A MULTILATERAL FRAMEWORK FOR INVESTMENT PROTECTION: THE MISSING PIECE IN THE PUZZLE OF ISDS REFORM?

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I. Introduction

As one of the more vibrant disciplines in international law, international investment law has given the global community much cause for celebration in the past few years. However, in the wake of growing concerns regarding imbalances within the Investor-State Dispute Settlement (ISDS) framework, the once swiftly growing appeal of ISDS is now steadily waning in various parts of the world.[1] In the recent past, there has been a marked transformation in the attitude of governments, whose enthusiasm has given way to hostility and fierce opposition, along with dramatic reassertion of State control over the international investment regime.[2] This discontent surrounding ISDS is arguably the most forceful within the European Union; in fact, the European Commission has been focusing on the issue of ISDS reform so strongly that many view far-reaching reform as inevitable.[3]

Since 2015, the European Commission has been advocating for a '*modern and reformed approach to investment dispute resolution*',[4] which must not only address but also overcome the drawbacks of ISDS.[5] The Commission envisages that a permanent judicial body must be established to resolve investment disputes – the so-called Multilateral Investment Court (MIC) – that will replace the "*old style*" ISDS framework based on

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1 Stephan Schill, *International Investment Law And Comparative Public Law* (OUP 2010) 1, 6.

2 Andreas Kulick, *Reassertion Of Control Over The Investment Treaty Regime* (CUP 2017) 3, 8.

3 Anthea Roberts, 'Incremental, Systemic, And Paradigmatic Reform Of Investor-State Arbitration' (2018) 3 American Journal of International Law 410, 416; See also, Nikos Lavranos, 'European Commission and the EU Member States' in Kulick (n 2) 309, 311.

4 'The Multilateral Investment Court Project' (*European Commission*, 21 December 2016) <http://trade.ec.europa.eu/doclib/press/index.cfm?id=1608> accessed 30 May 2020.

5 Colin Brown, 'The European Union's Approach to Investment Dispute Settlement' (The 3rd Vienna Investment Arbitration Debate, 2018) <https://trade.ec.europa.eu/doclib/docs/2018/july/tradoc_157112.pdf> accessed 30 May 2020.

commercial arbitration.[6] In the view of the Commission, the MIC is the only mechanism that can ensure the requisite transparency, neutrality and legitimacy that it considers to be absent within the ISDS regime.[7]

The EU initially attempted to establish the MIC on a bilateral basis as the 'Investment Court System' (ICS), first during the negotiations of the proposed Transatlantic Trade and Investment Partnership and subsequently in the trade and investment agreements with Canada, Singapore, Vietnam and Mexico.[8] However, the Commission soon realized that the bilateral setting would not address adequately the lasting reform that it seeks to achieve with the ICS. Therefore, the EU decided that UNCITRAL should be the prime forum to conduct the debate for ISDS reform and creation of the MIC at the multilateral level.[9] In July 2017, UNCITRAL entrusted Working Group III with a '*broad mandate to work on the possible reform of investor-State dispute settlement*', including identifying concerns regarding ISDS and developing relevant solutions for ISDS reform.[10] As of date, the deliberations among the Member States are still ongoing.[11]

While the structure and composition of the MIC remain subject to these negotiations, the Commission has publicly acknowledged that its vision for the MIC was inspired by the WTO dispute settlement body, stating that '[t]he multilateral investment court should be for investment dispute settlement what the World Trade Organisation is for trade dispute settlement, thus upholding a multilateral rules-based system.'[12]

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6 News Archive, 'Commission Proposes New Investment Court System for TTIP and Other EU Trade and Investment Negotiations' (*European Commission*, 16 September 2015) <http://trade.ec.europa.eu/doclib/press/index.cfm?id=1364> accessed 30 May 2020.

7 Directorate-General for Trade (EC), 'Inception Impact Assessment: Establishment of a Multilateral Investment Court for Investment Dispute Resolution' (*European Commission*, 2016) <https://ec.europa.eu/smart-regulation/roadmaps/docs/2016_trade_024_court_on_investment_en.pdf> accessed 30 May 2020, 2 ; News Archive, 'The EU Moves Forward Efforts at UN on Multilateral Reform of ISDS' (*European Commission*, 18 January 2019) <http://trade.ec.europa.eu/doclib/press/index.cfm?id=1972> accessed 30 May 2020.

8 'Concept Paper: Investment in TTIP and Beyond – the Path for Reform' (*European Commission*) <https://trade.ec.europa.eu/doclib/docs/2015/may/tradoc_153408.PDF> accessed 30 May 2020. Lavranos (n 3) 320-321.

9 European Commission, 'Discussion Paper for Expert Meeting: Establishment of a Multilateral Investment Dispute Settlement System' (Expert Meeting, Geneva, December 2016); President Jean-Claude Juncker, 'State of the Union Address' (European Parliament, 13 September 2017) < https://ec.europa.eu/commission/presscorner/detail/en/SPEECH_17_3165> accessed 30 May 2020.

10 UNIS, 'Press Release, UNCITRAL to Consider Possible Reform of Investor-State Dispute Settlement' (14 July 2017) UNIS/L/250 <http://www.unis.unvienna.org/unis/en/pressrels/2017/unisl250.html> accessed 30 May 2020.

11 The UNCITRAL Working Group III has conducted five sessions on the issue of Investor-State Dispute Settlement reform. The sixth session was scheduled for 30 March – 4 April 2020 but has been postponed until further notice <https://uncitral.un.org/en/working_groups/3/investor-state> accessed 30 May 2020.

12 European Commission, 'A Multilateral Investment Court <https://trade.ec.europa.eu/doclib/

However, the fact remains that, unlike the WTO, there is no multilateral rules-based system currently in place for ISDS. At present, the ISDS framework is underlined by a loose and fragmented network of international investment agreements (IIAs) consisting of nearly 3,300 treaties (including BITs and investment chapters in free trade agreements).[13] Neither the EU nor the UNCITRAL Working Group III has shown any concrete inclination to change the *status quo* with respect to the operation of IIAs. In fact, any discussion involving multilateral rules has been largely absent from deliberations regarding ISDS reform at the multilateral level.

Against this background, this article argues that effective and lasting reform of ISDS must necessarily involve the substantive reform of existing IIAs, and the MIC project can only be sustained upon a multilateral framework of investment rules if we seek to truly tackle the drawbacks of the existing ISDS framework and outcomes. To establish its case, **Part II** leads the discussion with an analysis of how the complaints associated with ISDS are rooted in the language and text of existing IIAs and outlines the policy considerations for substantive reform. **Part III** then examines the need for a multilateral framework on investment and the challenges involved. **Part IV** offers a study of the various pathways that could lead to a multilateral framework on investment incrementally. **Part V** focuses on the role of the EU in future reform of the investment regime and how its current approach could pave the way for a multilateral framework of investment rules. Finally, **Part VI** provides the conclusions and key observations of this study.

II. IIA Reform: Rationale and Policy Considerations

I. Reform of IIAs as a Necessary Element of ISDS Reform

In recent years, the international investment law regime has come under close scrutiny with heated parliamentary debates and street demonstrations taking place in several countries. NGOs and special interest groups have severely criticized the lack of transparency and accountability in ISDS, which they argue has no place within a system that scrutinizes State conduct and is funded by taxpayers' money, also referred to as the '*democratic deficit*'.[14] The rigidity and inconsistency of arbitral tribunals in some cases has generated a strong '*backlash*' against ISDS for its unacceptable intrusion into sovereign autonomy.[15]

Some commentators even refer to these overwhelming concerns as a legitimacy crisis,[16] and argue that 'the sphere of BITs has become too large for states to control, too

docs/2017/september/tradoc_156042.pdf> accessed 30 May 2020 (emphasis added).

13 UNCTAD, 'International Investment Policymaking in Transition: Challenges and Opportunities for Treaty Renewal' (IIA Issues Note, 2013) 1.

14 ibid 256.

15 Tania Voon, 'Consolidating International Investment Law: The Mega-Regionals as a Pathway Towards Multilateral Rules' (2015) World Trade Review 1, 5.

16 Susan Franck, 'The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public

complicated for companies to profit from, and too complex for stakeholders in general to monitor'.[17] These concerns have evoked stiff reactions from many stakeholders, and some states have already withdrawn from leading multilateral treaties such as the ICSID Convention and the Energy Charter Treaty.[18] Several States are revising their model IIAs[19] while many others have already commenced a general overhaul of their BIT regime by terminating their existing IIAs,[20] or at least, reviewing them.[21]

A shared consensus has now emerged that comprehensive reform of the international investment law regime is critical to ensure that ISDS works effectively for all stakeholders.[22] However, public debate regarding ISDS has focused almost exclusively on procedural reform, i.e. replacing investor-state tribunals with the MIC and seeks to tackle the systemic deficiencies of ISDS.[23] These include concerns of legitimacy and transparency, consistency of arbitral decisions, costs and duration of arbitral proceedings, absence of an appeal mechanism and arbitrators' independence and impartiality. However, a closer examination would reveal that the key problems plaguing ISDS are not entirely systemic – they also relate to the substantive deficiencies in the language and design of existing IIAs.

Broadly speaking, these substantive deficiencies arise from the following: (1) limited scope of treaty objectives; (2) overly broad definitions of 'investor' and 'investment'; (3) vague standards of investment protection; (4) lack of clarity on policy space for host states; and (5) wide discretion to investor-state tribunals.

1. Limited Scope of Treaty Objectives

A vast majority of contemporary IIAs are prefaced with a preamble, wherein the contracting parties state their negotiating goals and objectives for the conclusion of the

International Law through Inconsistent Decisions' (2005) Fordham Law Review 1521, 1523; Lone Wandahl Mouyal, *International Investment Law and the Right to Regulate: A Human Rights Perspective* (1st edn, Routledge 2016) 16.

17 ibid.

18 Tania Voon and Andrew Mitchell, 'Denunciation, Termination and Survival: The Interplay of Treaty Law and International Investment Law' (2016) ICSID Review Foreign Investment Law Journal, 421.

19 UNCTAD, 'Recent Trends IIAs and ISDS' (2015) <http://unctad.org/en/PublicationsLibrary/webdiaepcb2015d1_en.pdf> accessed 30 May 2020. .

20 Christian Leathley & Daniela Paez, 'Ecuador's Legislative Branch Approves the Termination of 12 Bilateral Investment Treaties' (*Herbert Smith Freehills*, 5 May 2017) <http://hsfnotes.com/arbitration/2017/05/05/ecuadors-legislative-branch-approves-termination-of-12-bilateral-investment-treaties/> accessed 30 May 2020.

21 UNCTAD, *World Investment Report 2017, Investment and the Digital* Economy (2017) 1, 112.

22 UNCTAD, 'UNCTAD's Reform Package for the International Investment Regime' (2018) 14 <https://investmentpolicy.unctad.org/uploaded-files/document/UNCTAD_Reform_Package_2018.pdf> accessed 30 May 2020.

