MAKING A CASE FOR REGULATORY CONVERGENCE IN INTERNATIONAL INVESTMENT

Declaration

I declare that this Mini-Dissertation which is hereby submitted for the award of Legum Magister (LL.M) in International Trade and Investment Law in Africa at International Development Law Unit, Centre for Human Rights, Faculty of Law, University of Pretoria, is my original work and it has not been previously submitted for the award of a degree at this or any other tertiary institution.

James Nyamunda

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Acronyms

BIT	Bilateral Investment Agreement
EU	European Union
FDI	Foreign Direct Investment
FET	Fair and Equitable Treatment
GATT	General Agreement on Tariffs and Trade
IIA	International Investment Agreement
ISDS	Investor-State Dispute Settlement
MFN	Most Favoured Nation
NAFTA	North American Free Trade Agreement
OECD	Organisation for Economic Cooperation and Development
RIA	Regional Investment Agreement
TPP	Trans-Pacific Partnership
TTIP	Transatlantic Trade and Investment Partnership
UNCTAD	United Nations Conference on Trade and Development
USA	United States of America
WTO	World Trade Organisation

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CHAPTER 1

INTRODUCTION

1.1. BACKGROUND TO THE RESEARCH

Mega-regional trade and investment agreements are deep integration partnerships between countries and regions with a major share of world trade and foreign direct investment (FDI), and whose aim is to improve regulatory compatibility and to provide a rules-based framework that irons out differences in investment and business climates among different countries of diverse economic and political structures[1].The most significant mega-regional agreements recently concluded and currently under negotiation are the Trans Pacific Partnership Agreement (TPP)[2] and the Transatlantic Trade and Investment Partnership Agreement (TTIP)[3].

Through the adoption of these agreements by party states, the world is likely to witness the unprecedented adoption of standalone agreements negotiated between collections of states that contribute immensely to the global economy[4]. In addition to the regulation of trade and other WTO-plus areas of interest, these regional agreements provide for investment regulation in a manner that demonstrates a shared acceptance of the need to liberalise investment while balancing the needs of capital importing and capital exporting countries.

These collective agreements by several countries on investment regulation are perceived as building blocks to the reformation of the current investment framework.

The regulatory convergence demonstrated by these agreements is an additional motivating factor to the intensification of discussions by countries over the negative impacts of the patchwork of bilateral investment treaties on the policy space of capital receiving states, the unfavourable consequences of investor-state dispute resolution, the need to harmonise regulation of bourgeoning Sovereign Wealth Funds, and the development of emerging economies as serious and influential exporters of capital to developed economies.

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[1] www.weforum.org/agenda/2014/07/trade-what-are-megaregionals/ accessed 14 January 2016.

[2] A mega-regional agreement concluded between the USA and Australia, Brunei, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore and Vietnam.

[3] The USA and the European Union.

[4] Put together, these agreements represent 80 percent of the world's Gross Domestic Product and 25 percent of Global Foreign Direct Investment: B Kotschwar: World Bank Group, Trade and Competitiveness presentation, October 12 2015.

1.2. RESEARCH PROBLEM

The fundamental problem that this thesis intends to resolve is the lack of a universally binding framework for the regulation of investment.

It should be acknowledged that the talk about a multilateral investment framework is not new. The idea has previously been proposed and engaged upon more than once but has failed and been shelved, countries preferring to regulate international investment by other means.

Essentially, it has been argued that the prevailing uncoordinated international investment regime has failed to provide harmonised regulation, promotion and protection of international investment and that the status quo should not continue to prevail unabated.[5]

Faced with the above problem, it has become relevant to evaluate the effectiveness of the regulatory mechanisms in place and to analyse whether there are no new compelling reasons for the improvement of the regulatory system by means of a harmonised regulatory framework for international investment, more particularly through a multilateral investment framework.

So, in light of the above, this research aims to make a compelling case for the regulatory convergence of international investment to be brought about by the mega-regional agreements which can be viewed as building blocks to the reformation of international investment regulation.

A number of cumulative reasons have been identified that make up a compelling case for the renewal of deliberations on the need for a multilateral investment framework.

Firstly, it has been noted that global FDI volumes have substantially grown to volumes that states cannot afford to leave unattended by a harmonised system of international regulation.[6] Secondly, the traditional movement of capital has changed course and now flows in both directions between developed and developing countries and is reasonably balanced between the supplying and receiving states, thereby requiring a more formalised mode of regulation.[7]

[5] Stephan W. Schill: Multilateralising Investment Treaties; Beckeley Journal of International Law, Vol 27 Issue 2 (2009) Article 5, Page 497.

[6] Anders Aslund: The World Needs a Multilateral Investment Agreement: Peterson Institute for International Economics: PB13-01. Page 6.

[7] Steve Woolcock: The impact of mega regional agreements on international investment rules and norms. Page 2

Thirdly, the problems with Investor-State Dispute Settlement (ISDS) have discomfited both developing and developed states therefore a new alternative ought to be agreed upon with regards to investment dispute settlement.

Fourthly, the large number of bilateral and regional trade agreements that provide for investment protection indicate a trend towards a multilateral framework with broader coverage as well as a simplified and standardized set of rules.[8]

Lastly, the expansion of foreign investment by state corporations and Sovereign Wealth Funds (SWF) warrants coordinated facilitation and standardized regulation.

The above are the components of the problem to which the thesis seeks to provide a resolution.

1.3. RESEARCH QUESTIONS

The broad research question which this study will seek to answer is whether there is a compelling need for a multilateral investment framework?

In answering the overarching question, the following adjunct questions will also be answered:

1. How effective is the international investment regulatory system in extant?
2. Are there compelling reasons for a multilateral investment framework?
3. What are the likely regulatory impacts of mega regional agreements on international investment regulation?

1.4. THESIS STATEMENT

This research argues that the prevailing uncoordinated international investment regime has failed to provide harmonised regulation, promotion and protection of international investment and that there is a compelling need for the regulatory convergence of international investment, the mega-regional investment agreements being the building blocks for the new multilateral investment framework.

[8] Note 7.

1.5. SIGNIFICANCE OF THE STUDY

The following discussion aims to highlight that through the mega-regional agreements, an opportunity has arisen for countries to fill the long-standing void for a coherent and uniform international investment regulatory system which has remained outstanding since the failure of the Havana Charter[9] from coming into force. The thesis shall demonstrate that the mega-regional agreements may serve as examples of regulatory systems that provide predictability and consistency to international investment and are therefore capable of serving as stepping stones to the establishment of a multilateral investment framework.

1.6. LITERATURE REVIEW

Hereunder, a review is carried out on what has been written regarding the path that led states to rely on BITs, the challenges that have been met by states while using BITs, the reasons for the failure of previous attempts at the adoption of a MIA and the new occurrences that have prompted the renewal of the debate on whether there is need to explore the adoption of a multilateral investment framework.

Vandevelde states that the history of international investment agreements falls into a trio of epochs that span between, firstly, the Colonial Era which began in the late Eighteenth Century and continued until the end of the Second World War. The second stage was the Post-Colonial Era, which started with the end of the war and continued until about 1990, being mostly influenced by the triumph of capitalism over communism and prominently marked by the collapse of the Soviet Union. The Third phase, dubbed the Global Era, began approximately in 1990 and has continued until the present day. [10]

Colonial period agreements were characterised by an amalgamation of trade and property protection provisions and states generally did not recognise the need to have separate agreements on property or investment.[11] Further, emphasis was generally placed on the establishment of commercial relations and the protection of property was made secondary in ranking to the establishment of commercial relations between states. As a general characteristic, the existing treaties during this period were weak as they did not provide for

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[9] The Havana Charter for an International Trade Organisation. U.N Conference on Trade and Employment, Final Act and Related Documents, U.N Doc. E/CONF. 2/78, U.N Sales No.IID. $ (1948).

[10] Vandevelde, Kenneth J. 2005. A Brief History of International Investment Agreements. Journal of International Law and Policy 12: 158.

[11] Vandevelde, note 9. Page 161.

means of enforcement. Instead, the colonial masters employed non-legal mechanisms of diplomacy and military force so as to provide protection to their investments abroad.[12] Essentially, there were no investment agreements of much substance at this stage as they were not a politically necessity.

The second stage of development was marked by the end of the Second World War (WWII) and the resultant consensus of the triumphant allies culminated in the 1947 General Agreement on Tariffs and Trade (GATT). The enactment of the GATT effectively meant that the global trade regulation framework transformed from a bilateral setup and transcended to a multilateral form and ushered in a new dispensation of multilateral trade regulation.

As a result, the promulgation of the GATT resulted in the creation of a dominant multilateral institution with jurisdiction to regulate international trade, excluding international investment. This consequently meant that investment was subsequently regulated separately from trade, albeit not by coordinated and institutional multilateral rules and regulations but by a patchwork of bilateral agreements[13]

Despite this remarked success of the trade regime agreement, the Havana Charter, a treaty that was intended to create a liberal multilateral investment regime for both trade and investment failed to enter into force. Riyaz Dattu writes that because the Havana Charted insisted on economic development over international standards of protection granted to foreign investment, multinational enterprises objected to it. At the same time developing countries perceived the Charter as giving too much protection to the multinational enterprises.[14] These factors were partly responsible for the failure of the Havana Charter negotiations.

In the aftermath of WWII, the Soviet Union spread a widely ranging campaign against the investments of the Capitalist nations and influenced the newly independent states to shun economic relations with developed states and not to follow the free market theory but adopt

[13] Note 9, Page 162.
[14] R. Dattu: A Journey from Havana to Paris: The Fifty-Year Quest for the elusive Multilateral Agreement on Investment, Fordham International Law Journal: Volume 24 Issue 1, 2000, Page 288.
Agreement on Investment.

centrally planned economic mechanisms.[15] This influence created an environment of takings by governments under the guise of regaining their resources from imperialistic vestiges.

In response to the threat of their investments being expropriated without compensation, in 1959, Germany concluded the first two bilateral investment treaties, one with Pakistan and the other with the Dominican Republic.[16]

Following the Germany example, several other countries entered into BITs and it has been noted that these BITs followed a distinctively uniform pattern of being exclusively dedicated to investment[17] and being premised upon two major conceptions, firstly, that they were meant to provide protection to the investments of capital exporting countries and to attract foreign investment from the perspective of the capital importing state.[18]

In support thereof, the UNCTAD states that in the first instance, BITs were entered into between a developed and a developing country, usually at the initiative of the developed country.[19] Typically, the developed country which was invariably a capital exporting country, entered into a BIT with a developing country, also customarily a capital importing country, in order to secure additional and higher standards of legal protection and guarantees for the investments of its firms than those offered under national laws. On the other hand, the developing country, would sign a BIT as one of the demonstrative elements of a favourable climate to attract foreign investors into its economy.[20] These were the sought after benefits of signing BITs.

Vandevelde notes that throughout the second epoch of BITs, the protections provided by the BITs were similar to those that had been provided in the modern Friendship Commerce and Navigation agreements concluded by the United States.[21] These treaties provided guarantees of national and most favoured nation treatment for covered investment, a promise of "fair and equitable treatment" for covered investment, a commitment to pay prompt, adequate and

[15] E W Nafziger, The Economics of Developing Countries 106-08 (3d ed. 1997).
[16] UNCTAD, Bilateral investment treaties in the mid-1990S at 8, 177, U.N. Sales No. E.98.II.D.8 (1998).
[17] Vandevelde, supra note 1 above. Page 170.
[18] UNCTAD, supra note 7 above. Page 5.
[19] Note 17.
[20] UNCTAD: Bilateral Investment Treaties 1959-1999. /ITE/IIA/2. Page 1.
[21] Vandevalde quoting with approval, Herman Walker, Jr., Modern Treaties of Friendship, Commerce and Navigation, 42 MINN. L. REV. 805 (1958); these were the first treaties of Friendship, Commerce and Navigation entered into by the United States between 1946 and 1966.

effective compensation for expropriation of covered investment, and restrictions on exchange controls.[22]

A close look at the third epoch in investment regulation demonstrates profound changes in the context in which international investment agreements were negotiated and highlights gravitation towards the objective of this dissertation, provoking more questions on the need for a multilateral investment agreement.[23]

Widely speaking, the third period has witnessed the amalgamation of trade and investment provisions in international agreements.[24] The World Trade Organisation (WTO) was created in 1995 and was tasked with the administration of the GATT.

The first development of particular interest with regards to the WTO was the conclusion of the General Agreement on Trade in Services (GATS) which contains provisions for trade in services through "commercial presence". This chosen mode of supply of trade in services leads to the establishment of services with acute features FDI in that a trader in services is allowed to set up a subsidiary in the foreign country. It has been argued in this regard that a GATS commitment to allow trade in a certain service sector through commercial presence amounts to a commitment to allow the establishment of foreign investment.[25]

In addition the WTO members concluded the Agreement on Trade Related Investment Measures (TRIMS) which proscribes the imposition of specific trade distorting requirements on foreign investment.[26]

Further, it has been observed that the 1990s witnessed a rapid increase in the number of BITs, and, by the end of the decade, the universe of these treaties looked dramatically different from that of previous decades. The number of treaties quintupled during the decade, rising from 385 at the end of the 1980s to 1,857 at the end of the 1990s.[27] This marked proliferation obviously followed the fall of the Soviet Union and the ease in political relations between the capital importing states and former Soviet bloc states and developing states. Countries sought to attract

[22] Vandevalde, note 11 above.
[23] Note 11.
[24] Note 11, Page 176.
[25] Note 11.
[26] Note 11.
[27] Bilateral Investment Treaties 1959-1999. UNCTAD/ITE/IIA/2. Page iii.

foreign investment and BITs were the day's only means of providing assurance of protection to foreign investment.

To date, the number of IIAs in force exceeds 3000, with more than 2833 BITs and more than 300 investment impacting trade agreements also being in force.[28]

It has been noted, and much in agreement with the objective of this writing that the amalgamation of trade and investment provisions within the same agreements goes to effect a change in the nature of economic activity. This highlights the nexus between trade and investment.

In this regard, trade and investment are no longer perceived as strange bedfellows but complementary elements to global economic activity.[29] As a result, deeper economic integration has demanded that barriers be eliminated not only in trade but also in investment and states have accepted the need to establish synergies between trade and investment so as to achieve meaningful and profitable liberalisation.

Vandevalde notes that whereas economic integration was traditionally between economies of comparable standing, the process of deeper economic integration began to occur among states with dissimilar economic circumstances, as epitomised by the conclusion of the North American Free Trade Agreement (NAFTA) between the United States, Canada and Mexico, the latter being a developing country as opposed to its other two developed counterparts.[30] Of more interest in this regard was the inclusion of investment provisions within the FTA.

Owing to the abovementioned investment provisions, several claims were filed against the formerly capital exporting states and the result was that the United States effected changes to its BITs.[31] The changes included the addition of language specifying that the fair and equitable treatment standard should merely incorporate the international minimum standard.[32] The subsequent BITs also limited the prescription period for the prosecution of investment claims to three years, thus overally limiting the extent of protection provided by BITs.

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[28] Anders Aslund: The World Needs a Multilateral Investment Agreement: Peterson Institute for International Economics: PB13-01. Page 2.
[29] Vandevalde, note 11 above. Page 180.
[30] Note 28. Page 181.
[31] Note 28.
[32] On 31 July 2001 the NAFTA Free Trade Commission issued a Note of Interpretation stating that the fair and equitable treatment standard as provided in Article 1105 of NAFTA did not mean any treatment exceeding that provided under customary international law. See also the 2004 US model BIT.

In the midst of these occurrences, the OECD took a shot at the conclusion of a Multilateral Agreement on Investment (MAI) with the intention to use the OECD group as a launchpad for the adoption of a wider reaching MIA.[33] This agreement unfortunately did not come to life as the states could not reach consensus regarding the provisions to be included in the agreement.[34] The MAI was perceived by OECD member states as encapsulating concessions rather than gains, hence the impetus for its success diminished while on the other hand, nongovernmental organisations that were opposed to economic globalisation campaigned against the very same idea and the political price to pay for the adoption of the agreement became too high for the OECD members.[35]

Subsequently, the question regarding a multilateral investment framework was placed on the Doha Round agenda of the WTO Ministerial Singapore meeting of 1996 when the United States and other industrialised states were convinced of the need to have multilateral framework on investment.[36] However, the agenda was dropped at the WTO Cancun ministerial meeting in 2003.

