New Developments in International Investment Law: A Need for a Multilateral Investment Treaty?

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Author

Malebakeng Agnes Forere

Affiliation

University of Witwatersrand
South Africa

Email
Malebakeng.Forere2@wits.ac.za

Date of submission

28 February 2018

Date published

27 November 2018

Editor Prof C Rautenbach

How to cite this article

Forere MA "New Developments in International Investment Law: A Need for a Multilateral Investment Treaty?" *PER / PELJ* 2018(21) - DOI http://dx.doi.org/10.17159/1727-3781/2018/v21i0a3282

DOI
http://dx.doi.org/10.17159/1727-3781/2018/v21i0a3282

Abstract

This work contributes to the global discussion on the desirability of the multilateral investment treaty to ensure coherence in the way foreign investment is protected across the globe. The paper argues that whereas the international community is not ready yet to adopt multilateral rules on investment liberalisation, the time is ripe for multilateral rules on the standards of protection backed up by a multilateral court with a two-tier system. Most importantly, this contribution provides a template for the content of the standards of protection, having observed the new approaches to the traditional standards of protection typically enshrined in the bilateral investment treaties.

Keywords

Bilateral investment treaties; standards of protection; multilateral investment treaty

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1 Introduction

International investment law is a late-comer, largely because traditional international law governs relations between states. The wrongs done to the individual abroad were assumed by the home state of the alien, thus raising state responsibility. Customary international law never developed the normative framework for investment law other than the host's rights over alien property, the protection of alien property, and just compensation resulting from the takings by the host state.[1] The rules on just compensation were to be adopted later by the American Secretary of State Cordell Hull writing to his Mexican counterpart during the era of Mexican expropriations, in which Hull said

> no government is entitled to expropriate private property, for whatever purpose, without provision for prompt, adequate, and effective payment therefor.[2]

The rule on "prompt, adequate and effective" compensation became known as the Hull Rule, and was erroneously referred to as customary international law.[3] Some developing countries, especially South American countries, rejected the Hull rule as being too stringent, and averred that foreign investors deserved no better treatment than that given to national investors.[4] However, international arbitral tribunals continued to make awards on the basis of this rule. As a result, states could not know, with certainty, the applicable rules regulating compensation.[5] Consequently, developed nations resorted to

* Malebakeng Agnes Forere. BA Law LLB (NUL) LLM (Essex) PhD (Bern). Senior Lecturer, School of Law, University of the Witwatersrand, South Africa. E-mail: Malebakeng.Forere2@wits.ac.za. This work was partly funded by the National Research Foundation (NRF) through Grant number KIC170421228290 and the World Trade Institute (WTI) Seco Project. The views expressed herein are solely those of the author, not the NRF or the WTI.

1 Salacuse and Sullivan 2005 *Harv Int'l LJ.* The rest of these standards as we know them today, incorporated in bilateral/international investment treaties, were largely developed by tribunals, thereby raising questions of legitimacy, and it is for this reason that states are beginning to question their legitimacy, Sauvant & Ortino 2013 http://ccsi.columbia.edu/files/2014/03/Improving-The-International-Investment-Law-and-Policy-Regime-Options-for-the-Future-Sept-2013.pdf. For rules on compensation, see *Norwegian Shipowners' Claims (Norway v United States of America)* (1921) 1 RIAA 307 ICGJ 393 (PCA 1922) 13th October 1922 Permanent Court of Arbitration [PCA] 316*;* Higgins 1983 *Recueil des Cours* 331.

2 Hackworth *Digest of International Law* 655-665.

3 No single author is able to trace the source of this rule beyond Secretary Cordell Hull; that is, it does not form part of the decisions of the Permanent Court of International Justice or its successor the International Court of Justice,' or any other recognised source of customary international law. It also cannot be argued to be state practice, as it was permanently rejected by some developing countries in Latin America.

4 Muchlinski "Rise and Fall of the Multilateral Agreement on Investment" 117; Polanco 2015 *ICSID Review* 172.

5 Congyan 2008 *Chinese JIL* 667.

bilateral investment treaties (BITs), since what was considered by them to constitute "customary international law" had been permanently denied by some developing countries in Latin America.[6] Later on, the newly decolonised African and Asian states joined the objections to the principles developed by capital exporting countries.[7] Thus, developing countries asserted sovereignty over their natural resources through the adoption of the Charter of Economic Rights and Duties of States (CERDS).[8] Through CERDS, countries reiterated their right to expropriate and pay appropriate compensation in accordance with their laws and the settlement of disputes through their national courts.[9] In addition to the CERDS, the New International Economic Order (NIEO) became fashionable in the developing countries.[10] Emphasising the spirit of CERDS, the NIEO confirmed the permanent sovereignty of developing countries over their natural resources, and the right to expropriate investments over such resources under certain conditions.[11]

Nevertheless, acting on the promise of economic development in return for protecting investment,[12] developing countries concluded BITs in the 1990s as well, and ultimately developed and developing countries alike concluded BITs at unprecedented levels, but for different reasons. In particular, a study undertaken by the United Nations Conference on Trade and Development (UNCTAD) in 1998 indicated that during the mid-nineties the motivation for developing countries to conclude BITs was to attract investment, while the motivation for developed economies was to seek protection.[13] Today some developing countries have also become senders of foreign direct investment (FDI) while developed nations continue to be major recipients and exporters of FDI. Although BITs are concluded across continents, they are similar with regard to the standards of protection they offer, and it could be argued that states have developed customary international law through concluding BITs, although this is not really the case. Despite the similarity in BITs' standards,

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6 Until 1964 when Kuwait and Iran concluded a BIT, all BITs involved an OECD country, usually with a developing country partner. See Newcombe 2007 *JWIT* 363.

7 This was also coupled with the rise of socialism in Eastern Europe, which rejected the idea of private property rights as created by contracts between investors and the host states. See Muchlinski "Rise and Fall of the Multilateral Agreement on Investment" 117.

8 *Charter of Economic Rights and Duties of States* GA Res 3281 (1974).

9 Articles 1, 2(a) and (c) of *Charter of Economic Rights and Duties of States* GA Res 3281 (1974)

10 *Declaration on the Establishment of a New International Economic Order* GA Res A/RES/S-6/3201 (1974).

11 *Declaration on the Establishment of a New International Economic Order* GA Res A/RES/S-6/3201 (1974) para 4.e.

12 Alvarez *Public International Law Regime* 132.

13 UNCTAD *Bilateral Investments Treaties* 8.

the international community has not succeeded in adopting a multilateral investment treaty (MIT) other than the International Convention on Settlement of Investment Disputes (ICSID), which as the name connotes deals with rules governing the settlement of investor-state disputes only.[14] The manner in which the ICSID settles disputes (the processes) and the awards (the outcomes) rendered by the ICSID have been a subject of much debate in international investment law,[15] and some countries especially in Latin America, such as Bolivia, Ecuador, and Venezuela, have responded to the ICSID's deficits by pulling out of it. In addition, recent trends indicate that some countries have undertaken a journey to reflect on their BITs policy framework and have thus made or proposed changes in their respective investment treaties or national law.

From the afore-going, it follows that the investment climate has become unpredictable and cumbersome as investors now have to deal with national laws and national courts as well as modified standards of protection. Consequently, the debate on whether an MIT has to be adopted cannot be avoided. There are now renewed efforts calling for the MIT, including a new mandate of the United Nations Commission for International Trade Law (UNCITRAL) to come up with a new proposal for a multilateral investment court.[16] As a result, the objective of this paper is to contribute to the revived debate on the desirability of the MIT. Specifically, the proposal to be advanced herein is the adoption of an MIT that focusses on the standards of investor protection backed up by the multilateral investment court. In achieving this objective, Part II of this paper will discuss the need for an MIT, while Part III focusses on the contents of the proposed MIT, if such a treaty were to receive buy-in from both developed and developing countries. Part IV will discuss the future of the existing international investment agreements (IIAs), should the MIT be adopted. The research will draw its final conclusions in Part V.

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14 *International Convention on the Settlement of Investment Disputes between States and Nationals of other States* (1965) 4 ILM 532.

15 Fauchald 2008 *EJIL* 301; Alvarez and Khamsi "Argentine Crisis and Foreign Investors" 379-478.

16 European Commission 2017 http://trade.ec.europa.eu/doclib/docs/2017/july/tradoc_155744.pdf; Auslund 2013 *Policy Brief*; Berger "Multilateral Investment Agreement" 65; Sauvant 2016 *China & World Economy* 78; Shan *Towards a Multilateral or Plurilateral Framework* 2. Not everyone agrees that it is desirable to have a multilateral treaty on investment. Perhaps a major critique against the proposal for the adoption of a multilateral treaty proposed herein is advanced by Professor Joost Pauwelyn in his description of international investment law. See Pauwelyn "Rational Design or Accidental Evolution?" 18.

