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ARTICLE

The Future of International Investment Regulation: Towards a World Investment Organisation?

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Abstract With growth in foreign investment and in the number of companies investing in foreign countries, the application of general principles of public international law has not been deemed adequate to regulate foreign investment and there is, as yet, no comprehensive international treaty on the regulation of foreign investment. Consequently, states have resorted to bilateral investment treaties (BITs), regional trade and international investment agreements (IIAs) and free trade agreements to supplement and complement the regime of protection for foreign investors. In the absence of an international investment court, states hosting foreign investment or investor states have opted for investor-state dispute settlement mechanism (ISDS). This mechanism has brought about its own challenges to the international law of foreign investment due to inconsistency in the application and interpretation of the key principles of international investment law by such arbitration tribunals, and further, there is no appellate mechanism to bring about some cohesion and consistency in jurisprudence. Therefore, there are various proposals mooted by scholars to address these challenges and they range from tweaks to BITs and IIAs, the creation of an appellate mechanism and the negotiation of a multilateral treaty to proposals for reform of ISDS only. After assessing the merits and demerits of such proposals, this study goes further, arguing for the creation of a World Investment Organisation with a standing mechanism for settlement of investment disputes in order to ensure legal certainty, predictability and the promotion of the flow of foreign investment in a sustainable and responsible manner.

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1 Introduction

The international investment regime is currently encountering an unprecedented level of public scrutiny. Investment regulation has, in recent years, received attention far beyond the confines of a small group of investment negotiators, practitioners and academics. This is because the law of foreign investment is in a state of flux and the investor-state dispute settlement (ISDS) mechanism has been criticised for producing inconsistency and confusion in jurisprudence, resulting in public backlash against ISDS. The mechanism was initially designed primarily for settling narrow commercial law disputes of private law character, however, it is now often called upon to adjudicate upon public law matters affecting the rights of the public in many countries. The problem is further compounded by the absence of a comprehensive international treaty pronouncing the substantive provisions on the regulation of foreign investment. Unlike in international trade law or international human rights law, there is as yet no single comprehensive international treaty regulating foreign investment, spelling out what the law is and what would be the mechanism to enforce the law. Consequently, many experts[1] are of the opinion that the current system is simply not working, as evidenced by the fact that a number of states are terminating their bilateral investment treaties (BITs) and others are publicly retreating from investment arbitration. For example, South Africa is systematically terminating all of its BITs with the ultimate aim of introducing domestic legislation, which will govern the treatment of foreign investors in its territory.[2] There is some clear evidence that other states may follow suit, with Indonesia already discontinuing 17 out of 64 international investment agreements (IIAs) and intending to discontinue more in the years ahead.[3] Nicaragua and Venezuela have also signalled similar intention.[4] Bolivia,[5] Ecuador[6] and Venezuela[7] have all already denounced the 1965 ICSID Convention. Furthermore,

[1] See for example UNCTAD (2015a); UNCTAD (2015b); Waibel et al. (2010); Van Harten (2008); Kalicki and Joubin-Bret (2015); Hachez and Wouters (2012); Schill (2014), p. 795.

[2] See UNCTAD IIA Navigator, South Africa has very few BITs and IIAs currently in force; many have been terminated recently, http://investmentpolicyhub.unctad.org/IIA/CountryBits/195#iiaInnerMenu (accessed 30 January 2017); see also Kron and Clark (2015).

[3] Jailani (2015).

[4] Appleton (2010) as cited in Trakman (2013), p. 344.

[5] Manciaux (2007).

[6] International Centre for Settlement of Investment Disputes (ICSID) News Release, 9 July 2009, https://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=OpenPage&PageType=AnnouncementsFrame&FromPage=NewsReleases&pageName=Announcement20 (accessed 30 January 2017).

[7] ICSID News Release, 26 July 2010, https://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=OpenPage&PageType=AnnouncementsFrame&FromPage=Announcements&pageName=Announcement100 (accessed 30 January 2017).

there are rumours swirling that Argentina might be the next state to announce its denunciation from ICSID.[8] Interestingly, in 2008, more than 50% of registered ICSID cases were pending against Latin American countries. Moreover, in 2012, around 25% of new ICSID disputes involved a Latin American respondent.[9] It is telling that the most frequent respondents in ICSID arbitration are the ones who appear to have lost faith in the system.[10]

Interestingly in 2012, United Nations Conference on Trade and Development (UNCTAD) also recommended 'limiting resort to ISDS and increasing the role of domestic judicial systems […] or even refraining from offering ISDS'.[11] Additionally, the potential inclusion of ISDS in the proposed Transatlantic Trade and Investment Partnership (TTIP) and the Canada-EU Comprehensive Trade and Economic Agreement (CETA) caused public outcry.[12] As a result of public criticism, the European Commission had to re-think its plans for these free trade agreements (FTAs), and in the end proposed an Investment Court System (ICS) in both agreements.[13] This appears to have catalysed the Commission to begin work on a multilateral ICS.[14] Whilst some have welcomed these steps, others are sceptical that the proposed ICS in TTIP and CETA at least, is simply a case of old wine in a new bottle.[15]

With these issues in mind, this paper will begin by setting out the main procedural and substantive problems with the current regime of foreign investment protection, as well as conducting an analysis of the decisions of investment tribunals to illustrate the point of inconsistency in jurisprudence. Next, will be a brief examination of the importance of 'getting it right' in the sphere of foreign investment. In light of the problems with the regime and given what is at stake, the paper will make a novel suggestion for consideration; the establishment of a completely independent World Investment Organisation (WIO). The paper will go on to examine how a WIO could remedy most, if not all of the main problems with the law of foreign investment. Finally, the concluding section will reflect on the enormity of the task of establishing a WIO.

[8] Hogan Lovells News, http://www.hoganlovells.com/newsmedia/newspubs/pubDetail.aspx?publication=8717 (accessed 30 January 2017); see also Dalmaso Marques (2014).

[9] Titi (2014), p. 357.

[10] Ibid., Titi argues that, 'the overall Latin American approach does not amount to a rejection of investment arbitration, nor should it necessarily be perceived as particularly hostile to it'.

[11] UNCTAD (2012c) pp. 43–44.

[12] See for example Dearden (2016).

[13] EU Commission, Draft text on investment in TTIP, available at http://trade.ec.europa.eu/doclib/docs/2015/september/tradoc_153807.pdf (accessed 31 January 2017); see CETA, available at http://trade.ec.europa.eu/doclib/docs/2014/september/tradoc_152806.pdf (accessed 31 January 2017).

[14] EU Commission, 'A future multilateral investment court', Press Release, 13 December 2016, available at http://europa.eu/rapid/press-release_MEMO-16-4350_en.htm (last accessed 31 January 2017).

[15] See for example Reinisch (2016), p. 761.

2 Problems with the Current Regime of Foreign Investment Regulation

2.1 Procedural Problems

2.1.1 Whether BITs Actually Attract/Increase Foreign Investment

Conventional wisdom states that the main reason that states sign BITs and IIAs is to attract foreign investment. It was accepted that having such agreements in place would create a favourable investment climate for foreign investors, and would attract greater levels of foreign direct investment (FDI). However, this conventional wisdom is now increasingly being questioned. Whether BITs actually increase FDI inflows has been the central question in a number of studies by researchers; results have been mixed.[16] One study concluded that the existence of BITs has little effect on the investment decisions of companies.[17] Thus, the notion that BITs are a vehicle to attract greater FDI inflows is highly questionable. If it is accepted that BITs do not attract or promote greater levels of FDI, one has to question their continued existence as a prominent feature of the law of foreign investment regime.

2.1.2 Investment Arbitration

ISDS is currently the preferred investment dispute settlement mechanism, and is commonly provided for by the network of over 3000 BITs and IIAs in operation.[18] The number of ISDS cases has exploded since the late 1990s: in 1999, just 11 new investment cases were registered, whereas in 2015, a record setting 70 new cases were registered.[19] It is important to note that these figures represent the known number of cases. In reality, the actual number of cases is likely to be higher, as many remain unpublished (at the wishes of the parties involved). With the explosion of investment arbitrations, criticism of ISDS has been growing, and in recent years, has culminated in somewhat of a backlash against the system.[20]

Firstly, there is a lack of democratic accountability.[21] Typically, investment tribunals consist of a three-arbitrator panel. Often, each party will select an arbitrator, and the third (often presiding) arbitrator, is selected by the mutual agreement of the parties. Pragmatically, parties are likely to choose individuals who they believe will offer the greatest chance of 'winning'. Indeed the former Singaporean Attorney General and current Chief Justice Sundaresh Menon cast doubt on the qualification and independence of investment arbitrators in his 2012

[16] Neumayer and Spess (2005), p. 1567; Mann and Von Moltke (2005); Sauvant and Sachs (2009); Aisbett (2009); Poulsen (2010); Yackee (2010), p. 397; Peinhardt and Allee (2012), p. 757; Jandhyala and Weiner (2014), p. 649.

