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The **E15** Initiative

# STRENGTHENING THE GLOBAL TRADE SYSTEM



## Substantive Provisions in IIAs and Future Treaty-Making: Addressing Three Challenges

Federico Ortino

June 2015

E15 Task Force on  
Investment Policy

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**Think Piece**

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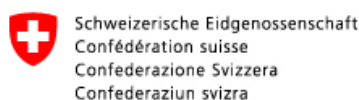
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# ABSTRACT

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There are three key challenges with regard to the substantive provisions of international investment agreements—limited object, broad investment protection, and legal uncertainty. The several mega-regional international investment agreement (IIA) negotiations currently under way provide what could be a “once-in-a-lifetime” opportunity to address these challenges.

There is a growing realization that IIAs should go beyond a concept of development that only focuses on economic growth. Development should be seen as a broader process involving economic, social, political, and legal considerations. Consensus is growing that IIAs should be perceived as instruments to achieve “sustainable development.” Accordingly, the think-piece puts forward three sets of options for policymakers to address the above mentioned three key challenges. While the three sets can be pursued independent of one another, it is suggested here that a combination of all of them would be the best approach.

In terms of addressing legal uncertainty of IIAs substantive provisions, the paper suggests focusing on clarifying the content and scope of the traditional investment protection standards of IIAs, particularly MFN, FET, expropriation, and available remedies.

In terms of addressing the breadth of investment protection guarantees, the paper suggests the following recalibration: IIAs should (a) focus on substantive provisions that require host states to behave in a “non-discriminatory” and “reasonable” manner; (b) omit those provisions that guarantee “contractual and regulatory stability” (“umbrella clauses” and “stabilization clauses”); and (c) limit the duty to compensate in case of expropriation to cases of “direct expropriation” only.

In terms of addressing the limited object of IIAs, the paper suggests considering extending them to cover a few key economic regulation issues, such as market access, corporate governance and responsibility, taxation, anticompetitive conduct, and investment contracts. In the long term, a few key social issues such as human rights, employment, environment, and corruption could also be included.

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# LIST OF ABBREVIATIONS

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BIT	bilateral investment treaty
CETA	Comprehensive Economic and Trade Agreement
FET	fair and equitable treatment
FPS	full protection and security
GVCs	global value chains
IFC	International Financial Corporation
IAs	international investment agreements
MFN	most-favoured nation
NAFTA	North American Free Trade Agreement
OECD	Organisation for Economic Co-operation and Development
SPS	Sanitary and Phytosanitary
TBT	Technical Barriers to Trade
UN	United Nations
UNCITRAL	United Nations Commission on International Trade Law
UNCTAD	United Nations Conference on Trade and Development
UK	United Kingdom
US	United States
WTO	World Trade Organization

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# INTRODUCTION

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The objective of this think-piece is to suggest policy options with regard to the substantive provisions of international investment agreements (IIAs). The paper, first, identifies three key challenges with regard to the substantive provisions of IIAs—limited object, broad investment protection, and legal uncertainty. Second, the paper puts forward specific options for addressing these three challenges.

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## THREE KEY CHALLENGES WITH REGARD TO THE SUBSTANTIVE PROVISIONS OF IIAS

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Focusing on the substantive provisions of IIAs, one can identify the following three key challenges—(1) the content or object of IIAs has traditionally been limited to affording protection to foreign investment (limited object); (2) the range of norms affording protection to foreign investment is broad and potentially restrictive of host states' regulatory authority (broad investment protection); and (3) given their open-ended nature, IIAs' investment protection provisions have been interpreted by arbitral tribunals in an inconsistent manner (legal uncertainty).

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### LIMITED OBJECT

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While there are several underlying purposes linked to the conclusion of an IIA (principally, promoting economic relations among the contracting parties, encouraging the flow of investment between them, and ultimately increasing the "prosperity" or "development" of both parties), the core object of IIAs focuses on affording protection to foreign investments, principally once they have been admitted to the host state. In other words, the content of IIAs includes mainly a series of substantive guarantees (as well as an investor-state dispute settlement system) intended to protect foreign investments. The underlying assumption is that "investment protection" (the object of IIAs) will promote economic relations, encourage investment flows, and increase the prosperity of contracting parties (the purpose of IIAs). In this sense, IIAs have been thematically

rather narrow, excluding, for example, any express obligations on home countries and foreign investors, as well as any express considerations of other relevant public policies (such as public health, environmental protection, public morals, cultural diversity, and labour rights), aside from a few clauses addressing "national security" or "balance-of-payments" concerns.