Owing to the inaction by the WTO on investment regulation, countries have come up with new forms of agreements that involve regulation of investment. These are the mega-regional agreements.

The researcher has observed that the mega-regional agreements demonstrate a shared convergence on norm setting in international investment regulation that bears the capacity develop novel or upgraded rules for regulation of international investment. It has therefore become imperative to investigate the likely impact of these agreements as new compelling reasons that may lead to the adoption of a multilateral framework for the regulation of international investment. Illustratively;

The TTP investment chapter[37] provides for:

Investment protection, ensuring non-discrimination, a minimum standard of treatment, rules on expropriation and prohibitions on specified trade distortive performance requirements. Also,

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[33] OECD, Towards Multilateral Investment Rules (1996).
[34] Vandevalde, note 23. Page 191.
[35] Anders Aslund, supra note 20 above. Page 5.
[36] K Tieleman: The Failure of the Multilateral Agreement on Investment (MAI) and the absence of a global public policy network. Page 17.
[37] https://ustr.gov/sites/default/files/TPP-Final-Text-Investment.pdf accessed 16 January 2016.

it includes provisions for investor-state dispute settlement subject to safeguards to protect the rights of TPP countries to regulate in the public interest.[38]

The TTIP investment chapter[39] regulates:

Guarantees of protection against expropriation, free transfer of funds, fair and equitable treatment and a level playing field for investing companies, investment protection, dispute settlement through a proposed new investment court system, relevant safeguards and right to regulate.[40]

From the foregoing, it is has been the writer's general observation that in the face of such wide agreement between countries of varyingly important economic influence, firstly, the need for agreement on wide reaching investment rules is highlighted, secondly, that countries are now more likely to settle and agree on a multilateral agreement more than ever.

The writer shall develop these arguments on the back of the lessons that have been learnt from the failures of the previous attempts to reach at the same goal.

In addition, the research shall also be built upon the welfare effects of a multilateral investment regulation system that have been advanced. In this regard, it has been observed that a multilateral investment framework prevents the marginalisation of countries not signatory to BITs with other countries, and in this case, countries not party to the mega regionals.

Also, study has shown that a multilateral framework has the potential to bring with it policy coherence, transparency, predictability and legal security in international investment.[41]

1.7. RESEARCH METHODOLOGY

The research shall be entirely carried out over the desktop. The sources to be used shall be, international agreements and policy statements, together with secondary sources in the form of research papers, academic articles, journals and media coverage of the issues.

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[38] Peter Draper and Ricardo Meléndez Ortiz: The Trans-Pacific Partnership (TPP) and the Trans-Atlantic Trade and Investment Partnership (TTIP) – Key Issues and Potential Impact on Members: Mega-regional Trade Agreements Game-Changers or Costly Distractions for the World Trading System? Pg 15-16.

[39] http://trade.ec.europa.eu/doclib/html/153807.htm accessed 15 January 2016.

[40] Note 35.

[41] Zdenek Drabek: A Multilateral Agreement on Investment: Convincing the Sceptics. World Trade Organisation.

An analysis of these sources shall be carried out with the aim to establish the benefits arising therefrom and to investigate whether there is need for a multilateral agreement.

A review shall be made on the impact that is likely to result from the mega-regional agreements that are being negotiated by states and how this impact may affect international investment regulation.

This analysis will be made by criticising the supposed benefits of each of the likely responses of member and non-member states approaches and an ultimate weighting shall be made of which approach proves to fulfil the economic needs of countries and a conclusion shall be made on the way forward.

1.8. LIMITATIONS TO THE STUDY

The mega-regional agreements under discussion are not yet in force. Negotiations for the TPP were concluded on the 25th of October 2015 and the TTIP remains under discussion, albeit facing severe criticism and objection from the general populace throughout Europe. Despite that these agreements are not yet in operation, the potential effects they may have on international investment law can be gleaned from the nature of their provisions. Both agreements carry significant and potentially game changing provisions on the regulation of investment within their spheres of operation. Further, the scope covered by these agreements is hard to neglect in terms of geographic and economic reach.

Despite that the agreements are not yet in force, it is considered that the magnitude assumed by the mega-regional agreements demands that particular attention be paid to their impact upon investment regulation, not only owing to the impact they shall pose upon the member countries but also on the basis of the likely repercussions to be faced by the countries from without their spheres of operation.

1.8. OUTLINE OF CHAPTERS

The dissertation shall be organised as follows:

1. Chapter one shall be the introduction, providing an overall overview to the discussion;
2. Chapter Two shall expose the ills of the patchwork of bilateral investment treaties currently in place,

3. Chapter Three shall seek to highlight the arguments for a multilateral investment framework,
4. The Fourth Chapter shall discuss the new developments that have culminated in mega-regional agreements and it shall aim at highlighting the meaning of these agreements to members and non-members as far as investment regulation is concerned;
5. Chapter Five shall be the conclusion of the discussion and shall provide recommendations on whether there should be any multilateral framework on investment and the appropriate route to take.

CHAPTER 2

THE PROBLEMS WITH THE EXISTING INTERNATIONAL INVESTMENT REGULATORY MECHANISM

2.1. INTRODUCTION

The focus of this chapter shall be on demonstrating the deficient and undesirable state of the current framework of international investment regulation. The purpose shall be to highlight that the prevailing uncoordinated regulatory framework composed of International Investment Agreements (IIAs) that are in the form of BITs and Regional Trade and Investment Agreements (RTAs), and WTO rules is riddled with shortcomings that require an overhaul of the entire regulatory framework. Further, the Chapter intends to highlight that following the failure of the current regime to ensure regulatory coherence and predictability, there is an alternative that lies in the form of a multilateral investment framework that is influenced by the mega-regional agreements currently under discussion.

2.2. THE DEFICIENCIES OF BITs

International investment involves the commitment of capital and resources, mostly amounting to huge sums that investors cannot afford to lose easily. Such forms of investment cannot be undertaken randomly in the absence of assurances of protection against various forms of risks, the most humongous risk being governmental power to expropriate. Expropriation is regarded to be the most severe act of interference with property and is defined as an action by the host state that deprives investors of the ownership, control and economic benefit of their investment.[42] What makes expropriation rank prominent among the threats known to international investment is that it may take either a direct or a more notorious and disguised indirect form. Further, in the event of expropriation an investor loses the benefit of their investment mostly at the expense of the host government, rendering the investor constricted with regard to obtaining fair and equitable compensation from the host state courts.

Despite the existence of such huge risks, the international investment sphere has no uniform, codified and universally binding regulatory framework that is directly meant to address such

[42] L. Cotula, 'Strengthening Citizen's Oversight of Foreign Investment: Investment Law and Substantial Development' Page 2.

risks. In other words, there are no universally binding rules of international investment inasmuch as there are rules for global trade.

In the stead of crafting a universal investment regulatory system, countries have resorted to entering into BITs amongst themselves in a bid to provide rules that regulate investment transactions by investors from across the borders. By definition, a BIT is an international legal instrument through which two countries set down rules that will govern investments by their respective nationals in the other's territory.[43]

Explaining the underpinning rationale for BITs, Sornarajah asserts that

"Had the rules on investment protection in international law been clear, there would have been no reason for such treaties. The accepted reason for the treaties is that as a result of the drive for the New International Economic Order by the developing states, there had been a lack of clarity as to the rules, with two competing sets of norms accepted by two sets of states as constituting the rules on foreign investment protection. It was in this context that investment treaties came into play so that states could bilaterally decide on what rules of protection would apply. These treaties were intended to be lex specialis, the general rules being unclear"[44].

The preceding assertion points to the fundamental need that states have had for regulatory clarity with regard to how investment should be treated when introduced to and received in foreign jurisdictions. Rawan adds to the above assertion by stating that due to the uncertainty of the customary rules available to foreign investors, states resorted to concluding ad hoc bilateral investment treaties.[45]

The justification for countries entering into BITs has been to anticipate the legal and business concerns of the foreign investor and to provide safeguards for such concerns before foreign investment is established in a country. In other words, the signature of BITs is meant to serve the need for legal coherence, predictability and consistency within the network of international investment.

[43] J.W. Salacuse and N.P. Sullivan: Do BITs really work? An evaluation of bilateral investment treaties and their grand bargain. Page 1.
[44] M. Sornarajah: The International Law on Foreign Investment, Page 233-234.
[45] Unpublished: A Coherence Perspective of Bilateral Investment Treaties: Rawan Mustafa Al-Louzi Ph.D. thesis The University of Manchester, 2012, Page 156.

2.2.1 The lack of regulatory coherence

Despite the inexistence of a strict legal system that governs international investment, the thesis takes a look at the de facto regulatory system of BITs in a bid to measure its coherence and consistence as a regulatory mechanism. This scrutiny is necessitated by the fact that while BITs are the factual regulatory mechanism in place, they should demonstrate a form of regulatory coherence that is required of any governing system to an international function of such importance as foreign investment.

International investment regulation is composed of several elements that ought to be synchronised with each other in order for there to be coherence. Firstly, there must be a real connection between the international investment law and the BITs. Secondly, there ought to be a connection within the vast network of BITs themselves if the entire platform is to regulate as a single unit. Thirdly, there must be cooperation between the rules of international investment as contained in the BITs and the international trade rules, given the growing relationship between trade and investment especially under the prevalent system that fuels the influence of Global Value Chains

Why is there a need for coherence, predictability and consistency at all, one may ask.

The major business principle that consistency and predictability is meant to serve revolves around the desire of corporations to reduce transactional costs. Typically, in a situation where there is no predictability, the investor incurs a considerable cost in order to ascertain the applicable conditions such as the permissible business structure to use in a given country, the internal regulatory requirements that ought to be complied with, the cost of such requisite compliance, and many other administrative and regulatory peculiarities.

Where these factors are not easily determinable, the cost of setting up and operating an investment increases and the efficiency of an investor is compromised. Given the investment of multinationals in different countries, the need for regulatory coherence cannot be emphasised.

On the other hand, the same difficulties would not present themselves where the legal requirements are universally applicable, and therefore easily ascertainable, especially under a formal system where countries abide by the same regulatory requirements that are binding and sacrosanct.

Further, it is noteworthy that the maintenance of a coherent system of BITs gives a higher form of predictability to states, policy makers and foreign investors with regard to their legally binding commitments and anticipated benefits. With this at their disposal, states and investors alike would be better able to make informed decisions and to know beforehand the form of legal arguments that would be admissible in the event of a dispute.[46] Further, the unlikely prospects of rapid change in these rules helps to keep the cost for the investor constant.

The principle of legal coherence is justified by Rawan Mustafa[47] who defines coherence as an attempt to prettify the law and minimise the effects of politics which may leave the law untidy.[48] Rawan continues to state that the coherence of a legal system is reflected in how the legal rules and regulations fit together to form one unified and tightly structured whole.[49] She further asserts that a coherent system would be one which is clear and carefully structured in such a way that all its parts connect and follow. Additionally, a legal system must be composed of supportive rationality or a kind of internal interconnectedness or plausible connection in which all its elements mutually support each other.[50]

From the above, a preliminary question may be posed whether the international investment sphere operates under any legal system at all. It is submitted that international investment operates in terms of a set of principles, norms and a disjointed lot of treaties that are overseen bilaterally, regionally and multilaterally by countries which have absolute control over the content and form of the rules and regulations that apply to both domestic and foreign investment within their respective countries and no further.

By comparison, the international investment platform is unlike the international trade system that is universally regulated by the overarching rules of the World Trade Organisation, which rules are of effect to both members and non-members.[51] Where the rules of the WTO encroach onto the regulation of investment, they only regulate a segment of international investment, particularly that which directly relates to international trade.

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[46] M. Sornarajah: The International Law on Foreign Investment, Page 143.
[47] J.W. Salacuse and N.P. Sullivan: Do BITs really work? An evaluation of bilateral investment treaties and their grand bargain, Page 23.
[48] J Raz, The Relevance of Coherence, Boston University Law Review, 72, 1992, Page 310.
[49] Note 44, Page 24.
[50] Note 44, Page 32.
[51] Where a WTO member trades with a non WTO member on favourable terms, the WTO Agreement requires that the same treatment be accorded to other members of the WTO. This is essentially what is referred to as the Most Favoured Nation Principle.

It is maintained therefore that in the absence of a framework that may be classified as a strict legal system, the international investment environment as governed principally by bilateral and regional treaties, and a couple of WTO Agreements, cannot fare very well if its coherence it to be placed under scrutiny.

2.2.2 The consequences of regulatory inconsistency

An investor will seldom go into a jurisdiction where they cannot, with reasonable accuracy, predict how they will be treated in terms of the applicable law, comparably with local investors and other investors from different countries. In recognition of this regulatory path, the 2015 World Investment Report notes that "the conclusion in 2014 of 31 international investment agreements (IIAs) – 18 bilateral investment treaties (BITs) and 13 "other IIAs[52]" - brought the total number of IIAs to 3,271 (2,926 BITs and 345 "other IIAs") by year-end."[53]

It is notable here that there has been a serious proliferation of BITs that are aimed at providing regulatory mechanisms to foreign investment.

The UNCTAD Secretariat in 2014 noted that:

"...recent developments brought about a growing dichotomy in investment treaty making. A rising number of developing countries in Africa, Asia and Latin America are disengaging from the system. At the same time, ***there is an upscaling trend in treaty making, which manifests itself in increasing dynamism*** *(more countries are participating in ever more quickly sequenced negotiating rounds) and in an expanding depth and breadth of issues addressed."*[54]

The above serves as clear demonstration that the investment regulation regime as it stands carries many significant disparities that continue to widen. In recognition of such differences it becomes imperative to assess whether despite the acknowledged differences the current system of BITs has managed to provide the necessary coherence, predictability and consistency into the international investment arena.

[52] World Investment Report: UNCTAD, 2015, Page 118.
[53] World Investment Report: UNCTAD, 2015, Page 107.
[54] United Nations Conference on Trade and Development: Transformation of the international investment agreement regime, note by secretariat, Page 2.

2.2.3 Unequal protection of investment

Firstly, it should be noted that traditionally BITs have been signed between developed capital exporting states on one hand and developing and least developed capital importing countries on the other hand. Further, these agreements have been signed on the primary premise of protecting and promoting foreign investment.[55] From the foregoing, it is understood that the traditional purpose has been to provide the utmost level of protection that may be accorded to investment, mostly according to the dictates of the capital exporting state.

It would also be foolhardy not to recognise that the provisions of such agreements are influenced heavily by political asymmetries where the wishes of the powerful country carry the day.

From this point of view, it has been noted that the inaugural BITs fostered an environment where foreign investment was treated as inviolable and untouchable. The BITs that were signed in the first phases were over-protective of foreign investment. This form of over-protection graduated during the period when the New International Economic Order (NIEO) agenda was being pursued by the developing and newly politically independent states that perceived foreign investment as a continuation of the defeated colonial influence.[56]

In recognition of the abovementioned political influence, it is naturally consequent that the levels of protection offered by a particular BIT would be a result of bargains between the negotiating states.[57]

The above stated consequence is noticeable from the fact that each country that has a considerable influence over cross-border investment has developed its own Model BIT, one that captures its peculiar investment policy and ideology. It is these Models that countries use as points of departure in negotiating the terms of treaties with their counterparts. Where the negotiating counterpart does not bear considerable negotiating power, the provisions of the Model BIT are adopted as they are and in instances where there is a stronger negotiating

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[55] Axel Berger: Do we really need a Multilateral Investment Agreement? Page 2.

[56] J Wouters et al: Inernational Investment Law: The perpetual search for consensus, Page 1-2.

[57] See the Bargain Theory by W Salacuse: The Three Laws of International Investment: National, Contractual, and International Frameworks for Foreign Capital.

partner, the ultimate provisions in the BITs reflecting a compromise between the parties. Cases in point are the China[58], India[59] and USA[60] Model BITs.

