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). 

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

\[1\] 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. 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

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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. 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

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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 negotiators\(^5\) 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 Reporter 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 law, 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

© 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 UNCTRAL has been meeting since October 2010 on the question of transparency, with the sixth meeting having taken place in February 2013. The UNCTRAL 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. 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. 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.

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.

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\(^\circ\) (e. g., as mentioned earlier, by using a definition of "investment" that makes "sustainability" an integral part of it\(^\circ\)). 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\(^\circ\); an assessment of whether any stand-

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

\(\circ\) 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.

\(\circ\) Greater clarity in this respect could itself reduce the incidence of investment disputes.
ards should be dropped\(^3\); 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)\(^4\), 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\(^5\); 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).\(^6\)

\(^3\) 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.

\(^4\) 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".".

\(^5\) 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).

\(^6\) 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"\(^\circ\), (iii) South Africa has decided that most of its BITs "are now open for either review or termination"\(^\circ\).


(iv) India has put its BIT talks on hold (triggered by concerns with the dispute-settlement mechanism)\(^\circ\), (v) the Parliament of Argentina has adopted a resolution calling for the denunciation of the country's BITs\(^\circ\), and (vi) there is a call to establish a Latin American Centre for Investment Dispute Settlement with its own rules. \(^\circ\) 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. \(^\circ\) Accordingly, a Consensus-


\(^\circ\) 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 organizations 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.

\(^\circ\) As Charles N. Brower observed in an interview with Arbitration Trends (2013), at http://quinnemanuel.com/media/371211/arbitration%20trends%202013%20winter%2020final.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 ‘hackslash’ 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 Farra, The History of ICSID (New York: Oxford University Press, 2012). See also UNCTAD, “Reform of Investor-State Dispute Settlement: In Search of a Roadmap”, HA Issues Note, No. 2 (2013).
building Working Group could also be convened to build consensus relating to the dispute-settlement process.

1. 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), 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 (especially regarding frivolous suits), and considering the implications of excluding investor-state dispute settlement from IIAs.

- Investigating to what extent alternative dispute-resolution

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Footnotes:


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

3. 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®) 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®; and, conversely, whether, if foreign investors have access to international dispute settlement, domestic investors should have the same option.®

® 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 Lec L. Anderson Jr. and Brian Polkinghorn, “Managing Conflict in Construction Mega-projects: 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.

® 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.

® 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 regime, 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. 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

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.  

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.

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(*) 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 a "hidden" form. 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.

① 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".

② 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. 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. 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 (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.

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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.

International Working Group of Sovereign Wealth Funds, Sovereign Wealth Funds: Generally Accepted Principles and Practice “Santiago Principles” (Santiago Principles), (IWG, 2008).


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 Gökçür, “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. One approach mooted is to leverage the work already done in this area by incorporating the Santiago Principles into more formal arrangements. However, such an approach has advantages and disadvantages—states must be satisfied that the principles represent an appropriate standard for domestic purposes. 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.

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.

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, Gutiérrez 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.

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”.

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 which focuses on trade, but also takes investment

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(3) 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.

(4) 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. 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. (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." Furthermore, as international

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.

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

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 Yale 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®, 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. ® An Advisory Center of this kind could be

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

® 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\(^\text{®}\), 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.\(^\text{®}\) Moreover, discussions were also held to establish an Advisory Facility on International Investment Law and Investor-State Disputes for Latin American countries.\(^\text{®}\) 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,

\(^\text{®}\) 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.aclf.org.

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

\(^\text{®}\) 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 Yale 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. 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. 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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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.

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 Schmidtke (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\(^{\circ}\), may not always take advantage of international arbitration when they feel that they have a claim.\(^{\circ}\) 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

\(^{\circ}\) 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.

\(^{\circ}\) 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. 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).

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 Kardasiopoulos 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. 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.

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). 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. Other issues arise from the multiplicity of

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.

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 pursuit 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 plurilateral 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. Moreover, the WTO’s Doha Round currently dominates multilateral economic policy-mak-

\[\text{\textcircled{\text{3}}} \quad \text{As, for example, in the case of the United Nations Framework Convention on Climate Change (UNFCCC) (Nairobi and Geneva; UNEP/WMO Information Unit on Climate Change, 1992).}\]

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ing. 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. 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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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.

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, as also advocated in some quarters. 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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6 Interviews by the authors in Geneva in January 2013 (on file with authors).
7 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: Peterson Institute for International Economics, 2013), p. 50. During the same month of April, the ICC adopted at 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. 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). 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, 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. 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

© 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.

© 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.


© 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®, 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®, MERCOSUR® and SADC.® (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

® Note that the UNCTAD, WTO and OECD Secretariats are cooperating in preparing reports for the G20 on investment policies.
® ASEAN Comprehensive Investment Agreement, February 26, 2009, Cha-Am, Thailand.
® Protocol of Colonia for the Promotion and Reciprocal Protection Of Investments in Mercosur (January 17, 1994) MERCOSUR/CMC/DEC No 11/93.
® 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 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. The G20, on the other

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7 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.

8 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; together, they accounted for about 70% of the world’s inward FDI flows and about 80% of its outward FDI flows during 2010-2011. Moreover, the Group has addressed the international investment issue in its communiqués. 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). 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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1. 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.

2. 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.

3. 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.

need to have an adequate dispute-settlement process. 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.

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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 Representative’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. In fulfilling the mandate to prepare the Guiding Principles, 47 international consultations were held (on all continents), and “the Special Representa-

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.

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”.

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. Particularly relevant are here the Trans-Pacific Partnership negotiations; the Regional Comprehensive Economic Partnership Agreement in Asia, the FTA negotiations of Canada with the European Union (which also cover investment), India and Japan; the BIT negotiations of China with the United States and possibly the European Union; the European Union negotiations with India.

- 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 Shub, "Czechs Face Uphill Battle To Cancel US Investment Treaty," *CzechPosition.com*, April 7, 2011, at http://www.czechposition.com/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.


- 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.

- 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/.


and Japan, as well as, more recently, the United States on a Transatlantic Trade and Investment Partnership; and the BIT negotiations of India with the United States. 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”, 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. 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.


Anirban Bhauvik, “India, US Set To Sign Bilateral Investment Treaty”, Deccan Herald (New Delhi), October 1, 2012, at http://www.deccanchronicle.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”).

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 renegotiation on the basis of a new Model BIT to be developed.”


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. 28, 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®) 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

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

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

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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.

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.

(编辑：龚宇)
国际投资法制和政策制度的未来：完善之路径

Karl P. Sauvant & Federico Ortino 撰，*陈欣译，陈辉萍校**

【内容摘要】目前，国际投资体系面临越来越多的挑战，这些挑战突出地反映在投资者—国家间仲裁机制，将国际投资体系的目标更多地转向对可持续发展的探索和加强对跨国公司行为的规制等。本文就该体系的完善提供了一系列的选择，包括：采取事实查证程序；就关键议题成立工作组并达成共识；起草国际投资协定范本；建立具体机制以完善国际投资体系；以及启动国际间的进程。本文主张通过在国际投资领域达成共识的过程促进国际投资体系的完善。

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芬兰外交部于2013年4月10－11日在赫尔辛基举办了促进国际投资机制研讨会，本论文是作者为会议准备的报告《完善国际投资法制和政策制度——面向未来的挑战》的一部分，该报告同时收入2013年12月芬兰外交部出版的书中。

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引言

在现今的全球经济中，国际投资，特别是国际直接投资（FDI），已成为将货物和服务带到国外市场，并使各个单一国家的产品生产体系相互融合的最重要手段之一。从2007年到2011年间，10万家左右的跨国企业遍布全球超过90万家以上的海外分支机构，每年的年平均对外投资额达到1.7万亿美元。各国政府纷纷推出吸引外资的举措以促进经济的增长和谋求国家发展。为此，各国还相继成立投资促进机构，减少管制措施并相互达成大量的国际投资协定（IIAs）。（1）

传统的国际投资制度具有以下几个重要特征。该体系最主要的目标是促进和保护外国投资。它适用的范围相当广泛，涵盖了外国投资者各种各样的投资类型，涉及不同经济利益的糅合，而保护的投资者更是囊括了个人和法人。但是，国际投资制度关注的内容却十分有限，多不涉及健康、环境、劳工等公共政策议题。国际投资协定通常会为已设立的投资提供保护，最核心的标准包括征收及其赔偿，公平程序，公平和公正待遇，充分的保护和安全，以及给予外国投资者不低于本国国民的待遇。一些国际条约还提供准许在的国民待遇，外国投资者能够以和东道国本国国民相同的条件进入东道国市场。投资者—国家间仲裁机制则有利于强化这些规范的实施，投资仲裁机构每年都能收到许多诉求。各个投资仲裁机构的裁决虽然没有判例的法律效力，它们毋庸置疑仍然构成体现国际投资制度的法律来源之一。其他类型的法律渊源还包括在过去50年间出现的国际投资条约、国际习惯法中对外国人的规制和具有“软法”性质的标准。然而，国际投资制度仍然体现出粗浅和碎片化的特质。

目前，国际投资领域还是出现了一些重要变化，这些变化将推动国际投资法的变革。其一，新兴市场国家的对外投资越来越多，订立国际投资协定时需要考虑的因素有所不同。其二，由于新兴市场的影响力越来越大，公司治理形态、价值、投资者投资的方式已经随之改变。特