While investors are generally in favour of IIAs' protection guarantees, they may also consider it desirable to extend the traditional object of IIAs to include pre-establishment guarantees, such as market access commitments and the regulation of performance requirements (as the United States [US] has done in the last 20 years). On the other hand, investors do not want the introduction of provisions limiting IIAs' protection guarantees and imposing obligations or requirements on investors. When one considers host states, they may not generally be keen to extend the content of IIAs beyond the core, post-establishment focus as they may want to maintain their sovereignty over whether foreign investments are allowed to enter their market and, if so, on what conditions. However, host states may be willing to grant pre-establishment guarantees within the context of a wider rebalancing of IIAs focused on maximising the development function of such agreements. Accordingly, next to protection guarantees and liberalization commitments, host states may be keen to use IIAs to regulate other investment-related areas such as investors' conduct, taxation, national security, and protection of the environment.

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### BROAD INVESTMENT PROTECTION

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The series of substantive protection guarantees found in IIAs entail obligations imposed on host states including, traditionally, national treatment; most-favoured nation (MFN) treatment; fair and equitable treatment (FET); full protection and security (FPS); the prohibition of "arbitrary," "unreasonable," or "discriminatory" impairment of the foreign investment; the duty to pay compensation in case the foreign investment is, directly or indirectly, expropriated; and the duty to observe any undertaking that the host state has entered into with regard to the foreign investment. Moreover, clauses dealing with transfer of funds and entry of personnel can commonly be found in IIAs. There may also be stabilization clauses. In terms of normative content, these substantive obligations provide four types of guarantees addressing (1) discriminatory conduct by the host state, (2) unreasonable conduct by the host state, (3) harm to the foreign investment, and (4) lack of contractual and regulatory stability.

Therefore, the range of traditional legal instruments affording protection to foreign investments is rather broad. Depending on how IIAs are drafted and how they are interpreted by investment tribunals, host states may feel that these protection guarantees are unduly restrictive of their ability

to regulate. With regard to the types of guarantees, investors are particularly keen to receive guarantees against “harm” or for the protection of “stability.” On the other hand, host states may prefer to just be subject to a requirement to behave in a “non-discriminatory” or “reasonable” manner.

## LEGAL UNCERTAINTY

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Since the investment protection obligations in IIAs have been drafted in general, open-ended terms, investment tribunals have interpreted the same obligation (in the same IIA or in two different ones) according to a different normative conception, thus creating inconsistent interpretations and uncertainty of investment law. For example, the FET provision has been interpreted as a guarantee vis-à-vis unreasonable conduct (for example, *Impregilo v Argentina*) and as a guarantee vis-à-vis lack of contractual and regulatory stability (for example, *CMS v Argentina*). Similarly, the duty to pay compensation for indirect expropriation has been interpreted by some tribunals as a guarantee vis-à-vis (substantial) harm on the foreign investment (for example, *Metalclad v Mexico*), and by other tribunals as a guarantee vis-à-vis unreasonable conduct by the host state (for example, *Tecmed v Mexico*).

The lack of legal certainty when it comes to the substantive content of IIAs is obviously a problem for investors and host countries and has the potential to weaken the overall legitimacy of the system.

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## OPTIONS FOR ADDRESSING THE THREE CHALLENGES

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The three challenges identified above can be addressed separately or jointly. Fundamentally, each entails a different level of complexity. In general terms, the previous section lists the three in a descending level of complexity. In this section, I will put forward options for addressing those challenges in reverse order. While, in principle, some of these challenges could be addressed at the level of treaty interpretation (by arbitral tribunals), the focus of this section will principally be on options requiring treaty making (or treaty amending). The opportunity afforded by the several mega-regional IIA negotiations currently under way, (the Transatlantic Trade and Investment Partnership [TTIP], Trans-Pacific Partnership [TPP], European Union (EU)-China, and US-China), is almost a “once-in-a-lifetime” chance.