It is this imbalance in negotiating power that results in unequal protection of investment in BITs.

2.3. THE POINTS OF REGULATORY INCOHERENCE IN BITs

Whereas several provisions are included in BITs, this work shall focus on a selected few to demonstrate how these agreements are inconsistent and diverse, thereby not providing any systematically coherent form of regulation to international investment.

2.3.1. Definitions of investment and investor

For an economic facet as important as international investment, it would be noble that the basic term "investment" must have a settled definition. However, the term investment continues to be given different meanings in different BITs, according to the economic ideologies and whims of the negotiating parties.

To illustrate the importance of the definition of the term "investment" to international investment stakeholders, it has been explained thus;

"From the perspective of a capital exporting country, the definition identifies who the country's constituents are for purposes of investment policy – who are the categories of persons, industries and groups that will benefit from the investment treaty program.

From the perspective of a capital importing country, the definition identifies who the country's clients are for purposes of investment policy – who are the persons, industries and groups that the country wants to attract in order to increase foreign investment.

From the perspective of investors, the definition identifies how the investment holdings may be structured in order to maximize protection of the investment under investment treaties."[61]

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[58] http://investmentpolicyhub.unctad.org/IIA/CountryBits/42 accessed 20 January 2016.
[59] https://www.mygov.in/sites/default/files/master_image/Model%20Text%20for%20the%20Indian%20Bilateral%20Investment%20Treaty.pdf accessed 20 January 2016.
[60] https://ustr.gov/sites/default/files/BIT%20text%20for%20ACIEP%20Meeting.pdf accessed 20 January 2016.
[61] B Legum: Defining Investment and Investor: Who Is Entitled to Claim? Making the Most of the International Investment Agreements: A Common Agenda, Page 1.

The above clearly shows how the precise definition of the term aids the cause of international investment not only to one party but to all the parties that may be engaging in an international investment transaction. Their understanding of the subject of engagement is central to the whole exercise, yet there is no uniform definition of the same principle.

It is important to note that the deficiency for a settled understanding of what constitutes "investment" can be said to stem from a lacuna in the International Centre for Settlement of Investment Disputes (ICSID) Convention which does not provide a precise definition despite that it is the Convention that establishes the sole institutional platform endowed with jurisdiction to settle legal disputes arising directly out of an investment[62] between a contracting state and a national of another contracting state.

Given this lack, states have adopted varied approaches at defining the term investment. It has been noted that most BITs define the term "investment" in a broad and open ended manner that caters for the capital to be introduced in the foreign territory as well as all other kinds of assets of the investor in the foreign territory.[63] This wide and seemingly unlimited definition is necessitated by the realisation that capital is fungible and investment of capital takes a multitude of forms.[64]

The practice of defining investment by open ended means can therefore be held to reflect an effort to accommodate the endless creativity of the capital markets and to encourage foreign investment in all its forms, present and future.[65] This constantly change in forms of capital is further reason for the need to establish a universal definition that is adopted across the board and adjusted accordingly when there is need.

While the above may appear to be the norm, the UNCTAD notes to the contrary that there are various forms through which the term investment is defined in BITs:

"Among the BITs concluded since 1995, one can distinguish several kinds of definitions. There is the traditional "asset-based" definition, which, with several variations, has continued to be the most common approach. A second kind of definition, the use of which has diminished recently, is related to a "circular" or "tautological" approach, which focuses on the features

[62] Article 25 (1) of the ICSID Convention.
[63] Bilateral Investment Treaties 1995-2006: Trends in Investment Rulemaking, Page 8.
[64] B Legum: Defining Investment and Investor: Who Is Entitled to Claim? Making the Most of the International Investment Agreements: A Common Agenda, Page 2.
[65] Bilateral Investment Treaties 1995-2006: Trends in Investment Rulemaking, Page 2.

of an investment rather than conceptualizing it. A third approach is a "closed-list" definition of investment. Fourth, there are techniques that exclude certain assets and transactions from the definition".[66]

In addition to the above discrepancies in defining the term investment, it has been noted that in a considerable number of BITs, the qualification of an investment as being covered under a BIT is often left to the domestic laws of the country to which the investment has been introduced. A case in point is the Indian Model BIT[67] which defines investment as *"an enterprise in the Host State, constituted, organised and operated in compliance with the law of the Host State and owned or controlled in good faith by an investor".*

The definition given above subjects the definition of investment to the changing characteristics of the laws of a country, giving the Host State unfettered control over what may be protected and what may not be protected, despite the provisions of the BIT. It would not be uncommon that what would have been deemed an investment at the time of signing a BIT may end up not qualifying as investment after domestic regulatory overhauls are effected.

It is opined here that this form of definition does not provide any settled understanding to the capital exporting state and to the investor regarding the economic interests to which substantive BIT protection is accorded. Moreover, such a definition is inhibitive of any future planning on the part of the investor given the ability of the potential host state to change its laws and define investment in any manner it deems fit and to subject such investment to new conditions as it chooses.

The definitions given in BITs have therefore given way to a common practice that renders the definition of investment to be capable of assuming diverse forms and to be restricted by every set of negotiating countries as they deem fit, thereby making the practice of BIT definition incoherent, unpredictable and inconsistent.

The above demonstrated possibilities of defining investment in diverse terms reveal that the prevailing system of BITs does not provide a consistent approach to the very basic concept of what constitutes investment that should be afforded protection from an international perspective. The examples illustrate that the BIT system perpetuates a regulatory fragmentation

[66] Note 63, Page 7.
[67] Model Text for the Indian Bilateral Investment Treaty, Note 59.

that runs deep into the basics of international investment and for as long as countries maintain the current individual ability to shape every facet of international investment, the abounding inconsistencies will continue unabated.

2.3.2. Standards of treatment

BITs commonly provide for specified standards of treatment that a host state should accord to investment once it has been established within the host's jurisdiction. These standards can be broadly classified into two categories which are; "absolute standards", being non-contingent and stand-alone standards that are different from "relative standards" whose definition depends upon juxtaposition with the treatment received by investment from third party countries that are not signatory to a given BIT.

True to the general position that has been adopted by the writer regarding the lack of coherence and consistency, the UNCTAD has noted that most BITs provide both categories of standards, albeit with significant variations.[68] From this early note, it becomes relevant to bring out the nature of the inconsistency and how it impacts the platform of international investment.

(a) Absolute Standards

These are standards that are intended to provide overall criteria by which to judge whether the treatment given to an investment is satisfactory, and to help interpret and clarify how more specific provisions should be applied in particular situations.[69]

The principle of "fair and equitable treatment" (FET) is the most prominent standard against which the treatment of foreign investment is measured without reference to the host's domestic rules and regulations. However, the UNCTAD notes that although clauses providing foreign investment with fair and equitable treatment are widespread, the standard itself lacks a precise meaning and this has raised important questions that are primarily focused on the nature and content of the commitment.[70] Commenting on the same standard, Sornarajah states that this phrase is vague and is open to different interpretations…the resulting practice making the phrase fair and equitable otiose at least as far as these treaties are concerned.[71]

[68] Note 65, Page 28.
[69] Bilateral Investment Treaties 1995-2006: Trends in Investment Rulemaking, Page 28.
[70] Note 63, Page 28.
[71] Sornarajah, Page 204.

The lack of a precise definition to the principle has given way to scholarly interpretations that are divergent. Sornarajah notes that there are two general views regarding this nebulous provision, the first being that the obligation to grant foreign investment "fair and equitable treatment" is not different from the obligation to treat the investment in accordance with the international minimum standard. This implies that the standard merely serves to affirm the international minimum standard, which is composed of a bundle of international legal principles.[72] Following such an interpretation, the fair and equitable provision is rendered to be of no consequence at all as it is equated to the international minimum standard to which all countries are subject.

On the other hand, the second school of thought pursues the position that the standard expands the scope of the international minimum standard by allowing future tribunals to create new standards as demanded by the justice deserving to foreign investors who suffer unfair treatment at the hands of the host state.[73]

According to this school of thought, "fair and equitable treatment" means something different from the international minimum standard and should be given its plain meaning, resulting in a case-by-case application of a test based on equity in order to determine whether the standard has been infringed.[74] This expansive interpretation has been used in the case of **METALCLAD v MEXICO**[75] wherein the tribunal held that the absence of transparency in the rules applicable to the circumstances in which licences were granted was a violation of the fair and equitable standard.[76] However, on review, a British Columbia court held that the transparency requirement was not inherent in the formulation of the fair and equitable standard as provided through Article 1105 of Chapter 11 of NAFTA.[77]

Further, demonstrating a lack in consistency in interpreting the same provision, in **S.D. MYERS v CANADA**[78] the tribunal limited violations of the fair and equitable standard to situations in which there was arbitrary treatment that was unacceptable from an international

[72] Sornarajah, Page 349.
[73] Sornarajah, Page 349.
[74] Note 59, Page 28.
[75] (2000) 5 ICSID Reports 209; (2001) 40 ILM 55.
[76] Sornarajah, Page 350.
[77] Note 76, Page 350.
[78] (2000) 40 ILM 1408; (2002) 121 ILR 7.

perspective. Sornarajah notes that the Myers tribunal was conscious of the need to limit the scope of the standard to violations of customary international law.[79]

Admittedly, the UNCTAD highlights that the practical implications of following one approach rather than the other could be significant as shown by the survey of BITs concluded during the decade preceding 2006. This survey distinguishes between seven different categories of fair and equitable provisions within BITs.[80]

It is the writer's argument that the possibility of identifying such a large stretch of distinct BITs that are dedicated to regulate the same subject matter confirms the lack of the necessary coherence within the BIT network. When interpreted in the indicated manner, these seven different categories lead to a confusion on what is meant by the basic and fundamental term of fair and equitable treatment. Further, in the absence of collective efforts by states to accurately define the term, it is likely that the fair and equitable treatment standard will continue to be a focal point of debate on international investment law.[81]

(b) Relative standards

Relative standards are another common feature in BITs and this work shall address the Most Favoured Nation (MFN) standard as a common provision that is addressed in multiple incoherent and inconsistent ways in BITs.

The MFN standard requires that investments and investors of a contracting party should be accorded treatment by the other contracting party that is not less favourable than the form of treatment granted to the investments and investors of any other third party state.

The above characteristic of MFN clauses generally provides investors with the opportunity to import more favourable clauses from other treaties that a co-signatory state has entered into with third party countries, thereby enabling an investor to benefit from an external provision that is foreign to the basic treaty between the parties. This ability carries with it the potential to import any unforeseen provision that has the likelihood to change the entire meaning and structure of the primary BIT between parties. The MFN provision therefore generally maintains an aura of uncertainly and unpredictability in BITs.

[79] Sornarajah, Page 351.
[80] Note 69, Page 30.
[81] Note 69, Page 33.

It should be noted that although the inclusion of the MFN clause in investment treaties has become general practice, the drafting of it is quite diverse in that while some clauses are narrow, some are more general.[82] Rawan states that many MFN clauses enclose specific exceptions and restrictions so at to exclude certain areas including economic integration and matters of taxation from their application.[83]

In support of the same sentiment, the UNCTAD notes that not all recent BITs address the MFN standard in the same manner.[84] The UNCTAD further notes that regarding the scope of the clause, two groups can be distinguished with one category granting MFN treatment only after investment has been established in the host state whereas the other category provides MFN treatment in both pre and post-establishment phase. Moreover, among the BITs granting MFN treatment only in the post establishment phase, one can distinguish several categories.[85]

The case *of* **MAFEZZINI v THE KINGDOM OF SPAIN**[86] illustrates the above distorting feature that is common to the network of BITs. In the Maffezini case, Mr Maffezini, an Argentine national who had invested in Spain invoked the BIT between Argentina and Spain (1991) and initiated an international arbitral procedure before ICSID. This was despite that in terms of the BIT between Argentina and Spain, a covered investor had to submit the claim first to domestic courts. The possibility of settling the dispute through international arbitration existed only if domestic remedies had been exhausted within 18 months.

During the course of the proceedings Spain objected to the jurisdiction of the arbitration tribunal, arguing that Mr. Maffezini ought to have approached Spanish courts first in compliance with the BIT between Argentina and Spain.

Mr. Maffezini nevertheless, argued that the MFN clause in article 4 of the BIT between Argentina and Spain allowed him to invoke the dispute settlement provisions in the BIT between Chile and Spain (2003), which permits the investor to submit the dispute to ICSID arbitration without having to involve the domestic courts first.

[82] Unpublished: A Coherence Perspective of Bilateral Investment Treaties: Rawan Mustafa Al-Louzi Ph.D. thesis The University of Manchester, 2012, Page 116.
[83] Note 82.
[84] Note 63, Page 38.
[85] Note 63, Page 38.
[86] Emilio Agustin Maffezini v. Kingdom of Spain ICSID No. Apr/97/7. Decision on Jurisdiction of 25 January 2000 and Award of the Tribunal of 13 November 2000.

After acknowledging that the MFN clause explicitly referred to “all matters subject to this Agreement”, the tribunal held that Mr. Maffezini was allowed to "import" the dispute settlement provisions of the BIT between Chile and Spain (2003) and thus avoid the requirement to submit his dispute to Spanish courts prior to initiating the case under ICSID.

The ability of an investor to make use of a more protective and foreign procedural provision in this case brings to the fore the unpredictable nature of the use of BITs as a regulatory network. The likelihood of this unforeseeable and incoherent trend will continue for as long as countries are able to enter into varied BITs that are couched in diverse provisions that provide varied levels of protection, and with many different countries.

On the other hand, while the Maffezini case demonstrated the possibility of importing more favourable procedural provisions to a BIT between states, other arbitral disputes that were resolved after Maffezini have not agreed with the stance to allow investors to make use of procedural provisions from other BITs. In the cases of **SALINI CONSTRUTORRI S.P.A. AND ITALSTRADE S.P.A. v. MOROCCO AND PLAMA CONSORTIUM LIMITED v. BULGARIA** [87] the tribunals held that the use of the MFN clause in a BIT to import procedural dispute settlement provisions from other treaties should only be allowed where in the BIT the parties have demonstrated a clear and unambiguous intention to do so.

This clear and unsettled divergence in the interpretation and application of one of the most standard provisions in BITs reveals a lack of coherence that runs deep within the international investment regulatory framework and requires a conclusive remedy that will apply to the entire regulatory framework.

On this note, it becomes more probable that the possibility to attain coherence through the application of the MFN clause is severely compromised by the existence of contradictory awards regarding the application of the MFN clauses. It is further true that this promotes uncertainty amongst states and investors as a result of inconsistency and lack of support between arbitral awards addressing the same issue. Ultimately, this deficiency in understanding how the MFN treatment operates is a major hurdle to increasing coherence within bilateral investment treaties.

[87] ICSID Case No. ARB/00/4, Decision on Jurisdiction, 23 July 2001; and ICSID Case No. ARB/03/24, Decision on Jurisdiction, 8 February 2005.

In conclusion, it has been noted that MFN clauses shoulder a significant effect in increasing coherence between bilateral investment treaties. They also contribute to providing a level playing field for relations between the host state and various home states with whom the bilateral investment treaties are concluded. Additionally, they form an essential part of the process of increasing coherence by reducing leeway for specialities that may occur in bilateral investment treaties. However, unless arbitral awards provide more guidance and fewer contradictory decisions in relation to the application of the MFN clauses, the MFN provisions will not reach their full potential of ensuring coherence and countering fragmentation in bilateral investment treaties.[88]

2.3.3. Ad hoc Investor-State Dispute Settlement (ISDS)

The resolution of investment disputes has been carried out through ISDS. Through ISDS, foreign investors have been enabled to bring claims in arbitration directly against the host state for a breach in terms of a BIT.

The intention behind this parallel dispute resolution measure has been to minimise country risk by placing the resolution of international investment disputes beyond the control of state controlled institutions that may be subject to political inclinations that work in favour of the host state. The underlying rationale to this dispute resolution mechanism is to ensure that the host country effectively implements its obligations in terms of the applicable BIT and that where decisions are made against the host state, such decisions are effectively enforced through a mechanism that the hosts have no control over.