（1）二十余年以来，联合国贸易和发展会议（UNCTAD）世界投资报告（WIR）一直关注国际直接投资流动、国际直接投资的构成及其发展。因此，本文所列数据，除非特别指出，都援引自联合国贸易和发展会议的国际投资报告（以下简称UNCTAD，WIR）。
别是，国有投资实体的增加以及发达国家对国家安全的考量，导致一些发达国家制定的投资政策发生了微妙的改变。其三，就政府而言，他们并不认为所有的投资带来的影响都是正面的，因此制定政策时更加谨慎。政策制定者越来越关心如何吸引适合其投资环境的合适投资，如何保护其利益和将风险控制在可接受的范围内。实际上，一些国家开始重新审视针对外国投资的制度，包括审查，重新谈判或撤销已作出的国际承诺和制订新的国内政策。此外，一些研究试图评估国家间签订投资协定对于吸引外资效果的影响，但结论是兼而有之，但在此前，投资条约能够促进投资这一假设经常被视为国际投资体系的重要基础之一。其四，建立在条约基础上的投资者—国家间争端解决机制的频繁使用和费用的持续增加也受到特别的关注。争端数量的增加甚至在一定程度上是全球投资总额增长的产物。但这也导致了在解释条约的过程中会不断遇到难题，一些国家的政府还试图减少甚至根除其可能需要承担的责任的范围。市民社会在围绕国际投资制度（特别是投资者—国家间争端解决机制）的争论中也有一席之地，并且给国际投资条约带来一些崭新的元素。其五，国家通过签订、修订和解释国际投资条约，以及为本国企业的对外投资提供直接的支持，积极参与到国际投资体制中。

当前，针对国际投资体系的争论包括以下几个关键议题。第一，如何确定国际投资体制的主旨，特别是国家是否需要持续关注对投资者的保护，以及是否应致力于促进可持续性国际投资。第二，投资条约所应包含的内容存在分歧，包括“投资”的定义，如何界定投资者的国籍，对国有企业投资的保护，投资条约的时效，国际投资条约优先适用的部门和条约的除外条款。第三，与投资相关的一些核心要素，如如何平衡投资者保护与东道国规制间的关系，是否作出准入前国民待遇的承诺，是否在投资条约中纳入规制母国和外国投资者的纪律。第四，目前国际投资体系中投资者—国家间争端机制不断变化所引发的议题。这些议题包括，投资仲裁的程序和裁决，从国家、投资者和其他利害关系方的角度探讨投资仲裁的合法性危机。第五，不同国际投资法法律渊源间的相互作用，不一致和重叠所带来问题。最后，国际投资制度无论在双边，区域或多边层面都缺乏完整的体系框架，这将影响到投资法及其政策架构的建立和实施。尤其是，国际投资体制本身存在的缺陷给
仲裁机构解释和实施投资条约带来了沉重的负担。

本文旨在对国际投资体制的改革提出一些建议。它的目标并不是提供综合性的改革选项，相反，它提出一系列建议并把重点放在国际投资体制本身及其实施所面临的挑战。当前，投资者—国家间的关系已经由权力导向转为法律导向，外国投资者较之以往更受益于这一体系，包括直接求助于投资者—国家间争端解决机制。显然，本文涉及的内容十分复杂且富有挑战性，因为它需要从不同角度考虑国际投资体制中各利害关系方的利益。虽然一些利害关系方基本上满足于现今的国际投资体制，其他一些主体仍然振臂疾呼要求其继续完善，还有一些主体则认为该体系一边倒，需要从根本上改变其发展方向，包括国际投资体制的目标、内容和最终可能诉诸的争端解决机制。相应地，本文对国际投资体制究竟是十分重要或可有可无不作评价，也不谈论未来该体系的完善应遵循哪些步骤。但本文隐含的前提仍然是，采取一定的行动至关重要。至于这种行动略微调整、实质性校准还是从范式上改变国际投资框架，将留待未来讨论和反思。

本文针对如何完善国际投资体制分为五部分加以讨论，包含从小到大到直逼雄心勃勃的各种举措：(1) 采取事实查证程序（fact finding processes）；(2) 就关键议题成立工作组并形成一致意见；(3) 制定国际投资协定范本；(4) 建立特别机制以完善国际投资体制；(5) 倡导政府间促进国际投资制度发展的进程。本文的各部分会分别讨论这些措施的目标、可能遇到的挑战和可行性。对其分别罗列并加以详述的目的在于构建一份清单并探讨哪些措施应优先采纳。因此，本文所列举的选项侧重于顾及所有利害关系方的利益，但这些措施能否产生实质性效果将由各参与方自行判断。

一、采取事实查证程序

诚然，各国间国际投资协定谈判能够或正在解决国际投资制度中的一些议题，但事实上仍然需要寻求国际层面的解决方式。特别是在目前国际投资体系呈现出分散性的背景下，正式的事实查证程序能起到一定的辅助作用，它足以识别和分析该体系的利弊，对目前的状况作出有公信力的评估。同时，为了增加程序的可信度，有必要在不同国
家、地区的利害关系方展开调查。本文在之后的论述中将会提及两种选择，即国际性的听证程序和对法律现状的盘点。它们的范围可以覆盖前述国际投资法和投资政策制度的关键性论题。所有这些程序都应独立进行，或多个程序平行进行。

（一）举行国际听证会

首先，由于涉及诸多利害关系方并且他们所关切的议题很多，因此，就国际投资领域所有问题举行国际听证会不失为明智之举。这一类型的磋商能够保证所有利害关系方（包括来源于政府、私营部门、工会、其他市民组织以及学术界）都能参与讨论，所有问题及其背后的考虑都能摆上桌面。由少数精英组成的专家组（包括主要利益集团的代表）将会是主持这类听证会的合适人选。通过书面提交的方式，专家组从国际投资体制的要求以及改革的方向、目的入手，进而探讨来自全球各利益集团的不同关切及主张的解决办法。听证会的结果可以总结为一份报告，这至少可以反映目前国际投资法和投资政策所涉及的范围。同时，他们还能将利害关系方有关如何推进改革的建议整合为一份菜单。因此，听证会应成为具有透明度的一致同意进程的重要组成部分，探讨哪些和目前投资体制相关的议题亟待解决，并判断未来需要推进的事项。进而，听证会的召开还会增进对国际投资体系中相互关联的各项重要议题的理解。

实践中，由全球主要大学组成的大学联盟能够担当此重任，他们还可以和在国际投资领域拥有一定权限的国际组织合作，并与国际投资论坛等活动相互配合。由利害关系方组成的顾问委员会则能提供指导并协助准备相关活动。

当然，组织这样一场国际性的听证会并记录讨论的结果需要相关领域的精英以专家身份参与，同时还需要利害关系方进行监督。由于类似活动举办将耗费大量的资源，这些资源或许可以由一个或若干个国家的政府提供，充足的资金可以保证不同地区利害关系方的充分参与和公开。

（2）就举办听证会而言，既可以地区性的听证会为基础，也可举办全球性的听证会。
（二）对原则和规范的精义诠释

对国际投资协定及相关文件中出现的原则和规范进行精义诠释，是另一个颇具野心的选项，它可以和国际性的听证会同时进行，也可以紧随其后。精义诠释的目的在于判断和解释“该法律体系目前的状况（从实定法的角度）和应然的状况（从规范法的角度）”。更特殊的是，它可以判断是否存在国际投资法所要着重强调的东西，如在国际投资法领域广泛接受的规则；在哪些议题上无法取得统一及其原因；对于未解决的事项是否存在其他选择，这些选择的优缺点以及他们的法律含义。针对国际投资制度诠释的意义还在于，提出国际投资协定中未体现或不典型的问题，有些利益团体希望将这些问题纳入，但对纳入的方式有分歧并存在不同的支持或反对的理由。换句话说，这对于在国际投资协定中包含更为合理的原则和条款具有前瞻性和创新性。这份阐释性的文件还可以讨论国际投资领域与其他国际法领域有关内在联系的问题以及这种联系对国际投资制度未来发展的影响。即使退一步说，一份成功的精义诠释起码能够奠定国际投资法和投资政策框架下被共同接受的内容。

3. 这一类型的评估类似于美国法学会（ALI）自1923年以来主要针对国际法的“精义诠释”，但区别在于本文提及的评估者还展望未来。ALI 所出版的《法律精义诠释》将各个有重大意义的司法裁判所形成的原则和规则，按照不同主题分类并进行论述。基于精义诠释所涉及的领域广泛，撰写过程严密、精确，对于美国学者，从业者和法官而言，精义诠释已经成为第二性的法律源流。每一精义诠释案由一位主要的报告人与由该领域专家构成的小组，ALI 成员以及由法官、教授和律师构成的 ALI 委员会进行咨询。目前正在进行的一个项目是美国法中的国际商事仲裁精义诠释，现已进入第二轮草案的起草。该精义诠释包含一系列主题，其中有专章讨论投资仲裁和美国法院间的关联，目的在于反映美国法律实践中出现的突出的程序议题及其解决。但是，实质性标准，如公平公正待遇或征收的定义等则未出现在精义诠释讨论的问题中。


54
诠释国际投资制度可能带来的成果还包括为国际投资协定的谈判方提供启发和指导，为仲裁员提供具有一定权威性的辅助法律渊源，对他们而言，在不存在广泛接受的看法的时候，他们需要不断协商并作出裁断。它还可以成为双边、区域、诸边甚至是全球性投资协定的起点，而这正是各国政府乐于看到的。

当然，这份精义诠释也有可能被认为本质上十分保守，因为它更像是总结现状如何，而不是将来应怎样。因此，国际投资制度精义诠释还需增加另外两项内容：首先，应考虑到法律随着时间的推进不断发展从而预测未来的发展趋势；其次，正如前文所述，精义诠释应当具有前瞻性，例如，应该立足于国际投资制度的目标，充分考虑超出现状的建议（也包括为谈判者提供具有创新性的选择）。此外，由于国际投资法处于不断发展，国际投资制度精义诠释还应密切关注新的国际投资协定和仲裁裁决。无论如何，它必须雄心勃勃地担负起为国际投资法添砖加瓦的责任，同时还应关注具体领域（见下文“建立达成共识工作组”）。

