and International Services Agreement), as well as major bilateral investment agreements. See the discussion below.

[60] 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 2012: "There is currently no appetite for negotiating a binding multilateral framework for investment." See, UNCTAD, WIR 2012: Towards a New Generation of Investment Policies (New York and Geneva: UNCTAD, 2012), p. 6.

investment[61], as also advocated in some quarters.[62] Several of the changing circumstances mentioned in the introduction 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, UNCTAD 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 en-

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[61] Interviews by the authors in Geneva in January 2013 (on file with authors).

[62] 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 DC: Person Institute for International Economics, 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 following 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 international agreements". 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.

forcement 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. [63] The possibility of cross-sectoral retaliation in the framework of the Organization's Dispute Settlement Understanding 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). [64] 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 Ministerial Conference in 2003[65], 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. [66] 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

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[63] 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.

[64] 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.

[65] WTO, Decision Adopted by the General Council on August 1, 2004, WT/L/579, August 2, 2004.

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

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, which provides guidance for formulating investment policies at the national, 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 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 Free-

dom 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 and due diligence in minerals supply chains, 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.

It might, however, be an option to have a process serviced by a group of intergovernmental organizations[67], 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[68], MERCOSUR[69] and SADC.[70] (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.

b. At the Plurilateral Level: Launching an Open Stand-alone Intergovernmental Process

The lack of a compelling forum to conduct multilateral discussions

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[67] Note that the UNCTAD, WTO and OECD Secretariats are cooperating in preparing reports for the G20 on investment policies.

[68] ASEAN Comprehensive Investment Agreement, February 26, 2009, Cha-Am, Thailand.

[69] Protocol of Colonia for the Promotion and Reciprocal Protection Of Investments in Mercosur (January 17, 1994) MERCOSUR/CMC/DEC No 11/93.

[70] SADC, Protocol on Finance and Investment (August 18, 2006).

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[71] 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, therefore, is not likely to find favor with developing countries.[72] The G20, on the other

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[71] 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, while 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. 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.

[72] 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.

hand, includes a wide spectrum of important countries from all groups of countries[73]; together, they accounted for about 70% of the world's inward FDI flows and about 80% of its outward FDI flows during 2010-2011.[74] Moreover, the Group has addressed the international investment issue in its communiqués.[75] If the G20 were to take up this issue, it could simply encourage the initiation of an exploratory process as to 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).[76] 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

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[73] 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.

[74] 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.

[75] 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). A 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, 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); see also UNCTAD, Joint UNCTAD-OECD Reports on G20 Investment Measures.

[76] See G20, "Statement on Shared Principles for International Investment", which lists seven broad principles for investment liberalization and protection. See further European Commission, Press Release, "EU and US Adopt Blueprint for Open and Stable Investment Climates", Brussels, April 10, 2012, at http://trade.ec.europa.eu/doclib/press/index.cfm?id=796; Statement of the European Union and the United States on Shared Principles for International Investment (EU-US Statement), at http://trade.ec.europa.eu/doclib/docs/2012/april/tradoc_149331.pdf.

need to have an adequate dispute-settlement process. [77] 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. [78]

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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" (and which could include a number of the options mentioned earlier). The Guiding Principles were developed under the headship of the Professor John Ruggie, the Special Representative of the UN Secretary General for Business and Human Rights, during the second phase of the Special Reppresentative's mandate, with a focus on supporting the "Protect, Respect, and Remedy" Framework already developed during the first phase. A broad and extensive program of stakeholder consultations helped to ensure a robust set of principles, and also to gather support and buy-in. [79] In fulfilling the mandate to prepare the Guiding Principles, 47 international consultations were held (on all continents), and "the Special Representa-

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[77] 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.

[78] 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".

[79] 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 and the United States).

tive and his team [visited] business operations and local stakeholders in more than 20 countries". 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. 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 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 2014) 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.[80] Particularly relevant are here the Trans-Pacific Partnership negotiations[81]; the Regional Comprehensive Economic Partnership Agreement in Asia[82], the FTA negotiations of Canada with the European Union (which also cover investment)[83], India and Japan; the BIT negotiations of China with the United States[84] and possibly the European Union[85]; the European Union negotiations with India

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[80] 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 Jeswald W. Salacuse and 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. 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, at 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.

[81] 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, at 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 N. Jansen Calamita (ed.), *Current Issues in Investment Treaty Law V* (London: British Institute of International and Comparative Law, 2013)

[82] 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 expected to be concluded at the end of 2015. See, UNCTAD, Investment Policy Monitor, No. 9 (March 2013), p. 8.

[83] 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, at http://ec.europa.eu/trade/creating-opportunities/bilateral-relations/countries/canada/.

[84] China and the United States began negotiating a bilateral investment treaty in June 2008. See Karl P. Sauvant and 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.

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

and Japan[86], as well as, more recently, the United States on a Transatlantic Trade and Investment Partnership[87]; and the BIT negotiations of India with the United States.[88] 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 circumstances"[89], 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.[90] 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.[91]

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[86] EU Member States agreed to begin negotiations for an agreement with Japan on 29 November 2012. See EC Trade, Japan, 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, at http://trade.ec.europa.eu/doclib/press/index.cfm?id=847 et al.

[87] 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, at http://europa.eu/rapid/press-release_MEMO-13-94_en.htm.

[88] Anirban Bhaumik, "India, US Set To Sign Bilateral Investment Treaty", Deccan Herald (New Delhi), October 1, 2012, at 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").

[89] 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* (November 21, 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 re-negotiation on the basis of a new Model BIT to be developed."

[90] Sujay Mehdudia, India Places All BIT Talks on Hold, Pending Review of Own Model Deal, 31(5) *Inside U.S. Trade*, February 1, 2013, p. 1.

[91] 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 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, 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.

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 of the right to regulate, answering some sustainable international investment questions, and resolving some dispute-settlement issues[92]) 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.

Conclusions: 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

[92] 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.

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", 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.

However, given the light and fragmented institutional structure of the international investment regime,[93] 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[94], 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

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[93] 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.

[94] Reference is to the United Nations Code of Conduct on Transnational Corporations, negotiated in the 1970s and 1980s.

government-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.

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