2 Is there a need for a multilateral investment treaty?

Before getting into why there is a need for an MIT, it is important to first address the sceptics. Those who argued that it was (is) not yet time for the MIT pointed out that the economic divide between the developed and least developed countries (LDCs), particularly African countries, was so big that the MIT would entrench poverty in the LDCs.[17] The contention was that in any event there is no evidence that the MIT would improve capital flows, which rendered it unnecessary. Another concern was that although countries sign IIAs at bilateral and regional level, they do not seem to be ready for the MIT, and often the developments from Havana to Paris are cited to show that even homogenous countries such as the Organisation for Economic Cooperation and Development (OECD) countries could not conclude an MIT.[18] The other argument was that the current system of IIAs worked well to facilitate FDI flows, and that there is therefore no need for the conclusion of an MIT.[19] All the concerns alluded to above are valid and many still stand, even today; however, these concerns were and are premised on investment liberalisation, which was not desirable at the time and is still not desirable, even today. In any event, since all states are competing for inward FDI, they tend to liberalise their investment market anyway but in a manner that best suits each individual state, which then makes an MIT that covers liberalisation undesirable. The issue that cannot be avoided today is the need to have universal standards of investment protection which will apply once a state has accepted FDI according to its own laws and needs. The section below gives reasons for why it is important to adopt an MIT, focussing only on standards of protection.

2.1 The importance of FDI calls for the adoption of an MIT

The prominence that FDI flows has assumed in international law is compelling evidence that the international community should adopt an MIT which seeks to provide for the protection of investment, irrespective of where the investment is situated. Today no one can dispute the role of FDI in the development of any country, although many LDCs in Africa may not have experienced positive results from FDI. Nevertheless, it is because FDI is important that all countries are competing for capital and use every incentive at their disposal to attract FDI. Hence the need for an MIT that standardises investment protection. As with other issues affecting every nation, such as human rights, the environment, labour issues and trade, which culminated in

17 UNCTAD *World Investment Report* 165.
18 Dattu 2000 *Fordham Int'l LJ* 302.
19 UNCTAD *World Investment Report* 161.

multinational treaties for their proper governance, there is no doubt that there is a need for the international governance of FDI through the establishment of a particular set of standards, especially standards of protection. Global FDI flows were estimated at $1.2 trillion in 2017 alone,[20] and this amount is so significant that it requires international standards of protection. There is simply no place for national standards of investment protection in the 21st century.

Developing countries tend to benefit more from the international standards of investment protection, and LDCs tend to sign IIAs that they have not negotiated, which may impose much higher standards that tend to limit their right to regulate and impose unreasonable demands on their part as host states. Therefore, an MIT that balances the interests of the host states and the protection of investment is desirable not only for investors but for their hosts as well.

2.2 Globalisation and global value chains

Over and above the growing importance of FDI in the global markets, there is also the phenomenon of globalisation, which makes it undesirable to use national laws or IIAs in the protection of FDI. Globalisation has transcended fictitious national borders, thereby bringing together actors in the global economy from across regions and continents and creating global value chains (GVCs), which then require multilateral governance. To this end, the bilateral and regional framework for regulation, particularly the protection of FDI, are no longer enough. There is a need for a concerted effort to be made towards the adoption of multilateral rules that will ensure coherence in the protection of FDI, irrespective of where it is based.

2.3 States' willingness to adopt a multilateral investment treaty

The question of whether the international community needs a multilateral treaty or should attempt to adopt such a treaty is not new. States have constantly shown their willingness to adopt such a treaty, although their attempts to do so have repeatedly failed for reasons that will be shown in this section and addressed in Part III. The first attempt at adopting an MIT was the failed Havana Charter,[21] which was tabled at the Bretton Woods conference that sought to rebuild the economies of the post-war world. The initial idea from the United States was for the investment chapter to protect

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20 UNCTAD 2017 http://unctad.org/en/pages/newsdetails.aspx?OriginalVersionID=1659.

21 Article 12 of the *Havana Charter for an International Trade Organization* UN Doc E/CONF.2/ (1948) (hereafter the Havana Charter).

foreign investments from discrimination and nationalisation by the host state.[22] However, this was met with a pushback from the developing countries, resulting in the provisions of the investment chapter of the Havana Charter being in sharp contrast with the initial plan. Thus, the final negotiated provisions gave more rights to host countries than the hoped-for protection of investment. The investment chapter left the determination of investment liberalisation,[23] admission requirements,[24] and performance requirements to individual hosts.[25] It also guarded against foreign interference in the internal affairs of host states through the use of foreign investment.[26] As a result of absence of the fulfilment of the expectations of the capital exporting countries, especially the United States, which had rallied behind the investment chapter of the Havana Charter, the Charter was abandoned, partly because the multinationals in the US felt that the Charter emphasised economic development rather than investment protection.[27] The death of the Havana Charter meant that investment protection and liberalisation were governed by customary international law, IIAs and national laws. Since customary international law was never developed further, as indicated in the introduction of this work, IIAs became the main source of law governing foreign investment, which of course is not desirable given the interconnectedness of markets, which require some form of uniformity and certainty, especially with regard to investment protection. Without an MIT, global investment becomes very volatile and unpredictable, as will be advanced in this work.

The second attempt at an MIT was at the GATT/WTO level. Backed by Japan, the US has on several occasions tried to push for a comprehensive agreement on investment, but was faced with a push-back from developing countries.[28] On the other hand, the European Communities (EC) and developing countries argued that it would be improper to broaden the scope of trade-related investment measures (TRIMs) to all areas of investment, thus going beyond those related to trade.[29] When the TRIMs Agreement was adopted, it reflected the position of the EC and developing countries in that only trade-related investment measures were regulated. Accordingly, the

22 Dattu 2000 *Fordham Int'l LJ* 287.
23 Article 12.2(a)(i) of the Havana Charter.
24 Article 12.1(c)(ii) of the Havana Charter.
25 Article 12.2(a)(ii) of the Havana Charter.
26 Article 12.1(c)(i) of the Havana Charter.
27 Shenkin 1994 *U Pitt L Rev* 555.
28 They argued that Articles 1, II, III, IV, XI, XV, XVI, XVII, XVIII and XXIII of the GATT regulate TRIMs, and therefore that what was needed was a comprehensive agreement on investment liberalization. See Kurtz 2014 *U Pa J Int'l L* 724.
29 Kwaw 1991 *NC J Int'l L & Com Reg* 328.

scope of coverage of TRIMs limits investment measures to those violating Article III (national treatment) and Article XI (quantitative restrictions) of the GATT.[30] It has nothing to do with investment protection.

The next multilateral attempt at adopting an MIT was to be at the OECD. The negotiations at the OECD Multilateral Agreement on Investment (MAI), which started in 1995 with the hope that they would be concluded in 1997, also failed. Nevertheless, the MAI borrowed heavily from the Energy Charter, NAFTA and other IIAs. Specifically, it contained investment liberalisation clauses and prohibited performance requirements at the same time.[31] The standards of protection – full protection and security, together with fair and equitable treatment – were also not novel and resembled the lIAs existing at the time.[32] The dispute settlement clause provided for both investor-state and state-to-state settlement procedures.[33] The rules of procedure to be used were to be those of the ICSID Convention and UNCITRAL.[34] On the face of it, this framework looked acceptable, which is why the negotiations were expected to be concluded swiftly. However, while the like-minded OECD countries in principle agreed on the broader goal of investment protection and liberalisation accompanied by strong dispute settlement mechanism, they could not agree on many aspects related to achieving the goal. Notably, there were disagreements on the use of performance requirements, with some members wanting the prohibition of performance requirements as in the TRIMs but also expanding the prohibition to non-trade aspects such as technology transfer. On the other hand, other members wanted to retain the use of incentives, arguing that incentives are good for the promotion of environmental and developmental goals. Regarding exceptions, the negotiating parties could not agree on some of the exceptions, with cultural industries becoming a contentious sector. Thus, France and Canada proposed that cultural industries be excluded from MAI, while the US was in favour of its inclusion. France was concerned about its film industry, particularly fearing competition from the US. In general, the list of exceptions became longer than the agreement itself, and this pointed to the likely demise of the MAI, as the various countries could not reach an agreement. External pressure from NGOs also played a role in shaping the MAI provisions. The

30 Article 2 of the *Agreement on Trade Related Investment Measures* (1994) 1868 UNTS 186. Examples of prohibited investment measures are: local content requirements, import quotas and export requirements. See Annex to the Agreement on Trade-Related Investment Measures.

31 Part III of the *Multilateral Agreement on Investment (Draft Consolidated Text)* DAFFE/MAI(98)7/REV1 (1998) (hereafter the Multilateral Agreement on Investment).

32 Multilateral Agreement on Investment Part IV.

33 Multilateral Agreement on Investment Part V.

34 Multilateral Agreement on Investment Part V.

NGOs felt that the MAI compromised states' ability to regulate on issues of national interest such as environmental and labour standards. The negotiating team could not agree on whether or not there should be a binding commitment in the MAI not to lower environmental and labour standards.

The DOHA Ministerial Declaration indicated the desire to have a comprehensive investment agreement,[35] but it was decisively rejected.[36]

Recently, the UNCITRAL has been equally responsive to the challenges caused by the absence of international court that deal specifically with the settlement of investment disputes.[37] Relevant to this paper on the work of the UNCITRAL Working Group III is the realisation that there is a need to adopt a multilateral treaty dealing specifically with standards of protection.[38] The adoption of such a treaty is for the future, as the Commission is now focussing on reforming the dispute settlement institution and procedures. It is for this reason that research is needed, which will shape the way for the Commission in its quest to adopt an MIT that will focus on the unification of standards of protection, as opposed to liberalisation.

It may be concluded from the above that states recognise the need for an MIT, and that the challenge is how to go about developing one. Research such as this is therefore necessary.

