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THE NEED FOR A SUPRANATIONAL ORGANIZATION IN FOREIGN INVESTMENT

DAVID M. HOWARD*

INTRODUCTION

While the World Trade Organization (WTO) does not regulate the field of foreign investment, the WTO has tried to negotiate multilateral rules on foreign investment in the past, and there are other current international agreements that contain investment provisions designed to regulate foreign investment.[1] Even though the previous multilateral investment agreement negotiations did not come to fruition, some scholars still believe there are several practical reasons for the WTO to regulate investment.[2] Most significantly, trade and investment are strongly linked in our globalizing world and both complement one another,

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[1] Efraim Chalamish, *Global Investment Regulation and Sovereign Funds*, 13 THEORETICAL INQUIRIES L. 645, 659–60 (2012).

[2] *See, e.g.*, Andrew T. Guzman, *Global Governance and the WTO*, 45 HARV. INT'L L. J. 303, 307 (2004).

with an increase in one corresponding to an increase in the other.[3] Professor Jürgen Kurtz describes the convergence of foreign investment and trade in what he coins as his *double helix* metaphor that characterizes the fields of international trade and investment as supported by, and connected to, each other.[4]

But history has divided these two pillars of our global economy: trade is regulated through a multilateral regime under the WTO, while investment is instead regulated by thousands of international investment agreements (IIAs), primarily bilateral investment treaties (BITs), and decentralized arbitral disputes. This Article acknowledges and accepts the characterization of a trade and investment as a double helix, but proposes the creation of a separate supranational investment organization to serve as a multilateral regulatory body on investment, and forum for investment negotiations, while still maintaining the economic link between investment and trade—namely, the institution of a World Investment Organization.[5]

The current bilateral nature of the international investment regime produces several structural problems for both investors and states.[6] Multilateral rules on investment can address these issues regarding the current investment framework and the interwoven world of BITs. A Multilateral Agreement on Investment (MAI) has been attempted before, but negotiations failed due to a myriad of reasons, not all of which pertain to investment principles.[7] The creation of a multilateral investment agreement requires the right forum for investment negotiations to take place—one specifically focused on international investment without the interference of trade or other international issues. As discussed in this Article, the current international forums and organizations are inadequate for investment negotiations, most significantly demonstrated by the previous failed attempts at creating an MAI. But the case for the creation of a global investment treaty is more compelling than ever, especially with the increase in importance of foreign investment in the global economy.[8] Therefore, before negotiations for a multilateral investment treaty can take place, a World Investment Organization (WIO) needs to be established to regulate the growing world of foreign investment and provide a forum for multilateral negotiations.

One prominent argument is that instead of creating a wholly new organization, the WTO should expand its jurisdiction to include the regulation

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[3] Lionel Fontagné, *Foreign Direct Investment and International Trade: Complements or Substitutes?*, (OECD Sci., Tech. & Indus., Working Paper No. 1999/03, 1999), http://dx.doi.org/10.1787/788565713012.

[4] JÜRGEN KURTZ, THE WTO AND INTERNATIONAL INVESTMENT LAW 24 (2016).

[5] A few scholars have noted the idea of creating a World Investment Organization, but this Article suggests a more serious and focused discussion to advocate for the creation of this institution. *See* Reuven S. Avi-Yonah, *National Regulation of Multinational Enterprises: An Essay on Comity, Extraterritoriality, and Harmonization*, 42 COLUM. J. TRANSNAT'L L. 5, 34 (2003). *Cf.* Merritt B. Fox, *What's So Special About Multinational Enterprises?: A Comment on Avi-Yonah*, 42 COLUM. J. TRANSNAT'L L. 551, 566 (2004) ("It is therefore difficult to see why a world investment organization is the right multilateral institution to resolve such conflicts.").

[6] William W. Burke-White & Andreas von Staden, *Private Litigation in a Public Law Sphere: The Standard of Review in Investor-State Arbitrations*, 35 YALE J. INT'L L. 283, 299 (2010) (noting that inconsistent decisions threaten the legitimacy of the investment arbitral system).

[7] STEPHEN SCHILL, THE MULTILATERALIZATION OF INTERNATIONAL INVESTMENT LAW 356–60 (2009).

[8] SURYA P. SUBEDI, INTERNATIONAL INVESTMENT LAW: RECONCILING POLICY AND PRINCIPLE 190 (2d ed. 2012).

of foreign investment.[9] This is an attractive argument at first glance and will be analyzed in this Article. In considering whether to add investment rules under the jurisdiction of the WTO, we must first address two problems: should we have multilateral rules in investment, and what is the best location for new multilateral investment rules?[10] This Article proposes three ideas: (1) multilateral rules and regulations on investment are necessary to better promote and protect foreign investment, (2) one way to do so is to expand the power of the WTO to fully regulate foreign investment, and (3) if the expansion of the WTO's power to regulate is shown to be not optimal, proposes the creation of a World Investment Organization (WIO) as the organization for the regulation of foreign investment, which is essential to the continued prosperity in our ever globalizing economy.[11] Some scholars have suggested the idea of the creation of other issue-specific organizations like the WTO,[12] but there has not truly been a specific proposal for an organization dedicated to investment.[13] That is the purpose of this Article, to envision both the theoretical and practical reasons for establishing this supranational[14] organization.

This Article will start by comparing trade and foreign investment in Part I to better understand the arguments that the WTO should in theory regulate foreign investment. Trade and investment are strongly linked, but there are still distinct differences between the two international legal fields. Part II will focus on the compelling reasons for a multilateral regime on foreign investment and why a de jure rather than a de facto multilateral investment agreement is needed.

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[9] Guzman, *supra* note 2, at 307.

[10] Peter Lloyd, *When Should New Areas of Rules be Added to the WTO?* 4 WORLD TRADE REV. 275, 275 (2005).

[11] *See* Efraim Chalamish, *The Future of Bilateral Investment Treaties: A De Facto Multilateral Agreement?*, 34 BROOK. J. INT'L L. 303 (2009).

[12] *See, e.g.*, Steve Charnovitz, *A World Environment Organization*, 27 COLUM. J. ENVTL. L. 323 (2002); Rosa M. Lastra, *Do We Need a World Financial Organization*, *in* THE REFORM OF INTERNATIONAL ECONOMIC GOVERNANCE 40, 48–49 (Antonio Segura Serrano ed., 2016) (discussing the proposal of a World Finance Organization); Daniel C. Esty, *The Value of Creating a Global Environmental Organization*, ENV'T MATTERS, June 2000, at 13.

[13] *See, e.g.*, WORLD BANK, GLOBAL DEVELOPMENT HORIZONS 2011—MULTIPOLARITY: THE NEW GLOBAL ECONOMY 108 (2011), http://siteresources.worldbank.org/INTGDH/Resources/GDH_CompleteReport2011.pdf ("The existence of a formal multilateral institution—a world investment organization analogous to the World Trade Organization—may also be an important step forward, especially if such a multilateral forum enhances access by developing countries, especially LICs, to global investment capital."); Nicolette Butler, *In Search of a Model for the Reform of International Investment Dispute Resolution: An Analysis of Existing International and Regional Dispute Mechanisms*, *in* RESHAPING THE INVESTOR-STATE DISPUTE SETTLEMENT SYSTEM 353, 561 (Jean E. Kalicki & Anna Joubin-Bret eds., 2015) ("Why is there a World Trade Organization (WTO), but not a World Investment Organization (WIO)?"); Avi Nov, *The "Bidding War" to Attract Foreign Direct Investment: The Need for a Global Solution*, 25 VA. TAX REV. 835, 861–62 (2006).

[14] The term "supranational" is still relatively vague and undefined, but this Article will try to use a broader definition to encompass all relevant organizations. For the purposes of this Article, "supranational" shall refer to an entity where (1) member states transfer regulatory powers that they themselves previously exercised over their nationals, and (2) in exercising these regulatory powers, a supranational actor must have independent authority from its member states. *See* Duncan B. Hollis, *Why State Consent Still Matters—Non-State Actors, Treaties, and the Changing Sources of International Law*, 23 BERKELEY J. INT'L L. 137, 156 (2005); *see also* Peter L. Lindseth, *Supranational Organizations*, *in* THE OXFORD HANDBOOK OF INTERNATIONAL ORGANIZATIONS 152, 152–54 (Jacob Katz Cogan et al. eds., 2016) ("The key distinction between a supranational organization (SNO) and an international organization (IO) is the scope of autonomous regulatory power that the body may enjoy.").

Part III will argue for the necessity of a WIO, particularly focusing on the past attempts of the WTO to regulate foreign investment. Part IV will focus on the creation and structure of the WIO and potential drawbacks to this proposal, focusing particularly on the legitimacy challenges to the organization and the hold-out problem confronting its establishment. Part V will conclude this Article.

I. TRADE AND FOREIGN INVESTMENT

Trade and foreign investment are intricately tied together, converging and driving our global economy,[15] and are often described as "two sides to the same coin."[16] Both foreign investment and trade share a common historical origin in the international agreements on the treatment of foreigners, but both history and practical objectives have divided the two pillars of globalization, with the realm of trade focused on liberalization of cross-border trading, and the field of foreign investment focused on the protection and promotion of that investment.[17] International investment law has experienced several stages of development throughout the past century, from the investment regime's origin with trade, to the two fields' divergence, and finally to the current reconvergence with trade again.[18] This Section will provide a brief overview of the similarities and differences between foreign investment and international trade to help the reader better understand the argument that the WTO should regulate foreign investment.

A. *SIMILARITIES BETWEEN INTERNATIONAL TRADE AND FOREIGN INVESTMENT*

From a strictly legal perspective, trade and investment are separate, but there are many reasons to attach them.[19] Today's world economy rests on both trade and investment, its "two fundamental pillars."[20] But rather than simply being substitutes for each other, foreign investment and international trade complement each other and share a fundamental goal in their objectives.[21] A relationship exists between the two legal systems when the effects originating in

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[15] Press Release, WTO, Foreign Direct Investment Seen as Primary Motor of Globalization, Says WTO Director-General (Feb. 13, 1996), https://www.wto.org/english/news_e/pres96_e/pr042_e.htm ("Indeed, in today's economy, trade and investment are not merely increasingly complementary, but also increasingly inseparable as two sides of the coin of the process of globalization.").

[16] Markus Wagner, *Regulatory Space in International Trade Law and International Investment Law*, 36 U. PA. J. INT'L L. 1, 16 (2014).

[17] Nicholas DiMascio & Joost Pauwelyn, *Nondiscrimination in Trade and Investment Treaties: Worlds Apart or Two Sides of the Same Coin?*, 102 AM. J. INT'L L. 48, 53–54 (2008).

[18] Anthea Roberts, *Clash of Paradigms: Actors and Analogies Shaping the Investment Treaty System*, 107 AM. J. INT'L L. 45, 75 (2013) (describing the international investment system's maturity "from its infancy and adolescence into adulthood").

[19] LONE WANDAHL MOUYAL, INTERNATIONAL INVESTMENT LAW AND THE RIGHT TO REGULATE 12 (2016).

[20] Daniil E. Fedorchuk, *Acceding to the WTO: Advantages for Foreign Investors in the Ukrainian Market*, 15 N.Y. INT'L L. REV. 1, 6 (2002).

