

人权理事会
第三十届会议
议程项目 3增进和保护所有人权——公民权利、政治权利、
经济、社会和文化权利，包括发展权促进民主和公平的国际秩序问题独立专家
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摘要

本报告论述国际投资协定、双边投资条约和多边自由贸易协定对人权和国际秩序的不利影响，不仅从这些文书的拟订、谈判、通过和实施的程序性方面，而且从实质内容角度作出分析，主要关注是否合乎宪法以及对民主治理的影响，包括如何影响国家行使监管职能，推进公民、文化、经济、政治和社会权利享受。报告要求事前和事后进行人权、健康和环境影响评估，并提出系统性改革的行动计划。

因为所有国家都接受《联合国宪章》的约束，所以一切条约必须与《联合国宪章》保持一致，特别是符合第一条、第二条、第五十五条和第五十六条。虽然承认全球化可能促进人权与发展，但经验告诉我们，人权常常屈从于注重利润而忽略可持续发展的市场原教旨主义学说。《联合国宪章》第一百零三条规定：“联合国会员国在本宪章下之义务与其依任何其他国际协定所负之义务有冲突时，其在本宪章下之义务应居优先”。因此，检验国际投资协定和投资者与国家争端解决协议的标准是看其是否符合《联合国宪章》，不损害国家确保其辖下所有人福祉的本职职能，不使人权发生倒退。与之相悖的协议或仲裁都与国际公共秩序背道而驰，可视为不符合《维也纳条约法公约》规定，违反公序良俗而无效。

* 本报告附件不译，原文照发。



新兴的国际人权习惯法反映了各国的共识，认为国际协议，包括国际劳工组织和世界卫生组织协定中的人权条款构成了普遍适用的具有国际约束力的法律制度。独立专家邀请联合国各专家委员会，以及各区域人权法院重申人权优先于其他条约的原则。他还请大会及劳工组织和卫生组织等联合国专门机构征询国际法院对相关法律问题的意见。他还邀请人权理事会通过普遍定期审议和所有特别程序在各自职责中审查这些条约是否符合人权准则。

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一. 引言

1. 根据人权理事会第 18/6 号、第 21/9 号、第 25/15 号和第 27/9 号决议，独立专家设法查明阻碍实现民主和公平国际秩序的因素，包括缺乏透明度和问责制(A/HRC/21/45 和 A//67/277)、国内和全球决策缺少真正的民主参与(A/HRC/24/38)、不对称的经济、金融和贸易做法(A/68/284)、军费开支(A/HRC/27/51)和剥夺自决权(A/69/272)。

2. 独立专家在本报告中论述了自由贸易和投资协定，包括双边和多边协定对国际秩序的不利影响。提交大会的报告将着重阐述投资者与国家争端解决仲裁。独立专家注重听取经济学家的意见，也重视其他特别程序任务负责人的报告，包括食物权问题特别报告员(A/HRC/19/59/Add.5 和 A/HRC/10/5/Add.2)；人人有权享有可达到的最高水准身心健康问题特别报告员；¹ 享有安全饮用水和卫生设施的人权问题特别报告员；² 人权与极端贫困问题特别报告员；³ 国家外债和其他有关国际金融义务对充分享有所有人权，尤其是经济、社会、文化权利的影响问题独立专家；⁴ 法官和律师独立性特别报告员；和平集会和结社自由权利问题特别报告员(A/HRC/29/25)；人权与跨国公司和其他工商企业问题秘书长前特别代表；⁵ 人权与跨国公司和其他工商企业问题工作组(A/HRC/29/28,第 30-31 段)。他非常赞同 2011 年《工商企业与人权指导原则》第一至第十条(A/HRC/17/31,附件)和联合国“保护、尊重和补救”框架。⁶ 他借鉴条约机构，包括人权事务委员会、经济、社会和文化权利委员会以及儿童权利委员会的相关一般性意见和结论性意见。他欢迎贸发会议的敏锐诊断、近期会议成果和相关改革举措。⁷

3. 自由贸易和投资协定倡导者可能质疑本报告中的分析，说分析缺乏实际操作经验。然而，批评者也无法否认其中的人权建议，因为这些建议符合设立本任务的人权理事会决议。按《联合国宪章》建立的主权和平等国家的国际秩序，承诺遵行法治、透明度和问责制原则，不容私人利益集团破坏，以缺乏民主合法性的跨国公司主导的国际秩序取而代之。

¹ A/69/299、A/HRC/11/12 和 A/HRC/20/15/Add.2。另见 E/CN.4/2005/51/Add.3 和 www.ohchr.org/Documents/Issues/SForum/SForum2015/DainiusPuras.pdf。

² “在下列情况下，可能发生域外侵权行为：....(d)国家在拟定、应用和解释贸易和投资协定时未能尊重人权，或限制他人遵守人权义务的能力”(A/HRC/27/55，第 71 段)。

³ “国家在设计 and 执行国际贸易、税收、财政、货币、环境和投资等各项政策时应考虑到自己的国际人权义务”(A/HRC/21/39，第 61 段)。

⁴ Juan Pablo Bohoslavsky and Juan Bautista Justo, “The conventionality control of investment arbitrations: enhancing coherence through dialogue”, *Transnational Dispute Management*, vol. 10, No. 1(2013), pp.1-12。

⁵ John Ruggie. See www.ohchr.org/EN/Issues/Business/Pages/SRSGTransCorpIndex.aspx。

⁶ business-humanrights.org/en/un-secretary-generals-special-representative-on-business-human-rights/un-protect-respect-and-remedy-framework-and-guiding-principles。

⁷ 贸发会议，《2015 年世界投资报告》；《2014 年贸易和发展报告》。

4. 这份论述一个复杂和多层面问题的初步报告并不怀疑自由贸易原则上是一件好事情，已带来数百年的发展。贸易纠纷甚至可能引起经济萎缩，正如罗马帝国衰落使世界进入了“黑暗时代”一样。虽然双边投资条约和自由贸易协定可能促进国际交往，但也不应过于乐观，将贸易与福利划等号，或声称“几乎可以说，贸易实际上就是人权”。⁸ 目前关税已经很低，还需要进一步降低关税，以不对社会政策进行调整为代价吗？现在重点已转移到非贸易壁垒，许多国家，包括发达国家和发展中国家都在利用这类措施保护其国内市场。一些观察家认为双边投资协定和自由贸易协定是地缘政治架构，与贸易自由化无关；另一些学者，如 Yash Tandon, 则说贸易的历史证明贸易是一种实施经济主导地位的工具。⁹ 无论如何，如《工商业与人权指导原则》所指出的，达成一种明智妥协¹⁰ 是可能的，既允许外国直接投资，同时又使人权得到保护。这项义务源自于习惯法和条约法，特别是《公民权利和政治权利国际公约》以及《经济、社会、文化权利国际公约》。按照定义，每个国家的合法性取决于能否推进其辖下人口的福祉。法治国家必须履行这一责任，不能将属于国家基本职能的活动外包出去或实行私有化，进而逃避其人权义务。国家在缔结国家投资协定之前和之后，必须进行人权、健康和环境影响评估。¹¹

5. 许多观察家对某些解决投资者与国家争端的仲裁表示关切，因为这些仲裁否定国家行使国内劳动、卫生和环境监管政策的职能，对人权，也对第三方造成不利影响，包括对行使民主治理产生了“寒蝉效应”。仲裁法庭要成为值得信赖的机构，必须按照《公民权利和政治权利国际公约》关于法律诉讼的第十四条第 1 条，以独立、透明和负责任方式运作。投资者与国家争端解决法庭不应该另立法律环境，也应接受国际人权制度所规定义务的约束，¹² 这些义务贯穿人类活动所有领域，包

⁸ Pascal Lamy(世界贸易组织前任总干事)，“朝着共同承担责任和更加协调一致的方向努力：人权、贸易和宏观经济政策”，在人权在全球经济中地位的讨论会上的发言，2010 年 1 月 13 日，日内瓦，可查阅：www.wto.org/english/news_e/sppl_e/sppl146_e.htm。

⁹ Yash Tandon, *Trade is War: the West's War against the World* (OR Books, 2015). See also the history of the Opium Wars to force the opening of China to European trade in Jack Beeching, *The Chinese Opium Wars* (Orlando, Florida, Harcourt Brace Jovanovich, 1975); and Susanna Hoe and Derek Roebuck, *The Taking of Hong Kong: Charles and Clara Elliot in China Waters* (Richmond, Surrey, Curzon Press, 1999)。

¹⁰ See Stephan W. Schill (ed.), *International Investment Law and Comparative Public Law* (Oxford University Press, 2010); Joseph François *et al.*, “Reducing transatlantic barriers to trade and investment: an economic assessment”, IIDE Discussion Paper No. 20130401(Institute for International and Development Economics, 2013); V. S. Seshadri, “Trans-Atlantic trade and investment partnership”, RIS Discussion Paper No. 185 (New Delhi, Research and Information Systems for Developing Countries, 2013); Jeffrey J. Schott and Cathleen Cimino, “Crafting a transatlantic trade and investment partnership: what can be done”, Policy Brief No. PB13-8 (Washington, D.C., Peterson Institute for International Economics, 2013); and U.S. Business Coalition for TPP, “VOICES: Asia-Pacific Policy Experts Support TPP”, 28 April 2015, available from tppcoalition.org/voices-asia-pacific-policy-experts-support-tpp-and-tpa。

¹¹ 见 A/HRC/19/59/Add.5; www2.ohchr.org/english/issues/food/docs/report_hria-seminar_2010.pdf and www.humanrights.dk/business/impact-assessment。

¹² Bruno Simma and Theodore Kill, “Harmonizing investment protection and human rights: first steps towards a methodology”, in Christina Binder *et al.* (eds.), *International Investment Law for the 21st Century: Essays in Honour of Christoph Schreuer* (Oxford University Press, 2009)。

括非国家行为者的活动。一些观察家认为，某些仲裁轻浮，证据明显不足，而又不可上诉。

6. 具有法律约束力的人权条约与国际投资协定运作之间的紧张关系产生了一个根本性问题。正如 Bohoslavsky 所说：“需要进行协调，以避免既追求合法性也希望最终达到一致的国际法律秩序的碎片化”。¹³

二. 保护投资还是保护人权

7. “任何地方的企业可能都同意，摆脱规则的约束将有利于企业盈利。贸易谈判者可能也相信这些贸易协定将对贸易和企业盈利有好处。但也会有一些大的输家——那就是我们其他人”。¹⁴

8. 国际投资协定并不是国际舞台的新现象。双边投资条约目前已超过 3,200 件。经过多年同投资者与国家争端解决、解决投资争端国际中心和其他仲裁打交道的经验，可明显看出，许多国家的监管职能和为公共利益立法的能力受到了损害。某些裁决的“寒蝉效应”使问题更加严峻，对国家通过法规保护环境、保证食品安全、允许获得非专利药品以及按照《烟草控制框架公约》减少吸烟进行惩罚。这些裁决的合法性受到质疑，因为破坏国内和国际公共秩序，有时被认为违反公序良俗。

9. 观察家们注意到权利保护出现倒退，这些权利包括生命权、食物权 (A/HRC/25/57)、¹⁵ 水权和卫生设施权、¹⁶ 健康权、住房权、受教育权、文化权、享有良好劳动标准权、由独立司法机构审判权、洁净环境权和不被强迫搬迁权。此外，人们还有理由担心，国际投资协定可能使极端贫困、¹⁷ 外债重新谈判、金融监管以及土著人民、少数民族、残疾人、老年人和其他弱势群体权利等问题更难解决。

10. 工商企业和人权问题工作组报告强调，《工商业与人权指导原则》原则 8 和 9 分别指出，“国家应确保负责规范企业行为的政府部门、机构和其他国家机构，在履行各自职责时，意识到并遵守国家的人权义务”；“国家应保持足够国内政策空间，以便在与其他国家或商业企业通过投资条约或合同等方式追求相关商业政策目标

¹³ Bohoslavsky (see footnote 4 above), p.10. 另见国际法委员会国际法碎片化问题研究组的报告：国际法多样化和扩大化造成的困难，《2006 年国际法年鉴》，第二卷（第二部分），第 251 段。

¹⁴ Joseph Siglitz, “On the wrong side of globalization”, *New York Times*, 15 March 2014. See also Pope Francis’ statement <http://www.pagina12.com.ar/diario/elpais/1-276806-2015-07-10.html>.

¹⁵ 当一个人因得不到药品而死亡，生命权便受到影响。药品垄断使“知识私有化”，专利“常青化”，又促使公司推迟或干脆不向市场推出十分便宜的仿制药。没有政府保护行动的“自由贸易”摧毁了农民和其他劳动者的生计，也是侵犯生命权。例如，双边投资条约和自由贸易协定造成印度数以百万计的农民失业，自杀倾向显著上升。见 Devinder Sharma, “‘Free’ trade killing farmers in India”, November 2007, available from www.bilaterals.org/?free-trade-killing-farmers-in.

¹⁶ www.cepal.org/es/publicaciones/3839-proteccion-del-derecho-humano-al-agua-y-arbitrajes-de-inversion http://cap-net-esp.org/document/document/181/agua_y_saneamiento_tratados_de_proteccion_a_las_inversiones.pdf.

¹⁷ www.globalresearch.ca/the-free-trade-agreements-the-asia-europe-peoples-forum-call-to-action/5416888?print=1.