2.4 Fragmentation of the current investment rules: a need for harmonisation

Not only is states' willingness a sufficient reason for the conclusion of an MIT, but the section below will demonstrate how fragmented the rules governing international investment have become, thereby pointing to a need to harmonise the global investment framework through the adoption of the MIT. While the attempts at adopting an MIT were and are still taking place, foreign investment was promoted and protected through the IIAs, which are enforced by the *ad hoc* ICSID Tribunals among others. There are over 2000 IIAs currently in force, and while they seem to be similar in their provisions, they are of course different, and this is undesirable, given the interconnectedness of markets and the need for investors to get consistency in the standards of protection no matter where the investment is situated. In 1996 UNCTAD was

35 *WTO Ministerial Declaration of the Fourth Session of Doha* WT/MIN(01)/DEC/1 (2001) 20-22.

36 *General Council Doha Work Programme* WT/L/579 (2004).

37 European Commission 2017 http://trade.ec.europa.eu/doclib/docs/2017/july/tradoc_155744.pdf.

38 UNCITRAL *Possible Reform of Investor-State Dispute Settlement*.

against the adoption of an MIT on the basis that the IIAs were operating fine.[39] Today that argument no longer holds as the seemingly similar IIAs at the time are different today, with countries taking bold steps to review the content of IIAs,' as will be shown below. In any event, UNCTAD was referring to investment liberalisation at the time, and this paper does not advocate the harmonisation of investment liberalisation rules, but of investment protection rules.

IIAs typically cover admission, standards of protection and dispute settlement provisions. At international law there is no obligation on states to admit foreign investment. It is left up to states to decide which investment to admit or reject,[40] and this is the position that is adopted by most IIAs. Except for the North American Free Trade Area (NAFTA) member states and other NAFTA-like agreements such as the Central American Free Trade Agreement (CAFTA),[41] no state has liberalised its economy to foreign investors. Even the most advanced and largest economies in the world such as the European Union (EU) have not opened up their domestic markets fully.[42] Nevertheless, where a treaty adopts the NAFTA right of establishment provision, it usually adopts a positive or negative list of sectors, thus indicating the point made earlier that no country will fully liberalise its domestic market for foreign investors.

It is at the stage of admission and establishment that host states get to screen investments and impose the conditions under which FDI is allowed. Such conditions come in the form of investment measures, which are usually incentives to attract investment and/or performance requirements to address the economic development of the host state, including addressing any anti-competitive practices of the investor.[43] Examples of performance requirements are local content requirements (geared to improve local business – specifically the procurement of goods and services), export requirements (geared to improve the host's balance of payments) and the

39 UNCTAD *World Investment Report* 161.

40 Dolzer and Schreuer *Principles of International Investment Law* 7.

41 Article 1102 of the *North American Free Trade Area* (1992) 32 ILM 289.

42 A typical formulation found in a BIT is as follows: "Each Contracting Party shall in its territory promote as far as possible investments by investors of the other Contracting State and admit such investments in accordance with its legislations."

43 Kwaw 1991 *NC J Int'l L & Com Reg* 318. Even with the performance requirements that are said to violate Article III and XI of the GATT, perhaps the TRIMs Agreement ignores the whole rationale for why they are invoked by countries in the first place, and this therefore calls for the conclusion of a multilateral treaty that seeks to balance investment protection with development. UNCTAD *Revitalising Development Growth and International Trade* 157.

transfer of technology.[44] Investors may also be given benefits such as tax reductions or direct capital, which could be argued to violate the WTO Subsidies Agreement, because they are intended for export goods and never apply to imports.[45] Nevertheless, performance requirements have since been recognised as important for host countries, as reflected in Article XII of the Havana Charter.[46] At the GATT/WTO level, states regulated only those investment measures that distort trade, being those violating national treatment and imposing quantitative restrictions.[47] Many IIAs are silent on performance requirements, but the IIAs concluded by the United States and Canada specifically prohibit the use of performance requirements.[48] Nevertheless, countries prefer to have the policy space to use performance requirements where necessary. It is interesting to note, however, that developed countries use incentives to attract investment more than developing nations, while developing countries use a bit of both, especially incentives such as tax deductions and low labour and environmental standards, in addition to performance requirements. This does not mean that developed nations do not use performance requirement, but they are inclined to mask performance requirements as rules of origin, voluntary export restraints and anti-dumping measures.[49] Developing countries are often ridiculed for using performance requirements since they often do not have the expertise to mask their performance requirements as rules of origin or anti-dumping measures. A multilateral agreement that addresses the use of performance requirements is desirable, because the current trend in the use of investment measures does not level the playing field for developing countries.

At the entry and establishment of foreign investment, many if not all IIAs cover the national treatment and MFN clause. In the past, aliens were not treated equally to the nationals of host states. They were discriminated against, their

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44 *Draft International Code of Conduct on the Transfer of Technology* UN Doc TD/Code TOT/25 (1980).

45 Shenkin 1994 *U Pitt L Rev* 551.

46 Articles XII.1(c)(ii) and (iv) of the Havana Charter.

47 Article 2 of the *Agreement on Trade Related Investment Measures* (1994) 1868 UNTS 186. Examples of prohibited investment measures are local content requirements, import quotas and export requirements. See Annex to the Agreement on Trade-Related Investment Measures.

48 Article 9 of the *Canada – Cameroon BIT* (2014), signed 3 March 2014; Art VI of the *Canada – Costa Rica BIT* (998), signed 18 March 1998; Art VI of the *United States – Albania BIT* (1995), signed 11 January 1995; Art 8 of the *United States – Rwanda BIT* (2008), signed 19 February 2008; Art 8 of the *United States Model BIT* (2012).

49 Sauvant & Ortino 2013 http://ccsi.columbia.edu/files/2014/03/Improving-The-International-Investment-Law-and-Policy-Regime-Options-for-the-Future-Sept-2013.pdf.

property was expropriated, and at times they faced expulsion. They were protected by their home states, which used their laws and courts even outside of their territorial jurisdiction. In most cases, home states resorted to the use of force and invasions to protect their nationals abroad. As this was not sustainable, the states agreed to down arms and allowed safe passage and the establishment of aliens around the 1600s, notably through the adoption of the 1648 Treaty of Westphalia. Further, states agreed to subject their nationals abroad to the laws and courts of the host states.[50] It is for this reason that national treatment in particular and MFN have been the hallmark of all investment treaties. However, it is important to note that although IIAs contain national treatment clauses, this does not apply to dispute settlement and standards of protection. Thus, foreign investors are usually given better treatment than nationals to the extent that both full protection and security (FPS) and fair and equitable treatment (FET) are not available to local investors. Further, foreign investors have access to international arbitral tribunals while local investors are subjected to national courts. While foreign investors do not want national treatment when it comes to standards of protection, they want national treatment regarding investment liberalisation, and this leads to double standards. Nevertheless, the fact that foreign investors are entitled to treatment other than national treatment when it comes to standards of protection and dispute settlement has caused discomfort among capital-importing countries, thereby giving rise to the return of the Calvo Doctrine, mostly in South American countries and South Africa. While these countries may be insignificant in the global economy, they are important markets for investors, and they can be influential in shaping the investment field in their South-South relations. For instance, South Africa has induced the Southern African Development Community (SADC) to revise its Finance and Investment Protocol and adopt the same approach as that taken by South Africa in its Protection of Investment Act (PIA).[51] Nevertheless, the return of the Calvo Doctrine signals the adoption of a nationalistic approach to a field that is otherwise international, to the extent that it governs relations between nationals of other states and the host state. Further, the Calvo Doctrine creates an unpredictable global investment climate, which needs to be addressed through the adoption of an MIT.

Concerning MFN treatment, which is a treaty-based relationship as opposed to being a customary international law standard, the issue that has remained thorny is the importation of the third state's IIAs standards or substantive

50 Pauwelyn "Rational Design or Accidental Evolution?" 21.

51 Naidoo 2017 https://agoa.info/news/article/15112-south-africa-is-on-notice-opinion-piece.html.

rights, as seen in cases such as *MTD v Chile,* wherein MTD, a Malaysian company, brought a claim against Chile and the tribunal invoked MFN to import substantive rights from other treaties that Chile had concluded with Denmark and Croatia.[52] The MFN standard has also been used in dispute settlement processes to import better procedures from treaties that the host has concluded with third states, as was the case in *Maffezini v Spain*,[53] a case that was brought pursuant to an Argentina-Spain BIT. The Argentina-Spain BIT required the exhaustion of local remedies and a waiting period of 18 months before accessing international tribunals. Through the use of an MFN clause found in the FET standard of the Argentina-Spain BIT, the *Maffezini* tribunal allowed the importation of a more favourable dispute settlement process found in a Chile-Spain BIT which did not require the exhaustion of local remedies. With more than 2000 IIAs in force and with the use of MFN we have created a spaghetti bowl of FDI rules, and the results have been unpleasant to the extent that some countries are beginning to develop an aversion to MFN. For example, India excluded MFN altogether from its Model BIT of 2015, and South Africa excluded it from its PIA. Traditionally countries would list exceptions to MFN on issues such as taxation agreements, but now countries are beginning to take a step away from MFN. Regardless of India's or South Africa's reaction to MFN, it is important to avoid treaty importation by adopting an MIT with standards of protection that will apply to all states parties.