[21] KURTZ, *supra* note 4, at 279.

one are felt in the area of the other system.[22] Trade and investment are inextricably related, as foreign investment stimulates exports from investing countries and foreign investment complements and supports trade.[23] This results in a positive correlation between investment and trade flows, and the two are mutually supportive.[24] Foreign investment expands international trade as foreign assets and subsidiaries buy goods and supplies, often from the parent corporation in a foreign country.[25] The more firms that invest in foreign countries, the more those firms generally export as well.[26] Trade liberalization further improves investor confidence in a foreign country, leading to a greater increase in Foreign Direct Investment (FDI) flows.[27] Unlike environment and human rights law, states make money through both trade and foreign investment when private shareholders in the state gain financial benefits and create jobs, incentivizing states to focus on predictability and enforceability.[28]

B. *DIFFERENCES BETWEEN TRADE AND FOREIGN INVESTMENT*

While investment and trade are connected in many ways, the two are still distinct economic flows.[29] Generally, modern trade is about overall welfare and the liberalization of trade flows and opportunities, while foreign investment is about individual rights with the principles of investment protection grounded in fairness.[30] Furthermore, trade disputes occur between states, while investment disputes pit the foreign investor against a sovereign state.[31] Investor's rights do not exist in trade law, and there is no equivalent in trade to the property protection contained in most IIAs.[32] In the rights of a foreign entity, there is no initial fundamental right to trade or to invest in a foreign country, as states have the sovereign right to exclude both foreign investors and traders.[33] But once an investment is made, if the host country expropriates or nationalizes the investment, a fundamental property right of the investor has been violated.[34]

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[22] GREGORY MESSENGER, THE DEVELOPMENT OF WORLD TRADE ORGANIZATION LAW: EXAMINING CHANGE IN INTERNATIONAL LAW 39 (2016).

[23] Fontagné, *supra* note 3.

[24] World Trade Organization Working Group on the Relationship between Trade and Investment, *Communication from the European Community and Its Member States, Checklist of Issues, Agenda Item IV: Advantages, and Disadvantages of Entering into a Bilateral, Regional and Multilateral Rules on Investment, including from a Development Perspective*, ¶ 3, WTO Doc. WT/WGTI/W/89 (Oct. 9, 2000).

[25] Charles O. Roehrdanz, *Reducing the U.S.-Japan Trade Deficit by Eliminating Japanese Barriers to Foreign Direct Investment*, 4 MINN. J. GLOBAL TRADE 305, 305 (1995).

[26] Stephen J. Canner, *The Multilateral Agreement on Investment*, 31 CORNELL INT'L L.J. 657, 659 (1998).

[27] Susan D. Franck, *Foreign Direct Investment, Investment Treaty Arbitration, and the Rule of Law*, 19 PAC. MCGEORGE GLOBAL BUS. & DEV. L.J. 337, 347 (2007).

[28] Joanna Jemielniak et al., *Introduction*, *in* ESTABLISHING JUDICIAL AUTHORITY IN INTERNATIONAL ECONOMIC LAW 1, 3 (Joanna Jemielniak et al. eds., 2016).

[29] JESWALD W. SALACUSE, THE THREE LAWS OF INTERNATIONAL INVESTMENT 23 (2013) (explaining the differences between investment and trade).

[30] DiMascio & Pauwelyn, *supra* note 17, at 53–54.

[31] José E. Alvarez & Tegan Brink, *Revisiting the Necessity Defense: Continental Casualty v. Argentina* 34 (N.Y. Univ. Pub. L. & Legal Theory, Working Paper No. 261, 2011).

[32] *Id.*

[33] Samuel K.B. Asante, *International Law and Foreign Investment: A Reappraisal*, 37 INT'L & COMP. L.Q. 588, 616 (1988).

[34] DAVID COLLINS, AN INTRODUCTION TO INTERNATIONAL INVESTMENT LAW 16 (2017).

However, if a country raises its walls and prevents the continuation of trade into its country, no fundamental right has been violated as there is no right to *continue* international trade.[35]

Many of the significant differences between trade and investment in their regulatory regimes stem from their historical divergence.[36] Because of the divergence through history, trade and investment today are regulated differently, with a centralized WTO regulating trade and a highly dispersed regime regulating investment.[37] Trade rules and agreements are enforced under the WTO through state-to-state dispute settlements, while investment is generally regulated through bilateral investment treaties and resolved through investment arbitration.[38] This difference in policies and regulations is primarily based on the different amount of risk and involvement of the two areas of the economy. Trade is generally less risky and less involved in the foreign country, as the product is built in a third country, and if it cannot be sold in one country, it may be sold in another. But investment comes with significantly more risk with much greater and longer involvement in the host country.[39]

Finally, the impact of trade and the impact of foreign investment differ significantly. Trade operates on a more general level, consisting of impersonal transactions, while investment is much more intimate and involved with extensive commitment in the foreign state.[40] Because foreign investment is characterized by its "lasting interest," foreign investment produces far more significant impacts on social, economic, and cultural aspects of the host state than trade would.[41] International investment can produce significant benefits for host states, including increased employment and higher capital flow, but it can also be harmful to cultural aspects of the host state because of its intimate nature.[42] Therefore, foreign investment and trade are significantly different in their history, their fundamental objectives, and their impact—which is why they warrant different international regimes and regulations.

C. *CONVERGING NATURE OF TRADE AND INVESTMENT*

Despite their historical and practical separation, trade and investment have recently been converging (or reconverging) in their international regimes

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[35] *See* Ernst-Ulrich Petersmann, *National Constitutions, Foreign Trade Policy and European Community Law*, 3 EUR. J. INT'L L. 1, 6 (1992) ("But US courts have also held that 'no one has a vested right to trade with foreign nations.'"). *Cf.* Philip Alston, *Resisting the Merger and Acquisition of Human Rights by Trade Law: A Reply to Petersmann*, 13 EUR. J. INT'L L. 815, 824–25 (2002) (noting disagreement among scholars of whether there is a fundamental right to trade).

[36] Wagner, *supra* note 16, at 12.

[37] Jeffrey L. Dunoff, *The Law and Politics of International Organizations*, *in* THE OXFORD HANDBOOK OF INTERNATIONAL ORGANIZATIONS, *supra* note 14, at 60, 77.

[38] Sergio Puig, *The Merging of International Trade and Investment Law*, 33 BERKELEY J. INT'L L. 1, 8 (2015).

[39] DiMascio & Pauwelyn, *supra* note 17, at 57–58.

[40] *See* WORLD TRADE ORG., UNDERSTANDING THE WTO, 9–10 (5th ed. 2011), https://www.wto.org/english/thewto_e/whatis_e/tif_e/understanding_e.pdf.

[41] JOSÉ E. ALVAREZ, THE PUBLIC INTERNATIONAL LAW REGIME GOVERNING INTERNATIONAL INVESTMENT 18 (2011).

[42] *See* COLLINS, *supra* note 34, at 23–26.

through the past few decades.[43] Arguably, the relationship between trade and international investment is stronger today than ever.[44] A significant commonality between the two regimes continues to be the protection of foreigners from unwarranted discrimination.[45] Even though trade and investment have significant differences, both have the same general end: to promote transnational business and globalization[46] while eliminating discrimination against foreigner investors or traders without encroaching unduly on the domestic regulatory sovereignty of states.[47] In modern treaties, trade and investment are often addressed together and generally have overlapping enforcement disputes.[48] Additionally, many foreign investments are undertaken precisely to foster trade.[49] Around half of the world's trade is between affiliates of multinational enterprises, companies that have both trade and investment interests.[50]

As globalization increased, the relationship between trade and investment has become reinforced, with trade inducing investment and investment inducing trade.[51] Trade facilitation has been shown to be a key factor in creating investment flows between countries.[52] As noted above, the relationship is complementary, but more investment is usually associated with more exports,[53] and the proliferation of cross-border investment and trade has increased the integration of trade and investment in global commerce.[54] Globalization has thus strengthened the relationship between trade and investment.[55]

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[43] *See* Roger P. Alford, *The Convergence of International Trade and Investment Arbitration*, 12 SANTA CLARA J. INT'L L. *passim* (2013) (focusing throughout the paper on "the overlap and convergence between the trade and investment regimes").

[44] Mary E. Footer, *International Investment Law and Trade: The Relationship that Never Went Away*, *in* INVESTMENT LAW WITHIN INTERNATIONAL LAW: INTEGRATIONIST PERSPECTIVES 259, 296 (Freya Baetens ed., 2013).

[45] Alford, *supra* note 43, at 40–41.

[46] Puig, *supra* note 38, at 11.

[47] *See* DiMascio & Pauwelyn, *supra* note 17, at 89 ("Both [trade and investment] regimes are grappling with the same core issue: the design of a national treatment test that eliminates discrimination against foreigners without encroaching too far upon domestic regulatory sovereignty.").

[48] *See* Joost Pauwelyn, *The Re-Convergence of International Trade and Investment Law: Causes, Questions, and Reform*, 108 AM. SOC'Y INT'L L. PROC. 255, 256 (2014).

[49] SALACUSE, *supra* note 29, at 23.

[50] *Communication from the Commission to the Council, The European Parliament, The European Economic and Social Committee and The Committee of the Regions, Towards a Comprehensive European International Investment Policy*, at 3, COM (2010) 343 final (July 7, 2010).

[51] *See generally* YANN DUVAL, ORG. ECON. CO-OPERATION & DEV., GLOB. FORUM ON INT'L INV., TRADE AND INVESTMENT LINKAGES AND POLICY COORDINATION: LESSONS FROM CASE STUDIES IN ASIAN DEVELOPING COUNTRIES (2008), http://www.oecd.org/investment/globalforum/40300944.pdf (providing an overview of South-Asian exploratory studies on trade and investment, as well as a summary of their findings, to demonstrate how globalization has impacted international trade and investment).

[52] Santi Chaisrisawatsuk & Wisit Chaisrisawatsuk, *Imports, Exports and Foreign Direct Investment Interactions and Their Effects* 2 (Asia-Pac.Research & Training Network on Trade, Working Paper Series, No. 45, 2007).

[53] *See* Li-Gang Liu & Edward M. Graham, *The Relationship Between Trade and Foreign Investment: Empirical Results for Taiwan and South Korea* para. 5 (Peterson Inst. for Int'l Econ., Working Paper No. 98-7, 1998).

[54] Greg Tereposky & Laura Nielsen, *Coordinated Actions in International Economic Law as Illustrated by Investment Treaty Arbitration and World Trade Organization Disputes*, *in* ESTABLISHING JUDICIAL AUTHORITY IN INTERNATIONAL ECONOMIC LAW, *supra* note 28, at 119, 119.

[55] KURTZ, *supra* note 4, at 70.