Owing to this need for impartiality and adjudicative independence, the majority of BITs that have been signed subject all investment disputes to arbitration by ad hoc panels that are constituted through the parties whenever there arises a dispute in terms of the BIT.

However, it is critical to note that the BITs themselves often scantily provide any essential details on dispute resolution. Most of the content is limited to specifying the venues for arbitration, the procedure for appointing the arbitrators and highlighting the obligation placed upon the parties to consider the arbitral award to be final, binding and permanently enforceable. The UNCTAD notes that in real terms, the numerous procedural aspects of arbitration are not regulated in the BITs themselves but through reference to the existing rules – often ICSID and/

[88] Note 87, Page 151.

or UNCITRAL to clarify these matters. However, it is imperative to note that even among these agreements, significant variations exist.[89]

Several forms of criticism have been laid against ISDS, even where the critics have not been advocating for the adoption of multilateral framework of international investment.

The censure that has been laid against ISDS attacks the basic model of using ad hoc arbitral tribunals that are not accountable to any institutional authority, despite that the decisions they make are often critical of laws and measures implemented by elected public officials in sovereign governments.

This has been commonly referred to as a legitimacy crisis that grips the entire ISDS mechanism. Questions have been posed whether foreign investors should be allowed to wantonly challenge public interest measures adopted by countries in a bid to promote social equity or to protect public health.

It has been further observed that the threat of being sued in international arbitral tribunals has imposed an undue regulatory freeze on some countries that are afraid to implement new measures, fearing that their measures may be challenged by multi-national corporations with investments in their territories. This trend has grown following the challenge posed by Phillip Morris against the Australian plain packaging measures.[90] Many countries have adopted a wait and see approach before enacting potentially controversial regulations in a bid to avoid being referred to international arbitration by corporations for alleged infringement of their rights in terms of BITs. It is argued here that such possibilities create disincentives for public interest regulation and impose huge pressure on public finance, especially where significant amounts are awarded to corporations as compensation.[91]

Further, it is common knowledge that the system of international investment arbitration does not follow any doctrine of precedence through which the legal reasons given in previous arbitral awards are followed by successive arbitral tribunals.[92] It is opined here that the

[89] Bilateral Investment Treaties 1995-2006: Trends in Investment Rulemaking, Page 100.
[90] https://www.pcacases.com/web/view/5 accessed 7 February 2016.
[91] Occidental Petroleum Corporation and Occidental Exploration and Production Company v. The Republic of Ecuador, ICSID Case No. ARB/06/11, Award, 5 October 2012.
[92] Scope and Definition, A Sequel: UNCTAD Series on Issues in International Investment Agreements II, Page 2.

possibility of these arbitral tribunals reaching at diverse and incoherent decisions can only continue to flourish under such circumstances.

The UNCTAD notes that the arbitral awards that have entered into the public domain have exposed recurring episodes of inconsistent findings, divergent legal interpretations of identical or similar treaty provisions and differences in the assessment of merits of cases involving the same facts.[93] The height of such incoherence was demonstrated in the cases of **SGS SOCIETE GENERALE DE SURVEILLANCE S.A. v. REPUBLIC OF PHILIPPINES**[94] wherein the tribunal concluded that a provision in the Swiss-Philippine bilateral investment treaty constituted an umbrella clause and allowed the investor to bring contractual claims under the relevant treaty. On the contrary, in **SGS SOCIETE GENERALE DE SURVEILLANCE S.A. v. ISLAMIC REPUBLIC OF PAKISTAN**[95] rejected such an effect to a similar provision included in the Swiss-Pakistani bilateral investment treaty.

It has been further noted that the divergence in decision making shown in the above cases perpetuates the writer's earlier conclusion regarding the incoherent interpretations given to standards of protection provided in the various BITs. The UNCTAD notes that these inconsistent interpretations have led to uncertainty about the meaning of the key treaty obligations and a lack of predictability of how they will be applied in future cases.[96]

An attack is also laid at the lack of an appeal structure against the arbitral awards that are handed down at the end of the arbitral hearings. It has become a norm that these arbitral wards are final and binding and can only be subjected to either the ICSID annulment process of a national court review process at the seat of arbitration for non ICSID cases. However, it is also true that these review mechanisms operate in terms of very narrow jurisdictional limits that severely limit the ability of parties to challenge the decisions of arbitrators. [97] Demonstrating this limitation of powers, in the case of **CMS GAS TRANSMISSION COMPANY v THE**

[93] INVESTOR-STATE DISPUTE SETTLEMENT: UNCTAD Series on Issues in International Investment Agreements II, Page 26.
[94] ICSID Case No. ARB/02/6, Decision on Jurisdiction, 29 January 2004.
[95] ICSID Case No. ARB/01/13, Decision on Jurisdiction, 6 August 2003.
[96] INVESTOR-STATE DISPUTE SETTLEMENT: UNCTAD Series on Issues in International Investment Agreements II, Page 27.
[97] Note 50, Page 27. The ICSID Convention provides that the grounds for annulment are i. improper constitution of the arbitral tribunal, b. manifest excess of power by the arbitral tribunal, c. corruption of a member of the arbitral tribunal, d. serious departure from a fundamental rule of procedure and, e. absence of a statement of reason in the arbitral award.

REPUBLIC OF ARGENTINA[98] an ICSID annulment committee found itself unable to annul or correct an award notwithstanding that it had observed manifest errors of law.

2.4. CONCLUSION

This chapter has demonstrated that the existing framework of international investment governance in the form of Bilateral Investment Agreements is plagued with several faults that render the BIT network inadequate and deserving of rectification. There is a systemic divergence and fragmentation in bilateral investment treaties that continues to breed more inconsistency and lack of predictability. This conflict within the BIT network renders the constitution of a coherent system of law governing international investment relations more difficult.[99]

The major fault as has been explained in this chapter lies with the lack of agreement regarding the meaning and scope of the provisions with the BITs. Given the proliferating variance, it becomes true that if BITs continue to refer to language, general principles and rules that leave excessive scope for interpretation, the treatment that should be expected by international investors from host governments becomes unpredictable, at the same time, host country governments are rendered uncertain regarding their treatment of international investors.

Consequently, uncertainty promotes the likelihood of international investment disputes. Moreover, the resolution of disputes through the ad hoc ISDS platforms created through BITs breeds more incoherence and uncertainty as demonstrated in this chapter.

From the above, it is concluded that the international investment regime deserves the clarification of key concepts in international investment. Such clarification and settlement will provide tighter wording that defines as clearly as possible the sort of injuries for—and circumstances in—which investors can seek compensation, and the type of actions governments can and cannot take. The development and generalized use of standardized wording would help in this regard.[100]

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[98] ICSID Case No.ARB?01/8, Decision of the ad hoc Committee on the application for annulment, 25 September 2007 at 97,127,136,150,157-159.

[99] Sornarajah, Page 143.

[100] Sauvant, Karl P. 2016. The Evolving International Investment Law and Policy Regime: Ways Forward. E15 Task Force on Investment Policy – Policy Options Paper. E15Initiative. Geneva: International Centre for Trade and Sustainable Development (ICTSD) and World Economic Forum.

The following chapter shall further explain the compounding factors that strengthen the argument for reformation of the international investment framework using mega-regional agreements.

CHAPTER 3

ARGUMENTS FOR AND AGAINST A MULTILATERAL INVESTMENT FRAMEWORK

3.1. INTRODUCTION

The purpose of this chapter shall be to draw attention to the compelling arguments that should propel the impetus for a transition to a multilateral international investment regulatory mechanism. The chapter shall also venture to unravel the criticism that has been posed against the adoption of a multilateral investment framework. The ultimate objective of the chapter shall be to demonstrate that the probative value of a multilateral investment framework outweighs the prejudicial effect of the current international investment regulatory framework.

3.2. THE SIGNIFICANT GROWTH OF FOREIGN DIRECT INVESTMENT (FDI)

Recognition should first be given that the need to exercise control over foreign investment grew from the realisation that reconstruction after the end of WWII would require immense foreign investment. Particularly, American investors poured capital into the reconstruction and development exercises throughout Europe to restore the damage inflicted by the war. However, despite this need, countries failed to come up with comprehensive rules to regulate the investment by foreigners in outside jurisdictions. Instead, the use of rules created through BITs proliferated on a country by country basis.

Since the end of WWII, FDI has significantly grown beyond Europe into all the continents of the world where investors foresee the prospect of reaping profits. However, there has been one constant, that is, the lack of a universal set of rules regulating foreign investment.

It is argued that the growth of FDI to the current levels warrants the regulation of the entire international investment sphere by universal rules. As put by Gary Hufbauer, "in the three decades since 1980, nominal world GDP has expanded three times; merchandise trade has expanded six times; while the stock of FDI has expanded twenty times." Hufbauer further states that world income is more than 20% larger today than in 1990 because of the huge expansion in world FDI."[101]

In support of the above, the 2015 World Investment Report notes that;

[101] Hufbauer, Gary Clyde. 2012. FDI Facts and Figures. World Economic Forum 2012, Global Agenda Council of Trade.

"FDI recovery is in sight. Global FDI inflows are projected to grow by 11 per cent to $1.4 trillion in 2015. Expectations are for further rises to $1.5 trillion in 2016 and to $1.7 trillion in 2017. Both UNCTAD's FDI forecast model and its business survey of large MNEs signal a rise of FDI flows in the coming years. The share of MNEs intending to increase FDI expenditures over the next three years (2015–2017) rose from 24 to 32 per cent. Trends in cross-border M&As also point to a return to growth in 2015. However, a number of economic and political risks, including ongoing uncertainties in the Eurozone, potential spillovers from conflicts, and persistent vulnerabilities in emerging economies, may disrupt the projected recovery."[102]

It is opined here that such huge levels of foreign investment, which also continue to expand at a considerable rate, cannot be left unattended by a comprehensive set of rules and regulations especially given the likely recurrence of international financial crises as seen through the 1998 Asian Tigers fall resulting from the sudden withdrawal of FDI from Asian economies, and the 2008 Global financial crises.

Given this burgeoning trend of FDI, it becomes significant to explain the role played by FDI in the economy of a country. FDI is considered to be vital for both home and host countries. The importance can be noted from the emphasis that has been placed upon the potential benefits that can be derived from foreign investment by host countries.

The benefits of FDI range from the relief given to local capital and government reserves to focus on other social and economic activities that are not necessarily directly linked to investment.

The above is further strengthened by the ability of FDI to contribute to domestic savings and investment.[103] It has been widely suggested that FDI bears the potential to introduce better and more useful technology and skills in the host country, which technology is deemed likely to spill over either vertically or horizontally to domestic industries.[104]

Further, the potential of a host country to raise the levels of employment is increased when there are more foreign investors in a country. Additionally, by having access to foreign capital

[102] UNCTAD: World Investment Report 2015: Reforming International Investment Governance, Page ix.
[103] D. Zdenek: A Multilateral Agreement on Investment; convincing the sceptics, Page 4.
[104] Note 103, Page 4.

and strategic synergies with foreign partners, it is more probable that the competitiveness and efficiency of local industries will be enhanced.

To the benefit of home states, their political influence is spread through the activities of corporates investing in foreign countries and their ability to repatriate the profits obtained from such foreign investment. This political influence has been given a further effect given the ability of countries to invest through Sovereign Wealth Funds, as shall be explained later in this chapter.

The growth of FDI does not lack its own prejudicial effects to both host and home countries. One such major drawback is the prospect of FDI replacing domestic influence over the host economy.

Where an economy is subjected to more foreign control and capture, a country's sovereignty tends to be placed under threat. Moreover, coupled with this downside is the likelihood of increased risk of capital flight and vulnerability that arises from the increase in country exposure to FDI. It is this immense power of FDI that most host countries are most sceptical of and often resort to regulatory measures to prevent such negative impacts.

Further on the downside and following the growing need to ensure sustainable development, it has been noted that the supposed benefits of FDI may fail to materialise as the foreign investors may fail to embed themselves in the local economy by building linkages to the domestic industry, developing labour skills or introducing complex technologies.[105]

It is contended that the growth that has prevailed in the foreign investment arena and the potential of home and host states to derive benefits from such foreign investment requires regulation by universal means. A form of regulation that inculcates the impression of harmony within the international community, enabling countries to derive their intended benefits and prevent the undesirable effects of FDI.

Whereas the drawbacks from FDI have been used by many to refute the need for a multilateral framework, it is the writer's position that the avoidance of such detrimental effects of FDI may be minimised through the use of a multilateral framework on international investment. As contented by the International Chamber of Commerce, a single set of legally binding

[105] UNCTAD. World Investment Report 1999: Foreign Direct Investment and the Challenge of Development. Geneva, United Nations Conference on Trade and Development.

multilateral rules and disciplines to govern international investment is needed to better protect the great volume of existing FDI and to facilitate its further expansion.[106]

3.3. THE INCREASE IN COMPETITION FOR FDI

Many countries have embarked on a liberalisation drive that has resulted in the removal of various restrictive barriers to the entry of foreign investors into their economies. The 2015 World Investment Report provides that countries' investment policy measures continue to be geared predominantly towards investment liberalization, promotion and facilitation. In 2014, more than 80 per cent of investment policy measures aimed to improve entry conditions and reduce restrictions.[107]

It has been noted that an open investment policy supports a liberal trade and competition policy by encouraging the movement of capital to markets where competition is either introduced or increased, and resources are used more efficiently and transformed into goods and services for local and worldwide distribution.[108]

In simple terms, the liberalisation of investment has facilitated the movement of capital from one country to another and the countries that have embraced the importance of FDI have developed various measures to configure their economies as the suitable destinations for foreign investors to place their investment and recoup the best possible return on investment. In order to attract such investment, countries have engaged in an incentive based form of competition with one another.

The most typical competition measures that have been adopted by countries are incentives, both fiscal and regulatory, where foreign investors are offered fiscal advantages in the form of tax breaks or reductions, or a scenario where countries have negatively offered or neglected to improve their regulatory standards in a bid to avoid the increase in the cost of operation to the foreign investor.

It has been acknowledged that incentives based competition for FDI is a global phenomenon that is used by governments at all levels worldwide,[109] regardless of countries being developed or otherwise. Financial incentives are common in developed countries, while incentive schemes

[106] Nunnenkamp, Peter; Pant, Manoj: Why the case for a multilateral agreement on investment is weak, Kieler Diskussionsbeiträge, No. 400, Page 15.
[107] UNCTAD: World Investment Report 2015: Reforming International Investment Governance, Page xi.
[108] K.C Kennedy: Foreign Direct Investment and Competition Policy at the World Trade Organisation, Page 598.
[109] C.P. Oman: Policy Competition for Foreign Direct Investment: A Study of Competition among Governments to Attract FDI, Page 3.

in developing countries are often based on tax holidays and other fiscal measures that do not require direct payments of scarce public funds.[110] More commonly, the use of special economic zones by countries is also a significant strategy used by governments to create competitive advantages over other investment destinations.

It is naturally consequent that the development of these foreign investment attracting measures has an influential and potentially distortionary effect on the flow of investment globally. While study has shown that national laws and regulations that discriminate against foreign direct investment distort international trade in much the same way as do tariffs, quotas and non-tariff barriers[111], the same result is imposed on international investment through unregulated incentives.

Furthermore, the distortionary effects of incentives, which tend to discriminate against smaller firms, against local firms and against firms in sectors that are not targeted, can be significant.[112]

The result of the competition proofing measures that have been used by countries in this regard is commonly referred to as the "race to the bottom" or the "race to the top", with reference to regulatory incentives and monetary incentives respectively.

Apart from the distortion caused to international investment, the efficiency of incentive use has been put to question. It is widely acknowledged that the strongest argument in favour of incentives is based upon the possibility of economic spillovers through which local industries are said to benefit from productivity enhancing externalities such as forward and backward linkages.[113] However, other scholars have maintained that the elusive nature of spillovers makes it difficult to justify the use of investment incentives on the scale they are being used today.[114]

Further, the system of incentives is capable of leading to the marginalisation of poor countries that cannot compete with developed countries that are able to finance more generous incentives. In this same regard, the potential to maintain monopolies is increased in developed countries, having starved competition with poorer countries.

