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ARTICLE

STRIKING CONSISTENCY AND PREDICTABILITY IN INTERNATIONAL INVESTMENT LAW FROM THE PERSPECTIVE OF DEVELOPING COUNTRIES

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The fragmentation of international investment law into bilateral investment treaties (BITs) and other international investment agreements (IIAs) made it impossible as a system of law. In addition, the potential for inconsistent and conflicting decisions (especially against developing countries) in investment treaty arbitrations are abundant. The causes of this situation are two-fold and concern both substantive law and procedural law. Concerning the substance, the fragmentation of sources of international investment law plays a significant role in disaggregating coherence. Due to the large number of BITs, a state measure might be assessed differently under the two existing investment treaties, with each treaty specifying different standards of investment protection, even varying with the nationality of the investor affected. Inconsistent decisions can also result from the possibility of having multiple proceedings, in the same or different form, relating to an identical set of facts that can arise from independent claims. For developing countries, who face investment law disputes more frequently than developed countries, an ideal solution would be a global investment treaty or a plurilateral investment agreement under the World Trade Organization (WTO) and use its dispute settlement system to resolve investment disputes.

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INTRODUCTION

International investment arbitrations have grown more common during the last two decades, especially at the International Centre for Settlement of Investment Disputes (ICSID), thanks partly to more than 2700 BITs as well as the Free Trade Agreements (FTAs), the North American Free Trade Agreement (NAFTA) and other regional and multilateral investment treaties, such as the Energy Charter Treaty.

The problem of having many potentially applicable laws for any given dispute is further complicated by the fact that there is no uniform dispute settlement body. The decision in arbitration is determined by an ad hoc arbitration panel. There are no institutional mechanisms that ensure

consistency and predictability in the decision of the arbitration tribunals. As the number of investment agreements has risen, the cases brought to dispute settlement have become increasingly complex. This has raised the risk of multiple and conflicting awards, as the same dispute can be resolved under different treaty regimes, leading to very different awards.

Although both developed countries and developing countries need to secure a stable legal environment for international investment, at the present time there is no uniform multilateral investment framework. Concerning the fragmentation of international investment law, it is widespread. Law scholars from all parts of the world published a statement on the website of York University in Toronto, Canada, that states:

> *States have a fundamental right to regulate on behalf of public welfare and this right must not be subordinated to the interests of investors, where the right to regulate is exercised in good faith and for a legitimate purpose [...]*
>
> *Awards issued by international arbitrators against states have incorporated in numerous cases overly expansive interpretations of language in investment treaties. These interpretations have prioritized the protection of the property and economic interests of transnational corporations over states' right to regulate and the right to self-determination of peoples. This is especially evident in the approach adopted by many arbitration tribunals to investment treaty concepts of corporate nationality, expropriation, most favored nation treatment, non-discrimination, and fair and equitable treatment, all of which have been given unduly pro-investor interpretations at the expense of states, their governments, and those on whose behalf they act. This has constituted a major reorientation of the balance between investor protection and public regulation in international law [...]*
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> *Investment treaty arbitration as currently constituted is not a fair, independent, and balanced method for the resolution of investment disputes and therefore should not be relied on for this purpose. There is a strong moral as well as political case for governments to withdraw from investment treaties and to oppose investor-state arbitration, including by refusal to pay arbitration awards against them where an award for compensation has followed from a good faith of measure that was introduced for a legitimate purposes [...]*

States should review their investment treaties with a view to withdrawing from or renegotiating them in light of the concerns expressed above; should take steps to replace or curtail the use of investment treaty arbitration; and should strengthen their domestic justice system for the benefit of all citizens and communities, including investors.[1]

Also in the United Nations Conference on Trade and Development (UNCTAD) World Investment Report 2011 it is mentioned that striking the proper balance between the national and international policy developments of further investment liberalization/promotion has become a key policy

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[1] This statement emerges from discussions during a visit by Professor M. Sornarajah to Osgoode Hall Law School of York University in Toronto, Canada, and at a workshop on the adjudication of international economic disputes held at the Oñati International Institute for the Sociology of Law. 47 professors and researchers from many universities who signed this statement are as follows: Gus Van Harten (Osgoode Hall Law School), David Schneiderman (University of Toronto), Muthucumaraswamy Sornarajah (National University of Singapore), Peter Muchlinski [University of London (SOAS)], Sol Picciotto (Lancaster University), Craig Scott Osgoode (Hall Law School), Kyla Tienhaara (Australian National University), Obiora Okafor (Osgoode Hall Law School), Stepan Wood (Osgoode Hall Law School), Amanda Perry-Kessaris [University of London (SOAS)], Kevin Gallagher (Boston University), Margot Salomon (London School of Economics), A. Claire Cutler (University of Victoria), Martin Loughlin (London School of Economics), Barnali Choudhury (McGill University), Saskia Sassen (Columbia University), Jennifer Clapp (University of Waterloo), Tom Faunce (Australian National University), Peter Drahos (Australian National University), Peter Newell (University of East Anglia), Sheldon Leader (University of Essex), Anne Orford (University of Melbourne), Julio Faundez (University of Warwick), Paddy Ireland (University of Kent), Emma Aisbett (Australian National University), Jonathan Klaaren (University of the Witwatersrand), James Gathii (Albany Law School), Ken Shadlen (London School of Economics), John Braithwaite (Australian National University), Harry Arthurs (Osgoode Hall Law School), Stephen Clarkson (University of Toronto), Ruth Buchanan (Osgoode Hall Law School), Martti Koskenniemi (University of Helsinki), Nico Krisch Hertie (School of Governance), Markus Krajewski (University of Bremen), Penelope Simons (University of Ottawa), Lawan Thanadsillapakul Sukhothai (Thammathirat Open University), Graham Mayeda (University of Ottawa), Congyan Cai (Xiamen University), Sun Liu (Zhongnan University of Economics and Law), Joachim Spangenberg (Sustainable Europe Research Institute), Daniel D. Bradlow (University of Pretoria), Xiuli Han (Xiamen University), Christian Bellak (University of Vienna), Audrey Macklin (University of Toronto), Eva Paus Mount (Holyoke College), Stephen McBride (McMaster University), and Jane Kelsey (University of Auckland). See *Public Statement on the International Investment Regime*, upcoming meetings of the UN Conference on Trade and Development and other organizations will address investment treaties, at 1–3, at http://www.osgoode.yorku.ca/public_statement/documents/Public%20Statement.pdf (last visited Apr. 10, 2011).

challenge.[2] Nowadays, especially for developing countries, it is necessary to undertake a major rebalancing between the rights and obligations of the state and investors.

This Article briefly analyzes the fragmentation of international investment law, the diversification of international investment arbitration tribunals and the consequences of that fragmentation and diversification. Finally, it suggests a possible solution for many of the current problems in foreign investment law.

I. STATISTICAL ANALYSIS

According to the UNCTAD World Investment Report, it is expected that global inflows will reach more than USD 1.2 trillion in 2010, and rising to USD 1.3–1.5 trillion in 2011 before heading towards USD 1.6–2 trillion in 2012. Developing and transitional economies attracted half of all global foreign direct investment (FDI) inflows and invested one quarter of global FDI outflows. In 2009 among the largest FDI recipients, China (as a developing country) rose to the second place after the United States. Half of the six top destinations for FDI flows are now developing or transition economies. On the outward investment side, China and the Russian Federation, in that order, are among the top 20 investors in the world.[3] The data demonstrates the importance and concern of developing countries in relation to investments and, hence, in the field of international dispute settlement.

At the end of 2009 there were a total of 5,939 agreements related to investment (including 2,750 BITs, 2,894 double taxation treaties and 295 other IIAs).[4] Moreover, by the end of 2010, the total number of known treaty-based cases was 390. Of those, 245 cases were filed before the ICSID Convention or under the ICSID additional facility, 109 cases under the United Nations Commission on International Trade Law (UNCITRAL) rules, 19 under the Stockholm Chamber of Commerce (SCC) rules, 6 with the

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[2] UNCTAD, *World Investment Report 2010, Investing in a Low-Carbon Economy, United Nations*, at 95, at http://www.unctad.org/en/docs/wir2010_en.pdf (last visited Feb. 10, 2012).