[17] Hogan Lovells, Bingham Centre, BIICL and Economist Intelligence Unit, 'Risk and return: foreign direct investment and the rule of law' (Briefing Note, May 2015).

[18] UNCTAD IIA Navigator, *supra* n. 2.

[19] UNCTAD (2016), p. xii.

[20] Waibel et al. (2010), p. xxxix.

[21] Ibid., p. xxxx.

keynote speech at the International Council for Commercial Arbitration.[22] He went on to outline his critical views on the application of both substantive laws and procedural rules by international investment law tribunals, arguing that many such tribunals had interpreted the substantive laws beyond the original intention of the parties that concluded individual investment treaties.[23]

Indeed, private individuals of questionable qualification, are being called upon to settle public disputes. Investment disputes are often considered to be public in nature, because they involve the state as a party, and often involve complex issues of public interest and public policy. This is problematic because private investment tribunals, 'wield enormous power—displacing local courts and making decisions about the rules that govern major portions of host country economies and, by extension, their societies'.[24] Thus, the decisions of investment tribunals often effectively limit the powers of host states to regulate their internal affairs. Commentators have expressed concern about this, asserting that it, 'undermine[s] basic principles of democratic representation and accountability'[25] and that investment treaty arbitration cannot provide the quality of review necessary for public law adjudication.[26] Furthermore, although the decisions in investment disputes are only directly applicable to the parties to the dispute, in reality, 'the pronouncements that these tribunals make as to the existence or non-existence of an alleged rule of international foreign investment law or the meaning and scope of a rule have wider ramifications and implications for other states as well as for international law as a whole'.[27]

Additionally, investment tribunals frequently 'cherry-pick' the rules which will be applied to the dispute, often choosing to ignore public international law rules.[28] Concerns have also been raised regarding the inadequate representation of developing states amongst panels of arbitrators.[29] This is hardly surprising, given that arbitrators are frequently top-flight counsel turning their hand to adjudication. Such highly qualified legal personnel are traditionally much more likely to hail from richer, developed states which are most often home to the prestigious educational institutions.

Investment arbitration is also criticised for tolerating potential conflicts of interest; the pool of potential arbitrators is very small indeed. So much so, that arbitrators may very well have worked as counsel for the disputing parties in other cases. Even if they have not done so, arbitrators obviously have an interest in repeat business, thus they may be partial to the party that selected them. In any case, arbitrators obviously have a 'vested interest in maintenance of the status quo'.[30]

[22] Menon (2012).

[23] Menon (2015), pp. 219–245.

[24] Leader (2006), p. 684.

[25] Van Harten (2005), p. 600.

[26] See for example Van Harten (2007).

[27] Subedi (2016), p. 172.

[28] Ibid.

[29] Waibel et al. (2010).

[30] Ibid.

ISDS is also heavily criticised for allowing too much confidentiality[31] in proceedings and for a lack of transparency.[32] Traditionally in commercial disputes, emphasis was placed on the need for confidentiality in order to ensure the businesses of the respective parties was not harmed. In turn, this high degree of confidentiality translated into a very opaque process. Confidentiality could be justified, with the outcome of the arbitration having little or no effect outside the relationship between the contracting parties. However, in investment disputes, such a high degree of confidentiality is less easy to justify. Citizens have the right to know that these types of disputes are occurring and how they are being settled, because important public issues and resources are at stake. It is important to note that there has recently been a significant shift towards greater transparency of procedure; the UNCITRAL Rules on transparency, which came into effect 1 April 2014, have made important inroads to transparency within the UNCITRAL arbitral rules. Furthermore, the UN opened its Transparency Convention up for signature in March 2015. The UN Transparency Convention will allow states wishing to do so, to apply the UNCITRAL Transparency Rules to BITs and IIAs that were negotiated before the Rules came into effect on 1 April 2014. However, it is equally important to note that only one institution has so far made any real progress in this regard. There are many fora that still need to address this issue.[33]

A final concern with ISDS is the lack of consistency of decisions. There have been a number of highly publicised decisions which demonstrate the lack of consistency in international investment arbitration; in cases where the facts are the same or very similar, different investment tribunals have managed to reach diametrically opposing decisions.[34] A case in point are the *Lauder* arbitrations in which two investment tribunals came to completely contradictory conclusions in spite of there being almost identical factual matrix, parties and legal norms.[35] There is no *de jure* doctrine of precedent in international investment law. This is because the roots of ISDS can be found in commercial arbitration between two private parties. However, ISDS disputes are, by their very nature, between an investor and a state. A natural consequence of state involvement means that public issues are often brought to the fore in disputes. Given the important difference between commercial cases and investment disputes, it is, at the very least, arguable that there should be greater consistency of decisions and, in turn, promotion of the rule of law. It should

[31] Dimsey (2008), pp. 36–37; also see Paulsson and Rawding (1995), p. 303.

[32] Waibel et al. (2010), p. xxxx.

[33] There appears to be mounting pressure for ICSID to increase its efforts as regards transparency according to some authors. See for example Parra (2012).

[34] Some of the most famous examples of such inconsistent decisions include *CME* and *Lauder* (*CME Czech Republic B.V. v. Czech Republic*, Ad hoc—UNCITRAL Arbitration Rules, Partial Award of 13 September 2001 and IIC 62 (2003), Final Award of 14 March 2003 and *Lauder v. Czech Republic*, Ad hoc—UNCITRAL Arbitration Rules, Final Award, 3 September 2001) as well as the *SGS* cases (*SGS Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/01/13 (2003), 42 ILM 1290 and *SGS Société Générale de Surveillance S.A. v. Republic of the Philippines*, ICSID Case No. ARB/02/6 (2004)). For academic commentary of inconsistencies see for example Franck (2005), p. 1521.

[35] *Lauder v. Czech Republic*, *supra* n. 34, pp. 5–7.

be noted that the terms 'consistency' and 'coherence' do not simply mean imitation of previous solutions; it is much more complicated than that. It involves examining previous decisions where the same or similar issues are at stake and comparing them with the present case. Perhaps in the present case there might be some material fact, which means that the case can be distinguished from the previous case(s). The work carried out by a commission led by Giardina and the Institut de Droit International's Tokyo Resolution is interesting in this regard.[36]

As a result of the many problems which plague ISDS, a number of reforms have been proposed in recent years,[37] but to date, reform has been minimal. When it comes to ISDS, 'it seems that despite a pressing need for (r)evolution, conservatism firmly holds the international investment legal regime'.[38]

2.2 Substantive Rules and Law-Making

2.2.1 National Treatment and the Overprotection of FDI and Investors

National Treatment provisions usually provide that foreign investors will be treated no less favourably than domestic investors in like circumstances. However, in reality the investment protections available to foreign investors can often exceed those legal protections available to domestic investors, leading to reverse discrimination.[39] For example, foreign investors usually have the ability to effectively sue the investment host state government through ISDS, whilst domestic investors will most likely have to pursue any arising dispute in the national courts. Access to investment arbitration is considered to be a significant advantage for investors.

2.2.2 Problems with Law-Making Mechanisms

Another significant problem with the law-making mechanisms is that they are so devolved from any central control, that what has been created is commonly referred to as a 'spaghetti bowl'[40] system of BITs and IIAs. There are currently more than 3000 BITs and IIAs in operation.[41] This chaotic system encourages treaty, forum and nationality shopping,[42] as well as parallel dispute settlement proceedings.[43]

[36] Institut de Droit International, Tokyo Resolution, 13 September 2013, Preamble, http://www.idi-iil.org/idiE/resolutionsE/2013_tokyo_en.pdf (accessed 30 January 2017).