时，履行人权义务”。因此，正在谈判的所有国际投资协定都应列入一项明确条款，规定如果国家的人权义务与其他条约之下的义务发生冲突时，应以人权公约居先。

11. 1994 年《北美自由贸易协定》就是这样的一项协定，它导致制造业迁移，估计美国失去了 85 万个就业机会，而人工成本低、社会保障也不符合国际劳工标准的墨西哥却涌现了大量称之为“Maquiladoras”¹⁸ 的组装工厂。《北美自由贸易协定》“向投资者提供了一系列独特保障，以刺激外国直接投资和工厂在北美洲自由流动……。此外，协定核心部分没有包含遵守劳工和环境标准的任何保护条款。结果是，北美自由贸易协定扭曲了经济的公平竞争环境，偏向于投资者，而不利于工人和环境”。¹⁹ 一些国际投资协定还在谈判之中，而且谈判大多是秘密进行的，其中包括《跨大西洋贸易和投资伙伴协定》、《服务贸易协定》、《跨太平洋伙伴关系协定》和《区域全面经济伙伴关系协定》。²⁰

12. 许多学者和经济学诺贝尔奖获得者已指出这些协定对民主治理和人权的威胁。斯蒂格利茨(Stiglitz)说：“这些协议远远超出贸易范畴，也涉及投资和知识产权，致使国家的法律、司法和监管制度发生了根本性变化，而又无需通过民主机制作出反馈和问责。这些协定中最令人反感也最不诚实的部分也许是投资者保护条款。当然，投资者需要防范流氓政府征收它们的财产。但是，这并不是这些规定的主要目的。近几十年来征收事件已极为罕见，而且投资者如果希望保护自己，可以向多边投资担保机构—世界银行的附属机构(美国及其他国家政府提供类似保险)，购买投资保险。……这些规定的真正意图是阻碍卫生、环保、安全，甚至是金融条例的实施”。²¹ 关于发展中国家，2014 年联合国《贸易和发展报告》指出：“外国资本流入发展中国家和转型经济体可支持投资、经济多样化和增长，也可能引发宏观经济不稳定、外部失衡及繁荣和萧条交替的信贷过程。……出于宏观审慎和发展原因，政府需要足够的政策空间，以便能够管理外国资本流动，影响其数量和构成，并引导其进入生产性用途”。²² 这段话恰恰说明了外国直接投资和其他资本流动可能在人权领域之外产生问题。

¹⁸ See www.hrw.org/news/1996/08/17/mexicos-maquiladoras-abuses-against-women-workers; sdmaquila.blogspot.ch/2010/02/maquiladoras-101-english.html; and www.researchgate.net/publication/266820089_Human_rights_violations_in_the_Maquiladora_Industry。

¹⁹ Robert E. Scott, “The high price of ‘free’ trade: NAFTA’s failure has cost the United States jobs across the nation”, Briefing paper No. 147, Economic Policy Institute, 17 November 2003, available from www.epi.org/publication/briefingpapers_bp147。

²⁰ See www.mfat.govt.nz/Trade-and-Economic-Relations/2-Trade-Relationships-and-Agreements/RCEP/donttradeourlivesaway.wordpress.com/2015/06/11/press-statement-civil-society-raises-major-concerns-on-indias-engagement-with-the-massive-rcep-trade-deal/; and trade.ec.europa.eu/doclib/docs/2006/december/tradoc_118238.pdf。欧洲自由协会也在谈判自由贸易协定，见 www.asean.org/images/2012/documents/Guiding%20Principles%20and%20Objectives%20for%20Negotiating%20the%20Regional%20Comprehensive%20Economic%20Partnership.pdf。

²¹ www.project-syndicate.org/commentary/us-secret-corporate-takeover-by-joseph-e--stiglitz-2015-05。

²² 《2014 年贸易和发展报告》，第 145 页，见：http://unctad.org/en/PublicationsLibrary/tdr2014_en.pdf。另见贸发会议，《2015 年世界投资报告》，改革国际投资体系。

13. 观察家们注意到国际投资协定和投资者与国家争端解决法庭存在严重民主缺欠，他们不理解为什么国家继续根据对国内生产总值增长和就业的片面研究和过于乐观的预测来进行谈判。不仅国家不积极主动地披露协议信息，而且关键利益相关者也被排除在谈判之外，谈判桌旁尽是公司律师和说客²³。甚至试图经由“快车道”通过这些协议以规避议会，表明正当程序严重缺位，也就谈不上民主合法性。

14. 对这一挑战并不是没有良好的诊断。问题或多或少出在对市场原教旨主义理念的不合时宜和不加批判的推崇。约瑟夫(Joseph)敏锐地指出：“自由贸易本身不是目的。……自由贸易倡导者继续狂热地鼓吹自由贸易着实让人吃惊”。²⁴ 斯蒂格利茨指出，贸易自由化可大幅度增加国内生产总值和就业并没有实证数据，尽管教条主义作此断言，人们对正在谈判的协定也寄以令人惊讶的乐观预测。²⁵ 约瑟夫还指出，因为贸易法已经渗透到其他法律领域，对确定性的渴求理应迫使贸易规则考虑所谓的非贸易因素，如人权和劳工标准。²⁶ 关于正在进行的《跨大西洋贸易和投资伙伴协定》的谈判，卡帕尔多(CAPALDO)质疑目前的假设和预测：“不同的机构预测似乎都依赖于已证明不适于作为贸易政策分析工具的‘可计算一般均衡模型’。…[我们]使用能够对宏观经济调整、就业动态和全球贸易作出更合理假设的‘联合国全球政策模型’评估了《跨大西洋贸易和投资伙伴协定》。我们预测，该协定将导致国内生产总值、个人收入和就业萎缩。我们还预测金融不稳定加剧，劳动力占国内生产总值比重呈持续下降趋势”。²⁷

²³ See www.washingtonpost.com/wp-srv/special/business/trade-advisory-committees/index.html.; big.assets.huffingtonpost.com/WarrenBrownTPPLetter.pdf; corporateeurope.org/pressreleases/2014/07/agribusiness-biggest-lobbyist-eu-us-trade-deal-new-research-reveals; www.publicintegrity.org/2005/07/07/5786/drug-lobby-second-none; www.citizen.org/documents/egregious-investor-state-attacks-case-studies.pdf; and www.opensecrets.org/lobby/methodology.php.

²⁴ Sarah Joseph, *Blame it on the WTO? A Human Rights Critique* (Oxford University Press, 2011), p. 288.

²⁵ Joseph Stiglitz and Andrew Charlton, *Fair Trade for All: How Trade can Promote Development* (Oxford University Press, 2005), p. 34.

²⁶ Joseph (see footnote 23 above), citing Frank Garcia, “The global market and human rights: trading away the human rights principle”, *Brooklyn Journal of International Law*, vol. 7 (1999), p. 51, at p. 65. See also Jeronim Capaldo, “The Trans-Atlantic Trade and Investment Partnership: European disintegration, unemployment and instability”, GDAE Working Paper No. 14-03, Global Development and Environment Institute at Tufts University, available from http://ase.tufts.edu/gdae/policy_research/ttip_simulations.html.

²⁷ Capaldo (see footnote above).

三. 投资者与国家争端解决：对民主和法治的挑战²⁸

15. 对民主和公平国际秩序的一大威胁来自于仿佛凌驾于国际人权制度之上的仲裁法庭。解决投资者与国家争端的仲裁法庭通常由企业仲裁员组成，利益冲突使它们的独立性屡遭质疑。²⁹ 应该承认，企业仲裁员不是公共利益天然监护人，他们在意的是企业利益和从经验上看偏向投资者而忽略民众的新“产业”。投资者与国家争端解决必然另设单独的争端解决制度，不仅游离于国内法院体系之外，而且裁决不得上诉。这让人不禁想起韦纳尔(Juvenal)提出的问题“*quis custodiet ipsos custodies?*”(“谁来监管这些监管人?”)。一个民主的政体如果允许建立单独、不透明和不可问责的争端解决机制，还能称得上民主吗?

16. 观察家质疑投资者可以起诉国家而国家不能起诉投资者的仲裁制度是否合法。³⁰ 对“投资”、“征收”和“公正及平等待遇”等术语的解释十分宽泛，难以与《维也纳条约法公约》第三十一条和第三十四条的解释通则相调和。经验表明，仲裁员对国际投资协定的解释无需顾忌人权或环境问题。程序不透明，人们甚至不知道实际发生了多少起仲裁，因为大多数不公布。可以知道的是仲裁员明显偏向企业，对一般性法律原则不屑一顾。贸发会议 2012 年报告指出，“对简约的条约语言作出宽泛的解释可能导致标准的适用缺乏可预测性。反过来，可能损害国家为了经济、社会、环境和其他发展目的进行正当干预的能力”。³¹

17. 西班牙仲裁员费尔南德斯—阿梅斯托(Fernández-Armesto)写到：“当我半夜醒来，想想仲裁案件，仍禁不住感到吃惊，主权国家居然同意接受投资仲裁。三个人肩负着审查的重任，没有任何限制或上诉程序约束，也无需顾忌政府的一切行为、法院的一切判决、议会的一切法律法规”。³² 事实上，令人不安的是，仲裁员可以无视一些基本原则，如尊重国家的“自由裁量权”、国家法律和国家最高法庭司法裁决。投资者保护的单行道不利于营造一种投资者与国家间合作的文化，而是助长了动辄诉讼、显然会产生“监管寒意”的霸道气焰。仲裁可以在世界银行的解决投资争端国际中心的主持下在华盛顿进行，但少不了令人担忧“挑选管辖地”过程。

²⁸ 根据自由贸易协定和双边投资条约投资章节处理并公开发表的投资案件数据库中包含投资者与国家争端解决案件，可按投资者质疑的政策类型(如环境)查阅，但 2010 年 5 月之后没有更新。见：www.iiapp.org/。投资者与国家争端的仲裁裁决，见：www.italaw.com and [unctad.org/en/Pages/DIAE/investor-State dispute settlement.aspx](http://unctad.org/en/Pages/DIAE/investor-State%20dispute%20settlement.aspx)。另见：[www.baerbel-hoehn.de/fileadmin/media/MdB/baerbelhoehn_de/www_baerbelhoehn_de/investor-State dispute settlement_TAFTA_Bundestag.pdf](http://www.baerbel-hoehn.de/fileadmin/media/MdB/baerbelhoehn_de/www_baerbelhoehn_de/investor-State%20dispute%20settlement_TAFTA_Bundestag.pdf)；www.iisd.org/pdf/2011/int_investment_law_and_sd_key_cases_2010.pdf。

²⁹ See Pia Eberhardt and Cecilia Olivet, *Profiting from Injustice: How Law Firms, Arbitrators and Financiers are Fuelling an Investment Arbitration Boom* (Corporate Europe Observatory, Brussels, 2012), available from www.tni.org/sites/www.tni.org/files/download/profitfrominjustice.pdf; acta.ffii.org/?p=2118; corporateeurope.org/sites/default/files/annex-2-still-not-loving-isds.pdf; corporateeurope.org/international-trade/2014/07/commission-isds-reform-plan-echo-chamber-business-views; www.bilaterals.org/?investor-to-state-dispute; and www.italaw.com/sites/default/files/case-documents/ita0221.pdf。

³⁰ See John Hendy, A threat to the sovereignty of courts and parliaments”, *Graya*, No. 128(2015), pp. 52–56.

³¹ 《公平与公正待遇》(联合国出版物，销售品编号：E.11.II.D.15), p. 2.

³² www.theguardian.com/commentisfree/2013/nov/04/us-trade-deal-full-frontal-assault-on-democracy。

仲裁也可以在其他地方进行，如伦敦国际仲裁法院、国际商会、斯德哥尔摩商会、香港国际仲裁中心或联合国国际贸易法委员会。注重利润而忽略人权的仲裁越来越多。³³ 根据贸发会议，许多投资者与国家争端解决仲裁是完全保密的，目前仅公布了 608 件仲裁裁决。³⁴ 独立专家提到了他即将提交大会的报告，并列举几起案件，说明诉讼过程及其对人权的影响。

18. 2013 年，一家在美国注册的加拿大卡尔加里的公司——Lone Pine 不是根据加拿大法律，而是援引《北美自由贸易协定》第十一章，起诉加拿大，反对魁北克省暂停使用裂解化学品。这家公司没有给加拿大留出时间查阅科学研究资料，了解一些裂解化学品是否包含致癌物质和有害空气污染物，从而需要采取预防措施。³⁵ Lone Pine 争辩说，这一禁令是“武断的”和“任意的”，将影响公司利润。

19. Ethyl 是一家弗吉尼亚州的公司，在加拿大设有子公司。它提起诉讼，指控加拿大颁布法规禁止汽油添加剂 MMT 进口违反了加拿大的义务。加拿大选择不抵抗，撤消了禁令，尽管这种添加剂对健康有害。³⁶

20. “Metalclad 诉墨西哥案”涉及一家公司起诉墨西哥不允许它建设废物处理场，因为可能污染墨西哥水源地。仲裁员判决赔偿 Metalclad 利润损失 1,679 万美元。³⁷

21. 2013 年，一家法国跨国公司 Veolia 起诉埃及提高最低工资使其预期利润下降。索赔数额为 8,200 万美元。³⁸

22. “*Aguas del Turani S.A. 诉玻利维亚共和国案*”涉及一桩科恰班巴市供水私有化合同，包括 40 年特许权和保证每年的现金流。这起交易获得了世界银行的批准，它将私有化当作贷款的一个条件。*Aguas* 公司的大股东是美国的 Bechtel 公司和西班牙跨国公司 Bengoa。这起合同 1999 年实施后，水价飙升。老百姓为了维护可负担得起的供水权而上街抗议，当时的政府宣布戒严，试图以军事力量平息抗议。在一名 17 岁少年死亡后，多民族玻利维亚国取消了私有化合同，*Aguas* 公司索赔 5,000 万美元。³⁹

³³ 欧洲宪法权利与人权中心，“人权不适用于国际投资仲裁吗？”，可查阅：www.ecchr.de/worldbank/articles/human-rights-inapplicable-in-international-investment-arbitration.html。

³⁴ 贸发会议，《国际投资协议题说明》，第 1 号 (February 2015 年 2 月)，可查阅：unctad.org/en/PublicationsLibrary/webdiaepcb2015d1_en.pdf。

³⁵ commonsensecanadian.ca/quebec-fracking-nafta-challenge-right-water-right-profit/。

³⁶ www.international.gc.ca/trade-agreements-accords-commerciaux/topics-domaines/disp-diff/ethyl.aspx?lang=eng and www.citizen.org/documents/egregious-investor-state-attacks-case-studies.pdf。

³⁷ www.citizen.org/documents/NAFTAREport_Final.pdf and solidarity-us.org/node/977. See also www.baerbel-hoehn.de/fileadmin/media/MdB/baerbelhoehn_de/www_baerbelhoehn_de/ISDS_TAFTA_Bundestag.pdf and www.oecd.org/daf/inv/internationalinvestmentagreements/40077817.pdf。

³⁸ www.elstel.org/ISDS.html.en; infojustice.org/archives/34113。

³⁹ www.citizen.org/cmep/article_redirect.cfm?ID=9208, documents.foodandwaterwatch.org/doc/ICSID_web.pdf and www.elstel.org/ISDS.html.en。

23. 2009 年，瑞典能源巨头 Vattenfall 公司根据《能源宪章条约》起诉德国，要求赔偿 14 亿欧元，理由是环保措施限制了使用和向易北河排放冷却水。在德国同意降低环境标准后，才达成和解，但对这条河流和野生动物产生了不良影响。⁴⁰ 福岛灾难后，德国民众要求关闭核电厂，德国政府决定逐步淘汰核能。Vattenfall 公司目前正寻求索赔 40 亿美元。⁴¹

24. 解决投资争端国际中心最荒唐的仲裁之一是“美国西方石油公司诉厄瓜多尔案”，指控厄瓜多尔下令关闭在亚马逊河上的石油生产基地。仲裁裁定赔偿西方石油公司 17.6 亿美元(加利息为 24 亿美元)，厄瓜多尔指责裁决侵犯多项人权和破坏环境。⁴²

25. 在“Philip Morris(瑞士)公司诉乌拉圭(2010 年)案”中，这家多国公司无视《世界卫生组织烟草控制框架公约》，根据《瑞士与乌拉圭双边投资协定》控告乌拉圭颁布禁止吸烟法使它的投资贬值。⁴³ 世卫组织提交了简短的法庭之友书状。

26. 2009 年，厄瓜多尔法院对雪佛龙公司活动造成的环境损害进行罚款。雪佛龙公司拒绝支付，遂向国际贸易法委员会提出控告，要求裁定厄瓜多尔赔偿利润损失。⁴⁴ 诉讼还在进行之中。

27. 2011 年，Philip Morris 公司起诉澳大利亚⁴⁵，控告它采取措施减少烟草消费。政府应诉说，它拒绝接受投资者与国家争端解决机制中“给予外国企业的法律权利多于国内企业的规定。……政府过去不接受将来也不会接受限制其行动能力的条款，使其无法针对烟草产品提出健康警示或简单包装要求或继续实施药品福利计划。…如果澳大利亚企业担心在澳大利亚贸易伙伴国的主权风险，它们需要自己评估是否愿意在这些国家投资”。⁴⁶

⁴⁰ www.italaw.com/cases/documents/1655. Nathalie Bernasconi, “Background paper on *Vattenfall v. Germany*”, IISD; Rechtsanwältin Günther(2012) Briefing Note. The Coal-fired Power Plant Hamburg-Moorburg.