[3] Id. at XIII–XIX.

[4] Id. at 81.

International Chamber of Commerce (ICC) rules and 4 ad hoc cases. One further case was filed with the Cairo Regional Centre for International Commercial Arbitration. In total, over the past years 83 governments have responded to investment treaty arbitrations: 51 developing countries, 17 developed countries and 15 countries with economies in transition.[5] Most claims were initiated by investors from developed countries. At the end of 2009, only 23 cases had been filed by investors from developing countries, while 9 cases had originated from investors headquartered in transitional economies.[6]

II. FRAGMENTATION OF INTERNATIONAL INVESTMENT LAW

A. Previous Clarification

Although both developed countries and developing countries need to secure a stable legal environment for international investment, they do not perceive the problem from the same perspective. Developed countries, as investment exporting countries, wish to protect their citizens' investments; whereas developing countries, as investment importing countries, simultaneously seek to attract investments and maintain regulatory autonomy.[7] Thus, due to the failure to sign a multilateral investment agreement, international investment law has developed unsystematically. In fact, the fragmentation into BITs and other IIAs would make it impossible to understand this area of law as a system of law or perceive it as part of an overarching order for international economic relations.[8]

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[5] In six of the total 390 cases, the applicable arbitration rules remain unknown. UNCTAD, *Latest Developments in Investors-State Dispute Settlement*, IIA Issues Note no. 1, United Nations, at 1–2, at http://www.unctad.org/en/docs/webdiaeia20113_en.pdf (last visited Feb. 10, 2012).

[6] UNCTAD, *Latest Developments in Investor-State Dispute Settlement*. IIA Issues Note no. 1. UNCTAD/WEB/DIAE/IA/2010/3, United Nations, at 2, at http://www.unctad.org/en/docs/webdiaeia20103_en.pdf (last visited Feb. 10, 2012).

[7] See Kate M. Supnik, *Making Amends: Amending the ICSID Convention to Reconcile Competing Interests in International Investment Law*, 59 Duke L.J. 342, 343 (2009), at http://scholarship.law.duke.edu/dlj/vol59/iss2/4/ (last visited Mar. 10, 2012).

[8] Stephan W. Schill, *The Multilateralization of International Investment Law: The Emergence of a Multilateral System of Investment Protection on the Basis of Bilateral Treaties*, conference paper for the Society of International Economic Law (SIEL), at 2, at http://ssrn.com/abstract=1151817 (last visited Feb. 20, 2012).

So far, international investment law is currently enshrined in over 2,700 BITs, 295 IIAs such as NAFTA, and to a varying degree by multilateral agreements in the WTO on Trade-Related Investment Measures (TRIMs), Trade-Related Aspects of Intellectual Property Rights (TRIPs), and the General Agreement on Trade in Services (GATS).

B. Unsuccessful Attempts to Establish a Comprehensive Multilateral Investment Treaty

1. Failures of Multilateralism I (1945–1973). — The international community first considered a multilateral investment agreement as a possible third international structure to complement the post-World War II Bretton Woods institutions (International Monetary Fund and International Bank for Reconstruction and Development, now the World Bank) in the 1940s. At the United States' insistence, the proposed 1948 Charter for an International Trade Organization (the Havana Charter) would have provided protection for foreign investment from discriminatory treatment and expropriation. The United States corporations, however, felt that the Havana Charter would be too lenient towards developing countries, whereas developing countries believed that the standards proposed would have granted investors too much power.[9] The disagreement resulted in the Havana Charter's failure.

The failure of the Havana Charter foreshadowed the waves of expropriations that affected foreign investors in many socialist and communist countries. Because of the failure of the Havana Charter, and ongoing problems related to foreign investment, a number of proposals for multilateral conventions were made during the 1950s. One of the most influential proposals was the Draft Convention on Investment Abroad, called the "Abs Shawcross Draft." It proposed a regime aimed at the comprehensive protection of foreign investment and contained provisions on fair and equitable treatment, protection against direct and indirect expropriation, and provided for investor-state dispute settlement. Although it was never implemented, the Abs Shawcross Draft heavily influenced other intergovernmental processes that aimed to establish a multilateral convention on foreign investment protection by serving as the basis for the 1967 OECD Draft Convention on the Protection of Foreign Property.

[9] See Supnik, fn. 7 at 357–58.

The 1967 OECD Draft Convention closely resembled the content of modern BITs and contained provisions substantially the same as those in the "Abs Shawcross Draft." However, the 1967 OECD Draft Convention also failed to gain sufficient support from OECD members and was never opened for signature.[10]

2. Failures of Multilateralism II (1973–2004). — From 1973 to 1978, the United States again encouraged an investment agreement for the GATT Tokyo Round agenda, but developing countries blocked the suggestion. Limited measures relating to investment were adopted during the Uruguay Round, with the inclusion of two specific agreements: TRIMs and GATS. Both agreements gave different treatments to related aspects of investment. Developed states walked away from the Uruguay Round feeling dissatisfied with the investment measures and "defeated by the developing world in their quest to achieve a high degree of investment liberalization within the WTO."[11]

Outside the WTO negotiating environment, the United States encouraged negotiations for a comprehensive, multilateral agreement on investment (MAI) within the Organization for Economic Co-operation and Development (OECD) in 1996. The MAI initially provided measures for increased protection of investment, including national treatment, non-discrimination and reduced barriers to investment. The initial dispute settlement procedures would have covered both state-to-state and investor-to-state disputes, including ICSID arbitration. But the OECD's MAI failed primarily due to disagreement among developed countries (not due to developing countries' non-participation in the negotiations). Excessive inertia points to the fact that it may not be in the best interest of any individual states to advance or ascribe to a new standard, be it bilateral or multilateral, until enough countries have already done so.[12]

In December 1996 during the Singapore Ministerial Declaration, member states agreed to establish a Working Group on Trade and Investment (WGTI) to examine the relationship between trade and investment, including

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[10] Stephan W. Schill, *The Multilateralizaton of International Investment Law*, Cambridge University Press (Cambridge), at 35–36 (2009).

[11] See Supnik, fn. 7 at 357–59.

[12] Santiago Montt, *State Liability in Investment Treaty Arbitration: Global Constitutional and Administrative Law in the BIT Generation*, Hart Publishing Ltd. (Oxford), at 103 (2009).

reviewing the work of other relevant international institutions, such as the OECD and UNCTAD.[13]

In 2001, the Doha Ministerial Declaration again included plans for multilateral investment negotiations. It recognized that "the case for a multilateral framework to secure transparent, stable and predictable conditions for a long-term cross border investment, particularly FDI, that will contribute to the expansion of trade, and the need for enhanced technical assistance and capacity building in this area" and "agreed that negotiations will take place after the fifth session of the Ministerial Conference on the basis of a decision to be taken, by explicit consensus, at that session on modalities of negotiations."[14] This declaration suggested a welcoming attitude from developing countries vis-à-vis multilateral rules on investment protection within the WTO.

On 9 September 2001, the Japan Commission in WTO suggested that the existing WTO dispute settlement mechanism should be applied to the future WTO investment agreement and that the intergovernmental nature of the WTO system should be preserved. But the special nature of investment required some further considerations, such as the role of consultation within the WTO dispute settlement mechanism. Another issue was the adequate compensation for expropriation. The existing dispute settlement mechanism did not have any mechanisms to provide compensation directly to the investor who had losses caused by expropriation. This is because WTO agreements stipulate trade rules between the countries, and the purpose of the WTO dispute settlement mechanism is not to provide remedies for losses but to identify WTO-inconsistent measures in the hope that they will later be changed to make them comply with WTO agreements. Consequently, foreign investors seeking compensation had to use domestic judicial procedures. In those cases where the domestic judicial procedures produces an unsatisfactory result, WTO members may seek correction through the WTO dispute settlement mechanism in order to bring the measure into conformity but not for the purpose of obtaining compensation for the investors.[15]

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[13] WTO, Singapore WTO Ministerial, Ministerial Declaration WT/MIN (9)/DEC(1996).