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[110] Nunnenkamp, Peter; Pant, Manoj: Why the case for a multilateral agreement on investment is weak, Kieler Diskussionsbeiträge, No. 400, Page 29.

[111] K.C Kennedy: Foreign Direct Investment and Competition Policy at the World Trade Organisation, Page 597.

[112] Note 6, Page 4.

[113] Note 8, Page 30.

[114] Hoekman, B. and K. Saggi. Assessing the Case for Extending WTO Disciplines on Investment-Related Policies. Journal of Economic Integration 15, Page 638.

The ability that has been maintained by countries to participate in these detrimental and distortionary practices can directly be linked to the lack of a binding standard and regulatory benchmark that countries should use for the attraction and retention of FDI.

The lack of a comprehensive and compelling framework on international investment regulation has given way to the implementation of distortionary and unsustainable competition-proofing measures. In support of the above, Oman states that the lack of transparency renders incentive-based competition for FDI problematic. Oman continues to state that secrecy creates "significant possibilities for graft, corruption and many other types of rent-seeking behaviour".[115]

Ironically, the use of the above measures has grown simultaneously with the need to embrace and promote sustainable development in all investment destinations. It is these measures that countries should endeavour to get rid of if there is to be the realisation of sustainable investment in any jurisdiction globally. In this regard, it has been further found that the undiscerning use of investment incentives can have a negative effect on FDI inflows, as they are perceived by the investors as unsustainable.

Moreover, in the absence of a binding and comprehensive framework, it is the writer's opinion that no country would offer to implement measures that leave it vulnerable to the increasing competition among countries for the attraction and retention of FDI.

Whereas the use of incentive based competition has been proven to be distortionary. Such distortionary effects therefore prove to be the justification for the need for a thorough guiding framework on investment and any accompanying competition policy among nations so as to avoid distortions within the investment spectrum.

Given the above demonstrations, it is surprising that countries worldwide have devoted less time to overcome the lack of coordination and to limit competition for FDI. In the absence of empirical evidence showing that the cost of maintaining incentives is outweighed by the economic benefit brought by the investment attracted thereby, and in the absence of proof that incentives actually increase FDI inflow, it is argued that there is need for regulatory cooperation and coherence in this regard. Such cooperation can be ushered through the adoption of a multilateral investment framework.

[115] C.P. Oman: The Perils of Competition for Foreign Direct Investment, Page 68.

Complementing the above observation, study has shown that unless the dilemma faced by countries whether to continue with incentives or not is tackled effectively by a binding multilateral framework, policy coordination at the regional level could be helpful in preventing an incentive race to the top.[116] This affirms the position that the incentive dilemma is one that requires coordination among all countries, especially those which compete directly for FDI within the same regions.

3.4. THE INCREASING CONTRIBUTION OF EMERGING ECONOMIES TO FOREIGN INVESTMENT

The longstanding flow of investment has been dominated by developed countries being the suppliers of capital and investment to developing and less developed countries. This one way flow of investment has resulted in the classification of countries as either capital exporting or capital importing, what has been termed the North-South divide.

Consequent to this traditional flow, the regulations that have been developed over time, especially through BITs, primarily have been skewed towards the protection of capital exported by developed countries to their less developed counterparts. It became a norm over time that the regulatory framework was meant to protect the foreign investor from abuse and expropriation by the capital importing states.

At the same time, the capital importing states did not bear any incentive to pursue the imposition of any regulatory provisions within the BITs that would protect their investments, as they did not have any meaningful investment abroad. The lack in outgoing foreign investment also weakened the bargaining strength of developing countries for a prolonged period. As a result of continuity in imbalance amongst the countries, capital importing counties have been traditionally forced to accord stringent and very high standards of protection to the foreign investor. In support of the above, Shan Wenhua writes thus; *"the original template for the IIA regime was "unbalanced," in the sense that it emphasised investment protection and promotion against the background of the "North-South divide," with little regard for preserving the regulatory space of the host state.*"[117]

The resulting effects of the above imbalance have been reflected in the much criticised deficiencies of the current international investment regime highlighted in the preceding

[116] K.C Kennedy: Foreign Direct Investment and Competition Policy at the World Trade Organisation, Page 31.
[117] Shan, Wenhua. Toward a Multilateral or Plurilateral Framework on Investment. E15Initiative. Geneva: International Centre for Trade and Sustainable Development (ICTSD) and World Economic Forum. Page 4.

chapter. These include the lack of specific reference to the rights of host states to regulate their own foreign investment spheres in the BITs, the wide and expansive definition of the concept of investment to cater for every kind of asset regardless of the characteristics thereof, the lack of definition and restriction to the fair and equitable standard, requirement for adequate, prompt effective compensation for expropriation of any form whether direct or otherwise, and the provision for unrestricted access to international arbitration initiated only by the foreign investor presided over by ad hoc tribunals that pay no attention to the stare decisis doctrine.

However, the flow of global investment has taken a new dimension that deserves critical notice. In the present day emerging economies have risen to represent not only one third of world investment outflow but also more than half of global investment inflow.[118] The UNCTAD notes that in 2014, transnational corporations from developing economies alone invested almost half a trillion dollars abroad, representing a 30% increase from the previous year, their share in global FDI reaching a record of 36%, up from 12% in 2007, the year prior to the global financial crisis.[119] The UNCTAD further states that among the 20 largest investors, nine were either from developing or transition economies,[120] with transnational corporations from Asia, Latin America, and the Caribbean increasing their investment abroad. In fact, for the first time, Developing Asian transnationals became the world's largest investors, accounting for almost one third of the total.[121] Complementing the above, it is reported that in 2013 emerging and developing economies accounted for 39% of a total of $ 1.45 trillion outward FDI, up from just 12% in the early 2000s.[122]

The implication of this structural shift in investment outflow patterns is that both classes of countries have begun to view FDI from both capital exporting and capital importing perspectives. While developing countries had little, if not any investment to protect and promote in the olden days, now as home states they ought to seek the protection of the investments of their emerging and outward bound investors. By the same token, developed countries as recipients of FDI now also seek to avoid the overbearing mandatory protections to foreign investment that the developing countries have been subjected to for several decades.

[118] Nunnenkamp, Peter; Pant, Manoj: Why the case for a multilateral agreement on investment is weak, Kieler Diskussionsbeiträge, No. 400, Page 2.
[119] UNCTAD: Global Investment Trends Monitor No.19, Page 1.
[120] Note 116.
[121] Note 116, Page 2.
[122] Steve Woolcock: The impact of mega regional agreements on international investment rules and norms EUROPEAN POLICY ANALYSIS 2015:13, Page 2.

In this regard, the writer affirms the position that the diversity between countries primarily importing and those exporting capital has lost its acuteness. This blurring of the former discrepancy transforms the interests of key actors among emerging markets as they are increasingly expected to seek to balance their interest as host countries (to maintain national policy space) with their interest as home countries (in favour of protection for their firms abroad, as well as liberal entry and operating conditions).[123]

In recognition of the above, Axel Berger states that *"companies from emerging countries are increasingly investing abroad and aim at a better protection of their foreign direct investment (FDI) in developing and industrialised countries. The traditional criticism put forward by influential, emerging countries against an MIA appears to be weakening as the result of a growing convergence of interests."*[124]

With the above in mind, it becomes clear that the likelihood of countries that have been considered to be traditionally at loggerheads to agree on a multilateral investment framework is now more profound, given the convergence of interests of countries, playing their dual roles as both capital exporting and importing counterparties while bearing the accompanying burdens as well.

The improvement of the influence of emerging economies serves as both a push factor as they seek to improve the protection of their outbound investment, and as a pull factor, to developed economies seeking to limit the protection rendered to foreign investment in their respective jurisdictions as potential host states. This status is different from that which prevailed when WTO members failed to agree on the modalities for an investment agreement at Cancun in 2003.

In the end, it can be stated that the position now held by the developing countries gives them the need and the urge required to converge with developing countries over the establishment of a multilateral investment framework.

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[123] K.P. Sauvant and F. Ortino: Improving the international investment law and policy regime: Options for the future, Page 19.
[124] Axel Berger: Do we really need a Multilateral Investment Agreement. Page 1.

3.5. THE NEED FOR LEGAL PREDICTABILITY, TRANSPARENCY AND SECURITY

In the absence of such legal certainty, a predictable and transparent regulatory framework, the risk attached to investment in a given country is heightened and foreign investors invariably require a corresponding compensation in the form of a higher financial return. The implication in this regard is that the cost of investment is increased. Such increase in the cost of investment will eventually cascade to the products of the investment itself, thereby making consumers pay for the risk caused by the state. In other instances, it is justified to assume that where the value of the return is outweighed by the risk involved, the investor will not embark on the investment at all.

Further, the absence of an assuring and predictable legal framework renders investment to be highly speculative and temporary, ready to take flight at the earliest sign of unfavourable legal circumstances.

Accordingly, it has been noted that unclear, ambiguous, biased and controversial rules are the classical deterrent to foreign investors.[125]

The preceding chapter has demonstrated that the patchwork of BITs has created an uncoordinated framework of governance in international investment. The patchwork can safely be equated to what has been called in international trade a 'spaghetti bowl' by Jagdish Bhagwati.[126] This pluralism admittedly has resulted in a host of serious systemic dangers, one of them being the lack of regulatory coordination among countries that compete for FDI and capital in general.

It has been stated by the WTO that if the members of the WTO were to perpetually use BITs as the sole form of regulation in international investment, it would require 7503 BITs to cater for all the countries' regulation.[127] It is apparent that such a large number of treaties would bear many inconsistencies which would inevitably lead to legal conflicts and uncertainties.

Whereas the signature of BITs was originally meant to provide clarity to the regulation of cross border investment, the proliferation of BITs has instead increased, rather than decrease the

[125] D. Zdenek: A Multilateral Agreement on Investment; convincing the sceptics, Page 4.
[126] Note 125, Page 5.
[127] Note 125, Page 5.

complexity and opaqueness of FDI regulations.[128] In fact, it has been argued that the propagation of BITs itself is partly owed to the absence of an overarching multilateral investment framework.[129]

On the other hand, it has been put forth that if the complex and legally divergent web of existing BITs were to be substituted by a 'one-stop' multilateral agreement, a remarked improvement in transparency would be gained and the asymmetries that have been built into the BITs and regional agreements would be effectively counterbalanced.[130]

As seen from a small scale investment perspective, the existence of multiple investment agreements increases overheads through collecting and evaluation of the relevant information. In many instances, the fees required in compliance thereof is unaffordable for small enterprises. This is a factor that is often not considered by advocates for bilateral approaches, despite that it is a real hindrance to foreign investment.[131]

While the prevalence of BITs has caused rampant divergence in investment regulation, a considerable number of countries have either threatened or actually pulled out from the use of BITs as regulatory mechanisms in favour of national regulation.[132] These countries are most likely to have been convinced by the argument that the existence or otherwise of BITs within their jurisdiction does little, if anything, to attract foreign investment. Regarding the unattractiveness of BITs, it has been argued that the proliferation of BITs since the 90s era has eroded the effectiveness of BITs in attracting FDI.[133] The UNCTAD has noted further that it would be unreasonable to expect that any improvements in the investment climate brought about by BITs could exert a significant impact on FDI inflows.[134]

The withdrawal of countries from the use of BITs in regulating foreign investment leads to further deficiencies in the regulatory structure of international investment. Further, some

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[128] C.P. Oman: Policy Competition for Foreign Direct Investment: A Study of Competition among Governments to Attract FDI, Page 4.
[129] Note 128, Page 5.
[130] World Bank: Global Economic Prospects and the Developing Countries 2003. Washington, D.C., http://www.worldbank.org/prospects/gep2003/toc.htm
[131] D. Zdenek: A Multilateral Agreement on Investment; convincing the sceptics, Page 5.
[132] South Africa has taken the most decisive steps in this direction, Enacting the Protection of Investment Act and announcing the non-renewal of all expiring BITs.
[133] C.P. Oman: Policy Competition for Foreign Direct Investment: A Study of Competition among Governments to Attract FDI, Page 8.
[134] UNCTAD: 1998 World Investment Report, Page 117.

developing countries are opting out of the ICSID, Bolivia, Ecuador, and Venezuela being the leading countries.[135]

In addition to the above lack, it is argued that the use of domestic regulations in facilitating and safeguarding foreign investment is not a viable alternative. Even in circumstances where there is a groundswell towards reform, the absence of international undertakings would signify a lack in compelling regulatory measures. What would be required is a coordinated international agreement that provides moral authority to governments, supported by enforceable national legislation. National legislation on its own is widely considered to be insufficient in providing adequate security to foreign investors simply for the reason that national laws are capable of being changed by political forces at any time and their enforcement may differ between the host and home country requiring, in the very least, an international mechanism for dispute settlement.[136].

Apart from the above apparent divergences, it should be borne in mind that further disunity is entrenched in the regulatory system by having the WTO in charge of the administration and enforcement of the TRIMS Agreement and the GATS, which are multilateral agreements that maintain a considerable bearing on the administration of investment by the proscription of specific trade related investment measures, and through the administration of trade in services, particularly through what is termed as mode 3 which entails the commercial presence of a foreign service provider in the territory of another member state either through a locally established affiliate, subsidiary or representative office. It is important to understand that the resolution of disputes under these two agreements falls under the Dispute Settlement Understanding within the WTO, thereby having two totally different investment dispute resolution mechanisms.

It is this regulatory fragmentation that continues to widen that the adoption of a multilateral framework would seek to remedy, in a bid "to secure transparent, stable, and predictable conditions for long-term cross-border investment."[137]

[135] Helen V. Milner: The Global Economy, FDI, and the Regime for Investment, Page 5.
[136] Note 131, Page 5.
[137] WTO: Doha WTO Ministerial Declaration. WT/MIN(01)/DEC/1. Geneva.

3.6. THE ECONOMIC, STRATEGIC AND CAPACITY BENEFITS OF A MULTILATERAL INVESTMENT FRAMEWORK

While a multilateral investment framework would aid in the liberalisation of the global economy, it should be known that liberalisation is not an abstract ending that is self-contained. Additionally, the multilateral framework would not be sufficient on its own to bring about liberalisation and a better economic environment. Rather, the framework would aid in the creation and operation of the coherent policies that would be aimed at improving and sustaining a conducive investment environment.

Recognising the growing influence of value chains in international trade, it has become unavoidable to acknowledge that any regulatory barriers that exist between different countries are inhibitive to smooth and profitable trade. The implementation of a multilateral framework that sets aside such regulatory inhibitions and complexities would aid the functioning of value chains and promote international trade and investment in the end. It has been noted in this regard that "*reducing regulatory and other barriers promises more competitive markets, lower prices, broader diffusion of innovations, and enhanced consumer welfare, as well as other benefits from liberalization of countries' domestic economies and regulatory governance structures*".[138]

Complementing the above, it has been postulated that "such a regime would standardize the terms of the arrangements that each country has made with others. And it might relieve competitive pressures on poorer states to give better terms to certain capital-exporting countries in search of more investment".[139]

Strategically, it is opined that the establishment of regulatory convergence through a multilateral framework is capable of establishing global standards that could be spread out to influence the development of regulatory measures and approaches, and investment and intellectual property arrangements.

The writer finds reason in the argument that the unilateral ability of countries to provide protection to their own economies and citizens by extension has been compromised through technological changes, global supply chains and global economic integration generally.[140]

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[138] R.T BULL, NEW APPROACHES TO INTERNATIONAL REGULATORY COOPERATION: THE CHALLENGE OF TTIP, TPP, AND MEGA-REGIONAL TRADE AGREEMENTS, PAGE 3.
[139] Helen V. Milner: The Global Economy, FDI, and the Regime for Investment, Page 5.
[140] Note 139, Page 6.

Despite the above development of global integration, the differences in national regulatory frameworks create regulatory gaps and fundamental differences that continue to widen and cause spill over effects in other jurisdictions. It is therefore arguable that the adoption of a multilateral framework may be used to plug these gaps and avoid the flow of investment to jurisdictions that use illicitly structured regulations to cater for their competitiveness concerns.