## OPTIONS ADDRESSING LACK OF LEGAL CERTAINTY

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### Clarification of (traditional) investment protection guarantees

This option entails the least change as it merely focuses on clarifying the content and scope of traditional investment protection provisions. There is no change in the traditional substantive provisions, but this option provides clarity to the meaning of these provisions. Accordingly, there are several examples of recent treaty making focusing on this type of clarification exercise. For example,

- clarifying whether or not the MFN provision can be used to import (more favourable) provisions from other IIAs (while the United Kingdom [UK] model bilateral investment treaty [BIT] clarifies that MFN can be used to import more favourable—substantive and procedural—provisions from other treaties, the Comprehensive Economic and Trade Agreement [CETA] clarifies that MFN cannot be used to import other treaty clauses);
- providing a definition of an “indirect expropriation” in the text of the provision on expropriation or in an annex to the IIA (see US treaty practice);
- defining the FET standard through the inclusion in the treaty of an exhaustive list of more specific obligations (CETA);
- limiting the content of a treaty standard to customary international law (see US treaty practice with regard to FET and FPS).

Additional clarifications should be considered (despite that there are not many real examples of it). For example, clarifications may deal with the content and scope of the umbrella clause (does it only cover contractual obligations or also unilateral commitments given by the host state under domestic and international law? Does it cover obligations stemming out of the contract signed between the claimant/investor and respondent/host state or does it extend to obligations entered into by the investor?). A reason for the lack of examples of clarification with regard to umbrella clauses may be that recent treaties appear to omit the clause altogether (see Section 3.2).

A crucial clarification revolves around the issue of available remedies for a breach of the investment protection obligations in IIAs. Despite the importance of this aspect (see, for example, the standard of compensation, valuation methods, interests, and so on), there is very little in terms of treaty practice (even recent) addressing the issue of remedies. Given the lack of discussion, the suggestion here would be to start discussing the kinds of remedies that should be made available (monetary compensation v. specific performance; retrospective

v. prospective remedy; differentiating remedies depending on the kind of unlawful conduct; direct v. indirect shareholders' claims; avoidance of double-recovery, simple interest v. compound interest, and so on).

The challenge in pursuing a clarification policy (applicable to existing and future IIAs) is at least three-fold.

- First, treaty makers need to determine what the ultimate result they would like to achieve is, with the clarification (broadening v. narrowing the content and scope of investment protection guarantees; for example, does the MFN provision apply to import more favourable procedural provisions found in other treaties?).
- Second, treaty makers need to make sure that the clarification is done in a way that the desired result is achieved.
- Third, they have to decide how to implement these clarifications with regard to existing IIAs.

The first two aspects are clearly interlinked. The failure (or difficulty) in clearly identifying the ultimate result that the treaty-maker would like to achieve may lead to an ineffective clarification. If one looks at some of the examples noted above, it can be seen that recent clarifications remain subject to different interpretations (compare, for example, the use of customary law with regard to FET v. FPS in the 2012 US model BIT, and the definition of the FET standard in CETA, particularly the unclear role of the protection of the investor's legitimate expectations).

One also needs to address the issue of existing treaties, so that clarifications do not only apply to future IIAs. The clearest options are:

1. renegotiation (or amendment) of existing treaties by the contracting parties to clarify the key substantive protection guarantees;
2. a multilateral treaty that supplements (ideally) all existing IIAs.

There are clear challenges with either option—while the first will entail multiple (several thousand) renegotiation or amendment processes (without the assurance that clarifications are the same across existing treaties), the second will require a level of "multilateral" consensus that may not be present right now.

One alternative option addressing these two obstacles draws inspiration from the recent Rules on Transparency in Treaty-based Investor-State Arbitration developed by the United Nations Commission on International Trade Law (UNCITRAL) and the related Convention on Transparency in Treaty-based Investor-State Arbitration adopted by the United Nations General Assembly on 10 December 2014. Since the UNCITRAL Rules on Transparency only apply to

UNCITRAL arbitrations brought under IIAs concluded after 1 April 2014, they do not apply, in principle, to all pre-existing IIAs. The UN Transparency Convention is aimed at giving those states that wish to make the UNCITRAL Rules on Transparency applicable to their existing IIAs a mechanism to do so. Specifically, and in the absence of reservations by the signatories, the Rules on Transparency will apply to any investor-state arbitration, whether or not initiated under the UNCITRAL Arbitration Rules, where (i) both the respondent state and the home state of the claimant investor are parties to the Convention; and (ii) only the respondent state is party to the Convention but the claimant investor agrees to the application of the Rules. While it is still early days, this process may inform a similar one with regard to (at least some) IIAs' substantive provisions.