Another cause for concern which warrants the adoption of the MIT relates to the standards of protection typically available to foreign investors. The standards of protection that are found in most if not all IIAs are FSP and FET. FPS requires states to take positive steps to provide physical protection to the property of the investor.[54] Under customary international law, protection and security is limited to physical protection.[55] With IIAs, FPS extends to other

52 *MTD Equity Sdn Bhd and MTD Chile SA v Republic of Chile* ICSID Case No ARB/01/7 (2004).

53 *Emilio Agustin Maffezini v Kingdom of Spain* ICSID Case No ARB/02/08 (2004); Radi 2007 *EJIL* 757.

54 In *Saluka Investments BV v The Czech Republi*c UNICITRAL Partial Award of 17 March 2006 para 484, the Tribunal ruled that "the 'full protection and security' clause … protect[s] more specifically the physical integrity of an investment against interference by use of force."

55 *Norwegian Shipowners' Claims (Norway v United States of America)* (1921) 1 RIAA 307 ICGJ 393 (PCA 1922) 13th October 1922 Permanent Court of Arbitration [PCA] 316; *Azurix Corp v The Argentine Republic* ICSID Case No ARB/01/12 (2006) para 408.

spheres such as legal security[56] and economic security,[57] and it is not limited only to organs of state but extends to acts of private parties.[58] FET requires a host state to refrain from engaging in any conduct that is or appears to be unfair and inequitable. Unfairness here does not relate to discrimination embodied in national treatment but pertains to the treatment given to an investor without comparing it to that accorded to nationals or investors from a third country, meaning that it is an absolute standard of treatment. The provision frequently gives rise to litigation,[59] and it has no precise tenets.[60] Nonetheless, it is a hallmark of IIAs. It was first introduced in the failed Havana Charter in 1948,[61] and featured later in the early 1960s in IIAs, yet it has attracted many cases in international tribunals. With FPS interpreted by the tribunals to go beyond physical protection and FET not having a precise meaning, there is definitely a need to have an MIT which is going to redefine these standards. Unhappy with the application of FPS and FET, individual countries have reacted differently towards FPS and FET. For example, South Africa excluded the FET in its PIA and limited FSP to physical protection, subject to the availability of resources.[62] Similarly, the Chilean Model BIT of 1994 no longer has FPS.[63] India has also completely left FET out of its Model BIT of 2015, and the trend in India's BITs is now to leave out this standard, as evidenced by the India-Singapore BIT.[64] Further, Brazil has excluded the FET and FSP standards from its Cooperation and Facilitation Investment

56 *Saluka Investments BV v The Czech Republi*c UNICITRAL Partial Award of 17 March 2006 paras 483-484.

57 Schreuer 2010 *JIDS* 7.

58 In *Wena Hotels v Egypt* ICSID Case No ARB/98/4 (2000), the Tribunal ruled that "Full protection and security imposed a duty of due diligence or reasonable care by the State authorities and that such duty was breached vis-à-vis the Swiss investor by the fact of not having offered a sufficient level of police protection in the area where the investment was located in order to prevent incursions, thefts, and vandalism perpetrated by residents of a nearby settlement."

59 To this end, one study shows that in a period between 1997 and 2007 alone, there were 34 cases where violation of this standard was claimed. Tudor *Fair and Equitable Treatment Standard* 3.

60 This standard is known for: "being non-contingent upon other standards or situations, … being so broad and vague, but also the fact that it is a unilateral obligation of the home State, requiring no specific duties from the Investor, had two direct consequences: first the Investors relied on FET extensively, seeing it as a sort of divine gift given to them by States and second, a lot of commentators and host States started to violently criticize this standard because of the unbalanced relationship it allegedly created between the foreign Investor and the host State." See Tudor *Fair and Equitable Treatment Standard* 3-4.

61 Article 29 of the Havana Charter.

62 Section 9 of the *Protection of Investment Act* 22 of 2015.

63 ICSID Date Unknown http://investmentpolicyhub.unctad.org/Download/TreatyFile/2841.

64 *Comprehensive Economic Partnership Agreement India-Singapore* (2005) (hereafter India-Singapore CEPA 2005).

Agreement (CFIA) with Angola, Mozambique and Mexico. The Comprehensive Economic and Trade Agreement (CETA) between the EU and Canada puts limits on these standards. Specifically, FPS is limited to physical security,[65] and this excludes legal and economic security.[66] Similarly, the FET under CETA has been narrowed down significantly to mean the denial of justice, which includes due process, arbitrariness, discrimination and abusive treatment.[67] Like the CETA, the US Model BIT of 2012 also limits FET to the guarantee of justice in criminal, civil or administrative adjudicatory proceedings, while the FPS is limited to the provision of police protection in accordance with customary international law.[68] The examples referred to above point to the need to have an MIT instead of an individualistic approach, which then fragments the global investment framework and cause it to be unpredictable.

Another reason to adopt a multilateral approach is with regard to a need to harmonise the rules on compensation in cases of expropriation. Such harmonisation can occur only through the adoption of the MIT. In line with the principles of state sovereignty, it is generally accepted that states have a right to take alien property under certain conditions. This is the oldest aspect of the law governing alien property in the host state's territory. It has very clear features: expropriations for 1) public interest reasons and on 2) a non-discriminatory basis, 3) observing due process, and 4) accompanied by just compensation under customary international law or "prompt, adequate and effective" compensation under IIAs.[69] While the rules governing expropriations under both customary international law and IIAs seem clear, there are two challenges which give rise to further fragmentation of global investment law. The first of these is the need to distinguish indirect expropriations from the governmental right to regulate, because there is a blurry line between the two.[70] Host countries have often found themselves

65 Article 8.10(5) of the *European Union–Canada Comprehensive Economic and Trade Agreement* (2017).

66 Articles 8.10(6) and (7) of the *European Union–Canada Comprehensive Economic and Trade Agreement* (2017).

67 Articles 8.10(1) and (2) of the *European Union–Canada Comprehensive Economic and Trade Agreement* (2017). There is, however, a potential that "abusive treatment" could be interpreted widely, just as in the case of the FET standard.

68 Article 5.2 of the *US Model BIT* (2012).

69 See Art 6.1 of the *Switzerland–Poland BIT* (1989) for a typical wording.

70 The interface between a *bona fide* governmental regulatory measure and indirect expropriation is well captured by Judge Rosalyn Higgins in her often quoted 1982 Hague Lecture, when she remarked: "Is this distinction intellectually viable? Is not the State in both cases (that is, either by a taking for a public purpose, or by regulating) purporting to act in the common good? And in each case has the owner of the property not suffered loss? Under international law standards, a regulation that amounted (by virtue of its scope and effect) to a taking would need to be 'for a public purpose' (in the

unable to act, the sovereign right to regulate having been stripped from them by IIAs. They are then not able to discharge the fundamental duty of states – the duty to regulate for public interest. On the other hand, states indirectly expropriate investors' property without paying compensation under pretence of the governmental right to regulate.[71] This part of the problem will not be discussed in this paper, given the research that is required to address the differences between the two concepts. Suffice it to say that this is a problem that demands a multilateral response. The second problem relates to the criteria for compensation. With regard to the standard of compensation, both customary international law and the early treaties on investment such as the US Treaties of Friendship, Commerce and Navigation (FCN) of the 1920s and 1930s referred to "prompt payment of just compensation".[72] The Hull formula as replicated in the IIAs was adopted only in 1938 in the letter written to Mexico by Cordell Hull.[73] Later FNCs such as the 1946 Treaty with China resultantly expanded the standard of compensation to "prompt, just and effective" compensation.[74] It is interesting that the FCN Treaties referred to just compensation and not "adequate" compensation.

Bearing in mind the huge amounts that states have to pay, based on the Hull formula, states have begun to raise concerns about the calculation of damages by the ICSID tribunals. In fact, the UNCITRAL Working Group III highlighted the financial burden that is placed by excessive ICSID awards (damages) on states, which have increased by 124 per cent from 2013.[75] For example, a successful claimant would, on average, be awarded $110.0m, which is an amount of such magnitude as to impoverish a developing country.[76] With these exorbitant amounts, there is a rise in revising the criteria for awarding compensation. Thus, the criterion for compensation under the South African Constitution is not the same as that in the Hull rule. The Constitution promises "just and equitable" compensation, which is the market value reduced by certain factors.[77] Similarly, the India Model BIT does not

sense of a general, rather than for a private, interest). And just compensation would be due." See Higgins 1983 *Recueil des Cours* 331.

71 Nicholson 1965 *BC L Rev* 391.

72 Walker 1956 *Am J Comp L* 235.

73 Taffet and Walcher *United States and Latin America* 6.7.

74 Walker 1956 *Am J Comp L* 235; Art VI.2 of the *Treaty of Friendship, Commerce and Navigation between the United States of America and the Republic of China* 63 Stat 1299 (1948); Art VI.3 of the *Treaty and Protocol between the United States of America and Japan* (1953).