[14] WTO, Ministerial Declaration, WT/MIN(01)/DEC/1 (2001).

[15] WTO, Communication from Japan, WT/WGTI/W/139 (2002).

On 10 September 2002, the European Commission of the WTO also suggested that any possible dispute concerning a future multilateral framework on FDI should be fully covered by the WTO Dispute Settlement Mechanism. The European Commission specifically noted that: "The relationship between the Dispute Settlement Understanding (DSU) and the state-to-state dispute settlement provisions of bilateral or regional investment Treaties may have to be addressed."[16] The Canada Commission had similar concerns and emphasized the intergovernmental nature of the WTO system.[17]

On 13 September 2002, the Separate Customs Territory of Taiwan, Penghu, Kinmen, and Matsu in the WTO alleged that:

> *"Although the DSU in its present form may be made applicable to the future multilateral framework on investment, we consider it equally appropriate for a special provision to be incorporated [...] [for] monetary compensation [...]. This is in line with the current practices of the WTO, under which most of the agreements have their own dispute settlement provisions. [...] In regard to whether the dispute settlement mechanism under the possible future multilateral framework should include a scheme for resolving disputes between members and private investors.*
>
> *[While the WTO framework is not focused on settling disputes between private parties, it does sometimes address private party dispute settlement. Consider:] The mechanism provided in the Agreement on Pre-shipment Inspection (PSI Agreement) for resolving disputes between an exporter (a private party) and a pre-shipment inspection entity (also a private party), i.e. the independent review procedures, is an example which may demonstrate that some form of dispute settlement for private parties is not an absolute impossibility under the existing WTO framework. [...]*
>
> *Our observation is that the possible future multilateral investment agreement could also have such an additional scheme to provide ways to resolve disputes between investors and host countries; however, this independent procedure should exist in parallel with the existing procedures under the ICSID, and should allow investors to decide the venues they wish to choose."*[18]

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[16] WTO, Communication from the European Community and Its Member States, WT/WGTI/W/141(2002).

[17] WTO, Communication from Canada, WT/WGTI/W/147(2002).

[18] WTO, Communication from the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu Organization. WT/WGTI/W/145 (2002).

In September 2003, during the Fifth Ministerial Conference in Cancun (Mexico) the negotiations on a multilateral investment treaty failed. In this regard, many observers argued that most of the responsibility for this failure was attributed to the United States' lack of interest in multilateral investment treaties, and preference for the United States' bilateral treaty system.[19] However, the United States was not the only opponent of the multilateral investment treaty. Certain developing countries also spoke out against this proposed treaty because it might reduce their own states' regulatory powers.[20] Schill, however, says that the lack of a multilateral investment treaty under the auspices of the WTO cannot be attributed to persistent fundamental conflicts between capital exporting and capital importing countries. Instead, a consensus on investment issues was doomed because of the more fundamental concern of development perspective in international trade relations. The subsequent decision to remove investment issues from the negotiation agenda, therefore, also reflects the desire to scale down future trade negotiations in the WTO and separate investment and trade issues in order to avoid distributive compromises between both sectors.[21]

3. Singapore Issues — Options Post-Cancun. — Before the failure to conclude a multilateral investment treaty, some initiatives by the European Commission had signaled the possibility of concluding plurilateral agreements in relation to investments within the WTO.[22]

On 30 October 2003, through a paper entitled "Singapore Issues — Options Post-Cancun," the European Commission proposed a plurilateral

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[19] Leonardo E. Stanley, Acuerdos bilaterales de inversión y demandas ante Tribunales Internacionales: la experiencia argentina reciente (Bilateral investment agreements and claims before international tribunals: Argentina's recent experience), Naciones Unidas, CEPAL (United Nation, Economic Commission for Latin America), Red de Inversiones y Estrategias Empresariales. Unidad de Inversiones y Estrategias Empresariales División de Desarrollo Productivo y Empresarial (Network Investment and Corporate Strategies. Unit on Investment and Corporate Strategies, Division of Production and Management), at 13, at http://cdi.mecon.gov.ar/biblio/doc/cepal/desprod/158.pdf (last visited Feb. 20, 2012).

[20] Rudolf Dolzer, *The Impact of International Investment Treaties on Domestic Administrative Law*, 37 N.Y.U. J. Int'L L. & Pol. 953, 969 (2006), at http://www.iilj.org/GAL/documents/THEIMPACTOFINTERNATIONALINVESTMENT.pdf (last visited Mar. 10, 2012).

[21] See Schill, fn. 10 at 60.

[22] Rudolf Braun Tillmann, *Investment Protection under WTO Law — New Developments in the Aftermath of Cancún*, University of Halle-Wittenberg, at 9, at http://www.wirtschaftsrecht.uni-halle.de/sites/default/files/altbestand/Heft28.pdf (last visited Mar. 10, 2012).

approach to the issues of investment and competition policy within the WTO. It laid out two plurilateral options:

Option 1: Where all WTO members would participate in the negotiations, but then would decide separately whether to sign any agreement.

Option 2: Where only a limited number of WTO members would take part in negotiations. The precedent was the Information Technology Agreement, initially negotiated in 1996 by 14 WTO members.

The plurilateral approach had also been mentioned as an option, at least for some Singapore issues, by the WTO General Council chairman, during informal consultations in the WTO. However, many developing countries voiced their opposition to this approach.[23]

It is necessary to consider that the virtual explosion in investor-state arbitrations, especially in ICSID, started in 2002, approximately at the same time that the previously-mentioned WTO multilateral investment agreement negotiations finished. Many developing countries that opposed the adoption of a multilateral investment treaty within the WTO changed their positions because they had been forced, through their obligations under BITs and the decisions of investment tribunals, to accept higher pro-investment standards which would have massive impacts on public matters.

C. Proliferation of BITs and IIAs

1. Importance of the BITs. — BITs intend to ensure the stability and predictability of national legal frameworks regarding FDI and elevate the legal status of investors in international law by allowing them to claim damages against host states before an international arbitration, without the participation of the state of which investors are nationals.[24]

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[23] Green Duncan and Claire Melamed, *Four Arguments against a Plurilateral Approach to Singapore Issues in WTO*, at http://www.choike.org/nuevo_eng/informes/1527.html (last visited Dec. 10, 2011).

[24] Blackaby Nigel, *El arbitraje según los tratados bilaterales de inversión y tratados de libre comercio en América Latina* (Arbitration under bilateral investment treaties and free trade agreements in Latin America), 1(1) Revista Internacional de Arbitraje (International Journal of Arbitration, Bogotá) 1, 26 (2004), at http://www.docstoc.com/docs/3169171/REVISTA-INTERNACIONAL-DE-ARBITRAJE-Bogot%C3%A1-Universidad-Sergio-Arbol eda-Comit% C3%A9-Colombiano (last visited May 20, 2012).