Accordingly, one could envisage a similar dual-pronged process in order to carry out a level of clarification of (traditional) substantive protection guarantees in existing IIAs. The first step involves reaching a consensus (similar to the UNCITRAL Rules on Transparency) on the substance of the clarification with regard to the various key investment protection standards (for example, should the MFN provision be used to import [more favourable] substantive and procedural provisions from other IIAs or not? Similarly, what kind of principles should the FET standard include? What should be the remedies available in the case of a violation of an IIA?). One could even envisage the possibility of multiple clarifications with regard to the same IIA provision.

The second step is to create a mechanism (similar to the UN Transparency Convention) allowing states to make the various clarifications applicable to their existing IIAs. As there will be several clarifications with regard to several key provisions of IIAs (and possibly two or more clarifications for the same provision), the Convention could consider the option for states to select which clarifications are applicable to their existing treaties. The Convention would then be opened for signature by any state. In order to be a signatory to the Convention, a state would need to subscribe to one or more clarifications contained in the Convention.

### **Establishment of a permanent appeal mechanism or standing investment tribunal**

Instead of (or in addition to) clarifying the content and scope of existing investment protection guarantees, a second option to address the lack of legal certainty (or consistency of interpretation) is to establish a permanent appeal mechanism (similar to the Appellate Body of the World Trade Organization [WTO]) or a standing investment tribunal. Both options have been on the table in the TTIP negotiations. Obviously, they both raise practical as well as political issues. Since this option addresses the issue of dispute settlement (which is covered by a parallel paper), it is not further developed here, but it is important to flag the issue that the reform of substantive provisions is inevitably linked with the reform of procedural/dispute settlement provisions (and vice versa).



## OPTIONS ADDRESSING BROAD INVESTMENT PROTECTION

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### Identifying which types of guarantees should be granted to foreign investors

As mentioned above, IIAs have included a broad range of norms or legal instruments to protect foreign investments. In addition to guarantees prohibiting discriminatory and unreasonable conduct by the host state, IIAs have also included guarantees aimed at addressing (i) the lack of contractual and regulatory stability and (ii) substantial harm to the foreign investor caused by the host state. While the breadth of these norms represents a high level of protection for foreign investment, the concern today is to determine whether this is justified, taking into account (a) the benefits brought by (attracting) foreign investment, and (b) the limitation imposed by IIAs on the host state's right/duty to regulate.

This option entails a reconceptualization of the type of investment protection guarantees afforded to foreign investment. IIAs would still be principally focused on affording protection to foreign investments (in that sense, there is no change from traditional IIAs), but the aim of this option is to fine-tune the kinds of protections that host states are willing to provide. In this exercise, a better understanding of the ultimate objective of IIAs and of the challenges that need to be confronted to effectively accomplish that objective is crucial. It is clear that the investment protection guarantees provided in IIAs are instruments to encourage capital flows between the signatory countries, and, in turn, contribute to their prosperity (or development). However, there is a growing realization that IIAs should be devised as instruments going beyond a concept of development that only focuses on economic growth. Consensus is growing that development should be seen as a broader process involving economic, social, political, and legal considerations. Accordingly, economic growth without social equity or economic redistribution without effective political participation could hardly be regarded as making a meaningful contribution to development. There is growing consensus that even if just focusing on affording protection to investment, IIAs should be perceived as instruments to achieve "sustainable development" (UNCTAD 2012).

In this reconceptualization, the comparative examination of national, supranational, and transnational public law is relevant. There is a growing voice arguing that IIAs should impose certain principles of good public governance (such as fairness and reasonableness) that already feature in many public law systems. In other words, IIAs should be aimed at establishing a system of judicial review at the international level in the area of investment. Comparative law provides useful lessons on this, particularly when it comes to issues such as the grounds and intensity of the review of public functions.

Accordingly, the paper suggests the following changes.