23 UNCTAD, *World Investment Report 2013, Global Value Chains: Investment and Trade for Development* (2013).

agreement.[24] Most contracting parties often draft the preamble with little attention because, unlike the substantive provisions, the preamble does not create legally binding rights and obligations.[25] Tribunals, however, often rely on the preamble as an important source for identifying the goals and objectives of the treaties.[26]

The traditional BITs were concluded in the specific economic context of the 1950s, 1960s and the 1970s, when a wave of economic nationalism had rendered foreign investments in several developing states susceptible to expropriation and legal uncertainty.[27] Thus, the core object of these traditional BITs was the protection of foreign investors and investments against arbitrary action of host states and investment promotion.[28] Consequently, the preambles of these BITs focus chiefly on economic objectives such as stimulating investment flows, fostering economic cooperation between the contracting parties and ultimately increasing the economic prosperity of both parties.[29] This is also the case for the preamble of the ICSID Convention, which stresses the '*need for international cooperation for economic development*' and the '*role of private international investment therein*'.[30]

Economic objectives in the preambular text have influenced the analysis of many tribunals, particularly while interpreting the definitions of 'investor' and 'investment'.[31] Tribunals have also considered the preamble to interpret the scope of substantive treaty provisions.[32] For instance, in *SGS v. Philippines*,[33] the tribunal relied on the BIT preamble to reason that ambiguities in the interpretation of the umbrella clause must be construed in

24 UNCTAD, 'Bilateral Investment Treaties 1995-2006: Trends in Investment Rule-Making' (2007) UNCTAD/ITE/IIA/2006/5, 3.

25 Jeswald Salacuse, *The Law of Investment Treaties* (OUP 2010) 127.

26 *Mera Investment Fund v Serbia* (Decision on Jurisdiction) (2018) ICSID Case No. ARB/17/2, 121; ibid.

27 Simon Lester, 'Reforming the Investment Law System' (2015) Maryland Journal of International Law, 70-81.

28 Federico Ortino, 'Substantive Provisions in IIAs and Future Treaty-Making: Addressing Three Challenges' (2015) ICTSD 1.

29 ibid.

30 Convention on the Settlement of Investment Disputes between States and Nationals of Other States, 1968, Preamble; Christoph Schreuer, 'International Centre for the Settlement of Investment Disputes' <https://www.univie.ac.at/intlaw/pdf/101_icsid_epil.pdf> accessed 30 May 2020.

31 *Tokios Tokeles v Ukraine* (Decision on Jurisdiction) (2004) ICSID Case No. ARB/02/18, 31; *Phoenix Action, Ltd. v Czech Republic* (Award) (2009) ICSID Case No. ARB/06/5, 106; *Telefónica S.A. v The Argentine Republic* (Decision of the Tribunal on Objections to Jurisdiction) (2006) ICSID Case No. ARB/03/20, 77.

32 *Siemens AG v Argentina* (Decision on Jurisdiction) (2004) ICSID Case No. ARB/02/8, 81; *Noble Ventures v Romania* (Award) (2005) ICSID Case No. ARB/02/8, 52.

33 *SGS Société Générale v Philippines* (Decision of the Tribunal on Objections to Jurisdiction) (2004) ICSID Case No. ARB/02/6.

favour of the foreign investor.[34]

Such interpretive outcomes have contributed to a general perception among host states that investor-state tribunals are unfairly biased in favour of investors.[35] However, this perceived bias is convincingly supported by the current language in investment treaties, which places great emphasis on investment protection. Thus, if states decided to include other objectives in the preambular text, it is more likely that the tribunals (or the MIC) would find themselves bound to weigh matters of public interest with great care.[36] Some treaty parties have already updated the preamble of their IIAs to clarify that investment protection and promotion must also respect other key public policy objectives such as public health and the environment.[37] The preambular text in recent IIAs and Model BITs also includes an emphasis on corporate social responsibility, sustainable development and human rights.[38]

2. Overly Broad Definitions of 'Investor' and 'Investment'

In ISDS practice, investor-state tribunals control the scope of these expansive definitions through the process of interpretation.[39] In the absence of concrete guidance within the text of IIAs, tribunals have often relied upon this analytical process to justify different outcomes while interpreting similar, even identical terms, particularly for the definitions of 'investment' and 'investor'.[40] They have even sought to 'modernize' the traditional notions of investor and investment, thus leading to surprising outcomes in some cases.[41] In *Abaclat v Argentina,* the tribunal did not find it necessary that 'investment of purely financial nature be further linked to a specific economic enterprise or operation taking place in the territory of the Host State'.[42] It concluded that sovereign bonds qualify as protected investments because 'it would be contrary to the BIT's wording and aim to attach a further condition to the protection of financial investment instruments'.[43]

34 ibid 116.

35 Nicholas Hachez & Jan Wouters, 'Arbitration & Preservation of Public Interest', in Freya Baetens (eds), *Investment Law Within International Law: Integrationist Perspectives* (CUP 2013) 429.

36 Alison Giest, 'Interpreting Public Interest Provisions in International Investment Treaties' (2017) Chicago Journal of International Law 1, 321, 338.

37 UNCTAD 'Bilateral Investment Treaties' (n 24) 3-4.

38 Kun Fan, 'Rebalancing the Asymmetric Nature of International Investment Agreements?' (*Kluwer Arbitration Blog*, 30 April 2018) <http://arbitrationblog.kluwerarbitration.com/2018/04/30/rebalancing-asymmetric-nature-international-investment-agreements/?doing_wp_cron=1590654119.7012450695037841796875> accessed 30 May 2020.

39 Maximilian Clasmeier, *Arbitral Awards as Investments – Treaty Interpretation and the Dynamics of International Investment Law* (Wolters Kluwer 2017) 53.

40 Rudolf Dolzer, 'The Notion of Investment in Recent Practice', in Steve Charnovitz (eds), *Law in the Service of Human Dignity: Essays in Honour of Florentino Feliciano* (2005 CUP) 275.

41 *Abaclat v Argentine Republic* (Decision on Jurisdiction) (2011) ICSID Case ARB/07/5, 387.

42 ibid 375.

43 ibid.

These outcomes have taken the host states by surprise, who have discovered that certain transactions that were not considered as investments at the time of entering into the treaty could now fall within the scope of the IIA due to the open-ended nature of the definitions.[44] States have slowly realized their broad exposure to investor claims, including the risk of multiple claims arising under one or more IIAs albeit from the same investment.[45] Moreover, tribunals have often restricted their judicial review to the formal nationality of a party when a question has been raised regarding whether the applicant truly qualifies as an 'investor' under the IIA, thus skipping a deeper analysis.[46] These issues have exposed the risks associated with open-ended treaty definitions, as well as the potential negative impacts on the host state.[47] While ISDS may have been a contributing factor in compounding these risks, the root cause of concern is the nature of definitions adopted by treaty parties in their IIAs.

3. Vague Standards of Investment Protection

Traditionally aimed at providing protection to foreign investments, IIAs contain standards of protection that specify the treatment that must be accorded to investments once they have been made in the territory of the host state.[48] It is widely acknowledged that these standards of treatment are generally expressed in terms that are ambiguous, vague and imprecise.[49] In the case of most traditional IIAs, treaty parties have neglected to include specific criteria for what may constitute, for example, unfair or inequitable treatment, or 'full' protection and security.[50] Often, IIAs do not even define these standards, or provide any reference to international law or other criteria for determining the scope of the standards.[51]

With the dramatic rise in the number of investment disputes, it has fallen to the arbitral tribunals to identify the meaning and scope of these standards of treatment.[52] However, tribunals have routinely struggled to define the extent of protection offered by these

44 Maximilian Clasmeier (n 39) 76.

45 Suzy Nikièma, 'Best Practices – Definition of Investor' (2012) International Institute for Sustainable Development Best Practices Series, 6, <https://www.iisd.org/sites/default/files/publications/best_practices_definition_of_investor.pdf> accessed 30 May 2020.

46 *Yukos Universal v Russian Federation* (Interim Award on Jurisdiction and Admissibility) (2009) Case No. 2005-04/AA227.

47 Suzy Nikièma (n 45) 6.

48 Jeswald Salacuse, *The Law of Investment Treaties* (n 25) 131.

49 Christain Tietje & Kevin Crow, 'The Reform of Investment Protection Rules in CETA, TTIP and Other Recent EU FTAs: Convincing?' in Stefan Griller (eds), *Mega-Regional Trade Agreements: CETA, TTIP, and TiSA: New Orientations for EU External Economic Relations* (OUP 2017) 87, 90.

50 ibid 95.

51 Jeswald Salacuse, *The Law of Investment Treaties* (n 25) 131.

52 UNCTAD, 'Investor-State Dispute Settlement and Impact on Investment Rule-Making' UNCTAD/ITE/IIA/2007/3 (2007) ix.

standards.[53] This has led to varying interpretations based on each tribunal's understanding of fairness, and even controversial outcomes. In ISDS practice, the wide application of these treaty standards has exposed further uncertainties and risks. *First*, tribunals have found it challenging to determine the appropriate standard of liability, i.e. how grave or manifest the alleged state conduct should be to constitute a violation of the standard.[54] *Second*, since tribunals have derived the substantive content of these standards on a case-to-case basis, there have been major concerns regarding the growing lack of consistency and predictability within the ISDS regime.[55] *Third*, some tribunals have interpreted the standards of protection in an even-handed manner, without any due consideration of the economic and political circumstances of host states.[56] The threshold admitted by tribunals has proved to be rather onerous for most states but even more so for developing and least developed states.[57]

Admittedly, these risks can be addressed only partially by incorporating more detailed and specific language in the IIAs. The structure and rationale of the investment law regime requires that the standards of protection have a certain degree of 'vagueness', which allows tribunals some flexibility to adapt these treaties in changed circumstances.[58] This means that tribunals (or the MIC) will continue to possess considerable power to interpret these provisions, irrespective of their drafting.[59] However, reformulating these treaty standards can reduce the arbitrators' overwhelming discretion and streamline the exercise of their power to achieve more even outcomes in ISDS awards.

4. Lack of Clarity on Policy Space for Host States

During the last few years, investors have challenged a wide range of government measures, from general legislation, to executive orders, to decisions of the national supreme court.[60] It has been suggested that ISDS has allowed transnational corporations to unfairly constrain the ability of a host state to regulate in public interest, thus undermining state sovereignty.[61]

53 Jeswald Salacuse, *The Law of Investment Treaties* (n 25) 132.

54 UNCTAD, 'Fair and Equitable Treatment: UNCTAD Series on Issues in International Investment Agreements II' (2012) UNCTAD/DIAE/IA/2011/5 https://unctad.org/en/Docs/unctaddiaeia2011d5_en.pdf> accessed 30 May 2020..

55 Federico Ortino (n 28) 1.

56 UNCTAD, 'Fair and Equitable Treatment: UNCTAD Series on Issues in International Investment Agreements II' (2012) UNCTAD/DIAE/IA/2011/5 <https://unctad.org/en/Docs/unctaddiaeia2011d5_en.pdf> accessed 30 May 2020.

57 In *CME v Czech Republic*, the compensation awarded to the investor was US $269,814,000, which was roughly equivalent to the annual healthcare budget of the Czech Republic.