75 UNCITRAL *Possible Reform of Investor-State Dispute Settlement (ISDS)* para 5.

76 UNCITRAL *Possible Reform of Investor-State Dispute Settlement (ISDS)* para 5.

77 The factors to be taken into account are: the history of the acquisition and the current use of the property; the extent of direct state investment and subsidy in the acquisition;

refer to the Hull formula for compensation; rather, it refers to adequate compensation, which is the market value as reduced by certain mitigating factors.[78] Indeed, the standards of compensation adopted by India and South Africa reflect those of customary international law. The customary international law standard of compensation was rather overtaken by the Hull standard as incorporated in the IIAs, but developing countries resuscitated it through the adoption the CERDS.[79] Although most countries are still trapped in the IIAs' unaffordable standard of compensation, a tiny minority has taken a step back to the customary international law standard. The international community should not be functioning on coercion that has been brought about by the existence of the IIAs. There is a need to adopt a realistic and reasonable standard of compensation through an MIT, which will protect both investors and states that exercise their sovereign right to expropriate. This means that if both the developed and the developing countries are to reap the benefits of FDI, the compensation criteria in the event of expropriations should be reasonable and take into account all the relevant factors.

The last reason suggested in this section of this paper for why there is a need for an MIT is in relation to dispute settlement, which has raised concerns from states and academics alike. Historically, investors relied on their home states for settlement of investment disputes, because the protection of individuals was a matter of state responsibility.[80] Since international courts or tribunals are for states, it follows that special institutions had to be created in order to give investors standing to litigate investment disputes, and so the ICSID was created in 1965 to enable investor-state dispute settlement, although it could hear its first case only in 1972. Today, ICSID tribunals surpass any international tribunal or court with regard to the number of cases resolved per year.[81] In order to signal their willingness to appear before international tribunals and not to hide behind sovereign immunity, host governments often bind themselves to international arbitration, and this serves as a guarantee that there will be a judicial process by a neutral body and remedies will follow when a dispute arises. Therefore, international arbitration in the form of ISDS

any beneficial capital improvement of the property; and the purpose of the expropriation.

78 Article 5.6 of the *India Model BIT* (2016). Such mitigating factors include: the past and current use of the property including its acquisition; previous profits made from the investment; compensation from insurance pay-outs; the value of the property remaining in the investor's control; and any harm that the investor has caused to the environment or the community. Art 5.7 of the *India Model BIT* (2016).

79 Article 2.2(c) of the *Charter of Economic Rights and Duties of States* GA Res 3281 (1974).

80 Tudor *Fair and Equitable Treatment Standard* 1.

81 ICSID 2017 https://icsid.worldbank.org/en/Documents/resources/ICSID%20Web%20Stats%202017-2%20%28English%29%20Final.pdf.

has been a hallmark of IIAs, such that even countries such as South Africa which are not parties to the ICSID Convention have submitted to international arbitration at the ICSID. Among the major concerns about ICSID tribunals, which call for a complete overhaul of ISDS, are: the tribunals' decisions are skewed against host governments and towards investors in their awards; there is a lack of transparency; the decisions made are inconsistent; and hefty awards can be made, that can potentially wipe out economies, as happened in Argentina.[82] There are also structural criticisms against ICSID tribunals, namely: the fact that the tribunals are *ad hoc,* which results in the absence of the collegiality that is fundamental to creating coherent jurisprudence. Further, the appointment of arbitrators and the fact that they wear different hats (as litigators in some instances and arbitrators in other instances) creates conflict of interest. In the light of these problems, countries have in recent years been rethinking ISDS. For instance, the South African PIA requires investors to submit to national courts (with reference to the exhaustion of local remedies) before resorting to international arbitration.[83] Such international arbitration is inter-state instead of ISDS.[84] Brazilian CFIAs have done away with ISDS; the CFIAs provide for inter-state arbitration, which is to be used as a last resort, as dispute prevention is the preferred route.[85] Australia has not incorporated ISDS into some of its BITs, notably the Australia–US BIT of 2004 and the Australia–Malaysia FTA of 2011. Nevertheless, the case of Australia is a little bit confusing in that as the country has started a trajectory of ISDS-free agreements, it seems to be going back on its recent agreements with South Korea and China.[86] Interestingly, both these new agreements with China and South Korea envisage the possibility of establishing appellate review with the jurisdiction to hear appeals on questions of law.[87] This could be an indication that Australia was not happy with ISDS as it stands, given the inconsistent decisions that we have seen from ICSID tribunals deciding on same/similar facts and issues, which undoubtedly warrants a call for the creation of appellate review. During the Transatlantic Trade and Investment Partnership

82 Franck 2005 *Fordham L Rev* 1521.

83 Section 12(4) of the *Protection of Investment Act* 22 of 2015.

84 Section 12(5) of the *Protection of Investment Act* 22 of 2015.

85 Article 15.6 of the *Brazil–Angola Cooperation and Facilitation Investment Agreement* (2015); Art 15.6 of the *Brazil–Mozambique Cooperation and Facilitation Investment Agreement* (2015). Brazil is much more interested in dispute prevention through Focal Points or Ombudsmen (Arts 5 and 15 of the *Brazil–Angola Cooperation and Facilitation Investment Agreement* (2015)); Arts 5 and 15 *Brazil–Mozambique Cooperation and Facilitation Investment Agreement* (2015).

86 *Republic of Korea–Australia Free Trade Agreement* (2014); *Australia–hina Free Trade Agreement* (2015).

87 *Australia–hina Free Trade Agreement* (2015) Art 9.23; *Republic of Korea–Australia Free Trade Agreement* (2014) Annex 11.E.

(TTIP) negotiations with the United States, the EU Parliament accepted ISDS in the TTIP, subject to having publicly appointed judges instead of private arbitrators.[88] As is generally known, ICSID arbitrators are privately appointed, serving on an *ad hoc* basis, and sometimes appearing as representatives for parties to the disputes. The UNCITRAL has embarked on a journey to review the current ISDS and adopt a multilateral investment court that seeks to address the problems highlighted above. This can be achieved only through the adoption of an MIT.

Despite the challenges of some of the provisions of IIAs, as described above, it is fitting to commend IIAs for the role they have played in bringing certainty to an otherwise fluid field of international investment law, absent an international constitutive or organic treaty. Further, IIAs must be commended for protecting alien property abroad, which was mainly done through the local remedies of the host state (Calvo) and diplomatic protection where such remedies were ineffective.[89] Since diplomatic protection can take any form, weaker states largely comply with the demands of stronger states,[90] which at times can be unreasonable. Therefore, having IIAs only as protection for private investors, they have also protected developing or weaker states from the arbitrary intervention of developed nations occasioned by diplomatic protection. However, the time is now ripe for the international community to adopt an MIT, given the problems discussed above with the IIAs and the fact that economies today are so interdependent that only multilateral rules and institutions can regulate commercial activities and issues of development.

3 Content of the proposed MIT and its host organisation

In 2000 one commentator argued it was not yet time to negotiate a multilateral agreement on investment, and emphasised that many more IIAs have to be concluded and their benefits realised by both developed and developing countries.[91] Well, more than enough IIAs have been signed and their benefits and disadvantages have been realised. It is therefore the right time to negotiate a multilateral treaty on investment, which must take into account both the interests of developed and developing countries. This section discusses the tenets of such a treaty.

88 European Parliament 2015 http://www.europarl.europa.eu/news/en/headlines/eu-affairs/20150706STO74853/plenary-highlights-greece-ttip-emissions-trading-reform.
89 Borchard 1927 *AJIL* 304.
90 Borchard 1927 *AJIL* 304.
91 Dattu 2000 *Fordham Int'l LJ* 277.

3.1 Purpose of the proposed treaty on investment

As indicated in the introduction to this work, the proposed MIT must deal mainly with standards of protection as against the liberalisation of investment. This is particularly so because each individual country has peculiar needs based on its economic structure and stage of development. Therefore, it would be undesirable to adopt blanket rules and define the sectors that are subject to investment liberalisation. In any event, one must bear in mind that one of the challenges of the OECD MAI was that the supposedly homogenous countries could not agree on which sectors were to be liberalised with the end result that the list of exceptions became longer than the agreement itself. In any event, investors are not concerned about investment liberalised. They are more concerned with investment protection, because all countries are competing for FDI in any event; hence, all countries adopt favourable approaches to investment liberalisation. Even the United States is concerned about attracting FDI.

Another purpose for the MIT must be to ensure that developed and developing countries alike reap the benefits of having such a treaty. The international community cannot continue to adopt rules that benefit capital exporting countries at the expense of capital importing countries. We have seen, in recent years, several developing countries revolt against what was deemed to be accepted standards of investment protection due to the harsh effect of such standards on their economies. Consequently, concluding the MIT will involve revisiting these rules and adopting rules that are mutually beneficial to both developing and developed countries. It is no longer possible to exclude developing countries or to force them to agree to certain standards through IIAs, nor is it desirable to rob developing countries of their resources and as a consequence destabilise the entire globe.[92]

3.2 Host international organisation for the proposed MIT

An appropriate organisation should host such a treaty. It is immediately tempting to consider the WTO as the home organisation,[93] yet the WTO deals with trade. Thus, the WTO is concerned with creating an environment for comparative advantage through the elimination of tariffs and other barriers.[94]

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92 Economic and political instability in Africa and the Middle East have brought instability to Europe and the United States, whose citizens have become weary of receiving immigrants or refugees. This has resulted in changing the nature of conventional politics in some developed nations, in the United Kingdom's exiting the EU, and in the US's electing an unimaginable president.