Sauvant explains that BITs are perceived as a tool to promote both outward and inward investment. BITs provide a strong signal that investors can rely on the existence of international law obligations.[25]

Signing a BIT has the advantage that it can be tailored to the specific situations of the two countries. On the other hand, when a bilateral agreement is negotiated, it may be affected by the unbalanced relations of power in political and economic terms between the two nations.[26]

With the on-going failures to sign a multilateral investment agreement, BITs have become the dominant mechanism for the international regulation of FDI. The tremendous popularity of these kinds of treaties is puzzling because they provide investment protections that exceed those offered by the former rule of customary international law, the Hull Rule.[27] According to Guzman, the reason why the developing countries concluded BITs with provisions favorable to foreign investors, is the result of a prisoner's dilemma in which these countries, competing against each other to attract FDI, bid away their own rights and any advantages that could have been secured under a multilateral treaty. He explains that an individual country has strong incentives to negotiate with and offer concessions to potential investors, thereby making itself a more attractive location relative to other potential host countries. At the same time, developing countries as a group are likely to benefit from forcing investors to enter contracts with host countries that cannot be enforced in an international forum, thereby giving the host a much greater ability to extract value from the investment. The core of his theory is the identification of a collective action problem, because developing countries as a group have sufficient market power in the sale of their resources that they stand to gain more when they act collectively than when they compete against one other, reducing the overall welfare of developing countries.[28]

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[25] Karl P. Sauvant & Michael Chiswick-Patterson eds., *Appeals Mechanism in International Investment Disputes*, Oxford University Press (New York), at 19 (2008).

[26] WTO, Comunication from Japan, Working Group on the Relationship between Trade and Investment, WT/WGTI/W/67 (1998).

[27] Andrew T. Guzmán, *Explaining The Popularity of Bilateral Investment Treaties: Why LDCs Sign Treaties That Hurt Them* (1997), at http://centers.law.nyu.edu/jeanmonnet/papers/97/97-12.html (last visited Feb. 20, 2012).

[28] Andrew T. Guzman, *Why LDCs Sign Treaties That Hurt Them: Explaining the Popularity of Bilateral Investment Treaties*, 38 Va. J. Int'l L. 640, 670–74 (1998), at http://works.bepress.com/andrew_guzman/15 (last visited Feb. 20, 2012).

2. Relationship between BITs and FDI. — The evidence as to whethe BITs actually succeed in attracting capital is unclear.[29] According to th UNCTAD report titled "The Role of International Investment Agreements i Attracting Foreign Direct Investment to Developing Countries," BIT is onl one element in investment decisions. Other key determinants are the size o the host country's market as measured by GDP, economic stability, marke size, and related host country advantages (such as the availability of natura resources, openness to trade measured as the ratio of trade to GDP or skil and/or cost gaps between host and home countries). Factors beyond resource and markets are also considered. For example, foreign investors typically consider institutional factors, such as the quality of the legal system, respect for the rule of law, political risk, or aggregate measures of institutional quality. Thus, it is not possible to distinguish the impact of individual BIT provisions on FDI flows.[30]

The existence of a BIT is not a necessary condition to receive FDI because there are many source-host pairs with substantial FDI that do not have BITs. For example, Japan, the third largest source of FDI until 2009,[31] has only concluded 15 BITs,[32] the United States does not have a BIT with China, even though China receives more US foreign investment than any other developing country, and China has become the United States' biggest foreign creditor.[33] Brazil, one of the top recipients of FDI, has not ratified a single BIT.[34]

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[29] Elkins Zachary, Andrew T. Guzman & Beth A. Simmons, *Competing for Capital: The Diffusion of Bilateral Investment Treaties, 1960–2000*. International Organization 60. The IO Foundation, at 843 (2006), at http://works.bepress.com/cgi/viewcontent.cgi?article=1013&context=andrew_guzman (last visited Feb. 20, 2012).

[30] UNCTAD, *The Role of International Investment Agreements in Attracting Foreign Direct Investment to Developing Countries, United Nations*, at 30–33 (2009), at http://www.unctad.org/en/docs/diaeia20095_en.pdf (last visited Mar. 10, 2012).

[31] UNCTAD, fn. 2 at 6.

[32] Japan has signed 15 BITs as of June 2010. See UNCTAD, *Total Number of Bilateral Investment Treaties Concluded*, Jun. 1, 2010, at http://www.unctad.org/sections/dite_pcbb/docs/bits_japan.pdf (last visited May 20, 2011).

[33] See Sarah Anderson, *U.S. China Bilateral Investment Treaty Negotiations*, Institute for Policy Studies, at 1 (2009), at http://www.ips-dc.org/reports/us-china_bilateral_investment_treaty_negotiations (last visited Feb. 20, 2012).

[34] As of June 2010 Brazil has not ratified any BITs. UNCTAD, *Total Number of Bilateral Investment Treaties Concluded*, at http://www.unctad.org/sections/dite_pcbb/docs/bits_brazil.pdf (last visited May 10, 2011).

Regarding the question of whether the presence or absence of BITS influences investment, Ackerman and Tobin conducted empirical research that provides evidence for three claims. First, the number of BITs signed by a developing host country with wealthy home countries generally has a positive impact on overall FDI in subsequent periods. Second, the marginal value of BITs as a signal of a strong investment environment in a particular country is dampened by the greater availability of BITs. Third, the positive influence of BITs on FDI flow is affected by the host country's overall investment environment. That is, BITs are not a substitute for a weak political environment for investment. Thus, the relationship between BITs and FDI is powerfully influenced both by global and local environments for FDI.[35]

3. Evolution of the International Investment Regime. — The UNCTAD World Investment Report 2010 mentions that in 2009 there was a rapid expansion of international investment agreements[36] from the bilateral level to a more integrated, inclusive and elaborate approach. There are indications that the landscape of the international investment agreement system is consolidating in different respects, such as: (a) an increase of plurilateral agreements that encompass investment as one component of a broader economic agreement; (b) efforts to create regional (notably South-South) investment areas; (c) the competence shift within the EU, which is likely to lead to an increasing number of international investment agreements; (d) the

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[35] Catherine A. Rogers & Roger P. Alford eds., *The Future of Investment Arbitration*, Oxford University Press (New York), at 132 (2009).

[36] The international investment agreements concluded in 2009 are of three different types. The first type consists of agreements with substantive investment chapters (frequently similar to obligations commonly found in BITs). There appears to be no fundamental differences between the content of traditional BITs and that of investment chapters in these broader economic cooperation agreements. The latter tends to include more innovative language, however, which could be a result of the cross-fertilization between trade and investment negotiations, such as ASEAN and Comprehensive Investment Agreement (ACIA). The second type consists of agreements with limited investment-related provisions, and usually focuses on granting market access to foreign investors more than on the protection of investments once they are made, such as the Albania-European Free Trade Association free trade agreement (FTA). The third type only deals with investment cooperation, usually providing for the creation of a consultative committee or a similar institutional arrangement to pursue common initiatives to encourage an open and transparent investment climate. Some agreements also commit the parties to enter into future negotiations, such as the Angola-United States Trade and Investment Cooperation Agreement. See UNCTAD, fn. 2, at 82–83.

abrogation of BITs to streamline the treaty landscape and eliminate contradictions with other legal instruments; and (e) efforts by numerous countries to reassess their international investment policies to better align them with development considerations, and to revise their bits to suit their new policies; also, efforts by numerous countries to examine their treaty networks and their development implications, sometimes leading them to denounce their BITs.

As a result of the many re-examinations and denunciations of BITs by many countries, the international investment regime is moving towards a more convergent and coherent body of international law. Increasing investment law-making activity at the regional level, combined with an emerging streamlining of the treaty landscape (e.g. the denunciations and renegotiations of BITs) and countries' reassessment of their international investment policies with a view to strengthening their development contribution (e.g. model BIT revisions or BITs reviews).[37]

The expansion of IIAs could, because of the impact of IIAs to increase FDI inflows, be generally stronger in the case of free trade agreements, regional integration agreements or economic cooperation agreements than in the case of BITs. IIAs improve the economic determinants of FDI, as opposed to BITs, whose influence is limited to the policy determinants of FDI.[38] Moreover, the enhancement of interactions between international investment agreements and other public policy regimes such as those dealing with social, broader economic and environmental concerns, also contribute to the growing of the importance of IIAs. To sum up, the trend is toward a rebalancing of the rights and obligations of the state and investors, providing more coherence and predictability in international investment law.

III. DIVERSIFICATION OF INTERNATIONAL INVESTMENT ARBITRATION TRIBUNALS

A. Previous Clarification

Though exact information about investment arbitration is not always

[37] Id. at 83–90.