Globalization does not just pertain to the increase of trade and investment across borders, but more generally, globalization refers to the interdependence and interconnectedness of movement, whether capital, goods, or even ideas.[56] In essence, globalization reflects the trend towards common, harmonized standards and centralization on a global scale, requiring global institutional management.[57] International law develops through influences across different areas, cross-fertilizing into other international regimes.[58] For example, the same event can bring disputes under different treaties or in different international legal systems.[59] Trade and investment disputes are now often pursued in parallel proceedings,[60] where the same alleged violation of treaties can be viewed as both a trade infringement and a foreign investment violation.[61] One such example of this is the recent proceedings against Australia, with an investment arbitration filed under the Australia-Hong Kong BIT,[62] and an action initiated in the WTO against Australia for the same issue.[63]

While there is no direct jurisdictional competition between the regimes of trade and investment disputes, because the parties are different in both, there are certain tensions and inefficiencies between the two, particularly in the context of parallel proceedings.[64] This parallel and overlap between trade and investment enforcement regimes has led to forum shopping where the claimant can move the claim between trade and investment enforcement depending on which would provide broader protection.[65] Even looking at the WTO dispute resolution docket, there is an increasing entanglement of trade and foreign investment disputes.[66]

Furthermore, both trade and investment have applied rules or adopted legal strategies across the two regimes, leading to tribunals borrowing from other areas of international law.[67] Article 31.3(c) of the Vienna Convention on the

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[56] JAMES CRAWFORD, CHANCE, ORDER, CHANGE: THE COURSE OF INTERNATIONAL LAW 109 (2014) (noting that the "mass movement of persons, capital, ideas and information—summed up as 'globalization'").

[57] Friedl Weiss, *The WTO—A Suitable Case for Treatment? Is it 'Reformable'?*, *in* THE REFORM OF INTERNATIONAL ECONOMIC GOVERNANCE, *supra* note 12, at 119, 121.

[58] MESSENGER, *supra* note 22, at 15.

[59] *See* Société Générale de Surveillance S.A. v. Islamic Republic of Pak., ICSID Case No. ARB/01/13, Decision on the Tribunal on Objections to Jurisdiction, ¶ 147 (Aug. 6, 2003) ("As a matter of general principle, the same set of facts can give rise to different claims grounded in differing legal orders . . . .").

[60] Tereposky & Nielsen, *supra* note 54, at 120–21.

[61] *See, e.g.*, Cargill, Inc. v. Mex., ICSID Case No. ARB(AF)/05/2, Award (Sept. 18 2009) (compensating the investor for the additional losses related to the investor as a producer and exporter of its product into Mexico, demonstrating a crossover between trade and investment law).

[62] Philip Morris Asia Ltd. v. Austl., Case No. 2012-12 (Perm. Ct. Arb. 2017).

[63] Dispute Settlement, *Australia–Certain Measures Concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging*, WTO Doc. WT/DS434 (May 5, 2014).

[64] *See* Brooks E. Allen & Tommaso Soave, *Jurisdictional Overlap in WTO Dispute Settlement and Investment Arbitration*, 30 ARB. INT'L 1, 15 (2014).

[65] *See generally* David A. Gantz, *Dispute Settlement Under the NAFTA and the WTO: Choice of Forum Opportunities and Risks for the NAFTA Parties*, 14 AM. U. INT'L L. REV. 1025 (1999) (explaining how the overlap in trade and investment provides forum choices that would otherwise not be available).

[66] KURTZ, *supra* note 4, at 68–69.

[67] Elizabeth Trujillo, *From Here to Beijing: Public/Private Overlaps in Trade and Their Effects on U.S. Law*, 40 LOY. U. CHI. L.J. 691, 716 (2009) (noting that NAFTA tribunals "tend to incorporate WTO panel interpretations of national treatment into their own understandings of national treatment").

Law of Treaties specifically provides that interpreters shall "take[] into account . . . [a]ny relevant rules of international law applicable in the relations between the parties."[68] Because of the overlaps between trade and investment, no rule of international law can be viewed in isolation, and other international laws may need to be taken into account.[69] For example, the tribunal in *Pope v. Talbot* looked to prior WTO decisions when interpreting provisions of the NAFTA treaty.[70] Similarly, the tribunal in *S.D. Myers v. Canada* explicitly referenced decisions by the WTO Appellate Body.[71]

Often, trade and investment are regulated in the same free trade agreement, such as NAFTA.[72] Additionally, trade law and investment law are both under the category of public international law and are principally governed by treaties entered into by states.[73] Due to the similarities and overlap between WTO disputes and investment disputes, there has actually been express usage of WTO exceptions in investment treaties.[74] This is the strongest appeal for having the WTO regulate foreign investment: the intimate connection between trade and investment and their overlapping jurisdictions.

But not all within the investment community recognize or adhere to this proposal of investment reconvergence with trade. For example, the tribunal in *Methanex v. US* explicitly stated that "the intent of the drafters [of NAFTA was] to create distinct regimes for trade and investment ."[75] To the tribunal, this was due to the distinct placement of words in the treaty and the assumption that if the drafters had wanted to incorporate trade law into the agreement, they would have expressed this intention.[76] Yet cases following *Methanex* have determined that WTO and Global Agreement on Tariffs and Trade (GATT) jurisprudence is "highly relevant" and can significantly influence investment awards.[77] Even though the award in *Methanex* has been cited over 30 times since its decision in the roughly 100 investment awards made public, the award has not been influential in those subsequent decisions.[78]

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[68] Vienna Convention on the Law of Treaties art. 31.3(c), May 23, 1969, 1155 U.N.T.S. 331.

[69] Joel P. Trachtman, *Trade*, *in* THE OXFORD HANDBOOK OF INTERNATIONAL ORGANIZATIONS, *supra* note 14, at 347, 361.

[70] Pope & Talbot, Inc. v. Can., Award on Merits Second Phase, ¶¶ 45–102 (NAFTA Arb. Trib. Apr. 2001).

[71] S.D. Myers, Inc. v. Can., Partial Award, 40 I.L.M. 1408, ¶¶ 244, 293 (NAFTA Arb. Trib. Nov. 2000).

[72] *See* Pauwelyn, *supra* note 48, at 256.

[73] *See* Wagner, *supra* note 16, at 11–12.

[74] KURTZ, *supra* note 4, at 168.

[75] Methanex Corp. v. U.S., Final Award of the Tribunal on Jurisdiction and Merits, ¶ 35 (NAFTA Arb. Trib. Aug. 2005).

[76] *See id.* ¶¶ 33–35.

[77] *See* Corn Prods. Int'l, Inc. v. Mex., ICSID Case No. ARB(AF)/04/1, Decision on Responsibility, ¶¶ 120–23 (Jan. 15, 2008) (citing and interpreting the decision in *Methanex*).

[78] *See* Kyla Tienhaara & Todd Tucker, *Regulating Foreign Investment: Methanex Revisited*, *in* ALTERNATIVE VISIONS OF THE INTERNATIONAL LAW ON FOREIGN INVESTMENT ESSAYS IN HONOUR OF MUTHUCUMARASWAMY SORNARAJAH 255, 273 (C. L. Lim ed., 2016) ("[T]he tribunal's three main determinations . . . have gotten little-to-no traction in subsequent cases – including from the award's own authors.").

II. COMPELLING REASON FOR MULTILATERAL REGULATION ON INVESTMENT

There are several problems with the current international investment regime, including inconsistent decisions and an incoherent body of law.[79] Some have even asserted these problems have created a "legitimacy crisis" in investment arbitral law.[80] Economic discrimination creates adverse political consequences, including political instability.[81] An ideal solution to the problems inherent in the current investment law regime would be to create a global multilateral investment treaty.[82] Foreign investment is the "lifeblood of the global economy,"[83] and multilateral investment rules will promote and protect foreign investment. This section will analyze the reasons for and against multilateral regulations on investment.

A. *IS THE CURRENT SYSTEM OF BITS A* DE FACTO *MULTILATERAL AGREEMENT?*

The international investment regime is often characterized by its fragmentation[84] due to the over 3,300 international investment treaties in the world, including the more than 2,900 BITs.[85] This fragmentation of investment treaties has created structural problems, the most significant being the creation of an inconsistent and incoherent body of investment law.[86] While some emphasize the problems of fragmentation and the resulting effect on the legitimacy of investment law,[87] there are several scholars who believe this fragmentation actually gives rise to a de facto multilateral agreement or regime.[88] This argument suggests that because international investment agreements are converging, investment treaties and tribunals take the place of

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[79] *See, e.g.*, Susan D. Franck, *The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law Through Inconsistent Decisions*, 73 FORDHAM L. REV. 1521, 1546–47 (2005).

[80] *See, e.g.*, MOUYAL, *supra* note 19, at 15–16, 16 nn.43–44 (citing scholars who have criticized the international investment law regime).

[81] IMMANUEL KANT, PERPETUAL PEACE 157 (M. Campbell Smith trans., Allen & Unwin 3d ed. 1917) (1795).

[82] SURYA P. SUBEDI, INTERNATIONAL INVESTMENT LAW: RECONCILING POLICY AND PRINCIPLE 190 (2d ed. 2012).

[83] *See* Bernardo M. Cremades & David J. A. Cairns, *Contract and Treaty Claims and Choice of Forum*, *in* ARBITRATING FOREIGN INVESTMENT DISPUTES 325, 325 (Norbert Horn & Stefan Kroll eds., 2004).

[84] *See* Int'l Law Comm'n, Rep. on the Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law, ¶ 8, UN Doc. A/CN.4/L.682 (Apr. 13, 2006) (defining fragmentation as the "emergence of specialized and relatively autonomous rules or rule-complexes, legal institutions and spheres of legal practice").

[85] U.N. CONFERENCE ON TRADE & DEVELOPMENT, WORLD INVESTMENT REPORT 2016, at 101 (June 22, 2016).

[86] Burke-White & von Staden, *supra* note 6, at 299.

[87] *See, e.g.*, J. Calamita, *Countermeasures and Jurisdiction: Between Effectiveness and Fragmentation*, 42 GEO. J. INT'L. L. 233, 237–39 (2011); Jens Dammann & Henry Hansmann, *Globalizing Commercial Litigation*, 94 CORNELL L. REV. 1, 35 (2008); Johanna Kalb, *Creating an ICSID Appellate Body*, 10 UCLA J. INT'L L. & FOREIGN AFF. 179, 198 (2005).

[88] SCHILL, *supra* note 7, at 368 ("To a large extent, the regime established by bilateral investment treaties therefore approximates a truly multilateral system which is based on a single multilateral treaty."); Chalamish, *supra* note 11, at 305; Natasha Marusja Saputo, *Paradoxical Pacts: Understanding the BIT Phenomenon and the Rejection of a Multilateral Agreement on Investment*, 41 OHIO N.U. L. REV. 121 (2014).

the multilateral investment treaty by making international law and even "precedent."[89] Instead of fragmenting in almost infinite ways, these investment treaties have converged to contain similar or almost identical structure, content, and objective.[90] This can be interpreted as an expression that states intend to create a uniform framework of international investment rules and principles.[91] Additionally, international organizations, including the U.N. Conference on Trade and Development (UNCTAD), facilitate and actively initiate negotiations between countries, working towards a consistent international policy and promote nearly identical drafts of BITs, making UNCTAD a functionally centralized investment institution in creating a de facto multilateral investment agreement.[92]

This de facto multilateral investment agreement argument does present a certain irony in that BITs are currently converging into similar and even identical agreements, yet an MAI has been rejected twice before. However, as discussed below, the previous attempts at an MAI did not fail simply because states did not want multilateral investment rules, but because other tangential issues complicated the negotiations.[93] Arguably, the current system of BITs has indeed created a de facto multilateral system where they establish uniform general principles and rules that govern the investor-state relationship.[94] Some scholars disagree,[95] and believe this argument is "dangerous," as far as it argues that arbitrators should not look to individual BITs but rather to generalized principles of international law.[96] However, arbitrators do need to often view BITs, not as isolated contracts, but in light of other international treaties, recognizing the almost identical language and common origin many BITs have with other investment agreements.[97] The choice for bilateral investment agreements came from the failure of the MAI negotiations, not a desire against having multilateral rules.