⁴¹ www.fr-online.de/energie/atomausstieg-vattenfall-fordert-milliarden,1473634,21169258.html Power Shift(2012) Der deutsche Atomausstieg auf dem Prüfstand eines internationalen Investitionsschiedsgerichts? Hintergründe zum neuen Streitfall Vattenfall gegen Deutschland. www.iisd.org/pdf/2012/powershift_forum_briefing_vattenfall.pdf.

⁴² 这一案件最恶劣的地方之一，是厄瓜多尔根据厄瓜多尔法律终止西方公司的许可和合同是合理的，但投资者与国家争端解决法庭还是惩罚厄瓜多尔，见 www.citizen.org/documents/oxy-v-ecuador-memo.pdf。

⁴³ www.iisd.org/itn/2011/07/12/philip-morris-v-uruguay-will-investor-state-arbitration-send-restrictions-on-tobacco-marketing-up-in-smoke/。

⁴⁴ www.italaw.com/cases/257. See also truth-out.org/news/item/23788, fpif.org/nafta-20-model-corporate-rule/and content.time.com/time/world/article/0,8599,2053075,00.html。

⁴⁵ www.italaw.com/cases/851 and www.iisd.org/itn/2011/07/12/philip-morris-v-uruguay-will-investor-state-arbitration-send-restrictions-on-tobacco-marketing-up-in-smoke/。

⁴⁶ www.acci.asn.au/getattachment/b9d3cfae-fc0c-4c2a-a3df-3f58228daf6d/Gillard-Government-Trade-Policy-Statement.aspx. The current Government of Australia may consider investor-State dispute settlement on a treaty by treaty basis.

28. 各国政府和国会议员已逐步开始反击企业侵犯国家主权基本要素的行为。在欧洲议会辩论《跨大西洋贸易和投资伙伴协定》时，有人提出了企业勒索问题，援引 Vattenfall 和 Veolia 公司的案例指出，跨国公司正在利用投资者保护规则来实现企业目标，增加了维护公共政策和规则的纳税人资金。欧洲委员会的概念文件“在《跨大西洋贸易和投资伙伴协定》缔约国和之外的投资——改革路径”⁴⁷，概述了可以对自由贸易协定范本作出的改进，以保证国家的政策空间。经验表明，自我监管是不够的，⁴⁸ 尽管《工商业与人权指导原则》提出了此种要求，但也需通过条约实施法律约束。在这种情况下，必须强调，即使仲裁可能判定国家胜诉和投资者败诉，但也不能消除相关危险，亦不能赋予投资者与国家争端解决模式以合法地位，因为仅仅是仲裁的威胁就促使作为发达国家的加拿大放弃进行社会立法。更何况发展中国家，它们更容易受到这种威胁的影响，⁴⁹ 因为缺乏资源与跨国大型企业周旋，为自己辩护。

29. 投资者对权利的侵害可以如此厚颜无耻，可以想像，有一天，当一个国家决定减少或停止生产违反国际人道主义法的杀伤人员地雷或集束炸弹，从而“剥夺”军火产业的预期利润时，军工企业可能会援引投资者与国家争端解决条款为自己辩解。

30. 这不仅仅是今后改革投资者与国家争端解决制度的问题，还需要审查和修订现有的双边投资条约和自由贸易协定，这些条约和协定原本不是为了约束国家。如果投资者与国家争端解决机制和解决投资争端国际中心已演变成经济胁迫机构，那么必须将这些机构解散，并按照《维也纳条约法公约》加以改造。

四. 规范框架

31. 尽管双边投资条约和自由贸易协定问题已经列入国际议程几十年，但其对人权的影响却鲜有报道。显而易见，潜在利润的诱惑以及过于乐观的国内生产总值增长和创造大量就业机会的预期，让一些政府趋之若鹜，忽略人权问题，也允许对国家职能大打折扣。

32. 国际法院承认的法律渊源之一是贯穿国家和国际法律秩序的一般法律原则（《国际法院规约》第三十八条第一款寅项），而诚信是一项这类法律原则。诚信原则已被纳入许多国家的民法和宪法，要求法律必须一致，不能形成对立以摧毁权利。《世界人权宣言》第三十条阐释了诚信原则，两项人权公约第五条也包含了这一原则。其他一般法律原则还包括：相称原则、可预见原则、情势变迁原则、廉洁原则、禁止反言原则（不法行为不产生权利）、禁止滥用权利原则、钓鱼执法原则、禁止违反公序良俗的条约或合同原则。

⁴⁷ trade.ec.europa.eu/doclib/docs/2015/may/tradoc_153408.PDF。另见贸发会议，《2015 世界投资报告》：“改革国际投资治理”。报告提出了投资制度改革“行动菜单”。贸发会议《国际投资协定议题说明》，2015 年 5 月。

⁴⁸ ccsi.columbia.edu/files/2012/11/FDI-Perspectives-eBook-v2-Nov-2012.pdf。

⁴⁹ Guatemala, www.theguardian.com/business/2015/jun/10/obscure-legal-system- lets-corporations-sue-states-ttip-icsid。

33. 大多数国家已将公共秩序概念纳入宪法和法律。一个国家如果自折羽翼，无法维护和保护其辖下人民的利益，那么就背叛其存在的理由，失去了民主合法性。

34. 大量现行人权条约、协定和宣言构成了宪政框架，一个国家在与其他国家和/或私营机构，包括金融机构和跨国企业缔结协议时必须考虑这些文书。人权制度，包括国际和区域人权条约和国际劳工组织及世界卫生组织的公约应被视为优先于其他协议，包括双边投资条约和自由贸易协定。国家法院和国际法庭及仲裁机构也必须服从于这一制度。

35. 各国必须确保的权利有：生命权、人身安全权、参与公共事务权、返回家园权、行动自由权、保健权、受教育权、就业权和享有社会保障权。这些承诺也见于《公民权利和政治权利国际公约》第一条、第二条、第六条、第九条、第十二条、第十七条、第二十五条、第二十六和第二十七条以及《经济、社会、文化权利国际公约》第一条、第二条、第五条、第六条、第七条、第九条、第十条、第十一条、第十二条和第十三条。

36. 双边投资条约和自由贸易协定的拟订、谈判和通过过程，必须符合《公民权利和政治权利国际公约》第二十五条第一款关于确保所有利益相关者参与的要求。这一条款规定各国政府负有义务主动披露必要信息和鼓励公众参与。获得信息是根据《公民权利和政治权利国际公约》第十九条行使见解自由和言论自由权利的必要条件。协商和参与的额外好处是建立共识，从而减少繁重诉讼的可能性。议会有责任认真审查双边投资协定和自由贸易协定，并确保进行人权和环境影响评估。

37. 秘密进行贸易谈判(虽然不涉及国家安全!)，并将主要利益相关者排除在外，必然违反《公民权利和政治权利国际公约》第十九条和第二十五条。⁵⁰ 正如独立专家 2013 年提交理事会的报告所说，民主选出的代表没有从选民那里得到绝对授权，遇事必须与选民协商，按照选民的意愿行事。⁵¹ 民主不是偶尔用之，而是与代表和选民持续对话。若不是维基解密⁵² 公布了正谈判的自由贸易协定的若干章节，还不会引起这场必要的公众辩论。

38. 经济、社会和文化权利委员会发布了相关的一般性意见：第 12 号——取得足够食物的权利(第十一条)第 19 段和第 36 段(“缔约国应该确保有关国际协定适当注意到取得足够粮食的权利”)；第 14 号——享有能达到的最高健康标准的权利(第十二条)第 39 段(“在缔结其他国际协议方面，缔约国应采取措施，保证有关文书不会对健康权产生不利影响”)和第 41 段(禁止药品和医疗设备禁运)；第 15 号——水权(第

⁵⁰ 威尔逊的《十四点和平原则》第 1 条告诫我们警惕秘密条约。《联合国宪章》第一百零二条规定条约必须予以公布。即使部分公布了双边投资条约和自由贸易协定的内容，但如果谈判和通过没有民众的参与，也缺少民主的合法性。一些观察家已表示担心，世界范围内对公民个人进行监视的理由之一是预测可能何时何地出现民主运动，从而将其扼杀在萌芽状态。因此，保护隐私权和禁止未经允许的监视，已在《公民权利和政治权利国际公约》第十四条和第十七条作出规定。

⁵¹ A/HRC/24/38，第 15–24 段。另见《维也纳宣言和行动纲领》，第 8 段。

⁵² 2015 年 3 月 20 日在厄瓜多尔驻伦敦大使馆对朱利安·阿桑奇的专访，见：wikileaks.org/tpp/pressrelease.html, wikileaks.org/tpp-investment/press.html, wikileaks.org/tisa/press.html and www.theguardian.com/media/2015/jun/03/wikileaks-documents-trade-in-services-agreement。

十一条和第十二条)第 31 段和第 35-36 段(“缔约国应确保在国际协议中充分注意人权。为此,应该进一步考虑制订法律文书。在缔结和执行其他国际和区域协定时,缔约国应该采取措施,确保这些文书不侵犯人权”);第 18 号——工作权利(第六条);第 19 号——社会保障的权利(第六条)。⁵³

39. 这些承诺通过国际劳工组织第 14 号、第 29 号、第 77 号、第 78 号、第 87 号、第 95 号、第 98 号、第 102 号、第 105 号、第 138 号、第 169 号和第 182 号公约得到了进一步加强。与此有关的还有世界卫生组织的公约和其他国际条约,如《保护非物质文化遗产公约》、《保护世界文化和自然遗产公约》和《联合国气候变化框架公约》。

40. 世界和区域人权条约,包括《公民权利和政治权利国际公约》和《经济、社会、文化权利国际公约》、《欧洲人权公约》、《美洲人权公约》和《非洲人权和人民权利宪章》必然优先于其他条约。正如欧洲人权法院在 1989 年 Soering 诉英国一案的判决中指出的,《欧洲人权公约》之下的义务优先于引渡条约之下的义务,因此也优先于双边投资协定和自由贸易协定。

五. 系统性改革

41. 特别问题需要大胆办法来应对。对于反民主的投资者与国家争端解决协议不时出现的错误裁决,可以通过修订或终止这类协定来解决。如果国家能够采取非常措施,救助违法银行,那就更有理由采取措施,保护人民的福祉。一个国家的经济、农业或工业若因为双边投资协定和自由贸易协定有时不可预测的影响而濒临崩溃,那么理应根据不可抗力原则,采取保护措施。

42. 双边投资协定和自由贸易协定是否有效,可以根据《维也纳条约法公约》的规则进行检验。例如,如果发现以下情况,可以宣布条约无效:明显违反国家宪法,缔结条约时假定存在且构成其同意承受条约拘束之必要根据的事实或情势错误(第四十八条);一谈判方的欺诈行为(第四十九条);故意误导或虚假的声称,贿赂(第五十条);胁迫(第五十一条和第五十二条 2);或与一般国际法强制规范相抵触(第五十三条)。还可能根据重大违约(第六十条)、发生意外不可能履行(第六十一条)或情况之基本改变(第六十二条)等理论终止或暂停执行条约。通常情况下,条约都包含废止或退出条款。如果没有这样的条款,条约的性质可暗含这种权利(第五十六条)。如果双边投资条约和自由贸易协定导致侵犯人权,就应该修订或终止这类条约或协定。第六十五条及其以下各条规定的相关程序。

43. 在《美国国际法杂志》一篇著名文章中,Verdross 阐述了哪些条约可被认为违反公序良俗:“对于这个问题,文明国家法院的判决给出了明确答案。对判决的分析可以看出,无论在哪里,凡过度或不合理地限制一缔约方自由或损害其最重要权利的条约,都视为违反公序良俗。这一公式和类似公式都表明,文明国家的法律首先要求建立司法秩序,保证其成员在理性和道德范围内共存。由此可见,不符合实

⁵³ bineternet.ohchr.org/_layouts/treatybodyexternal/TBSearch.aspx?Lang=en&TreatyID=9&DocTypeID=11。

证法这一目标——或隐含的目标——的所有条约规范，都应视为无效”。⁵⁴ 此外，根据合同中止理论，可以在不放弃整个条约的情况下，中止违反公序良俗的条约条款。

44. 任何法院如果判定某一条约或合同合法，都必须看其是否合乎宪法。因此，也就需要审查在对一国宪法作出任何合理解释情况下，该国是否会放弃为公众利益进行立法的本体职能问题。在大多数国家，法院给出的答案是否定的。此外，每项合同或条约都应该有最低道德门槛。一项条约如果阻止文明国家履行下述普遍公认的职责，也是违反公序良俗：(a) 维护公共秩序；(b) 建设国防，抵御外部攻击；(c) 保证其管辖之下个人的精神和身体健康；(d) 保护海外侨民。⁵⁵

45. 许多国家在宪法和法律中都列入了诚信和不当得利违法的规定。而且，规范人们行为的不仅有成文法，还有索福克勒斯作品《安提戈涅》中承认从而肯定了人类不成文法(αγραφοσυνομος)的广义自然公正原则，以及禁止不合情理地利用弱势一方——也可视为一种经济新殖民主义或新帝国主义形式——的更高道德法律概念。许多国家宪法都有禁止滥用各项权利的条款，当一个跨国公司干涉政府保护就业、健康、环境和社会秩序的行动时，便可适用这些规定和原则。

46. 投资者也许忍不住援引“协议必须遵守原则”(《维也纳条约法公约》第二十六条“条约必须遵守”)，是与莎士比亚作品《威尼斯商人》描述的“一磅肉”心态如出一辙的实证主义表现，其中的放债人夏洛克坚持履行合同规定，从借钱的破产商人安东尼奥身体上割下一磅肉。毫无疑问，夏洛克有权得到赔偿，但要求从安东尼奥胸口割下一磅肉等于要了他的命。在权利争夺中，莎士比亚最后决定偏向安东尼奥。以此类推，可以说，污染河水并造成重大环境损害的石油公司不能声称它的利润必须得到保证，防止环境损害的国家法令应予废除。这种条文主义的無稽之谈已接近犯罪，应按照《联合国宪章》第一百零三条予以驳斥。

47. 在审查双边投资条约和自由贸易协定时，也可借鉴国际刑法和纽伦堡法庭先例，⁵⁶ 如果跨国公司及其游说者从事了违反刑法的活动，便可对其适用。不妨考虑将“密谋”实施违反公序良俗行为(前南斯拉夫问题国际刑事法庭使用了“共同犯罪行为”)适用于秘密拟订和谈判国际投资协定活动。犯“密谋”罪是国家还是跨国公司？这

⁵⁴ Alfred Verdross, “Forbidden Treaties in International Law”, *American Journal of International Law*, Vol. 31, No. 4(1937), pp. 571 *et seq.* Verdross, “Les principes du droit et la jurisprudence internationale”, *Recueil des Cours de l'Académie de Droit International*, La Haye, (1935), pp. 195–249. Robert Kolb, *The International Court of Justice*, Oxford, 2013, p. 81. Irmgard Marboe and August Reinisch, “Contracts between States and foreign private law persons” in *Max Planck Encyclopedia of Public International Law*, vol. II, pp. 758–766. Oxford, 2012. felj.org/sites/default/files/elj/Energy%20Journals/Vol17_No1_1996_article_international.pdf.