[38] UNCTAD, fn. 30 at 110–11.

available, some institutions publish awards and decisions as well as statistics from which one may deduce further information. In its recent move toward greater transparency, ICSID encourages publication of awards rendered pursuant to its rules and at least makes public that proceedings have been instituted. The exact number of other investment arbitrations conducted under the arbitration rules of the ICC, the SCC, the London Court of International Arbitration (LCIA) or the UNCITRAL rules, often administered by the Permanent Court of Arbitration, is harder to ascertain. Many of these proceedings are still conducted under confidentiality requirements. Without a transparent system, there is no way to assess the quality of the awards and generate accurate statistics. Moreover, as long as the awards are only partially available because of confidentiality obligations, the basis for a potentially self-correcting system is lacking.

The discussion below describes the problems related to investment disputes before the diversification of international investment arbitration centers.

B. Inconsistent Awards and Decisions

Literally thousands of BITs and an increasing number of IIAs contain dispute settlement provisions which permit an undefined number of investors access to direct arbitration against host states. In addition, in most of the situations both a company and its shareholders will have separate rights to bring investment claims, often under different BITs and different arbitration rules (such as, ICSID rules, UNCITRAL rules, ICC rules, SCC rules, and so on).

Moreover, the decisions of the international arbitration centers usually are made by ad hoc tribunals established for the express purpose of the dispute at hand and lack the concept of *de jure stare decisis* (because prior decisions are not binding, tribunals are free to adopt rulings that deviate from prior decisions by other tribunals). Since there is no obligation to respect an earlier precedent, every arbitration tribunal in a network of tribunals is independent of each other and thus free to come up with its own interpretations of various principles of foreign investment law. It is not uncommon for one tribunal to disagree with the opinions of another tribunal

or even criticize the reasoning in a decision of another tribunal.[39] Thus, the inconsistencies in investment treaty arbitrations can result from differing assessment of law and facts by different tribunals.

In domestic legal systems, inherent risks of inconsistent decisions are usually mitigated by the availability of appellate structures which promote consistency through binding case law on issues of possible controversy. In the international investment legal order, such structures are generally nonexistent. Quite to the contrary, the proliferation of international courts and arbitration tribunals has led to multiplication of proceedings before different fora or to the re-litigation of already decided cases because of some arbitration rules, such in ICSID, do not contemplate the consolidation of cases and it is not possible to apply consolidations rules between cases from different arbitral tribunals. At a minimum, this involves a waste of judicial resources; and, in the worst case, it may lead to divergent or even conflicting outcomes. Moreover, as Sornarajah pointed out, arbitral tribunals coexist without hierarchy and are not subject to appeals or any other form of external control by a supervisory body that could ensure consistency in the decision making process.[40]

For illustrative purposes, here are some examples of various forms of inconsistencies in awards or decisions, including specific cases:

Investment tribunals may come to different conclusions concerning the same or similar legal issues. (1) Most favored nation (MFN) clause. It applied to jurisdictional matters in the case *Emilio Agustin Maffezini v. Kingdom of Spain*[41] but in *Plama Consortium Limited v. Bulgaria*[42] the tribunal refused to apply the MFN. Also in *Tza Yap Shum v. The Republic of Peru*, the tribunal refused to permit the claimant to invoke the MFN clause in the China-Peru

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[39] Surya P. Subedi, *International Investment Law: Reconciling Policy and Principle*, Hart Publishing Ltd. (Oxford), at 204–05 (2008).

[40] See Sauvant & Chiswick-Patterson, fn. 25 at 41.

[41] In *Maffezini v. Kingdom of Spain* (ICSID case no. ARB/97/7), Decision on Jurisdiction (Jan. 25, 2000), para. 64.

[42] "[...] the principle with multiple exceptions as stated by the tribunal in the *Maffezini* case should instead be a different principle with one, single exception: An MFN provision in a basic treaty does not incorporate by reference dispute settlement provisions in whole or in part set forth in another treaty, unless the MFN provision in the basic treaty leaves no doubt that the Contracting Parties intended to incorporate them." *Plama Consortium Limited v. Bulgaria* (ICSID case no. ARB/03/24), Decision on Jurisdiction (Feb. 8, 2005), para. 223.

BIT[43] (the three cases regulated by ICSID rules). While in *Renta 4* case, the tribunal of SCC accepted the general proposition that MFN clauses could extend the tribunal's jurisdiction beyond the scope of the underlying treaty's jurisdictional clause.[44] (2) Umbrella clause. Some tribunals have taken the position that an umbrella clause cannot be interpreted to elevate an ordinary contractual claim to the level of a breach of an international obligation (e.g. *SGS Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan*,[45] *El Paso Energy International Company v. Argentine Republic*,[46] *Pan American Energy LLC and BP Argentina Exploration Company v. Argentine Republic*[47]). Other tribunals allow a broader interpretation, in favor of investors, permitting jurisdiction over contractual claims relating to the dispute (e.g. *SGS Société Générale de Surveillance S.A. v. Republic of the Philippines*,[48] *Enron Creditors Recovery Corporation (formerly Enron Corporation) and Ponderosa Assets, L.P. v. Argentine Republic*,[49] and so on).

Investment tribunals may reach different results not only with regard to similar legal issues but also concerning the same or similar facts. The divergent assessment whether a state of necessity prevailed in Argentina in the early 2000 by the ICSID tribunals. Notable cases of these are *CMS Gas*

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[43] *Tza Yap Shum v. Republic of Peru* (ICSID case no. ARB/07/6), Decision on Jurisdiction and Competence (Jun. 19, 2009), para. 216.

[44] *Renta 4 SVSA v. Russian Federation* (SCC case no. 24/2007), Award on Preliminary Objections (Mar. 20, 2009) paras. 80–101. See UNCTAD, fn. 6 at 5–6.

[45] *SGS Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan* (ICSID case no. ARB/01/13), Decision of the Tribunal on Objections to Jurisdiction (Aug. 06, 2003), para. 165.

[46] *El Paso Energy International Company v. Argentine Republic* (ICSID case no. ARB/03/15), Decision on Jurisdiction (Apr. 27, 2006), para. 70.

[47] *Pan American Energy LLC and BP Argentina Exploration Company v. Argentine Republic* (ICSID case no. ARB/03/13). Decision on Jurisdiction (Jul. 27, 2006), para. 109.

[48] *SGS Société Générale de Surveillance S.A. v. Republic of the Philippines* (ICSID case no. ARB/02/6). Decision of the Tribunal on Objections to Jurisdiction (Jan. 29, 2004), para. 515.

[49] *Enron Creditors Recovery Corporation (formerly Enron Corporation) and Ponderosa Assets, L.P. v. Argentine Republic* (ICSID case no. ARB/01/3) Decision on Jurisdiction (Ancillary Claim) (Aug. 02, 2004), para. 49. See also the ad hoc committee renders its decision on annulment (Jul. 30, 2010), para. 344.

Transmission Company v. Argentine Republic[50] and *LG&E Energy Corp., LG&E Capital Corp. and LG&E International Inc. v. Argentine Republic.*[51] The tribunal in CMS rejected the defense of necessity brought up by Argentina but the tribunal in LG&E a couple of years later went contrary to the decision in CMS and accepted the defense. The reasons for this divergence go to the nature of the arbitration system which does not rely on the doctrine of precedence and has no specified rules in regard to interpretation of treaties, among others. Later, the Ad Hoc Committee partially annulled the award rendered in favor of the CMS Gas Transmission Company. There were other tribunals that also rejected the applicability of the state of necessity doctrine as a defense, such as *Enron Corporation Ponderosa Assets, L.P v. Argentina Republic,*[52] and *Sempra Energy Int'l v. Argentina Republic* (but in the last case, this award was annulled in 2010).[53]

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[50] "The tribunal had already decided that Argentina had breached its international obligations under article II(2)(a) and article II(2)(c) of the BIT. It also decided that in the present case there was no state of necessity and did so in terms which, by necessary inference, excluded also the application of article XI. Thus, under the well-known principle of international law recalled in article 1 of the ILC articles, Argentina was responsible for the wrongful measures it had taken. The Committee concludes that, whatever may have been the errors made in this respect by the tribunal, there is no manifest excess of powers or lack of reasoning in the part of the Award concerning article XI of the BIT and state of necessity under customary international law." *CMS Gas Transmission Company v. Argentine Republic* (ICSID case no. ARB/01/8). Decision of the ad hoc Committee on the Application for Annulment of the Argentine Republic (Sept. 25, 2007), para. 149–50.