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[89] Stephen Schill, *The Jurisprudence of Investment Treaty Tribunals*, *in* FOREIGN INVESTMENT, INTERNATIONAL LAW AND COMMON CONCERNS 9, 23 (Tullo Treves, Francesco Seatzu & Seline Trevisanut eds., 2014).

[90] SCHILL, *supra* note 7, at 364.

[91] *Id.* at 16, 364–65.

[92] Chalamish, *supra* note 11, at 322.

[93] SCHILL, *supra* note 7, at 356–60.

[94] *Id.* at 16.

[95] *E.g.*, Footer, *supra* note 44, at 284–85.

[96] *Id.* at 161.

[97] *Id.* at 367.

Representative Number of Investment Treaties States Have Signed

States	Number of BITs Signed[98]	Number of FTAs Signed[99]
United States	52	11
China	128	4
Mexico	32	6
United Kingdom	117	
South Africa	49	1
India	85	

B. *BENEFITS OF A DE JURE MULTILATERAL REGULATION OF INVESTMENT*

So while a persuasive argument can be made for a de facto multilateral investment agreement, a de jure multilateral investment agreement with supranational regulation has several significant benefits, and the harmonization of international investment law into a homogeneous legal framework for investment has been promoted both by economists and legal scholars.[100] International governance by general norms and principles is essential for a global system to perform its required function of law.[101] But our current investment regime is simply a wide network of treaties without international regulation and no permanent supranational body to apply a set of coherent principles.[102] States would only create a multilateral investment regime if they believed that such a cooperative arrangement would advance their individual interests,[103] and to negotiate this multilateral investment regime, there needs to be a dedicated investment forum.

The benefits of a multilateral investment agreement include: (1) greater transparency, security, and predictability, (2) policy coherence, (3) protection for countries not currently signatories to some BITs, (4) elimination of wasteful investment incentives, and (5) enhanced credibility of countries attempting to attract investment.[104] A specific appeal of multilateral investment agreements is that they have lower transaction costs—with one multilateral regime, states would no longer need to negotiate individual investment agreements or

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[98] Database of Bilateral Investment Treaties, ICSID, https://icsid.worldbank.org/en/Pages/resources/Bilateral-Investment-Treaties-Database.aspx#a3 (select "view treaties by parties" and select the countries) (last visited Apr. 20, 2018).

[99] Other Investment Treaties, ICSID, https://icsid.worldbank.org/en/Pages/resources/Other-Treaties.aspx (last visited Apr. 20, 2018).

[100] Rafael Leal-Arcas, *The Multilateralization of International Investment Law*, 35 N.C. J. INT'L L. & COM. REG. 33 (2009).

[101] Anton K. Schnyder & Stefanie Pfisterer, *Features of Trade Law Adjudication and Their Impact on the Development of Legal Concepts and Precedents*, *in* ESTABLISHING JUDICIAL AUTHORITY IN INTERNATIONAL ECONOMIC LAW, *supra* note 28, at 188, 203.

[102] Michael E. Schneider, *The Role of the State in Investor-State Arbitration: Introductory Remarks*, *in* THE ROLE OF THE STATE IN INVESTOR-STATE ARBITRATION 1, 8 (Shaheeza Lalani & Rodrigo Polanco Lazo eds. 2015).

[103] JESWALD W. SALACUSE, THE LAW OF INVESTMENT TREATIES 8 (2d ed. 2015).

[104] Kevin C. Kennedy, *A WTO Agreement on Investment: A Solution in Search of A Problem*?, 24 U. PA. J. INT'L ECON. L. 77, 79–80 (2003).

determine which agreement controls a specific issue.[105] The rapid growth of foreign investment and the proliferation of IIAs has created a system with less coherence than the trade system.[106] One scholar proposed the idea that individual investment agreements actually can lead to rent-seeking and even corruption in a game-theory perspective.[107] If there is no multilateral agreement, negotiations are individual and not guided by international policies, yet a multilateral agreement can bind states to these beneficial policies. Arguably the greatest benefit of a de jure multilateral investment agreement is the increased security of foreign investment and improved predictability and stability in the investment environment.[108] Multilateral regulation under a supranational organization would encourage investment flows and minimize the risk of the protectionism that prevents economically beneficial foreign investment.[109] While there may be a de facto multilateral system through the current bilateral system, it does not provide the same benefits or security as a de jure multilateral system would.

One specific problem brought by the thousands of BITs is the *race to the bottom* phenomenon, where countries compete with one another to attract foreign investment, especially among developing states; this competition can worsen labor, environmental, and human rights standards.[110] This competition or incentive escalation causes economic waste and lessening of individual protections—issues a multilateral agreement can address by providing one uniform standard for states to follow.[111] Currently, many states are essentially forced to give concessions, including tax incentives, in order to attract foreign investment, justified by the argument that other countries provide these incentives, leading to a bidding war between states.[112] A multilateral agreement would provide a path for states to reduce their restrictions and liberalize investment, but still be better off, removing the prisoner's dilemma problem.[113] Additionally, while BITs may have some advantages in flexibility and tailoring, not every issue can be regulated at the bilateral level. For example, an MAI could be a proper way to create a binding codification of corporate responsibility provisions[114] or environmental standards.

One necessary condition for a multilateral agreement and organization is a general consensus and accepted rationale for the law.[115] As described above, investment agreements are converging, often having similar or identical

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[105] Saputo, *supra* note 88, at 149.

[106] Burke-White & von Staden, *supra* note 6, at 299.

[107] Stephen Young & Ana Teresa Tavares, *Multilateral Rules on FDI: Do We Need Them? Will We Get them? A Developing Country Perspective*, 13 TRANSNAT'L CORP. 1, 9 (2004).

[108] ORG. FOR ECON. CO-OPERATION & DEV., OPEN MARKETS MATTER: THE BENEFITS OF TRADE AND INVESTMENT LIBERALISATION (1998); *see also* U.N. CONFERENCE ON TRADE & DEV., WORLD INVESTMENT REPORT 1998: TRENDS AND DETERMINANTS, at 129 (1998).

[109] Richard N. Haass, *The Age of Nonpolarity: What Will Follow U.S. Dominance*, 87 FOREIGN AFF. 44, 55 (2008).

[110] *See* Andrew T. Guzman, *Why LDCs Sign Treaties That Hurt Them: Explaining the Popularity of Bilateral Investment Treaties*, 38 VA. J. INT'L L. 639, 688 (1998) (concluding, after a comprehensive analysis of the race to the bottom phenomenon, that the least developed countries should act as a group instead of competing against each other as individual states).

[111] Young & Tavares, *supra* note 107, at 9.

[112] Nov, *supra* note 13, at 846.

[113] Lloyd, *supra* note 10, at 279; Trachtman, *supra* note 69, at 349

[114] Chalamish, *supra* note 11, at 348.

[115] Lloyd, *supra* note 10, at 277.

language and protections. While BITs can provide flexibility in negotiations, widespread international investment coordination provides additional benefits such as enhancement of the availability of credit and liquidity of assets.[116] If most model BITs already use identical language, then it would benefit states to coordinate investment regulations at the multilateral level to attain the benefits of a harmonized system rather than one that may be converging in only a few respects.[117]

There are several arguments against a universal application of multilateral standards in foreign investment, generally focused on the assertion that the State will have the additional transaction costs of negotiating a comprehensive multilateral investment treaty, a greater amount than negotiating a single BIT.[118] Another counterargument to a multilateral forum or agreement is the idea that a multilateral agreement encourages free-riders. Practically speaking, a multilateral agreement and dedicated investment forum would reduce transaction costs for negotiating investment treaties, but those countries who are more active in foreign investment—such as China and the U.S.—would incur greater transaction costs than negotiating individual BITs.[119] These are some drawbacks to any multilateral arrangement, but these would be greatly offset by the benefits of having multilateral investment regulations.

Finally, multilateral rules on investment would reduce the growing body of inconsistent investment decisions. Consistency requires that a rule be applied uniformly in every similar or applicable situation,[120] a principle the WTO Appellate Body has embraced.[121] Similarly, the principle of coherence—that the investment system should make sense as a whole—is integral to the order of international law because coherence forms a well-organized structure.[122] But different interpretations of essentially identical provisions in similar or the same BIT—such as the scope of most-favored nation provisions—create a lack of coherence and threaten the legitimacy of the investment dispute system.[123] One of the predominant reasons the WTO dispute system is so popular compared to other international courts is the high consistency of the Appellate Body and its coherent commitment to precedent.[124] As the jurisprudence of the WTO has steadily become consistent, the number of cases brought has also declined.[125]

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[116] Chalamish, *supra* note 11, at 348.

[117] *See* Gabriel Bottini, *Indirect Claims Under the ICSID Convention*, 29 U. PA. J. INT'L L. 563, 618 (2008) (noting most model BITs use similar definitions to identify the investors or investments covered by the treaty).

[118] Saputo, *supra* note 88, at 148.

[119] *See* Peter Nunnenkamp & Manoj Pant, *Why the Case for a Multilateral Agreement on Investment is Weak* (Kieler Diskussuionbeiträge Working Paper, No. 400, 2003), http://www.econstor.eu/bitstream/10419/2931/1/kd400.pdf.

[120] THOMAS M. FRANCK, FAIRNESS IN INTERNATIONAL LAW AND INSTITUTIONS 38 (1995).

[121] Appellate Body Report, *United States–Final Anti-Dumping Measures on Stainless Steel from Mexico*, ¶ 160, WTO Doc. WT/DS344/AB/R (Apr. 30, 2008) (concluding that "absent cogent reasons, an adjudicatory body will resolve the same legal question in the same way in a subsequent case").

[122] MOUYAL, *supra* note 19, at 2.

[123] Gabriel Egli, *Don't Get Bit: Addressing ICSID's Inconsistent Application of Most-Favored-Nation Clauses to Dispute Resolution Provisions*, 34 PEPP. L. REV. 1045, 1079 (2007).

[124] David A. Gantz, *Assessing the Impact of WTO and Regional Dispute Resolution Mechanisms on the World Trading System*, *in* ESTABLISHING JUDICIAL AUTHORITY IN INTERNATIONAL ECONOMIC LAW, *supra* note 28, at 31, 41.

[125] GUIGUO WANG, INTERNATIONAL INVESTMENT LAW: A CHINESE PERSPECTIVE 571 (2016).

