3.0. INTRODUCTION

A distinguishing feature of the current era of globalization has been cross-border flows of foreign direct investment (FDI) in which businesses in one country own part or all of businesses in other countries. Indeed, FDI flows have grown at much faster rates than has the flow of goods and services. The last twenty-five years have seen the gradual liberalization of foreign investment regimes. Europe, the United States, and other industrialized countries have all taken major steps to encourage FDI in the 1990s, opening up certain sectors that were previously highly restricted, including telecommunications. This was as a result of the Uruguay Round and associated trade agreements. Liberalization has been particularly pronounced in developing countries, which have recently become important sources and destinations for FDI. China, India, Brazil, Russia, and dozens of smaller developing countries have also made substantial strides in opening up their economies to FDI. As a result, even with the natural ups and downs associated with global growth cycles, FDI has grown dramatically in the past generation. FDI policy and regulation plays very significant roles in promotion and growth of FDI over last two decades.

The FDI regulation panorama is very diverse and multilayered. The failed attempts to establish multilateral rules for investment, such as the Multilateral Agreement on Investment in 1998 and the Cancun WTO Ministerial Conference of 2003, seem to have triggered the new trend of bilateral and regional promotion and protection of FDI. The proliferation of investor-state arbitrations is evidence of the fact that, for the time being, bilateral and regional governance of investment via Bilateral Investment Treaties (BITs) and investment chapters of free-trade agreements (FTAs) will be the prevailing means of governing FDI. Yet, so much investor-state arbitration is causing issues of conflicting arbitral awards and forum shopping. Hence, there is the importance of coordination at the multilateral level towards the creation of a multilateral investment treaty.
This section provides an overview of the regulatory systems related to investment. The scope of this overview is to lay down the existing rules in order to prepare the field for further comments on the issue. The following layers of FDI regulation will be presented:

1. Bilateral Investment Treaties (BITs)
2. Regional Approaches to Investment Regulation
3. Multilateral Approaches to Investment Regulation

3.1. BILATERALISM

Bilateral treaties designed and developed for investment have two main aims: the protection and the promotion of investment. In spite of differences, the majority of BITs have a common structure. These are the establishment of investment, its treatment following the establishment, its protection and guarantee, and the settlement of disputes between countries as well as between the host countries and investors. For this, BITs has considered a series of issues that is related to admission of investments, standard of treatment of investments, transfer of the proceeds, expropriation, and settlement of disputes.

3.1.1. Admission of Investments

A foreign investment must be in conformity with domestic laws of host country. However, the majority of BITs has considered laws of host country and has incorporated them in treaties. In the majority of BITs, the Contracting Parties engage to encourage, promote, and create favorable conditions for foreign investments, subject to their national legislation. Other BITs also considered the regulations and administrative practices and the obligation to admit foreign investment is subject to the Parties’ right to exercise powers conferred on them by their own legislation.

3.1.2. Standard of Treatment of Investments

The treatment of an investment regroups the obligation of admission, the facilitation of the transfer of their proceeds, and the agreement on a reasonable mode of settlement of disputes. The majority of these treaties contain the general formula of “fair and equitable treatment.” This general formula is sometimes replaced in some of the existing BITs, by a treatment that should not be less favorable either to national investors or investors of any other country, whichever is more favorable.
3.1.3. Transfer

The transfer of the proceeds is the most important for a foreign investor. Therefore the majority of BITs provide for transfers without delay. However, some BITs recognize that the balance of payments of many developing countries may make it difficult for them to allow the immediate transfer of large sums of money. Thus, they provide for the transfer of such sums in installments. Some BITs provide for payments of interests for delay. The exchange rate is also important element which is to be found in most treaties, especially with reference to the official and/or the market rate of exchange and some to the IMF exchange regulations.

3.1.4. Expropriation

The expropriation has to consider three issues which are conditions, measures of compensation, and transfer of compensation. Public interest is generally as a condition precedent for any measure of expropriation of the BITs. The majority BITs also require the measure to be non-discriminatory and also not in breach of any specific commitment not to expropriate. The measure of compensation is expressed in a various ways. Some BITs contain clauses, such as prompt, adequate, and effective. Other BITs provide for a just, full, reasonable, or fair and equitable compensation. Another approach is to look at the value of the investment either at the date of expropriation or at the real or market value. Finally, the transfer of compensation is to be realized without delay or without undue delay in most BITs. However, a large number of BITs considered the possibility of delay. In such event, the interest should be paid at the normal commercial rate or the interest rate should be agreed upon between the Parties. All the other matters relating to the transfer of compensation are governed by the main provision dealing with the transfer of the proceeds of the investment.