[51] Between 1 December 2001 and 26 April 2003, Argentina was in a state of necessity, for which reason it shall be exempted from the payment of compensation for damages incurred during that period. *LG&E Energy Corp., LG&E Capital Corp. and LG&E International Inc. v. Argentine Republic* (ICSID case no. ARB/02/1), Decision on Liability (Oct. 3, 2006), para. 267.

[52] Enron Creditors Recovery Corporation (formerly Enron Corporation) and Ponderosa Assets, *L.P. v. Argentine Republic* (ICSID case no. ARB/01/3). The *ad hoc* committee renders its decision on annulment (Jul. 30, 2010), para. 394.

[53] The effect of the tribunal's treatment of necessity as a matter solely of customary international law is that Argentina has effectively been deprived of its procedurally assured entitlement to have its right of preclusion laid down in article XI of the BIT — the applicable law in this respect — subjected to legal scrutiny. For this reason, as annulment may be a matter of discretion, the Committee has concluded that, in this case, the Award must be annulled." *Sempra Energy International v. Argentine Republic* (ICSID case no. ARB/02/16), Decision on Annulment (Jun. 29, 2010), para. 222.

In relation with the concept of investment, in *Saipem S.p.A. v. The People's Republic of Bangladesh*, the tribunal applied the so-called Salini test in order to determine whether Saipem has made an "investment" within the meaning of article 25 of the ICSID Convention.

According to such a test, the notion of "investment" implies the presence of the following elements: (1) a contribution of money or other assets of economic value; (2) a certain duration; (3) an element of risk; and (4) a contribution to the host country's development. By contrast, in *M.C.I. Power Group, L.C. and New Turbine, Inc. v. Republic of Ecuador*, the tribunal noted that these elements "must be considered as mere examples and not necessarily as elements that are required for" the existence of an "investment" for purposes of article 25 of the ICSID Convention;[54] (3) the disputes in *Corn Products International, Inc. v. United Mexican States* and *Archer Daniels Midland Company and Tate & Lyle Ingredients Americas, Inc. v. United Mexican States*, where consolidation of the two cases was rejected and the separate tribunals then reached contradictory conclusions on key substantive issues.[55]

Finally, investment tribunals may come to opposing results in situations where the same dispute is litigated by a subsidiary and its parent, as was the case in the CME/Lauder arbitrations. While the tribunal established pursuant to the Czech Republic, *Lauder v. Czech Republic*, hearing the claim of the controlling US shareholder, found that minor infraction of that treaty did not lead to the liability of the Czech Republic; the tribunal established pursuant to the *Czech Republic Netherlands BIT, CME v. Czech Republic*, hearing the claim of the Dutch subsidiary, concluded that various BIT standards had been breached and ultimately found the Czech Republic liable in the amount of almost USD 500 million.[56]

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[54] UNCTAD, *Latest Developments in Investor-State Dispute Settlement.* IIA MONITOR no. 1. UNCTAD/WEB/ITE/IIA/2008/3, United Nations, at 4, at http://www.unctad.org/en/docs/iteiia20083_en.pdf (last visited Feb. 10, 2012).

[55] Christina Knahr, Christian Koller & Walter Rechberger et al. eds., *Investment and Commercial Arbitration — Similarities and Divergences*, Eleven International Publishing (Utrecht), at 3 (2010).

[56] Christina Binder, Ursula Kriebaum & August Reinisch et al. eds., *International Investment Law for the 21st Century,* Oxford University Press (New York), at 907–08 (2009).

To sum up, it is relevant to consider the UNCTAD Report of Latest Developments in Investor-State Dispute Settlement (2010) that noted "the cases that were concluded in 2009 maintain the trend of diverging — and sometimes conflicting — awards. [...] The resulting lack of coherence, consistency and predictability raises systemic concerns for the IIA regime. Novel issues also arise from the increasing challenges to arbitrators, with key questions relating to arbitrators' independence — or lack thereof."[57]

IV. WTO AS A NATURAL FORUM FOR INVESTMENT AGREEMENTS AND TO RESOLVE INVESTMENT DISPUTES

The WTO, as a transparent, democratic, and globally representative organization, with an established and effective dispute resolution system, is a natural forum within which to negotiate and implement an investment agreement.[58]

Whilst investment *per se* was never included in the last round of WTO negotiations (Uruguay Round), many of the Agreements concluded in that round indirectly provided some regulations of international investment, such as TRIMs and GATS. Other agreements, e.g. TRIPs and DSU, also indirectly impact upon investment.

The TRIMs represents the nexus between trade and investment in its Preamble. Nonetheless, its application is limited to banning discriminatory investment measures in the field of trade in goods. The Agreement clearly outlaws any legislative or administrative measures that favor domestic products or use of the same over imported ones. It thus outlaws such requirements as domestic content, import-export balancing, foreign exchange balancing, etc.

Although GATS is focused broadly upon all forms of trade in services, it importantly covers the supply of services through direct "commercial

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[57] UNCTAD, fn. 6 at 12.

[58] Pippa Read, *International Investment in the WTO: Prospects and Challenges in the Shadow of the MAI*, 11(2) BondLR 360, 399 (1999), at http://epublications.bond.edu.au/cgi/viewcontent.cgi?article=1176&context=blr&seiredir=1#search="Read,+Pippa.+International+Investment+in+the+WTO:+Prospects+and+Challenges+in+the+Shadow+of+the+MAI (last visited Feb. 20, 2012).

presence" in the territory of another member state. Accordingly, it regulates many instances of FDI in services. The other three modes of service supply entail cross-border supply, the movement of the supplier, and the movement of consumer. There is often an overlap between the commercial presence and movement of the supplier modes in relation to FDI, as the presence of intra-company personnel, such managers, executives, and specialists will often be necessary in order to establish a commercial presence. Furthermore, GATS imposes the broad obligations of MFN and transparency upon all members, across all sectors. However, GATS allows members to list specific sectorial exceptions to MFN treatment, and there is no general requirement for national treatment. Instead, it permits each member to list their positive commitments on market access and national treatment in specific service sectors or sub-sectors, subject to any terms, conditions or qualifications.

Regarding the differences between BITs and the WTO Agreements, the TRIMs constrains the use of performance requirements by host country government, departing significantly from the provisions included in BITs, which usually do not. GATS provides investors with MFN treatment and national treatment. For the movements of personnel and transfer in service sectors selected by members given the selective nature of the positive-list approach, GATS represents a clear difference with the BITs, which usually does not allow specific exceptions to non-discrimination obligations. Another difference is that GATS does not include provisions on investment protection, normally included in BITs, other than the right of a foreign-service supplier to make international payment and transfers.[59] Thus, the TRIMs and GATS are less invasive of the host countries' domestic policies than most of the BITs.

In conclusion, although investment has not been the primary focus of these agreements, they have indirectly imposed investment liberalization and investment protection obligations upon WTO members. TRIMs prohibits a category of performance requirements, whilst GATS provides investors with MFN treatment, national treatment, market access, movement of personnel and transfer/payment rights in some nominated service sectors. Both agreements impose a broad obligation of transparency.

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[59] Benno Ferrarini, *A Multilateral Framework for Investment?*, at 14, at http://www.cid.harvard.edu/cidtrade/Papers/ferrarini_wti_investment.pdf (last visited Feb. 20, 2012).

