
Karl P. Sauvant
THE EVOLVING INTERNATIONAL INVESTMENT LAW AND POLICY REGIME: WAYS FORWARD
NOTE

The policy options presented in this synthesis are the result of a collective process involving all members of the E15 Task Force on Investment Policy. It draws on the active engagement of these eminent experts in discussions over multiple meetings as well as an overview paper and think pieces commissioned by the E15 Initiative and authored by group members and external contributors. Karl P. Sauvant was the author of the report. While a serious attempt has been made on the part of the author to take the perspectives of all group members into account, it has not been possible to do justice to the variety of views; in fact, views within the Task Force on a number of issues discussed in the paper varied widely. The analysis and policy recommendations should therefore not be considered to represent consensus; they remain the responsibility of the author. The list of group members and E15 papers are referenced.

The full volume of policy options papers covering all topics examined by the E15 Initiative, jointly published by ICTSD and the World Economic Forum, and launched at the Forum’s Annual Meeting at Davos-Klosters in 2016, is complemented with a monograph that consolidates the options into overarching recommendations for the international trade and investment system for the next decade.

E15 INITIATIVE

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

For more information on the E15 Initiative:
www.e15initiative.org
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OBJECTIVES AND OUTPUT

The E15 Task Force on Investment Policy had six objectives

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

Overarching questions and issues the Task Force was tasked to consider

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

Task Force analysis and policy proposals were submitted in two forms

1. Critical issues studied through an overview paper and think pieces commissioned for the E15 Initiative. These papers are referenced on page 15 and can be accessed at http://e15initiative.org/publications/.

2. Policy options presented in this synthesis and compiled in the summary table. The options fall under six main categories:
   - Updating the objective and content of international investment agreements
   - Establishing an international support programme for sustainable investment facilitation
   - Addressing the challenge of preventing, managing, and resolving investment disputes
   - Establishing an advisory centre on international investment law
   - Initiating an exploratory process towards a comprehensive multilateral/plurilateral framework on investment
   - Launching an informal consensus-building process
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FOREWORD

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

Today, the international investment regime is at a crossroads, highlighted by the explosion in the number of investor-state dispute settlement (ISDS) cases brought in the past 20 years. Critics sense the system is unbalanced, biased towards foreign investors and undermining national rights to regulate, while costs of arbitration are overwhelming. Discussions in recent mega-regional negotiations—such as the Trans-Pacific Partnership and especially the Transatlantic Trade and Investment Partnership—have brought unprecedented attention to the ISDS mechanism, with civil society voices and a number of governments calling for reform. However, countries have not come to a uniform vision on provisions that extend beyond investment protection (and, to a certain extent, liberalization), and differ on how to address sustainable development concerns.

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

The deliberations of the Task Force convened by ICTSD and the World Economic Forum were motivated by this need for reform, stressing the long-term nature of the exercise. The Group was composed of nearly 40 leading investment experts from a broad spectrum of disciplinary and professional backgrounds. The policy options are the product of the Theme Leader's assessment of discussions in two Geneva-based meetings and a scoping meeting held in New York, all under the leadership of Karl P. Sauvant from Columbia University. The Group commissioned 19 think pieces on subjects ranging from investment and state-owned enterprises, responsible investment contracting and regional approaches to harmonization, to investment incentives, taxation, and the future of the multinational enterprise.

As conveners of the E15Initiative we are convinced of the need to provide organized and structured input into the policy and governance debate on international investment. The options that have resulted from these thought and dialogue processes are offered to policy-makers and stakeholders alike, in the hope that they provide paths effectively to address the most pressing challenges and respond to policy imperatives of societies the world over. In a second phase of this Initiative, we intend to engage policy-makers in advancing these options.

Ricardo Meléndez-Ortiz
Chief Executive, ICTSD

Richard Samans
Managing Director and Member of the Managing Board, World Economic Forum
INTERNATIONAL INVESTMENT NEEDS ARE TREMENDOUS. ALL COUNTRIES SEEK TO ATTRACT INVESTMENT BECAUSE IT INVOLVES RESOURCES THAT ARE CENTRAL TO CREATING EMPLOYMENT, ADVANCING GROWTH AND DEVELOPMENT, AND ULTIMATELY INCREASING PROSPERITY FOR ALL. THE PUBLIC PURSE WILL HAVE TO FINANCE A CONSIDERABLE SHARE OF THESE NEEDS. BUT A SUBSTANTIAL SHARE WILL HAVE TO BE MOBILIZED BY THE PRIVATE SECTOR, INCLUDING INTERNATIONAL INVESTORS. MOREOVER, NOT ONLY IS MORE INVESTMENT NEEDED, BUT IT HAS TO BE SUSTAINABLE INVESTMENT.

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

As part of the E15Initiative, ICTSD, in partnership with the World Economic Forum, convened a Task Force on Investment Policy to examine the state of the international investment law and policy regime and how its governance might be enhanced to encourage the flow of sustainable FDI for sustainable development. The regime covers the international investment typically undertaken by MNEs, primarily through FDI and various forms of non-equity modes of control, including management and supplier contracts, as well as portfolio investment. The discussions in the Task Force were future-oriented, looking ahead five to ten years—a daunting challenge in a fast-moving field in which some ideas that would have been cast aside as pipedreams only a few years ago are now on the international policy agenda, such as a world investment court.