93 Chalamish 2009 *Brook J Int'l L* 311; Lin "China's G20 Agenda" 58.

94 Jackson *World Trade* 330.

Earlier proposals for an MIT suggested removing barriers to global investment,[95] and this proposal for investment liberalisation is resurfacing in order to meet the demands of Global Value Chains (GVCs).[96] The question is whether the removal of global investment barriers is desirable and achievable at this point. As has been shown above, no country would be willing to liberalise its domestic market, which on its own would be in sharp contrast with the spirit of the GATT/WTO. Rather, investors are much more interested in the predictability of the rules governing the protection of investment, and this should be the purpose of the MIT – investment protection rather than investment liberalisation. The markets must be allowed to drive investment liberalisation. In any event, the WTO is facing its own challenges regarding treaty conclusion, as is reflected in its 10th Ministerial Council in Nairobi. It is noteworthy that the WTO established a Working Group on Trade and Investment in 1996 during its Ministerial Conference in Singapore and suspended it in 2003 at the Cancun Ministerial Committee.[97] Ultimately, investment was taken completely off the Doha Agenda.[98] With this in mind, the WTO cannot be a host organisation for the proposed MIT. The unsuitability of the WTO is further demonstrated in regard to dispute settlement. It is widely accepted that ISDS is suitable for resolving investment disputes, yet the WTO dispute settlement is based on inter-state settlement. There have already been proposals to create private rights in the GATT system in order for companies to litigate investment disputes.[99] The adoption of this proposal is unthinkable. WTO members guard this institution jealously and it is most unlikely that they would agree to create private rights, thereby enabling ISDS.[100] Further, WTO remedies are not suitable for investment, especially where foreign property has been taken (expropriated); the WTO remedies would be suitable only for investment liberalisation and not for investment protection.

Salacuse[101] proposed that the World Bank, being an institution that houses both developed and developing countries and is also sensitive to development issues, should be the home to the General Agreement on Direct International Investment, as he termed it. I doubt, however, that developing

95 Shenkin 1994 *U Pitt L Rev* 544.
96 Shan *Toward a Multilateral or Plurilateral Framework* 4.
97 WTO 2003 https://www.wto.org/english/thewto_e/minist_e/min03_e/draft_decl_e.htm.
98 General Council Doha Work Programme WT/L/579 (2004).
99 Shenkin 1994 *U Pitt L Rev* 544.
100 In any event, the proposals on the reform of the WTO Dispute Settlement on the Doha Agenda are limited to clarifications on consultations only. *WTO Ministerial Declaration of the Fourth Session of Doha* WT/MIN(01)/DEC/1 (2001) 22.
101 Salacuse 1984 *J Air L & Com* 1006.

countries could still see the World Bank as an appropriate institution, especially with its quota voting structure.[102]

The OECD has also been recommended, but it would be undesirable to have it as the host organisation. The OECD attempted to establish the MAI in 1995 with like-minded countries. Other countries were to be invited to accede once the agreement had been concluded. It is important to recall, however, that the purpose of the MAI was "to improve market access and investment protection in developing countries",[103] the very group that was not represented among the OECD membership, thereby calling into question the legitimacy of the OECD and its activities. It seems to me, however, that wealthy nations do not learn from their mistakes with regard to the legitimacy of international organisations. Displays of disrespect and disregard to developing countries' views keep recurring, although they glaringly fail to yield the desired outcomes in terms of treaty conclusion. Notable about the failed OECD MAI is the fact that developing countries were primarily excluded from it, as it was felt that attending to their interests/demands would dilute the MAI.[104] The exclusion of developing countries was lamentable. Despite the great interest that developed countries have in investing in developing countries, the latter are never seen as partners in negotiations but only as rule-takers,[105] which has resulted in the world economic order not functioning optimally. One agreement after the other fails because of the inability to recognise developing countries as equal partners with different needs.

The G20 has also been proposed as the convener of the discussions on the MIT, which could later be extended to the OECD and then to the WTO and UNCTAD.[106] During the conference held at the World Trade Institute on 19 June 2017, scholars such as Axel Berger argued that Rome was not built in a day, and that if the MIT were to succeed, it should be negotiated among the top economies, and once those big economies had set the rules, then only could other countries be allowed to participate.[107] Interestingly, the proposer

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102 Anonymous Date Unknown https://finances.worldbank.org/Shareholder-Equity/Top-8-countries-voting-power/udm3-vzz9/data.

103 Muchlinski "Rise and Fall of the Multilateral Agreement on Investment" 121-122.

104 Kutz 2014 *U Pa J Int'l L* 714.

105 The original GATT included very few developing countries, and the negotiations for the failed Multilateral Investment Agreement intentionally excluded developing countries with a view that the latter would join later when the rules have been agreed upon. Only a few developing country OECD members participated in the negotiations. See Kelly 2000 *Colum J Transnat'l L* 493.

106 Berger "Multilateral Investment Agreement" 66.

107 Also see Shan *Towards a Multilateral or Plurilateral Framework* 11, advocating an agreement between the top five exporters and importers of capital, which are basically developed nations.

of this idea said that the selection of countries to participate in this initial MIT process should be determined by the size of their GDPs. Clearly, this borders on the exclusionary behaviour that has plagued some of the international organisations and which ultimately resulted in the revolt of the rule-takers (the developing countries). Under international law all countries are equal, irrespective of their GDPs, and Berger's proposal is therefore unlikely to be legitimised by the very same countries that he is hoping would accede to the MIT from which they have been excluded.

Chalamish[108] and other scholars propose a new institution altogether, a World Investment Organisation, which would benefit from having a narrow focus. I think, however, that establishing a new organisation would stretch the already limited funding for international organisations too thinly, especially when the world's states have already created the World Bank and UNCTAD with investment mandates.

Some have identified UNCTAD as a possible host, given that it already plays a role in monitoring IIAs, but others criticise UNCTAD as being biased towards developing countries.[109] This work aligns itself with the proposal to have UNCTAD as a host organisation, and if indeed UNCTAD is biased towards developing countries,[110] that means that the MIT is likely to be concluded, because the developing countries will feel safer in the hands of UNCTAD than with any other organization. Only the content of the MIT would be a subject of discussion rather than issues of organisational legitimacy. Even better, the UNCITRAL would be an appropriate alternative, because it is already working on the establishment of the world investment court and its rules are widely used already for the settlement of investment disputes. It would be ideal if the organisation that houses the investment court were also home to the MIT. Being a United Nations body, UNCITRAL enjoys support from both the developed and developing countries, as against the Bretton Woods institutions, which are viewed with suspicion by developing countries while garnering support from developed countries.

3.3 Entry and establishment requirements

3.3.1 Right of entry and establishment

In the light of the suggestion made above that the purpose of the proposed MIT should be limited to adopting uniform standards of protection only, it

108 Chalamish 2009 *Brook J Int'l L* 335; Avi-Yonah 2003 *Colum J Transnat'l L* 7.

109 Chalamish 2009 *Brook J Int'l L* 335.

110 The concern about UNCTAD's bias is unfounded as the secretariat does not make decisions. States parties do.

follows that the MIT should not create the right of entry and establishment. This should be left to states, because only states can determine the areas that need FDI for their economic development and can impose performance requirements where necessary. Basically, the current practice as contained in the IIAs, where entry and establishment are subject to the laws of the host country, should be maintained in the MIT as it permits countries to allow investment that is relevant to their respective economic needs. This is at least the approach that was adopted by the Havana Charter, in which admission requirements were left up to the individual states to determine and prescribe.[111]

3.3.2 Investment measures

As argued above, another purpose for the establishment of the proposed MIT must be to ensure mutual benefits between capital exporting and capital importing countries. Investment measures are one way of ensuring that capital importing countries benefit from FDI, while investors from capital exporting countries benefit from the exploitation of the resources and the market in the capital importing country. Yet the discussion about the usefulness of the investment measures, especially performance requirements, is far from over. To this end, performance requirement are typically regarded as being inimical to global welfare, based on the neo-classical theory that informs TRIMs, which presupposes the existence of perfect competition in the global markets and therefore shuns any governmental intervention, as that can only improperly allocate resources.[112] Nevertheless, it is trite that markets are imperfect and so is competition; therefore, the idea of performance requirements is to promote the development that is expected from FDI.[113] Yet it is not clear that performance requirements bring about development in a host country.[114] Their failure or success is determined by how they are applied. On their own they are neither particularly good nor bad for a host state's economic growth.

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111 Article 12.1(c)(ii) of the Havana Charter.

112 Moran *Impact of Trade-Related Investment Measures* 32.

113 Even with the performance requirements that are said to violate Article III and XI of the GATT, perhaps the TRIMs Agreement ignores the reason why they are invoked by countries in the first place. This calls for the conclusion of a multilateral treaty that seeks to balance investment promotion with protection. Kwaw 1991 *NC J Int'l L & Com Reg* 331.

114 It is argued that the imposition of local content forces a firm to accept inputs from an expensive local supplier, which pushes the price of its products up. Coupled with export requirements, it follows therefore that without export subsidies the firm could not, on its own, sustain exports at prices higher than those elsewhere, so that the state would have to subsidise the exports. Moran *Foreign Direct Investment and Development* 32.

With regard to incentives (which are largely used by developed nations), there do not seem to be strong arguments against their use in the academic literature, although they have the same effects as performance requirements. Interestingly, when developing countries use incentives they are said to be leading a race to the bottom regarding human rights, labour and environmental standards,[115] yet nothing is said about incentives that are used chiefly by developed nations in order to influence the location of firms.