C. *BITS ARE GENERALLY IMPOSED ON DEVELOPING COUNTRIES*

One specific drawback to the current investment regime should be discussed here, especially with the changing nature of investment flows. While there are benefits in using BITs, specifically their ability to provide flexibility for the contracting states,[126] one major concern with the current system has been that BITs often are imposed on developing countries rather than negotiated with them.[127] Investment treaties were originally designed to protect the property rights of foreign investors, motivated by the belief that this protection would encourage foreign investment in the host state.[128] Theoretically, these BITs are reciprocal, but in reality they are often single-sided,[129] and capital flows largely in one direction.[130] In practice, the two contracting states to a BIT often do not have shared economic interests, and many least-developed-countries (LDCs) have been lured into BITs as they believe it necessary to enhance their credibility to attract foreign investment.[131] Some of these BITs have not been balanced to benefit both parties, and usually benefit the developed country significantly more by protecting their investors over the lesser-developed state.[132] This has resulted in the overwhelmingly majority of treaties becoming manifestly unbalanced and imposing obligations solely on the host states.[133] Many developing states argue that current investment treaties do not satisfy the needs of developing countries.[134]

It is often argued that LDCs face an uneven playing field in the international investment regime, including in the international investment arbitrations.[135] If a small state holds out, it has more to lose than a developed state, giving the smaller state a significant disadvantage in the negotiations.[136] This is related to the race-to-the-bottom or prisoner's dilemma argument,[137] as LDCs regularly sign BITs to advantage themselves over other states, thereby attracting more foreign investors and more revenue, but these BITs undermine the independence and control over the state's regulatory power these LDCs fought to attain.[138] Many developing countries have compelling interests to attract foreign investment, yet these countries are often forced to make significant concessions

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[126] Kennedy, *supra* note 104, at 183.

[127] Guzman, *supra* note 110, at 658.

[128] Kenneth J. Vandevelde, *A Brief History of International Investment Agreements*, 12 U.C. DAVIS J. INT'L L. & POL'Y 157, 168–69 (2005).

[129] Chalamish, *supra* note 11, at 309.

[130] Olivia Chung, Note, *The Lopsided International Investment Law Regime and Its Effect on the Future of Investor-State Arbitration*, 47 VA. J. INT'L L. 953, 956 (2007).

[131] José E. Alvarez, *A BIT on Custom*, 42 N.Y.U. J. INT'L L. & POL. 17, 26–27 (2009).

[132] Eustace Chikere Azubuike, *The Place of Treaties in International Investment*, 19 ANN. SURV. INT'L & COMP. L. 155, 172–73 (2013)

[133] Tarcisio Gazzini, *States and Foreign Investment: A Law of the Treaties Perspective*, *in* THE ROLE OF THE STATE IN INVESTOR-STATE ARBITRATION, *supra* note 102, at 23, 23.

[134] Ursula Kriebaum, *Are Investment Treaty Standards Flexible Enough to Meet the Needs of Developing Countries?*, *in* INVESTMENT LAW WITHIN INTERNATIONAL LAW: INTEGRATIONIST PERSPECTIVES, *supra* note 44, at 330, 331.

[135] José E. Alvarez, *The Emerging Foreign Direct Investment Regime*, 99 AM. SOC'Y INT'L L. PROC. 94, 96 (2005)

[136] Chris Brummer, *The Ties That Bind? Regionalism, Commercial Treaties, and the Future of Global Economic Integration*, 60 VAND. L. REV. 1349, 1365 (2007).

[137] Guzman, *supra* note 110, at 658.

[138] *Id.* at 666–70.

in exchange for attracting developed countries' foreign investors.[139] Additionally, developing states that do not have a firmly stable legal regime are disproportionally exposed to investment arbitration, as they present the very political risks that concerns investors.[140] Many of these developing countries lack the ability and resources to negotiate provisions of developed countries' BITs, such as the U.S. Model BIT.[141]

But a multilateral investment agreement can fix this potential problem. Foreign investment plays an integral role in enhancing competitiveness, creating jobs in states, transferring technology, and removing poverty, but host states cannot benefit without the capacity to develop investment policies and treaties.[142] A supranational organization regulating foreign investment and investment agreements can level this playing field, and many collective actors in the investment regime can provide a balance to more developed countries.[143] By regulating foreign investment similarly to international trade at the WTO, unfavorable investment treaties could be prevented and a more fair and balanced multilateral investment regime would protect both foreign investors and state, including LDCs. While much of the current hostility towards international organizations stems from the understanding that the centralized power is still concentrated in their most powerful members, the relative powers of states are undoubtedly more equal than before the institution of international organizations.[144]

III. NECESSITY OF A WORLD INVESTMENT ORGANIZATION

There have previously been arguments for instituting other world organizations to regulate different international aspects.[145] Scholars have queried: "Why is there a World Trade Organization (WTO), but not a World Investment Organization (WIO)?"[146] In fact, the idea of creating a WIO has been briefly noted before,[147] with some calling for the creation of this international

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[139] Victor Mosoti, *Bilateral Investment Treaties and the Possibility of a Multilateral Framework on Investment at the WTO: Are Poor Economies Caught in Between?*, 26 NW. J. INT'L L. & BUS. 95, 96 (2005).

[140] Carlos G. Garcia, *All the Other Dirty Little Secrets: Investment Treaties, Latin America, and the Necessary Evil of Investor-State Arbitration*, 16 FLA. J. INT'L L. 301, 322 (2004).

[141] Chalamish, *supra* note 11, at 322. However, some scholars have recently asserted this theory is unfounded. Jason Webb Yackee, *Pacta Sunt Servanda and State Promises to Foreign Investors Before Bilateral Investment Treaties: Myth and Reality*, 32 FORDHAM INT'L L.J. 1550, 1566–67 (2009).

[142] Gazzini, *supra* note 133, at 25–26.

[143] Azubuike, *supra* note 132.

[144] José E. Alvarez, *International Organizations: Then and Now*, 100 AM. J. INT'L L. 324, 345 (2006).

[145] *See generally* Vito Tanzi, *Is There a Need for a World Tax Organization*, *in* THE ECONOMICS OF GLOBALIZATION: POLICY PERSPECTIVES FROM PUBLIC ECONOMICS 173 (Assaf Razin & Efraim Sadka eds., 1999) (discussing whether there is a need for a World Tax Organization).

[146] J.J Saulino & Josh Kallmer, *The Emperor Has No Clothes: A Critique of the Debate over Reform of the ISDS* System, *in* RESHAPING THE INVESTOR-STATE DISPUTE SETTLEMENT SYSTEM, *supra* note 13, at 560, 561.

[147] WORLD BANK, *supra* note 13, at 108 ("The existence of a formal multilateral institution—a world investment organization analogous to the World Trade Organization—may also be an important step forward, especially if such a multilateral forum enhances access by developing countries, especially LICs, to global investment capital.").

organization to regulate foreign investment.[148] As investment treaties become more prevalent, and as global investment flows rise to more than $1.76 trillion,[149] the necessity of an international organization to regulate and promote comprehensive investment policies becomes all the more evident. There needs to be a comprehensive framework to guide investment law, and the first step is to create an adequate forum for investment discussions.

Probably the best example of the necessity for the creation of a separate WIO—and why the WTO and existing bodies are inadequate forums—is to look to the failures of previous multilateral investment negotiations. Nowhere is this more evident than in the negotiations for an MAI in the Organisation for Economic Co-operation and Development (OECD) and the WTO Doha Round. These negotiations for multilateral investment rules did not fail solely because of gridlock on investment principles, but because the negotiations took place in an unsuitable forum and thereby were complicated by trade disagreements.[150] What is truly needed for negotiations of a multilateral investment system is a dedicated forum with wide membership and representation of developed and developing states where a broad purpose of harmonizing the investment regime can be pursued.[151]

Coherent policies and comprehensive regulation of foreign investment throughout the world will produce tremendous benefits for both home and host countries. Foreign investors want their investments to have low risk, and many host countries want to attract foreign investors. A multilateral system would be more predictable and generally stable, particularly when investors know the interpretation, application, and protection provided by one single multilateral agreement rather than the thousands of individual BITs, which should both promote and protect investment.[152] Under the WIO, the supranational organization could monitor state compliance and effectively regulate international investment, promoting investment, and providing states with a regulatory framework for future actions.[153]

A. *PRIOR MAI NEGOTIATIONS IN OECD AND THE WTO*

To understand the need for a wholly separate investment organization, we must start with the failure of investment negotiations in other fora. In 1986, the United States sought to implement stricter disciplines on investment measures related to trade.[154] But during the discussions of the Uruguay Round, developing countries objected to this, and the discussions resulted in a significantly narrower scope.[155] In 1991, the OECD began working on an MAI.[156] The negotiations

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[148] Nov, *supra* note 13, at 861–62.

[149] U.N. CONFERENCE ON TRADE & DEVELOPMENT, *supra* note 85, at x.

[150] SCHILL, *supra* note 7, at 365.

[151] Avi-Yonah, *supra* note 5, at 34.

[152] Leal-Arcas, *supra* note 100, at 126.

[153] *See generally* Chalamish, *supra* note 11.

[154] Stefan Amarasinha & Juliane Kokott, *Multilateral Investment Rules Revisited*, *in* THE OXFORD HANDBOOK OF INTERNATIONAL INVESTMENT LAW 119, 125 (Peter Muchlinski et al. eds., 2008).

[155] *Id.*

[156] Org. for Econ. Co-Operation & Dev., Rep. by the Comm. on Int'l Inv. & Multinational Enters. (CIME)/ & the Comm. on Capital Movements & Invisible Transactions (CMIT), A Multilateral Agreement on Investment, DAFFE/CMIT/CIME(95)13/FINAL (May 5, 1995).

began in secret among the members of the OECD from 1995 to 1998, and were aimed to develop multilateral rules for international investment.[157] Many, including the OECD, believed the "time [was] ripe to negotiate a multilateral agreement in investment."[158]

While the view of the MAI at the commencement in 1995 was generally uncontroversial,[159] the negotiations encountered several obstacles going forward, specifically the negotiating environment and the content of the agreement.[160] Because the negotiations were to take place in the OECD, developing countries were unrepresented, which was puzzling given the purpose of the MAI was to improve investment protections in developing countries.[161] However, the OECD was chosen as the forum to keep the developing countries from watering down the protections offered by the MAI.[162] Historically, developing countries—often the host countries for foreign investment—have resisted the development of multilateral investment rules.[163]Additionally, many nongovernmental organizations (NGOs) opposed the MAI negotiations in the OECD,[164] and because of the lack of publicity of the negotiations, many felt NGOs and the public were excluded from the process.[165] In 1998, after a concentrated campaign by those against the negotiations, France announced it would not support the MAI, and negotiations ended.[166] The MAI failed for multiple reasons, including the lack of consensus and considerable opposition.[167] Ultimately however, the MAI negotiations at the OECD failed because the forum consisted solely of a "rich countries' club" and was the inappropriate forum to negotiate agreements when the purpose of the MAI was to protect their investments in developing countries.[168]

The push for an MAI occurred again several years later, this time at the WTO. In the Doha Declaration, many WTO contracting states recognized the need for "a multilateral framework to secure transparent, stable and predictable conditions for long-term cross-border investment."[169] But because of the strong conflict between the developed and developing states at the Cancun Summit, all investment negotiations were effectively removed from the agenda.[170] However,

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[157] Leal-Arcas, *supra* note 100, at 67.

[158] OECD HANDBOOK ON ECONOMIC GLOBALISATION INDICATORS 9 (2005), http://www.oecd.org/sti/ind/measuringglobalisationoecdeconomicglobalisationindicators2005.htm.

[159] Jürgen Kurtz, *A General Investment Agreement in the WTO? Lessons from Chapter 11 of NAFTA and the OECD Multilateral Agreement on Investment*, 23 U. PA. J. INT'L ECON. L. 713, 757 (2002).

[160] Peter T. Muchlinski, *The Rise and Fall of the Multilateral Agreement on Investment: Where Now?*, 34 INT'L LAW. 1033, 1038 (2000).