58 Christain Tietje & Kevin Crow (n 49) 87, 90.

59 ibid.

60 ibid.

61 Tarald Berge & Axel Berger, 'Does Investor-State Dispute Settlement Lead to Regulatory Chill? Global Evidence from Environmental Regulation' (2019) <https://www.peio.me/wp-content/

Some foreign investors have reportedly used the threat of arbitration to compel governments to 'reconsider' their proposed legislative or regulatory activities intended for the benefit of the public at large.[62] This phenomenon, which is commonly known as '*regulatory chill*', has impacted not only developing states but also developed states.[63] For instance, in 1994, the Canadian government was debating plain packaging regulations to tackle the widespread concern for the adverse impacts of tobacco on public health. Relying on NAFTA's investment chapter, a leading tobacco company sent a letter to the government claiming that plain packaging would amount to illegal expropriation of a protected trademark and could require Canada to pay hundreds of millions of dollars as compensation.[64] According to some sources, this threat deterred the Canadian government from taking concrete legislative action on plain packaging.[65]

ISDS tribunals have been criticized for failing to balance the investors' rights regarding investment protection with the host state's right to regulate in public interest, which has considerably shrunk the policy space for host states and their flexibility to exercise public authority.[66] This criticism has emerged not only from the international community but also from arbitrators within the ISDS regime as well.[67]

The structure and text of IIAs follow the narrow theme of 'investment protection',[68] and create rights for foreign investors on the one hand and obligations for host states on the other.[69] IIAs do not typically include specific obligations for investors, or references to other policy objectives of the host state (such as public health, national security and the environment), or the state's right to regulate in public interest.[70] There is little clarity within these treaties to indicate whether tribunals can extend '*a margin of appreciation*' to state

uploads/2019/01/PEIO12_Paper_78.pdf> accessed 30 May 2020.

62 Alison Ross, 'Uruguay Urged to Fight On In Cigarette Claim' (*Global Arbitration Review*, 13 August 2010) <https://globalarbitrationreview.com/article/1029513/uruguay-urged-to-fight-on-in-cigarette-claim> accessed 30 May 2020.

63 Matthew Porterfield & Christopher Byrnes, 'Phillip Morris v. Uruguay: Will Investor-State arbitration Send Restrictions on Tobacco Marketing Up In Smoke?' (*Investment Treaty News*, 12 July 2011) <https://www.iisd.org/itn/2011/07/12/philip-morris-v-uruguay-will-investor-state-arbitration-send-restrictions-on-tobacco-marketing-up-in-smoke/> accessed 30 May 2020.

64 ibid.

65 ibid.

66 Vera Korzun, 'The Right to Regulate in Investor- State Arbitration: Slicing and Dicing Regulatory Carve-Outs' (2016) The Fordham Law Archive of Scholarship and History 355, 374.

67 *William Ralph Clayton, William Richard Clayton, Douglas Clayton, Daniel Clayton and Bilcon of Delaware Inc. v. Government of Canada* (Award on Jurisdiction and Liability) (2015) UNCITRAL PCA Case No. 2009-04, Dissenting Opinion of Professor Donald McRae, 48-49.

68 David Gaukrodger, 'The Balance between Investor Protection and the Right to Regulate in Investment Treaties: A Scoping Paper' (2017) 2 OECD Working Papers on International Investment 17.

69 Federico Ortino (n 28) 1.

70 ibid.

measures while conducting their analysis.[71]

In response, States are gradually incorporating more safeguard provisions, i.e. provisions that safeguard the host states' right to regulate, within the text of IIAs to replace the old-generation BITs.[72] Some states have adopted various techniques in their recent IIAs, such as general or specific exceptions, carve-outs, standards of review, reservations, limited scope of substantive protections (especially Fair and Equitable Treatment (FET) and MFN clauses) and non-precluded measures.[73] The scope and form of these safeguard provisions vary greatly, and they may cover the whole treaty, an individual chapter, or a particular substantive protection obligation.[74]

However, most States concluding these new-generation IIAs continue to remain parties to various traditional IIAs, which offer little indication regarding preservation of policy space for host states.[75] From a systemic perspective, there is thus a high risk of incoherence for all countries, especially developing states that often lack the requisite expertise and negotiating power in the development of investment rules.[76] Going forward, it is essential that states adopt clear and precise text in their IIAs as a matter of consensus, which not only offers much-needed clarity to ISDS tribunals but also clarifies their role and responsibility in balancing investment protection with the host state's right to regulate.

5. Wide Discretion to Investor-State Tribunals

States have long expressed deep concerns regarding the inconsistencies in arbitral decision-making in ISDS awards, which has now evolved into a major challenge to the system's credibility and legitimacy.[77] According to States, the mere divergence in outcomes is not the issue *per se*; they were more concerned about those cases where the same investment treaty standard or same rule of international law was interpreted differently without any justifiable ground for the distinction.[78]

It is well-settled that there is no doctrine of binding precedent in ISDS, and tribunals are not bound to any previous legal interpretations rendered in other awards.[79] For this reason, ISDS tribunals can 'decide each case on its own merits, independently of any apparent

71 Yuval Shany, 'Toward a General Margin of Appreciation Doctrine in International Law?' (2006) 5 European Journal of International Law, 907-940.

72 Vera Korzun (n 66) 355, 387.

73 David Gaukrodger (n 68), 29.

74 Vera Korzun (n 66) 355, 388.

75 UNCTAD, 'Investor-State Dispute Settlement' (n 52) ix.

76 ibid.

77 Federico Ortino (n 28) 1.

78 UNCTAD, 'Investor-State Dispute Settlement' (n 52) 21.

79 August Reinisch, 'Investment Arbitration – The Role of Precedent in ICSID Arbitration' in Christian Klausegger (eds), *Austrian Arbitration Yearbook 2008* (2008 Stämpfli Verlag) 498; Gabrielle Kaufmann-Kohler, 'Arbitral Precedent: Dream, Necessity or Excuse?' (2007) Arbitration International Vol 23(3) 357, 368.

jurisprudential trend'[80] and arrive at different conclusions on matters of jurisdiction and liability.[81] Commentators have suggested that inconsistency is an inherent feature of ISDS due to certain features of the investment law regime.[82] The definitions and treaty standards in IIAs are typically drafted in extremely broad and unqualified terms, which are designed to apply to a wide range of situations and are therefore open to different interpretations.[83] Most IIAs offer little or no guidance to tribunals regarding the normative content and the scope of application of the various standards.[84] This results in legal uncertainty regarding the meaning and can give rise to inconsistent, even contrary, interpretations.[85]

However, given the nature of ISDS as a 'legal system', consistency and predictability is acknowledged as a desirable goal by all stakeholders, a view that is also shared by some ISDS tribunals.[86] According to the tribunal in *Saipem v. Bangladesh,*[87] there is 'a duty to seek to contribute to the harmonious development of investment law and thereby to meet the legitimate expectations of the community of States and investors towards certainty of the rule of law'.[88]

The rise in the number of investment disputes has tested the wisdom of drafting IIAs with extremely broad and open-ended treaty standards, thus delegating the task of defining the meaning and scope of these legal concepts to ISDS tribunals.[89] This delegation vests in the tribunal a certain discretion to give meaning to the treaty provisions.[90] The interpretative authority of tribunals is conditioned by various sources of law.[91] Studies report that the use of these sources by individual tribunals depends heavily on the arguments of the parties to the dispute.[92] In the absence of treaty guidance or any other process that can offer interpretative guidance, tribunals have placed different weights on these rules based

80 *Burlington Resources v Ecuador* (Decision on Liability) (2012) ICSID Case No. ARB/08/5, 187.

81 IBA, 'Consistency, Efficiency and Transparency in Investment Treaty Arbitration' (2018) 6 accessed on <https://www.ibanet.org/Document/Default.aspx?DocumentUid=A8D68C6C-120B-4A6A-AFD0-4397BC22B569>.

82 Thomas Schultz, 'Against Consistency in Investment Arbitration', in Zachary Douglas (eds), *The Foundations of International Investment Law: Bringing Theory into Practice* (OUP 2014) 297, 305.

83 IBA (n 82).

84 Federico Ortino (n 28) 2.

85 UNCTAD, 'Investor-State Dispute Settlement and Impact on Investment Rule-Making' UNCTAD/ITE/IIA/2007/3 (2007) 9.

86 ibid.

87 *Saipem SpA v The People's Republic of Bangladesh* (Decision on Jurisdiction) (2007) ICSID Case No ARB/05/07 67, 67.

88 ibid.

89 ibid.

90 UNCTAD, 'IIA Issues Notes', 2011 (2011) 3.

91 Ole Kristian Fauchald, 'The Legal Reasoning of ICSID Tribunals – An Empirical Analysis' (2008) 19(2) European Journal of International Law 301, 303.

92 ibid 310.

on the parties' arguments, thus giving rise to 'different solutions for resolving the same problem'.[93]

Most traditional IIAs do not provide treaty parties any mechanism to intervene during the arbitration proceedings or control the interpretation of IIA obligations by providing authentic and authoritative interpretations.[94] While some treaties like NAFTA allow treaty parties to file submissions before the arbitral tribunal, their submitted interpretations do not bind the tribunal while adjudicating the dispute.[95] This was the case in *GAMI v. Mexico*, wherein the home state of the investor intervened to submit the interpretation of certain treaty provisions as intended by the treaty parties.[96] However, the submitted interpretation was rejected by the tribunal.[97]

Against this background, it can be seen that ISDS tribunals actually function under the umbrella of their respective IIAs.[98] Therefore, these issues associated with the overly wide discretion of tribunals are rooted in the broad and imprecise language in IIAs, which can be effectively remedied by states as drafters of the IIAs.[99] Thus, states share interpretative authority with tribunals,[100] and treaty interpretation must be understood not as a monologue but as a 'constructive dialogue between investment tribunals and treaty parties'.[101]

It is thus clear that the practice of ISDS tribunals and IIAs are closely intertwined. For this reason, reform of IIAs must be treated as a necessary element of international deliberations to achieve lasting and comprehensive reform of the investment law regime.

II. IIAs must Adapt to the Changing Landscape of Investment & Policy

Efforts to achieve lasting and comprehensive reform of ISDS must not only target the drawbacks of the existing system but also adapt to meet 'the needs and realities of today and tomorrow'[102]. IIAs, like most other treaties, are a product of the specific historic,

93 *AES v Argentina* (Decision on Jurisdiction), ICSID Case No ARB/02/17, 30; Sergio Puig, 'The Death of ISDS' (*Kluwer Arbitration Blog*, 16 March 2018) <http://arbitrationblog.kluwerarbitration.com/2018/03/16/the-death-of-isds/> accessed 30 May 2020.

94 UNCTAD, 'Investor-State Dispute Settlement and Impact on Investment Rule-Making' UNCTAD/ITE/IIA/2007/3 (2007) 138.

95 North America Free Trade Agreement (entered into force 1 January 1994) 32 ILM 289 (NAFTA), art 1128: "On written notice to the disputing parties, a Party may make submissions to a Tribunal on a question of interpretation of this Agreement."