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

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

BACKGROUND TO RULE-MAKING ON INTERNATIONAL INVESTMENT

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

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

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

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

POLICY OPTIONS: SUSTAINABLE FDI FOR SUSTAINABLE DEVELOPMENT

UPDATING THE PURPOSE AND CONTENTS OF IIAs

Any discussion of strengthening the international investment regime needs to begin with the very purpose of the regime. Given the origin of IIAs, it is not surprising that its principal purpose has been, and remains, to protect foreign investors, and, more recently, to facilitate the operations of investors, seeking to encourage in this manner additional FDI flows and the benefits associated with them.\(^1\)

POLICY OPTION 1 – Broaden the regime’s purpose to promote sustainable development

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

POLICY OPTION 2 – Recognize the need for adequate policy space

Promoting such an expanded purpose of the regime, in turn, necessitates that governments preserve a certain amount of policy space that gives them the right to regulate in the interest of legitimate public policy objectives, a right that needs to be acknowledged in a dedicated article in IIAs. It also means that investors commit themselves to responsible business conduct. The contents of IIAs needs to reflect this broadened purpose. “Policy space” is a vague and sometimes politicized...
concept. Care needs to be taken that it is not interpreted as a carte blanche for governments to disregard international commitments such as non-discrimination.

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

POLICY OPTIONS 3 TO 5 – Clarify key concepts and interrelationships

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

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

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

There is also the issue of the responsibilities of investors, to promote desirable corporate conduct and discourage undesirable behaviour. Host country governments, as sovereigns, can of course impose obligations on investors in their national laws and regulations, and have done so. Investors have to abide by them, making them liable for any infringements that might occur. Beyond that, various non-binding/mixed instruments designed, inter alia, by the OECD, the International Labour Organization (ILO), and the Office of the High Commissioner on Human Rights (OHCHR) address this issue, and these should be developed further.2

POLICY OPTION 7 – Recognize the responsibilities of investors in IIAs

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

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

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

DEVELOPING AN INTERNATIONAL SUPPORT PROGRAMME FOR SUSTAINABLE INVESTMENT FACILITATION

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

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

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

The proposal’s key premise is the importance—and urgency—of creating more favourable national conditions for higher sustainable FDI flows to developing countries. Work on such an Understanding could be undertaken, in due course, in the WTO. It could also begin within another international organization with experience in international investment matters, perhaps UNCTAD or the World Bank or the OECD. Or, a group of the leading outward FDI countries could launch such an initiative. The impetus could come from the G20, which could mandate the initiation of such work. Detailed substantive work will be necessary to flesh out what aspects of “investment facilitation” could be included in every of the above options.

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

**ADDRESSING THE CHALLENGE OF PREVENTING, MANAGING AND RESOLVING DISPUTES**

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

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

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

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

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Disputes should be settled at the national level...

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

**POLICY OPTION 15 – Allow governments direct access to ISDS as claimants**

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

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

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

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

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

**ESTABLISHING AN ADVISORY CENTRE ON INTERNATIONAL INVESTMENT LAW**

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

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

**POLICY OPTION 17 – Establish and Advisory Centre on International Investment Law**

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

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

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

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

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

**NEGOATING A MULTILATERAL/PLURILATERAL FRAMEWORK ON INVESTMENT**

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

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

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

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

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

A comprehensive international framework on investment would establish basic rules for the relations between principal stakeholders,...
Next steps: An informal and inclusive consensus-building process

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

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

Policy option 20 – Launch an informal consensus-building process

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

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

Endnotes

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

<table>
<thead>
<tr>
<th>POLICY OPTION</th>
<th>CURRENT STATUS AND GAP</th>
<th>HOW TO GET THERE</th>
</tr>
</thead>
<tbody>
<tr>
<td>Updating the purpose and contents (substantive and procedural provisions) of IIAs</td>
<td>The principal purpose and narrow focus of the international investment regime has been and remains to protect foreign investors and, more recently, to facilitate the operations of investors, seeking in this manner to encourage additional FDI flows.</td>
<td>Constitute a working group of leading international investment experts, including practitioners and arbitrators, to propose how the purpose and contents of IIAs could best be updated, in close consultation with principal stakeholders, supported by a consortium of universities from all continents as well as other interested stakeholder organizations. Present the results to governments for their consideration in future investment rule-making.</td>
</tr>
<tr>
<td>1. Broaden the regime’s purpose to include promoting sustainable development and other key public policy objectives, including the protection of public welfare and human rights.</td>
<td>Same as above.</td>
<td>Same as above.</td>
</tr>
<tr>
<td>2. Recognize, in a dedicated article in IIAs, the need for adequate policy space and the right to regulate.</td>
<td>Concepts such as “policy space” are elastic. Care needs to be taken that the legal consequences and limits of these concepts are understood. There is a need for tighter wording that clearly defines the sort of injuries for (and circumstances in) which investors can seek compensation, and the type of actions governments can and cannot take. Key substantive provisions to be clarified include national treatment, fair and equitable treatment, most-favoured-nation treatment, full protection, and security.</td>
<td>Same as above.</td>
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<tr>
<td>3. Clarify key concepts in IIAs, including their substantive protections.</td>
<td>Guidance on how such linkages are to be recognized and any conflicts between regimes are to be reconciled should be built into IIAs. The adoption of a “clean hands” defence should be considered in investment treaties.</td>
<td>Same as above.</td>
</tr>
<tr>
<td>4. Clarify interrelationships with other international law regimes (e.g. human rights, environment).</td>
<td>The intersection of these two legal regimes is likely to generate more policy challenges that will have to be dealt with in the future.</td>
<td>Same as above.</td>
</tr>
<tr>
<td>5. Encourage empirical research and firm-level data gathering on the incidence and effectiveness of FDI incentives.</td>
<td>There is a general recognition that incentives do not constitute, as a rule, important FDI determinants. Yet virtually all countries (and many sub-national units) offer financial, fiscal, or other incentives in the hope of influencing the locational decisions of firms.</td>
<td>Same as below.</td>
</tr>
<tr>
<td>6. Establish a working group to prepare in a multistakeholder process an indicative list of sustainable FDI characteristics.</td>
<td>With the adoption of the Sustainable Development Goals by the international community, this matter has acquired additional urgency. Governments seeking to attract sustainable FDI could use the indicative list. It could also be of use to arbitrators.</td>
<td>The working group could identify what mechanisms could be used, at both the national and international levels, to encourage the flow of sustainable investment—i.e. mechanisms that go beyond those used to attract FDI in general and benefit from it. At the national level, special incentives could be one of the tools. At the international level, the working group could examine, among other things, what can be learned from various instruments established in the context of the UNFCCC, such as the Clean Development Mechanism.</td>
</tr>
<tr>
<td>7. Recognize the responsibilities of investors and address them in IIAs, in the interest of promoting desirable corporate conduct and balancing rights and responsibilities between investors and governments.</td>
<td>Various non-binding/mixed instruments address this issue and could be developed further (e.g. OECD Guidelines, OHCHR Guiding Principles on Business and Human Rights, ILO Tripartite Declaration). Responsibility clauses could be included in IIAs that condition the availability of investor protections on compliance with applicable national or international instruments defining investor responsibilities.</td>
<td>Constitute a working group of leading international investment experts, including practitioners and arbitrators, to propose how the purpose and contents of IIAs could best be updated. Present the results to governments for their consideration in future investment rule-making.</td>
</tr>
</tbody>
</table>
### Developing an international investment support programme for sustainable development