⁵⁵ law.wustl.edu/SBA/upperlevel/International%20Law/IntLaw-Mutharika2.pdf.

⁵⁶ 一些纳粹企业家也因其商业活动造成的后果而被追究刑事责任。www.roberthjackson.org/the-man/speeches-articles/speeches/speeches-related-to-robert-h-jackson/the-influence-of-the-nuremberg-trial-on-international-criminal-law/. Telford Taylor, *The Anatomy of the Nuremberg Trials: A Personal Memoir*, New York, 1992. 这一原则也适用于较近期的侵犯人权行为。Horacio Verbitsky, Juan Pablo Bohoslavsky (eds.), *Cuentas Pendientes. Los cómplices de la dictadura*, Siglo veintiuno, 2013.

类密谋行动可包括：故意提供虚假信息；发布虚假的国内生产总值和就业增长预测；邀请智库、经济学家、大学或基金会编写“目的论报告”；与媒体集团勾结，只报道双边投资条约和自由贸易协定的“阳光灿烂”一面，隐瞒或尽量少报道有争议问题。跨国公司对生态灭绝⁵⁷和其他犯罪的刑事责任问题，值得在未来报告中深入分析。⁵⁸

48. 在审查条约有效性时，法院也应考虑运用公平原则，无论是法律范围内的公平(国际法规则范围内)，还是超越法律的公平(代之以国际法规则，适用公正原则或“实质重于形式原则”)。事实上，每个法院，包括国际法院都可依据公允善良原则作出决定，正如在所有协议中都存在固有的公平。缔约协议的每一方都试图获得一份最好的交易，当国家签署双边投资条约和自由贸易协定时，都期待将带来国内生产总值增长、创造就业和发展。谁也不希望协议中包括“特洛伊木马”条款，如不可预测的投资者与国家争端解决承诺和“存续条款”，也不会想象仲裁员将“征收”等概念解释为包括可能减少投资者利润的财政、预算、宏观审慎、社会、环境或卫生等措施。假如把这些危险说得很清楚，恐怕没有一个国家会同意。因此，如果对风险的披露不够，进行虚假陈述和对经济增长作出过于乐观的预期，当事方不是知情同意，那么《维也纳条约法公约》便提供了修订或终止的依据。

49. 从实质上看，投资者与国家争端解决法庭不能免除投资者对所造成的损害进行补救的责任，不能以缴纳罚款无异于“征收”为借口而不遵守“污染者付费”原则。任何独立法庭都应该断言拒绝这种说法，判定其轻佻和违反公共秩序。

50. 根据这一分析，退出国际投资协定不仅是正当的，也是合法的。其“存续条款”若目的在于延续侵犯人权的制度，也应视为无效。

六. 前景

51. “可持续和包容性发展没有快速或现成的道路可走，但是，过去的三十年表明，如果对经济政策采取千篇一律的方法，将空间越来越多地出让给全球大公司和市场力量牟利的野心，那么这种发展是不可能实现的。各国最终都应依靠自己的努力来筹集生产性资源，特别是应提高它们的国内投资(公共和私人投资)、人力资本和技术知识的程度。但是，要做到这一点，它们必须要有尽可能大的行动空间，以找到在它们的具体条件下有效的政策，国际机构不应使它们的政策空间不断缩小”。⁵⁹

52. 根据《世界人权宣言》第二十八条，各国应确保“在一种社会的和国际的秩序中，本宣言所载的权利和自由能获得充分实现”。《公民权利和政治权利国际公约》第二条和《经济、社会、文化权利国际公约》强化了这一要求。

⁵⁷ Polly Higgins, *Eradicating Ecocide: Laws and Governance to Prevent the Destruction of our Planet*, London, 2010.

⁵⁸ Harmen van der Wilt, “Corporate criminal responsibility for international crimes”, *Chinese Journal of International Law*, vol. 12 (Issue 1), pp. 43–77.

⁵⁹ 贸发会议《2014年贸易和发展报告》。

53. 10 项核心国际人权条约以及大会、经济和社会理事会和人权理事会无数决议和宣言的通过、国际劳工组织和世界卫生组织的相关公约、可以作出具有约束力判决的区域人权法院的兴起、1993 年《维也纳宣言和行动纲领》以及千年发展目标——数十年达成的这些文书表明，习惯国际人权法已经成形，体现了人权至上的法律意见和国际共识。因此，全球化和针对性投资应该营造一种通过国家监管职能充分实现人权的环境。可惜的是，国际投资协定在篡夺国家职能，仿佛唯一权利只有贸易权和投资权。

54. 在知识产权领域，各国的共识是知识产权需要保护，但必须与保护人权相向而行。二十一世纪的人类是在几千年的知识自由或者思想与发明成果自由交换基础上生存和发展的。虽然研究应该得到酬报，新的药品和发明也应该授予专利，但垄断绝不能加剧不平等，各国政府应该通过立法确保灵活性，防止专利“常青化”。获得可负担得起的药品是保护生命必不可少的，拒绝提供廉价药品相当于拒绝向处于危险中的人们提供人道主义援助⁶⁰ 或协助的犯罪行为。换句话说，不能为了利润独占知识，或将知识私有化或商品化，而应本着国际团结精神分享知识。正如欧洲核研究组织共享万维网一样，无偿分享知识是人类文明的优良传统。

55. 我们不能允许全球化成为一个全球大赌场，投资者可以操纵这一制度保证自己总是赢家。如果这一“神奇新世界酒店”将国家吸引进来，能够入住而不能离开，那么建立一个民主和公平的国际秩序就是一句空话。由于外国直接投资的魅力已证明并非真实，各国政府必须摆脱这种容易上当的神话，要求提供就业的实证数据，并拒绝在人权上“竞相杀价”。本着良好的意愿，各国可以调整国际投资协定，使其发挥应有作用。

56. 跨国企业是在接受《联合国宪章》约束的国家领土上经营的，《联合国宪章》接近于世界宪法，其宗旨和原则对于建立民主和公平的国际秩序至关重要。跨国公司不能在《联合国宪章》之外另外设立了一种新的法律秩序，也不能不受法律限制，可以不遵守法治、一般法律原则和基本行为规范。跨国公司不是存在于真空之中，也受国际人权制度的约束。即使其对当今社会最宝贵的贡献——造就业，要成为可能，也离不开确保市场有序运作、明晰产权分配和依赖有效法院的法律。它们必须在问责和制衡制度下经营，而这些制度是历经几个世纪才建立起来的，谁也不能回避。无论跨国公司在哪里注册或开展业务，母国和东道国都有责任规范它们的行为，防止它们侵犯人权。

57. 国家若不能确保其辖下人民的人权，就是一个失败国家，即使它履行了所有财政义务。为了防止国家无法有效保护人权，而跨国企业支配公共政策的反面乌托邦情况的出现，各国必须按照联合国的宗旨和原则，特别是《联合国宪章》第一条和第二条，重申维护主权决心。它们必须能够修订并在必要时终止与人权相冲突的协定。

58. 铭记资本主义和投资的本质是承担风险，各国必须坚决要求投资者接受风险，遵守东道国法律。这也符合国际投资争端管辖权必须属于投资所在国家的卡尔沃主

⁶⁰ www.icrc.org/eng/resources/documents/misc/57jq32.htm。

义学说⁶¹。这一学说已被纳入许多拉美国家宪法，可当作国际投资协定的范本使用。跨国企业不能声称，东道国采取措施维护环境、健康和卫生标准，将带来不可预知风险。

59. 修订或终止国际投资协定可能是一件复杂任务，但总比处理武装冲突等难题容易得多。世界经济迫不得已一次又一次地作出调整，以促进人类尊严。例如禁止利润丰厚的贩奴，取缔奴隶制和殖民制度，由其他经济模式取而代之。在数个世纪，奴隶制是带有默示合法性的事实上的经济模式；殖民主义是事实上的国际秩序。今天，这些做法已被看作是危害人类罪。几十年来，投资者与国家争端解决仲裁事实上在扰乱国际秩序，但不能够践踏《联合国宪章》。正如其他经济范式遭到摒弃一样，投资者与国家争端解决最终也将被认定是有问题的实验，是劫持宪政导致人权倒退的企图。不修订或不终止双边投资条约和自由贸易协定的后果比清醒地认识到需要修订更为严重。

60. 作为结论，不妨重申，虽然自由贸易和投资协定有其存在的理由，但国家的主要职能是为公众利益服务。企业和投资者有充分机会赚取合法利润，与国家建立真正“伙伴关系”，而非不对称关系。凭借经验法则，理想情况应该是：(a) 属于企业的应还给企业——公平竞争环境；(b) 国家应行使的根本和不可分割的职能应回归国家——主权和政策空间；(c) 属于议会的应回归议会——审议公约的所有方面，没有任何不民主的保密，也不走“快车道”；(d) 属于人民的应还给人们：公众参与、正当程序和民主权利。

七. 行动计划

61. 《联合国宪章》生效七十年后，需要重申它的宗旨和原则，根据第一百零三条，应优先于其他条约。铭记一个民主和公平的国际秩序，只能通过国家、国家人权机构、政府间组织和民间社会的共同努力，才能实现，独立专家提出以下初步行动计划以及预防和整改建议。

62. 国家：

(a) 各国必须确保所有贸易和投资协定，无论是现有还是未来的协定，都代表有关人民的民主意愿。对目前草案的谈判不能秘密和“快速”进行；相反，应在人权、健康和环境影响评估基础上，鼓励公众参加；

(b) 各国应确保议会、国家人权机构和监察专员参与贸易和投资协定的拟订、谈判、通过和适用进程；

⁶¹ Patrick Juillard, “Calvo Doctrine/Calvo Clause”, Max Planck Encyclopaedia of Public International Law, vol. I, pp. 1086–1093, Oxford, 2012. D. R. Shea, *The Calvo Clause: A Problem of inter-American and International Law and Diplomacy*, Minneapolis, 1955. C. K. Darymple, “Politics and foreign direct investment: the multilateral investment guarantee agency and the Calvo Clause”, *Cornell International Law Review*, vol. 29, pp. 161–189.

(c) 各国必须确保所有贸易和投资协定承认人权至上，规定在发生冲突时以人权义务为准。各国必须履行执行人权条约和遵守国际劳工组织及世界卫生组织公约这一普遍义务，

(d) 各国必须恪尽职守，尽量减少双边投资协定和自由贸易协定通过和运作带来的侵犯人权风险，避免因采取必要财政、金融和解决债务措施或应对金融危机、新科学发现或公民对普遍适用法律要求等不断变化情况的政策而必须给予外国投资者赔偿的风险；

(e) 各国若希望遵守国际投资协定，必须确保经商定后建立独立监管机制，如监察员办公室。还必须在事前和事后进行人权和环境影响评估；

(f) 各国不能损害保护人权的义务，接受投资者与国家争端解决协议，允许投资者挑战本国劳动法、环境法和卫生法；

(g) 各国必须确保国际投资协定不能削弱它们实施促进发展的产业和宏观经济政策的能力，而这是联合国“宪政”法律的核心目标；采取步骤及时修订对人权有负面影响的现有双边投资条约和自由贸易协定。各国应检查现有双边投资条约和自由贸易协定是否符合各自国家宪法，当这些协定与人权义务发生冲突时，根据《维也纳条约法公约》，修订或终止这些协议；

(h) 各国应当将核心服务掌握在政府手中，以确保民主的透明度和问责制。任何私有化都必须附带有效的人权保障措施；

(i) 未来所有国际投资协定都应规定，争端解决不应诉诸投资者与国家争端解决机制，而应诉诸国家法院或国际投资特别法庭，特别法庭应明确承认人权、公共利益和国家主权居首要地位；

(j) 各国应采取措施，确保评估贸易和投资协定对人权影响的指导原则得到执行，并使其在国内法律秩序中具有法律约束力；

(k) 各国应监督在其境内经营的所有跨国企业遵守《工商业与人权指导原则》，并使《指导原则》在国内法律秩序中具有法律约束力；

(l) 各国应与民间社会组织建立合作伙伴关系，共同抵制自由贸易协定对享受人权的负面影响，为公民社会组织创造有利环境；

(m) 各国必须拒绝执行侵犯人权的投资者与国家争端解决和解决投资争端国际中心裁决，声援寻求修订或终止双边投资条约、自由贸易协定或投资者与国家争端解决协议或拒绝执行仲裁裁决的国家，并针对违反国际人权法的投资者和跨国公司采取措施；

(n) 遭受违反公序良俗的投资者与国家争端仲裁之害的国家，应采取协调一致行动，联合起来拒绝执行，召开缔约国会议，立即修订或终止投资者与国家争端解决协议，在裁决涉及侵犯人权时，修订或终止《承认及执行外国仲裁裁决公约》的适用；

(o) 各国应在双边投资条约和自由贸易协定中列入要求跨国公司和投资者对其活动造成的环境、健康和其他损害进行赔偿的法律责任条款，加强国内刑法法规，以便追究投资者和公司高管损害环境或严重侵犯人权的个人刑事责任。为此，各国应建立监督机制，以评估投资者遵守人权情况；

(p) 各国应援引《联合国宪章》第九十六条，并请大会向国际法院提出相关法律问题征询其意见。

63. 议会：

(a) 铭记代议制民主政体议会是受托代表人民的意志，议员必须与选民协商，主动告知并征求各阶层民众，特别是可能受国际投资协定影响民众的意见，“快速”达成的协议违背民主进程，最终成为非法条约；