实践中，如果由来自各大洲国际投资法领域杰出学者组成的工作组准备国际投资制度精义诠释，将会增加它的可信度。工作组应保证所有利益关系方的意见都得到充分考虑，其中包括国际投资协定谈判中政府官员的意见，他们在谈判这类协定时有实际经验，最清楚针对具体问题时如何作出选择，而且他们正是这一诠释工作的潜在受益者。我们还必须注意到，对于每一利益集团而言，哪些问题在目前亟待解决，不同利益集团有不同的看法。世界各国大学的学者也可以组织相关活动，并吸收不同利益集团代表所组成的顾问委员会提供的意见。

起草国际投资制度精义诠释需要全球专家的参与。从过往实践可以看出，它将会耗费大量时间，并要求定期更新且因此投入大量资源。

⑤ 各类组织都为国际投资协定的谈判者们筹备了各种活动，特别是方便他们交流经验并通报新近的发展趋势。例如，UNCTAD以及南方中心，通过与国际可持续发展中心及其他机构合作，在近年来一直致力于此。对发展中国家，特别是最不发达国家的技术援助是其重要活动之一，因为它代表了所有利益关系人的利益，同时保证所有国际投资协定的谈判者在进行谈判时都处于可能达到的最佳状态。

⑥ 在政府间进行这一尝试会十分困难，因为政府代表很可能将其视为是一种谈判的形式。国际法协会曾经成立工作组讨论沿着精义诠释的路径起草新法的可能性，其特别关注在投资领域推行新法是否成熟。
二、建立达成共识工作组

目前，国际投资法存在大量的法律渊源和政策体系。由于组织架构薄弱且呈现出碎片化的特点，很多关键用语不存在精确的解释，无法单独通过事实查证的方式来发现和处理。虽然其中的一些问题相对集中（例如如何看待资本控制），可以用特定的方式加以解决，其他议题却富有挑战性且更接近国际投资制度的核心。它们要求大量的分析和讨论，并最终达成广泛接受的统一意见。

为了在特定议题上保持立场的相同，建立达成共识工作组是非常有用的一步。工作组或圆桌会议的方式有利于集中讨论实体性和程序性的国际投资问题，它还有利于在利害关系方间展开对话和建立相互信任。下文将罗列出达成共识工作组应当重点关注的议题。

（一）在商业社会和市民社会间开展圆桌对话

市民社会和商业社会的一些成员间在国际投资框架下存在许多观点分歧，这种分歧甚至远远超过其他利害关系方。简而言之，由于商业社会代表的论断通常建立在这一假设的基础上，即所有的外国投资都是经济增长和发展的基础，因此应该对外国投资予以鼓励和保护。而市民社会则通常认为外国投资并不一定是好事，事实上，它甚至有可能造成危害，因此需要严格的控制和监督，从而保证外国投资最大可能地有利于东道国经济的可持续发展。相应地，在过去，这两个利益集团对国际投资体系的建构持不同观点。当然，我们还可以对此进行简述：从目前的情势能够看出市民社会和商业社会间观点和方法上的差异，但他们之间也有达成关键性共识并取得丰硕成果的合作范例。国际投资体系理应予以完善，在这点上双方并无分歧，但对于何为最佳方案却很难达成一致意见。

然而，在某些环节上，各方都有一些无法妥协的观点和解决问题的办法。双方之间的沟通、理解和合作有利于国际投资制度的建构，因

⑦ 例如，2010年10月，UNCITRAL就成立了针对透明度问题的工作组。2013年2月，工作组召开了第六次会议。从UNCITRAL关于透明度问题的谈判中可以看到，当各国观点不一致时，达成共识十分困难。
此，应组织这两个利益集团的代表召开一次或多次非正式的私下会晤。圆桌会议的形式有利于进一步深入理解不同利益集团的主张和关切，从而在双方之间建立互信。诚然，圆桌会议关注的焦点是在两个利益集团间，但它们仍应邀请政府部门的代表（例如投资促进机构，特别是新兴市场的投资促进机构）分享东道国的看法和实践。一些组织，如弗里德里希—艾伯特基金会（Friedrich Ebert Stiftung）对与发展相关的议题可能会感兴趣，为促进更大范围的讨论，他们会组织和资助一个或一系列相关活动。

（二）关注实体性问题：国际投资协定的目标、可持续发展的国际投资、国际投资规范的内容、国际投资协定的选用

达成共识工作组应当特别关注的问题至少包含以下四个方面：国际投资协定的目标、可持续发展的国际投资、国际投资规范的范围和内容、国际投资协定的选用。

（1）由于国际投资协定的内容取决于其目标，因此首要解决的问题是国际投资协定的目标。国际投资协定的谈判者都会认可，签订协定是为了达到多个不同的目标，这些目标既可以是单纯地保护投资者，也可能包含可持续发展。谈判者对条约目标的认知和态度不仅是仲裁裁决解释的辅助手段，同时还决定了条约适用的其他方面、实体性的义务以及争端解决机制。早期国际投资协定的目标是单纯地保护投资，此后发展到包含可持续发展，这种变化不仅体现在投资协定的序言中，同时还出现在协定的正文中，它代表了国际投资法正的改变。相应地，达成共识工作组不仅应在国际投资协定一般目标上建立共识，同时理应关注国际投资协定的具体内容是否服务于这一目标。

（2）第二个受到越来越多关注并值得探讨的重要议题（它还决定了协定内容的走向）是可持续发展，包括国际投资的可持续发展，这是贯穿本文一再强调的议题。但直到现在，这个概念都没有明确的定义。传统国际投资协定对“可持续发展”的定义更多集中在“经济发展”，也就是说假设国际投资协定有益于全球直接投资的流动，一个国家接受

⑧ 可以说，至少有部分讨论的方向已经开始改变，如UNCTAD新框架中，从可持续发展视角关注投资谈判的秘书处指南，以及南部非洲发展共同体（SADC）双边投资协定模板。
的直接投资越多，对该国的贡献越大，但目前人们对这一论断的正确性争论不休。国际投资仲裁的仲裁员开始意识到，国际投资协定的制定者和仲裁员都束手无策。采用实地调查和各个利益方之间的磋商，有可能就何为“可持续性国际投资”达成一致，详述其构成要素，在考虑不同地区、不同情况的基础上，实现将“可持续性国际投资”囊括于国际投资协定中的构想(例如，如前所述，对“投资”重新定义，从而将可持续性的概念包含其中(9))。它还将有助于投资促进机构批判吸引直接投资需要考虑的因素，事实上，投资促进机构评估“可持续性投资”时，可持续性是其考虑因素之一(特别是经济发展)，但它们却容易忽略其他一些核心要素，如社会性问题(包括劳工问题)。对“可持续性投资”下定义十分困难，但仍可通过清单的方式列举用于评估要素。在具体情况下，要求投资应该是可持续的，从而一定程度上有利于澄清这个特定的议题，并且有利于促进可持续发展。

(3) 第三个需要特别关注的议题是国际投资协定包含的各项要素。本议题的达成共识工作组应对国际投资协定中涉及的各项标准予以澄清，明确政府应承担的义务(10)，评估是否存在需要摒弃(11)或者添加的标准。其中，准入前国民待遇、国民待遇、母国政府和投资者的义务等问题尤其需要受到关注。

(4) 最后是选用投资协定的问题(也被称为“国籍策划”)。作为投资协定的一方，母国并不希望将保护范围扩大到某些国外机构，特别

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(9) 或许，如果在进行投资的当时保证可持续发展因素的存在，并对其进行准确定义和施加特定的义务可能就已经足够。目前存在的一些法律文件中已经体现了这些要素，例如，负责任和跨国公司和其他商业机构秘书处特别代表取得的工作成果。
(10) 不容置疑，对“可持续性国际投资”进行定义十分困难，但该概念中可能包含去贸易化的各种不同考量。而事实上，如何衡量不同标准的可持续性困难重重，而且对于不同地方团体而言，这定义对他们的意义也大相径庭。

9 在这方面进行进一步的澄清本身就有有利于降低投资争端发生的可能性。
10 例如，美国2004年和2012年BIT范本都没有放弃过投资保护义务的保护伞条款(缔约一方，应当遵守其与另一缔约方就国际投资条约中所作出的任何承诺的义务)，该条款通常明确规定违反投资条约(而非合同)的争议可以诉诸仲裁。
是那些只设立了简易办公室的国外分支机构。由于这个议题特殊（而且选用投资协定通常具有投机性）⑨，如果谈判方有该项要求，达成一致并起草标准条款从而避免选用协定的实践或其某一方面造成的影响，应该相对容易。⑩ 甚至就已有的未明确包含选用国际投资协定条款的条约而言，感兴趣的各国政府还可以通过联合声明的方式对此予以澄清。

（三）程序性议题：争端解决机制

如前所述，投资者—国家间争端解决机制是所有利益关系方都关注的议题。主要原因在于争端解决在现代国际投资协定中占据了核心地位。解决争端所包含的成本，该程序中仲裁员和其他专业人士的地位，争端数量的增长，裁决的连贯性问题，以及大量国际投资协定都规定投资者—国家间争端解决条款等因素（以及这些因素和数量巨大的国际投资者和国际投资因素的融合），由此可以预计将来还会产生越来越多的争端。有人认为，相对于国际投资协定的其他实质性规范，争端解决问题的进展进展得十分缓慢。此外，就目前已有安排，持反对意见的国家数量虽然较少，但仍然不断增长并态度强硬。例如：(1) 澳大利亚对于在国际投资协定中包含投资者—国家间争端解决机制持怀疑态度；(2) 玻利维亚，厄瓜多尔，委内瑞拉退出《ICSID 公约》⑩；(3) 南非决定，将修改或终止大多数双边投资协定⑩；(4) 出于对争端解决机

⑨ See, e.g., Saluka Investments B. V. v. Czech Republic, Partial Award, March 17, 2006, para. 240. 仲裁庭明确指出：“如果一家公司和 BIT 契约方并无实质性联系，实际上是由另一家非 BIT 契约方管辖下公司所控制的壳公司，那么它就不能援引条约中的条款。这种可能性会导致对仲裁程序的选用，构成‘选用协定’，具有更偏重批评的‘挑选法院’行为的众多特点。”