**8. Turn the Aid for Trade Initiative into an Aid for Investment and Trade Initiative.**

- **Current Status and Gap:** Virtually all governments seek to attract FDI and benefit from it. But a number of governments, especially of the LDCs, have weak capabilities to compete successfully in the world FDI market. The key premise is the importance of creating more favourable conditions for higher sustainable FDI flows to meet the investment needs of the future.

- **How to Get There:** Such an effort could be pursued in the short term through the Global Review on Aid for Trade. It would include WTO members and other international organizations. The new initiative should cover investment fully, create an integrated platform for promoting sustainable FDI, improve national FDI regulatory frameworks, and strengthen investment promotion capabilities, especially in LDCs and other developing countries.

**9. Expand the Trade Facilitation Agreement (TFA) to cover sustainable investment, making it an Investment and Trade Facilitation Agreement.**

- **Current Status and Gap:** Same as above. (This is a more ambitious medium-term option)

- **How to Get There:** A subsidiary body of the Committee on Trade Facilitation (to be established in the WTO when the TFA enters into force) could provide the platform to consult on any matters related to the operation of what would effectively be a sustainable investment module within the TFA.

**10. Urge a multilateral organization to launch a Sustainable Investment Facilitation Understanding focusing on ways to encourage sustainable FDI flows to developing countries.**

- **Current Status and Gap:** Same as above. (This is a long-term option)

- **How to Get There:** Work on such an Understanding could be undertaken (in due course) in the WTO. It could also begin within another IGO with experience in international investment matters—e.g. UNCTAD, the World Bank or the OECD (ILQ, UNEP, and OHCHR could also bring their expertise).

1. **Addressing the challenge of preventing, managing, and resolving disputes**

**12. Establish investor-state conflict management mechanisms at the national level to help prevent, manage, and resolve disputes.**

- **Current Status and Gap:** Governments need to develop national investor-state conflict management mechanisms that allow governments and investors to address their grievances before they escalate into full-blown legal disputes. Institutional infrastructure needs to be developed to engage in regular government-private sector dialogues and to monitor conflicts and resolve these.

- **How to Get There:** Institutions such as national investment ombudspersons and inter-ministerial committees that vet conflicts when they arise are helpful here. The World Bank has begun to help countries to establish such conflict-management mechanisms, an effort that ought to be made available to as many countries as possible. National investment promotion agencies could be assisted to conduct IIA impact assessments and to advise on the implementation of treaty commitments.

**13. Provide assistance to low-income countries negotiating large-scale contracts.**

- **Current Status and Gap:** Same as above.

- **How to Get There:** Support the creation of an investment negotiation support facility currently being considered by the G7 (with LDC backing), not only to arrive at well-negotiated contracts but also to reduce the likelihood that disputes arise. This initiative should come to fruition as soon as possible.
### 14. Further institutionalize ISDS through the establishment of an appellate mechanism and/or a world investment court (e.g. through an ICSID II agreement).

- **Policy Option**: Further institutionalize ISDS through the establishment of an appellate mechanism and/or a world investment court (e.g. through an ICSID II agreement).
- **Current Status and Gap**: It is unavoidable that some disputes reach the international arbitral level. Given the centrality of the investor-state dispute-settlement (ISDS) mechanism to the investment regime, that mechanism has to be beyond reproach. This is not only a technical matter, but also one that has implications for the very legitimacy of the international investment regime. A number of steps have already been taken to improve this mechanism, but more needs to be done.
- **How to Get There**: Several different arrangements are conceivable:
  a) Awards issued by the ad hoc panels currently used in IIA disputes could be appealed to ad hoc appellate bodies (the members of the appellate bodies could be chosen from a predetermined list of experts, preferably by an independent third party).
  b) The establishment of a single permanent and independent world investment court could be envisaged.
  c) An appellate mechanism for reviewing awards could be established in the framework of a treaty between two or more parties, to review decisions of ad hoc tribunals; other states would be invited to opt in, multilateralizing the appellate mechanism in this manner.

Since ICSID is the single most prominent dispute-settlement venue, one could think of a treaty updating the present Convention—an ICSID II. It would preserve enforceability, but update any features in the current rules that might require modernization. Such a new treaty could create a single world investment court (and appellate body) that would then be available to all governments that have signed and ratified the treaty.

### 15. Allow governments direct access to ISDS as claimants.

- **Policy Option**: Allow governments direct access to ISDS as claimants.
- **Current Status and Gap**: There is the question of access to any dispute-settlement mechanism. In particular, if the contents of IIAs are expanded to include investor responsibilities, governments arguably should have direct access to the regime’s dispute-settlement mechanism and not only by way of counter-claims.
- **How to Get There**: Embarking on the process of exploring how the current dispute-settlement mechanism could be improved would send a strong signal that governments recognize the need to develop a better mechanism. Discussions of the range of issues relating to this matter are already underway in a number of governmental and non-governmental forums, ranging from the European Parliament to various academic conferences. These should be expedited. All interested stakeholders should be heard and all pertinent issues should be addressed.