[161] *Id.*

[162] SCHILL, *supra* note 7, at 53.

[163] Kurtz, *supra* note 159.

[164] KATIA TIELEMAN, U.N. VISION PROJECT ON GLOBAL PUB. POL'Y NETWORKS, THE FAILURE OF THE MULTILATERAL AGREEMENT ON INVESTMENT (MAI) AND THE ABSENCE OF A GLOBAL PUBLIC POLICY NETWORK 12 (2000), http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.627.7992&rep=rep1&type=pdf.

[165] Muchlinski, *supra* note 160, at 1039–40.

[166] Leal-Arcas, *supra* note 100, at 68–69.

[167] SCHILL, *supra* note 7, at 54–55.

[168] Avi-Yonah, *supra* note 5, at 32–33.

[169] World Trade Organization, Ministerial Declaration of 14 November 2001, WTO Doc. WT/MIN(01)/DEC/1, 41 I.L.M. 746, 749 (2002) (spelling out the mandate of the trade and investment working group).

[170] SCHILL, *supra* note 7, at 59.

this resistance by developing countries was created by other trade issues, specifically agricultural subsidies, and showed the need for the focus on trade negotiations and the separation of trade and investment rules.[171]

While the Doha Round itself may be "dead,"[172] the need for an MAI is still alive.[173] The failed attempts for the MAI have spurred an increasing trend of bilateral and regional investment agreements, and this continues to be the primary source of investment regulation.[174] Neither of the failed attempts should be seen as a rejection of multilateralism, but as the difficulty and complexity of global investment rules, as discussed in the next section.

B. WHO *SHOULD REGULATE INTERNATIONAL INVESTMENT*

An initial question we must ask is *which* organization should actually regulate international investment and negotiate multilateral rules? Some scholars believe the WTO may be the best forum for global regulation and negotiations.[175] This idea of incorporation in the WTO is "not new,"[176] and there are several factors that give the WTO a distinct advantage as a forum for investment negotiations and multilateral regulations.[177] Notably, the WTO already covers several areas of international law, it has virtually universal state membership, and it has a dispute mechanism to enforce awards.[178] Additionally, as discussed above, trade and investment are linked in many ways, and as our economy becomes more globalized, this connection only becomes stronger. For example, investment law must deal with both private investors and public actors (states) in disputes, and similarly, the WTO must regulate one category of public actors (states), while focusing on the outcomes for private actors.[179] Because trade and investment are so highly interlinked, by having both regulated under the WTO, coherent and consistent policies addressing both regimes can be achieved together. Furthermore, the WTO as an organization has experience in creating and implementing multilateral agreements.[180] It could be beneficial to have the WTO regulate both in order to form complementary policies and similar practices.[181]

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[171] *Id.* at 59–61.

[172] David A. Gantz, *World Trade Law After Doha: Multilateral, Regional, and National Approaches*, 40 DENV. J. INT'L L. & POL'Y 321, 321 (2011).

[173] EDWARD M. GRAHAM, FIGHTING THE WRONG ENEMY: ANTIGLOBAL ACTIVISTS AND MULTINATIONAL ENTERPRISES 14 (2000).

[174] Leal-Arcas, *supra* note 100, at 134.

[175] David Collins, *A New Role for the WTO in International Investment Law: Public Interest in the Post -Neoliberal Period*, 25 CONN. J. INT'L L. 1, 9 (2009); Guzman, *supra* note 2, at 309.

[176] Antonio Segura Serrano, *Reforming the Trading and Financial Systems*, *in* THE REFORM OF INTERNATIONAL ECONOMIC GOVERNANCE, *supra* note 12, at 3, 18–19.

[177] Avi-Yonah, *supra* note 5, at 33 (noting that the "WTO presents a tempting arena" for investment negotiations).

[178] Lloyd, *supra* note 10, at 276.

[179] MESSENGER, *supra* note 22, at 55.

[180] Edward Graham, Trade and Investment at the WTO: Just Do It!, *in* LAUNCHING NEW GLOBAL TRADE TALKS 151, 151–52 (Jeffrey J. Schott ed., 1998).

[181] Pascal Lamy, European Comm'r for Trade, Opening Remarks of European Trade Commissioner at WTO NGO Symposium, Speech/01/333 (July 6, 2001)(providing that some basic rules on investment created by the WTO would "increase[e] the predictability for potential investors, [and would] lead to more investment with all the benefits it can bring") (transcript available in the European Commission Press Release Database).

However, in considering the location of multilateral regulations, the primary factor should be effectiveness—essentially, can the forum accomplish the multilateral regulation effectively and efficiently?[182] There are several reasons the WTO is not the appropriate forum for negotiations on investment agreements.[183] One can only look to history to see why: negotiating investment agreements in the WTO can be hindered by the intense trade disputes between states, as during the Doha Round. And while there is some push for multilateral rules on investment, a significant number of WTO members opposed including foreign investment as a separate negotiation in the Doha Round,[184] further demonstrating the need for a separate and exclusive forum for investment negotiations. Some scholars have questioned the ability of the WTO to regulate and negotiate investment agreements,[185] including the political capacity to address all issues related to foreign investment.[186] Others assert that regulating investment under the WTO may "undermine the credibility" of the WTO negotiations on world trade issues.[187] As with other areas of international law such as human rights and environmental policy, the incredible power of the WTO has elevated trade issues at the expenses of other fields, including international investment.[188] Any hard bargaining by the WTO for a single undertaking will meet hard resistance due to the political nature of the target regulations and their connection to trade.[189]

There is a strong link between trade and investment,[190] but there is still a distinct separation.[191] As discussed above, trade occurs between states, while foreign investment is generally private actors investing in another state.[192] These sometimes require different policies and different practices, and while states may be open to the free-flow of trade under the WTO, some states may not be willing to give up the control over these negotiations. Some states are concerned about the WTO commitment to liberalizing free trade, which could translate to the investment regime if under the WTO.[193] Additionally, while there is a positive correlation between trade and investment, the effect of trade policies is only one factor in investment promotion.[194] On the more practical side, having the WTO regulate investment may overwhelm the already high levels of activity

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[182] Lloyd, *supra* note 10, at 283.

[183] *Cf.* Guzman, *supra* note 2, at 306 (arguing that the "better strategy, then, is to bring non-trade topics into the debate at the WTO").

[184] Jürgen Kurtz, Commentary, *Developing Countries and Their Engagement in the World Trade Organization: An Assessment of the Cancún Ministerial*, 5 MELB. J. INT'L L. 280, 280–97 (2004).

[185] Leal-Arcas, *supra* note 100, at 131–33.

[186] Steve Charnovitz, *Triangulating the World Trade Organization*, 96 AM. J. INT'L L. 28, 43 (2002).

[187] Chalamish, *supra* note 11, at 335.

[188] Guzman, *supra* note 2, at 304.

[189] Sungjoon Cho, *An International Organization's Identity Crisis*, 34 NW. J. INT'L L. & BUS. 359, 391 (2014).

[190] *See* Mary Amiti & Katharine Wakelin, *Investment Liberalization and International Trade*, 61 J. INT'L ECON. 101 (2003); *see also* Xiaming Liu, Chengang Wang & Yingqi Wei, *Causal Links Between Foreign Direct Investment and Trade in China*, 12 CHINA ECON. REV. 190 (2001).

[191] Footer, *supra* note 44, at 264.

[192] *See supra* Part I.

[193] Muchlinski, *supra* note 160, at 1050.

[194] Press Release, World Trade Org., Trade and Foreign Direct Investment, (Oct. 9, 1996), http://www.wto.org/english/news_e/pres96_e/pr057_e.htm ("True, a country's trade policy is only one of a number of factors that determine FDI inflows.").

at the WTO.[195] Admittedly, the WTO could expand its capabilities to include investment, but increased trade disputes and negotiations currently keep the focus on international trade issues. Some scholars believe that expanding the regulatory power of the WTO beyond trade would defeat the purpose and effectiveness of the current WTO.[196] As a result, both states and private interest groups would want to prevent any expansion of regulation beyond trade if that would harm the trade-oriented mission of the WTO or undermine the organization's legitimacy.[197]

Finally, developing countries participating in the 2001 Singapore Discussions were not so opposed to investment negotiations as the issue was more focused on agricultural and other trade problems. The investment consensus at that time was doomed because developing countries were concerned with the lack of comprehensive trade reform and international trade relations.[198] But the failure to create a multilateral investment agreement does not mean states do not have an interest in uniform multilateral investment rules. The previous attempts were unsuccessful because of the complexity in creating multilateral agreements rather than the differences in international principles.[199] The negotiations for an MAI under the WTO failed primarily because of trade disagreements rather than investment issues.[200] In fact, the irony described above—that states have converged in their principles on foreign investment but have rejected an MAI twice before—is a prominent reason that a new forum specifically dedicated to foreign investment regulation is needed to create a multilateral investment regime.

Since the WTO may not be the best forum for investment regulation, the second question in this analysis moves to: "What could serve as an alternative forum to the WTO for international investment regulation?"[201] Some scholars have suggested the OECD or the G20.[202] However, the forum needs to be one where developing countries have a legitimate representation, and the G20 and the OECD both arguably have forum issues not suitable for these investment negotiations, as seen with the initial MAI negotiation in the OECD.[203] The focus needs to be specifically on investment to ensure the negotiations do not stall due to concurrent issues. This is why this Article proposes the creation of a World Investment Organization: to create a forum for multilateral investment regulation and future negotiations for an MAI.

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[195] KURTZ, *supra* note 4, at 259.

[196] John O. McGinnis & Mark L. Movsesian, *Against Global Governance in the WTO*, 45 HARV. INT'L L.J. 353, 356–58 (2004) ("[W]e believe that the WTO should not be a forum for the substantive regulatory bargains that Guzman envisions.").

[197] Jide O. Nzelibe, *Interest Groups, Power Politics, and the Risks of WTO Mission Creep*, 28 HARV. J.L. & PUB. POL'Y 89, 93–95 (2004).

[198] SCHILL, *supra* note 89, at 365.

[199] *Id.*

[200] *Id.*

[201] Chalamish, *supra* note 11, at 305.

[202] ANDERS ÅSLUND, PETERSON INST. INT'L ECON., THE WORLD NEEDS A MULTILATERAL INVESTMENT AGREEMENT (Jan. 2013), http://www19.iadb.org/intal/intalcdi/PE/2013/12809.pdf.

[203] Chalamish, *supra* note 11, at 335.