[37] See for example UNCTAD (2013).

[38] Hachez and Wouters (2012).

[39] See WTO Working Group on Trade and Investment, WTO Doc. WT/WGTI/W/122, 27 June 2002, http://trade.ec.europa.eu/doclib/docs/2004/july/tradoc_113951.pdf (accessed 30 January 2017); see also Waibel et al. (2010), p. xxxviii.

[40] See for example UNCTAD (2008).

[41] UNCTAD (2014).

[42] Yannaca-Small (2006).

[43] Yannaca-Small (2008), p. 1009. See also Kreindler (2010), pp. 127–150.

Treaty, forum and nationality shopping occur when investors carefully and deliberately select the rules that will be applied to them. For example, ingenious investors have been finding ways to swap nationalities for example, in order that their investment will benefit from more generous treaty terms.

Parallel proceedings are becoming increasingly problematic and common in international investment law dispute resolution. Parallel proceedings are, for the purposes of this work, defined as the situation occurring where the same parties initiate the same proceedings in more than one forum.[44] Investors seeking to pursue claims often have a choice of fora available to them, and may choose to pursue multiple claims (as this is often not expressly forbidden). Parallel proceedings are problematic for a variety of reasons, but especially because they can lead to conflicting awards being rendered.[45]

In instances where parallel proceedings occur, there are two jurisdictional regulating rules which may be applied; *res judicata* and *lis pendens*. However, their application in international litigation is less clear than in domestic proceedings: they are not contained in arbitration institution rules or in international investment agreements, and they are not frequently referred to in investment disputes.[46]

Parallel proceedings may also be regulated through treaty-based methods, such as provisions requiring the exhaustion of local remedies, fork-in-the-road provisions, no U-turn clauses, waiver and umbrella clauses or through the consolidation of claims. The UNCITRAL Rules and the ICSID Convention do not provide for the consolidation of claims at the present time. Additionally, consolidation of claims has not yet become standard BIT practice.[47]

Parallel proceedings in international investment law significantly increase the risk of conflicting decisions. Although it may be argued that such divergent decisions do not occur frequently, one cannot ignore the possibility that they may occur. Furthermore, the possibility of them occurring is ever-increasing, due to the multitude of investment agreements that are now in force, and many more which are currently being negotiated. In international investment disputes, where important public interest issues are often at stake, the outcome of such inconsistent decisions may be very serious indeed. Whilst there are a number of devices in existence which may limit the possibility of parallel proceedings, such devices are not mandatory, and as such multiple proceedings can and do sometimes occur.[48]

2.2.3 The Scope of Fair and Equitable Treatment

Fair and Equitable Treatment (FET) clauses 'protect investors against serious instances of arbitrary, discriminatory or abusive conduct by host states'.[49] Although

[44] Yannaca-Small (2008), p. 1009; Kreindler (2010); Dimsey (2008), p. 140.

[45] Yannaca-Small (2008).

[46] Yannaca-Small (2008), pp. 1012–1025. See also Reinisch (2010), p. 123.

[47] OECD (2006), pp. 226–239.

[48] Yannaca-Small (2008), p. 1045.

[49] UNCTAD (2012b).

there are differences in wordings of FET provisions, there has been some convergence on the interpretation of the standard generally. It is thought to include:

(a) Prohibition of manifest arbitrariness in decision-making;
(b) Prohibition of denial of justice;
(c) Prohibition of targeted discrimination on manifestly wrongful grounds;
(d) Prohibition of abusive treatment;
(e) Protection of the legitimate expectations.[50]

Interestingly, FET is the most relied upon and most successful basis for claims under investment treaty arbitration.[51] However, the concept is also very vague and open to diverse interpretation in its application, thus, 'the content of this standard has caused much anxiety'.[52] Indeed, 'there has been a noticeable trend in arbitral practice away from the classic customary international law standard of treatment of aliens towards a less stringent reading of the standard'.[53] In fact, Kläger notes that, '[i]t is both fascinating and astonishing that FET treatment has developed from an almost vacant expression into an obligation of such potential breadth within a few years'.[54]

Traditionally,

> the FET standard—regardless of how it is expressed—came into existence as an expression of the minimum standard of treatment. However, where the FET obligation is not expressly linked textually to the minimum standard of treatment of aliens, many tribunals have interpreted it as an autonomous, or self-standing one. Instead of deriving the content of the standard from its original source (customary international law), these tribunals chose to focus on the literal meaning of the provision itself.[55]

Where the FET provision is tied to customary international law, the threshold for liability of breach of FET is much higher. In such situations, breach has been limited to cases where the host state government has acted disgracefully.[56] In the seminal *Neer* case (1926), the Commission set out quite an extreme test for FET, stating that,

> Without attempting to announce a precise formula, it is in the opinion of the Commission possible to […] hold (first) that the propriety of governmental acts should be put to the test of international standards, and (second) that the treatment of an alien, in order to constitute an international delinquency, should amount to an outrage, to bad faith, to wilful neglect of duty, or to an insufficiency of governmental action so far short of international standards

[50] Ibid., p. xvi.

[51] Ibid.

[52] Sornarajah (2010), p. 204.

[53] UNCTAD (2012b).

[54] Kläger (2010), p. 443.

[55] UNCTAD (2012b).

[56] *LFH Neer and Pauline Neer (United States v. Mexico)* (1926) 4 RIAA 60.

that every reasonable and impartial man would readily recognize its insufficiency.[57]

In 2009, the *Glamis* case confirmed that the *Neer* standard is still applicable, 'an act must be sufficiently egregious and shocking'.[58]

However, in some cases where the FET provision is not qualified by reference to customary international law, the threshold for breach has been interpreted as much lower, thereby catching more state actions as breaches of the standard.[59] Nonetheless, several tribunals have suggested that an autonomous FET standard does not differ significantly from the international minimum standard/customary international law standard.[60] Others have said that the threshold required for finding violation of an autonomous FET clause is still 'high'.[61] Another tribunal suggested that 'in order to violate the [unqualified FET] standard, it may be sufficient that States' conduct displays a relatively lower degree of inappropriateness',[62] compared with the international minimum standard.

Interestingly, the case of *Merrill & Ring Forestry*[63] has suggested that there is only one universal FET standard, and that anything other than a single universal concept 'would be to countenance an unacceptable double standard',[64] In that case, the tribunal stated that the autonomous FET standard had become part of the international law.[65]

However, this universal concept of FET has not been embraced by all commentators, with some asserting that the diverging thresholds for finding breach of FET have led to a spectrum of FET liability.[66] Thus, from the jurisprudence, it seems that there is no general consensus on when FET obligations have been breached by states.

[57] Ibid.

[58] *Glamis Gold Ltd v. United States*, UNCITRAL Rules, Award, 8 June 2009.

[59] Cases which have not linked FET to the international minimum standard, but rather view FET as an autonomous concept include *SGS Surveillance v. Philippines*, ICSID Case No. ARB/03/11; *Occidental Exploration and Petroleum Co. v. Ecuador*, UNCITRAL Rules, Award, 1 July 2004; *Siemens AG v. Argentina*, ICSID Case No. ARB/02/8; *Enron Corporation and Ponderosa Assets LP v. Argentina*, ICSID Case No. ARB/01/3; *LG v. Argentina,* ICSID Case No. ARB/02/1.

[60] *Rumeli Telekom v. Kazakhstan*, ICSID Case No. ARB/05/16, Award, 29 July 2008, para. 611; *Biwater Gauff v. Tanzania*, ICSID Case No ARB/05/22, Award, 24 July 2008, para. 592; *Duke Energy v. Ecuador*, ICSID Case No. ARB/04/19, Award, 18 August 2008, para. 337; *Saluka v. Czech Republic*, UNCITRAL, Partial Award, 17 March 2006, para. 291; *Azurix v. Argentina*, ICSID Case No. ARB/01/12, Final Award, 14 July 2006, para. 361; *CMS v. Argentine Republic*, ICSID Case No. ARB/01/8, Award, 12 May 2005, paras. 282–284; *Occidental Exploration and Petroleum Co. v. Ecuador*, *supra* n. 59, para. 190.

[61] *Biwater Gauff*, *supra* n. 60.

[62] *Saluka*, *supra* n. 60.

[63] *Merrill & Ring Forestry v. Canada*, UNCITRAL (NAFTA), Award, 31 March 2010.