### 16. Consider, long-term, turning ISDS into an investment dispute-settlement mechanism and opening it to other stakeholders.

- **Policy Option**: Consider, long-term, turning ISDS into an investment dispute-settlement mechanism and opening it to other stakeholders.
- **Current Status and Gap**: Following option 15, the question would also arise whether the dispute-settlement process should then be opened up further to other stakeholders too (this would be a profound, challenging, and very ambitious change).
- **How to Get There**: Same as above.

## Establishing an Advisory Centre on International Investment Law

### 17. Establish an independent Advisory Centre on International Investment Law (ACIIL).

- **Policy Option**: Establish an independent Advisory Centre on International Investment Law (ACIIL).
- **Current Status and Gap**: A strong signal demonstrating the will to enhance the legitimacy of the investment regime would be sent if the ability of vulnerable countries to defend themselves in disputes would be improved. LDCs particularly do not generally have the human resources to defend themselves adequately, and many do not have the financial resources to hire the required expertise. This puts many countries in an asymmetric situation whenever a dispute arises. An independent ACIIL would help to establish a level playing field by providing administrative and legal assistance to low-income country respondents.
- **How to Get There**: The process of clarifying the issues surrounding the creation of an Advisory Centre on International Investment Law should begin now. Persuade a few governments concerned about the legitimacy of the international investment regime to assume a lead role in establishing such a Centre, supported by an NGO with a track record of work on the international trading system and drawing on the experience of IGOS. The WTO Advisory Centre has done valuable work, contributing to enhancing the legitimacy of the international trading system. An Advisory Centre on International Investment Law (which would suitably complement the reform of the ISDS mechanism) could do the same thing for the international investment regime.

### 18. Create a small-claims court for SMEs and designate an international Investment Ombudsperson.

- **Policy Option**: Create a small-claims court for SMEs and designate an international Investment Ombudsperson.
- **Current Status and Gap**: Similar considerations as above apply to SMEs, as they typically do not have the expertise and resources to bring claims. They too require support. Costs and delays could become even more of an obstacle if an appeals mechanism were to be established.
- **How to Get There**: A small-claims settlement mechanism, with an expedited process, set deadlines and sole arbitrators, could be of help. As a low-cost alternative dispute-settlement mechanism of potential value, an International Investment Ombudsperson could be designated, cooperating with an ad hoc ombudsperson in a respondent state.
### 19. Initiate an exploratory process towards negotiating a comprehensive universal framework on international investment, preferably a multilateral framework on investment, possibly starting with a plurilateral framework on investment that would be open for future accessions by other states.

The convergence of policy interests that has been underway between home and host countries with the growth of outward FDI from emerging markets could facilitate reaching such an objective. Governments continue to show a great willingness to make rules on international investment. This is reflected in the negotiation of bilateral investment treaties between key countries (e.g. US-China BIT), and in the negotiation of mega-regional agreements with investment chapters (e.g. Trans-Pacific Partnership). These negotiations represent opportunities to shape the investment regime by narrowing the substantive and procedural investment law differences among the principal FDI host and home countries. The negotiation of a multilateral instrument (especially a high-standards one) would face major challenges in light of the unsuccessful efforts of the past and the wide range of views surrounding IIAs. The July 2015 decision by the Third International Conference on Financing for Development has mandated UNCTAD to work with member states to improve IIAs. A universal framework would have to start from the need to promote sustainable FDI for sustainable development. The most comprehensive recent effort in this respect is the UNCTAD Investment Policy Framework for Sustainable Development. The WTO offers the best platform for trade and investment regimes to be combined and consolidated, as a unified system providing systematic legal and institutional support for the future growth of GVCs, turning that organization into a World Investment and Trade Organization. The WTO Working Group on the Relationship between Trade and Investment could be reactivated or a new working group could be established. Another alternative is to build on existing agreements, especially the GATS, to cover other types of investment and obligations. There might also be the possibility that the international investment court and appellate mechanism sought by the European Commission could become a stepping stone towards a permanent multilateral system for investment disputes, which, in turn, could become the nucleus around which a universal framework could be built. If a multilateral framework is out of reach at this time, a plurilateral framework could serve as a first step. It could be an agreement negotiated by interested parties that would be open for future accessions. It could also build on recent bilateral and mega-regional agreements (e.g. Pacific Rim) in a process of sequential multilateralization. The G20 is a potential forum to launch the exploratory process.

### 20. Encourage a credible NGO to launch and organize an informal process to encourage a free and open discussion of all the issues involved.

Any systematic process to improve the investment regime needs to be government-led and -owned. However, considering the range of stakeholders involved in international investment matters, it would be advisable to launch an (accompanying) informal but inclusive confidence- and bridge-building process on how the international investment law and policy regime can best be enhanced. A trusted institution, perhaps with the support of a few countries and in cooperation with an international consortium of academic institutions, should organize the process outside an intergovernmental setting. It should identify systematically any weaknesses of the current regime and advance concrete proposals on how to deal with them. It should be inclusive and involve the principal stakeholders to ensure that all issues are discussed and all key interests are taken into account. The outcome could be a draft agreement that could be made available to governments to use as they see fit.

### Additional recommendation

**Provide better data**

Countries do not necessarily follow the reporting guidelines provided by IMF, UNCTAD, and OECD. Implementing these guidelines would correct major distortions in international investment statistics. Encourage all countries to report FDI flows with and without special-purpose-entity transactions and on the basis of the location of the ultimate parent firm, to provide better data for the evaluation of the impact of FDI. Technical assistance programmes undertaken by IGOs could help.
The papers commissioned for the E15 Task Force on Investment Policy can be accessed at http://e15initiative.org/publications/.