Moreover, an interpretative note to Annex 1A of the Agreement Establishing the WTO indicates that if there is a conflict between the General Agreement on Tariffs and Trade 1994 (GATT) and any of other agreements in Annex 1A, the latter shall prevail. Such specific provisions would prevent potential WTO conflicts between the WTO Agreements and a future investment agreement or a modification of TRIMs.

Furthermore, one of the principal problems of the international investment arbitration centers (mentioned above), is that they coexist without hierarchy and is not subject to the control by a supervisory body that could ensure consistency in the decision making process. In relation to this issue, it is important to consider the Appellate Body of the WTO that has been provided security, transparency and predictability in the multilateral trading system.

WTO dispute settlement is a good blend of conciliation, mediation, arbitration and appeal within one system.[60] Furthermore, the WTO Panels and the WTO Appellate Body have equally developed a consistent body of international trade law by *de facto* "*stare decisis*," which could ensure both the quality and the consistency of investment awards. The WTO Appellate Body is an example of a permanent or quasi permanent judicial institution which has gained expertise and, through expertise, a high reputation.[61]

WTO Dispute Settlement Body (DSB) has a strict timetable and efficient and speedy proceedings, which is important because investors get frustrated with the slow movement of international investment tribunals (The average time taken by an ICSID arbitration tribunal, from date of the request for arbitration is filed to the date of a final award, is 3.6 years).[62] This is two years longer than the average time taken to resolve a trade dispute by a WTO DSB. Moreover, the DSU has a special provision for consolidation claims (Article 9.1)

The disadvantages in the WTO dispute settlement system makes no provision for private actors, as the system is set up to govern relationships

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[60] See Subedi, fn. 39 at 208.

[61] See Binder, fn. 56 at 909.

[62] Anthony Sinclair, *ICSID Arbitration: How Long Does It Take?* 4(5) GAR Journal 1, 1–2 (), at http://www.goldreserveinc.com/documents/ICSID%20arbitration%20%20How%20long%20does%20it%20take.pdf (last visited Feb. 20, 2012).

between and among states. According to the 2002 Report of the Working Group on the Relationship between Trade and Investment to the General Council, consideration should be given to provisions for investor-state disputes, as well as for state-state disputes, as this was the model adopted in most IIAs and the Agreement on Pre-shipment Inspection in WTO (it is a precedent for the settlement of disputes between private parties and governments mentioned by the Permanent Mission of the Separate Customs Territory of Taiwan, Penghu, Kinmen, and Matsu in WTO).[63] Another view was that consideration should be given to provisions for state-state disputes because the introduction of investor-state dispute settlement provisions in a prospective investment framework of the WTO would require a fundamental change to the DSU that was unwarranted and probably not feasible.[64] Although introducing those settlement provisions would require a fundamental change to the DSU, this change would be necessary because the WTO dispute settlement system should accommodate a far larger range of actors as potential complainants to gain credibility and be more responsive to those who are directly affected by final decisions under the DSU.

Another reason for changing the existing WTO system is that the WTO dispute settlement mechanism does not have mechanisms to provide compensation directly to the investor who has losses incurred because of expropriation.[65] This is because the WTO Agreements stipulate trade rules between the countries, and the purpose of the WTO dispute settlement

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[63] See WTO, fn. 18.

[64] WTO, *Report of the Working Group on the Relationship between Trade and Investment to the General Council*, WT/WGTI/6 (2002).

[65] Article 3.7 of the DSU states that the primary objective of the dispute settlement mechanism is to secure the withdrawal of measures found to be inconsistent with the WTO agreement, not to seek compensation of damages. Compensation is available as a temporary measure and only if the immediate withdrawal of the measure is impracticable. Article 3.7 explicitly provides preference for compensation over the suspension of concessions. However, the system is set up in such a way that compensation is not always a viable option, while suspension of concessions often is. According to article 22.2, members have to enter into negotiations with the other party with a view to "develop mutually acceptable compensation." If no satisfactory compensation has been agreed within 20 days after the date of expiry of the reasonable period of time, any party having invoked the dispute settlement procedures may request authorization from the DSB to suspend the application to the member concerned of concessions or other obligations under the covered agreements.

mechanism is not to provide remedies for losses but to bring the WTO inconsistent measures into conformity with the WTO Agreements. Therefore, as the Japan Commission in WTO suggested in 2001, foreign investors should seek resolution through the domestic judicial procedures. When sufficient settlement was not provided through the domestic judicial procedures, members might seek correction through the WTO dispute settlement mechanism in order to bring the measure into conformity but not for the purpose of obtaining compensation for the investors.[66]

To sum up, an ideal solution to address many of the current problems in international investment law would be to have a multilateral or plurilateral investment treaty (preferably under the WTO) to unify international investment regulations and use the WTO DSU to resolve investment disputes. The WTO DSB has more legitimacy to ensure the quality and the consistency of investment awards. With the constantly increasing international trade, the necessity of these changes in the international investment area, for developing countries, is more compelling today than ever before.

V. POSSIBLE SOLUTION: CELEBRATION OF A PLURILATERAL INVESTMENT AGREEMENT WITHIN THE WTO

Many developing countries that opposed the adoption of a multilateral investment treaty within the WTO have been forced through their own BITs and the decisions of ICSID and other investment tribunals to accept higher pro-investment standards. Thus, it would be better for the developing countries to have a comprehensive global investment treaty than for them to continue signing BITs and accepting the often unbalanced and controversial decisions from arbitration tribunals.

The negotiation of a global treaty on foreign investment law is not currently on the agenda of the WTO. Moreover, because of the difficulty of concluding a multilateral investment treaty, it is necessary to analyze the possibility of, instead, concluding a plurilateral investment agreement within WTO with the aim of entrusting the DSB to settle all investment disputes (that was one of the main reasons for adopting a multilateral approach to investment rules in 2000s). Since the DSB provisions are already applicable

[66] WTO, fn. 15.

to investment disputes arising out of the interpretation and application of the WTO Agreements, (including the TRIMs) the provisions could ensure a greater coherence in the treatment of investment disputes. Furthermore, developing countries need to consider that plurilateral investment agreements tend to increase FDI inflows more than BITs do.[67]

A plurilateral investment agreement within the WTO could permit developing countries to strike the proper balance between national and international policy interests, and promote their public interest and international investment. Furthermore, plurilateral investment agreements would allow developing countries to resolve their future international investment disputes in a forum that guarantees fair, substantive justice and legal consistency in its awards, as the WTO dispute settlement system does.

According to article II:3 of WTO Agreement, such plurilateral agreements are only binding for those WTO members who accept it. However, they can be included in the WTO system exclusively and only by consensus of the Ministerial Conference (article X:9, WTO Agreement). If an understanding on such a plurilateral agreement could be reached between a critical mass of a representative number of WTO members, it would then depend on whether the remaining WTO members would at least not deny the request to include the plurilateral agreement in the WTO system.

Developing countries should take the initiative in setting the rules necessary to balance foreign investment law with other principles of international law, such as the protection and preservation of the environment and human rights. The International Institute for Sustainable Development's Model International Agreement on Investment for Sustainable Development[68] offers a good model of some substantive clauses to be considered. Also, it is possible to establish specific rules to regulate the amount of compensation and also specify that policies related to public order shall not be judged. In relation to this issue, WTO law already allows states to take otherwise unlawful measures for pursuing public interest goals, i.e. in article XX GATT,

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[67] UNCTAD, fn. 30 at 110–11.