- The purpose of IIAs should be the promotion of "sustainable development" and it should be expressly stated in their preamble.
- The investment protection guarantees in IIAs should focus on requiring host states to behave in a "non-discriminatory" and "reasonable" manner.
- IIAs should not include provisions that guarantee "contractual and regulatory stability" ("umbrella clauses" and "stabilization clauses").
- The duty to compensate in case of expropriation should be limited to cases of "direct expropriation" only (as unreasonable measures that harm investors will be caught by the guarantee vis-à-vis unreasonable conduct).
- There is no need to provide general exception provisions (modelled on Article XX of the General Agreement on Tariffs and Trade) as the prerogative to adopt measures to pursue legitimate public policies is inherent in the substantive guarantees based on non-discrimination and reasonableness (however, such prerogatives should be expressly stated in the agreement).

Accordingly, a combination of recalibration (focusing on non-discrimination and reasonableness guarantees) and clarification (providing more details on the content of such guarantees) will achieve a balance between the need of business for protection and predictability and the need of governments for flexibility to pursue legitimate public policies.

Because the recalibration and clarification are aimed at imposing, through IIAs, certain generally recognized principles of good public governance on host states, there is no need to introduce different disciplines for different types of countries or classes of investors or economic sectors. As explained later, such differentiation should be considered with regard to "market access" or "pre-establishment" disciplines.

In terms of recent treaty practice, there are signs that indicate a preference (or priority) for investment protection guarantees that are based on the non-discrimination and reasonableness principles over investment protection guarantees aimed at ensuring stability and providing compensation for harm to the foreign investor. For example, a recent United Nations Conference on Trade and Development (UNCTAD) review of 13 IIAs concluded in 2014, for which texts are available, shows that none of them included an umbrella clause (UNCTAD 2015). Another example is limiting the duty to provide for compensation in the case of "direct" expropriation only (see recent Brazil model treaty on investment).

While limiting the breadth of investment protection guarantees could be said to be achieved also by limiting the scope of application of IIAs in terms of “covered investors,” this option would more exactly limit the consequences of having broad investment protection guarantees. In other words, it would not really address the issue of the substantive breadth of investment protections, but simply the issue of the extent of the impact of these protections. Nevertheless, there is recent treaty practice that has addressed the so-called issue of treaty planning and/or treaty shopping (see CETA, for example), which may provide some guidance.

### **Conditioning the availability of investment protection guarantees to investor's satisfaction/compliance with corporate standards**

This option takes a different approach in the sense that the IIA would still focus on affording investment protection, but it would limit that protection to “meritorious” investments only. In other words, the IIA would condition the availability of its investment protection guarantees on the foreign investment complying with certain standards or benchmarks, not only at the time of establishment in the host state but all through the life of the investment.

Two key challenges here are (a) identifying the relevant corporate standards/benchmarks and (b) implementing/operationalizing these conditions.

With regard to relevant standards and benchmarks, reference to existing global standards (such as the Organisation for Economic Co-operation and Development [OECD] Guidelines on Multinationals or the United Nations [UN] Guiding Principles on Business and Human Rights) as well as sector-specific standards (Equator Principles, Forest Stewardship Council, Kimberly Process) may be an option. The WTO has, for example, required Members to take into account “international standards” developed by international specialized agencies as a way to address potential trade barriers with regard to their technical and health-related regulations.<sup>1</sup>

With regard to the issue of operationalizing these conditions, some level of institutional infrastructure may be needed to supervise/implement the conditions as it is necessary to ensure/certify that an investment (whether at the time of establishment or during its life/operation) complies with the relevant standards/benchmarks. The IIA itself, or a related committee, could identify certain specialized, independent firms that provide such certification services. In this perspective, the experience of various environmental impact assessment or human rights due diligence processes, such as the International Financial Corporation (IFC) Guide to Human Rights Impact Assessment and Management, may provide useful insights on some of the challenges.

## **OPTIONS ADDRESSING THE LIMITED OBJECT OF IIAS**

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Under this umbrella, one may include a wide range of options going beyond the traditional, narrow function of “investment protection”. Here IIAs would be transformed in instruments for “investment regulation” at the international level. One can distinguish between two main categories: “economic regulation” and “social dimension” (Muchlinsky 2007). While it would still constitute a change in the traditional limited object of IIAs, focusing on economic regulation may entail a less of a “jump” compared with a focus on both economic and social dimensions.