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E15 INITIATIVE: EXPERT GROUPS AND TASK FORCES

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

E15 INITIATIVE THEMES

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

* Policy options to be released in late 2016
Implemented jointly by ICTSD and the World Economic Forum, the E15 Initiative convenes world-class experts and institutions to generate strategic analysis and recommendations for government, business and civil society geared towards strengthening the global trade and investment system for sustainable development.
国际投资法

演进中的国际投资法律与政策
体制：未来路向*

[美] Karl P. Sauvant 撰** 李庆灵译 陈辉萍校***

【内容摘要】国际社会对国际投资的需求是巨大的，所有国家都在努力吸引外资。因为它涉及各种资源，这对创造就业、促进经济增长与发展并最终增进全人类的繁荣至关重要。尽管这一需求的相当一部分要由公共财政承担，但大部分仍需动员私人部门来承担，其中包括国际投资者。此外，我们需要的不仅是更多的投资，还要求投资具有可持续性。

当前国际投资已经成为国际经济交往中最重要的方式，也是经济

* 本文系E15投资政策特别工作2015年研究报告的内容提要。E15倡议由国际贸易与可持续发展中心(UNCTAD)和世界经济论坛(WEF)共同负责，其召集世界知名专家和相关机构，以期为当前至2025年期间的全球贸易和投资体系改革提供可靠、全面的政策选项方案。E15倡议联合16个知名机构，召集全球375名顶尖专家在2012-2015年间就18个主题展开了80多次互动式对话。

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一体化中最强大的载体。在向国外市场提供产品和服务方面,投资比贸易发挥更大的作用,它通过日益一体化的生产网络和全球价值链使得各国的国民经济彼此紧密衔接。跨国企业 (Multinational Enterprises,为MNEs) 的出现及其横跨不同国际市场的商业往来,不仅使得国际贸易在全球价值链中占有很大的份额,也使得投资和贸易密不可分。在这个进程中,新兴市场作为外国直接投资 (Foreign Direct Investment, FDI) 的主要接收方和输出方,其参与度日益增强。在这种新形势下,重新审视国际投资治理变得尤为重要。

可持续发展中心 (International Centre for Trade and Sustainable Development,ICTSD) 作为E15倡议(E15 Initiative)的发起者之一,与世界经济论坛 (World Economic Forum, WEF) 联合成立了一个与投资政策相关的特别工作组 (Task Force), 旨在审查国家的国际投资法律和政策制度,以及时加强其治理并鼓励那些有助于可持续发展的可持续 FDI 的流动。这一机制所涵盖的国际投资通常由MNEs所承担,主要方式是通过 FDI 和各种形式的非股权模式控制,包括管理和供应商合同,以及证券投资。工作组的研讨具有未来导向,其预测未来五到十年在发展迅速的领域中所面临的艰巨挑战——其中的一些想法,如世界投资法院,在数年前还被视为不方夜谭而被搁置一边,如今却被提上国际政策议程。

特别工作组的目标是提出几项关键政策的选择方案,以有效应对投资制度改革中面临的挑战。考虑到本研究报告是在主题负责人的领导下完成的,故需要强调的一点是,该研究报告并不代表工作组所有成员的一致意见。事实上,工作组内部就下述讨论的许多问题都存在不同看法。

改革投资体制的当务之急是,在鼓舞人心与普遍接受的国际投资框架下,采取各种专门的措施来促进更多具有可持续发展的可持续 FDI 的流动,特别是流向发展中国家和最不发达国家。要改良投资体制,相关政策建议应集中在该体制目的的扩大上,即在保护国际投资与促进投资者的有效运营之外,还应包含促进可持续发展(并允许追求其他合法的公共政策目标)以及建立制度化的争端解决机制,同时设立国际投资法律咨询中心作为补充。在此之前(或与此同时)可借助非正式的共识构建进程,在多边或诸边投资协议谈判中为国际投资提
供一个总体框架。

一、国际投资规则制定的背景

国际投资的经济重要性毋庸置疑，但至今仍缺乏一整套包容万象的规则来调整该议题。相反，现有的国际投资体制是由 3000 多个国家的投资协定（International Investment Agreements, IIAs）组成，其中绝大多数为双边投资条约（Bilateral Investment treaties, BITs）。这一投资体制反过来又为国家制定投资规则提供了法律标准。国际和国内两套投资框架共同调整国际投资者和政府的行为。

构建合理的国际投资框架本身并非目的。可以预见的是，世界经济可能面临十年或更长时间的缓慢增长，但遗憾的是，全球 FDI 流入却由于金融危机的缘故从 2007 年的最高峰 2 万亿美元大幅下降。投资的流量不仅需要恢复，而且还要反超之前的记录。从经济上看，没有理由认为 FDI 不能以 2007 年流量的双倍或三倍增长，但问题不仅在于追求更多的 FDI，而且在于更多的 FDI 能够促进全球经济的可持续发展。

促进此类投资的首要条件是，各国在经济上、监管上以及能促进投资的各种决定性因素这几方面做到位。但处理各国政府和国际投资者关系的国际框架也必须加强：这一框架应提供明确的事理规则，以及当政府和投资者这两个行为体之间产生争端时，提供一个适当的体制来解决这两者之间的争端。此外，该框架还需为所有非经济合作与发展组织（经合组织，Organization for Economic Co-operation and Development, OECD）成员的经济体——如发展中国家或转型经济体——提供国际市场，增强其对国际投资者的吸引力。改良后的投资体制，具有更强的正当性，可以提供更有利的框架来增加能够促进可持续发展的可持续 FDI 的流动量。

本报告着眼于为完善国际投资体制提供可行的路径，故其政策选项仅关注具有系统性影响的几个有限主题。下文将对这些主题进行分别讨论，逐个分析原因，但它们彼此之间是密切相关的。
二、各种政策选项：以可持续发展为目标的可持续投资