⑩ 但条约的当事方未必有这样的要求。

⑩ 虽然，这样的联合声明对具体争端中政府作为被告同时又是条约的缔约一方，是否能以选用仲裁程序干预争端的裁决没有决定性的作用，它仍然能暗示一国实践的立场并有可能影响仲裁庭。

⑩ 国际投资争端解决中心（ICSID）《关于解决国家与他国国民间投资争端公约》（以下简称《ICSID 公约》）。据报道，阿根廷考虑采取相同的举动，即此颁布案文。但本文完成的时候，阿根廷仍然是 ICSID 的签约国。然而，仍然需要指出，即使阿根廷确实选择退出《ICSID 公约》，其声明应在世界银行收到通知的 6 个月后生效。

制的考虑，印度暂停一些双边投资协定的谈判；(5) 阿根廷国会通过一项决议，呼吁终止该国双边投资协定的效力；(6) 一些国家倡议，建立拉丁美洲的投资争端解决中心并适用其认可的规则。总而言之，未来的国际投资协定仍然会包含强有力的争端解决条款（虽然还存在国家间的争端解决机制可供选择，且投资者可求助于当地法院，但值得注意的是，这两种争端解决方式的效率较低），但目前的机制仍有许多不尽如人意的地方，而另一方面，争端数量却在持续增长。相应地，达成共识工作组应致力于召集各利害关系方就争端解决程序涉及的事项达成一致意见。

1. 建立争端解决程序达成共识工作组

针对投资者—国家间争端解决这一议题，工作组所面临的主要挑战是如何更好地从所有利害关系方的视角，保证投资仲裁的正当性。达成共识工作组关注的对象应包含以下的一项或多项：

(1) 与投资者—国家间争端解决程序和裁决有关的各项问题，及

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其内部和外部正当性，这些事项都可从对争端解决程序基本理论的探讨开始。具体的议题可能包括明确争端解决机制中仲裁员和其他参与者的地位，是否可以或应该重新启用当地救济，加强协定签署方在争端解决中的地位（如允许出具解释性声明），同意政府在是否启动争端解决程序时起到把关的作用（例如，在争端解决开始前予以通知，开启公共利益审查，就诉诸投资者—国家间争端解决机制所属门槛，争端发生时首先寻求协定签署方间的解决），恢复对反诉的运用，赋予ICSID 筛选争端的权力（特别是对滥用案件），有人建议将投资者—国家间争端解决机制排除出国际投资协定，我们应探讨这样做的深远影响。

（2）探讨其他争端解决方式（如由国家主导的争端解决机制）能否得到更多的运用，特别是在国际投资协定的“冷却期”。

（3）国内法、国际法和争端解决之间的相互作用。例如，在诉诸国际争端解决上，较之本国投资者，外国投资者在多大程度上拥有更多的权利；反之，如果外国投资者可以诉诸国际争端解决，是否应赋予本国投资者相同的选择权。此外，国际投资争端解决也应考虑和国内

— ICSID 筛选程序的方式仍然是调查事实和审视法律的规定，而这需要实质性的审查。
— 第三方融资人本身也存在风险，因此在决定资助某一争议前会采取严格的筛选程序。
— 有证据表明，对于私人投资者之间，在特定行业特别是建造—经营—退出项目中，争端管理机制被证明有效。但在投资者—国家关系的语境中，例如对东道国政府错误行为导致的损害赔偿，投资者和东道国政府在非常早的阶段就会尝试解决可能发生的纠纷，而非等到分歧升级为真正的争端。该机制包括促进机构内部的合作以更好地遵守法律规则、初期中立评估、建立争端解决委员会及采取事实认定程序。几年前，秘鲁曾经着手包含相关要素的程序。秘鲁采用的架构遵循避免纷争的政策导向，而政府采取避免争端的机制并鼓励采用其他方式解决争端。世界银行集团的投资环境部门曾对此进行研究，并对这些条款具体内容的安排提供技术支持。
— 这是吸引投资的原因之一（例如一家企业在境外成立分支机构，并由该分支机构返回投入母国），这种投资方式在中国很常见，但它也和其他国家有关。
— 1994 年《加纳投资促进中心法案》要求“保证外国投资者以及法案所及的所有投资者都拥有诉讼国际仲裁的权利（例如，包括在加纳投资促进中心登记的国内投资者）”。参见1994 年《加纳投资促进中心法案》第 21 条第 1 款规定：“本法适用于所有按照本法成立的公司，但不包括采矿业和石油（气）业。”第 29 条规定：“就争端解决程序而言，所有投资者都可以申诉仲裁（例如，按照 UNCITRAL 的规则）。”这里应该注意到，该法案不适用于采矿业和石油（气）业。
体系的合作，包括法律适用和用尽当地救济。

2. 建立上诉机构

另一个受到广泛关注的议题是，成立独立的上诉机构，以审查特设仲裁庭所作的裁决，这样作是否具有可行性和正当性。越来越多的人使用ICSID裁决的撤销程序，但实际上撤销程序仍然具有特设的性质，并且适用范围十分狭窄。这就产生一个问题，即是否需要对其进行完善，或者是否有必要建立上诉机制。这和WTO的演变类似，从GATT下特殊的争端解决专家小组发展到WTO框架下的《争端解决谅解备忘录》（在贸易体系中，这是在101个专家小组报告后才走出的一步，这些专家小组的实践为此提供了充分的经验。而在国际投资框架下，2013年底前已经提起了近600个基于条约产生的争端）。支持者认为，对于普遍存在和难以解决的法律解释问题，永久性的上诉机构显然是对症下药，并且更能从整体上保证体系的正当性。然而，上诉机制将使仲裁裁决的一裁终局沦为空谈，使这一程序“重新被政治化”，增加的上诉机构有可能是简单重复仲裁中存在的问题而非解决问题。即使通过永久性的法庭，利益的偏好和纷争仍然存在。而且，除非严格限制诉诸上诉机构解决的争端，否则成本还会持续上升。虽然，其中一些问题可以通过周密并具有兼容性的机构设计来解决，但目前的国际投资制度始终缺乏某些必要的因素，例如，投资保护标准的协调即使不是不能解决，也十分困难。

为了使结果更具有可信度，任何工作组在考虑这些问题时都应具有全球性的视角。他们工作应当是开放和透明的，特别是应考虑所有利害关系方的观点。他们还必须考虑权威性国际组织的意见，例如UNCTAD、经济合作与发展组织（OECD），以及与国际投资制度本身关系更为紧密的ICSID和地区性机构。一些大学（或国际组织）在投资条约各领域的研究能力有目共睹，如果建立综合性的合作机制，它们能为达成共识工作组提供坚实的后盾基础。工作组最终的研究成果将普遍地提供给与国际投资协定谈判、解释和裁决相关的主体，从而有利于为这些问题的解决提供启发和指引。

诚然，组织这类达成共识工作组并记录他们的研究成果，需要国际上权威专家的广泛参与、付出辛勤的努力并投入大量的资源。
三、制定国际投资协定范本

制定国际投资协定的范本也是完善国际投资制度的途径之一，虽然该路径显然更为艰巨。在当代，虽然各国纷纷推出其投资协定的范本，但国际上并不存在权威的模板。过往的实践表明，如果有国际投资协定范本存在，各国政府会倾向于借鉴这些范本；1967年，OECD颁布了《保护外国财产协定草案》。虽然OECD理事会未曾正式批准该草案，条约的起草者仍将其作为国际投资协定谈判的基础之一，因为不存在其他可以作为指南的模板。但在目前，由于起草者都是资本输出国的代表，且国际直接投资由于征收的风险频繁不前，《保护外国财产协定草案》已经过时。在这种情况下，新的范本将有助于国际投资协定的谈判方，特别是那些最不发达国家和发展中国家，它们没有代表其利益的范本可资借鉴而谈判对手却握有自己的范本。而在国际税收领域，这两类国家通常会分别使用联合国和OECD提供的范本，同时，投资合同也出现类似的情况。

正如其他条约范本，范本的目的在于提供底线，例如确定国际投资协定应包含的内容（或自由贸易协定中涉及投资的章节），平衡东道国和母国的利益，并在此基础上反映谈判双方的特殊利益。解释性的注释则可用来表明特定议题的替代选择，无论如何，国际投资协定范本需要阐明这些选择可能产生的法律影响。实践中，UNCTAD《关于可持续发展的投资政策框架》、OECD《投资政策框架》、南部非洲发展共同体（SADC）《双边投资协定范本》、《促进可持续发展的共同准则》、国际可持续发展研究所（IISD）《促进可持续发展的国际投资协定范本》可以作为未来努力的起点，它们对于国际投资协定的谈判者们而言是宝贵的经验，但并不是说所有这些都是真正成熟的范本，或都是经过广泛、正式咨询后的最终成果。

当然，由于需要搜集数量巨大的各类型的协定，召集所有相关主体

⑨ 该方法的一种变形（这种变形反映了既是在东道国又是母国的国家数量的增长）是多准备一个额外的范本，而非只有一个范本，其中一个反映资本输出国的利益，而另外一个反映资本输入国的利益。亚非法律顾问组织（AALCO）就采用这种方法，它发布了三个版本的BIT范本，反映了不同形式的投资者自由化和投资保护。

⑩ 并不是说在这些问题上没有进行过磋商。例如，UNCTAD向大批专家咨询并邀请利害关系人对其取得的成果发表评论。秘书处在伦敦和其他地区也进行了一系列咨询。
进行一系列重要谈判（见下文详述），并掌握大量的数据，起草这一范本将花费大量的时间。

另一方面，国际投资协定范本起草过程中同样会遇到前面提到的各项议题，同样会碰到保守主义、可信度、参与性、资源等困难的挑战。

四、建立特别机制以完善国际投资体制

完善国际投资法和投资政策有很多具体的方法和选择，从而保证所有利害关系方都能受益于此。实际上，政府是否受到其所承担国际义务的约束是考察国际投资制度正当性的重要因素，必须保证他们采取的政策措施透明，并且对所有的当事方都能彰显公平。例如，不断滋生的针对国际直接投资的保护主义倾向（包括就不同类别的投资者适用不同规则），便利争端解决程序的运用等都必须给予关注。