96 *GAMI Investments v Mexico* (Final Award) (2004) UNCITRAL, 11.

97 ibid 29.

98 UNCTAD, 'Investor-State Dispute Settlement' (n 52) 9.

99 UNCTAD, 'IIA Issues Notes' (2011) 3. UNCTAD, IIA Issues Note, 2011, [3.3].

100 ibid.

101 Anthea Roberts, 'Power and Persuasion in Investment Treaty Interpretation: The Dual Role of States' (2010) 1 American Journal of International Law 225.

102 UNCTAD, 'Press Release: UNCTAD Report Proposes Ways to Reform International Investment Agreement System' (24 June 2015) <https://unctad.org/en/pages/PressRelease.aspx?OriginalVersionID=254> accessed 30 May 2020..

economic and social context of the time during which they were negotiated.[103] Today, IIAs must adapt to a new context and respond to new challenges.

1. A New Paradigm for 'Responsible Investment'

While investment remains the primary driver of economic growth and development, the expectations regarding the role and contribution of investment to the economy of the host state have changed.[104] A paradigm shift in investment policy from 'a strong emphasis on interests of private property protection towards a more comprehensive approach'[105] is emerging, as states increasingly seek to promote 'responsible investment' i.e. investment that places social and environmental goals on the same footing as economic objectives.[106] Accordingly, investment policy and IIAs cannot be recalibrated in isolation; they need to be harmonized to fit in with the wider policy agenda of sustainable development.[107]

Traditional IIAs, with their focus on investment protection, must be replaced by new treaties that seek to balance investor rights and obligations, preserve the right of the host state to regulate in public interest, and recognize the significance of economic as well as social and environmental goals in their provisions and design.[108] This view has also entered the mainstream of investment policymaking at the international level,[109] with international organizations such as UNCTAD offering detailed frameworks and alternative models for the recalibration of IIAs.[110]

The ongoing process of ISDS reform presents an opportunity to restore balance within the investment regime by entrenching obligations and standards for corporate responsibility within the text of the IIAs.[111] In order to ensure 'responsible investment', states are increasingly expecting investors to uphold standards of responsible business conduct in areas such as human rights, labour, environmental issues, corruption and corporate

103 UNCTAD, 'UNCTAD's Reform Package for the International Investment Regime' (2018) 14 <https://investmentpolicy.unctad.org/uploaded-files/document/UNCTAD_Reform_Package_2018.pdf>.

104 ibid 15.

105 Steffen Hindelang and Markus Krajewski, 'Towards a More Comprehensive Approach in International Investment Law' in Steffen Hindelang and Markus Krajewski (eds), *Shifting Paradigms in International Investment Law* (OUP 2016) 1,5.

106 UNCTAD, 'Investment Policy Framework for Sustainable Development' (2015) UNCTAD/DIAE/PCB/2015/5, 17.

107 ibid 6.

108 Peter Munchlinski, 'Negotiating New Generation International Investment Agreements: New Sustainable Development Oriented Initiatives' in Steffen Hindelang & Markus Krajewski, *Shifting Paradigms in International Investment Law: More Balanced, Less Isolated, Increasingly Diversified* (OUP 2016) 41.

109 UNCTAD Secretariat Note, 'Recent developments in the international investment regime: Taking stock of phase 2 reform actions' (2 September 2019) TD/B/C.II/42, 1.

110 UNCTAD, 'Investment Policy Framework' (n 106).

111 ibid.

governance.[112] Going forward, by including clear standards for investor conduct in IIAs, states can ensure that investments truly advance social, economic and environmental policy goals.[113]

6. The Greater Role of Governments in Economic Regulation

Over the past four decades, the global investment and development challenges faced by governments have transformed radically.[114] Public health, environmental protection, poverty alleviation, social equity and conservation of natural resources have fostered a new context for government policy, both nationally and internationally.[115] In the face of these new challenges, states have increasingly moved away from deregulation and adopted a stronger role, especially with regard to developmental strategies including economic development.[116]

Investment policy has thus become a component of a much broader and intricate development policy agenda.[117] Today, policymakers seek to steer investment by devising policies that place inclusive growth and sustainable development at the heart of efforts to mobilize foreign investment.[118] This has wider implications for investment policy at the international level. There is a clear imperative to strengthen the development dimension of IIAs, and preserve the flexibility of host states to adopt social and environmental regulations along with maintaining a generally favourable investment climate.[119]

The necessity of a multilateral framework on investment has long been felt within the international community but it has never been as acute as it is today.[120] Given that economies across the world are becoming intricately linked due to forces of globalization, the international community needs '*global rules for a global economy*'[121] that establish

112 Lorenzo Cotula & Terrence Neal, 'UNCITRAL Working Group III: Can Reforming Procedures Rebalance Investor Rights and Obligations?' (2019) South Centre Investment Policy Brief <https://www.southcentre.int/wp-content/uploads/2019/03/IPB15_UNCITRAL-Working-Group-III-Can-Reforming-Procedures-Rebalance-Investor-Rights-and-Obligations_EN-1.pdf> accessed 30 May 2020.

113 ibid 2.

114 Peter Munchlinski (n 108) 41.

115 ibid.

116 UNCTAD, 'UNCTAD's Reform Package for the International Investment Regime' (2018) 16 <https://investmentpolicy.unctad.org/uploaded-files/document/UNCTAD_Reform_Package_2018.pdf> accessed 30 May 2020.

117 Lise Johnson (eds), 'Clearing the Path: Withdrawal of Consent and Termination as Next Steps for Reforming International Investment Law' (2018) CCSI Policy Paper <http://ccsi.columbia.edu/files/2018/04/IIA-CCSI-Policy-Paper-FINAL-April-2018.pdf> accessed 30 May 2020.

118 UNCTAD, 'Investment Policy Framework' (n 106) 6.

119 ibid.

120 Wenhua Shan, 'Toward a Multilateral or Plurilateral Framework on Investment' (2005) E15 Initiative Think Piece 1.

121 Karl Sauvant, 'The Evolving International Investment Law and Policy Regime: Ways Forward' (2016) ICTSD Policy Options Paper 33 <http://e15initiative.org/wp-content/uploads/2015/09/

stable, predictable and transparent governance for all stakeholders within the investment regime including foreign investors and host states as well as ISDS tribunals (or the MIC).

III. The Case for a Multilateral Framework on Investment

While the focus thus far has been largely on individual aspects of investment law and policy and how they could be improved, the ongoing legitimacy crisis offers an unprecedented opportunity to comprehensively reform the framework of IIAs on a global scale.[122]

A multilateral framework on investment would define, in a clear and coherent manner, the relationship between states and foreign investors and offer the legal certainty and stability that global investment requires, while facilitating the flow of sustainable FDI for sustainable development.[123] If and when achieved, a multilateral framework on investment could eliminate the struggles associated with a fragmented regime based on a wide network of IIAs. This would benefit both foreign investors, who would no longer have to deal with disparate and varying commitments in IIAs for different jurisdictions, and governments which would be able to promote investment flows and guarantee investment protection without compromising their other policy objectives.[124]

It has become imperative to develop a holistic and comprehensive approach to the governance of international investment, and one that is ideally the outcome of a multilateral consensus.[125] In this context this article advocates that the current global scenario offers the right setting for the negotiation of a multilateral framework on investment, even as it recognizes the challenges that threaten such an endeavour.

I. Growing Need for Harmonization of Investment Rules

In the current scenario, there are three major compelling reasons to take concerted action for the harmonization of investment rules through multilateral consensus. They are: (1) rise of global value chains and a 'global economy'; (2) fragmentation within the international investment law regime; and (3) structural asymmetry in existing IIAs.

1. Rise of Global Value Chains and a 'Global Economy'

Global Value Chains (GVCs) refer to fragmented supply chains where the tasks and activities associated with production are dispersed across different countries.[126] GVCs may be organized as sequential chains or complex networks, whether at the global or the regional level, and represent the broader economic phenomenon of 'integrated international

WEF_Investment_Law_Policy_regime_report_2015_1401.pdf> accessed 30 May 2020.

122 Wenhua Shan (n 120) 6.

123 ibid.

124 Karl Sauvant (n 121) 34.

125 ibid 33.

126 UNCTAD 'World Investment Report 2013' (n 23) 125.

production' for goods and services.[127] GVCs are typically coordinated by transnational corporations ('TNCs'), which often possess borderless networks of affiliates, contractors and arm's length suppliers.[128]

The phenomenon of GVCs has brought together actors and economic forces from continents and regions all over the world, thus signalling the emergence of a 'global economy'.[129] Forces of globalization and remarkable advances in technology have allowed TNCs to expand their international production networks and engage in cross-border production.[130]

As GVCs become increasingly global in scale and impact, bilateral or regional regulatory frameworks are no longer sufficient for investment protection and need to be replaced by a multilateral framework of governance.[131] In a global economy, 'industry needs a truly global framework for investment, set up in a forward looking and strategic manner and able to cope with a diverse and constantly changing reality'.[132] There is a greater need for coordination in investment policymaking which can ensure coherence and sustainability in policies for investment protection and promotion, irrespective of the jurisdiction where the foreign investment is located.

2. Fragmentation within the International Investment Law Regime

Unlike international trade in goods and services that is governed by the WTO Agreement and its Annexes, there is no legal equivalent for the governance of foreign investment at the international level.[133] On the contrary, the proliferation of IIAs has created a 'spaghetti bowl' of criss-crossing treaty relationships, with little attention to coherence among treaty provisions or to the implications of such divergence for stakeholders in global markets.[134] The 'overlapping, supporting and possibly conflicting'[135] obligations across IIAs are far from consistent, nor can they be consistently interpreted and applied by the hundreds of *ad*

127 ibid 122.

128 ibid.

129 MA Forere, 'New Developments in International Investment Law: A Need for a Multilateral Investment Treaty?' (2018) 21 PER / PELJ 6.

130 Victor Fung, 'Preface: Governance in a Changing World', in Deborah Elms & Patrick Low, *Global Value Chains in a Changing World* (WTO Publications 2013) xix, xxi.

131 Forere (n 129).

132 Herbert Oberhänsli, 'Regulatory Competition in Globalising Markets for Improved Conditions for Private Investment' (2015) E15 Initiative 6.

133 Anne van Aaken, 'Fragmentation of International Law: The Case of International Investment Protection' in Tuomas Tiittala, *Finnish Yearbook of International Law, Vol. XVII* (Bloomsbury Publishing 2008) 91, 95.

134 Richard Baldwin & Patrick Low, *Multilateralizing Regionalism: Challenges for the Global Trading System* (CUP 2009) 1, 5.