Further it is apparent that the promotion of regulatory coherence through a multilateral framework is capable of achieving economies of scale through the shared administrative burden between different countries. Apart from this, under a multilateral framework parties would only find it easier to share information and analyses with trade and investment partner countries, providing a good platform for countries to learn from the practices of others.

3.7 THE POSITIVE CRITICISM AGAINST A MULTILATERAL FRAMEWORK

3.7.1 The principle of indifferential treatment

The general idea of investment liberalization entails the equal treatment of investment through the traditional principles of National Treatment and Most Favoured Nation Treatment. To extend such treatment on a multilateral basis means the removal of discriminatory treatment, thereby according the opportunity of equal competition among investors and their investments. In principle, granting national and MFN treatment creates "world citizens" who can freely invest in any country without any regulatory barriers. Although the existing agreements already provide for grounds of discrimination, provided the variables are in "like circumstances", it should be recognised that the definition of such circumstances is not easily reachable and there will always be differences among the various stakeholders.

While the above achieves the ideal form of international investment liberalisation and may arguably be postulated as the creation of a new rule, the peculiar economic circumstances of countries should not be disregarded. Further, the right of a host country to regulate and possibly prohibit the admission of aliens into its territory cannot be easily taken away. This right emanates from the territorial sovereignty principle enjoyed by states. It is an established position of international law that a foreign investor does not have an inherent right of entry and establishment.

As demonstrated above, it is clear that the adoption of a multilateral investment framework based on a laissez faire approach that gives unlimited rights of entry and operation would not only achieve ideal multilateralization but create unequal opportunities as investors from

developed countries will have access to all investment destinations, guaranteed of equal and unrivalled treatment with the nationals of host countries. Such treatment would not create favourable economic results to the host countries and is greatly discouraged. The unfavourable quality of such liberalising provisions is engraved through the "ratchet" effect of clauses common in investment treaties that require that once a barrier has been whittled, it cannot be restored and should be further brought down with the passage of time.

The above is justification for the need to give heed to the rights of countries to regulate and manage the entry of foreign capital into their territories. On the other hand, it should be realised that the transformation of customary international law has been unfolding over the past several decades. Whereas customary international law has been viewed to support the notion that nations retain the authority to avoid the admission of foreigners, it should be recognised that today, the need to attain liberalisation has grown stronger, especially through BITs that invariably insist upon national treatment of investors and their investment. In other words, over the decades, the countries' approaches towards entry and operation of foreign investment has been left to the operation of treaties. The customary international law on the right of establishment is therefore no-longer as crude.

Further, it should be noted that the treaties have not left foreign investment to its own devices. On the contrary, practicable safeguards have been developed that leave countries with ample room to implement reasonable regulations that allow them to avoid wholesale admission of foreign investment. Exceptions have been provided in the various agreements and these have been effective in achieving the desired results.

On a multilateral level, it is arguable that the same, and even better exceptions can be put in place to safeguard the interests of countries. These exceptions can be as general to apply across the entire board on an MFN basis. Such exceptions include National Security, Culture and Public Order. The other category would be composed of such exceptions that are country specific and to be applied reciprocally by countries with matching exceptions.

In conclusion, the writer adopts the position that "the principles underlying the process of trade liberalization, that is, the most-favoured nation and national treatment principles, are inappropriate for an investment regime in their crude form. They must be adjusted to reflect

the dynamic nature of the issues that need to be addressed and ought to be complemented by a substantial institutional architecture that adds flexibility and effective implementation.[141]

3.7.2 The cost of adjustment

The adjustment from the current system of investment regulation to a multilateral form of governance will not be without its own cost, financially and in many other forms. It has been noted that "multilateralists" have often portrayed the idea of a multilateral framework as costless.[142] It is unavoidable that through the course of adjustment, a recognisable number of domestic business entities will be overtaken and replaced by foreign businesses while others move to better and more favourable investment destinations. This will lead to governments transforming to new taxation, budgetary and expenditure structures that will most likely reduce their revenues. It is submitted that this unavoidable cost of adjustment will immensely inform the decisions of governments and for a multilateral framework to be acceptable to governments it must provide a cushion against this cost in one way or another.

3.8 Conclusion

It has been demonstrated that there are several compelling factors that validate the need for a comprehensive and all-encompassing international investment framework. These factors have been demonstrated to be plaguing the current status of international investment, leading to less economic returns and lesser efficiency for countries that could be receiving better returns within a more coordinated setup. It has been shown above that the adoption of the international investment framework should not be considered as an unrefined concept that adopts the entire liberalisation agenda on a wholesale scale without paying regard to the peculiarities of the member states. It should be structured in a way that increases the gains of countries while addressing their concerns, given their different levels of development.

In the following chapter, the unique characteristics of the mega regionals is demonstrated, bringing the thrust of this thesis into practical perspective.

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[141] Konrad von Moltke: An International Investment Regime? Issues of Sustainability, Page vi.
[142] Convincing the sceptics, Page 13

CHAPTER 4

THE CONTENTS OF INVESTMENT PROVISIONS IN MEGA REGIONAL AGREEMENTS

4.1 INTRODUCTION

Whereas economic integration efforts have traditionally led to the establishment of Free Trade Areas (FTAs) and to the expansion of Regional Trade Areas (RTAs), the recent trend has seen the establishment of a newer phenomenon that has become to be known as mega-regional agreements. The establishment of a mega-regional agreement typically occurs when two or more countries that are influential drivers and that serve as hubs in Global Value Chains and the flow of global FDI come together to constitute a single block that establishes an agreement that regulates their conduct with regards to trade, investment and several other fundamental facets of their economies in a commonly administered manner.[143]

Characteristically, mega-regional agreements incorporate a larger network of members that are of diverse economic development, situated in different geographic regions, encompassing a greater amount of trade and investment and generally intending to cater for a wider and deeper scope of regulation.

The main emphasis of these agreements is to introduce a better form of regulatory compatibility between the parties and to introduce a set of rules that deal with the discrepancies in the investment climates and the business environment generally.

This chapter shall focus on the Trans Pacific partnership (TPP) and the Trans-Atlantic Trade and Investment Partnership (TTIP). It is critical to understand that the negotiations for the TPP were concluded on the 25th of October 2015 and the TTIP negotiations remain underway. Therefore, the two agreements are not yet in force.

These agreements are a new and unique phenomenon that may usher a new dimension to investment regulation given that the agreements involve at the very least two economies, the US and the EU's, that are pivotal to global FDI and Global Value Chains. The parties to these agreements are members to a wide network of BITs and are party to extended investment exchanges with several countries that are nonetheless not members to the mega regional agreements. Further, the uniqueness of these agreements stems from their reach beyond the

[143] Mega-regional Trade Agreements Game-Changers or Costly Distractions for the World Trading System. Page 13.

matters that are covered by bilateral investment agreements, thereby addressing the regulatory reforms that are essential to international investment concerns generally.

By way of illustration, it is reported that the TPP congregates 12 nations surrounding the Pacific, which countries account for nearly 40% of the entire world GDP and approximately a third of the world's FDI inflows.[144] In terms of trade volumes, it is reported that the trade among TPP countries totalled $2 Trillion in 2012.[145]

The TPP block additionally represents an influential trade and investment partner to emerging economies, with India reportedly attributing 25% of its exports and about $1.1 Trillion to trade with TPP partners.[146] Owing to these qualities, the TPP has been hoisted as a prime example of a new generation of "mega-regional" trade agreements that bring together more states and cover more trade and investment flows than earlier free trade agreements.[147]

The TTIP on the other hand represents a total GDP of approximately 46% of world GDP. In terms of trade volumes, goods and services exports bear an approximated $1.1. Trillion, which is equivalent to 6% of the entire world's exports. Further, and more directly to the present discussion, the TTIP grouping contributes about 16% of world outward investment, summing up to about $3.9 Trillion.

In general terms, the TPP can be viewed as an agreement that aims to establish widespread liberalization of goods and services, and involves a far-reaching coverage of trade in services, investment, government procurement, non-tariff measures and many regulatory topics.

The TPP dedicates an entire Chapter to investment regulation. The chapter bears provisions that ensure non-discrimination, a minimum standard of protection, comprehensive rules on expropriation, dispute settlement provisions that are made subject to specific safeguards aimed at protecting the rights of member states to regulate in the interest of the greater public.[148]

The TTIP on the other stretch focuses on trade liberalisation and beyond-the-border barriers and provides for the alignment and possible harmonisation of regulations and standards governing, among other aspects, investment markets. It has been estimated that the most

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[144] Office of the United States Trade Representative, Overview of the Trans Pacific Partnership, available at: https://ustr.gov/tpp/overview-of-the-TPP; UNCTAD, World Investment Report 2015, p. 6.
[145] Ricardo Melendez-Ortiz: Mega-Regionals: What is going on? Note 1, Page 6.
[146] Joshua P. Meltzer Standards and Regulations in the Trans-Pacific Partnership; Implications for India, Page 2
[147] World Economic Forum, Mega-regional Trade Agreements Game-Changers or Costly Distractions for the World Trading System?, Global Agenda Council on Trade & Foreign Direct Investment, July 2014, available at: http://www3.weforum.org/docs/GAC/2014/WEF_GAC_TradeFDI_
[148] Note 143, Page 15.

prominent gains to be derived from the TTIP will emanate from the ex-post compatibility and alignment of standards and regulations that hinder trade, investment and public procurement.

With specific and direct reference to investment, the TTIP provides guarantees against expropriation, the fair and equitable treatment of investors and their investments, the free transfer of funds from the host jurisdiction, dispute settlement that is also subject to pro-public regulation safeguards.[149]

4.2 THE MOTIVATIONS FOR THE MEGA-REGIONAL AGREEMENTS

There are varying reasons that have been observed to be behind the interests of countries to enter into mega-regional agreements. Generally, it has been identified that these reasons reveal an attempt to resolve the ills of the bilateral regulatory system and to move towards multilateralism.

Among some of the reasons that propel countries to enter into mega-regional agreements are the need to upgrade, refresh and build out old agreements. Most of the BITs in operation today were entered into in the 80s and 90s era when the economic, political and social circumstances suited the provisions contained in the treaties. Today, with the advancement that has been achieved in global trade and investment, it is only befitting that the agreements be upgraded to suit the new environment. In this regard, countries have taken note that the factors that influenced international investment generally have changed. Emerging markets have changed the landscape, the relationship between trade and investment has become more profound and less apart. These factors were not responsible for the content of the earlier day BITs and therefore the old terms require a thorough update.

In order to achieve this, countries have looked to the mega regionals, so as to collectively agree on how to accommodate the new investment environment into the legal frameworks that regulate investment.

Further the expectations that countries have had from foreign investment have changed over the years. As the volumes of capital have increased, so have the gains expected by the investors, the countries hosting the investors and their investments, as well as the home countries. By the same token, the facilitation of such greater gains cannot be ensured through the same rudimentary investment provisions used in the old BITs. In order to create the necessary legal nets that catch the bigger returns from foreign investment, countries have looked to mega-

[149] Note 143, Page 16.

regional agreements that create higher ambition provisions which satisfy the enlarged expectations of investment stakeholders.

Given the championship of mega-regional arrangements by countries that are perceived as trade and investment hubs, the assumption that geopolitical considerations are paramount among their motivations is not far-fetched. To this end, Hillary Clinton in her capacity as the United States Secretary of State has referred to both the TPP and the TTIP as an "economic NATO"[150], with the intention to portray the two mega-regionals as geopolitical instruments used to assert American and European economic and political might. The need to use these agreements especially to the benefit of the United States has been heightened by the need to counter the steady and immense advance of China as a Global trade and investment powerhouse. It has been further suggested that to the Obama Administration, the TPP is meant to strengthen the strategy to tilt towards Asia while increasing leverage to convince Europe to agree to the TTIP. It is ultimately hoped that these agreements will put pressure on China to join the global marketplace on a reciprocal basis and for China to agree to the ongoing negotiations for a China-US BIT.[151] It has already been reported that China is in the process of preparing a negative list to facilitate the signature of a China-USA BIT.[152]

Closely linked to the motivation above, it can generally be averred that mega-regionals aim to meet the liberalization needs of developed countries. By advancing their causes as developed countries with specific and special conditions to be met by the new markets they seek, developed countries will be enabled to create potential precedents for future investment agreements. By establishing such new and constantly mutating standards, the investment cycles whose pace is dictated by the most developed among countries, is kept moving. This need to keep the momentum active and the entire process of rule-making alive has been referred to as "keeping the bicycle moving".[153] In these probable precedents, the agreements create high standards that could help them tap the potential of trade and investment and at the same time symbolize the interest of the US and the EU in keeping a decisive say in the rules applicable to

[150] Eyal Benvenisti, Democracy Captured: The Mega-Regional Agreements and the Future of Global Public Law (GlobalTrust Working Paper 08/2015), at 2 (quoting Clinton), available at http://dx.doi.org/10.2139/ssrn.2646882. Accessed 20 April 2016.

[151] José E. Alvarez: Is the Trans-Pacific Partnership's Investment Chapter the New "Gold Standard"? Page 4.

[152] http://www.bna.com/china-working-investment-n57982072734/?promocode=LIPP101AA&utm_source=Twitter&utm_medium=compcontent&utm_campaign=BloombergLaw.

[153] Note 143, Page 19.

trade and investment in the 21st century. [154] In line with the above, it has been argued that if the TTIP succeeds in propelling regulatory convergence of a higher degree between the US and the EU, its provisions could become the de facto global standards, thereby restoring the primacy of American and European influence in the WTO and other multilateral bodies.[155]

It is also imperative to recognise that the WTO has suffered from stagnation for a prolonged term. While countries are deadlocked in the Doha Round, countries of like mind have sought platforms to make progress. Mega regional agreements enable such countries to gather and establish agreements of a greater command as compared to the common denominator issues that are achievable within the WTO.

Further, while the deadlock continues within the WTO, the new issues that have arisen remain unresolved and countries cannot afford to let such new problems firmly establish themselves. One of the most prominent developments is the emergence of a more integrated global production system that rides on the back of Global Value Chains. These are complex networks of domestic and foreign firms that specialise in the production of various parts and components of goods that are assembled in different locations across the globe. It is a system that is based on the sale and purchase of products of mixed parentage, heavily reliant on the digital economy and the increasing demand for cheap products worldwide.[156]

In this respect, countries have recognised mega-regional as points of discussion to deal with the cropping obstacles to investment and trade.

Furthermore, the facilitation of liberalised investment through regulatory cooperation and coherence bears more competitive markets, lower prices, broader diffusion of innovations and enhanced consumer welfare, as well as other benefits tied to domestic economy liberalisation and coherent regulatory governance structures.[157] It is submitted that such promises of an economic character tend to propel countries into entering into mega-regional agreements, where the prospect of achieving regulatory coherence is more profound as opposed to any other form of regional cooperation.

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[154] Note 143, Page 6.
[155] REEVE T. BULL: NEW APPROACHES TO INTERNATIONAL REGULATORY COOPERATION: THE CHALLENGE OF TTIP, TPP, AND MEGA-REGIONAL TRADE AGREEMENTS, Page 4.
[156] See Karl Sauvant, The Evolving International Investment Law and Policy Regime: The Way Forward (E15 Task Force on Investment Policy Options Paper, Jan. 2016), available at http://e15initiative.org/publications/evolving-internationalinvestment-law-policy-regime-ways-forward
[157] Note 143, Page 3.

The argument that defensive reasons are at the core of mega-regionals has been advanced as well.[158] It is true that where countries recognise that they are likely to be locked out of a new dispensation that will put them at a competitive disadvantage, they seek to join in and reap the benefits of the new arrangement. It has been argued in line with the above that the US joined the P4 countries and ultimately launched the TPP out of the fear of being locked out of the possible new agreement, albeit it being with countries of economies of lesser magnitudes. This need to be part of new rule making exercises that has encouraged the US is likely to propel other countries into ultimately becoming party to the agreements so as to benefit therefrom. This will likely lead to the expansion of the agreements and the development of the rules made thereunder.