（一）监督国际直接投资领域出现的保护主义倾向

国际投资者有可能会由于东道国国内监管措施的变革而不再青睐这些国家（例如鼓励措施被废除）。一些国家，包括发达国家国内针对外国直接投资的监管制度或措施，具有保护主义的考虑或实际上产生保护的效果，它们有时候采用公然的方式，有时候则是 UNCTAD 所说的隐蔽的方式。例如，新兴市场的投资者经常受到此类措施的影响（例如通过国内筛选机制），阻碍这些经济体融入世界经济，而非在国际投资领域对其采取鼓励性的措施。

类似地，针对不同类别的投资者，国际上也存在完全迥异的规则，在一些国家，国有实体似乎被界定为特殊的投资者。例如，从一些国家的立法可以推定，国有企业的兼并或收购遵循特殊的程序，如在通过或

① 在过去的二十多年间，UNCTAD 监测到投资领域政策的变化，包括歧视性待遇的变化，明确警告存在“一些国家采用保护主义投资措施的风险显著增加”。

拒绝通过前给予通知，并采取调查程序。这些措施还出现或反映在国际投资协定中（例如，豁免适用国内审查等机制），或甚至采用独立的监管体系（例如，针对国家主权基金的措施），使整个投资法律体系碎片化或潜在地破坏公平待遇。实践中，《主权财富基金的圣地亚哥规则》虽然是自愿遵守的规则，却是在这个方向走出的一步。如果对投资者的类别进行划分并适用不同的规则成为主流趋势，其他类型的投资者（如对冲基金、私募股权基金）也一样会成为目标，因为他们的投资不具有长期的特质。

在对“竞争中立”的讨论中，我们同样能够观察到区分不同类别投资者的现象。有关“竞争中立”的讨论认为，国家控制的实体（特别是国有企业），由于其本质（以及其他原因），在对外投资时较之他们的私人对手具有优势，因此需要特殊的规则促进公平竞争。这种优势包括金融和财政手段、信息的取得，以及进行对外投资时的保障。

OECD 和《跨太平洋伙伴关系协议》（TPP）的谈判都曾讨论过这些议题，并详细列举了区分不同类别投资者所带来的影响。它们提供讨论的模式之一是充分利用该领域目前已取得的进展，例如将《圣地亚哥规则》纳入更为正式的协定中。但是，这一模式本身也有其利弊所在——成员方必须认可这些规则代表了国内诉求希望的标准。更
为重要的是，那些有利条件不仅适用于国家控制的实体，同时还延伸到私人对外投资者。最关键的问题是，保护主义和对不同类别的投资者的划分的判断标准更多是从形式而非实质——不仅仅是国家控制的实体接受来源于政府的支持，同时还包括其他对外投资的企业。因此，如果目标是在对外投资领域保证公平竞争，那么，磋商和讨论的基础就应该建立在所有类型投资者对外投资时取得的优惠，而不是通过所有权的特性加以限定。

由于国际直接投资保护主义可能性的攀升，以及不同类型投资者适用不同规则这一现象的发展，实践中非常有必要针对投资保护主义建立观察组，分析国内投资法、投资监管及政策，以期发现是否存在保护主义的潜在可能并定期发布成果。该观察组可以部分借鉴 WTO 贸易政策审查机制的模式，集中召开一系列会议，以期为政府和利害关系方提供经验交流的平台，探讨如何采取令人满意的方式既满足国内的政策目标（例如保护国家安全、公共健康和环境、促进发展、维护公共秩序），且不会不适当地限制投资在不同国家间的流动。由此，工作组能够提供客观的、非政府角度的报告，从而评估和分析政府在某一时段所采取的限制直接投资措施的增加，是否是为了应对恐怖主义、全球性经济危机或新兴国家投资者（包括国家控制实体）的出现对国家安全或经济良好运行实际或可能的威胁。但是，它能产生的效果主要取决于研究和报告的可靠性（这些报告还可提交到政府间国际组织的投资委员会）以及其点名批评的能力。

针对直接投资保护主义成立的观察组应具备独立的研究和报告体系，完全致力于国际投资监管的发展，或者作为国际贸易预警的延伸。在目前，国际贸易预警主要集中研究贸易，但一定程度上也涉及投

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61 国际贸易预警 (GTA) 是就政府措施提供信息的报告服务，关注有可能对外国商业产生潜在损害的政策。它的监控包括投资措施，例如对外国人所有的土地、税收税征、上市规则、国际支付以及设立上的限制。GTA 的运作由在立足于伦敦的智囊团和经济政策研究中心负责，全球各地许多不同的研究机构为该提供相关分析。世界银行集团、英国政府贸易政策部门、管理创新国际研究中心（一个加拿大的智囊团）、美国的德国马歇尔基金会和国际发展研究中心（加拿大皇家公司旗下）为其提供资助。
资措施。进行相关活动所需要的资源可能来源于公共机构（包括国内和跨国性的公共组织），而另一方面，私营部门由于深受这些研究发展的影响，因此也会乐于提供资助。

（二）争端解决机制的便利化

国际投资制度的正当性在很大程度上不仅取决于能否反映所有利害关系方的需求和利益，还在于保证所有受到该体系影响的当事方都能受益于之。为此，问题的关键就在于，无论是受到损害作出申诉还是作为被申诉方应诉，各当事方应有平等的机会利用争端解决机制。在实践中，如果不能做到这点，而仅仅是那些相对大型的企业和富裕的国家能实际上有效地利用争端解决机制，那么国际投资体系的正当性就无从谈起（这也是成立 WTO 法咨询中心的考量之一）。但实际上，除了此前所提到的问题，当前争端解决机制的架构势必导致相对贫穷的国家和中小企业在利用争端解决机制时会遇到障碍。现实中仲裁费用居高不下，特别是对于所在地区未建立仲裁中心或者没有合格的仲裁员和从业者的当事人更是如此。正如前国际法院院长吉劳姆（Guillaume）所言，“利用国际裁决机制不应受到资金不足的影响。”此外，由于受到国际投资影响的利害关系方不断增加，更应该为这些利害关系方提供发言和提出诉求的机会。

诚然，解决这些问题可以有各种不同的选择，包括成立国际投资法的咨询中心，设立微小案件裁判庭，采用第三方融资的模式以及构建更宽泛的利害关系方诉求机制。

② 虽然 OECD 的投资自由化圆桌会议程序（包括 OECD 成员和一些观察员），以及 G20 集团对 WTO、OECD 和 UNCTAD 有关贸易和投资措施都涉及这一领域，但它们的努力都受到其本质是政府间组织的限制。

③ 存在的问题还包括其他主体的准入，如提交法庭之友意见陈述。与此相关的还包括反诉。

1. 成立国际投资法咨询中心

为了保证相对贫穷的国家以及利用争端解决机制较少的国家（这类国家对于建立强有力的应诉团队没有特别的兴趣）能够有效应对针对他们的申诉，应成立独立的国际投资法咨询中心。成立国际投资法咨询中心的目的在于，为成员方应对投资者诉求提供法律或行政上的帮助，包括争端解决前的建议（例如投资者诉求的理由十分充分，咨询中心可能建议被诉国家与投资者和解）。它同时还会鼓励当事方选择其他争端解决方式（如调解或仲裁），帮助各国建立争端预防和冲突管理机制。国际投资法咨询中心更长远的计划还包括帮助发展中国家参与到国际投资协定和国家契约的谈判中，增强国内解决争端的能力，以及这些方面的培训。在模式选择上，咨询中心可以采用日内瓦WTO 法咨询中心的模式，但同时应注意到了两者之间的差异，WTO 国家间争端解决主要建立在多边规则的基础上，而投资者—国家间争端解决则立足于大量双边和区域性条约。

贸易领域在这方面的进展之一是地区的太平洋岛屿论坛国家贸易顾问办公室。此外，拉丁美洲国家正在讨论建立国际投资法和投
国际投资法制和政策制度的未来: 完善之路径

资者—国家间争端解决的咨询机构。但，国家间成立类似组织的谈判，以及如何解决财政问题并达成可行的计划，至今都没有实质性的成果。直到最近，UNASUR 和一家新的地区性仲裁中心（可作为 ICSID 的替代）发起建立咨询中心的动议。2012 年 10 月 10 日至 11 日，由秘鲁作为主席国的工作组在亚松森的圆桌会议上提出若干建议。该咨询中心将“就投资争端解决提供法律指导、技术援助、调查、专门研究和法律陈述”。

正如 WTO 咨询中心的实践表明，即使只有少数国家致力于成立咨询中心（或者多个地区性的咨询中心），该努力仍然有可能获得成功。但前提是，利害关系方的观点至关重要，这些利害关系方包括私营的律所（他们可能会认为这些机构会带来不必要的竞争，虽然与咨询机构的合作存在许多途径）。同时，它还面临许多实际的问题，例如资金来源、雇员，以及如何保证咨询中心的独立性、效率和有效性。69 在设立咨询机构的过程中，各参与方还需要考虑发展中国家的偏好和要求，利用目前已有的支持框架，建立新机构的努力能够填补发展中国家和发达国家间的分歧。尤其是，地方性的咨询中心（以及使用本地区方言的雇员）可以专门致力于处理当地成员关心的问题。