(b) 议会必须确保国际投资协定包含对协定定期审查和修订的规定，还应该包含终止、撤销或暂停适用的规定，而且没有不合理的“存续条款”；

(c) 议会必须确保双边投资协定和自由贸易协定推进粮食安全、教育、保健、卫生设施和社会及经济政策，并决定国内预算和财税事项；

(d) 议员们应抵制对增长和发展作出过于乐观预测的跨国企业游说的诱惑。必须要求进行独立的经济研究和独立的人权影响评估；

(e) 议员们应抵制将核心政府服务，包括提供安全饮用水和卫生设施私有化的企图；

(f) 地区议会和议会会议应该讨论双边投资条约和自由贸易协定对人权的威胁，包括按照《维也纳条约法公约》予以废除和/或修订的方式。

64. 跨国企业和投资者：跨国企业必须接受国家有权采取措施逐步实现《经济、社会、文化权利国际公约》规定的人权，并将这一因素计入经营成本。它们必须避免干涉国家行使政府职能，为履行人权条约义务进行公共利益立法。

65. 民间社会、国家人权机构、大学和宗教团体：

(a) 民间社会组织和大学应重新审视市场原教旨主义教条，通过实证检验现有国际投资协定是促进还是阻碍人权享受；

(b) 个人和团体应当要求行使参与确定政府预算、财政、经济、贸易和社会政策进程的民主权利。它们应该要求人权优先于投资特权，维护物质和非物质指标构成的公众满意度指数体现之社会契约；

(c) 个人和团体应该要求定期审查国际投资协定成功与否。当与人权条约发生冲突时，必须修订、修正或终止；

(d) 个人和团体应该要求民选官员增加透明度和问责制，特别是增加拟订、谈判、通过和适用贸易和投资协定的透明度和问责制；

(e) 个人和团体应邀请国家法庭判定现有双边投资协定和自由贸易协定是否符合宪法，并明确未来可能签署的协议的参数；

(f) 个人和群体应该维护自己的权利，援引区域人权法院的管辖权，要求它们调查和谴责适用国际投资协定或执行国家争端解决裁决造成的侵犯公民、文化、经济、政治和社会权利情况；

(g) 法学院应开设伦理课，教导未来的律师和仲裁员懂得他们有义务服务社会，维护法律的原则和精神。它们不能助长和怂恿预期后果可能侵蚀人权和环境的任何制度。学生们应理解投资法是包括人权在内的法律框架。法律不是游戏，目标不是要“赢”，而是伸张正义，因为实证法律必然要求尊重人的尊严。任何人都不应寻求从不公正中获利；

(h) 宗教机构应联合起来，评估双边投资条约和自由贸易协定遵守人权法和人权标准的情况，并酌情推介对人权有不利影响条约的修订或终止方式；

(i) 国家人权机构应该建议国家不签署无法保障国家主权和监管空间的双边投资条约或自由贸易协定。还应建议国家如何修订或终止妨碍实现人权的条约。

66. 人权理事会：

(a) 新的人权、民主和法治论坛应该举办一次会议，讨论双边投资条约和自由贸易协定对人权的影响。论坛应该制订一个行动计划，解决现有问题，提出可实施的解决方案，包括逐步取消投资者与国家争端解决机制，恢复国家法庭或以独立、透明的国际投资法院取代投资者与国家争端解决机制。国际投资法院应拥有常设法官，法官接受人权优先和禁止单向管辖规约的约束，不仅投资者，而且国家都有资格提起诉讼；

(b) 人权理事会应系统地使用普遍定期审议程序，调查双边投资条约和自由贸易协定对人权享受的影响；

(c) 人权理事会应考虑责成人权高专办举行一次全球在线咨询，了解自由贸易和投资协定对享有人权的不利影响，以便向问责和补救项目提供意见投入；并为此咨询提供额外资金；

(d) 理事会应考虑向联合国安全理事会和联合国专门机构如联合国粮食和农业组织、国际劳工组织、世界卫生组织和联合国儿童基金会交付有关事项，研究是否有可能请求这些机构发出防止侵犯公民、文化、经济、政治和社会权利的禁制令。

67. 联合国机构和附属机构：

(a) 贸发会议应考虑召开一次会议，在现有双边投资条约和自由贸易协定包含有干涉国家为保护人权进行立法、执行经济政策和为公共利益实施监管的条款时，探讨修订或终止这些协定的可能性。此次会议应推动贸发会议的改革“行动菜单”和“路线图”；

(b) 贸发会议和人权高专办应就如何扭转双边投资协定和自由贸易协定对人权的不利影响以及如何补偿受害者，提供咨询服务和技术援助；

(c) 所有联合国机构和附属机构应该将国际投资协定提上议事日程，向考虑这类协议的国家提供咨询服务和技术援助，以确保保护所有人权，包括食物权、健康权、最低工资权、更高劳工标准权、两性平等权和儿童权利。在解决投资争端国际中心和投资者与国家争端解决机制的相关仲裁中，提交法庭之友书状。还应该根据《联合国宪章》第九十六条第二款，利用自己职权，请求国际法院提出相关咨询意见；

(d) 世界贸易组织应该将人权纳入其使命宣言，并确保其争端解决机制促进人权；

(e) 作为国际贸易法领域的联合国系统核心法律机构，联合国国际贸易法委员会⁶² 应该将人权纳入其活动主流，尤其是加强透明度原则，确保仲裁能够系统反映《公民权利政治权利国际公约》和《经济、社会、文化权利国际公约》规定的义务，避免损害人权、国家政策空间和环境保护措施。仲裁必须从私法模式转向促进整体利益的公法框架。

八. 后记

68. 独立专家感到欣慰的是，对本任务的认可度提升促使各国政府、国家人权机构、民间社会和学术界积极献计献策。他欢迎与所有相关领域利益相关者进行接触，并期待着在即将到来的报告年度与它们合作。

69. 作为结论，独立专家愿再次感谢辛勤能干的人权高专办工作人员，并要求大会为人权高专办分配更多资源。

⁶² www.uncitral.org/, www.uncitral.org/pdf/english/texts/arbitration/rules-on-transparency/Rules-on-Transparency-E.pdf, www.uncitral.org/pdf/english/texts/arbitration/rules-on-transparency/Rules-on-Transparency-E.pdf.

Annex

[English only]

Selected Activities

Participation at side-events during the 27th, 28th and 29th sessions of the HR Council and side-events during UPR sessions.

- 9 October 2014: Keynote speaker at the Erskine Childers lecture on the right to peace, London.
- 23–24 October: Participation in two panels of the International Law Association, on international governance and geo-engineering, and on new Special Procedures mandates, New York.
- 6–9 December: Conference on the humanitarian impact of nuclear weapons, Vienna.
- 13 December: “Parliaments and the United Nations”, United Nations Association, Bern.
- 27 January 2015: bilateral consultation with trade experts at South Centre, Geneva.
- 10 February: Panel discussion, “Combating Violence and Discrimination against Women, Carter Center, Atlanta.
- 11–12 February: Conference on Democracy and democratic elections, including bilateral meeting with President Carter, Atlanta.
- 19 March: Symposium on Unilateral Sanctions, Legal Policy and Business Challenges, London Centre of International Law Practice, London.
- 20–21 April: Consultation convened by the Independent Expert on human rights and international solidarity, Geneva
- 20–24 April: Participation in the open-ended inter-governmental working group on the right to peace.
- 27 April: Video message to Women’s International League for Peace and Freedom (WILPF)’s Conference on Peace, The Hague.
- 28 April: Bilateral consultations with trade experts at IPU, Geneva.
- 4 May: Bilateral consultations with trade experts at ILO and WHO
- 5 May: Expert consultation on free trade and investment agreements, Geneva (see Appendix 2).
- 19 May: Conference on unilateral economic sanctions, Institute of Democracy and Cooperation, Paris.
- 8–12 June: Annual meeting of Special Procedures mandate holders, Geneva.

Questionnaire of the Independent Expert on the promotion of a democratic and equitable international order

(1) In your views, do free trade and investment agreements promote or obstruct an international order that is more democratic and equitable? Can you provide positive or negative examples of the effects of free trade and investment agreements on human rights,

including labour standards, prohibition of child labour, minimum wage levels, vacation and pension entitlements, gender equality etc.?

(2) How do States ensure that the genuine will of the people is respected when free trade and investment agreements are elaborated, negotiated, ratified and implemented?

(3) How do States ensure that the distribution of benefits and wealth derived from free trade and investment agreements is proportional to all its parties, as well as third-parties that may also be impacted? In particular what fiscal measures are in place to ensure that profits are legitimately taxed and to prevent the use of tax havens or tax avoidance schemes.

(4) To what extent can affected groups be identified and consulted in order to mitigate potential adverse effects of these agreements on their human rights? To what extent are all stakeholders consulted, including labour unions, syndicates, environmental protection organizations, health professionals, ombudsmen?

(5) How can Parliaments ensure transparency and accountability in the process of elaboration, negotiation, ratification and implementation of trade and investment agreements to ensure that human rights are respected, protected and fulfilled?

(6) What recommendations could be provided as guiding principles to strengthen disclosure of information to enable meaningful participation in the decision-making process in relation to these agreements?

(7) Have opinion polling and referenda been used before the adoption of past trade and investment agreements, and how could these mechanisms be effectively employed in current negotiations?

(8) To the extent that globalization impacts all States, whether parties of free trade and investment agreements or not, how can the democratic participation of all States in global decision-making processes be advanced?

(9) To what extent do free trade agreements or investment agreements compromise the sovereignty of States over domestic policy decisions on the protection of public health, the environment, promotion of local industries and agriculture? Are there human rights clauses or provision for exceptions to ensure the respect of human rights?

(10) What jurisdiction is competent to judge alleged breaches of a free trade or investment agreement? What are the appeal possibilities? What kind of sanctions can be imposed?

(11) In States parties to free trade and investment agreements, what recourses and remedies are available to States, corporations, groups and individuals, including indigenous peoples, in case human rights are violated?

Concept Note of the Consultation on the impact of free trade and investment agreements on an equitable and democratic international order, 5 May 2015

1. Background

1. The mandate of the Independent Expert was created by Human Rights Council resolution 18/6 in September 2011. Subsequent resolutions 21/9, 25/15 and 27/9 have complemented the mandate's terms of reference. The first, and current, mandate holder, Mr. Alfred de Zayas, was appointed effective 1 May 2012. To date, the Independent Expert has presented three substantive reports to the Human Rights Council and three reports to the General Assembly on various issues falling within his mandate including on fostering full, equitable and effective participation in conduct of public affairs; the adverse impacts of military expenditures on a democratic

international order; the right of self-determination, as well as initiatives and mechanisms promoting the right to peace, international cooperation, and enhanced participation of States and civil society in global decision-making.

2. In resolution A/HRC/RES/25/15, the Human Rights Council calls upon Members states “to fulfil their commitment ... to maximize the benefits of globalization through, inter alia, the strengthening and enhancement of international cooperation to increase equality of opportunities for trade, economic growth and sustainable development...”, reiterating “... that only through broad and sustained efforts to create a shared future based upon our common humanity and all its diversity can globalization be made fully inclusive and equitable.”

3. In recent years, globalization has fostered trade as well as cultural and human exchange, which ultimately has benefitted economic growth. Globalization has provided opportunities for improved standards of living and poverty reduction, but it has also caused unemployment in some sectors, dismantled local industries and triggered population movements and migration. Moreover, the increasing influence of trade in global, regional and bilateral relations between States has in many instances led to growing inequalities both between States and within States. While globalization has allowed for the empowerment of individuals and communities in various domains, the increased rapidity of trade liberalization today, especially in terms of financial flows and corporations’ influential capacity, renders it pertinent to examine the continuing effects of trade and investment agreements on a democratic and equitable international order.

4. Accordingly, the Independent Expert intends to examine the impact of free trade and investment agreements on a democratic and equitable international order in his upcoming reports to the Human Rights Council and to the General Assembly.

5. As part of the process of elaborating these reports, the Independent Expert is convening a one-day expert consultation on 5 May 2015 in Geneva, Switzerland.

2. Objectives

6. The consultation intends to:

(i) Seek the views of experts on the impact of free trade and investment agreements on the protection and promotion of human rights and the promotion of a democratic and equitable international order;

(ii) Explore ways in which globalization in trade-related areas could advance, rather than hinder, the realization of an international order that is more democratic and more equitable;

(iii) Gather suggestions for concrete and pragmatic recommendations for his reports to the Human Rights Council and General Assembly.

3. Expected outcome

7. The expected outcome of this meeting is to provide inputs and suggestions to inform the Independent Expert’s 2015 reports to the Human Rights Council and the General Assembly. Participants are encouraged to put forward possible recommendations for inclusion in these reports. Written submission before or after the consultation are welcome.

4. Thematic focus

8. The meeting is expected to address the following issues:

Public participation

9. The level of proactive information provided by governments and transnational enterprises and financiers in the process of elaboration, negotiation and adoption of free trade and investment agreements and the opportunity of the public to meaningfully participate in the

process are often not compliant with article 25 of the ICCPR. The rapid adoption of these agreements in parliaments with little consultation or participation, often influenced by lobbyists, prevents the electorate from voting on issues that affect them directly.

10. For this reason it is imperative to examine the role of Parliaments in monitoring the elaboration, negotiation and adoption of these agreements, their responsibility to legislate for the public interest notwithstanding FTAs, their power of modification and/or termination of FTA agreements that conflict with the proper exercise of State competences in protecting the environment, health and labour standards. The role of Parliaments in regulating the activities of transnational enterprises, especially in areas of environmental protection and health standards will also be discussed.

5. Impact on human rights

11. Existing and proposed free trade and investment agreements have far-reaching effects on human rights. International agreements impact the rights to employment and labour, the right to health, the right to food, and the right to a safe, clean, healthy and sustainable environment. The normative framework to be examined will include the United Nations Charter, the two human rights covenants, the conventions on the rights of the child, the convention on migrant workers, the ILO Conventions on labour standards, WHO Conventions including the Framework Convention on Tobacco Control, and soft law resolutions and declarations including the 1998 ILO Declaration on Fundamental Principles and Rights at Work, the Guidelines on Business and Human Rights and the Declaration on the Right to Development.

12. A review of human rights concerns that have arisen in the past on the basis of the experience with free trade and investment agreements, especially concerning States' obligation to adopt measures to progressively advance economic, social and cultural rights will notably be discussed. The "chilling effect" of the threat of costly Investor State Dispute Settlements (ISDS) arbitrations, which may deter States in adopting social legislation, will also be explored. The question arises whether transnational corporations can ever be allowed to hinder the competence of States to legislate in the public interest, and whether States can waive their competences without negating the ontological nature of the sovereign State as understood in the UN Charter.

13. Participants will examine the pertinence of human rights impact assessments in the process of elaboration of free trade and investment agreements, as well as the usefulness of subsequent or follow-up human rights impact assessment.

6. Reviewing the primacy of human rights treaty obligations over Free Trade and Investment Agreements

14. During the consultation, participants will be able to express their views on the primacy of the UN Charter and in particular its human rights provisions over other treaties (Cf. Art. 103 of the UN Charter). The discussion should also address experiences with the use of exception clauses or clauses that allow States to legislate in the public interest without fearing financial consequences before ISDS Tribunals. To the extent that free trade and investment agreements hinder the State's function of legislating in the public interest and result in violations of human rights treaties including ICCPR, ICESCR, ILO and WHO Conventions, they may be considered *contra bonos mores* and as such null and void pursuant to article 53 of the Vienna Convention on the Law of Treaties (CVLT). Customary international law on these issues should be revisited, including general principles of law (Art. 38 ICJ statute) including good faith (Art. 26 Vienna Convention on the Law of Treaties) and the concept of abuse of rights contained in the legislation of many countries.