[64] Ibid.

[65] Ibid.

[66] Jones and Jhangiani (2014).

2.2.4 The Application of Most Favoured Nation Clauses

Most Favoured Nation (MFN) clauses enable 'nationals of the parties to profit from favourable treatment that may be given to nationals of third states by either contracting state'.[67] MFN clauses essentially attempt to provide equality of treatment at the highest standard, and prevent discrimination. It should be noted that some tribunals, for example in the *Maffezini* case,[68] have interpreted MFN very expansively. As a result, MFN clauses have been accepted as covering jurisdictional matters or matters concerning the administration of justice.[69] A number of tribunals[70] have followed the *Maffezini* decision, though some[71] did question the validity of the expansive interpretation of MFN clauses in that case, and tried to limit the operation of MFN clauses somewhat. Nonetheless, there is no consensus on the application of the MFN standard.

2.2.5 The Operation of Umbrella Clauses

Umbrella clauses have also proven to be a cause for concern in the law of foreign investment. It was a generally accepted principle in international law that the breach of a contract by a state does not automatically give rise to direct international responsibility (i.e. a treaty breach). Nonetheless, most recently, many BITs have included 'umbrella clauses', which are thought to give rise to a sort of blanket protection for foreign investors against the contract breaching state. In such situations, breach of contract gives rise to breach of BIT/IIA, which in turn, activates protections available under the law of foreign investment. This is essentially an extension of foreign investment law to contractual disputes; muddying the separation of public and private law.[72]

2.2.6 Expropriation

In international law, sovereign states have the right to take property that is held by nationals or aliens and nationalise it, provided that certain, narrowly defined, cumulative conditions are met:

(i) Property must be taken for a public purpose;
(ii) On a non-discriminatory basis;
(iii) In accordance with the due process of law;

[67] Sornarajah (2010), p. 204.

[68] *Maffezini v. Spain* (2005) 5 ICSID Reports 396.

[69] Subedi (2016), p. 168.

[70] See for example *Siemens v. Argentina*, *supra* n. 59, and *Gas Natural SDG SA v. Argentina*, ICSID Case No. ARB/03/10 of 17 June 2005.

[71] See for example *Salini Construttori SPA and Italstrade SPA v. Kingdon of Jordan*, ICISD Case No. ARB/02/13 of 15 November 2004 and *Plama Construction v. Bulgaria*, ICSID Case No. ARB/03/24 of 8 February 2005, both of which appear to attempt to reign in the effects of the earlier liberal interpretations of MFN clauses.

[72] Subedi (2016), p. 102.

(iv) Accompanied by compensation.[73]

Expropriation may be direct, involving direct taking or seizure or property. Or, it may be indirect, where action which falls short of direct taking can have the effect of depriving the owner of the property, or destroying its value. BITs and IIAs often include clauses clarifying the situations in which the investment host state party to the agreement may or may not expropriate assets, and clarifying the level of compensation that would be payable in the event of such expropriation. A significant number of investment disputes have been brought involving expropriation, and such cases have arguably muddied the waters of what behaviour amounted to expropriation. As Sornarajah asserts, 'what constitutes an act of taking of foreign property in international law was once clear but has now come to be befuddled with difficulty as a result of the progressive expansion of the concept of taking'.[74] Examples of actions which may amount to expropriation include: the exercise of management control over the investment; cancellation of permits and licences; taking by agents; excessive taxation; expulsion of the investor; freezing bank accounts; and exchange controls.[75]

3 The Importance of Getting It Right: What Is at Stake?

3.1 Protecting the Regulatory Power of the State

When entering into BITs and IIAs, states have to reconcile their constantly changing domestic political, economic and environmental landscapes with honouring promises made to foreign investors. From time to time, the regulatory activities of the state may have a detrimental effect on a foreign investor's investment. If this occurs, the foreign investor will usually seek to initiate ISDS proceedings. It seems odd that states would choose to effectively limit their regulatory power in such a way. Pauwelyn[76] asserts that states agree to limit this power out of self-interest; in order to attract investment.[77] The purported benefits of foreign investment are well documented.[78]

In order to benefit from foreign investment, states may, in certain situations, have to compromise their regulatory power. Therefore, 'a delicate balance needs to be struck between the regulatory powers of the host state and the need to legally protect the interests of foreign investors'.[79] At present, it is arguable that this delicate

[73] UNCTAD (2012a).

[74] Sornarajah (2010).

[75] Ibid., pp. 400–407.

[76] Pauwelyn (2014), p. 372.

[77] Though the extent to which the self-limitation of power through the signing of BITs and IIAs does attract investment is currently being questioned. Neumayer and Spess (2005), p. 1567; Mann and Von Moltke (2005); Sauvant and Sachs (2009); Aisbett (2009); Poulsen (2010); Yackee (2010), p. 397; Peinhardt and Allee (2012), p. 757; Jandhyala and Weiner (2014), p. 649.

[78] Trakman and Ranieri (2013), p. 11.

[79] Gazzini (2012), p. 113.

balance has not been achieved, and that the balance rests very much in favour of investors.

3.2 The Costs of Investment and Arbitration

Another compelling reason to make sure that the investment regime functions to the best of its ability is the amount of money that is often at stake. Companies often invest millions, if not billions of pounds in host states. Moreover, the cost of claims and awards in the event of a dispute should be taken into account; recently, the Permanent Court of Arbitration awarded $50 billion in an expropriation claim against Russia.[80] It is also important to note that the legal costs involved in an individual dispute average out at around $4 million for both claimants and respondents.[81] With such sums at stake, it is important that the law of foreign investment functions as well as possible.

3.3 Ongoing and Future Plurilateral Negotiations

A full re-examination of the investment regime is timely with the current trend towards the negotiation of plurilateral trade and investment agreements, as these negotiations have the potential to shape the future of global trade and investment policy.

Taking the TTIP negotiations as an example, one of the most highly contested issues has been the potential inclusion of ISDS as the default dispute settlement mechanism. Public outcry about the ability of foreign investors being effectively able to sue sovereign governments from various stakeholders[82] has caused the EU to reconsider its position. Accordingly, the EU Commission now proposes the inclusion of a bilateral investment court in TTIP. The ICS will make use of a 'Tribunal of First Instance', where 'judges' will pronounce on the dispute. If a party wishes to appeal the decision, they will be able to do so by making an application to the 'Appeal Tribunal'. Awards would be enforceable through the New York Convention 1958 or the ICSID Convention 1965.[83] The ICS mechanism has already been included in the concluded Canada-EU agreement CETA.[84] Despite the inclusion of the word 'court' in the name, many commentators have come to the conclusion that the ICS mechanism is largely an 'ISDS plus' mechanism, which at its core retains many of the features of investment arbitration that critics of ISDS wishes to see removed.[85]

[80] *Hulley Enterprises Limited (Cyprus) v. The Russian Federation* (2014) PCA Case No. AA226; *Yukos Universal Limited (Isle of Man) v. The Russian Federation* (2014) PCA Case No. AA227; *Veteran Petroleum Limited (Cyprus) v. The Russian Federation* (2014) PCA Case No. AA28, final awards available at http://www.pca-cpa.org/showpage.asp?pag_id=1599. Accessed 28 June 2016.

[81] Hodgson (2014).

[82] See for example Donnan and Wagstyl (2014); Greens in the European Parliament (2014).

[83] EU Commission, Draft text on investment in TTIP, *supra* n. 13.

[84] CETA, available at http://trade.ec.europa.eu/doclib/docs/2014/september/tradoc_152806.pdf (accessed 31 January 2017).

[85] See for example Friends of the Earth (2016); Bernardini (2017), p. 38.

However, it is not only the inclusion of ISDS in new trade and investment agreements that have caused controversy. The standards of protection that should be offered to foreign investors have also been highly contentious. Indeed, the very fact that foreign investors are offered protections over and above those offered to domestic investors has been called into question. Detractors of TTIP and CETA have argued that these investor protections are not required in an agreement between the US/EU and the EU/Canada, as all parties are relatively rich, stable, well developed states. It is argued that domestic legislation and the domestic legal system of each party nation is developed and impartial enough to be able to deal with foreign investors in a fair and acceptable manner, without resorting to giving foreign investors significant privileges over domestic investors. The following section will examine some of the novel proposals for investment protection and regulation in TTIP and CETA.