（一）更新国际投资协定的目的及内容

关于强化国际投资体制的任何讨论都需要从该体制的目的开始。如果考察IIAs的起源，那么保护外国投资者作为其曾经的，并且继续作为其首要目标也就不足为奇了。晚近，IIAs还将便利投资者的运作纳入其目的当中，以此促进FDI及相关利益的增长。

政策选项1：扩大体制的目的，促进可持续发展

然而，仅以此为目的已然不够，IIAs的目的需要进一步扩展。除此之外，IIAs还特别需要认识到促进可持续发展以及FDI对这一目的实现作用。更进一步的目的，包括保护公共福利和人权，如公共卫生、劳动标准、安全和环境保护。在追求这些目标的过程中，那些较为脆弱的经济体可能需要更多的国际支持，包括通过IIAs提供支持，这一情况将在投资的国际竞争中进一步加剧。

政策选项2：承认足够政策空间的必要性

推动体制目的的扩展，为政府保留一定的政策空间，使其享有为了合法的公共政策目标之利益的规制权，该规制权应在IIAs的条文中得以确认。这也意味着投资者需要为自己的商业行为承担责任。IIAs的内容需要体现这一放宽了的目的。

“政策空间”是一个模糊的概念，有时候还会被政治化。需要注意的是，它并不能被理解为赋予政府漠视诸如非歧视此类国际义务的权利。

这是一个挑战，类似于在解释IIAs所包含的关键概念和保护时，确保其解释不会过于宽泛。如果IIAs包含提及普遍原则和规则的措辞，会留下过于宽泛的解释空间。这会增加国际投资者知晓他们可以期望从东道国政府获得何种待遇的难度，也会加大东道国政府确认他们对投资者所做行为对错与否的难度。这种不确定性会反过来增加争端的可能性。有鉴于此，应尽最大可能提升法律的确定性。

① 基本的建议是鼓励所有国家提供更多的有关FDI影响的统计数据。
政策选项 3-5：澄清关键概念及其相互关系

因此，完善投资体制应关注的一个重要方面是，在界定IIAs的关键概念时，采用更为严谨的措辞，以尽可能地明确其含义。例如，投资者可以寻求赔偿的损害与情况的种类，以及政府可为与不可为的行为类型。在这方面，标准化措辞的形成及其普遍使用将是有所助益的。此外，同样还需要澄清国际投资体制与国际法的其他重大领域之间的相互关系，特别是那些有关人权、环境、劳工、贸易，以及税收和优惠的领域。

政策选项 6：成立工作组以准备一份有关FDI的可持续性特征清单

目前在上述问题上虽然已有所进展，但仍需更多努力。这包括界定国际（国内）投资的可持续性特征这一难度较高的挑战。为此，应成立一个工作组，在征询多层次的利益相关方后，准备一份描述FDI可持续性特征的指导性清单。这一清单可为有兴趣吸引可持续FDI的政府所用。

此外，还需考虑投资者的责任问题，以便鼓励可取的企业行为，阻止其不良行为。作为主权国家，东道国政府当然可以通过国内的法律、法规对投资者施加强制性的义务，当前已有这方面的实践。投资者必须遵守相关法律法规，并承担任何可能出现的侵权责任。除此之外，为解决这一问题，OECD、国际劳工组织（International Labor Organization，ILO）和人权事务高级专员办事处（Office Of The High Commissioner For Human Rights，OHCHR）还制定了各种无拘束力/混合性的机制，但它们仍需进一步改进。②

政策选项 7：在IIAs中承认投资者的责任

但由此带来问题是，为防止东道国违反条约的条款，IIAs应在何种程度上限制东道国对投资者施加义务的能力，或阻止东道国如此行事。在IIAs中引入投资者的责任，提供相应的国际标准，可以解决这一问题，尽管人们就此类标准达成共识并不容易。此外，就该国际标准问题达成广泛共识，至少在一定程度上有助于那些能力有限的国家执

②这些法律文件《OECD跨国企业准则》、《OHCHR关于商业和人权的指导原则》，以及《ILO关于跨国公司和社会政策的三方原则宣言》。
行该领域的国内法律和法规。

扩展 IIAs 的目的，澄清关键概念，承认与其他法律制度之间的相互关系，并认识到投资者的责任，所有这些都是未来所应追求的目标。

工作组由最知名的国际投资专家组成，包括仲裁员和从业人员。通过与主要利益相关方的密切协商，工作组可为更新 IIAs 目的与内容提供最佳方案。这个团队将得益于各大洲、由一流大学组建而成的大学联盟以及其他感兴趣的利益相关组织的支持。其成果可以提交给政府，作为其在未来制定投资规则时的参考。

（二）为可持续投资便利化构建国际援助计划

国际投资体制的目的与内容中有一个方面需要特别关注，即几乎所有政府都在努力吸引 FDI，并尽可能从中获益。但不少政府，特别是最不发达国家的政府，缺乏在国际 FDI 市场竞争中胜出的能力。有鉴于此，应启动一项促进可持续投资的国际援助计划，重点帮助改进国内 FDI 的管理制度并增强投资促进能力。该计划应集中采取切实可行的方法和手段，鼓励可持续 FDI 流向发展中国家，尤其是其中的最不发达国家，努力增强发展中国家投资促进机构（Investment Promotion Agencies，以下简称 IPAS）的能力。通过建立促进可持续 FDI 的综合平台，该计划可以对各种贸易便利化措施，特别是 WTO 主导的贸易援助倡议以及近期达成的 WTO 贸易便利化协定进行全面补充。