4.3 THE PROVISIONS OF THE MEGA-REGIONAL AGREEMENTS

Before delving into the impact that the agreements are likely to cause, it is imperative to unpack the agreements as far as investment regulation is concerned.

4.3.1 The definition of investment and investor

The TPP begins by defining investment as only tangible assets that involve the commitment of capital, entailing an assumption of risk and coupled with the expectation of profit. Interestingly, the definition expressly excludes orders and judgments entered in judicial or administrative actions.[159]

Likewise, the TTIP requires that an investment should have the same characteristics, that is, the commitment of capital or other resources, the assumption of risk and the expectation of gain therefrom.

However, the TTIP does not make reference to claims arising from judicial and administrative judgments and orders. Further, the TTIP requires that the investment should be of a certain duration, although the requisite duration is not specified.

The definition shared by these two agreements are in agreement with the restrictions that have been imposed on investment protection for purposes of the ICSID Convention by case-law, particularly the Salini Case.[160] While the restriction to the provisions of the ICSID Convention are to be understood with regard to the TPP, the TTIP's reference thereto begs the question

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[158] Note 143, Page 19.

[159] Article 9.1

[160] Salini Costruttori SpA and Italstrade Spa v. Kingdom of Morocco, ICSID Case No. ARB/00/4, Decision on Jurisdiction, 23 July 2001 (42 International Legal Materials 609 (2003).

whether the parties thereto have merely taken guidance therefrom, given that they have expressed an intention to establish an Investment Court. This shall be focused on later in this chapter.

The TPP specifically defines an investor of a party as that who/which attempts to make, is making, or has made an investment in the territory of another party.[161] This conferment of pre-establishment rights of protection to investors is paramount in qualifying the level of protection given by the agreement, affirming the claim that the TPP is a high standard agreement. In clarifying the meaning to be given to "attempts to make" investments, the agreement explains further that an investor will be regarded as having made such an attempt only when they have made concrete actions to make the investment such as channelling capital towards the establishment of a business.[162]

4.3.2. The relative standards

Given that the concept of non-discrimination is central to investment liberalisation, the operation of the standards of treatment within the agreements requires consideration. The obligations imposed upon the parties in the agreements are a means to ensure the non-discriminatory treatment of investors and their investments, both domestic and foreign, subject to the existence of like circumstances. The determination of whether like circumstances exist or not in the TPP is left to the circumstances surrounding the case, including distinctions made in pursuance of the objectives demanded by public policy, such as those related to the protection of the environment or public health.[163]

By allowing this ground of qualification of investment, the agreement allows for investment to be distinguished on grounds that transcend national origin. By this stretch, the agreement can be said to be allaying the fears of countries that regard liberalisation as wholesale non-discrimination on the basis of a mere mechanical approach to interpreting like circumstances.[164]

[161] Article 9.1.
[162] TPP, Article 9.1, Explanatory Note 12.
[163] TPP, Article 9.4, Explanatory Note 14.
[164] See Archer Daniels Midland, et al, v. United Mexican States, ICSID Case No. ARB(AF)/04/05, Award (21 November 2007) and Grand River Enterprises Six Nations Ltd. et al. v. United States of America, UNCITRAL, Award (12 January 2011). See also also Nicholas DiMascio and Joost Pauwelyn, 'Nondiscrimination in Trade and Investment Treaties: Worlds Apart or Two Sides of the Same Coin?' 102 American Journal of International Law 48 (2008).

In aiding the cause for enhanced liberalisation, the agreement extends the use of the standards of treatment to encompass the establishment and acquisition of investment.[165]

On the other hand, the TPP limits the operation of the MFN clause to the extent that it cannot be used to attract more favourable dispute settlement provisions from other treaties.[166]This limitation effectively prevents investors from claiming more beneficial provisions on Investor State Dispute Settlement that is awarded to TPP members in previous BITs.

It is observed that these two qualities within the two agreements are a demonstration of the attempts being made by the agreements to eliminate the undesirable characteristics of bilateral investment agreements and lock in the lessons that have been learnt through the implementation of BITs and RTAs particularly the NAFTA investment Chapter.

4.3.3 The absolute standards

It has been argued that several concerns regarding the favours bestowed upon foreign investors are based upon the use of the fair and equitable standard.[167] The TPP equates the concepts of fair and equitable treatment and full protection and security with the international minimum standard of treatment. Article 9.6 specifies further that these notions do not require treatment that goes beyond that which is required under the international minimum standard and that it crates no additional substantive rights thereto.

Alschner, commenting on the new dimension that has been added to the agreement, states that the TPP goes beyond established practice by clarifying that a frustration of an investor's expectation or a reduction of a previously provided subsidy or grant does not in itself amount to a violation of the minimum standard, even if such refusal causes loss on the investor's part.[168] On the contrary, Johnson and Sachs argue that by stating that a breach of an investor's "expectations" does not *alone* give rise to a claim for the breach of the minimum standard of treatment, the TPP recognises that these expectations may be relevant to establishing a violation of the fair and equitable standard.[169] The approach feared for by Johnson and Sachs has been recently made use of in a NAFTA award in the case of **BILCON V CANADA**[170]

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[165] W. Alschner: The new Gold Standard? Empirically situating the TPP in the investment treaty universe, Page 5.
[166] Article 9.5.
[167] L. Johnson & L. Sachs: The TPP's Investment Chapter: Entrenching, rather than reforming, a flawed system, Page 4.
[168] Note 23, page 6.
[169] Article 9.5
[170] PCA Case No. 2009-04, Award on Jurisdiction and Liability, March 17, 2015.

where the tribunal held that the interference with an investor's expectations alone would not constitute a breach of the fair and equitable treatment standard but would nevertheless not be disregarded in the determination of the violation of the same of principle. It is therefore arguable that the TPP leaves room for the use of the above approach, allowing investors to make use of their expectations to establish claims.

The TTIP on the other hand provides for the fair and equitable treatment without equating it to the international minimum standard of treatment. Instead, the TTIP specifies the possible breaches that would constitute violation of the obligation to provide fair and equitable treatment.[171] Further, providing greater clarity on the import of full protection and security, the agreement states that the obligation related to the duty of the host state to provide physical security to investors and their investments.[172]

With regard to the use of expectations, the TTIP specifies that an enquiry would have to be made whether a party made *specific* representation to an investor, which representations induced an investor to make an investment but was later frustrated by the party.

While the two agreements reflect that changes have been made as far as the definition of the fair and equitable treatment standard is concerned, it is also apparent that the effective implementation of the changes will determine whether the agreements represent a shift from the old BIT and FTA meaning given to the standard. It is left to the dispute resolution platforms to give meaning to the provisions and distinguish them from the old order. What is apparent however is the attempt by the agreements to deal with the difficulties that have been encountered under the BIT framework as far as the interpretation of the FET clause is concerned.

4.3.4. Expropriation

The TPP expropriation clause contains very essential clarifications that are useful in resolving the many issues surrounding the levels of compensation, the meaning and extend of indirect takings, the rights of host states to regulate and to exercise their control over their natural resources.

Prominently, the TPP restates that no expropriation shall be allowed except for a public purpose, in a non-discriminatory manner, on payment of prompt, adequate and effective

[171] Article 3.2.
[172] Article 3.5.

compensation and in accordance with the due process of law. Annexure 9 B to the TPP further clarifies that an act of expropriation is only constituted where it interferes with a tangible or intangible property or property interest in an investment. Further, the annexure illuminates that the determination of the occurrence of indirect expropriation requires a case by case factual inquiry that considers the following nuances[173];

i. *the economic impact of the government action, although the fact that an action or series of actions by a Party has an adverse effect on the economic value of an investment, standing alone, does not establish that an indirect expropriation has occurred;*

ii. *the extent to which the government action interferes with distinct, reasonable investment-backed expectations; and,*

iii. *the character of the government action.*

The consideration made in (ii) above resembles an acceptance by the parties that the indirect expropriation of investment will always amount to interference, but such interference must be of a higher degree than the unavoidable. It would seem that the considerations stipulated must be cumulative for a tribunal to come to the conclusion that there has been indirect expropriation.

This stems from the qualification in (i) that the adverse effect of indirect expropriation on the economic value of an investment, ***on its own***, would not automatically establish indirect expropriation.

Providing certainty on the provision, the TPP provides that *a Party's decision not to issue, renew or maintain a subsidy or grant, or decision to modify or reduce a subsidy or grant, (a) in the absence of any specific commitment under law or contract to issue, renew or maintain that subsidy or grant; or (b) in accordance with any terms or conditions attached to the issuance, renewal, modification, reduction and maintenance of that subsidy or grant, standing alone, does not constitute an expropriation.*

The above qualification works against the use of certain "expectations" of investors to establish claims of expropriation. It is submitted that the qualifications made above entrench the right of countries to impose legitimate forms of interference in their economies without the fear of being labelled expropriators.

[173] Annexure 9B, Article 3 (a).

In addition, the clause expressly provides that compensation shall be no less than the fair market value on the date of expropriation, plus interest at a commercially reasonable rate accrued from the date of expropriation until the date of payment.[174] The clarity provided in this clause eliminates the possibility of prolonged debates on the quantum of compensation that would be due to an investor. This has the potential to lessen the legal fees to be incurred by the parties in the event of a dispute as well.

4.3.5. Right to regulate

It is a common criticism against international investment agreements that they are inherently infringing on the sovereign right of countries to manage their economies by regulatory means. This reproach has mainly been set against the Investor-State Dispute Settlement measure that has been adopted by almost all the international investment agreements. One such complaint comes against the threat of having a foreign investor, such as the tobacco industry's, claiming that a measure implemented to protect the health interests of the public, such as the plain packaging of cigarettes in certain jurisdictions in Australia, would constitute a violation of an investor's many rights. This worry is heightened by the real possibility of arbitral awards being granted in favour of the foreign investor, given the propensity of arbitral tribunals to overprotect foreign investors. It has been argued that this quality in international investment agreements imposes a "regulatory chill" on countries.[175]

The TPP represents a good effort at the re-calibration of the balance between the rights of the investors and the sovereign right of the state to regulate.[176] In this effort, the TPP provides in Annexure 9-B (3) that the non-discriminatory implementation of rules that are meant to protect legitimate public welfare objectives such as public health, safety and the environment will not amount to creepy expropriation, except in rare circumstances. The agreement even goes further to exemplify the actions that would be considered as regulatory actions in pursuance of public interest.[177] In like fashion, the TTIP makes the same qualification in its investment chapter proposal, specifying that indirect expropriation would only occur in "*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."*[178]

[174] Article 9.8 (3).
[175] José E. Alvarez: Is the Trans-Pacific Partnership's Investment Chapter the New "Gold Standard, Page 10.
[176] Note 175, Page 26.
[177] Annexure 9-B, Footnote 37.
[178] TTIP Annexure 1-Expropriation, Sub Article 3.

Other commentators have found it easy to pour criticism over Article 9.16 of the TPP which provides that;

"Nothing in this Chapter shall be construed to prevent a Party from adopting, maintaining or enforcing any measure otherwise consistent with this Chapter that it considers appropriate to ensure that investment activity in its territory is undertaken in a manner sensitive to environmental, health or other regulatory objectives".

It is argued by Johnson and Sachs that through the above provision, the TPP fails to prevent the host states against potential regulatory chilling effects. They argue that these provisions are only marginal tweaks that establish a powerful mechanism that exposes host states to litigation.[179]

On the other hand, it is submitted that it is prudent to acknowledge that this particular clause is not to be read in isolation from the provisions of Annexure 9-B (3) which clearly demarcate the province of regulatory rights of the host state. Article 9.16 entrenches the right of the state to regulate, but subject to the provisions of the entire investment chapter. It is believed that this qualification of the right to regulate was placed so as to avoid the exaggeration of the right. In this regard, it is opined that the right of host states to regulate is ingrained in the TPP and goes beyond the usual provisions of international investment agreements.

4.3.5. Dispute resolution

Vehement condemnation has been directed at ISDS for a prolonged period. It is one aspect about the international investment regulatory framework that has sustained the most serious censure owing to the perception that through it, foreign investors are preferred over both domestic investors and the general public in the host states. The substance of the attack that has been posed against ISDS has already been dealt with in Chapter 2 above.

Adopting such criticism, various commentators have either called for reform of the ISDS measure or its total abandonment. Particularly, it has been suggested that ISDS should be replaced with a new and truly reformed mechanism that addresses the myriad concerns that are still lurking around it.[180]

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[179] Lise Johnson & Lisa Sachs, The TPP's Investment Chapter: Entrenching, Rather than Reforming, a Flawed System (Columbia Center on Sustainable Investment Policy Paper, Nov. 2015), *available at* http://ccsi.columbia.edu/files/2015/11/TPP-entrenching-flaws-21-Nov-FINAL.pdf

[180] TTIP Annexure 1-Expropriation, Sub Article 3.

What is meant by the new and truly reformed mechanism is hereby supposed to be the novel investment dispute settlement mechanism that is sought to be introduced by the TTIP.[181] Through the TTIP, the European Union has proposed to substitute the usual ISDS mechanism with a new investment court that is composed of a standing bench of judges that are appointed from the US, the EU and from independent non-TTIP countries. The proposal requires that the judges must "*possess the qualifications required in their respective countries for appointment to judicial office, or be jurists of recognised competence. They shall have demonstrated expertise in public international law. It is desirable that they have expertise in particular, in international investment law, international trade law and the resolution of disputes arising under international investment or international trade agreements*".[182]

This court would be complemented by an appeal structure that will hear appeals on errors of the law and review factual findings where there are allegations of manifest errors of fact.

The dispute resolution procedure compulsorily requires that parties first attempt to amicably resolve a having recourse to the Court.[183] Further, parties may agree to have recourse to mediation at any stage of the proceedings.[184]

It is important to set out why this proposal has been paraded to be an innovative and commendable shift from the much criticised system of ISDS.

Firstly, it is true that the ISDS mechanism has been seen as an illegitimate mechanism that gives investors too much power over the dispute resolution mechanism attached to international investment. To remedy this, the agreement brings dispute resolution to a public based structure. As a measure of getting rid of the legitimacy crisis, the TTIP measure leaves the appointment of a standing bench to the member states, and even to independent third parties. It is apparent that this measure addresses the likely misuse of party autonomy that has been used by investors to be able to appoint arbitrators that could be sympathetic to their cause. Additionally, the agreement requires that every division be chaired by a third party judge, thereby instilling impartiality in decision making.

Secondly, by sanctioning the appointment of judges whose qualifications are at par with the party state requirements, the TTIP has been able to ensure that only those persons that are fit

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[181] See the official EU proposal http://trade.ec.europa.eu/doclib/docs/2015/september/tradoc_153807.pdf accessed 21 May 2016.
[182] Article 9.4.
[183] Article 2.
[184] Article 3.

and proper to adjudicate end up resolving the relevant matters. This addresses the lack of formal qualifications that has run the course of ISDS.

Thirdly, it has always been argued that arbitrators in ISDS are merely persons without ethical values as they dabble as "representatives" of both investors and the host states. Most of them being lawyers, they are capable and entitles to be chosen by anyone that wishes to nominate them onto an arbitral tribunal, be they investors or host states. With this in mind, it has always been argued that their need to be reappointed gives them an impetus to be seen to lie in favour of a party to the proceedings. The TTIP, to rid the system of this likelihood, has fixated the terms of the court judges[185], such that they would maintain their impartiality and not yearn to be under the employ of any party to the proceedings in the future.

Fourthly, it is submitted that the use of a court system aids in the development of a jurisprudential framework that is specifically dedicated to the regulation, protection and treatment of investment. This is perceived to be an advance from the ISDS mechanism that does not subscribe to any doctrine of precedence. Owing to this lack, the investment arena has worked with many varying interpretations and definitions to the basic notions surrounding investment, such as the FET principle. In support of this, it has been commented that the investment court system will enhance the legal correctness, consistency and predictability of investment rules and awards, without necessarily lengthening the proceedings or adding costs for investors.[186]

Fifthly, the employment of a court system is likely to decrease the time of resolution of disputes. A court whose judges are mandatorily required to be present at all times and who do not dabble in any other business but that of the court would most likely deliver resolutions timely and in a manner that reduces costs for the entire system.