3.3.1 EU Commission's Plans for Investment in TTIP and CETA: Notable Inclusions

3.3.1.1 Right to Regulate In TTIP, the Commission proposes to strengthen the right to regulate by the inclusion of a specific provision making reference to the EU/US governments' right to adopt measures and regulations in order to achieve legitimate policy objectives, as well as a provision clarifying that TTIP would not prevent the governments from discontinuing state aid when such aid has been prohibited by competent state authorities (Article 2 of the proposal).[86] The latter provision is to be included presumably to avoid the recurrence of a *Micula*[87] type of case in the future.

3.3.1.2 Establishing an Investment Court System In Article 9 of the proposal, the European Commission advocates for the creation of a roster of approved 'judges' who would be selected by the EU and US government. Judges would either be required to be eligible to hold judicial office in their home jurisdiction or be 'jurists of recognised competence'. Furthermore, it suggests that third party submissions be accepted in cases where the third party has a direct and existing interest in the outcome of the dispute (Article 23). There is a lot of concern within the international investment community that the proposed roster may not be as positive a move as it may sound. For example, investors would have no say in who should be on the list, which may lead the two governments to select arbitrators that they perceive to generally be pro-host state rights and biased against investors. Moreover, it is difficult to comment on the plan for third party submissions without a consolidated text; much would depend on what is meant by a 'direct and existing interest' in the dispute (Article 23).[88] A very similar proposal has been green lit by the Canadians in CETA. CETA negotiations were concluded in 2016 and the agreement was

[86] EU Commission, Draft text on investment in TTIP, *supra* n. 13 (Art. 2).

[87] *Ioan Micula, Viorel Micula, SC European Food SA, SC Starmill SRI, SC Multipack SRL v. Romania*, ICSID Case No. ARB/05/20, Final Award of 11 December 2013.

[88] EU Commission, Draft text on investment in TTIP, *supra* n. 13.

signed by both parties in October 2016. The European Parliament will shortly vote on the deal, and if approved it could be in force later in 2017.

3.3.1.3 Appellate Mechanism In TTIP, the European Commission proposes (Article 10)[89] to include a bilateral appellate mechanism, which would provide for the review errors of law and fact in order to increase legitimacy, transparency and predictability. The proposed bilateral appellate body is again, a step in the right direction, however, the proposal would not remedy the wider problems associated with international investment law and ISDS discussed above e.g. inconsistencies and create further fragmentation of the system, adding a layer of extra procedure in EU-US cases only. Furthermore, there is no detail in the proposition about how the EU and US propose to dissuade the losing party in each case from making an automatic appeal. Appeals could cost a lot of extra time and money and become par for the course if there is no adequate filter. CETA also includes an appellate mechanism.

3.3.1.4 A View to a Permanent Multilateral Court The Commission suggests that a bilateral court could lead to a permanent multilateral court in the future which,

> would apply to multiple agreements and between different trading partners, also on the basis of an opt-in system. The objective would be to multilateralise the court either as a self-standing international body or by embedding it into an existing multilateral organization. Work has already begun on how to start this process, in particular on aspects such as architecture, organisation, costs and participation of other partners.[90]

It is submitted that such an institution would be difficult to establish on the basis envisioned in the proposal, and would do little to address some key concerns about ISDS e.g. consistency. Consistency would not be remedied if the new permanent court was charged with interpreting different bilateral and plurilateral agreements. In order to achieve consistency, arguably a multilateral framework would need to be developed.

The EU does seem to be moving forward on its proposal to establish a multilateral court. Whilst such an endeavour is to be welcomed, at least in theory, it is submitted that embedding it within a multilateral organisation would be the best way forward (rather than within a bilateral or regional organisation). However, the authors are of the opinion that existing multilateral institutions would be ill-equipped to house such a body. It is therefore suggested that a permanent court should be established within a new multilateral World Investment Organisation.

[89] Ibid.

[90] EU Commission Concept Paper, 'Investment in TTIP and beyond—the path for reform', 5 May 2015, available at http://trade.ec.europa.eu/doclib/docs/2015/may/tradoc_153408.PDF (accessed 30 January 2017), pp. 11–12.

4 The potential role of the World Investment Organisation

4.1 Overview and Potential Benefits

The WIO would be a forum dedicated purely to investment matters. It is hugely important to have a new forum because existing institutions are not suitable; they each have their own problems and perceived prejudices. Further, none of the existing institutions are devoted to dealing with investment matters. The World Trade Organisation (WTO) for example would not be a suitable forum, because it is often criticised for being a 'rich man's club',[91] in that it prioritises the interests of developed nations over lesser-developed ones. Its decision-making process is hindering its capacity to take decisive decisions and take them swiftly. Moreover, it is a body designed to promote free trade and its ethos would not necessarily be consonant and consistent with the objectives of a body that can strike a balance between public and private interests and take into account other societal values such as environmental and human rights protection. Thus it is important to have a completely 'clean slate', which is exactly what the WIO could provide. In terms of dispute settlement at least, Mann and Von Moltke agree that existing dispute settlement institutions 'were not designed to address complex issues of public policy that now routinely come into play in investor-state disputes'.[92] One could go a step further than Mann and Von Moltke, making a similar argument in terms of international investment regulation more generally (as opposed to dispute settlement only); that none of the existing institutions are adequately equipped to take on the regulation of foreign investment.

The establishment of the WIO would lead to a system that better balances the interests of international investment stakeholders. In the past, concerns have been raised about the balance of power and balance of the competing interests in investment relationships between investors and investment host states. It is often alleged that investors hold all the power, and can effectively hold the state to ransom through the threat of the initiation of ISDS proceedings. In turn, this can lead to 'regulatory chill'. There is no general consensus on the exact meaning of the phrase 'regulatory chill',[93] but at the very least, it is accepted that investment arbitration as an institution can influence the course of policy development.[94] This occurs when policy makers shelve new regulations or policies, because they believe that investment disputes may arise were the new policy to be introduced.

Moreover, the WIO would enable a redress of the balance of power in the foreign investment law-making processes. In so-called 'traditional' BITs (those between developing states and developed nations[95]), developing states are often at a

[91] Salzman (2000), p. 769; Mathiason (2003).

[92] Mann and Von Moltke (2005).

[93] Tienhaara (2011).

[94] Ibid.

[95] The distinction between developed and developing states may be becoming less clear, as states such as China and India, which would still be technically classed as developing countries are large capital exporting states, which are catching up to western foreign investment ideologies rather quickly.

disadvantage as they are usually keener to attract investment, and as such may wish to be perceived as 'investor friendly' nations. In order to retain this 'friendly' reputation, states may agree to limit their right to regulate their internal affairs more severely. This would give the investor confidence that their investment will be safer, and thus induce them to invest in said state. This element of competition for investment, and the benefits that such investment can bring to lesser-developed nations (e.g. wealth, jobs and infrastructure), may serve to put developing nations at a negotiating disadvantage. A WIO that operates under a multilateral framework could lead to the creation of a fairer, and more inclusive system. In turn, this would reflect in the creation of a truly balanced multilateral agreement. In multilateral negotiations, developing states could form negotiating 'blocks' in order to ensure that their interests are prioritised and heard, and without the element of competition described above.

Furthermore, the creation of the WIO could enhance consistency, predictability and fairness within the international investment regime. Consistency is an often-cited, elusive goal of the law of foreign investment.[96] The WIO could enable consistency to be achieved, in terms of the outcomes of disputes, but also in the understanding and interpretation of the *lex specialis* of international investment law and general international legal principles.

Predictability and legal certainty would also be achieved with the WIO in a number of ways. Most obviously, a dedicated investment court (with an appellate mechanism) would enable a solid body of jurisprudence to be built up, perhaps even based on the doctrine of formal legal precedent.

Lastly, the creation of the WIO would increase fairness in the foreign investment regime. Different types of fairness would be achieved in a number of different ways. Firstly, fairness between the interests of developing and developed states would be enhanced due to improved negotiating processes and goals, whereby the wishes and desires of less developed nations are heard and acted upon, rather than ignored or railroaded by their richer counterparts. Furthermore, fairness could be achieved between the interests of investors and states e.g. investor protection versus the regulatory power of sovereign states by the negotiation of a truly balanced multilateral investment agreement.