政策选项 8-11：实施此类国际援助计划的方案选择

事实上，实施这个计划可有多个方案，第一个可选方案是，将投资纳入贸易援助倡议的范围，将全面扩展为投资与贸易援助的倡议。第二个中选的方案则是将可持续投资纳入贸易便利化协定的范围，将其变成一个投资和贸易便利化协定。第三个方案是由所有或者一群感兴趣的国家启动一个可持续投资便利化谅解，寻求切实可行的方式去鼓励可持续 FDI 流向发展中国家。适当时，这一谅解可在 WTO 框架下进行，也可在另一个具有国际投资经验的国际组织框架下开展，它可能是联合国贸发会议（United Nations Conference on Trade and Development, UNCTAD）、世界银行或 OECD。亦或，由世界主要的 FDI 输出国组成的集团发起此类倡议。这一推动力可来自 20 国集团，由该集团授权启动此类工作。为纳入上述选项以充实“投资便利化”
计划各方面内容，有必要开展细致、扎实的工作。

这个提案的关键前提是创造更有利的国内环境，以促进可持续FDI, 具有更大的流动性，从而满足未来投资需求，这是重要且迫切的。这种观点已为越来越多的政府和私营部门所接受，现在需要集结政治意愿，以便构建一个促进可持续投资的国际援助方案。

(三) 应对预防、管理和解决争端的挑战

政策选项 12－13：构建投资者－国家间争端的国内管理机制

即便投资体制的项目得以扩展，其内容获得澄清，国际投资者与东道国之间仍可能出现争议。因此，各国政府需要构建应对投资者－国家间争端的国内管理机制，允许政府和投资者在其冲突全面升级为法律纠纷之前，妥善处理他们的不满情绪。

政策选项 14：建立投资者－国家争端解决上诉机制或世界投资法院

但是，一些争议不可避免会上升到国际投资仲裁的层面，其中的一部分很可能通过替代性的争端解决机制解决，因此需要多鼓励人们利用这些机制。但鉴于投资者－国家争端解决（Investor State Dispute Settlement，以下简称 ISDS）机制在投资体制的中心地位，这一机制也应当是无可厚非的。这不仅是一个技术性问题，而且对国际投资制度的正当性具有重要意义。为改善这一机制，人们已经采取许多措施，但仍需进一步努力。

首要的重大改革应是针对当前的特设仲裁庭建立上诉机制，或者是（如欧盟委员会最近提出的）建立世界投资法院，作为常设法庭裁决任何争端案件，或者是这二者的结合。这种将争端解决进一步制度化的方式是完善投资体制的重要步骤，相当于 GATT 框架下的特设争端解决程序向 WTO 框架下更强有力的争端解决机制转变。以此为方向的制度性发展未必能够确保所有 IIA 在适用上完全一致，因为，虽然这些基础性条约采用了某些特定的原则和常用的核心概念，但其内容并不一致。但是，随着时间的推移，一致性的问题将会得到改善，从而提升争端解决过程的可问责性，并形成许多具有法律权威性的一般原则和解释，后者将会增进投资体制的连贯性、可预测性，乃至最终提升其正当性。
对此，可以考虑以下几种安排。例如，当前在IIAs争端中使用的特设仲裁庭，其作出的裁决可以上诉至特设上诉机构。或者，还可以设想建立一个单一的、常设的、独立的世界投资法院。或者，还可以考虑在双方或多方之间的条约框架下建立一个上诉机构，审查特设法庭所作的裁决；其他国家也可以受邀有权选择利用这一机制，籍此将这个上诉机制多边化。最后，由于解决投资争端国际中心（ICSID）是唯一且最重要的争端解决场所，有人认为可以考虑缔结一个条约以更新《关于解决国家与其他国家国民之间投资争端公约》，也许可以将这一条约称之为《ICSID公约 II》。这个新条约可以构建一个单一的世界投资法院（和上诉机构），供所有签署和批准这一条约的政府使用。

政策选项 15：允许政府作为指控方直接进入ISDS

最后一个问题关于争端解决机制的使用问题。特别是，如果扩充IIAs的内容，将投资者责任纳入其中，则可以认为，政府享有直接利用争端解决机制的权利。由此也带来另一个问题——这是深远而宏大的变化——争端解决的过程是否也因此应向其他利益相关者开放。

政策选项 16：考虑逐步将ISDS变成一个投资争端解决机制

朝这一方向进行改革，将投资者—国家争端解决机制转变成为投资争端解决机制，将对国际投资争端解决过程的性质产生深远的改变。相应地，这将显著地改变当前有关国际ISDS的研究动向。

然而，改善目前的争端解决机制是一个艰巨的任务，可能需要克服政治和技术方面所面临的重重困难。着手探索如何才能完成这一任务，以期构建更好的机制，将发出一个强有力的信号，表明政府认识到这一机制需要改进。这不仅仅是一个技术问题，还（有关ISDS的公开讨论表明）关乎舆论所认可的公平问题。

从欧洲议会到各种学术会议，这一事项的各种问题已在许多政府和非政府的场合中广为探讨。应该加快相关进程，听取所有利益相关者的声音，并探讨所有相关的问题。

(四) 建立国际投资法律咨询中心

如果在作为投资争端的被控方时，弱势经济体的自我防御能力可以得到提升，则会发出一个强有力的信号，类似于表明人们增强争端解决程序正当性的意愿。相反，一个不为当事人提供公平竞争环境的争
端解决机制，很容易被视为对该机制的一种损害，削弱的正是其正当性。诉诸司法不应仅是表面上的公平，还必须将公平内嵌于其自身的运作当中。

特别是最不发达国家，它们一般没有足够的人力进行应对。许多国家就连聘请必要专业人员的财力都没有。这同样不利于保障仲裁程序的效率和质量，使许多国家在争端出现时处于能力不对称状态。

政策选项 17：建立国际投资法律咨询中心

一个独立的国际投资法律咨询中心将有助于建立一个公平竞争的环境，为那些在面对投资者的起诉时不能进行充分抗辩的被指控方提供行政和法律援助。但在构建此类机制之前，仍有许多问题尚待考虑。WTO 法律咨询中心的经验表明，这一做法对于世界贸易体系大有裨益。