The sixth component that has been added to the international investment arena is the valuable appeal that is afforded to the parties. This opportunity addresses the concerns that have been aired regarding the finality of arbitral awards and the stringent grounds that exist for their reversal. The avenue to an appeal provides accountability to the system, allowing parties to seek recourse where they reasonably think they have not been treated well. The importance of the appellate structure is given more credence where consideration is given to the nature of

[185] Article 9.5

[186] J Pauwelyn: Why The US Should Support the EU Proposal for an "Investment Court System" available on https://www.linkedin.com/pulse/why-us-should-support-eu-proposal-investment-court-system-pauwelyn accessed 21 May 2016.

some of the decisions that may be presided over by the court. Where criticism has been heaped on the legitimacy of arbitrators to scrutinise public laws and regulations and to question the decency of decisions made by publicly elected officials, the propriety of an appeal mechanism to ensure that such decisions are not wantonly discredited cannot be reasonably be questioned. It is further argued by Howse that the availability of an appeal structure helps to lessen the attack that may be placed on the entire system when controversial decisions are made by the court of first instance.[187] Rather, the aggrieved parties would have recourse and direct their efforts to reverse the unfavourable decision through a formal and institutional channel, rather than through condemning the entire superstructure.

At this juncture the writer agrees that the judicial system that has been proposed by the EU bears the potential to put ISDS on a new, more promising, efficient and legitimate trajectory.[188]

4.3.6. Overall observations

The contents of the above discussed agreements reveal that in both substantive and procedural respects, the agreements are nothing similar to the generic international investment treaties. The TTIP and the TPP are high standard agreements that resemble the high ambitions sought to be achieved by the parties thereto. It has been commended that the agreements converge with regard to high standards for investment protection, host state regulatory flexibility, and dispute settlement. What is more profound is that this trifecta is not achieved in the broader spectrum of investment treaties.[189] The agreements exude the intention to balance the interests of investors with those of host states, and generally to reposition the interests of countries that have traditionally perceived themselves as predominantly capital exporting. These interests are aligned with the forces and expectations of emerging economies that have also increasingly assumed the role of capital exportation.

Further, the agreements have made clarifications that are capable of settling the differences that have continuously existed within the international investment circles for a prolonged period. The refinement and settlement of these new clarifications is capable of being maintained through the new dispute settlement mechanism that may be implemented through the TTIP, through the doctrine of judicial precedence.

[187] Rob Howse: Courting the Critics of Investor-State Dispute Settlement: the EU proposal for a judicial system for investment disputes, Page 17.
[188] Rob Howse: Courting the Critics of Investor-State Dispute Settlement: the EU proposal for a judicial system for investment disputes, Page 18.
[189] José E. Alvarez: Is the Trans-Pacific Partnership's Investment Chapter the New "Gold Standard, Page 32.

Generally, it can be said that the mega-regional agreements have ushered in a better mode of investment regulation and their impact on the entire investment framework ought to be assessed as shall be undertaken below.

4.4. THE LIKELY IMPACT OF THE MEGA-REGIONAL AGREEEMENTS ON INTERNATIONAL INVESTMENT REGULATION

The greatest benefit that is capable of being drawn from the mega regional agreements lies in their potential and ability to foster greater regulatory cooperation and integration among countries both within and out of the reach of the agreements.

It is probable that the mega-regional agreements will pose their impact in both micro and macro ways, their effects being posed on the development of a new crop of BITs as well as the potential development of international investment law respectively.

The potential macro effects of these agreements stem from the position that at present international investment law exists within a fragmented framework and mega-regional agreements are seemingly an opportunity for consolidation and the promotion of coherence in the realm of international investment agreements. While the mega-regional agreements cannot be touted as a quick fix to the faults within the BIT framework, the impact of the mega-regionals will spread to the BITs, those existing and new ones to be negotiated.

The preceding qualities found within the mega regional agreements invoke the need to multilateralise disciplines on investment and to see these agreements as a stepping stone to such multilateral organisation.

The 2014 World Investment Report states that "*once concluded, these are likely to have a major impact on global investment rule making. Negotiations on mega-regional agreements may present opportunities for the formulation of a new generation of investment treaties that respond to sustainable development imperative*".[190]

Expressing the potential to use the mega-regionals as a tool to create a multilateral investment framework, the European Commission asserts that;

"TTIP and TPP are framed as "living agreements," creating a standing joint regulatory coordinating body (RCB) that will engage high-level political officials with the aim of spurring continual

[190] UNCTAD World Investment Report 2014, Page 118.

initiatives to reduce regulation-based trade barriers over time in a variety of regulatory sectors. Recognizing the difficulties in achieving convergence on substantive regulatory measures, TTIP and TPP also seek, under the banner of "regulatory coherence" or "regulatory integration," to promote cross-sector cooperation on regulatory decision-making processes, including intensive consultation, information sharing, risk-assessment procedures, regulatory impact-assessment procedures, public participation, mutual learning from best practices, and joint review and analysis of the performance of regulatory measures and strategies".[191]

It is these qualities that collectively work towards establishing a multilateral framework hence the mega regionals represent a huge block in a potential build-up to a multilateral investment framework.

In complementary fashion, Alschner states that the state-of-the-art treaty design bestowed upon the TPP gives it the appeal to work as a template for multilateralization.[192] He continues to state that the TPP is well suited to bring the investment policy of hundreds of countries from the 20th century to the 21st Century standards, a task that may be equivalent to the costly renegotiation of the thousands of investment agreements.[193]

What is interesting to note with regard to the above is that the TPP and the TTIP will be able to wipe out all at once a complex "spaghetti bowl" of investment agreements that are already in place between the party states. This great potential should serve as illumination to countries that are out of the agreements that the use of mega-agreements may be an effective solution to rid the investment platform of the sophistication that has grown out of the many investment agreements that have been signed on bilateral and regional levels.

4.5 CONCLUSION

The above discussed mega-regional agreements are a demonstration of a new crop of international investment agreements that are directly aimed at resolving the faults that are found in the BIT network. Despite that the agreements are not yet operational, their geographic and economic coverage renders them to be considered as game changers as far as investment

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[191]See, e.g., European Commission, Textual Proposal for Chapter on Regulatory Cooperation in TTIP, 6–8 (Feb. 2015), http://trade.ec.europa.eu/doclib/docs/2015/february/tradoc_153120.pdf.
[192] Note 24, Page 26.
[193] Note 51.

regulation is concerned. The agreements demonstrate a unique level of regulatory convergence between many major and small countries. It is this harmonisation that points towards the multilateralization of investment regulation.

In the following chapter the writer shall conclude the thesis by making suggestions on how countries may capitalise on these agreements so as to gravitate towards better convergence and multilateral rules on investment.

CHAPTER 5

CONCLUSION AND RECOMMENDATIONS

5.1. RECAP OF THE RESEARCH PROBLEM

The preceding chapters have demonstrated that there is a systemic divergence and fragmentation in bilateral investment treaties that continues to breed more inconsistency and lack of predictability. This conflict within the BIT network renders the constitution of a coherent system of law governing international investment relations difficult. Further, it has been shown that there are several compelling factors that validate the need for a comprehensive and all-encompassing international investment framework. Having set out the above, the thesis has amply made a case for mega-regional agreements as demonstrations of new international investment agreements that are directly aimed at resolving the faults that are found in the BIT network and that despite being not yet operational, their geographic and economic coverage renders them suitable to be considered as game changers as far as international investment regulation is concerned.

5.2. SUMMARY OF FINDINGS

The foregoing discussion has set out the state of the law that constitutes the international investment framework. The aim has been to exude the regulatory challenges that are faced by the stakeholders to international investment, that is, the investors, the home and host states, and the public in general.

The discussion proceeded to give attention to the change in the circumstances that surround investment globally. It is such changes that have necessitated the inquiry into whether the regulation of investment by bilateral and sometimes regional agreements is still proper and adequate.

Out of this inquiry, the writer has set out the weaknesses that have become a usual eyesore in international investment. The faults within the system range from the lack of settlement upon the basic concepts that form the bedrock of international investment such as the meaning of investment, the growing displeasure over the Investor-State Dispute Settlement (ISDS) mechanism, the encroachment by ISDS onto the sovereign ability and right of states to regulate and guide their economies, among several other genuine complaints.

These shortfalls in the regulatory setup can generally be said to resonate with the remarks of the International Court of Justice in the **BARCELONA TRACTION**[194] case, that;

"considering the important developments of the last half-century, the growth of foreign investment and the expansion of international activities of corporations, in particular of holding companies, which are often multinational, it may at first sight appear surprising that the evolution of the law has not gone further and that no generally accepted rules in the matter have crystalised."

While many factors that have been discussed at the beginning of the thesis form part of the changed circumstances, there has remained a disintegrated and highly uncoordinated means of regulating international investment. Countries have remained protective of their jurisdictions and have resisted any strong moves to converge and multilateralise investment. Out of this individuality, there has arisen a spaghetti bowl of investment treaties that has only managed to further confuse investment regulation. Yet despite the resistance, the advances that have been made in international trade have made it grow much closer to global foreign investment.

The need by countries to find new markets for their growing industries has necessitated the need to seek regulatory cooperation with other countries. Moreover, the system of production has mutated to the extent that products are now "made here and there and sold over there". The import being that international trade and investment has outgrown the regulatory boundaries that the protective bilateral measures seek to maintain. Essentially, the economic realities call for a shift from bilateralism to a recognisable form of multilateralism that accommodates and balances the interests of all parties to be involved.

5.3. CONCLUSIONS

The mega regional agreements that have been discussed herein are a demonstration of the efforts that have been made to realign the interests of the stakeholders in international investment. The agreements are arguably an indication of the meeting of minds among countries that for a long time have been of diverse and contradictory views on investment regulation but whose interests regarding incoming and outflowing foreign investment have recently taken the usually opposite status. This has all resulted in a form of regulatory convergence that is demonstrated through the mega-agreements.

[194] Barcelona Traction, Light and Power Co (Belgium v. Spain), ICJ Reports 1970, 3, 46-7.

What can be learnt from the mega-regional agreements can be summed up as follows; the shortcomings of the investment regulatory system have become of a global magnitude, and the development of trade and investment has pushed beyond national and regional constrictions. The most reasonable response to these has turned out to be the provision of solutions that measure up to the challenges, solutions of global a magnitude.

In a bid to resolve the same predicament, Shan[195] states that the solution to such a crisis cannot be just piecemeal, mending on bilateral or regional basis. Investment protection has been proven to be a global issue, which requires a global solution. It is submitted that the most appropriate solution of global reach would be the negotiation of a multilateral investment framework.

When reference is made to a multilateral investment framework, it is easy to imagine the kinds that have been proposed before, the latest being the 1998 OECD MIA.

It should be noted that the MIA failed because of its inability to strike a balance between the interests of the parties involved.

What this thesis has set out to prove is that the bulk of the MIA shortcomings are capable of being resolved through the negotiation of a framework that has the mega-regional agreements at the core.

5.4. RECOMMENDATIONS

Principally, it would be prudent to follow the route that has been suggested, that the negotiation of a multilateral framework on investment should be perceived as an opportunity to introduce "a systemic review and reform of the IIA regime from root to rules".[196] The root being referred to is the fundamental basis of the agreement. It is suggested that the underlying function must be to achieve a balanced framework that proportionately serves the interests of both capital importing and capital importing countries. The new framework should cease to insist only upon investment protection and promotion.

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[195] Shan, Wenhua. *Toward a Multilateral or Plurilateral Framework on Investment.* E15Initiative. Geneva: International Centre for Trade and Sustainable Development (ICTSD) and World Economic Forum, 2015. www.e15initiative.org/ Page 2.

[196] Wenhua Shan: Toward a multilateral or Plurilateral framework on investment, Page 12.

Once the function of the framework is understood to be the achievement of a balance, it must be possible to accommodate the interests of the opposite ends. This has already been demonstrated through the mega-regional agreements.

The subsequent clauses relating to the scope of coverage, investment liberalisation, substantive protections and dispute resolution should demonstrate the motive to achieve a balance of interests of the different stakeholders. What should be central to the exercise must not be the usual investment promotion objectives, but the beginning of approaches that counterbalance the objectives of practicable liberalisation and multilateralization of regulation. In support of this, Wenhua Shan states that the key to improving the substantive provisions is to rebalance public-private interests and to restructure investment dispute settlement mechanisms and de-commercialise the dispute resolution system.[197]

Wenhua Shan suggests that a Plurilateral framework on investment represents the best first step towards a multilateral framework.[198] It is proposed that the conclusion of a trilateral investment arrangement between the US, the EU and China could bring together top players in global trade and investment. The likelihood of concluding the TTIP and the recent overtures between the US and China to enter into a bilateral investment agreement seem to enable the foundation of such a trilateral arrangement.

Furthermore, it is proposed that if an opportunity is provided for additional sign-on by third party countries to the mega-regional agreements there would be increased possibilities for the enlargement of participation and implementation of the regulatory cooperation that may be derived from the mega-regionals.

Already, the TPP on its own has had a spreading effect on the countries that have signed investment agreements with the countries party to it. It is reported that IIAs concluded by TPP members in particular by Canada and Japan are textually the closest to the TPP.[199] Specifically, it has been noted that the investment agreements concluded in the past five years have indicated a positive prospect for a Plurilateral investment treaty among the selected economies, the most prominent being the EU and Chinese economies.[200]

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[197] Wenhua Shan: Toward a multilateral or Plurilateral framework on investment, Page 14.
[198] Note 197, Page 14.
[199] M Rodriguez Parareda et al: A Plurilateral Treaty on Investment: Finding Common Ground after the TPP Agreement, Page 16.
[200] Note 199.

To emphasise the unavoidable clout that the TTIP carries over the regulation of investment, it has been noted that the EU is one of the most significant players in the investment scene today, accounting for foreign direct investment outflow worth more than $345 Billion. Its views on investment policy are said to be significantly standard setting and thus its current standards, possibly to be set out in the TTIP, are indispensable in the measurement of the practicability of a global Plurilateral investment agreement.[201] Further, the likelihood of the EU to entrench regulatory convergence stems from the exclusive status that has been bestowed upon the EU Commission as the sole determinant of the FDI regime for all the members of the Union through the Treaty on Functioning of the European Union (Lisbon Treaty) in 2010.

Since EU member states no longer have the jurisdiction to negotiate BITs, this means that the members' investment agreements with third parties will be uniform, as determined by the EU, possibly along the TTIP lines so as to lock in the benefits of the agreement and avoid granting grounds for challenge by the US under the TTIP.

On the other hand, it has been acknowledged that the achievement of a multilateral framework is not fraught with its own challenges. Special note has been taken that there are potential obstacles to multilateralization mainly caused by the difference of positions regarding the scope of ISDS. It is suggested here that the Investment Court approach that has been adopted by the TTIP in this regard is capable of resolving many of the complaints that countries hay have about ISDS.

Complementing the above, it has been shown that there is remarked similarity between the TPP and the investment treaties signed with EU members, the only major differences being around ISDS scope and fora, and the most favoured nation treatment.[202] The difference in the ISDS provisions referred to above is to be understood, given that through the TTIP, the EU and the US intend to establish an investment court that will be composed of a tribunal of first instance and an appeal structure. The investment court should represent a unique investment dispute settlement mechanism, one that is permanent, presided by judges from the party states and third party countries. Essentially, the investment court is meant to remedy the wrongs that have been observed from ISDS. However, what is important to note is that although there are divergences

[201] Note 199, Page 20.
[202] Note 199, Page 21.

with respect to certain provisions, such differences will not be decisive elements preventing the conclusion of a Plurilateral investment treaty.[203]

In conclusion, it can be stated that the reform of the international investment framework can be achieved with guidance from the mega-regional agreements that have been discussed herein. The high standards that have been demonstrated and the expansive coverage reached by the agreements show a movement towards the levels of regulatory convergence that necessitates the establishment of a Plurilateral framework that can later be used to introduce multilateral rules.

[203] M Rodriguez Parareda et al: A Plurilateral Treaty on Investment: Finding Common Ground after the TPP Agreement.