[68] Howard Mann, Konrad von Moltke & Luke Eric Peterson et al., *IISD Model International Agreement on Investment for Sustainable Development*, International Institute for Sustainable Development, at 5–16 (2005), at http://www.iisd.org/pdf/2005/investment_model_int_agreement.pdf (last visited Feb. 20, 2012).

article XIV GATS or the Safeguards Agreement. Although those exceptions set high hurdles to be cleared, they nevertheless grant flexibility for regulatory measures taken in good faith.[69]

According to article 1.1 and Appendix 1 of the Understanding on Rules and Procedures Governing the Settlement of Disputes, the application of the Understanding to plurilateral agreements shall be subject to the adoption of a decision by the parties to each agreement setting out the terms for the application of it to the individual agreement, including any special or additional rules or procedures for inclusion in Appendix 2, as notified to the DSB.

Considering the special character of investment and the possibility of including any special or additional rules or procedures unique to this agreement in Appendix 2 of DSU, this kind of agreement must address certain concerns — for example, whether the agreement provides a remedy (and specifies compensation) for expropriation. The existing WTO DSU does not have any mechanisms to provide compensation directly to the investor who has losses incurred through expropriation. This is because WTO Agreements stipulates trade rules between the countries, and the purpose of the WTO dispute settlement mechanism is not to provide remedies for losses but to bring the WTO inconsistent measures into conformity with WTO Agreements. Therefore, foreign investors could seek resolution through the domestic judicial procedures. When sufficient settlement was not provided through the domestic judicial procedures, members might seek correction through the WTO dispute settlement mechanism in order to bring the measure into conformity but not for the purpose of obtaining compensation to the investors.[70] In the same position, Paterson (a New Zealand academician) also mentions as a solution that the resolution of a foreign investment dispute under the existing domestic legal systems could be combined with a transnational court of appeal.[71]

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[69] Anne van Aaken, *International Investment Law and Rationalist Contract Theory* [dissertation], NYU School of Law: IILJ International Legal Theory Colloquium Spring 2009 Virtues, Vices, Human Behavior and Democracy in International Law, at 19, at http://www.iilj.org/courses/documents/2009Colloquium.Session2.Aaken.pdf (last visited Feb. 20, 2012).

[70] WTO, fn. 15.

[71] Mariel Dimsey, *The Resolution of International Investment Disputes: Challenges and Solutions*, Eleven International Publishing (Utrecht), at 224 (2008).

The requirement that investment disputes seek resolution through the domestic judicial procedure before seeking relief from a WTO panel would be criticized if the host country were a developing country. Investors typically assume that municipal courts in developing countries lack the necessary technical competence or neutrality to adequately and fairly resolve investment disputes.[72]

Against this argument, it is necessary to consider the following: First, it is possible to explain this point using the analogy with other matters addressed by the WTO such as antidumping duties, safeguards, and countervailing duties (anti-subsidy duties). These kinds of duties are imposed by the government before local administrative offices that realize an investigation against foreign exporters according to the proceeding regulated by the WTO. If the resolution taken by a local authority is inconsistent with the WTO Agreements, the exporter's member country may complain to the WTO panel first and then to the DSB, the DSB determines if the challenged measure is inconsistent with WTO Agreements and then recommends that the responding member bring it into conformity with WTO law. These kinds of proceedings sometimes are initiated by the local authority at its own initiative, without the national producer's denunciation. Thus, in those cases it is possible to say that the local authority is "judge" and "prosecutor" at the same time. But the local authority shall be impartial and comply with the procedure established by the WTO, otherwise the authority will be reviewed by the WTO DSB. In the case of investment, it is possible to regulate plurilateral agreements with regard to some requirements of the administrative and judicial procedure (as the TRIPs, Part III Enforcement of Intellectual Property Rights do) such as establishing special time limits on the procedure to ensure the rights of the investor, the proceedings must be fair and equitable.

Requiring the exhaustion of domestic remedies first respects the sovereignty of the host state (either developing or developed countries) on the well-warranted assumption that its courts are capable of doing justice. Requiring foreign investors to resort to domestic courts allows the host state

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[72] Jason Webb Yackee, *Conceptual Difficulties in the Empirical Study of Bilateral Investment Treaties*, at 16, at http://works.bepress.com/cgi/viewcontent.cgi?article=1000& context=jason_yackee (last visited Mar. 10, 2012).

to correct its own mistakes. In most cases, the domestic court will provide a remedy to the foreign investor at a lower cost and with less chance of error than an arbitral tribunal. Moreover, the position of some countries in relation to the necessity of the inclusion of investor-state arbitration mechanism is changing. It is necessary to consider the example of the US-Australia FTA signed at the beginning of 2004 that constitutes a new milestone in the area of dispute resolution in international investment because these two states agreed that the FTA would not contain any investor-state arbitration mechanism. It is interesting to observe that it was Australia, but not the USA, that insisted on excluding the resolution of investor-state disputes by arbitration, arguably due to the concern that it would repeatedly find itself at the receiving end of actions before international arbitral tribunals. However, the official reason that Australia cited for this decision was that "both parties possessed robust, developed, legal systems for the resolution of disputes between investors and states."[73]

Although, given the right of individual investors to pursue claims against host states in the WTO dispute settlement mechanism implied a change to the DSU and would be very difficult to be approved by consensus, this change to the DSU is necessary for the development of the WTO and its DSB. While creating an infrastructure that allowed individual investors to bring claims before the WTO DSB would be expensive, a system of fees could be established, just as now there are fees for other arbitration. Moreover, it is necessary to consider that international trade and investment are closely linked with each other and foreign investment can help facilitate the adjustment process as economies open up to international competition — and opening up economies to international competition is one objective of the WTO.

The pre-existing treaties (BITs or IIAs) between the countries signatory to the plurilateral investment agreement in the WTO shall be deemed to be terminated by mutual consent and all the rights and obligations shall be pursuant to the plurilateral investment agreement. However, many BITs contain a "survival clause" stating that the treaty remains in effect for a number of years (usually five, ten or fifteen years) after the denunciation. In

[73] See Dimsey, fn. 71 at 222.

such cases, investors retain the right to bring claims until the "survival period" expires, so they have the right to choose either the WTO dispute settlement or the arbitration tribunal mentioned in the BIT.

CONCLUSION

An ideal solution for developing countries (who are most involved in international investment disputes) to balance foreign investment law with other competing principles of international law and ensure quality and consistency of investment awards in the international investment arbitrations,[74] would be to have a global investment agreement under the WTO and use its DSU to resolve investment disputes.

The reasons why such global investment agreement still does not exist are numerous. States are reluctant to commit themselves to an international treaty unless they are fully satisfied with the provisions in such a treaty (as shown by the experience within the Doha Round in the WTO). Another reason for this reticence to negotiate a global investment treaty could be that foreign investment is understood to be an issue touching the sovereignty of a state.[75] But if that were true it is hard to understand why the developing countries concluded BITs with provisions favorable to foreign investors and are reluctant to do the same in the case of a multilateral international agreement with similar provisions. Subedi explained that the reasons could be that the BIT has a limited or fixed lifespan, the states can also easily denounce a bilateral or other contractual treaty by giving advance notice and it is also easier to renegotiate such treaties since the number of states to them is small. However, an agreement to conclude an international treaty would mean committing the state to the provisions of the treaty for a long time and it would be harder to denounce or withdraw from such treaties. Especially in the case of a WTO agreement, since the WTO system does not allow participants to pick and choose between them. Moreover, by agreeing to

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[74] UNCTAD, fn. 2 at 95.

[75] Amit M. Sachdeva, *International Investment: A Developing Country Perspective International Investment: A Developing Country Perspective*, 8(4) J.W.I.T. 1, 6, at http://www.vaishlaw.com/article/International%20Investment-Amit%20Sachdeva.pdf (last visited May 23, 2011).

conclude an international treaty the state concerned would be contributing to the making of general international law on the subject matter which would be binding on all parties. So it would be harder to renegotiate an international treaty involving a large number of states.[76] However, these reasons would be overcome with the signing of a plurilateral agreement in the WTO.

Nowadays, it looks unlikely that a plurilateral investment agreement on foreign investment in the WTO will be concluded in the near future. Nevertheless, the necessity of such one is more compelling today than ever before.

[76] See Subedi, fn. 39 at 195.