69 可以学习资助发展中国家运用国际法院和国际海洋法庭（ITLOS）的经验。例如，Cesare P. R. Romano 注意到国际法院的信托基金很少被使用。部分原因在于，对于发展中国家而言，程序过于复杂，且捐赠者捐助的能力也有限。更重要的是，该基金不用于一个国家单方提出的争端。与之相反，使用 ITLOS 自愿捐款的程序比较不严格。See the discussion in Cesare P. R. Romano, International Courts and Tribunals: Price, Financing and Output, in Stefan Voigt, Max Albert and Dieter Schmidtoth (eds.), International Conflict Resolution, Mohir Siebeck, 2006, pp. 198 – 199. 任何面向国家提供的财政或技术援助都需要保证申请程序简单直接，申请条件不会削弱它的有效性或者间接地对特定国家造成歧视，并提前保证这项服务的资金充裕。
2. 设立微小案件裁判庭

为了便于受到损害的小型企业能够得到公正的裁决，有必要参考国内法中的简易案件处理法庭，量身定做成本更低、更及时的争端解决机构及程序。它可以采用迅速完成并且称为“快车道”的仲裁方式，并且和地区性的机构合作。同时，它还应包含替代性争端解决机制，如调停、争端管理机制（如前所述秘鲁采用的机制），从而为当事方提供有益的帮助。它的优势还在于，可以专门为中小企业构建独立的机制，中小型企业面对不公正待遇时，很难利用现有的手段消除政治影响或取得财务支持，因此，这正是它们目前所急需的。另一方面，也有观点认为小型争端处理机制有可能分流地方法院的案件，削弱地方法院判案能力的发展。此外，这样的机构还可能导致争端的减少，对地方法院的优势造成影响，因此各国政府可能没有兴趣成立相应的机构。

3. 采用第三方融资的模式

当大型公司面临争端时，如果考虑到机会成本，他们可能不愿意利用国际仲裁。而第三方融资的出现为该处境下的企业提供了新的机会。同时，和国内法院出现的情况类似，对第三方融资的看法同样存在分歧。由于第三方融资人在仲裁程序中对实质性事项没有直接的利益，牟利的动机会导致他们不关心事实的真相，而通过和解的方式来解决纠纷（降低风险，维持良好关系等）。也有人认为，第三方融资能够潜在地促进公平，更好地管理风险，并通过更专业意见，评估争端的前景及处理争端。他们强调，第三方融资已经得到许多国家的广泛认可，并通过立法或其他规章制度来降低其不利影响。例如，有些争端解决机构要求向专家组和争端相对方披露所有第三方融资的安排。它可以协助评估采用第三方融资对争端解决可能带来的潜在影响。但是，


© 第三方出资一般不适用于小型企业，因为这些企业的诉讼标的通常较小，因此，从财务计算的角度，第三方出资者并不愿意资助小型企业。
由于仲裁员通常没有权力对第三方发布命令，要规制第三方融资人在国际投资争端中的行为还需要各国的协助，并建立多边合作的框架。目前，第三方融资的现状十分复杂，要求国际上所有感兴趣的利害关系方组成工作组，评估第三方融资的主要风险，并且对这些风险作出一致的反馈（例如，通过双边投资协定范本中的标准条款、行为准则或国内监管第三方融资人的指南）。

4. 构建更广泛的利害关系方诉求机制

为了保证任何受国际投资实践影响的利害关系方都能够参与并表达诉求，应考虑建立新的诉求机制。世行内部的监察小组、《北美自由贸易协定》（NAFTA）框架下《北美环境与合作协定》中的公众提呈程序及OECD《跨国企业指南》中的申诉制度都是这方面的典范。这些机制通常和一系列的政策相联系，并要求跨国组织、国家或跨国企业承担义务或遵守相应的准则。例如，世行监察小组通过具体的政策和程序，保证世行资助的项目避免或减少对社会和环境造成损害。NAFTA的公众提呈程序则允许非政府组织递呈请求，指证NAFTA成员方不能有效实施环境法。而OECD的申诉程序主要针对由政府成立的与国家相关的商业运作，允许公众对不符合OECD《跨国企业指南》的行为提交申请，要求调查或者提出控诉。据此，由于建立申诉机制有利于保证国际投资实践中更大范围利害关系方的参与及表达诉求，因此应明确相关概念、程序和机制构建等问题。

总而言之，无论是上述的任何一种方法，其目的都在于当国家制
定监管措施时，应保证信息的透明度以及信息能够被公平获取，并保证存在诉诸司法的可能，从而保护国际投资参与方的利益，而这正是判断监管机制正当性的重要标准。就国际投资制度的未来发展而言，需要重点关注的问题之一是保证所有利害关系方从国际投资体制中获益。

五、倡导政府间促进国际投资制度发展的进程

在国际投资领域，政府间国际投资协定谈判主要在双边和区域层面进行。政府谈判方能够影响国际投资协定的实质性和程序性内容，并通过这种方式塑造该制度的特征。例如，他们在谈判新的协定时，可能考虑国际投资领域新的发展趋势（例如，通过澄清具体概念的方式），他们可以签订确认书或发表阐释性声明，他们还可以重新谈判国际投资协定（而非延长现存协定的有效期）。所有这些都应被视为在政府间将投资关系带入法治框架的进程。

但现实中，谈判者仍然面临许多挑战，决策者并未充分关注国际投资，从而政府间双边或区域协定不能代表全球的发展趋势。当前发生的某些变化（如争端数量特别是费用高昂的争端数量的增加，前述对目前国际投资协定缺陷的批评）将影响到国际投资框架，而本文前述的一些解决方法（如国际听证程序）也能起到相同的效果。由于一些现实的原因，国际投资议题十分复杂。与跨国投资者的实际运作相比，针对国际投资监管，一些国家间或跨国别的议题存在过度监管或监管不足。由于法律渊源的多样性，虽然很多有约束力的国际投资协定呈现出显著的相似性，但彼此间仍然存在重大区别。这些议题的本质

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6) 例如，UNCTAD 在授权下，秘密地对各国的国际投资协定进行审查，以考察这些协定不一致、差距、重叠的地方，并提供建议。建立在其投资框架上，往下可能进行的工作包括帮助起草示范条款，促进协定的现代化和协助各国解决制定新的多边投资条约及其执行所遇到的问题。这些与国际投资协定相关的审查还包括促进避免争端的政策和采取争端解决替代方案。

7) 近来，从跨国企业税收课征的争论中，可以反映出该议题的显著性。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.
都具有国际性，其复杂程度会削弱该体系的核心目标——每个国家作为个体，一方面在国内构建和保持信息的透明度，以及跨国投资者对长期国际投资决策的预见性，另一方面又需要实现国内公共政策目标。这一现象含蓄地预示了，全球性的现象呼吁全球性的解决办法。

那么，如果答案是肯定的，则有必要寻求多边和诸边层面的解决办法。但这显然不是一项轻松的任务，因为目前的国际投资框架主要还是建立在各国自身的推动上，因此，除非国际投资制度自身能够部分或全部地解决这些潜在威胁，否则存在难以逾越的困难并不奇怪。

最终，当然还要由各国政府自行决定是否参与国际投资的多边或诸边谈判，以及在哪里及如何进行。

（一）多边层面: 在WTO组织非正式的大使级会议

从历史进程中可以看出，无论在任何历史阶段，多边投资框架的谈判都是一项极具挑战性的工作：所有曾经的努力都没有取得任何成果。本文在这里谨慎地使用“框架”这个概念，原因在于国际投资协定的前景仍然是不确定的，它有可能只包括用于推动进一步谈判所需的最低限度的权利和义务的分配，或者是囊括国际投资各议题的条约。另一方面，WTO的多哈回合谈判在多边经济政策的制定上处于主导地位。除非本轮谈判结束，由于国际投资议题饱受争议，各国成员方追求的目标不同，不太可能在本回合进行其他努力。但是，各国仍需要建立多边框架，为所有国家尤其是小国提供比双边或区域性更有利的安排。他们会希望目标更为明确，其原因在于协定的目标将会决定双边投资协定的实质性内容。最后，往往实践表明，任何多边谈判都需要建立在透明和协商的基础上。但就目前而言，WTO并无兴趣涉猎投资的所有

⑧ 例如《联合国气候变化框架公约》（UNFCCC）（Nairobi和Geneva；UNEP/WMO Information Unit on Climate Change，1992）。
⑨ 除此之外，主要国家早已率先进行主要区域性和诸边贸易条约（包含投资一章）的谈判（特别是《跨太平洋伙伴关系协议》、《跨大西洋贸易与投资伙伴关系协议》和《国际服务协议》），以及主要的双边投资协定。参见以下评论。
议题。此外，如果在多边的层面推动，但最后却没有进行下去，反而会对以后类似的努力造成负面影响。

另一方面，WTO 的新议程中出现了一些非正式的讨论，可以确定在某些小组讨论已经涉及投资的内容。在本文的概述中曾经提到目前国际投资环境的变化，这种变化也影响到各国对多边投资框架的看法，包括新兴市场对外投资者的增加，传统的母国固定投资保护的范围，采取扩大解释以潜在地限制监管权，对国际投资在可持续发展问题上的期望不断变化。他们有可能在 WTO 非正式的代表会议中讨论和国际投资规则相关的议题，了解不同成员方的意图，促使未来的谈判能够将这些议题放在更合适的位置上。

届时，产生的问题是国际投资问题非正式地交换意见或进行谈判的场所的选择。主要的政府间国际组织有 WTO、UNCTAD 和 OECD，它们都有可能成为谈判的场所，同时具有各自的优缺点。

假定预想的目标是取得具有法律约束力和可执行的多边文件，WTO 将会是最合适的谈判场所之一。因为 WTO 有能力组织多边谈判，同时又足以保证条约义务的履行。虽然多哈回合谈判面临相当多的困难，但这些困难更多源于议程的特性和如何安排，而非该组织谈判