One potential criticism that the WIO might face, is that states should be free to set their own investment agenda at the national level instead of having an international regime. South Africa clearly believes that this should be the case, hence they are taking steps to nationalise their investment protection with the Foreign Investment Bill.[97] South Africa believes that the inflows of investment will not be harmed by withdrawing their BITs and nationalising foreign investment regulation. However, the Promotion and Protection of Foreign Investment Bill is currently in the drafting process; accordingly, if it is indeed adopted, the effects will

Footnote 95 continued
Nonetheless, the distinction may be useful to understand the historical underpinnings of the law of foreign investment.

[96] Dimsey (2008), pp. 36–37; also see Paulsson and Rawding (1995).

[97] Gazzini (2014), pp. 46–48.

only come to light in the months and years to come. It is worth considering the potential counterfactual; that when states terminate their BITs they might lose foreign investment.[98] If this happens, in a bid to re-attract or attract more investment, states choosing to nationalise their investment protection could inadvertently cause a race to the bottom in terms of the regulatory power of sovereign states in the long run. This is a significant risk. Thus, it may be better to regulate the investment regime at an international level.

4.2 The Practicalities of Establishing a WIO

The WIO could not function properly in the current foreign investment climate. The thousands of BITs and IIAs, each with similar, but potentially important differences in wording would mean that a WIO would be difficult to implement, and in real terms would only serve to further muddy the already very murky waters. Therefore, it is submitted that a WIO could only function under a formal multilateral treaty framework. Existing BITs and IIAs would need to be terminated eventually, and states would need to negotiate and sign a multilateral investment agreement (which would serve to regulate FDI on a global level, and which would establish a WIO and court with an appellate mechanism). The negotiation of a multilateral investment agreement would be a tall order, and not easy to achieve. There have been several unsuccessful attempts to negotiate a multilateral treaty in the past. From the Havana Charter[99] to the Multilateral Agreement on Investment,[100] negotiations have systematically failed to achieve large-scale multilateral co-operation on investment regulation. It could be argued that the previous negotiations have always failed, partly because of the lack of a credible forum for negotiations.[101] Previous negotiations have always seemed to run into the same old problems with developed/developing nations and their competing interests. Thus, negotiating and establishing a WIO under the auspices of an existing organisation e.g. the UN World Bank or the WTO would be highly unsatisfactory. The WIO would need to represent a 'clean slate'. Thus, a new, completely independent organisation should be established. It is highly likely that negotiations for a WIO within an existing organisation such as the World Bank or the WTO would fail, as all previous attempts to negotiate under their organisations have. Now is the time to create a balanced global regime; it is submitted that this can only be done with a completely new negotiating forum; the WIO. The negotiations to create a multilateral treaty could be undertaken with complete neutrality, and free from perceived organisational biases or agendas.

[98] The possible outcomes from BIT termination are almost impossible to predict at this time; partly because there is no agreement about the extent to which BITs attract investment in the first place, see n. 77.

[99] Havana Charter 1948 (full text), http://www.worldtradelaw.net/misc/havana.pdf (accessed 1 July 2014).

[100] OECD, Multilateral Agreement on Investment, http://www.oecd.org/investment/internationalinvestmentagreements/multilateralagreementoninvestment.htm (accessed 2 February 2017). For in depth discussion of the previous attempts to establish a global multilateral investment treaty see Nieuwenhuys and Brus (2001); Dattu (2000), p. 275; Karl (2002), p. 293.

[101] Salzman (2000); Mathiason (2003).

Arguably we already have informal or *de facto* multilateralism,[102] so the negotiation of a formal multilateral treaty may not be as revolutionary as it initially may sound.

As for the substantive provisions of such a multilateral treaty, Articles 10–14 of the recent Tokyo Resolution of the Institut de Droit International[103] could serve as inspiration for the negotiators.[104]

In terms of the internal organisation of the WIO, it could take inspiration from the structure of existing successful international organisations. Due to the naturally close relationship between trade and investment, an obvious source of inspiration would seem to be the WTO. However, the WIO founding members and negotiators could also take inspiration from other successful international organisations (e.g. ICSID, WIPO, WHO and the UN). The WTO, for example, appears to have a well functioning organisational structure. WTO decisions are made on the basis of consensus. The WTO's highest-level decision-making body is the Ministerial Conference, which meets biennially. Below the Ministerial Conference is the General Council, which consists of ambassadors and heads of delegation in Geneva, and sometimes officials sent from member states on an individual basis. The General Council meets several times each year in Geneva. The General Council also meets as the Trade Policy Review Body and as the Dispute Settlement Body. Beneath the General Council are the Goods Council, Services Council and Intellectual Property (IP) Council, each of which reports to the General Council. Beneath the Goods, Services and IP Council are various Committees and Working Groups. The day to day running of the WTO is overseen by the Secretariat (headed by the Director General), which consists of around 640 staff based in the Geneva headquarters. The Secretariat is not a decision-making body; rather it provides technical and legal support and assistance to the decision-making bodies and member states, as well as prospective members.[105]

The new WIO could utilise a similar organisational structure to the WTO,[106] with states as signatories to a founding convention, designating them as members of the organisation. The members could meet annually or bi-annually at a conference in order to decide on the organisation's priorities for the next period and make decisions on investment matters within the sphere of the organisation's mandate. Under the conference, a number of bodies for example a court-like body and a general council or body which would meet regularly in order to carry out the organisation's agenda for a set period. Below the general body and court, a number of specialised committees could undertake more specific work e.g. investment and human rights, investment and the environment, and investment in least developed nations. Committees could create working parties or groups to work on detailed

[102] Schill (2009).

[103] Institut de Droit International, Tokyo Resolution, *supra* n. 36.

[104] For more information on the role of the Institute and the Resolutions that it adopts, see Institut de Droit International, 'History (Origins)', http://www.idi-iil.org/idiE/navig_history.html (accessed 2 February 2017).

[105] WTO website, 'The organization', https://www.wto.org/english/thewto_e/whatis_e/inbrief_e/inbr02_e.htm (accessed 2 February 2017).

[106] For more information on the organizational structure of the WTO, see WTO website, 'Organizational structure', https://www.wto.org/english/thewto_e/whatis_e/tif_e/org2_e.htm (accessed 2 February 2017).

projects within the broader committee's remit. The conference, general council, court and committees would be the decision-making bodies of the WIO. It is submitted that the WIO should not operate a consensual decision-making process. Due to reasons of efficiency it is submitted that the WIO should work on a majority voting system.

In terms of the day to day running of the organisation, the WIO could utilise a secretariat system, led by a director general. The secretariat would not have decision-making power; rather it would provide all the administrative assistance required to successfully run the WIO. The organisational structure proposed herein is a basic proposal; clearly if a WIO were to be created, extensive thought would need to be put into the creation of the optimum organisational arrangements.

4.3 The World Investment Court

As noted above, the EU's ultimate aim in terms of investment dispute settlement is a permanent investment court. The suggestion to create such a court is not new; Van Harten,[107] Goldhaber[108] and Subedi[109] actually proposed this idea a number of years ago.[110] However, it is submitted that the proposed court cannot come to fruition without undertaking other reforms first, namely the creation of a multilateral treaty framework[111] and the establishment of the WIO.

Van Harten has articulated his views on the matter in great detail.[112] He believes that the way forward is to encourage states 'to support a multilateral code that would establish an international court with comprehensive jurisdiction over the adjudication of investor claims'.[113] Van Harten goes on to state that the newly created world investment court he envisages would ideally have obligatory jurisdiction over all claims filed by investors in the first instance, where the states involved were members to the newly negotiated multilateral treaty. It is intended that the court would become the default mechanism for the resolution of all investment disputes; a sort of one-stop shop, in order to achieve the coveted goals of consistency and fairness, and at the same time, solve the problems associated with forum shopping and parallel procedures in investment disputes. A WIO and court would be ineffective if they did not have mandatory jurisdiction in all investment matters. Turning his attention to the staffing of the court, Van Harten asserts that twelve or fifteen judges would be required, and that they should be appointed by states for 'a set term based on the model of other international courts'.[114] For example, the International Court of Justice (ICJ) is staffed by 15 judges, each elected for a term of 9 years by the United Nations Security Council and General Assembly. In order to

[107] Van Harten (2008).