IV. CREATION AND STRUCTURE OF THE WIO

This Article asserts that the creation of a World Investment Organization is necessary to further the development of foreign investment and act as a forum for the negotiations of future multilateral investment agreements. This supranational organization is essential because there needs to be multilateral regulation of investment treaties and a forum for investment discussion. As discussed in the last section, the current organizations are inadequate for investment negotiations and regulation, primarily shown by past events and lack of movement in the investment field.[204] Without this proposed organization, investment law will remain stagnant, leading to the further proliferation of BITs and the increased dissatisfaction of states with the investment regime.[205] As with trade, the law came first, and now the WIO is needed to service the development of that law.[206] It is becoming clear that only increased global cooperation can provide an effective strategy for addressing states' investment concerns.[207]

A. *THEORETICAL PROPOSAL OF THE LEGITIMACY OF THE WIO*

While the creation of the WIO would significantly benefit states through improving the investment regime, many believe regulation through supranational organizations—like the WIO—would threaten the state sovereignty.[208] The power of states to regulate or stop foreign investment is an essential quality of state sovereignty, and a supranational organization like the WIO and the multilateral regulation of investment, diminish that state power.[209] Delegation requires state leaders to give up their powers to make law in their state and constrains the ability to favor their citizens over others.[210] Admittedly, international investment law can threaten public law values, including democracy and sovereignty.[211] Investor-state arbitration is one such situation, where investors can bring claims against states before an international arbitral tribunal rather than domestic courts, often directly challenging a state's power.[212]

While bilateralism allows states to minimize the delegation of power by regulating through individual negotiated treaties, multilateralism can address many of the concerns of the current investment regime. Professor Stephen Schill

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[204] Karl P. Sauvant & Federico Ortino, *in* COLUMBIA FDI PERSPECTIVES NO. 101 (Vale Columbia Center Aug. 12, 2013), http://ccsi.columbia.edu/files/2014/01/FDI_101.pdf.

[205] Schneider, *supra* note 102, at 6–7 (describing state dissatisfaction with the current investment regime).

[206] Trachtman, *supra* note 69, at 348.

[207] Guzman, *supra* note 2, at 307.

[208] Leal-Arcas, *supra* note 100, at 35; *see also* Antonio F. Perez, *WTO and U.N. Law: Institutional Comity in National Security*, 23 YALE J. INT'L L. 301, 361 (1998); Edward T. Swaine, *The Constitutionality of International Delegations*, 104 COLUM. L. REV. 1492, 1496–97 (2004).

[209] Footer, *supra* note 44, at 277.

[210] Swaine, *supra* note 208, at 1541.

[211] MOUYAL, *supra* note 19, at 18.

[212] Charles N. Brower & Stephan W. Schill, *Is Arbitration a Threat or a Boon to the Legitimacy of International Investment Law?*, 9 CHI. J. INT'L L. 471, 497 (2009) ("Investment treaties can affect the way host states govern, legislate, and adjudicate and can have a profound impact on local populations.").

eloquently described the difference in relationships between States in multilateralism and bilateralism as:

> The core difference between multilateralism and bilateralism as forms of international cooperation, therefore, concerns the nature of the relations among States. While bilateralism puts the State and its sovereignty center stage, assumes a primacy of national interests, and allows for preferential and discriminatory treatment among States depending their relative power, multilateralism views States as embedded in the international community, stresses the primacy of international law over national interests, and presupposes that international relations are ordered on the basis of non-discriminatory principles that apply to all states.[213]

The raison d'être for international organizations is to fulfill a specific function which is necessary to address problems affecting numerous states.[214] Since the end of World War II, the number of supranational organizations dramatically increased due to the growing number of international problems that could only be solved through interdependence between states.[215] Trade liberalization and investment promotion—along with the economic gains derived from both—require states to cooperate internationally and invest in supranational organizations to govern, and this includes circumscribing some of their national sovereignty.[216] Any move toward global governance involves some decisions further removed from direct democratic input.[217] But to gain the benefits from this multilateralization of foreign investment, states need to delegate some of their powers to outside organizations, such as the WTO, and in this proposal, the WIO.[218]

Like other supranational organizations, the WIO can be legitimate.[219] In the political context, legitimacy of a supranational organization refers to justification of a government's authority to rule over its people,[220] specifically the acceptance of political authority[221] based on the perception that the actor has

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[213] Schill, *supra* note 89, at 10–11.

[214] Anne Peters, *International Organizations and International Law*, *in* THE OXFORD HANDBOOK OF INTERNATIONAL ORGANIZATIONS, *supra* note 14, at 33, 35.

[215] Patrick Tangney, *The New Internationalism: The Cession of Sovereign Competences to Supranational Organizations and Constitutional Change in the United States and Germany*, 21 YALE J. INT'L L. 395, 403 (1996).

[216] Daniel C. Esty, *Good Governance at the Supranational Scale: Globalizing Administrative Law*, 115 YALE L.J. 1490, 1500 (2006).

[217] Guzman, *supra* note 2, at 337.

[218] Note, *International Delegation as Ordinary Delegation*, 125 HARV. L. REV. 1042, 1043 (2012) (noting that "failure to permit international delegations could leave the United States (and potentially the world) helpless to address pressing global problems").

[219] The legitimacy of current supranational organizations such as the WTO is still being questioned today, and the legitimacy analysis of the WIO would undergo the same challenges if instituted. *See, e.g.*, Esty, *supra* note 216, at 1545; Guzman, *supra* note 2, at 303.

[220] Julian G. Ku, *The Delegation of Federal Power to International Organizations: New Problems with Old Solutions*, 85 MINN. L. REV. 71, 126 (2000).

[221] Dunoff, *supra* note 37, at 74.

a "right to rule."[222] This global governance must receive popular confidence, generally evidenced in its acceptance by the member states.[223] Therefore, legitimacy is largely connected to compliance or obedience,[224] and compliance creates order, which is essential for a just and stable global society.[225] Functionalist arguments assert that international organizations are justifiable as global public goods, yet a growing academic trend flows more towards legitimacy based on accountability rather than functionalism.[226]

States have a duty to their people to serve the best interests of their citizens.[227] International investment law is a public good,[228] and even the World Bank has provided that a "greater flow of foreign direct investment brings substantial benefits to bear on the world economy and on the economies of developing countries in particular."[229] Likewise, the Havana Charter specifically provided that "international investment, both public and private, can be of great value in promoting economic development and reconstruction, and consequent social progress."[230] With the current trend towards globalization, state borders are becoming a less significant barrier to cross-border investment and trade,[231] and the traditional principle of state sovereignty is constricting[232] as our world moves more towards what Professor Philip Bobbitt calls the "market state."[233] Because of this, our world is becoming a more international community.[234] Yet globalization itself impedes states' ability to pursue policies of its people because states are confronted with international problems only solved through cooperation.[235] Due to this impediment, states need to turn to supranational organizations and multilateral regulation, such as the WIO.[236]

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[222] Jean d'Aspremont & Eric De Brabandere, *The Complementary Faces of Legitimacy in International Law: The Legitimacy of Origin and the Legitimacy of Exercise*, 34 FORDHAM INT'L L.J. 190, 190 (2011).

[223] Peter L. Lindseth, *Democratic Legitimacy and the Administrative Character of Supranationalism: The Example of the European Community*, 99 COLUM. L. REV. 628, 736 (1999).

[224] THOMAS M. FRANCK, THE POWER OF LEGITIMACY AMONG NATIONS 24 (1990) (concluding "[l]egitimacy is a property of a rule or rule-making institution which itself exerts a pull toward compliance on those addressed normatively because those addressed believe that the rule or institution has come into being and operates in accordance with generally accepted principles of right process.").

[225] MALCOLM N. SHAW, INTERNATIONAL LAW 1–7 (6th ed. 2008).

[226] Peters, *supra* note 214, at 36, 42.

[227] Louis W. Pauly, *Introduction: Democracy and Globalization in Theory and Practice*, *in* DEMOCRACY BEYOND THE STATE? 1, 1 (Michael Th. Greven & Louis W. Pauly eds., 2000).

[228] Barnali Choudhury, *International Investment Law as a Global Public Good*, 17 LEWIS & CLARK L. REV. 481, 499 (2013).

[229] Fedorchuk, *supra* note 20, at 12 (citations omitted).

[230] Havana Charter for an International Trade Organization, U.N. Conference on Trade & Employment, Final Act and Related Documents, art. 12, ¶ 1(a), U.N. Doc. E/Conf. 2/78 (April 1948) [hereinafter Havana Charter]

[231] WANG, *supra* note 125, at 4.

[232] *See* John Linarelli, *How Trade Law Changed: Why It Should Change Again*, 65 MERCER L. REV. 621, 622 (2014) ("While the most sophisticated and developed of these institutions is still at the level of the state, the sovereignty of states is becoming a quaint and outdated idea.").

[233] PHILIP BOBBITT, TERROR AND CONSENT 4 (2008) (defining a "market state" as "[t]he emerging constitutional order that promises to maximize the opportunity of its people, tending to privatize many state activities and making representative government more responsible to consumers.").

[234] Note, *supra* note 218, at 1042.

[235] Diane M. Ring, *What's at Stake in the Sovereignty Debate?: International Tax and the Nation-State*, 49 VA. J. INT'L L. 155, 171 (2008).

[236] *See, e.g.*, MARC F. PLATTNER, DEMOCRACY WITHOUT BORDERS? GLOBAL CHALLENGES TO LIBERAL DEMOCRACY 81–82 (2008) ("The rise of multilateral institutions is a natural response to a

If we accept Professor Ronald Dworkin's premise that each state has a general obligation to improve its own legitimacy and promote the status and wealth of their citizens, then because of the increasing growth and importance of foreign investment in this globalizing world, states have a duty to improve the overall international investment system.[237] Because the improvement of international investment law would benefit the people of the states, if this can be done more effectively and efficiently through a supranational investment organization—as argued in this Article—then states need to contribute to the creation of this WIO.[238] Therefore, the legitimacy of the WIO and international investment agreements, along with the states involved in these agreements, will actually be reinforced due to the international nature of this organization and the resulting widespread agreement on investment policies.[239] Furthermore, there is truly little delegation of actual authority by states in this proposal, as this WIO would operate similar to the current framework of investment treaties, but would provide a forum for future multilateral investment negotiations.[240] Therefore, this delegation of state authority would have minimal impact on state sovereignty.

But the actual ignition of political will for creating this WIO may be difficult to find. While there is precedent for the creation of individual forums in new areas other than trade-related measures—namely the Bretton Woods Conference and the creation of the International Monetary Fund and the World Bank—these organizations were generally created at a time of crisis where there was little alternative.[241]There are many theories surrounding the reasons why international organizations are created,[242] but whichever theory is correct, international legal crises historically have played an important role in the formation of supranational organizations.[243] That being said, the WTO was born not out of crisis, but was created—at least in part—due to the need for states to have a predictable international trading system.[244]

There is no set blueprint for the creation of a supranational organization, and international actors must aim to create this organization to meet its end—namely the regulation of investment treaties and a dedicated forum for the negotiation of a multilateral investment agreement.[245] The WIO can be partly modeled after

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shrinking world. As cross-border contacts multiply, both in the economy and in other spheres, there is an inevitable need for institutions that can address problems that lie beyond the competence of any single state. Even for a superpower like the United States, neither isolationism nor across-the-board unilateralism is a realistic option. The serious argument is about the nature of multilateral institutions and their powers vis-à-vis national governments.").

[237] Ronald Dworkin, *A New Philosophy for International Law*, 41 PHIL. & PUB. AFF. 1, 17 (2013).

[238] For a reply to Professor Dworkin's international theory, see Adam S. Chilton, *A Reply to Dworkin's New Theory of International Law*, 80 U. CHI. L. REV. DIALOGUE 105 (2013).

[239] *See* Andrew T. Guzman, *Against Consent*, 52 VA J. INT'L LAW 747, 753–54, 759 (2012).

[240] *See* Andrew T. Guzman & Jennifer Landsidle, *The Myth of International Delegation*, 96 CAL. L. REV. 1693, 1695 (2008) ("This sense that states have delegated important and impactful decisions to international institutions across a wide range of policy issues is simply false. It is a myth.").