135 Simon Lester (eds), *Bilateral and Regional Trade Agreements: Commentary and Analysis* (CUP 2015) 3, 4.

hoc arbitral tribunals specifically constituted for each case.[136]

The 'spaghetti bowl' effect of IIAs has also generated structural problems, the most significant being the creation of an inconsistent and disjointed body of investment law.[137] The variable standards and rules for investment protection under IIAs have allowed investor-state tribunals to give unique interpretations across treaties even for similarly-worded treaty provisions, which has led to divergent, or even contradictory, outcomes.[138] This has compounded the fragmentation within the investment law regime and weakened its coherence and credibility.[139]

This fragmentation highlights the need for harmonized investment regulation that would allow governments to apply a single set of legal rules to investment flows in general.[140] On one hand, harmonization of investment rules would offer uniform protection to foreign investors across jurisdictions and eliminate the potential for treaty shopping, and on the other, states would no longer need to negotiate individual IIAs or resolve conflicts among overlapping IIAs, thus leading to lower transaction costs for both parties.[141] Further, ISDS cases have often demonstrated tensions between IIAs and other areas of international law such as trade, labour, human rights, environmental and tax law.[142] These linkages between IIAs and other areas of international law are vital for public policymaking but governments can effectively address the interaction between IIAs and other policy areas only once harmonization of investment rules is achieved to a certain degree.[143]

3. Structural Asymmetry in Existing IIAs

The contemporary framework of international investment law is highly asymmetrical in its basic normative architecture.[144] Under the traditional BITs, investors hold both substantive and procedural rights but the host states and the communities that are affected

136 Wenhua Shan (n 119) 2.

137 David Howard, 'The Need for a Supranational Organization in Foreign Investment' (2008) 2 Notre Dame Journal of International & Comparative Law 15, 24.

138 August Reinisch, 'The Proliferation of International Dispute Settlement Mechanisms: The Threat of Fragmentation vs. the Promise of a More Effective System? Some Reflections from the Perspective of Investment Arbitration' in Isabelle Buffard and others (eds), *International Law between Universalism and Fragmentation: Festschrift in Honour of Gerhard Hafner, Netherlands* (Martinus Nijhoff 2008) 107, 114.

139 ibid.

140 Mark Feldman, Rodrigo Monardes and Cristian Rodriguez Chiffelle, 'The Role of Pacific Rim FTAs in the Harmonisation of International Investment Law: Towards a Free Trade Area of the Asia-Pacific' (2016) 4.

141 Stephan Schill, *The Multilateralization of International Investment Law* (CUP 2009) 69.

142 UNCTAD, *World Investment Report 2017, Investment and the Digital* Economy (2017) 129.

143 ibid 130.

144 Frank Garcia and others, 'Reforming the International Investment Regime: Lessons from International Trade Law' (2015) 4 Journal of International Economic Law 861, 869.

by such investments have neither.[145] Further, the host state has no leverage in investment treaty arbitration to hold investors accountable for the negative consequences of their investment activities, as states cannot initiate ISDS claims due to the one-sided dispute settlement terms of the BITs.[146] To address this asymmetry, states are now recalibrating their IIAs to foster a more balanced approach, and many newer IIAs include references to business and human rights instruments, global standards and other international agreements to impose corporate social responsibility.[147] However, due to the largely bilateral nature of these efforts, such references remain rare within the overall network of IIAs.[148]

Clearly, the solution to the structural asymmetry embedded within the investment regime cannot be piecemeal, nor can it be tackled sufficiently on a bilateral or regional basis.[149] In order to create a truly balanced regime that provides a level-playing field to investors and treaty parties, one-sided treaty norms (whether they favour investors or host states) must be replaced with a balanced and harmonized configuration of investment rules that can preserve the rights and interests of both stakeholders.

III. Change and Convergence in State Interests

In the past, efforts to develop a multilateral framework have failed largely due to the historic divergence in the interests of developing and developed countries.[150] However, modern trends indicate that 'the constellation of interests of countries has changed profoundly over the past decade, and in a manner that favours a more universal approach'.[151]

In the 1950s and 1960s, the global market for foreign direct investment (FDI) was marked by intense competition, particularly among developing countries that perceived FDI as a necessary road to economic development.[152] This fostered a clear divergence between the interests of *capital-importing* countries, which sought to attract FDI and stimulate investment flows into their territories, and of the *capital-exporting* countries, which wished to protect their nationals and their investments abroad with guarantees of extensive legal protection under BITs.[153] For this reason, governments were able to define

145 Alessandra Arcuri and Montanaro Francesco, "Justice for All? Protecting the Public Interest in Investment Treaties" (2018) 8 Boston College Law Review 2791, 2793.

146 Frank Garcia (n 144) 870.

147 Kun Fan (n 38).

148 UNCTAD, *World Investment Report 2017* (n 21).

149 Mavluda Sattarova, 'Investor Responsibilities from a Host State Perspective: Qualitative Data and Proposals for Treaty Reform' (2019) American Society of International Law 22, 26.

150 Kate Supnik, 'Making Amends: Amending the ICSID Convention to Reconcile Competing Interests in International Investment Law' (2009) 2 Duke Law Journal 343, 345.

151 Karl Sauvant (n 121) <http://e15initiative.org/wp-content/uploads/2015/09/WEF_Investment_Law_Policy_regime_report_2015_1401.pdf> accessed 30 May 2020.

152 Zachary Douglas, *The International Law of Investment Claims* (CUP 2005) 1-2.

153 Jeswald Salacuse, 'BIT by BIT: The Growth of Bilateral Investment Treaties and Their Impact on Foreign Investment in Developing Countries' (1990) 3 The International Lawyer 655, 660; More

their policy interests at the multilateral level based on their role either as home states or host states.

However, the map of global FDI flows looks radically different today.[154] FDI outflows from developing economies (or traditional capital-importing countries) have grown twenty-fold in the last two decades, and accounted for nearly one-fifth of the global FDI flows in 2015.[155] Multinational corporations headquartered in these economies have emerged as significant and outward dynamic investors.[156] Accordingly, developing economies today define their policy interests not only as host countries but also as home countries, which are interested in protecting their nationals and facilitating their investments abroad.[157]

On the other hand, developed economies (or traditional capital-exporting countries) have realized that they are also important recipients of FDI inflows, which include significant inflows from foreign investors based in emerging markets.[158] Further, the number of ISDS cases against developed countries as host states have been on the rise and they are increasingly respondents to claims challenging broad regulatory policies.[159] In response to these shifts, developed economies identify not only as home countries but also as host countries, which are interested in preserving ample policy space to pursue legitimate public policy objectives.[160]

Incidentally, the trend towards more balanced IIAs was started by the United States with its NAFTA treaty partners, Canada and Mexico.[161] Following their experience with a number of high-profile ISDS cases, the three NAFTA states introduced a number of pioneering provisions to balance investment promotion and the host state's right to regulate.[162] One could observe a similar debate in recent IIA negotiations involving developed and developing countries, such as the Trans-Pacific Partnership, the EU-Viet Nam IPA and the Regional Comprehensive Economic Partnership.[163] These agreements

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generally, for the economic function of IIAs, see also, Alan Sykes, 'The Economic Structure of International Investment Agreements with Implications for Treaty Interpretation and Design' (2019) 3 The American Journal of International Law 482-534.

154 UNCTAD, 'Investment Trends Monitor, No. 33' (2020) UNCTAD/DIAE/IA/INF/2020/1 3.

155 World Bank, *Global Investment Competitiveness Report 2017-2018* (2018) 9.

156 ibid.

157 Karl Sauvant (n 121).

158 UNCTAD, 'Investment Trends Monitor, No. 33' (2020) UNCTAD/DIAE/IA/INF/2020/1 3.

159 UNCTAD, 'Recent Developments in Investor-State Dispute Settlement (ISDS), IIA Issues Note No. 1 2014 (2014) UNCTAD/WEB/DIAE/PCB/2014/3 2.

160 Karl Sauvant (n 121).

161 Axel Berger, 'Developing Countries and the Future of the International Investment Regime' (*Deutsche Gesellschaft für Internationale Zusammenarbeit (GIZ) GmbH* 2015) 8 <https://www.die-gdi.de/uploads/media/giz2015-enStudy_Developing_countries_and_the_future_of_the_international_investment_regime.pdf>.

162 ibid.

163 Rodrigo Polanco, 'The No of Tokyo Revisited: Or How Developed Countries Learned to Start

could lead to a more harmonized approach to investment policymaking and if concluded, they could become important stepping stones for a multilateral framework on investment.[164] Thus, the convergence between policy interests of host and home countries offers an ideal springboard to finally pursue a common approach at the multilateral level.

IV. Current Challenges to Building Multilateral Consensus

In the past, the international community has made several attempts to conclude a multilateral investment treaty but these efforts have been largely unsuccessful.[165] To this day, a host of multilateral forums such as the United Nations, the OECD and the WTO have failed to develop multilateral consensus, leaving countries to negotiate investment treaties on the bilateral and regional level.[166] While it is true that the general attitudes of states towards investment governance have changed profoundly and in favour of a more common approach, it is no guarantee for reaching consensus at the multilateral level.[167]

Negotiating a multilateral framework on investment is bound to face considerable challenges even today due to the mixed views and considerable passion surrounding IIAs.[168] These challenges include determining the costs and benefits of a multilateral treaty framework for a global community, and the struggles involved in designing an international instrument that can accommodate the heterogenous interests of multiple potential signatories.[169] There is a palpable risk that the outcome of multilateral negotiations would simply be a 'lowest-common-denominator agreement', which could undermine the benefits that have already been achieved through the practice of existing bilateral and regional IIAs.[170] There is also the matter of the appropriate forum for facilitating these negotiations, whether it should be the WTO, the OECD, the UNCITRAL Working Group III, or any other forum.[171]

One would also have to consider whether a multilateral agreement, if concluded, would supersede that existing IIA commitments of signatory states, or merely provide a floor of standards and obligations for all signatories, including those countries that have

Worrying and Love the Calvo Doctrine'(2015) 1 ICSID Review 172, 173.

164 Karl Sauvant (n 121).

165 Kate Supnik, 'Making Amends: Amending the ICSID Convention to Reconcile Competing Interests in International Investment Law' (2009) 2 Duke Law Journal 343, 357.

166 Efraim Chalamish, 'The Future of Bilateral Investment Treaties: A De Facto Multilateral Agreement' (2009) 2 Brooklyn Journal of International Law 303, 334.

167 Jan Wouters, Philip De Man and Leen Chanet, 'The Long and Winding Road of International Investment Agreements: Toward a Coherent Framework for Reconciling the Interests of Developed and Developing Countries' (2009) 3 Human Rights and International Legal Discourse 263, 288.

168 Karl Sauvant (n 121).

169 ibid.

170 Anders Åslund, *'The World Needs a Multilateral Investment Agreement'* (Peterson Institute for International Economics 2013) 7.

171 ibid.

not concluded IIAs.[172] It must be also considered how this multilateral framework would interact and operate in conjunction with other plurilateral and multilateral agreements, such as the GATS and the TRIMS agreements under the WTO.[173]

The challenges enumerated above are not exhaustive, and additional issues will arise for clarification during multilateral negotiations. However, if achieved, a multilateral framework on investment could 'help overcome the deficiencies of the current patchwork of bilateral, regional, sectoral and few multilateral rules of investment by establishing a framework of transparent, stable, and predictable rules'[174] at both substantive and procedural levels. Therefore, despite the costs and challenges, a multilateral framework on investment is definitely a goal worth striving for in order to achieve lasting and comprehensive reform.