3.1.5. Settlement of Disputes

The BITs contain an arbitration clause. There are two major institutions dedicated to arbitration, namely the International Centre for Settlement of Investment Disputes (ICSID) and the United Nations Commission on International Trade Law (UNCITRAL).
International Centre for Settlement of Investment Disputes

The International Centre for Settlement of Investment Disputes (ICSID), an institution of the World Bank group based in Washington, D.C., was founded in 1966 pursuant to the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (commonly known as the ICSID Convention or Washington Convention). As of 2009, 156 countries have signed the ICSID Convention. The ICSID has an Administrative Council, chaired by the World Bank’s President, and a Secretariat. It provides facilities for the conciliation and arbitration of investment disputes between member countries and individual investors. According to former General Counsel of the World Bank Ibrahim Shihata, the International Centre for Settlement of Investment Disputes (ICSID) provides a forum for conflict resolution in a framework that carefully balances the interests and a requirement of all the parties involved, and attempts in particular to depoliticize the settlement of investment disputes.

The ICSID provides a legal and organizational framework for the arbitration of disputes between home country, host country and investors. The ICSID Convention makes it a treaty obligation the agreement to arbitrate an investment dispute before the ICSID. Thus an arbitration agreement providing for ICSID proceedings engages the country’s international responsibility. The ICSID allows investment disputes to be arbitrated without interference from domestic political or judicial organs in the same manner as a dispute between countries can be made subject to international adjudication by an international court or tribunal.

Arbitration under the ICSID is subject to four conditions:

1. The parties must have agreed to submit their dispute to dispute settlement under the ICSID;
2. The dispute must be between contracting countries to the ICSID;
3. The dispute must be a legal dispute; and
4. The dispute must arise directly out of an investment made in the host Contracting State.

The United Nations Commission on International Trade Law (UNCITRAL) is a body of member and observer states under the auspices of the United Nations. It drafted and later adopted the UNCITRAL Model Law on International Commercial Arbitration in June 1985. Agreements which cite the UNCITRAL Arbitration Rules may be bound to this form of dispute resolution.

Arbitration under UNCITRAL Rules may be an option under a regional regime for investment (for example, NAFTA) or under a BIT. Alternatively, provisions may be made for a dispute to be referred to an ad hoc tribunal operating under UNCITRAL rules. Under BITs, CME/Lauder v the Czech Republic arbitrations are “first publicly known investment dispute involving bilateral investment treaties” to be decided under UNCITRAL rules instead of ICSID. In that case, the dispute resolution provision in the relevant BIT (in 1991, BIT between Czechoslovakia and the Netherlands) provided for a dispute to be submitted to an ad hoc arbitral tribunal which would determine its own procedure and would apply the UNCITRAL Rules.

International Court of Justice

The role of the International Court of Justice (ICJ) in the field of investment disputes has been quite limited so far. Although there have only been three cases involving claims of expropriation of foreign investment before the ICJ, that is the Anglo- Iranian case, the Barcelona Traction case, and the Elettronica Sicula S.p.A (ELSI) case. We will learn some important points for future investment treaties from ELSI case. These are:

1. Treaties should be drafted as to entitle foreign investors to make claims with respect to acts suffered by a domestic company substantially owned by the investors;
2. The standards concerning expropriation should be given a broader view.
3. The translation of agreements and the meaning of words in the different languages concerned have to be taken into consideration by countries.
4. The interpretation of treaties is a very broad and widely commented issue. The lesson to be learned from the ELSI case is that general words do not seem to be good enough; they must be, therefore, supplemented by more specific ones, making it impossible to deny investment protection where it was indeed intended.
The overview of the BITs content was aimed at giving a general idea of the kind of issues discussed in these treaties and also at arguing that, even though there is a high number of BITs signed, there are not as many varieties of provisions. The differences are more often verbal than substantive.

In 2001, many bilateral investment treaties (BITs) were evolved. Ninety-seven countries were involved in the signature of at least one treaty. A total 158 BITs were signed in 2001. The total number of treaties rose to 2,099 in 2009 from 1,941 the previous year. The number of BITs signed among developing countries has also significantly increased. These figures are encouraging because the BITs provide evidence of the interest of their signatories in the elaboration of FDI rules, that is, in the creation of a body of rules outside the national territory. Although the BITs are different from each other, however they have a number of common denominators that will be very useful in the design of a multilateral framework for investment. From the existing BITs, we already point out a couple of similarities or trends that are to be underlined as the first steps towards the internationalization of the topic.

3.2. REGIONALISM

Regionalism may be an alternative to bilateralism and short of multilateralism. There are attempts at the regional level at building a more institutionalized framework for investment for example, European Union (EU) and NAFTA. We will look at the enforcement of Article XXIV of the GATT at the regional level. We will focus on two regional blocs: the EU and the NAFTA.