[241] Suzanne Katzenstein, *In the Shadow of Crisis: The Creation of International Courts in the Twentieth Century*, 55 HARV. INT'L L.J. 151, 153 (2014).

[242] Jon Pevehouse & Inken von Borzyskowski, *International Organizations in World Politics*, *in* THE OXFORD HANDBOOK OF INTERNATIONAL ORGANIZATIONS, *supra* note 14, at 3, 4–5.

[243] Katzenstein, *supra* note 241, at 153.

[244] Jemielniak et al., *supra* note 28, at 5.

[245] JAN KLABBERS, AN INTRODUCTION TO INTERNATIONAL ORGANIZATIONS LAW 7 (3d ed. 2015).

the WTO, looking to improve upon the evolution of the current international body and framing the organization in the investment field. Through an international treaty, states can sign onto the WIO and become member states, effectively creating a charter like that of the WTO. But states will not create or cooperate with supranational organizations except to the extent states perceive the organization satisfies their interests,[246] and this introduces the next problem surrounding this proposal.

B. *POTENTIAL HOLD-OUT PROBLEM IN THE CREATION OF WIO*

With this proposed creation of the WIO, there are several issues that must be considered. The most stringent problem to the WIO and multilateral investment regulation is membership. There is no guarantee that there would be universal or even plurilateral[247] membership, and some countries may hold out from signing on to the organization to influence the terms of its creation. Hold out problems can occur both before creation, with countries holding out to influence negotiations, and after creation, as those countries may have an advantage by staying out of the supranational investment organization, incurring the benefits of free-riding. Furthermore, it would take time and significant effort to achieve similar levels of success as the WTO or other supranational organizations,[248] and the WIO may not even achieve equivalent success as the WTO, as some scholars argue was the case with the International Labour Organization.[249]

The initial holdout problem would most likely come from developed countries rather than developing countries, contrary to what occurred in the MAI negotiations. Countries such as China and the U.S. comprise much of the current foreign investment flows,[250] and these countries would be unlikely to give up their negotiating power easily to a supranational organization. Because these countries would be necessary in creating a WIO due to the significant investment flows generated by their investors, these states would most likely refuse to join without significant concessions in their favor.[251] Often, more powerful states can benefit from fragmentation for several reasons, not the least of which is the ambiguity that fragmentation creates surrounding relevant rules, which hampers legal efforts to restrain the actions of powerful states.[252] Additionally, the United States has historically been reluctant to cede power to supranational organizations, likely due to the refusal of the U.S. to be bound by international organizations, although this reluctance has decreased in the past half century.[253] As a result, some countries would benefit greatly from refusing to participate in

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[246] Peters, *supra* note 214, at 59.

[247] The term "plurilateral" refers to more than two states but not nearly universal as in multilateral. *See* Rafael Leal-Arcas, *The Resumption of the Doha Round and the Future of Services Trade*, 29 LOY. L.A. INT'L & COMP. L. REV. 339, 343 nn.20–21 (2007).

[248] Nov, *supra* note 13, at 862.

[249] Guzman, *supra* note 2, at 314–15.

[250] *See* U.N. CONFERENCE ON TRADE & DEV., *supra* note 85, at 6.

[251] Guzman & Landsidle, *supra* note 240, at 1694 (noting that because of free-riding problems, states critical to the efforts may refuse to participate if they do not stand to gain themselves).

[252] Dunoff, *supra* note 37, at 79.

[253] Tangney, *supra* note 215, at 412.

the WIO, specifically during the process of creation in an effort to influence the organization in a way to gain comparative advantages for their state.[254] Even after the establishment of the WIO, many states may recognize a free riding opportunity. However, with coordinated negotiations within the supranational organization, these incentives to free ride could be diminished.[255]

C. *WHY WILL THIS NEGOTIATION WORK WHEN PREVIOUS ONES HAVE FAILED AND WHY NOW?*

The main proposal in this Article is that by instituting a WIO, future negotiations for multilateral investment rules can be achieved because the WIO will create a forum amiable to investment negotiations and separate from trade issues. Without this multilateral organization, future development of the investment regime may be impeded, reducing the regime's ability to withstand challenges—including challenges to its legitimacy.[256] To move forward in improving international investment law, rules need to be consolidated, and a coherent regulatory framework and body of law must be produced. The proliferation of BITs and the multitude of investment tribunals have created incoherent principles and structural problems, particularly inconsistent arbitral decisions and divergent treaty interpretations.[257]

So the final question remains: why would negotiation within the WIO work when there have been several attempts at similar multilateral negotiations in the past that have failed? One such reason is that a shift in foreign investment flows has occurred since the last time multilateral rules were attempted.[258] Developing countries now both receive foreign investment and invest in other countries, with investment flows moving both directions.[259] Investment agreements are no longer only brokered between traditional investment-exporting countries; BITs now are signed between developed countries, and are increasingly being negotiated between developing countries.[260] The MAI failed partly because the world was divided between investor and investing countries, but that "line has now blurred."[261]

Second, this is not a multilateral investment agreement *yet*. This is simply a proposal to create a supranational forum for multilateral discussions and

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[254] Nov, *supra* note 13, at 862. *Accord* Joshua D. Moore, *The Economic Importance of Tax Competition for Foreign Direct Investment: An Analysis of International Corporate Tax Harmonization Proposals and Lessons from the Winning Corporate Tax Strategy in Ireland*, 20 PAC. MCGEORGE GLOBAL BUS. & DEV. L.J. 345, 364 n.150 (2007).

[255] Trachtman, *supra* note 69, at 349.

[256] Jeswald W. Salacuse, *The Emerging Global Regime for Investment*, 51 HARV. INT'L L.J. 427, 468 (2010). *Cf.* Kennedy, *supra* note 104, at 86 ("An agreement on investment could thus conceivably have little or no impact on FDI flows because it would not materially change the policy and legal framework for FDI that presently exists at the national level.").

[257] Chalamish, *supra* note 11, at 340.

[258] COLLINS, *supra* note 34, at 19–20 (noting that FDI flows from developing countries now comprise over fifty percent of all FDI flows).

[259] *See* BOAO FORUM FOR ASIA, ANNUAL CONFERENCE REPORT 2015, at 44–45 (2015), https://www2.deloitte.com/content/dam/Deloitte/cn/Documents/about-deloitte/deloitte-cn-boao-2015-report-en.pdf.

[260] Stephan W. Schill, *Multilateralizing Investment Treaties Through Most-Favored-Nation Clauses*, 27 BERKELEY J. INT'L L. 496, 498 (2009).

[261] BOAO FORUM FOR ASIA, *supra* note 259, at 45.

regulations in the view that a multilateral agreement will be instituted in the future. Current forums are not suitable to foreign investment discussions, as demonstrated by the past, and the argument here is that the creation of a new forum strictly dedicated to foreign investment will aid in the creation of a multilateral investment agreement. The first step to overcoming the problems of fragmentation is to bring the actors together, and then the common rules can be identified, and compatibility can be obtained.[262] This will be done by instituting a WIO.

Additionally, with the immense increase in foreign investment, information-gathering becomes an integral part in early detection of potential risks, particularly in international financial regimes.[263] States would greatly benefit from delegating this information-gathering function to a supranational body with the organization and resources to effectively collect and analyze this data. Additionally, while there is no blueprint for creating a supranational institution, international investment law can find many pertinent lessons by looking to the evolution of the GATT into the WTO.[264]

D. *NEGOTIATING A COMPREHENSIVE MULTILATERAL INVESTMENT TREATY*

Once this WIO is instituted, negotiations for a multilateral investment treaty can begin. There are many broad policy concerns regarding a multilateral regime. First, any multilateral agreement on investment must reflect the interests of developing countries, particularly due to their past opposition to parts of the previous draft MAI.[265] The parts of the multilateral investment treaty would need to address similar areas that BITs currently do, and with the converging principles in BITs, this would be a starting point for negotiations. Most significantly, the scope of the agreement would need to be addressed, particularly the definition of "investment" and "investor," while broad across most investment agreements, may need to be constricted to narrow their scope.[266] Additionally, nearly all BITs provide investors with a mechanism for bringing claims before an arbitral tribunal, often the International Centre for Settlement of Investment Disputes (ICSID), and generally under ICSID Rules, U.N. Commission on International Trade Law, or International Chamber of Commerce rules.[267] But other provisions do not necessarily have widespread agreement, including the application of non-discrimination protections to pre-admission, such as exclusion of FDI from certain industries, or post-admission, including nationalism and expropriation.[268] The previous MAI draft applied non-discrimination standards to both pre- and post-admission investment.[269]

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[262] Ralph Alexander Lorz, *Fragmentation, Consolidation and the Future Relationship Between International Investment Law and General International Law*, *in* INVESTMENT LAW WITHIN INTERNATIONAL LAW: INTEGRATIONIST PERSPECTIVES, *supra* note 44, at 482, 483.

[263] Manuela Moschella, *International Finance*, *in* THE OXFORD HANDBOOK OF INTERNATIONAL ORGANIZATIONS, *supra* note 14, at 365, 369.

[264] KURTZ, *supra* note 4, at 282.

[265] Kurtz, *supra* note 159, at 714.

[266] Lloyd, *supra* note 10, at 279.

[267] Amarasinha & Kokott, *supra* note 154, at 148–50.

[268] *See* Chalamish, *supra* note 11, at 338–39.

[269] Kurtz, *supra* note 159, at 764.

As BITs are generally uniform and have the same core provisions, this makes it difficult for many countries to object purely on a policy basis to having universal standards since in practice, BITs are already uniform.[270] But this does not necessarily mean this will prevent those objections, particularly on specific issues that are not widely agreed upon such a pre- and post-admission investment protections. While BITs generally have similar or identical language, there are still some variations, and these disagreements can be sticking points in negotiating an MAI. However, this is precisely why the WIO is needed, to provide a dedicated forum for these discussions to take place outside the influences of other international issues.

CONCLUSION

Trade and investment are strongly connected and will continue to converge with the increase in globalization. But for this interconnectedness to be effective, both trade and investment law need to be promoted and advanced. Without an international forum for investment discussions and multilateral regulation of investment, international investment law will stagnate and simply remain a fragmented landscape of bilateral treaties, and the discontent of states with current investment regime will only grow. For the trade and investment "double helix" envisioned by Professor Kurtz to fully effectuate, the WIO would need to be created to aid investment law in its maturity.

This Article proposed a somewhat radical idea of creating a World Investment Organization. Because there is currently no international regulation of investment treaties, nor an exclusive investment forum for multilateral negotiations, a supranational organization such as this would greatly improve international investment law and further promote foreign investment, the " 'neglected twin of trade' — at least in terms of its multilateral regulation."[271] While there are several problems that may affect the process of establishing this institution, including challenges to its legitimacy and problems with hold-out states, the benefits of a multilateral investment agreement would greatly outweigh those issues. A WIO is necessary to address the problems of the current investment system, and states will have increasing pressures and incentives to establish this supranational organization. Our times need a new economic order, and we need supranational organizations such as the WIO to govern this new order.[272]

[270] *See* Mosoti, *supra* note 139, at 132.
[271] Footer, *supra* note 44, at 296.
[272] Lastra, *supra* note 12, at 48–49.