© 本文作者在 2013 年 4 月对加利·霍夫鲍尔（Gary Hufbauer）和杰弗里·斯科特（Jeffrey Schott）在向国际商会（ICC）研究基金会提交的报告中指出：“WTO 应为多边投资框架的达成做好准备。” see Gary Hufbauer and Jeffrey Schott, Payoff from the World Trade Agenda 2013, Person Institute for International Economics, 2013, p. 50. 同样在 2013 年 4 月，ICC 在多哈发布的 2013 年贸易峰会议程中也表明了其“工作的优先关注点”。该议程包含五项优先关注点，其中一章直接指 WTO 多哈回合谈判并建议：“鼓励在国际投资领域建立高标准的多边框架，从而支撑经济增长和发展，同时，保留目前国际协议所提供的保护水平。”类似地，在全球经济论坛暨贸易和直接投资议程委员会 2013 年 6 月的报告中，正如其标题所显示的，号召在投资领域形成多边协议。虽然并非所有 ICC 成员国会同等支持这一倡议，该声明仍然暗示了国际商业社会的关注，国际商业社会作为重要的利益关系方，支持在投资领域形成多边框架。
的能力。此外，就规则的执行力而言，WTO 的记录良好。⑤ WTO《关于争端解决规则与程序的谅解》中交叉报复的可能性，足以威慑不履行条约义务的一方。当然，可能只有一部分成员方会关注这种可能性，特别是那些准备进入新市场的成员方（例如，发达国家通过投资进入新兴市场时被施加相应的条件）。与此同时，这并不是 WTO 首次涉及与投资有关议题的范例。WTO《与贸易有关的投资措施协定》（《TRIMs 协定》）主要处理贸易中与投资相关的具体问题，更重要的是，《服务贸易总协定》（GATS）也包含和国际投资相关的法律义务，例如通过商业存在的方式提供服务（第 3 种方式）。⑥ 此外，虽然 2003 年坎昆会议决定在多哈回合谈判中暂停贸易和投资关系的讨论⑦，WTO 早期关于投资的谈判仍然能够提供有用的信息基础，并成为审视何为正确进展方向的起点，成员方可借此将投资议题的谈判继续下去。⑧ 同时，我们还要注意到，WTO 的成员方不断扩张（虽然并未囊括所有国家或地区），连同区域政治的影响，增加了 WTO 谈判的复杂性。无论如何，除非多哈回合谈判以某种形式结束，如前所述，它不太可能增加新的议题。而且，将投资者—国家间争端解决程序引入 WTO，对于该组织框架显然是个挑战，因为 WTO 争端解决机制建立在国家间的此基础上。进一步会碰到的难题则是区分非正式的“初步讨论”和实际进行的谈判；如果对话是从 WTO 开始，它会被理解为谈判的第一步，并照此开始自由的讨论。

UNCTAD 作为联合国的组成部分，是处理和投资及发展包括国际投资协定相关所有事项的机构。它得益于政府间通过世界投资论坛和投资委员会建立的达成共识的程序。在过去的四十年中，它的投资部门拥有大量的研究资料和专家，研究范围涉及所有的投资议题。它提供全面的技术援助和能力提升项目（共同构成规则制定和执行机制的重要组成部分），拥有由不断壮大的利害关系方队伍组成的大型网络

⑤《TRIPS 协定》在多边贸易框架下进行谈判的主要原因之一是 WTO 引导成员方履行国际条约义务的有效性。
⑥ 需要注意的是，2010 年，国际直接投资按 2/3 的流人流出都在服务部门。
⑦ WTO，Decision Adopted by the General Council on August 1，2004，WT/L/579，August 2，2004。
⑧ 严格说来，虽然 WTO 贸易与投资工作组进入了休眠期，它仍然可以由成员方决定重新启动。
（这是多边共识构建不可缺少的组成部分），更重要的是，无论对发展
中国家还是发达国家而言，它在国际投资共同体中累积了长期的信誉。
此外，即便不提多边谈判，UNCTAD 近年来发起了可持续发展投资政策
框架，该框架致力于为国内、双边和区域型投资政策的制定提供指南，
并成为多边谈判达成共识的基础。虽然，仍有些发达国家对于在联合
国讨论投资议题心存怀疑，但这并不意味着不能在 UNCTAD 进行初始
的讨论、建立共识和开始初期的谈判。如前所述，它在这些方面仍然具
有特殊的核心竞争力。

无论是在整个国际投资领域，还是仅就投资协议而言，OECD 都起
到了重要的作用。1967 年 OECD 颁布的《保护外国财产公约草案》即
被视为第一代 BIT 的模板。在 20 世纪 80 年代末 90 年代初，OECD 主
持了《多边投资协议》（MAI）谈判，虽然最终没有达成具有约束力的协
议，它还是为不断变化背景下投资规则的制订提供了大量的信息。自
此之后，OECD 的投资委员会，以及近期成立的投资自由化圆桌会议，
就投资规则的各方面做了大量工作，包括争端解决条款，最惠国待遇、
国家安全，公平公正待遇和间接征收等。OECD 还在矿业供应链企业的
尽职调查和负责任商业行为等问题上提供了综合性的指引，包括通
过国家联络处构建的创新性的争端解决机制。OECD 成员国的数量不
断增加，支持其投资文件的非成员国的数量也不断增长，而它的投资自
由化圆桌会议还吸引了巴西、中国、俄罗斯、南非等非成员国的参与。
由于 OECD 的成员国不具有普遍性，且在一些地区被认为主要是发达
经济体利益的代表，因此有可能出现质疑的声音——OECD 是否有资
格独立组织谈判。

对此，还有一种选择是由政府间组织共同主导，但它通常不被认为
是有效的方式。能参与共同主导谈判的政府间组织不仅包括上述三
个组织的代表（在国际投资问题上显然还有 ICSID），还包括区域型处
理国际投资事务的组织，如东南亚国家联盟（ASEAN）®、南方共同市场

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资政策报告。

® 2009 年 2 月 26 日泰国曼西里府达成的 ASEAN《综合性投资协议》。
(MERCOSUR)和南部非洲发展共同体(SADC)。我们假定，参与的这些国际组织都获得各自管理机构的授权并支持该项活动，虽然非正式的安排也是可能的。这些组织可以共同提供合适的讨论投资问题的场所，保证所有国家和利害关系方普遍的、包容性强的、透明的参与，从而确保其正当性并立足于发展问题。

（二）诸边层面：开启开放、独立的政府间进程

缺乏强制性的多边讨论或谈判的论坛并不会排除另一种选择，由一个、两个或一组感兴趣的国家（最好同时包含发达国家和发展中国家），发起开放、独立的政府间的沟通，并采取更有利和可行的诸边模式（最后也可能演变为多边模式）。除了新成立的特设机构，G8 和 G20 可成为谈判的潜在发起人，或鼓励其本身启动相关程序。G8 的劣势在于创始成员国不包括发展中国家，不太可能得到发展中国家的支持。与之相反，G20 则包含了一系列不同类型的主要国家，在 2010 年到 2011 年间代表了全球 70% 的直接投资流入和 80% 的直
接投资流出。而且，G20 在其公报中已探讨过国际投资议题。如果 G20 希望启动这项议题，它只需要开启关于投资规则更有利和更可行的派边/多边框架的探索过程。它甚至还能提供全面的政治性的指引（欧盟和美国都更关注本身投资协定的谈判）。例如，它可以确认目前国际投资制度亟须完善的问题，指出国际投资协定理应服务的目标，以及确认一些核心原则，如投资者保护的重要性、监管的权力、负责任商业行为的必要性和合理的争端解决机制。G20 还能够有效推动政府间合作，并为其设置进程（投资领域国际或区域性组织的工作人员都能服务于此），而其他国家也能够参与，最终实现对国际投资协定关键概念的澄清，以及与争端解决相关或国际投资制度中组织框架相关的讨论——即使最终并不能实现多边投资制度的创新。

无论在多边或诸边层面，任何政府间谈判进程都需要建立共识程序的先行或支持，这种程序类似于《企业和人权指导原则》准备过程中采取的程序（还可能包括前述的一些方式）。《企业和人权指导原则》

⑤ G20 集团的成员国包括阿根廷、澳大利亚、巴西、加拿大、中国、法国、德国、印度、印度尼西亚、意大利、日本、韩国、墨西哥、俄罗斯、沙特阿拉伯、南非、土耳其、英国、美国和欧盟，欧盟的代表是欧洲委员会主席和欧洲央行总裁。


⑧ 例如，申明双方必须做到：(i) 开放和非歧视性的投资环境，(ii) 机会均等，(iii) 为投资者和投资者提供强有力的保护，(iv) 公开和具有约束力的争端解决机制，(v) 坚决贯彻透明度和公众参与的原则，(vi) 负责任的商业行为，(vii) 限制需要进行公共安全审查的事项。

⑨ 安德斯·阿斯朗德（Anders Åslund）建议：“G20 应在 2013 年圣彼得堡峰会上进行政治性施压，促成多边投资协议（MAI）谈判”；他认为“应在 WTO 框架下进行 MAI 谈判，形成诸边协议，而非适用于所有成员方的协议”。

= 78 =
是在联合国企业和人权秘书处特别代表约翰·鲁杰（John Ruggie）教授的领导下，在第一阶段得到认可的“保护、遵守和救济”框架的基础上，通过两个阶段最终完成的。大范围的利害关系人的参与和磋商确保了一系列健全的规则的形成，并由此获得了广泛的支持和采纳。在获得联合国授权准备指导原则的过程中，特别代表及其团队在各大洲组织了47次全球性的咨商，参观了超过20个国家企业的运营并拜访了当地的利害关系方。此外，一些原则，例如为商业、企业和团体非司法申诉机制设立可执行的标准，还通过试点计划得到了“实地测试”。它的一些具体义务安排在一开始放低门槛的做法被证明大有裨益，具有多边或诸边投资制度所不具备的优点。《企业和人权指导原则》谈判过程的成功，为投资领域提供了多利害关系人参与时如何建立共识的范本。