[108] Goldhaber (2004).

[109] Subedi (2016), pp. 201–202.

[110] Concept paper, *supra* n. 90, pp. 11–12.

[111] Van Harten (2008).

[112] Van Harten (2007), p. 179.

[113] Ibid., p. 180.

[114] Ibid.

ensure continuity, one-third of the judges is elected every three years. Judges are elected as experts in international law, and as persons of the highest moral character. There are also geographical considerations; the court must not include more than one national of the same state, and the judges must be fairly representative of global society and the principal legal systems of the world.[115] The WIO could be staffed in a similar manner to the ICJ i.e. electing 15 judges to serve 9 year terms (or similar), with exclusivity clauses in their contracts (so that they cannot act as adjudicators outside the WIO). Judges could be selected using a majority voting procedure from a large pool of state nominations, giving the member states one vote each. Being staffed in this way would enable the court to ensure the independence of its judges, and the number of judges would allow several three-judge panels to sit simultaneously in order to keep up with the increased demand, which has been witnessed in investment dispute settlement in recent years. The judges would be selected to hear cases on a rotating basis by the court's president or by random assignment. If the impartiality of a judge is challenged, the other members of the court will pronounce on the matter. As with other international courts, the judges of the world investment court would be prohibited from taking part in activities that might be deemed incompatible with their professional duties and which may compromise their independence.[116]

4.4 An Appellate Mechanism within the WIO Court

The creation of an appeal mechanism in ISDS has been hotly debated since the mid to late 2000s.[117] More recently, the EU Commission has pursued the idea of setting up appellate mechanism in CETA. Furthermore, in its paper on investment in TTIP the EU Commission asserts that it is intended that an appellate mechanism be include in final agreement.[118] Opponents to the idea, such as Legum[119] have argued that an appeal mechanism is not feasible in the current climate i.e. of thousands of BITs/IIAs, because it would be impossible to harmonise interpretation of thousands of agreements; even if this were possible, it was not intended by the states who negotiated them anyway. These sorts of arguments would not be sustainable if the appeal mechanism was operated under the auspices of a WIO and court, which would in turn be operating under a multilateral agreement.

An appeal mechanism has obvious advantages; not least, it would provide the best chance of achieving consistent interpretations of the substantive principles of international investment law. Furthermore it would enable a body of jurisprudence to be built up, and if it operates a doctrine of precedent, it would encourage greater predictability of outcomes and would enhance the application of the rule of law in

[115] ICJ, 'Members of the Court', http://www.icj-cij.org/court/index.php?p1=1&p2=2 (accessed 2 February 2017).

[116] Ibid.

[117] See for example, Sauvant (2008); Gantz (2006), p. 39; Bishop (2006); Qureshi (2008).

[118] Concept paper, *supra* n. 90, pp. 8–10.

[119] Legum (2008), pp. 231–240.

the investment regime. Additionally, it would provide a corrective mechanism for those occasions where, for whatever reason, the tribunal of first instance erred. Such errors, at present, largely go unresolved in the present system of ISDS with its limited scope for review.[120]

In terms of the practicalities of the appellate mechanism, it is envisaged that the WIO could emulate many of the features of the WTO appellate body (AB), which is seen as highly successful, '[The AB] seems to me still today an extraordinary achievement that comes close to a miracle […] and which has proved so far to be a notable success'.[121] Praise for the WTO AB has been echoed by many other experts[122]; indeed, Zimmermann states that the appellate mechanism has been hailed as an ideal potential model for dispute settlement procedures in other areas of public international law.[123]

Thinking about the practicalities of the WIO AB, Walde has suggested that if appeal is to be introduced in investment disputes, a standing body, much like the WTO AB would be preferable.[124] This would support the incorporation of an appeal mechanism in the newly created WIO, as proposed herein. The WTO AB is composed of seven members who are appointed by the Dispute Settlement Body to serve for four-year terms, with the possibility of being reappointed once. The AB membership is broadly representative of membership in the WTO. The AB members have recognised expertise in the field of law and international trade and should not be affiliated to any government.[125]

When it comes to the scope of appeal of the WIO AB, perhaps the WIO can once again borrow from the WTO.[126] The WTO AB's scope of review is limited to legal errors. Though, in one of its decisions,[127] the AB has stated that, '[w]hether or not a panel has made an objective assessment of the facts before it, as required by Article 11 of the DSU, is […] a legal question which, if properly raised on appeal, would fall within the scope of appellate review'.[128] Therefore, it seems the AB can, in some limited circumstances, offer a very narrow form of factual review. It may be argued that only errors of law should be reviewable, in order to minimise the number of appeals sought. This will keep the caseload of the AB relatively low, and provide for efficient resolution of appealed disputes. On the other hand, it could be

[120] For more on annulment see Caron (1992), p. 21; Schreuer (2001), p. 891.

[121] Ehlermann (2003), p. 695.

[122] See for example Lockhart and Voon (2005).

[123] Zimmermann (2005), p. 27.

[124] Walde (2006), pp. 135–144. See also Ngangjoh-Hodu and Ajibo (2015), p. 308.

[125] WTO, 'Dispute settlement: the appellate body', http://www.wto.org/english/tratop_e/dispu_e/appellate_body_e.htm (accessed 2 February 2017).

[126] Art. 17 of the WTO Understanding on Rules and Procedures Governing the Settlement of Disputes 1994 (full text) is available at http://www.wto.org/english/tratop_e/dispu_e/dsu_e.htm (accessed 28 June 2016). The Understanding was negotiated as part of the Uruguay round of trade negotiations, signed in Marrakesh in 1994 and entered into force in January 1995.

[127] *EC Measures Concerning Meat and Meat Products (Hormones)*, WT/DS26/AB/R, WT/DS48/AB (WTO AB 16 January 1998).

[128] *EC Measures Concerning Meat and Meat Products (Hormones),* ibid., as cited in Legum (2005).

argued that a more flexible approach, with some capacity to correct errors of fact (as demonstrated by the WTO AB) should be taken.

Though the existing academic literature in support of an appellate mechanism is predicated largely on simply creating an extra layer of arbitration in ISDS (probably using a standing appellate body which would hear disputes arising from existing BITs and IIA), the arguments can be applied to the establishment of an appeal mechanism within the court of the WIO, as proposed herein. In fact, many of the arguments for an appeal mechanism would be strengthened if the mechanism were incorporated into a court and WIO system, as they would maximise the potential to achieve consistency and coherence.

4.5 The Role of Non-State Actors within the Proposed WIO

In the present international investment law regime non-state actors play an important role. Most importantly, investors are non-state actors. They derive rights from BITs and IIAs, the most important of which in the present system is access to ISDS. The proposal herein to establish a WIO and court would essentially mean maintenance of the *status quo* in this regard; a multilateral investment agreement such as the one proposed in this article would give similar rights to investors i.e. protections for their investment and access to a neutral dispute settlement forum. However, the multilateral agreement establishing the WIO and court could also be used to balance up the current system by placing obligations on investors to act in a responsible manner e.g. not to degrade the host state environment or not to commit human rights abuses. There is some debate within the academic literature as to how this could be achieved (given that at present BITs, and in the future the multilateral investment agreement) constitute agreements between state parties; thus how can a non-state actor be obliged by an agreement to which he/she is not party? Basically it is possible to limit access to investor protection provisions by making investor protection conditional on compliance with certain obligations e.g. to comply with the domestic law of the host state. In this way, the host state can better control, and place obligations on the investor than the current BIT/IIA regime does.

Another significant role of non-state actors in the current regime of foreign investment law is the ability of non-state actors to intervene in investment disputes through *amicus curiae*. Many BITs and IIAs enable non-state actors and non-parties to the agreement to make submissions to investment tribunals. This could continue if the proposed WIO and court is established; in the rules of procedure, provisions could be included in order to permit these important submissions to the court and Appellate Body. Further, non-state actors, whether investors or other civil society organisations concerned with environmental or human rights protection, could be granted observer status by the WIO and allowed to participate in some policy-making deliberations by the WIO. For instance, the UN Human Rights Council allows civil society representatives to participate in various of its meetings including the interactive dialogue sessions with special procedures mandate holders. The work of the Council is enriched by their participation and its work becomes more transparent. A similar mechanism could be developed for participation by non-state actors in policy formulation by the WIO.