15. A review of the establishment of ISDS Tribunals and issues of conflict of interests and a review of the jurisprudence of ISDS arbitrations, including the possibilities of challenging arbitration awards will be discussed. In particular, the possibility and modalities of refusing implementation of arbitration awards and the consequence of such refusal will be explored, as

well as the experience made by States in suing transnational corporations for environmental damage (the polluter pays principles) and endangering public health. In this context participants should consider whether the establishment of parallel systems of dispute settlement are compatible with the State's obligation to ensure that suits at law are examined by independent tribunals. Separate and unaccountable dispute settlement mechanisms seem to be contrary to the rule of law, in particular to article 14(1) ICCPR.

7. Pragmatic recommendations to make globalization work for human rights

16. Global challenges include privatization, the role of the World Bank and its International Center for Settlement of Investment Disputes, the WTO and the IMF, foreign debt management, default, unilateral sanctions, extraterritorial application of laws, etc.

17. Participants will discuss general issues about the impact of globalisation on human rights, including the ideas of taxation of transnational enterprises and phasing-out of tax havens and formulate recommendations thereon.

18. Among possible recommendations are the modification or termination of free trade and investment agreements that have led to violations of human rights. Participants consider the grounds for denunciation, invalidity, suspension, modification or termination of treaties laid down in the VCLT, including error (art. 48), fraud (art. 49), corruption (art. 50), coercion (arts. 51 and 52), conflict with peremptory norms (art. 53), implied right of denunciation or withdrawal (art. 56), breach (art. 60), supervening impossibility of performance (art. 61), fundamental change of circumstances (art. 62), emergence of a new jus cogens norm (art. 64), and the procedure to follow (arts. 65 et seq.)

19. Participants may also consider the feasibility for the General Assembly or some other body such as the ILO or WHO to request advisory opinions from the International Court of Justice on the primacy of human rights over FTAs and on available mechanisms to provide redress to victims.

Guiding Principles on business and human rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework – excerpts

20. The Human Rights Council endorsed the Guiding Principles in its resolution 17/4 of 16 June 2011.

Guiding principle 9

States should maintain adequate domestic policy space to meet their human rights obligations when pursuing business-related policy objectives with other States or business enterprises, for instance through investment treaties or contracts.

Commentary

Economic agreements concluded by States, either with other States or with business enterprises — such as bilateral investment treaties, free trade agreements or contracts for investment projects — create economic opportunities for States. But they can also affect the domestic policy space of Governments. For example, the terms of international investment agreements may constrain States from fully implementing new human rights legislation, or put them at risk of binding international arbitration if they do so. Therefore, States should ensure that they retain adequate policy and regulatory ability to protect human rights under the terms of such agreements, while providing the necessary investor protection.

Guiding principle 25

As part of their duty to protect against business-related human rights abuse, States must take appropriate steps to ensure, through judicial, administrative, legislative or other appropriate means, that when such abuses occur within their territory and/or jurisdiction those affected have access to effective remedy.

Report of the Working Group on the issue of human rights and transnational corporations and other business enterprises, A/HRC/29/28 – excerpts

Transparency in investment arbitration

21. A significant opportunity for increasing transparency in the area of investor-State arbitration has arisen from work of the Working Group on Arbitration and Conciliation of the United Nations Commission on International Trade Law (UNCITRAL). The UNCITRAL Working Group started working on transparency in 2010, with a mandate that stressed the importance of ensuring transparency in investor-State dispute settlements (A/6317, para. 314). In a written submission in support of that mandate, a Member State observed that the lack of transparency in investor-State arbitration was contrary to the fundamental principles of good governance and human rights upon which the United Nations is founded (see A/CN.9/662, para. 20). That work has culminated in two major texts: (a) the rules on transparency in treaty-based investor-State arbitration, which came into effect on 1 April 2014; and (b) a convention on transparency⁶³ (the United Nations Convention on Transparency), which was finalized by the Commission in July 2014 and opened for signature on 17 March 2015. The Working Group on the issue of human rights and transnational corporations and other business enterprises welcomes these new transparency rules.

22. Both the Guiding Principles and the UNCITRAL work on transparency back procedural and legal transparency and take a practical approach to achieving that aim. The new UNCITRAL rules on transparency seek to address a regular concern with investor-State dispute settlement cases – namely that their typically confidential and non-participatory nature does not allow for involvement by affected stakeholders, or for an adequate balance between the need for States to ensure that they retain adequate policy and regulatory ability to protect human rights and provide investor protection, as clarified in Guiding Principle 9. With the new UNCITRAL rules and the United Nations Convention on Transparency in Treaty-based Investor-State Arbitration, States have a practical means to promote good governance and respect for human rights with a broader policy framework that is aligned with the Guiding Principles.⁶⁴

23. These rules, when they apply, provide a transparent procedural regime under which investment treaty arbitrations are conducted. They can be used in investor-State arbitrations initiated under UNCITRAL arbitration rules, as well as under other institutional arbitration rules or in ad hoc proceedings. States can now incorporate them into investment treaties concluded on or after 1 April 2014, but for the rules to apply to disputes arising under the more than 3,000 investment treaties concluded before that date, the States parties to a treaty, or disputing parties in an investor-State arbitration, would need to agree to apply the rules under that treaty or to that dispute. This highlights the importance of the Convention on Transparency, which provides an efficient, multilateral mechanism by which States can agree, subject to relevant reservations, to

⁶³ A/CN.9/812 and www.uncitral.org/pdf/english/texts/arbitration/transparency-convention/Transparency-Convention-e.pdf. The Working Group chairperson was invited to speak at the March 2015 signing ceremony.

⁶⁴ <http://blogs.lse.ac.uk/investment-and-human-rights/portfolio-items/transparency-in-investment-treaty-arbitration-and-the-un-guiding-principles-on-business-and-human-rights-the-new-uncitral-rules-and-convention-on-transparency/>.

apply the rules to all arbitrations arising under their investment treaties concluded before 1 April 2014. The Working Group welcomes the rules and considers that an obvious step for States to remedy incoherence between current modes of investment with norms for good governance and human rights considerations, including those set out in the Guiding Principles, would be to sign and ratify the Convention.

24. The Working Group is pleased to have had the opportunity to engage with UNCITRAL, including at its forty-seventh session in July 2014, and to note that in the report of that session the Commission agreed that the UNCITRAL secretariat should monitor developments in the area of business and human rights, in cooperation with relevant bodies within the United Nations and beyond and inform the Commission about developments of relevance to UNCITRAL work (see A/69/17, para. 204).

Guiding principles on human rights impact assessments of trade and investment agreements, A/HRC/19/59/Add.5 – excerpts

25. All States should prepare human rights impact assessments prior to the conclusion of trade and investment agreements.

26. States must ensure that the conclusion of any trade or investment agreement does not impose obligations inconsistent with their pre-existing international treaty obligations, including those to respect, protect and fulfil human rights.

27. Human rights impact assessments of trade and investment agreements should be prepared prior to the conclusion of the agreements and in time to influence the outcomes of the negotiations and, if necessary, should be completed by ex post impact assessments. Based on the results of the human rights impact assessment, a range of responses exist where an incompatibility is found, including but not limited to the following:

- (a) Termination of the agreement;
- (b) Amendment of the agreement;
- (c) Insertion of safeguards in the agreement;
- (d) Provision of compensation by third-State parties;
- (e) Adoption of mitigation measures.

28. Each State should define how to prepare human rights impact assessments of trade and investment agreements it intends to conclude or has entered into. The procedure, however, should be guided by a human rights-based approach, and its credibility and effectiveness depend on the fulfilment of the following minimum conditions:

- (a) Independence;
- (b) Transparency;
- (c) Inclusive participation;
- (d) Expertise and funding; and
- (e) Status.

29. While each State may decide on the methodology by which human rights impact assessments of trade and investment agreements will be prepared, a number of elements should be considered:

- (a) Making explicit reference to the normative content of human rights obligations;
- (b) Incorporating human rights indicators into the assessment; and

(c) Ensuring that decisions on trade-offs are subject to adequate consultation (through a participatory, inclusive and transparent process), comport with the principles of equality and non-discrimination, and do not result in retrogression.

30. States should use human rights impact assessments, which aid in identifying both the positive and negative impacts on human rights of the trade or investment agreement, to ensure that the agreement contributes to the overall protection of human rights.

31. To ensure that the process of preparing a human rights impact assessment of a trade or investment agreement is manageable, the task should be broken down into a number of key steps that ensure both that the full range of human rights impacts will be considered, and that the assessment will be detailed enough on the impacts that seem to matter the most:

- (a) Screening;
- (b) Scoping;
- (c) Evidence gathering;
- (d) Analysis;
- (e) Conclusions and recommendations; and
- (f) Evaluation mechanism.

International Labour Organisation Declaration on Fundamental Principles and Rights at Work and its Follow-Up, adopted by the International Labour Conference at its eighty-sixth session, Geneva, 18 June 1998 (Annex revised 15 June 2010) – excerpts

“2. Declares that all Members, even if they have not ratified the Conventions in question, have an obligation arising from the very fact of membership in the Organization to respect, to promote and to realize, in good faith and in accordance with the Constitution, the principles concerning the fundamental rights which are the subject of those Conventions, namely:

- (a) freedom of association and the effective recognition of the right to collective bargaining;
- (b) the elimination of all forms of forced or compulsory labour;
- (c) the effective abolition of child labour; and
- (d) the elimination of discrimination in respect of employment and occupation.”

Declaration of Santa Cruz, Bolivia, 17 June 2014 – excerpts

In its Declaration, the 134 members of the Group of 77 expressed their concern about the negative impact of certain trade agreements on developing countries:

64. We note with great concern that non-communicable diseases have become an epidemic of significant proportions, undermining the sustainable development of member States. In that sense, we acknowledge the effectiveness of tobacco control measures for the improvement of health. We reaffirm the right of member States to protect public health and, in particular, to ensure universal access to medicines and medical diagnostic technologies, if necessary, including through the full use of the flexibilities in the Doha Declaration on the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement) and Public Health.

169. We believe that trade rules, in WTO or in bilateral and regional trade agreements, should enable developing countries to have sufficient policy space so that they can make use of policy instruments and measures that are required for their economic and social development. We

reiterate our call for the effective strengthening of the special and differential treatment and less than full reciprocity principles and provisions in WTO so as to broaden the policy space of developing countries and enable them to benefit more from the multilateral trading system. We also call for bilateral trade and investment agreements involving developed and developing countries to have sufficient special and differential treatment for developing countries to enable them to retain adequate policy space for social and economic development.

UNCTAD Database of Investor-State Dispute Settlement (ISDS) in 2014⁶⁵

<i>Case title</i>	<i>Year the case was initiated</i>	<i>Respondent State</i>	<i>Home State of investor (claimant)</i>	<i>Legal Instrument</i>	<i>Arbitration Rules</i>	<i>Outcome/Status of proceedings</i>
A11Y Ltd v. Czech Republic	2014	Czech Republic	United Kingdom	Czech Republic-UK BIT	UNCITRAL	Pending
Albaniabeg Ambient Sh.p.k, M. Angelo Novelli and Costruzioni S.r.l. v. Republic of Albania (ICSID Case No. ARB/14/26)	2014	Albania	Italy	Energy Charter Treaty	ICSID	Pending
Alpiq AG v. Romania (ICSID Case No. ARB/14/28)	2014	Romania	Switzerland	Switzerland-Romania BIT; Energy Charter Treaty	ICSID	Pending
Anglia Auto Accessories, Ivan Peter Busta and Jan Peter Busta v. Czech Republic	2014	Czech Republic	United Kingdom	Czech Republic-UK BIT	SCC	Pending
Anglo American PLC v. Bolivarian Republic of Venezuela (ICSID Case No. ARB(AF)/14/1)	2014	Venezuela, Bolivarian Republic of	United Kingdom	United Kingdom-Venezuela BIT	ICSID AF	Pending
Ansung Housing Co., Ltd. v. People's Republic of China (ICSID Case No. ARB/14/25)	2014	China	Korea, Republic of	China-Republic of Korea BIT (2007)	ICSID	Pending
Ayoub-Farid Saab and Fadi Saab v. Cyprus	2014	Cyprus	Lebanon	Cyprus-Lebanon BIT	ICC	Pending
Bear Creek Mining Corporation v. Republic of Peru (ICSID Case No. ARB/14/21)	2014	Peru	Canada	Canada-Peru FTA	ICSID	Pending
Beijing Urban Construction Group Co. Ltd. v. Republic of Yemen (ICSID Case No. ARB/14/30)	2014	Yemen	China	China-Yemen BIT	ICSID	Pending
Blusun S.A., Jean-Pierre Lecorcier and Michael Stein v. Italian Republic (ICSID Case No. ARB/14/3)	2014	Italy	Belgium; France; Germany	Energy Charter Treaty	ICSID	Pending
Casinos Austria International GmbH and Casinos Austria Aktiengesellschaft v. Argentine Republic (ICSID Case No. ARB/14/32)	2014	Argentina	Austria	Argentina-Austria BIT	ICSID	Pending