（三）通过关键谈判产生国际投资规则的范本

因此，问题的关键在于政府是否愿意参与到广义的政府间谈判进程中去，特别是就投资议题进行磋商，即使这种磋商是在有限的框架和非正式的论坛中进行，且无论主要的利益团体是否支持这种尝试。也就是说，目前关注的焦点应该更加现实并探索其他选择，例如弄清楚利害关系方在投资议题上的观点和他们设想的解决办法（如通过国际性听证会的方式），制订国际投资协定框架，建立各种国际性工作组并就核心议题达成共识，以及或者建立具体机制完善投资制度。这里所述的行动模式都应与现在正在进行的双边和区域性投资谈判结合，并最终采取多边或诸边的途径。

未来将要作出的任何决定都应考虑到，近年来（直到2014年5月本文完稿时），一些主要国家都致力于参与双边和区域性的投资谈判。这意味着，国际投资制度一直处于不断变化中（当然谈判也为吸收变化提供了机会），而且，谈判所产生的“事实上”的范本，引起国际投资

⑧一些国家（如南非、澳大利亚和美国近来就其国际投资法和政策框架的审查和回顾）提供了有益的借鉴。
协定实体性和程序性内容不断走向统一化。

特别需要提到的是 TPP 的谈判，《亚洲全面经济伙伴关系协议》，加拿大和欧盟的自由贸易协定谈判（同样包括投资的内容），印度和日本、中国和美国（以及有可能和欧盟的）的双边投资协定谈判，欧盟和印度、日本的谈判，以及美国倡导的《环大西洋贸易和投资伙伴关系协议》，印度和美国的


2013 年初，加拿大和欧盟开始广泛性的经济和贸易协定的谈判，其中也包含投资一章。See EC Trade, Canada, at http://ec. europa. eu/trade/creating-opportunities/bilateral-rela
tions/countries/canada/.


双边投资协定谈判。尽管存在这些进展，我们仍应意识到，巴西未进行双边投资协定的谈判；南非声称“除非受到经济、政治环境的压力，未来不再签订双边投资协定”；由于争端解决程序所带来的难题，印度在对该国双边投资协定范本审查结束之前，暂时中止所有谈判。此外，欧盟根据《里斯本条约》的条款，正在考虑建立一套其特有的国际投资协定谈判的程序。

最终，这些谈判有望取得成功，会成为未来谈判重要的里程碑。他们很可能缩小国际投资协定关键条款间的差异（例如，对重要保护标准的澄清，勾勒监管的边界，回答和可持续性国际投资相关的问题，解决争端解决程序中出现的情况）。其结果是，在这个过程中很可能产生适合未来国际投资协定谈判的模式。此外，除非上述一部分或绝大多数谈判最终结束，主要国家可能没有兴趣开始更大范围的国家间针对投资的谈判程序，所以等待他们和主要谈判对手就核心议题谋求解决办法后再开始新的议程不失为明智之选。


从 2009 年起，根据《里斯本条约》，投资政策的制定主要由欧盟委员会而非各成员国负责。参见 2007 年 12 月 13 日签订，2009 年 12 月 1 日生效的《里斯本条约》。《里斯本条约》（2007/C 306/01）对创建欧洲经济共同体的《罗马条约》和建立欧盟的《马斯特里赫特条约》的修改。《里斯本条约》第 2B(1) 条规定，欧盟有制定“共同商业政策”的排他性权力，第 188C 条规定直接投资政策属于“共同商业政策”。这些“共同商业政策”执行的势头越来越大。

例如，美国相对近期的国际投资协定包含呼吁建立上诉机制的条款（虽然在该问题上并未采取实际的行动）。例如，参见 2005 年美国—乌拉圭 BIT 第 28 条。UNCITRAL 关于透明度问题的工作也与此相关，其最后文本在 2013 年 2 月达成。
结论：在国际投资领域建立共识的必要性

国际直接投资是将货物和服务带到外国市场最重要的手段，它同时还将国内生产体系和国外市场连接在一起。贸易是国际经济事务的另一种重要形式，它的治理基于连贯的多边贸易框架并由受到推崇的争端解决机制保证运行。然而，构成国际投资关系的制度框架却几乎仅以投资保护为指向，以与投资相关的问题为基础，投资标准是其核心，该制度还选择仲裁作为争端解决的方式，包含多样性的法律渊源，在机构框架上呈现出松散和碎片化的特点。

虽然绝大多数国家都以这样或那样的方式参与国际投资法和政策制度的构建（各国政府签订超过3000个国际投资协定的迹象表明，他们希望在国际投资领域形成国际性规则），但国际上仍然广泛认为目前的制度亟须完善。目前需要作出改变的地方包括优化现有框架，进行修补，并从根基上加以改变。换句话说，在利益关系方内部，对于改变的程度、方向和实现的目标都有各种不同观点。具体而言，国际商业社会以及国际仲裁从业者并未考虑过于激进的变化，虽然越来越多的企业和从业者的观点趋向灵活且更容易被说服。另一方面，市民社会的各种组织通常更愿意从根本上改变国际投资制度，虽然对于改革的性质也有不同理解。而各国政府正在继续积极推进国际投资制度的构建并在该进程中占据主导地位。虽然一些国家考虑退出，更多的国家希望随着时间的推移，逐渐加入可能的新的要素，改变国际投资制度的本质。总的来说，由于没有一个利益团体的观点被认为是绝对正确，情况十分复杂，但仍然有必要在各利害关系方间建立沟通的桥梁。虽然该体系的现代化和改革是可能的，它仍然要求通过审慎的进程来协调一系列不同的利益。

条约和仲裁实践的发展可以为国际投资法和政策制度的完善带来很好的机遇。可以说，该体系所面临的一系列挑战在很多方面反映了发展中的危机——即在成长过程中出现的危机，其原因在于该体系十分年轻且进展迅速。

但是，国际投资制度还面临着基础性危机，因此，至少在一定程度上需要从范式上加以改变。
在国际投资制度走向成熟的正常过程中会遇到哪些挑战，其基础性议题如国际投资制度的目标和该体制的内容会有哪些变化并不明确。但无论如何，国际投资制度走向成熟的过程需要耗费大量的时间。

那么，在目前的情势下该做些什么？国际投资制度的进程何去何从？

首先，有必要加快国际投资制度演变的速度，并反映所有利害关系方的切身利益，最重要的是寻求强势的投资者保护和政府追求合理公共政策目标间的平衡，在国际投资制度全面现代化目标的框架下，对实体性和程序性条款加以完善。

但是，由于国际投资制度过于松散和机构体系碎片化的特点，并不存在毫无争议的组织主导谈判，推动国际投资制度向前发展。当然，主要的国际组织，特别是UNCTAD、OECD和ICSID，在国际投资领域十分活跃，即使不能进一步深化，也可以继续从事他们正在进行的有价值的工作。另一方面，政府在可预见的将来不会愿意给予任何国际组织超出目前所做工作的授权，同时，正如政府代表经常铭记在心并在国际投资论坛中提到的，开启实质性谈判最终将会招致各国政府的反对，因此在政府间论坛开始新的讨论也十分困难。如果WTO多哈回合谈判最终达成共识，并开始新一轮谈判，它或许会包含投资议题（建立在GATS和早期在投资议题上已进行工作的基础上），但这更多是一种假设而非可能。此外，几乎所有国际投资领域重要的参与者都在进行双边或区域性投资谈判，他们只会考虑等待目前谈判取得成果后再作进一步的努力。

基于目前的状况（以及联合国®、OECD和WTO过去失败的努力），国际投资法律和政策的构建需要独立、开放的达成共识的程序，它首先应有计划地决定要开展的议题，讨论如何以及在哪里讨论这些议题，并就解决办法提出建议。为了增加可信度，主要利益集团的代表，包括国际和区域性政府间机构处理国际投资的代表都应参与，而实际上，这些机构的代表都应以各种方式（至少是非正式的方式）服务于

® 如前所述，在国内层面也能找到这种碎片化，许多政府部门（以及其他行政部门和组织）负责国际投资的各个方面，这导致在一些情况下，一国政府内部对具体问题由哪一国际组织负责很难达成统一意见。

® 参见联合国20世纪70年代和80年代谈判达成的《跨国公司行为守则》。
国际投资制度谈判的进程。小型国家也有责任推动国际投资制度的谈判，事实上它们这么做，会得到其他国家热烈的欢迎。当然，最佳方案是由一个国家，或少数几个发达国家和新兴市场，发动一个包含大量议题、非正式但致力于构建多数利害关系方共识的程序，这个程序能够完善国际投资体系并重建各方的信心。本文认为，可以通过 G20 发动谈判并鼓励感兴趣的国家参与。令人振奋的是，在赫尔辛基进程中，芬兰和坦桑尼亚发起的针对全球治理的磋商已经提出这一倡议。

完善国际投资制度的进程还包括各种各样的活动（或鼓励其他主体参与其中）。本文认为，提供选择的菜单应包含前文提到的各种方式（以及在这些方式细化过程中出现的其他更可取的方式）：事实调查（如针对投资制度的国际听证程序、对国际投资法的精义诠释）；商业和市民社会间的圆桌对话，达成共识工作组就实体性议题（如国际投资制度的目标、可持续性的国际投资以及其他一些概念的具体内容）和程序性议题（如争端解决）的讨论；双边投资条约范本；具体的促进投资制度发展的机制（如针对国际直接投资中出现的保护倾向的观察组、国际投资法的磋商中心以及面向更广泛的利害关系人的求偿机制）；建立多边投资框架必要性的讨论。它还可以鼓励致力于投资的国际组织间更广泛的合作。另一方面，在国际投资制度完善的过程中还能识别“容易摘到的果实”（例如，各方都普遍认为需要推动的具体议题，如协定选用、滥诉）等。在相关议题研究成果的支持下，设计各种备选的解决办法并提供给各国政府作为参考。

在国际投资领域，虽然最初只是建立共识的进程，但终究有可能发展为国际投资指导小组，从而在更大范围的政府间谈判中施加影响。政府间谈判达成的决议以及由此形成的框架，最终将决定国际投资法和政策制度未来演变的路径，无论其未来演变发生在双边、区域或多边层面。

（编辑：韩秀丽）