政策选项 18：为中小型企业创建一个小型的索赔法院

针对中小型企业也有类似的考虑，它们也常常因为没有足够的专业人士和资源而无法提起诉讼，非常需要支持。所以，即使上诉机制得以建立，成本与延误也可能会成为更大的障碍。在这方面，使用快速程序、设定期限和独任仲裁员的小额索赔机制，将有所助益。

在这两个机构（咨询中心和小额索赔机制）之外，还可以指定一个独立的国际投资监察员，与被诉国的特设监察员合作。其潜在价值便是作为政府与（特别是小）企业间的一种低成本的替代性纠纷解决机制。

关于创建国际投资法律咨询中心，现在就应该开始着手澄清一些问题，从而尽快使之成为现实。我们亟须一些特别关注国际投资制度正当性的政府，带头建立此咨询中心和小额索赔机制。他们可以从那些在国际贸易体系有良好工作记录的非政府组织中获得支持，也可以从对这一主题感兴趣的政府间组织处借鉴经验。

（五）展开多边/诸边投资框架的谈判

迄今为止，相关探讨均集中在国际投资制度个别但关键的方面，以及如何改进之上。然而，国际投资的治理也可以采取一种整体性的方法，即通过谈判，构建一个综合性的、全球性的国际投资框架。多边投资框架是一个最好的选择，可以先从复边投资框架开始，其他国家日后
可以加入进来。这个框架必须从促进可持续发展的可持续 FDI 这一需要出发。随着新兴市场国家对外投资的增长，母国与东道国之间的政策利益正在融合，这将有助于该目标的达成。

此外，根据春水船上的 IIAs 也表明，政府对国际投资规则的制定仍表示出最大的诚意。这尤其体现在主要国家间的 BITs 和大型区域协议投资章节的谈判当中。所有这些谈判，共同呈现一个塑造投资制度的巨大机会，缩小主要的 FDI 东道国和母国投资法在实体和程序方面的差距。这一情况若能成真，那么，这些谈判的结果可能会是随后促成全球投资体制的重要踏脚石。然而，考虑到过往的多次失败尝试，对 IIAs 的多样看法以及极大的热情，这一机制的成功将会面临重大的挑战，尤其是对于标准较高的机制而言。

政策选项 19：启动探索综合性全球投资框架的议程

尽管存在这样或那样的挑战，先启动一项探索国际投资框架可能性的议程，应是比较可取的方案，理想的框架是多边性质的。这可能会与第三届国际发展融资会议于 2015 年 7 月作出的决议特别相关，它授权 UNCTAD 与其会员国合作以改进 IIAs；也与 UNCTAD 这一组织在该领域的丰富经验相关，尤其是晚近该组织尝试通过其可持续发展的投资政策框架推动新一代投资政策的产生。

另一方面，WTO 可以为贸易和投资体制的融合与统一提供最佳的平台。作为一个统一的体系，它可以为未来“全球价值链”的增长提供系统的法律和制度性支撑，该组织也因此转变为一个世界性的投资与贸易组织。若要达成这一目标，那么，WTO 的贸易和投资关系工作组可以在适当的时候重新启动，或者可以建立一个新的工作组。另一个选择是，在已有协议的基础上，特别是《服务贸易总协定》，增加其他类型的投资和义务。还有一个可能是，将欧洲委员会寻求的国际投资法院和上诉机制作为永久性的多边投资争端体制的垫脚石，相应地，该多边体制可作为构建全球性框架的核心。

如果当下建立真正的普遍性和综合性投资框架的时机尚不成熟，那么，复边的国际投资框架可以作为朝该方向努力的第一步。在此，可以借鉴服务贸易协定的经验，它便是由感兴趣的缔约方谈判达成，日后再对其他国家开放加入。这种做法，特别是如果中国—美国 BIT 可以尽早达成，将对全球性投资框架的构建大有助益。若真是如此，那么，
这项通过发达国家和发展中国家当中最重要的母国和东道国谈判达成的协议，可以作为一个供未来参考的范本。2016 年在中国举办的 20 国集团首脑会议可以推动这一议程。

三、下一步：非正式、包容性的共识构建过程

公众有关投资体制的讨论以及国际投资法共同体内部的争论表明，该制度的完善势在必行。在谈判单个 IIA 时，投资制度的改进可按主题领域逐个进行。如果有新的提议，应尽快启动。最后，应认真考虑准备进行多边、双边投资协议谈判。任何完善投资制度的系统性进程最终都要由政府主导并获其认可。

政策选项 20: 启动非正式的共识构建进程

然而，考虑到国际投资事项利益相关者的范围，在如何最好地改进国际投资法律与政策制度方面，一个可取的做法应是启动非正式（附随性）但集信心建设、共识建设和桥梁建设于一体的进程。这一非正式的进程应在政府间框架之外进行，以便激励和促进人们自由、开放地探讨所有相关议题。这一议程应由一个可靠的机构来组织，某些个别国家，特别是对该议题感兴趣的国家，也可以给予支持。在确认何谓当务之急时，应根据现有国际组织近及开展的重要工作进行通盘考虑。应彻查当前体制存在的不足，并对如何应对这些问题提出具体的建议，这些问题不仅涉及政府与投资者的关系，还包括对增加可持续 FDI 的流动以及从中获益。这个议程应当具有包容性，保障所有主要利益相关方的参与，确保所有问题均可被公开讨论，所有的核心利益都被考虑在内。

这一议程的成果可以是一个提供给政府使用的协议草案，如果政府认为合适的话。无论如何，这一成果应尽可能广泛公开，以便帮助各国政府改善其国际投资法律和政策制度，将之作为促进可持续发展的可持续 FDI 流动性增加的授权框架。

（编辑：张金苓）
The Evolving International Investment Law and Policy Regime: Ways Forward

Karl P. Sauvant

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