⁶⁵ <http://unctad.org/en/Pages/DIAE/ISDS.aspx>

<i>Case title</i>	<i>Year the case was initiated</i>	<i>Respondent State</i>	<i>Home State of investor (claimant)</i>	<i>Legal Instrument</i>	<i>Arbitration Rules</i>	<i>Outcome/Status of proceedings</i>
CEAC Holdings Limited v. Montenegro (ICSID Case No. ARB/14/8)	2014	Montenegro	Cyprus	Cyprus-Serbia and Montenegro BIT	ICSID	Pending
Cem Uzan v. Republic of Turkey	2014	Turkey	Data not available	Energy Charter Treaty	SCC	Pending
City-State N.V., Praktyka Asset Management Company LLC, Crystal-Invest LLC and Prodiz LLC v. Ukraine (ICSID Case No. ARB/14/9)	2014	Ukraine	Netherlands	Netherlands-Ukraine BIT	ICSID	Pending
Corona Materials, LLC v. Dominican Republic (ICSID Case No. ARB(AF)/14/3)	2014	Dominican Republic	United States of America	CAFTA	ICSID AF	Pending
Cyprus Popular Bank Public Co. Ltd. v. Hellenic Republic (ICSID Case No. ARB/14/16)	2014	Greece	Cyprus	Cyprus-Greece BIT	ICSID	Pending
David Aven, Samuel Aven, Carolyn Park, Eric Park, Jeffrey Shioleno, Giacomo Buscemi, David Janney and Roger Raguso v. Costa Rica	2014	Costa Rica	United States of America	CAFTA	UNCITRAL	Pending
Elektrogospodarstvo Slovenije - razvoj inženiring d.o.o. v. Bosnia and Herzegovina (ICSID Case No. ARB/14/13)	2014	Bosnia and Herzegovina	Slovenia	Energy Charter Treaty; Bosnia Herzegovina-Slovenia BIT	ICSID	Pending
EuroGas Inc. and Belmont Resources Inc. v. Slovak Republic (ICSID Case No. ARB/14/14)	2014	Slovakia	Canada; United States of America	Slovakia/Czechoslovakia-US BIT; Canada-Slovakia BIT	ICSID	Pending
Highbury International AVV, Compañía Minera de Bajo Caroní AVV, and Ramstein Trading Inc. v. Bolivarian Republic of Venezuela (ICSID Case No. ARB/14/10)	2014	Venezuela, Bolivarian Republic of	Netherlands	Netherlands-Venezuela BIT	ICSID	Pending
IBT Group LLC, Constructor, Consulting and Engineering (Panamá) SA and International Trade and Business and Trade, LLC v. Republic of Panama (ICSID Case No. ARB/14/33)	2014	Panama	United States of America	Panama-US BIT	ICSID	Pending
Infinito Gold Ltd. v. Republic of Costa Rica (ICSID Case No. ARB/14/5)	2014	Costa Rica	Canada	Canada-Costa Rica BIT	ICSID	Pending
InfraRed Environmental Infrastructure GP Limited and others v. Kingdom of Spain (ICSID Case No. ARB/14/12)	2014	Spain	United Kingdom	Energy Charter Treaty	ICSID	Pending
Ioan Micula, Viorel Micula and others v. Romania (ICSID Case No. ARB/14/29)	2014	Romania	Sweden	Romania-Sweden BIT	ICSID	Pending

<i>Case title</i>	<i>Year the case was initiated</i>	<i>Respondent State</i>	<i>Home State of investor (claimant)</i>	<i>Legal Instrument</i>	<i>Arbitration Rules</i>	<i>Outcome/Status of proceedings</i>
JML Heirs LLC and J.M. Longyear LLC v. Canada	2014	Canada	United States of America	NAFTA	Data not available	Pending
Krederi Ltd. v. Ukraine (ICSID Case No. ARB/14/17)	2014	Ukraine	United Kingdom	Ukraine-UK BIT	ICSID	Pending
Louis Dreyfus Armateurs v. India	2014	India	France	France-India BIT	UNCITRAL	Pending
Masdar Solar & Wind Cooperatief U.A. v. Kingdom of Spain (ICSID Case No. ARB/14/1)	2014	Spain	Netherlands	Energy Charter Treaty	ICSID	Pending
Michael Dagher v. Republic of the Sudan (ICSID Case No. ARB/14/2)	2014	Sudan	Jordan; Lebanon	Jordan-Sudan BIT; Lebanon-Sudan BIT	ICSID	Pending
NextEra Energy Global Holdings B.V. and NextEra Energy Spain Holdings B.V. v. Kingdom of Spain (ICSID Case No. ARB/14/11)	2014	Spain	Netherlands	Energy Charter Treaty	ICSID	Pending
Nusa Tenggara Partnership B.V. and PT Newmont Nusa Tenggara v. Republic of Indonesia (ICSID Case No. ARB/14/15)	2014	Indonesia	Netherlands	Indonesia-Netherlands BIT	ICSID	Discontinued (for unknown reasons)
Oded Besserglik v. Republic of Mozambique (ICSID Case No. ARB(AF)14/2)	2014	Mozambique	South Africa	Mozambique - South Africa BIT	ICSID AF	Pending
Red El eléctrica Internacional SAU v. Bolivia	2014	Bolivia, Plurinational State of	Spain	Spain-Bolivia BIT	UNCITRAL	Settled
RENERGY S. àr.l. v. Kingdom of Spain (ICSID Case No. ARB/14/18)	2014	Spain	Data not available	Energy Charter Treaty	ICSID	Pending
RWE Innogy GmbH and RWE Innogy Aersa S.A.U. v. Kingdom of Spain (ICSID Case No. ARB/14/34)	2014	Spain	Germany	Energy Charter Treaty	ICSID	Pending
Sodexo Pass International SAS v. Hungary (ICSID Case No. ARB/14/20)	2014	Hungary	France	France-Hungary BIT	ICSID	Pending
Tarique Bashir and SA Interp árol Burundi v. Republic of Burundi (ICSID Case No. ARB/14/31)	2014	Burundi	Belgium	Belgium/Luxembourg-Burundi BIT	ICSID	Pending
Unión Fenosa Gas, S.A. v. Arab Republic of Egypt (ICSID Case No. ARB/14/4)	2014	Egypt	Spain	Egypt-Spain BIT	ICSID	Pending
United Utilities (Tallinn) B.V. and Aktsiaselts Tallinna Vesi v. Republic of Estonia (ICSID Case No. ARB/14/24)	2014	Estonia	Netherlands	Estonia-Netherlands BIT	ICSID	Pending

<i>Case title</i>	<i>Year the case was initiated</i>	<i>Respondent State</i>	<i>Home State of investor (claimant)</i>	<i>Legal Instrument</i>	<i>Arbitration Rules</i>	<i>Outcome/Status of proceedings</i>
VICAT v. Republic of Senegal (ICSID Case No. ARB/14/19)	2014	Senegal	France	France-Senegal BIT	ICSID	Pending
Vodafone International Holdings BV v. India	2014	India	Netherlands	India-Netherlands BIT	UNCITRAL	Pending
Zelena N.V. and Energo-Zelena d.o.o Indija v. Republic of Serbia (ICSID Case No. ARB/14/27)	2014	Serbia	Belgium	Belgium/Luxembourg-Serbia BIT	ICSID	Pending

UNCTAD Investment Policy Framework for Sustainable Development – excerpt⁶⁶

Core Principles for investment policymaking for sustainable development

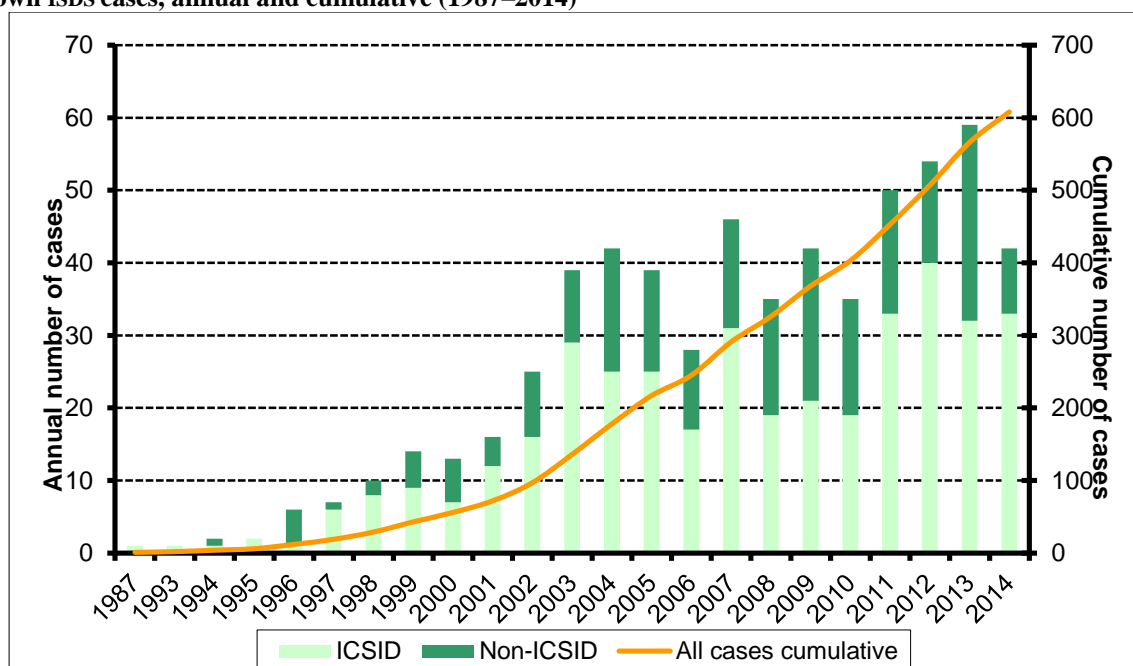
<i>Area</i>	<i>Core Principles</i>
1 Investment for sustainable development	<ul style="list-style-type: none"> The overarching objective of investment policymaking is to promote investment for inclusive growth and sustainable development.
2 Policy coherence	<ul style="list-style-type: none"> Investment policies should be grounded in a country's overall development strategy. All policies that impact on investment should be coherent and synergetic at both the national and international level.
3 Public governance and institutions	<ul style="list-style-type: none"> Investment policies should be developed involving all stakeholders, and embedded in an institutional framework based on the rule of law that adheres to high standards of public governance and ensures predictable, efficient and transparent procedures for investors.
4 Dynamic policymaking	<ul style="list-style-type: none"> Investment policies should be regularly reviewed for effectiveness and relevance and adapted to changing development dynamics.
5 Balanced rights and obligations	<ul style="list-style-type: none"> Investment policies should be balanced in setting out rights and obligations of States and investors in the interest of development for all.
6 Right to regulate	<ul style="list-style-type: none"> Each country has the sovereign right to establish entry and operational conditions for foreign investment, subject to international commitments, in the interest of the public good and to minimize potential negative effects.
7 Openness to investment	<ul style="list-style-type: none"> In line with each country's development strategy, investment policy should establish open, stable and predictable entry conditions for investment.
8 Investment protection and treatment	<ul style="list-style-type: none"> Investment policies should provide adequate protection to established investors. The treatment of established investors should be non-discriminatory in nature.
9 Investment promotion and facilitation	<ul style="list-style-type: none"> Policies for investment promotion and facilitation should be aligned with sustainable development goals and designed to minimize the risk of harmful competition for investment.

⁶⁶[http://unctad.org/en/Pages/DIAE/International%20Investment%20Agreements%20\(IIA\)/IIA-IPFSD.aspx](http://unctad.org/en/Pages/DIAE/International%20Investment%20Agreements%20(IIA)/IIA-IPFSD.aspx)

Area	Core Principles
10 Corporate governance and responsibility	<ul style="list-style-type: none"> Investment policies should promote and facilitate the adoption of and compliance with best international practices of corporate social responsibility and good corporate governance.
11 International cooperation	<ul style="list-style-type: none"> The international community should cooperate to address shared investment-for-development policy challenges, particularly in least developed countries. Collective efforts should also be made to avoid investment protectionism.

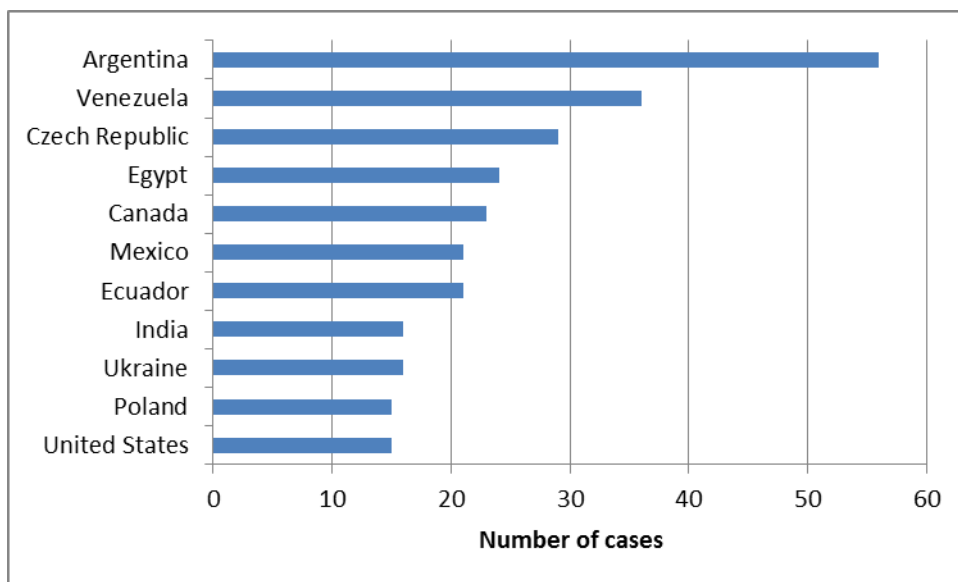
UNCATD IIA Issues Note No. 2, Investor-State Dispute Settlement: Review of Developments in 2014, May 2015⁶⁷

Known ISDS cases, annual and cumulative (1987–2014)

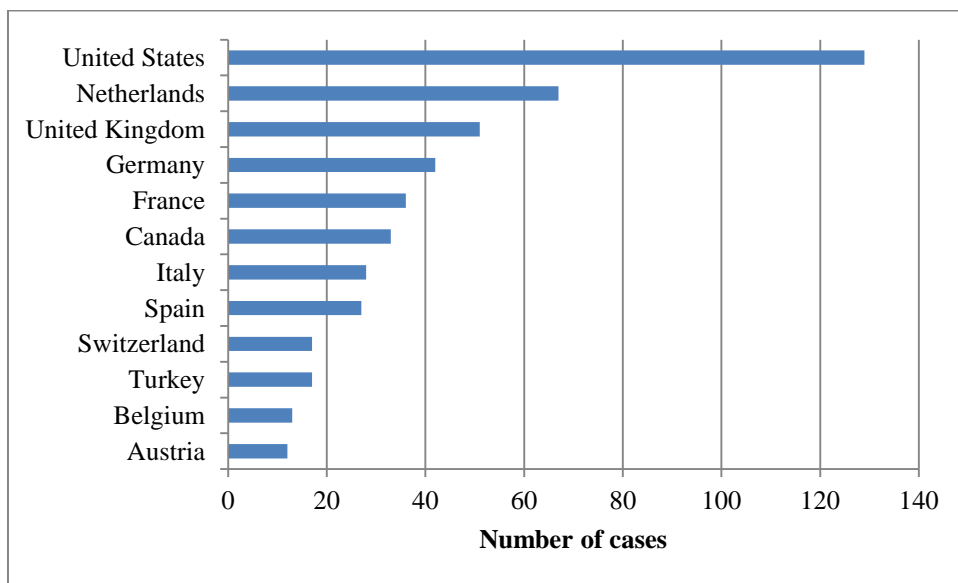


⁶⁷http://investmentpolicyhub.unctad.org/Upload/Documents/UNCTAD_WEB_DIAE_PCB_2015_%202%20IIA%20ISSUES%20NOTESMAY%20evening.pdf

Most frequent respondent States (total as of end 2014)



Most frequent home States (total as of end 2014)



UNCTAD Expert Meeting on the Transformation of the International Investment Agreement Regime: The Path Ahead, 25–27 February 2015 – excerpts⁶⁸

Item 3 Transformation of the international investment agreement regime

4. Pursuant to the terms of reference agreed by the Extended Bureau of the Trade and Development Board in September 2014, the experts will discuss the path ahead for the international investment agreement (IIA) regime. Challenges arising from the negotiation of

⁶⁸ TD/B/C.II/EM.4/1 available at: <http://unctad.org/en/Pages/MeetingDetails.aspx?meetingid=643>

IAs and their implementation suggest that the time has come to revisit the IIA regime with a view to transforming it. Such challenges include the move towards megaregional agreements and the increasing number of investor–State dispute settlement (ISDS) cases.