IV. Pathways For A Multilateral Framework on Investment

Despite the resistance that we have witnessed to multilateral efforts in the past, governments today continue to show great willingness in making rules for international investment, as is reflected in the proliferation of bilateral and regional IIAs.[175] This presents the potential to build multilateral consensus over critical substantive and procedural matters among major actors in international investment. Although current political trends suggest that concluding a single overarching multilateral investment treaty may not be feasible at this time, a multilateral approach adopted *incrementally* could shape the future of the investment policymaking by narrowing the differences in ideology and interests of the stakeholders in the investment field.[176]

This section examines three such pathways that offer new possibilities for the gradual pursuit of multilateral rules on investment: (1) mega-regional agreements; (2) plurilateral framework in the WTO; and (3) a draft framework through a stand-alone process.

I. Mega-Regional Agreements

In recent times, there has been a marked shift towards regionalism in the fields of both trade and investment.[177] The interplay between these two fields has become increasingly significant as states actively negotiate regional trade agreements ('RTAs') with investment

172 Karl Sauvant (n 121).

173 Peter Draper, Beatrice Leycegui, Alejandro Jara and Robert Lawrence, 'Foreign Direct Investment as a Key Driver for Trade, Growth and Prosperity: The Case for a Multilateral Agreement on Investment' (*World Economic Forum* 2013) 29.

174 Stefan Amarasinha and Juliane Kokott, 'Multilateral Investment Rules Revisited' in Peter Muchlinski, Federico Ortino and Christoph Schreuer (eds), *Oxford Handbook of International Investment Law* (OUP 2008) 119, 130.

175 Karl Sauvant (n 121).

176 Voon, 'Consolidating International Investment Law: The Mega-Regionals as a Pathway Towards Multilateral Rules' (n 15) 3.

177 Emmanuel Laryea, 'The Globalisation versus Regionalism Debate' (2013) 2 Global Journal of Comparative Law 167, 174.

chapters, among which Mega-regional agreements now occupy centre stage.[178] Mega-regionals are 'deep integration partnerships between countries or regions with a major share of world trade and foreign direct investment (FDI), and in which two or more of the parties are in a paramount driver position, or serve as hubs, in global value chains.'[179] The geographical scope of the mega-regionals encompasses developed and emerging markets across regions,[180] and they typically cover not only substantive obligations relating to trade and investment but also other issues such as labour standards and the environment.[181] Given their coverage and reach, they may form the "*nucleus of global economic governance in the future*".[182]

Mega-regional agreements, such as the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP), Transatlantic Trade and Investment Partnership (TTIP), Regional Comprehensive Economic Partnership (RCEP), EU-Canada Comprehensive Economic and Trade Agreement (CETA), are often seen as stepping stones to the creation of a far-reaching multilateral framework on investment.[183] Despite the current climate of uncertainty regarding the future of these agreements, the investment chapters in the Mega-regionals '*converge to an astonishing degree*'[184] and thus carry great potential for multilateralization of investment rules.[185] Given the sheer number of countries involved and the uniformity in the approaches to standards of investment liberalization and protection[186] these agreements are likely to have a major impact on global investment rulemaking and

178 August Reinisch, 'Investment Protection and Dispute Settlement in Preferential Trade Agreements: A Challenge to BITs?' (2009) 2 ICSID Review – Foreign Investment Law Journal 416, 417.

179 Ricardo Meléndez-Ortiz, 'Mega-regional Trade Agreements Game-Changers or Costly Distractions for the World Trading System?' (*World Economic Forum* 2014) 6.

180 Chris Brummer, *Minilateralism: How Trade Alliances, Soft Law and Financial Engineering are Redefining Economic Statecraft* (CUP 2014) 55.

181 Tomas Hirst, 'What Are Mega-Regional Agreements?' (*World Economic Forum* 09 July 2014) <https://www.weforum.org/agenda/2014/07/trade-what-are-megaregionals/> accessed 30 May 2020.

182 Stephan Schill and Heather Bray, 'The Brave New (American) World of International in Investment Law: Substantive Investment Protection Standards in Mega-Regionals' (2016) 2 British Journal of American Legal Studies, 419, 421.

183 Voon, 'Consolidating International Investment Law: The Mega-Regionals as a Pathway Towards Multilateral Rules' (n 15) 3; See also Stefanie Schacherer , 'TPP, CETA and TTIP Between Innovation and Consolidation—Resolving Investor–State Disputes under Mega-regionals' (2016) 3 Journal of International Dispute Settlement 628, 649.

184 Catherine Titi, 'The Evolution of Substantive Investment Protections in Recent Trade and Investment Treaties' (ICSTD 2018) 4.

185 Leon Trakman, 'The Status of Investor - State Arbitration: Resolving Investment Disputes under the Transpacific Partnership Agreement' (2014) 1 Journal of World Trade 1, 2.

186 Anna Joubin-Bret, 'Preferential Trade and Investment Agreements and Regionalism: A Stepping Stone Towards a Multilateral Set of Investment Rules or Another Type of Noodles in the Spaghetti Bowl?' in Rainer Hofmann, Stephan Schill and Christian Tams (eds), *Preferential Trade and Investment Agreements: From Recalibration to Reintegration* (Nomos 2013) 289, 294.

may even lead to a new generation of investment rules.[187]

Investment chapters in Mega-regionals adopt formulations that are far more specific than the broad and vague principles of investment protection contained in the old-style BITs.[188] They not only clarify the scope of investor rights but also the extent of regulatory powers of host states through more detailed treaty drafting, while seeking to create a textual balance between investment protection and the policy space of host states.[189]

Overall, treaty drafters have sought to recalibrate the treaty text by limiting the scope of application of investment protection standards, developing better formulations of substantive standards of treatment to accommodate more regulatory space for states and creating new institutional safeguards that allow treaty parties to exercise greater control over the dispute settlement framework.[190] For instance, the TTIP gives specific meanings to the terms 'direct expropriation' and 'indirect expropriation',[191] and clarifies:

> 'except in the rare circumstance when the impact of a measure or series of measures is so severe in light of its purpose that it appears manifestly excessive, non-discriminatory measures of a Party that are designed and applied to protect legitimate public welfare objectives…do not constitute indirect expropriation.'[192]

A similar policy exception for indirect expropriation is also present in the CPTPP.[193] More generally, the Mega-regionals contain, without exception, a separate provision or exception that preserves host states' regulatory powers for legitimate public welfare objectives, including for the protection of the environment, public health and safety.[194]

That said, Mega-regionals do not represent simple improvements on traditional BITs but are unique agreements that have recalibrated standards of protection in ways that are both innovative and ambitious. *First*, mega-regionals have assumed an expanded role

187 UNCTAD, 'World Investment Report 2014, Investing in the SDGs: An Action Plan' (2014) 118-121.

188 Stephan Schill and Heather Bray, 'The Brave New (American) World of International in Investment Law: Substantive Investment Protection Standards in Mega-Regionals' (n 182) 425.

189 Karsten Nowrot, 'Of "Plain" Analytical Approaches and "Savior" Perspectives' (2017) <https://www.wiso.uni-hamburg.de/fachbereich-sozoek/professuren/koerner/fiwa/archiv/publikationsreihe/heft-10-nowrot-investment-chapters-in-mega-regionals.pdf> accessed 30 May 2020.

190 Stephan Schill and Heather Bray, 'The Brave New (American) World of International in Investment Law: Substantive Investment Protection Standards in Mega-Regionals' (n 182) 425.

191 Transatlantic Trade and Investment Partnership (TTIP), Annex I, 1 and 2.

192 TTIP, Annex I, 3.

193 The Comprehensive and Progressive Agreement for Trans-Pacific Partnership (2018) (CPTPP), Annex 9-B, 3(b).

194 TTIP, art 2.1; CPTPP, art 9.10.3(h); Comprehensive Economic and Trade Agreement (CETA) between Canada, of the one part, and the European Union and its Member States, of the other part OJ L 11, art 19.2(2).

to become instruments for investment liberalization, by including greater market access commitments and applying standards of national treatment and MFN treatment to the entry of foreign investments.[195] This can be witnessed in the CETA, which imposes limitations on states' ability to restrict access for foreign investors while providing for non-discriminatory treatment at the pre-establishment phase.[196] *Second*, due to the increased public scrutiny and need for greater transparency, mega-regionals include provisions that grant greater access to the public to case documents and arbitral hearings, and that allow *amici curiae* to make submissions in arbitration proceedings.[197]

Finally, Mega-regionals have increased the potential for consensus-building between states by facilitating cross-deals between trade and investment, and allow states to concede certain level of protection in one sector for favourable protection in another sector.[198] This combination of trade and investment also offers great opportunity for cross-fertilization, as is reflected in the general exception clauses in some mega-regionals that mirror GATT Article XX and Article XIV of the GATS.[199]

Given these new developments, the Mega-regionals have offered a template and platform to enhance consensus that is already emerging, and which, given the right conditions and participation, could evolve into a multilateral framework for investment in the future.

II. Plurilateral Framework in the WTO

There has been overwhelming support in academic literature to pursue reform of investment rules within the framework of the WTO.[200] It is widely believed that 'the WTO offers the best platform for trade and investment regimes to be combined and consolidated, as a unified system providing systematic legal and institutional support for the future growth of GVCs'.[201] This is for a variety of reasons, including the nearly global membership of the WTO, the success of its dispute settlement body and its broad mandate over trade and

195 Stephan Schill and Heather Bray, 'The Brave New (American) World of International in Investment Law: Substantive Investment Protection Standards in Mega-Regionals' (n 182) 425.

196 CETA, arts 8.4, 8.6 and 8.7.

197 Trans-Pacific Partnership Agreement (signed 4 February 2016), art 9.24(2); Free Trade Agreement Between the European Union and the Republic of Singapore (signed 19 October 2018) (EU-Singapore FTA), Annex 9-C, art 2; CETA, art 8.36.

198 Stephan Schill and Heather Bray, "The Brave New (American) World of International in Investment Law: Substantive Investment Protection Standards in Mega-Regionals" (n 182) 444.

199 CETA, art 28.3.

200 For example, see Rafael Lael-Arcas, *International Trade and Investment Law: Multilateral, Regional and Bilateral Governance* (Edward Elgar 2010) 258–259; Stefan Amarasinha and Juliane Kokott, 'Multilateral Investment Rules Revisited' in Peter Muchlinski, Federico Ortino and Christoph Schreuer (eds), *Oxford Handbook of International Investment Law* (OUP 2008) 119, 136-, Anders Åslund, *'The World Needs a Multilateral Investment Agreement'* (Peterson Institute for International Economics 2013) 7.