Despite the above, performance requirements and incentives can find support in the Japan-Korean Model,[116] which drove up South Korean exports in electronics.[117] Also, irrespective of whether investment measures work or not, developing and developed countries are equally keen on them, and so the MIT must not regulate them until such time as the MIT can include investment liberalisation.[118] For now, just like any tool that does not work, investment measures will be abandoned in due course if they do not work.[119] To bolster the proposal to leave investment measures outside the ambit of the MIT, we should remember that one of the key purposes of the investment chapter of the Havana Charter was to "give effect to other reasonable investment requirements",[120] which refers among other things to admission and performance requirements.

3.4 Standards of protection

As indicated above, states and investors are most concerned about investment protection and stability, especially in the light of the rise of the "governmental right to regulate", which borders on indirect expropriations. Investment liberalisation is not much of a concern, as host states will be

115 Chalamish 2009 *Brook J Int'l L* 320.

116 The Japan-Korean Model is characterised by import restraints and export promotion, subsidies and grants to create national companies, restrictions on FDI, coupled with requirements for licensing technology, instead of establishing subsidiaries. See Moran *Foreign Direct Investment and Development* 127-128.

117 The study undertaken by the United Nations on the Impact of TRIMs on Development indicates that the influence of TRIMs on the behaviour of firms is relatively small. As such, TRIMs as a trade policy has had little impact on investment flows. See Moran *Foreign Direct Investment and Development* 6.

118 It has become evident that host states, especially developing countries, cannot sit back and hope that firms or FDI can bring economic development. Kelly 2000 *Colum J Transnat'l L* 495.

119 For instance, developing countries rallied behind NIEO in 1974, which asserted sovereignty and expropriation without compensation. As NIEO did not work out for them they concluded BITs, because they believed in the promise of capital flows in exchange for foreign investment protection. Consequently the NIEO became obsolete, as countries such as China, which originally supported NIEO, later abandoned it for BITs. Alvarez *Public International Law Regime* 132.

120 Article 12.2(a)(ii) of the Havana Charter.

amenable to liberalising their sectors anyway, because they are in need of FDI. Consequently, it is reiterated herein that the MIT must address investment protection as opposed to liberalisation. Departing from this premise, the sections below make recommendations on the standards of protection that the MIT must embrace.

3.4.1 National treatment *and Most Favoured Nation*

In contradiction of the positions adopted by India and South Africa, to eliminate MFN, it is recommended herein that once an investment has been admitted, it should be given national treatment and MFN treatment. Perhaps the reason why India and South Africa have adopted the route of severing themselves from MFN is because there is no multilateral treaty on investment, and MFN therefore creates free-riding, which yields detrimental results in the field of investment.[121] But once there is an MIT, it should not be a problem to have an MFN clause. In any event, since the proposed MIT covers only the standards of protection, there should not be a problem in extending both the national and MFN standards of protection to all other members of the MIT.

Interestingly, a long list of exceptions to national treatment that saw the collapse of the OECD MAI would not be a problem for this MIT because it would deal with protection, not liberalisation or promotion.[122] Therefore, national treatment and MFN would be limited to standards of protection and the dispute settlement clauses enshrined in the MIT.

3.4.2 Fair and equitable treatment and full protection and security

The approach taken by India and South Africa should be adopted in the MIT. Thus, the vagueness of this standard, coupled with the fact that national treatment and compensation in cases of expropriation are available, warrant the exclusion of the FET standard. The FET standard can only cause chaos in the global economy. There is no use in stripping countries of their limited resources under the guise of the FET standards. This could only result in worsening the global economic and social ills that we are seeing today, by enriching a limited minority at the expense of vast populations. At the very minimum, the EU-Canada CETA or the US Model BIT description of the FET could be incorporated into the MIT to the extent that it is limited to due

121 *Emilio Agustin Maffezini v Kingdom of Spain* ICSID Case No ARB/02/08 (2004); Radi 2007 *EJIL* 757.

122 Muchlinski "Rise and Fall of the Multilateral Agreement on Investment" 125.

process, arbitrariness, discrimination, and excludes "abusive treatment".[123] This is so because tribunals are likely to stretch "abusive treatment" as far as elasticity would allow, thus taking us back to the nightmare we experienced with the FET.

The main concern regarding FPS is for the MIT to revive the basics; that is, to revert to customary international law on protection and security instead of "full" protection. To this end, alien property must be protected by the host state as a matter of customary international law, which is limited to physical security.[124] At least it has been indicated above that there is a move to limit protection and security (examples – South Africa, CETA, US Model BIT of 2012), and the MIT must also limit this standard accordingly.

3.5 Expropriation and compensation

Most literature on the topic of compensation would like to position the Hull Rule as customary international law,[125] and I dispute this position because the Hull letter to Mexico expressing the quantum of compensation was composed as recently as in the 1930s, and the standard "prompt, adequate and effective" is found nowhere except as expressed in the Hull letter.[126] Consequently, the Hull Rule cannot be thought to constitute customary international law. It is simply treaty based. Further, it has been opposed by some developing countries in Latin America, and African states could not reject it because they were colonies at that stage. It was because of their general rejection of the Hull rule that many countries eventually resorted to BITs. To this end, developing countries have continued to reject it at the United Nations and through effecting nationalisations.[127] The standard of compensation under customary international law is "just compensation", as outlined in the *Norwegian Shipowners* case, or "appropriate compensation", as adopted by countries at the United Nations level.[128]

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123 Articles 8.10(1) and (2) of the *European Union–Canada Comprehensive Economic and Trade Agreement* (2017).

124 *British Claims in the Spanish Zone of Morocco (Great Britain v Spain)* Arbitration 2 UNRIAA 1924 641.

125 Elkins, Guzman, and Simmons 2006 *Int'l Org* 813; Grisel "Sources of Foreign Investment Law" 221.

126 Elkins, Guzman and Simmons argue that this rule is found in the *Norwegian Shipowners'* case, which in fact is not the case. Elkins, Guzman, and Simmons 2006 *Int'l Org* 813.

127 Iran's nationalisation of British Oil in 1951, the nationalisation of the Suez Canal by Egypt in 1956, the nationalisation of sugar by Cuba in the 1960s. See Elkins, Guzman, and Simmons 2006 *Int'l Org* 813.

128 *Charter of Economic Rights and Duties of States* GA Res 3281 (1974).

The Hull standard is just too rigorous to be maintained in the proposed multilateral treaty. Rather, states must consider "appropriate compensation or just compensation ... taking into account ... all circumstances that the State considers pertinent",[129] as is already done by South Africa and India. However, there must still be guidance from the MIT on what the pertinent factors might be, in order to ensure certainty to investors. Otherwise, leaving the matter open could very well diminish compensation beyond acceptable levels in some states. Given the word limit that applies to this paper, I shall not discuss the factors that the MIT should regard pertinent in awarding compensation.

Further, states must consider flexible ways in which payment can be made, because often the issues of the affordability and availability of foreign currency are important for developing countries.[130]

For predictability purposes, the MIT should give time-lines within which payment should be made, instead of using the word "prompt". The WTO DSU serves as an appropriate model to follow regarding timelines for the settlement of disputes.

3.6 Dispute settlement

It is often said as a generalisation that institutions and courts in developing countries are ill-suited for the protection and adjudication of FDI cases,[131] yet one does not get substantive reasons why courts in developing countries are said to be lacking the sophistication to deal with investment cases. The same loyalty that national courts in developing countries are suspected to have to their national governments against the investor may very well exist in developed nations' courts. It is for this reason that we are seeing the NAFTA Chapter 11 tribunals and recently the investment court proposed in CETA. If the laws and courts in developed nations were well-equipped to deal with investment cases, surely Canadians or Mexicans would have been happy to have their investment cases adjudicated in the American national courts and vice versa, but that is not the case.

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129 Report of the Second Committee UN Doc A/9946 (1974) and GA Res 3281 29 UN Doc GAOR Supp (No 31) 50 UN Doc A/9631 (1974). This method of calculating compensation is similar to the South African model as enshrined in the South African Constitution as well as in the Indian Model of BIT criteria.

130 The UK BITs in this regard are commendable for the flexibility they have adopted in effecting payment. See Art 4 of the *United Kingdom–Antiqua and Barbuda BIT* (1987) signed 12 June 1987.

131 Shu-Acquaye 2013 *Fla A&M U L Rev* 74.

It is a long-standing rule of customary international law that aliens are given the same treatment as nationals and are subject to national laws, yet developing countries seeking to attract FDI bind themselves to a higher standard of treatment than national treatment with regard to dispute settlement. Thus national investors are subjected to national courts, whereas foreign investors have the right to resort to international arbitration, using treaty law instead of national law.

In refuting a widely cited work by Guzman on why LDCs sign the BITs that hurt them, Alvarez[132] indicates that contrary to the view posited by Guzman that LDCs reneged on their commitment in the NIEO by concluding BITs, in the period circa 1974, when NIEO was fashionable, very few BITs with LDCs contained ISDS, and it was only in the 1990s that the majority of BITs provided for a commitment to third-party ISDS. BITs that had been concluded before 1990 provided ineffective ISDS mechanisms, such as the Canada-Poland BIT.[133]

Two issues arise with regard to investment dispute settlement: national treatment *vis-à-vis* international arbitration, and the institutional nature of international arbitration. With regard to national treatment, the question is whether national treatment should be extended to dispute settlement, with the result that foreign investors must be subjected to national courts – the return of the Calvo Doctrine. To this end, the desirability of having a multilateral court cannot be over-emphasised. Again, once we have a multilateral treaty, it should be overseen and interpreted by the multilateral court or tribunals. In any event, the excesses of ICSID tribunals would have been eliminated through careful drafting, especially regarding the standards of treatment – FET and FPS.