5. Member States and IIA stakeholders at the 2014 IIA Conference, held in connection with the World Investment Forum in Geneva in October, called upon UNCTAD to develop a road map for the reform of the IIA regime and sketched the contours of such reform.

6. A number of developments characterize the current IIA regime and set the background against which such reform would be undertaken.

7. First, the balance is gradually shifting from bilateral treaty making to regional treaty making, including through megaregional agreements, such as the Regional Comprehensive Economic Partnership, the Trans-Pacific Partnership, or the Transatlantic Trade and Investment Partnership. These agreements, also known as “megaregionals”, could have systemic implications for the IIA regime: they could either contribute to the consolidation of the existing treaty landscape or create further inconsistencies through overlap with existing IIAs, including those at the plurilateral level (*World Investment Report 2014*).

8. Second, the second-highest number of treaty-based ISDS cases were brought against host countries in 2014. Host countries — both developed and developing — have learned that ISDS claims can be used by foreign investors in unanticipated ways, as a number of recent cases have challenged measures adopted in the public interest (*World Investment Report 2014*). This has sparked growing interest in reform of the investment dispute settlement system.

9. Third, an increasing number of countries are concluding IIAs with novel provisions aimed at rebalancing the rights and obligations between States and investors, as well as ensuring coherence between IIAs and other public policy objectives, in response to the recognition that inclusive growth and sustainable development need to be placed at the core of international investment policymaking (2013 and 2014 editions of the *World Investment Report*).

UNCTAD Trade and Development Report 2014 – excerpts (pp. 46 48)

In an increasingly globalizing world, no less than at the domestic level, market activity also requires a framework of rules, restraints and norms. And, no different from the domestic level, the weakening and strengthening of that framework is a persistent feature. However, there are two important differences. The first is that the international institutions designed to support that framework depend principally on negotiations among States with regard to their operation. Essentially these States must decide on whether and how much of their own policy space they are willing to trade for the advantages of having international rules, disciplines and support. Inevitably, in a world of unequal States, the space required to pursue their own national economic and social development aspirations varies, as does the likely impact of an individual country’s policy decisions on others. Managing this trade-off is particularly difficult at the multilateral level, where the differences among States are the most pronounced. Second, the extent to which different international economic forces can intrude on a country’s policy space also varies. In particular, cross-border financial activities, as Kindleberger (1986) noted in his seminal discussion of international public goods, appear to be a particularly intrusive factor. But in today’s world of diminished political and legal restraints on cross-border economic transactions, finance is not the only such source; as chapter V notes, there are also very large asymmetries in international production, in particular with the lead firms in international production networks, which are also altering the space available to policymakers.

The growing interdependence among States and markets provides the main rationale for a well-structured system of global economic governance with multilateral rules and disciplines. In principle, such a system should ensure the provision of global public goods such as international economic and financial stability and a more open trading system. In addition, it should be represented by coherent multilateral institutional arrangements created by intergovernmental

agreements to voluntarily reduce sovereignty on a reciprocal basis. The guiding principle of such arrangements should be their ability to generate fair and inclusive outcomes. This principle should inform the design, implementation and enforcement of multilateral rules, disciplines and support mechanisms. These would contribute significantly to minimizing adverse international spillovers and other negative externalities created by national economic policies that focus on maximizing national benefits. From this perspective, how these arrangements manage the interface between different national systems (from which they ultimately draw their legitimacy), rather than erasing national differences and establishing a singular and omnipotent economic and legal structure, best describes the objectives of multilateralism.

The extent to which national development strategies respond to national needs and priorities can be limited or circumscribed by multilateral regimes and international rules, but equally, they can be influenced by economic and political pressures emanating from the workings of global markets, depending on the degree of integration of the country concerned. While the extent and depth of engagement with the global economy may result from domestic economic policy choices, subsequent policies are likely to be affected by that engagement, sometimes in a way and to an extent not anticipated. As noted in TDR 2006, it is not only international treaties and rules, but also global market conditions and policy decisions in other countries that have an impact on policy space. Global imbalances of power (both economic and political) also remain undeniably significant in affecting the capacities of governments of different countries to engage in the design and implementation of autonomous policies.

There are valid concerns that the various legal obligations emerging from multilateral, regional and bilateral agreements have reduced national policy autonomy by restricting both the available range and the efficacy of particular policy instruments. At the same time, multilateral disciplines can operate to reduce the inherent bias of international economic relations in favour of countries that have greater economic or political power (Akyüz, 2007). Those disciplines can simultaneously restrict (particularly *de jure*) and ease (particularly *de facto*) policy space. In addition, the effectiveness of national policies tends to be weakened, in some instances very significantly, by the global spread of market forces (especially financial markets) as well as by the internalization of markets within the operations of large international firms.

It is important to consider whether, how and to what extent policy space is reduced and reconfigured. Limits on policy space resulting from obligations or pressures to deregulate markets tend to circumscribe the ability of governments to alter patterns of market functioning to meet their broader social and developmental objectives. Yet unfettered market processes are unlikely to deliver macroeconomic and financial stability, full employment, economic diversification towards higher value added activities, poverty reduction and other socially desirable outcomes.

But while national policies are obviously affected by the extent of policy space available, as determined by the external context, they are also – and still fundamentally – the result of domestic forces. These include, among others, politics and the political economy that determine the power and voice of different groups in society, domestic expertise and capacities, the nature of institutions and enforcement agencies, the structure of the polity (e.g. degree of federalism), and prevailing macroeconomic conditions. Even when policymakers have full sovereign command over policy instruments, they may not be able to control specific policy targets effectively.

Furthermore, the interplay between these internal and external forces in determining both policymaking and implementation within countries in today's globalized world is an increasingly complex process. The emergence in the 1980s and 1990s, and the growing acceptance by policymakers throughout the world, of what could be called a standard template for national economic policies — irrespective of the size, context and nature of the economy concerned — was certainly influential (even if not always decisive) in determining patterns of market liberalization. But even as waves of trade liberalization and financial deregulation swept across the world, culminating in what we experience as globalization today, variations across

individual countries suggest that they have retained some degree of policy autonomy, along with relatively independent thinking.

Certainly, for the more developed countries, globalization *à la carte* has been the practice to date, as it has been for the more successful developing countries over the past 20 years. By contrast, many developing countries have had to contend with a more rigid and structured approach to economic liberalization. This one size-fits-all approach to development policy has, for the most part, been conducted by or through the Bretton Woods institutions — the World Bank and the International Monetary Fund (IMF) — whose surveillance and influence over domestic policymakers following the debt crises of the 1980s were considerably extended giving them greater authority to demand changes to what they deemed to be “unsound” policies. Countries seeking financial assistance or debt rescheduling from the Bank or the IMF had to adopt approved macroeconomic stability programmes and agree to “structural” and political reforms, which extended the influence of markets — via liberalization, privatization and deregulation, among others — and substantially reduced the economic and developmental roles of the State. Similarly, and as discussed in greater detail in the next chapter, the Uruguay Round of trade negotiations extended the authority of the World Trade Organization (WTO) to embrace services, agriculture, intellectual property and trade-related investment measures, thereby restricting, to varying degrees, the policy space available to developing countries to manage their integration into the global economy.

Emphasizing the role of policy, and of the international economic institutions in promoting one set of policies over another, is an important correction to the view that globalization is an autonomous, irresistible and irreversible process driven by impersonal market and technological forces. Such forces are undoubtedly important, but essentially they are instigated by specific policy choices and shaped by existing institutions. It is also misleading to think of the global economy as some sort of “natural” system with a logic of its own. It is, and always has been, the evolving outcome of a complex interaction of economic and political relations. In this environment, multilateral rules and institutions can provide incentives and sanctions that encourage countries to cooperate rather than go their own way. And as the world has become increasingly interdependent, it is more challenging for countries to build institutional structures and safeguard remaining flexibilities in support of inclusive development. To the extent that markets and firms operate globally, there are grounds for having global rules and regulations. Moreover, international collective action is needed to help provide and manage global public goods that markets are unable or unwilling to provide. Dealing effectively with emerging threats, such as climate change, also requires appropriate global rules, regulations and resources. However, it goes without saying that governance at the international level is very different from governance at the national level, given that governments are being asked to surrender some measure of their sovereignty and responsibility to support collective actions and goals. It is imperative, therefore, and all the more so in a world of interdependent but unequal States and economies, for international measures to be designed in such a way that they complement or strengthen capacities to achieve national objectives and meet the needs of their constituencies.

The system that has evolved under finance-led globalization has led to a multiplicity of rules and regulations on international trade and investment that tend to excessively constrain national policy options. At the same time it lacks an effective multilateral framework of rules and institutions for ensuring international financial stability and for overseeing extra-territorial fiscal matters. Within this imperfect system, policymakers in developed countries are aiming to tackle a series of interrelated macroeconomic and structural challenges, while those from developing countries are trying to consolidate recent gains and enter a new phase of inclusive development. It is therefore more important than ever before for national policy space to be made a central issue on the global development agenda.

UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration, General Assembly resolution 68/109 – excerpts

Article 1. Scope of application

Applicability of the Rules

1. The UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration (“Rules on Transparency”) shall apply to investor-State arbitration initiated under the UNCITRAL Arbitration Rules pursuant to a treaty providing for the protection of investments or investors (“treaty”)* concluded on or after 1 April 2014 unless the Parties to the treaty** have agreed otherwise.
2. In investor-State arbitrations initiated under the UNCITRAL Arbitration Rules pursuant to a treaty concluded before 1 April 2014, these Rules shall apply only when:
 - (a) The parties to an arbitration (the “disputing parties”) agree to their application in respect of that arbitration; or
 - (b) The Parties to the treaty or, in the case of a multilateral treaty, the State of the claimant and the respondent State, have agreed after 1 April 2014 to their application.

Application of the Rules

3. In any arbitration in which the Rules on Transparency apply pursuant to a treaty or to an agreement by the Parties to that treaty:
 - (a) The disputing parties may not derogate from these Rules, by agreement or otherwise, unless permitted to do so by the treaty;
 - (b) The arbitral tribunal shall have the power, besides its discretionary authority under certain provisions of these Rules, to adapt the requirements of any specific provision of these Rules to the particular circumstances of the case, after consultation with the disputing parties, if such adaptation is necessary to conduct the arbitration in a practical manner and is consistent with the transparency objective of these Rules.

Discretion and authority of the arbitral tribunal

4. Where the Rules on Transparency provide for the arbitral tribunal to exercise discretion, the arbitral tribunal in exercising such discretion shall take into account:
 - (a) The public interest in transparency in treaty-based investor-State arbitration and in the particular arbitral proceedings; and
 - (b) The disputing parties’ interest in a fair and efficient resolution of their dispute.
5. These Rules shall not affect any authority that the arbitral tribunal may otherwise have under the UNCITRAL Arbitration Rules to conduct the arbitration in such a manner as to promote transparency, for example by accepting submissions from third persons.
6. In the presence of any conduct, measure or other action having the effect of wholly undermining the transparency objectives of these Rules, the arbitral tribunal shall ensure that those objectives prevail.

Applicable instrument in case of conflict

7. Where the Rules on Transparency apply, they shall supplement any applicable arbitration rules. Where there is a conflict between the Rules on Transparency and the applicable arbitration rules, the Rules on Transparency shall prevail. Notwithstanding any provision in these Rules, where there is a conflict between the Rules on Transparency and the treaty, the provisions of the treaty shall prevail.

8. Where any of these Rules is in conflict with a provision of the law applicable to the arbitration from which the disputing parties cannot derogate, that provision shall prevail.
9. These Rules are available for use in investor-State arbitrations initiated under rules other than the UNCITRAL Arbitration Rules or in ad hoc proceedings.

Draft Declaration on the Right to International Solidarity of the Independent Expert on human rights and international solidarity (A/HRC/26/34) – excerpts

Article 9

1. In the elaboration and implementation of international agreements and related standards, States shall ensure that the procedures and outcomes are fully consistent with their human rights obligations in matters pertaining to, inter alia, international trade, investment, finance, taxation, climate change, environmental protection, humanitarian relief and assistance, development cooperation and security.
2. States shall take appropriate, transparent and inclusive action to consult their populations and fully inform them of the decisions agreed upon at the national, bilateral, regional and international levels, in particular on matters that affect their lives.

Article 10

1. States shall establish an appropriate institutional framework and adopt domestic measures to give effect to the right of peoples and individuals to international solidarity, in particular by ensuring and facilitating access for everyone to domestic and international legislative, judicial or administrative mechanisms:
 - (a) When failure of States to fulfil their commitments made at the regional and international levels results in denials and violations of human rights; and
 - (b) When actions and omissions by non-State actors adversely affect the exercise and full enjoyment of their human rights.
2. States shall promote and prioritize support for micro, small and medium community based and cooperative enterprises which generate the majority of jobs around the world, including through national and international grants and concessional loans.
3. States shall be guided by International Labour Organization Recommendation No. 202 (2012) concerning National Floors of Social Protection, with a view to securing universal access to social services.

Article 11

1. States shall implement a human rights-based approach to international cooperation and all partnerships in responding to global challenges such as those relating to:
 - (a) Global governance, regulation and sustainability in the areas of climate change, protection of the environment, humanitarian relief and assistance, trade, finance, taxation, debt relief, technology transfer to developing countries, social protection, universal health coverage, reproductive and sexual health, food security, management of water and renewable energy resources, social standards, free education for all, human rights education, migration, and labour, and in countering dumping of toxic wastes, and transnational organized crime, such as terrorism, human trafficking, piracy and proliferation of arms.
2. States shall establish and implement appropriate mechanisms to ensure that international cooperation is based on equal partnerships and mutual commitments and obligations, where partner States are accountable to each other, as well as to their respective constituents at the

national level, for the outcomes of policies, strategies and performance, whether at the bilateral, regional or international level, which shall reflect the best interests of their citizens and all others within their jurisdiction, in accordance with international human rights principles and standards.

3. States shall give effect to the establishment of a fair, inclusive and human rights based international trade and investment regime where all States shall act in conformity with their obligation to ensure that no international trade agreement or policy to which they are a party adversely impacts upon the protection, promotion and fulfilment of human rights inside or outside of their borders.

Article 12

The right to international solidarity shall impose on States particular negative obligations, required by applicable international human rights instruments, including:

- (a) Not adopting free trade agreements or investment treaties that would undermine peoples' livelihoods or other rights;
- (b) Not imposing conditionalities in international cooperation that would hinder or make difficult the exercise and enjoyment of human rights;
- (c) Not denying anyone access to life-saving pharmaceuticals and to the benefits of medical and scientific progress.

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