4.6 The Relationship between the Law of Foreign Investment and Other Branches of Public International Law

International investment law is a member of the family of public international law. When it comes to interpreting the rules of international investment law or the provisions of BITs, IIAs or FTAs and ascertaining the scope and status of such treaties the investment tribunals apply the public international law rules of interpretation of treaties as stipulated in the Vienna Convention on the Law of Treaties. In other words, issues within international investment law should not be considered in isolation but as part of the overall framework of public international law. However, many international investment tribunals often become reluctant to take into account other competing principles of international law such as international environmental law or international human rights law when making their decisions or interpreting the rules of international investment law.

A state that has concluded a BIT or IIA or an FTA according a series of protection to investors may become a party to an international treaty designed to protect the environment or to promote human rights. The state may then have to require natural and juridical persons within the country, including foreign investors who would be operating within the country after acquiring legal personality of some kind in the country to conform to the international standards stipulated in such international treaties. The state is duty bound to fulfil its obligations undertaken through such treaties. In such a situation a public international law adjudicatory body would be expected to have regard for such obligations of states when interpreting the rules of international investment law or the provisions of BITs, IIAs or FTAs.

However, many international investment tribunals have been reluctant to do so in making their decisions or have given precedence to the provisions concerning investment protection over societal or global values stipulated in other international treaties. The tendency on the part of many international investment tribunals has been to regard investment disputes between foreign investors and host governments as a narrow commercial dispute to be adjudicated on the basis of a narrow set of rules according protection to foreign investors. Therefore, if a WIO and an international investment court were to be established, they, as public international law institutions, will be operating within the framework of public international law and the jurisprudence coming out of the court would be more balanced. The WIO and the court would bring more cohesion in the development of both international investment law and public international law that is conducive to achieving the higher objectives of the international community and the international legal order.

5 Conclusion

The creation of a WIO and court is clearly a very ambitious proposal that would be difficult to bring to fruition. As Pauwelyn asserts,

> Even if, on the face of things, the benefits of reform clearly outweigh the cost of bringing about the change, reform may be blocked because of information problems (e.g. difficulties in convincing people of the benefits or feasibility of change), public choice (e.g. incumbents such as certain arbitrators or law firms benefitting from the status quo being more influential in the political process than advocates of reform) or network-related costs (e.g. standard appointments mechanisms or BIT clauses being difficult to change because of network effects).[129]

The creation of a WIO and the associated reforms discussed in this article clearly have higher 'upfront' costs than current regime of BITs i.e. the time it would take to negotiate multilateral treaties and put in place an infrastructure for such an organisation. However, these higher up front costs could lead to significant 'down the line' benefits. The creation of a WIO could provide an important opportunity to achieve important and delicate balances of power within the law of foreign investment. Firstly, thought could be devoted to the balance of power between developed and developing nations when it comes to foreign investment. The hand of lesser-developed nations is thought to have been forced by developed states who hold more power when it comes to bilateral treaty negotiations. Add to this the fact that developing states typically try to attract as much foreign investment as possible, due to the advantages it is thought to bring (e.g. infrastructure, wealth and employment), and investors from developed nations often have more money to invest, it is clear that the balance of power between these two types of nations in the present BIT dominated system is far from perfect. A multilateral forum such as the WIO would enable developing nations to have a stronger voice and even allow them to band together in negotiating blocks in order to protect their interests in numbers.

Moreover, the creation of a WIO and significant modification to the regulatory climate of foreign investment would enable reconsideration of the balance of power between investors and states. There is presently much debate about the balance of power between states and investors, particularly within the context of the on-going TTIP negotiations, which has brought the issue to the fore. It is often alleged that foreign investors are almost able to hold states to ransom through the threat of bringing an action using existing ISDS provisions. States are allegedly scared to legislate and regulate in their own interests and in the interests of their citizens because they are afraid that in doing so they will potentially breach investment obligations and land themselves with having to pay a multi-million pound award, or at the very least an average of $4 million of legal costs per case.[130] Fundamental reform of the regulatory framework and dispute settlement, as advocated herein, could enable the balance of power to be recalibrated; allowing states to regain the regulatory control that they are alleged to have lost under the present 'regime'.

Finally, establishment of a WIO and court would also enable the balance of power to be redressed in terms of private tribunals pronouncing on public issues. There has been much discussion in recent years about the fact that privately

[129] Pauwelyn (2014).

[130] Hodgson (2014).

appointed tribunals are increasingly involved in the adjudication of issues of public policy e.g. human rights and the protection of the environment through ISDS. Accordingly, the standard of review in ISDS has come under scrutiny and been criticised fiercely of late. Giving mandatory and exclusive jurisdiction to the WIO's court would alleviate this problem. Qualified and impartial judges would be employed on a full time basis solely to adjudicate investment disputes. This would undoubtedly enhance consistency in investment dispute settlement, which would in turn promote the rule of law and enhance legitimacy in the decision-making process and review procedures.

The creation of a WIO may also be difficult to achieve due to the apparent trend of international institutions seemingly having fallen out of favour. As Goldhaber asserts, 'all-powerful global institutions may be out of fashion'.[131] However, perhaps the WTO could serve as important inspiration in this regard, and evidence against the assertion of such a trend. Although it has not managed to escape criticism completely, the WTO is largely regarded as a success[132]; particularly its Dispute Settlement Body (including AB) which is seen as the 'linchpin'[133] of the system. Recently, some critics have argued that the WTO is failing/losing popularity/nearing its end especially with the missing of the Bali deadline,[134] and the ongoing negotiations of trade agreements, such as TTIP, which are being negotiated outside of the multilateral trading system. However, one could view these as supplementary agreements, not substitutive. The multilateral system of the WTO has been dealing with a deluge of Regional Trade Agreements for many years, and it could be argued that the multilateral regime has not been damaged by such agreements. Indeed, it could be argued that the multilateral regime has benefitted in many ways, with global trade on the whole being increased by such agreements and a renewed enthusiasm/interest from many states in global trade policy, with a bicycle effect whereby regional negotiations have triggered consideration of certain issues at the multilateral level. Furthermore, it is important to note that non-members states are still initiating accession to the WTO, and negotiating rounds and gatherings are still on going.[135] Thus, the WTO provides a good example of how a global, multilateral organisation can survive and even thrive in the often-difficult current political and economic conditions. There is no reason why an analogous investment organisation could not do the same. It is also important to remember that, as Walde pointed out, ICSID was not popular when it was first established; over time it has become increasingly so.[136] Interestingly, large regulatory institutions are also being proposed in other fields of international economic law. Lastra recently contended that a world financial organisation might

[131] Goldhaber (2004).

[132] See for example WTO, 'Ten benefits of the WTO trading system', https://depts.washington.edu/wtohist/Research/documents/10benefits.pdf (accessed 2 February 2017); on dispute settlement see for example Zimmermann (2005); Davey (2014).

[133] Bhala (1999), as cited in Zimmermann (2005).

[134] Shotter, Kazmin and Donnan (2014).

[135] Howse (2014).

[136] Walde (2006), pp. 135–144.

be beneficial for global financial regulation, which at present is very fragmented (much like the current state of affairs in international investment law).[137]

Finally, Sornarajah[138] recently argued that co-ordination or the creation of a 'regime' (such as that essentially proposed herein) is no longer possible because the system is so fragmented and moving away from neo-liberalistic ideals. It could be argued that this is precisely the time to push for the recognition of a regime; leading to harmonisation and unification when it is most needed.

Nonetheless, this paper has demonstrated a case for the establishment of a WIO. It is at least an option for reform that might be considered. It is certainly the most radical suggestion for reform of the area, which would undoubtedly be difficult to achieve. However, the potential gains of such fundamental reform could make the difficulty of the task worthwhile, and could solve many, if not all of the problems associated with the law of foreign investment at present. Given the gravity of the matter and the wide range of issues that need to be tackled within the regime of international investment law it would be better to take a holistic approach to the regulation of foreign investment in order to protect global societal values while ensuring flow of foreign investment from one jurisdiction to another. Thus, the time may have come to take a bold step and create a WIO and court, to deal with the issues relating to investment protection and regulation in a systematic manner.

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[137] Lastra (2014), p. 787.

[138] Sornarajah (2013), pp. 475–498.

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