Regarding international arbitration, it is notable that states seem to be going back to inter-state dispute settlement, which would be unsuitable for investment as opposed to trade. This is so because we are talking here of investments that are taken in the event of expropriation, yet it is well known that states do not always want to litigate. They take into account many factors to decide whether to litigate or not.[134] Should the home state decide not to litigate, then we are talking of a loss of property and unjustified enrichment. Inter-state dispute settlement is suitable for investment liberalisation and not entirely so for protection, especially where takings have occurred. The return of state-to-state investment disputes is argued to be unnecessary.

132 Alvarez *Public International Law Regime* 125.
133 Alvarez *Public International Law Regime* 126.
134 Shaffer *Defending Interests*.

Governments took a deliberate and conscious decision to abandon it in favour of ISDS because of the bottlenecks associated with it. Interestingly, advocates of state-to-state arbitration raise questions of the policy space to regulate in, and that ISDS encroaches on the governmental right to regulate. On this point Susan Franc[135] rightly indicates that governments can inscribe carve-outs in the BITs and agree to lesser rights so as to create policy space, instead of getting rid of ISDS. Indeed, this is already happening, as was indicated earlier in this paper. Brazil, India and South Africa having limited the application of MFN, eliminated fair and equitable treatment altogether, and restricted what was known as full protection and security.

The second issue relates to investment tribunals as institutions, irrespective of whether the MIT adopts ISDS or state-to-state arbitration. One will recall that the current *ad hoc* ICSD tribunals have arbitrators that wear different hats and make conflicting decisions on the same issues and facts.[136] Consequently, it is proposed here that the MIT establish or create a permanent court with tenured arbitrators. A proposal for a court with a two-tier system similar to that of the WTO has already been made in the CETA and also in the UNCITRAL, but what I propose here is *ad hoc* first instance arbitral tribunals and a permanent appeal court, because of the frequency with which investors are filing their disputes. Whereas I do not support the CETA court system for the simple reason that it is a treaty negotiated between the EU and Canada therefore not inclusive enough, I support the idea of having a two-tier court system similar to that of the WTO and as also now proposed for the UNCITRAL investment court,[137] which can be housed by UNCITRAL, where it is already work in progress, or at least in the ICSID or the UNCTAD. It follows that if it were to be housed at the ICSID, the ICSID Convention would have to be amended, and because the ICSID Convention requires that all contracting parties must agree to an amendment,[138] it may seem impossible. However, since all states are potential respondents and would not always be happy with the decisions of the first instance tribunal, amending the ICSID Convention to allow for a permanent two-tier court would most certainly not be impossible.

135 Franck 2005 *Fordham L Rev* 1591.
136 Egli 2007 *Pepp L Rev* 1079.
137 Franck 2005 *Fordham L Rev* 1591 citing Professor Elihu Lauterpacht.
138 Article 66.1 of the *International Convention on the Settlement of Investment Disputes between States and Nationals of other States* (1965) 4 ILM 532.

4 Existing bilateral investment treaties

As Berger has cautioned, if the MIT were to be adopted, it would have the potential of adding to the existing complexity by its concurrent existence with the BITs.[139] The question is whether the existing IIAs could be grandfathered, as happened in the GATT/WTO in relation to the preferential trade agreements that existed before the GATT 47 was adopted. The current and future IIAs could not exist in parallel with the proposed MIT, because that would defeat the whole purpose of adopting the MIT in the first place. Equally, they could not be terminated, as that would go against the doctrine of state sovereignty and states would continue concluding IIAs in line with their sovereign right to conclude treaties. Any MIT should not seek to override the existing IIAs if it needs to get the support of states.[140] Against the backdrop of the discussion in this paper, it goes without saying that there must be a relationship between IIAs and the proposed MIT, a more organic relationship than that of the PTAs and the WTO - a relationship that would allow the MIT court or tribunal to have jurisdiction over IIAs.

It is important to flag that IIAs are generally composed of four elements: investment liberalisation or promotion; investment protection; investment measures; and adjudication. As argued above, the proposed MIT would cover only protection and adjudication, leaving aside promotion and investment measures. Therefore, issues of promotion and investment measures (generally MIT-plus provisions) would have to be shielded from MFN by a specific provision in the MIT.

5 Conclusion

With the move away from the BITs described above, to the national regulation of investment as well as the refinement of traditional investment provisions, it is compelling that the MIT should be adopted. This is especially so because whereas it may be argued that investments would still be given adequate protection under national law, governments are not static, and so changes in government carry with them changes in the standards of protection that exist under domestic law. On the other hand, international law lends itself to predictability and is not prone to swift changes that discourage investment, especially in construction and extractible resources, which demand long investment periods. Also, international treaties carry with them an inherent

139 Berger "Multilateral Investment Agreement" 65; Sauvant 2016 *China & World Economy* 68.

140 Comments by Gary Hufbauer and Tyler Moran in Shan *Toward a Multilateral or Plurilateral Framework* 15.

obligation on the state to carry out its treaty obligations in good faith – *pacta sund servanda* - which does not exist at national law.

Contrary to the views that IIAs have converged on investment liberalisation and protection, standards of protection, and dispute settlement, thereby warranting an MIT that reflects this convergence,[141] it has been shown in this paper that instead of convergence, cracks have begun to show, and the MIT should take these cracks into account. As pointed out above, there is no agreement on investment measures. Developing and some developed nations want to have investment measures in the form of performance requirements or incentives. Equally, except for Japan, Canada and United States, most countries are not ready for investment liberalisation. The only thing that is certain is that all countries want refined investment protection provisions and an overhaul of dispute settlement. These are the areas that the MIT must focus on. I suppose the United States, if seriously keen on having a multilateral treaty, would have to realise that a "fast-track" liberalisation agreement, as Muchlinski[142] refers to it, cannot be achieved; we have to start slowly and incrementally. Already we have a convention on dispute settlement.[143] We must add protection, and the markets will direct us as to how liberalisation can be approached in due course, in the light of the economic asymmetry between the developed and the developing nations. We have all learned, through dispute settlement, what protection mechanisms should be like in order to balance the interests of the investors and the host countries.

The proposed MIT would be beneficial to both developing and developed countries because individually developing countries are not able to resist the pressures exerted on them by developed nations. Similarly, capital-exporting countries need certainty about the investment climate in the host state, which they cannot get through the national laws of developing countries. Interestingly, some developing countries which need FDI are also capital-exporting countries, for example South Africa, Brazil, and India, and they would undoubtedly not want to experience the adverse effects of the national regulation of FDI in host countries.

141 Wenhua and Wang 2015 *ICSID Review* 260-267.

142 Muchlinski "Rise and Fall of the Multilateral Agreement on Investment" 133.

143 Of course the dispute settlement mechanism must be overhauled to address the concerns raised throughout this paper.

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List of Abbreviations

AJIL	American Journal of International Law
Am J Comp L	American Journal of Comparative Law
BC L Rev	Boston College Law Review
BITs	Bilateral Investment Treaties
Brook J Int'l L	Brooklyn Journal of International Law
CAFTA	Central American Free Trade Agreement
CERDS	Charter of Economic Rights and Duties of States

CETA	Comprehensive Economic and Trade Agreement
CFIA	Cooperation and Facilitation Investment Agreement
Chinese JIL	Chinese Journal of International Law
Colum J Transnat'l L	Columbia Journal of Transnational Law
DTI	Department of Trade and Industry
EC	European Communities
EJIL	European Journal of International Law
EU	European Union
FCN	Friendship, Commerce and Navigation
FDI	Foreign Direct Investment
FET	Fair and Equitable Treatment
Fla A&M U L Rev	Florida A&M University Law Review
Fordham Int'l LJ	Fordham International Law Journal
Fordham L Rev	Fordham Law Review
FPS	Full Protection and Security
FTA	Free Trade Agreement
GATT	General Agreement on Tariffs and Trade
GDP	Gross Domestic Product
GVCs	Global Value Chains
Harv Int'l LJ	Harvard International Law Journal
ICSID	International Convention on Settlement of Investment Disputes
IIAs	International Investment Agreements
Int'l Org	International Organization
ISDS	Investor-State Dispute Settlement
J Air L & Com	Journal of Air Law and Commerce
JIDS	Journal of International Dispute Settlement
JWIT	Journal of World Investment and Trade
LDCs	Least Developed Countries
MAI	Multilateral Agreement on Investment
MIT	Multilateral Investment Treaty
MFN	Most Favoured Nation
NAFTA	North American Free Trade Area
NIEO	New International Economic Order
NC J Int'l L & Com Reg	North Carolina Journal of International Law and Commercial Regulation

OECD	Organisation for Economic Co-operation and Development
Pepp L Rev	Pepperdine Law Review
PIA	Protection of Investment Act
SADC	Southern African Development Community
TRIMs	Trade-Related Investment Measures
TTIP	Trade and Investment Partnership
U Pa J Int'l L	University of Pennsylvania Journal of International Law
U Pitt L Rev	University of Pittsburgh Law Review
UNCITRAL	United Nations Commission for International Trade Law
UNCTAD	United Nations Conference on Trade and Development
US	United States of America
WTO	World Trade Organization