### **Economic regulation**

There are certain key economic issues that could be subject to regulation in a broader IIA. Some may be of particular interest to investors.

- **Market access:** Some IIAs already provide for a certain level of market access (that is, liberalization) in the area of foreign investment. These agreements extend, in particular, national treatment to the pre-establishment phase (see North American Free Trade Agreement [NAFTA]). However, the great majority of existing IIAs only focus on post-establishment investment protection. Future IIAs could include provisions that limit the discretion of host states in allowing foreign investment access to their territory. Total or partial exclusion of foreign investors, performance requirements, restrictions on foreign ownership, laws regulating equity joint ventures between foreign and local enterprises, and screening laws are examples of the kinds of restrictions that would be regulated by IIAs. In light of a host of different reasons (infant industry, national security, lack of regulatory capacity, cultural identity, and so on), market access commitments should be tailored to the specificities of the relevant contracting parties. The traditional way to guarantee a level of flexibility is through sector-specific and measure-specific exceptions (see negative listing in NAFTA).
- **Anti-competitive behaviour:** A broad IIA could at least start including some rules addressing certain (egregious) anti-competitive conduct/practices (see the work carried out in the WTO on the interaction between trade and competition policy as one of the so-called Singapore issues).

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1

See Article 2.4 of the Technical Barriers to Trade (TBT) Agreement and Article 3 of the Sanitary and Phytosanitary (SPS) Measures Agreement.

- **Corporate governance, liability, restructuring/bankruptcy:** There are several issues that could be addressed in a broad IIA with regard to the functioning of corporate investors operating at the global level through horizontal/vertical corporate structures and/or global value chains (GVCs). Corporate governance, corporate liability and corporate restructuring, and bankruptcy are three examples.
- **Taxation:** There is also a growing awareness of the importance of the link between foreign investors (as multinationals) and taxation. Key issues here would include double taxation, transfer pricing, and tax havens.
- **Investment contracts:** IIAs could include disciplines regulating investor–state contracts. These disciplines could include the express prohibition of certain clauses (for example, freezing clauses) or require the use of certain other clauses (for example, economic equilibrium clauses; mediation/conciliation mechanisms). On the other hand, these disciplines could focus on identifying certain best practices, which may apply with regard to specific sectors/industries or across the board.<sup>2</sup>

### Social dimension

A further step in broadening the scope of IIAs is to address directly the social dimension of foreign investment. Key issues here would include the link between business and human rights, employment and industrial relations, the protection of the environment, and combating corruption.

While this further “expansion” is theoretically possible, it should only be considered for the long-term agenda. Aside from the political issues, the greatest practical complexity in introducing these additional areas is principally due to the need to coordinate with a host of various other on going initiatives pursued by national, regional, and international organizations.

## CONCLUSIONS AND RECOMMENDATIONS

In light of the three key challenges identified above, the paper has put forward three sets of options for policymakers. While the three sets can be pursued independent of one another, it is suggested here that a combination of all of them would be the best approach.

In terms of clarification, the paper suggests focusing on clarifying the content and scope of the traditional substantive provisions of IIAs, particularly MFN, FET, expropriation, and available remedies.

In terms of fine-tuning or recalibrating the kinds of protection afforded to investors by traditional substantive provisions, the paper suggests that future IIAs should (a) focus on substantive provisions that require host states to behave in a “non-discriminatory” and “reasonable” manner; (b) omit those provisions that guarantee “contractual and regulatory stability” (“umbrella clauses” and “stabilization clauses”); and (c) limit the duty to compensate in case of expropriation to cases of “direct expropriation” only.

In terms of addressing the limited object of IIAs, the paper suggests first considering extending them to cover a few key economic regulation issues, such as market access, corporate governance and responsibility, taxation, anticompetitive conduct, and investment contracts. In the long term, a few key social issues such as human rights, employment, environment, and corruption could also be included.

2

See, for example, the Model Mining Development Agreement Project at [www.mmdaproject.org/](http://www.mmdaproject.org/), and other examples listed in the State-Investor Contracts Toolbox of the Investment and Human Rights Learning Hub at <http://blogs.lse.ac.uk/investment-and-human-rights>.

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