201 Wenhua Shan (n 120) 12.

investment matters.[202]

However, attempts to conduct negotiations for multilateral investment rules straightaway in the WTO are likely to be mired in controversy, as is reflected in the shadow and pitfalls of past failures. During the 2003 WTO Ministerial Conference in Cancún, WTO members discussed whether the WTO should be mandated to negotiate a multilateral investment agreement.[203] No agreement could be reached,[204] however, due to the irreconcilable differences in interests and priorities of the developed and developing states.[205] The General Council ultimately held in 2004 that the issue of trade and investment 'will not form part of the Work Programme set out in [the Doha] Declaration and therefore no work towards negotiations on any of these issues will take place within the WTO during the Doha Round',[206] thus putting an end to any potential progress on a multilateral investment framework under the umbrella of the WTO.[207]

Even today, given the flailing performance of the WTO's negotiating arm in recent years,[208] the outlook for conducting negotiations for a multilateral investment framework does not seem very promising within the WTO. Against this background, a better approach would be to move forward through a plurilateral framework on investment within the WTO.

Plurilateral agreements are the singular exception to the 'single undertaking' principle of WTO agreements and are recognized in Article II:3 of the WTO Agreement, which provides that such agreements are binding only on the signatory Members and do not create rights or obligations for other WTO Members.[209] States can utilize the considerable

202 Silvia Fiezzoni, 'Striking Consistency and Predictability in International Investment Law from the Perspective of Developing Countries' (2012) 4 Frontiers of Law in China 521, 542.

203 WTO, 'The Fifth WTO Ministerial Conference (2003) <https://www.wto.org/english/thewto_e/minist_e/min03_e/min03_e.htm> accessed 30 May 2020.

204 WTO, *Carlos Perezdel Castillo, Closing Remarks* (WTO General Council: Follow Up to the Cancun Ministerial Conference, 16 December 2003) <https://www.wto.org/english/news_e/news03_e/stat_gc_chair_16dec03_e.htm> accessed 30 May 2020.

205 Elizabeth Smythe, 'From Singapore to Cancún: Knowledge, Power and Hegemony in the Negotiation of Investment Rules at the WTO', (Paper presented at the Annual Meeting of the International Studies Association, Quebec, 2004) 5.

206 WTO, *Doha Work Programme* (1 August 20014) WT/L/579 <https://www.wto.org/english/tratop_e/dda_e/draft_text_gc_dg_31july04_e.htm> accessed 30 May 2020.

207 Jan Wouters, Philip De Man and Leen Chanet, 'The Long and Winding Road of International Investment Agreements: Toward a Coherent Framework for Reconciling the Interests of Developed and Developing Countries' (2009) 3 Human Rights and International Legal Discourse 263, 288.

208 Rudolf Adlung and Hamid Mamdouh, 'Plurilateral Trade Agreements: An Escape Route for the WTO?', WTO Working Paper 2016, 8 <https://www.wto.org/english/res_e/reser_e/ersd201703_e.pdf> accessed 30 May 2020. See also Michitaka Nakatomi, 'Plurilateral Agreements: A Viable Alternative to the WTO?' ADBI Working Paper 2013 5 < https://www.adb.org/sites/default/files/publication/156294/adbi-wp439.pdf> accessed 30 May 2020.

209 Article II:3, Agreement Establishing the World Trade Organization (signed 15 April 1994) 1867 UNTS 154 (Marrakesh Agreement). Two such agreements have expired (Marrakesh Agreement,

room and flexibility offered by plurilateral agreements to jumpstart negotiations as well as build consensus gradually for a multilateral investment framework among a '*critical mass*' of WTO Members at first, instead of its entire membership.[210] Ideally, such a multilateral framework should be designed with flexibility so that it can accommodate relevant differences without requiring a Member state to relinquish its key interests and bargains.[211] The concept of '*variable geometry*' found in WTO Agreements shows that multilateralism does not necessitate a 'one-size-fits-all' approach and parties can instead adopt different standards for different types of countries or actors within a broader multilateral framework.[212] Once such a plurilateral agreement is concluded, it could be opened for future accessions by other WTO Members.

There is also a possibility that such a plurilateral agreement could cover not only investment rules but also matters related to investor-state dispute settlement. It has been suggested that the WTO Dispute Settlement Body could play a greater role in settling investor-state disputes[213] which seems rather implausible given the current legal structure of the WTO and the ongoing Appellate Body crisis. Nevertheless, any future outcome and understanding reached under the aegis of the UNCITRAL Working Group III discussions could also be easily incorporated into the plurilateral framework in the WTO by the Members and could even become the nucleus around which the multilateral framework on investment is built.

III. Draft Framework through a Stand-Alone Process

A stand-alone process presents another appealing option, especially considering how structured and systematic multilateral initiatives in the OECD and the WTO have failed in the past.[214] There are other precedents for similar stand-alone negotiations at the international level that have been effective in the past. For instance, in 1990, the UN General Assembly established the Intergovernmental Negotiating Committee for a Framework Convention on Climate Change, which operated independently and outside the UN framework, with its own secretariat. The Committee developed the text of the Framework Convention, and it

annex 4(c) (International Dairy Agreement); Marrakesh Agreement, annex 4(d) (International Bovine Meat Agreement. Two such agreements are currently in force (Marrakesh Agreement, annex 4(a) (Agreement on Trade in Civil Aircraft); Marrakesh Agreement, annex 4(b) (Agreement on Government Procurement).

210 Michitaka Nakatomi (n 208) 7, 8.

211 Voon, 'Consolidating International Investment Law: The Mega-Regionals as a Pathway Towards Multilateral Rules' (n 15) 13.

212 Craig Van Grasstek and Pierre Sauvé, 'The Consistency of WTO Rules: Can the Single Undertaking Be Squared with Variable Geometry?' (2006) 4 Journal of International Economic Law 837, 837.

213 Nicolette Butler, 'Possible Improvements to the Framework of International Investment Arbitration' (2013) 4 Journal of World Investment & Trade 613, 615.

214 Wenhua Shan (n 120) 11.

was adopted in May 1992.[215] More recently, in March 2013, negotiations were commenced outside the WTO for a trade agreement to liberalize trade in services – the Trade in Services Agreement (TiSA).[216] The negotiations are currently ongoing among 23 member states of the WTO, and negotiating parties intend to transform TiSA into a WTO agreement that will be open to accession by other states in the future.[217]

Going forward, any consensus-based process to develop a multilateral investment framework would have to be government-driven and government-owned.[218] However, in the absence of any constraints of organizational membership, stand-alone negotiations can include a wide range of actors and stakeholders, both governmental or non-governmental. By discarding the typical inter-governmental setting, this process can foster an open and inclusive discussion of the fundamental issues concerning the investment regime, thus allowing parties to take a holistic view of the reforms and build upon the significant progress achieved by various international organizations.[219] Broader participation and a transparent process can allow the members to develop solutions to advance the relationship between investors and host states, and make the global flows of FDI more sustainable and responsible for international communities.[220]

In terms of outcome, the process could lead to a draft framework that can serve as a model template for governments to guide their efforts to reform the investment law and policy regime in the short-term and the long-term.[221] This approach has been used by OECD with reasonable success. In 2006, a task force consisting of government officials from 60 OECD and non-OECD countries developed the *OECD Policy Framework for Investment* through consultations across different regions of the world.[222] Leading institutions such as the World Bank and UN and a number of business, labour and civil society organisations participated in the process and contributed to the development of the Framework. The Framework assists governments to design and implement policy reforms for creating a sturdy environment for domestic and foreign investment.[223] More recently, in 2014, it was updated in light of the changes to the global economic landscape and the need to improve

215 United Nations Framework Convention on Climate Change (adopted 9 May 1992, entered into force 21 March 1994) 1771 UNTS 107.

216 European Commission, 'Trade in Services Agreement (TiSA)' <https://ec.europa.eu/trade/policy/in-focus/tisa/> accessed 30 May 2020.

217 Government of Canada, 'Trade in Services Agreement (TiSA)' <https://www.international.gc.ca/trade-agreements-accords-commerciaux/topics-domaines/services/tisa-acs.aspx?lang=eng,> accessed 30 May 2020.

218 Karl Sauvant (n 121).

219 ibid.

220 ibid.

221 ibid.

222 OECD*, Policy Framework for Investment* (2006).

223 OECD, *Update of the Policy Framework for Investment* (2015).

investment conditions.[224]

A similar approach could be adopted for developing a draft framework for multilateral investment rules and an international body or institution such as the G-20 could provide the necessary leadership and momentum to the policy dialogue among the various stakeholders.[225] This draft framework could eventually form the foundation for a binding, inclusive and consensus-based multilateral framework, which reflects a plurality of interests of the negotiating states, as well as of the people and the communities that state actors represent on the international level.

V. European Union As The Driving Force Behind Reform

Since 2009, the European Commission has been working actively to centralize and consolidate the legal framework for investment protection in the EU.[226] The Commission has indicated that it seeks to harmonize the rules for investment liberalization and protection as well as create a level playing field for investment.[227] More recently, it has emerged as one of the fiercest critics of ISDS, and has become the driving force behind the proposal to establish the MIC that seeks to replace the ISDS mechanism altogether.[228]

The EU, taken as a whole, constitutes one of the largest and most influential trading blocs in the world, and the policy choices that EU institutions make regarding trade and investment can have far-reaching impact on various regions and economic sectors even outside the EU.[229] Further, the EU is the world's largest source and the top global destination for FDI[230] and has become a formidable power in international economic governance. Given the weight that EU exercises in international investment negotiations, it is uniquely positioned to lead from the front and 'set a new agenda for investment protection and investor state dispute settlement provisions'[231] that can transform the face of international

224 ibid.

225 Wenhua Shan (n 120) 11.

226 Carrie Anderer, "Bilateral Investment Treaties and the EU Legal Order: Implications of the Lisbon Treaty" (2010) 3 Brooklyn Journal of International Law 851, 854.

227 European Commission, 'Towards a Comprehensive European International Investment Policy' (07 July 2010) COM(2010)343 final <https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2010:0343:FIN:EN:PDF> accessed 30 May 2020.

228 For details and analysis, see Catherine Titi,'The European Union's Proposal for an International Investment Court: Significance, Innovations and Challenges Ahead' (2017) 1 Transnational Dispute Management.

229 Sean McClay, 'Can It Lead from behind: The European Union's Struggle to Catch up in International Investment Policy Making in the Wake of the Lisbon Treaty' (2016) 2 Texas International Law Journal 259, 260.

230 European Commission, 'Investment' <https://ec.europa.eu/trade/policy/accessing-markets/investment/> accessed 30 May 2020.

231 European Commission, 'Factsheet: Investment Protection and Investor-to-State Dispute Settlement in EU Agreements' (26 November 2013) <http://www.sice.oas.org/TPD/USA_EU/Studies/tradoc_151916__Investment_e.pdf>.

investment law as we know it.[232]

While a multilateral framework on investment does not seem to be on the EU policy agenda for the moment,[233] the EU has certainly made an independent push for substantive and systemic reform of IIAs in recent years that could pave the way for a multilateral framework in the future.

I. Towards a New Generation of EU IIAs

With its new investment policy, the EU seeks to create a '*better balance*' between the state's right to regulate for public policy objectives and the need to protect investors.[234] In the view of the European Commission, this can be achieved by clearly defining the scope of investment protection standards and leaving no room for interpretive ambiguity.[235] The Commission is also aware that the EU is in 'a strong position to convince its trading partners of the need for clearer and better standards' and has therefore adopted bilateral negotiations with third countries as the primary route for substantive reform of EU IIAs.[236] However, it has expressly rejected the idea of an 'EU Model BIT' as a template for IIA negotiations to avoid any limitations on its negotiation freedom.[237]

Over the last decade, the EU has been engaged in bilateral negotiations with several states including Canada, India, Singapore, Japan, China and Vietnam for investment protection agreements (IPAs) or comprehensive trade agreements that will also include an investment chapter.[238] According to the latest draft texts of these agreements, the EU has adopted a uniform approach towards improving investment protection rules in three main areas: (1) host state's right to regulate; (2) FET standard of protection; and (3) protection against expropriation.

1. Host State's Right to Regulate

The new generation of EU agreements for investment protection, from the CETA to the EU-VietNam IPA, contain provisions that expressly affirm the right of host states to regulate

232 Catherine Titi, 'International Investment Law and the European Union: Towards a New Generation of International Investment Agreements' (2015) 3 European Journal of International Law 639, 654.

233 The EU has chosen bilateral negotiations as its primary vehicle for create better and clearer standards. See European Commission, 'Factsheet: Investment Protection and Investor-to-State Dispute Settlement in EU Agreements' (26 November 2013) <http://www.sice.oas.org/TPD/USA_EU/Studies/tradoc_151916__Investment_e.pdf> accessed 30 May 2020.

234 ibid 1.

235 ibid 6.

236 ibid 1.

237 European Commission, 'Towards a Comprehensive European International Investment Policy' (07 July 2010) COM(2010)343 final <https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2010:0343:FIN:EN:PDF> accessed 30 May 2020.

238 European Commission, 'Negotiations and Agreements'< https://ec.europa.eu/trade/policy/countries-and-regions/negotiations-and-agreements/> accessed 30 May 2020.

to achieve legitimate public policy objectives.[239] Further, they also clarify that the mere fact that a state amends its regulatory framework that results in a negative impact on a foreign investment would not constitute a breach of the treaty obligations.[240] In addition to this section on the right to regulate, the treaty texts also include general exceptions modelled on Article XX of the GATT, which are applicable to certain investment provisions.[241] They also include, *inter alia*, national security exceptions,[242] prudential carve-outs,[243] limited application to taxation measures,[244] and exceptions for activities of central banks.[245] Thus, these agreements make it abundantly clear that the regulatory autonomy of the treaty parties must be preserved and respected by future tribunals (or the MIC).

2. FET Standard of Protection

Another item on the EU's investment agenda is to ensure that key substantive standards of investment protection such as FET are drafted in a *'detailed and precise manner*'.[246] The recent EU investment chapters and IPAs provide an exhaustive list of conduct that qualifies as breach of the FET standard: denial of justice in criminal, civil and administrative proceedings; fundamental breaches of due process; manifestly arbitrary conduct; harassment, coercion, abuse of power or similar bad faith conduct.[247] Notably, the element of legitimate expectations of a covered investor does not feature in this list.[248] According to the draft texts, legitimate expectations would be created based on a state's "*specific or unambiguous representations to an investor*" and can only be "*taken into account*" by the tribunal as a factor while determining whether the FET standard has been breached.[249] By choosing such innovative language, the EU seeks to exercise a greater level of control over the application of the FET standard with the twin objective of limiting arbitral discretion and protecting the regulatory space of host states.[250]

239 CETA, art 8.9 (1); Investment Protection Agreement between the European Union and its Member States of the one part, and the Republic of Singapore, of the other part (signed 19 October 2018) (EU-Singapore IPA), art 2.2(1); EU-Viet Nam Investment Protection Agreement (signed 30 June 2019) (EU-Viet Nam IPA), art 2.2(1).

240 CETA, art 8.9 (2); EU-Singapore IPA, art 2.2(2); EU-Viet Nam IPA, art 2.2.(2).

241 CETA, art 28.3; EU-Singapore IPA, art 2.3(3); EU-Viet Nam IPA, art 4.6.

242 CETA, art 28.6; EU-Singapore IPA, art 4.5EU-Viet Nam IPA, art 4.8.

243 CETA, art 28.8; EU-Singapore IPA, art 4.4; EU-Viet Nam IPA, art 4.5.

244 CETA, art 28.7; EU-Singapore IPA, art 4.6; EU-Viet Nam IPA, art 4.4.

245 CETA, art 28.5; EU-Singapore IPA, art 4.7; EU-Viet Nam IPA, art 4.7.

246 European Commission, 'Factsheet: Investment Protection and Investor-to-State Dispute Settlement in EU Agreements' (26 November 2013) <http://www.sice.oas.org/TPD/USA_EU/Studies/tradoc_151916__Investment_e.pdf> accessed 30 May 2020..

247 CETA, art 8.10(2); EU-Singapore IPA, art 2.4(2); EU-Viet Nam IPA, art 2.5(2).

248 Catherine Titi, 'International Investment Law and the European Union: Towards a New Generation of International Investment Agreements' (2015) 3 European Journal of International Law 639, 656.

249 CETA, art 8.10(4); EU-Singapore IPA, art 2.4(3); EU-Viet Nam IPA, art 2.5(3).

250 Catherine Titi, 'International Investment Law and the European Union: Towards a New

3. Protection against Expropriation

The second standard that the EU wishes to specify in its investment agreements is the protection against expropriation. While the basic elements of expropriation have not been changed, the draft texts include annexes with detailed provisions that: (i) describe 'direct expropriation' and 'indirect expropriation', (ii) specify which factors could be taken into account while deciding whether a measure constitutes indirect expropriation, and (iii) exclude state measures adopted to protect legitimate policy objectives "*except in rare circumstances*".[251] Further, EU has also clarified the provisions relating to compensation, stating that it shall amount to the "*fair market value of the covered investment immediately before its expropriation or impending expropriation became public knowledge plus interest at a commercially reasonable rate*.".[252] These detailed provisions seek to provide concrete guidance to arbitrators on how to decide whether a government measure constitutes indirect expropriation and thus prevent investors from abusing the system.[253]

While other non-EU IIAs have also included the innovative language and detailed formulations seen in recent EU IIAs, these revisions demonstrate the clear determination of the EU to recalibrate the balance in the investment protection regime - a desire that also seems to be shared by its influential treaty partners. While its current approach to investment negotiations is largely bilateral, the EU has the necessary political will and policy capacity to become the driving force behind substantive reform at the multilateral level and lead the efforts to create a global framework on investment.

II. Leading the Way for Systemic Reform

The investment law regime is currently standing on a complex web of nearly 3,300 treaties, out of which more than 2,500 IIAs in force today are 'old' treaties, i.e. first-generation treaties that were concluded before 2010.[254] The continued existence of these treaties has become a systemic problem; it creates overlaps and fragmentation in treaty relationships and perpetuates inconsistencies that can be exploited by foreign investors.[255] Most of the recently concluded IIAs do not clarify whether the 'new' treaties replace the pre-existing treaties between the same treaty partners, which has led to the parallel application of outdated and new treaties.[256] This increases the complexity in an already

Generation of International Investment Agreements' (n 248) 58, 82.

251 CETA, Annex 8-A; EU-Singapore IPA, Chapter 4 – Annex 1; EU-Viet Nam IPA, Chapter 4 – Annex 4.

252 CETA, art 8.12(2); EU-Singapore IPA, art 2.6(2); EU-Viet Nam IPA, art 2.7(2).

253 European Commission, 'Factsheet: Investment Protection and Investor-to-State Dispute Settlement in EU Agreements' (26 November 2013) 8 <http://www.sice.oas.org/TPD/USA_EU/Studies/tradoc_151916__Investment_e.pdf> accessed 30 May 2020.

254 UNCTAD, 'International Investment Policymaking in Transition: Challenges and Opportunities for Treaty Renewal' (IIA Issues Note, 2013) 1.

255 UNCTAD, 'IIA Issues Note, 2017' (2017) 7.

256 UNCTAD, 'Reform of the International Investment Agreement Regime: Phase 2' (2017) TD/

complex system.[257]

The EU, however, has developed a pioneering approach aimed at consolidation within the IIA network. When the EU concludes an IIA with a third state, the new agreement replaces all pre-existing BITs and IIAs that were concluded by individual EU member States with that state. For example, CETA is scheduled to replace eight prior BITs between Canada and individual EU member States.[258] Similar provisions have also been incorporated in the EU-Singapore IPA and the EU-VietNam IPA, which will replace twelve and twenty-one pre-existing treaties respectively.[259] The EU thus ensures an effective transition from the 'old' to the new treaty regime by establishing uniform and modern rules for all treaty partners.[260] From a systemic reform perspective, the EU approach has the dual effect of modernizing investment rules and reducing fragmentation and gaps in treaty relationships within the IIA network.[261] The EU's focus and attention on consolidation would prove to be a powerful asset while creating a future multilateral framework on investment, which would necessarily require states to abrogate their pre-existing IIAs and replace them with a single framework of investment rules.

VI. Conclusion

Considering the mounting criticism that the investment law regime has been facing lately, it is clear that comprehensive and lasting reform is necessary to ensure that the ISDS system works effectively for all stakeholders. States are already deliberating on proposals to replace ISDS but they have opted for bilateral or plurilateral negotiations as the primary vehicle for addressing the substantive flaws of IIAs. This study has shown that procedural reform of ISDS is likely to be inadequate and short-lived unless efforts are made to create a multilateral rules-based framework on investment to tackle the substantive deficiencies of the IIAs. While it is true that such efforts have failed in the past, the current political context and recent economic trends offer an unprecedented opportunity to reconsider a multilateral framework on investment due to greater convergence in the interests and positions of states in relation to FDI. Negotiations for a multilateral investment treaty do not seem very plausible at this time but there are various pathways that could incrementally lead to multilateral consensus.

This study also considers that the EU could emerge as the driving force behind large-scale reform of the investment law regime. It has already refined the treaty language and design of its IIAs to recalibrate the balance of investor rights and state obligations,

B/C.II/MEM.4/14, 8.

257 ibid.

258 CETA, art 30.8.

259 EU-Singapore IPA, Annex 5; EU-Viet Nam IPA, Annex 6.

260 UNCTAD, 'Reform of the International Investment Agreement Regime: Phase 2' (2017) TD/B/C.II/MEM.4/14 9.

261 ibid 8.

which have been adopted by its influential treaty partners such as Canada, Singapore and Vietnam. The EU has also placed considerable emphasis on consolidation of its IIAs by including provisions to replace pre-existing and overlapping treaties, thus resulting in broader systemic reform.

It remains to be seen whether the idea of a multilateral framework on investment would capture the attention of governments just yet. However, as *Voon* puts it, 'the energy that many States are continuing to put into plurilateral and mega-regional agreements is capable of being harnessed towards the longer-term pursuit of multilateral rules as a tool for reform of the beleaguered investment regime',[262] and it is hoped that states realize this sooner than later.

262 Voon, 'Consolidating International Investment Law: The Mega-Regionals as a Pathway Towards Multilateral Rules' (n 15) 30.