3.2.1. The European Union

European rules applicable to investment are the combination of two different series of provisions: Article 56 EC, regarding the freedom of capital movement, and Article 43 EC, regarding the freedom of establishment. The European Commission issued a communication on the intra-EU investment aimed at interpreting the two above-mentioned Articles.
Freedom of Capital Movement

One of the four fundamental freedoms in the EU – freedom of capital movement – has been introduced by the Treaty of Rome. Restrictions on capital movements are called exchange and investment controls. Exchange controls restrict transactions such as the inward or outward flow of investment capital and repatriation of the proceeds of investment, depending on the policy goal. Countries use exchange and investment controls apply monetary policies, thereby totally preventing certain types of capital movements or restricting them just in part.

The free movement of capital was significantly transformed by the Maastricht Treaty. This section will consider the evolution from the Treaty of Rome to the Treaty of Maastricht. The Treaty of Maastricht completely revised the provisions on free movement of capital with effect from 1 January 1994. The freedom of capital movements entered a new era in 1990 when capital movements became fully liberalized within the European Community. In 1993, with the entry into force of the Maastricht Treaty, this fundamental freedom gained the same status as the other single market freedoms, and its governing principles were inserted in the EC Treaty. The current provisions included in the EC Treaty are Articles 56 to 60 EC.

These new provisions consider the freedom of capital movement as an independent issue, abolishing the limited perspective of the Treaty of Rome. The other innovation is that EU Member States and third countries seem to receive equal treatment. This is however false, as the Articles following Article 56 EC – which establishes full freedom as a rule – qualify the application of that provision, introducing a series of specific exceptions. They give the right to the European Community or its Member States to maintain or introduce restrictive measures, in particular with respect to foreign ownership of EU assets. Article 57 (1) EC allows the lawful restrictions on such capital movements existent on 31st December 1993 to remain. Article 57 (2) EC requires the Council to endeavor to achieve free movement of capital with third countries “to the greatest extent possible.” This formula leaves a great deal of interpretation to the EU Council. The EU Council is also empowered to take safeguarding measures in exceptional circumstances when capital movements to and from non-member states may threaten to cause serious difficulties for the operations of the economic and monetary union.
Finally, in order to have a complete overview of the rules on free movement of capital, one should mention Articles 119 EC and 120 EC. They give a qualification of a different nature with respect to Article 56 EC. These two Articles envisaged a situation of a balance-of-payment crisis prior to the entry into force of the third step of the European Monetary Union. It is pertinent to mention these Articles as they constitute one of the numerous emergency issues designed by the EC Treaty. It is a two-step strategy: in the first place, a Community-sponsored situation is looked for (Article 119EC) and, if not found, a unilateral action by the EU Member State is allowed (Article 120 EC).

**Freedom of Establishment**

The provisions that concern the freedom of establishment are the Articles 43 to 48 EC. Two kinds of situations are regulated throughout these Articles: natural persons (workers, students, retired persons) and legal persons (companies, branches, subsidiaries, agencies). We will focus on the second category.

Article 43 EC prohibits any kinds of “restrictions on the freedom of establishment of nationals of a Member State in the territory of another Member State.” Concerning companies, this provision applies also to the various forms of secondary establishment – subsidiary, branch or agency.

Article 48 EC provides that the “companies or firms formed in accordance with the law of a Member State and having their registered office, central administration or principal place of business within the Community shall, for the purposes of this Chapter, be treated in the same way as natural persons who are nationals of Member States.” This treatment is not strictly possible, given the many differences between natural and legal persons. The alternative would be to make a difference between primary and secondary establishment in the case of a registered office of a company opposed to one of its subsidiaries or branches. In practice, despite the many company law directives adopted, there are still considerable differences in the way various EU Member States regulate companies and their activities.

Foreign investment in international agreements where the EC is a party acknowledging the importance of foreign investment regulation, and the European Community (EC) has incorporated foreign investment agreements that it has concluded with third
countries. The EC Treaty does not offer a specific legal basis enabling the EC to take external action in the field of foreign investment. However, the EC Treaty includes a number of provisions that enable the EC to take action and conclude international agreements with third countries in the field of foreign investment. As mentioned above, the EC Treaty makes an explicit reference to foreign investment in Article 56 EC on capital movements, while a number of provisions touch upon specific aspects of foreign investment regulation.

In order to avoid the opposition of EU Member States, the EC has considered its foreign investment policy complementary to that of its Member States, inserting provisions on issues such as capital movements and investment promotion, as a field of development cooperation. The EC has gradually expanded its foreign investment policy in other areas of foreign investment regulation, in particular concerning entry and operation of foreign investment. Foreign investment provisions are incorporated in agreements that have divergent objectives and aim at different levels of political, economic, and social integration. As the EC has opted for broader association agreements dealing with a variety of external policy issues, regulation of foreign investment is only part of the broader framework, being influenced by the general objectives pursued. Considering the orientation of EC external policy with regard to developing countries and its emphasis on their development and integration in the world economy, it is understandable that the Economic and Partnership Agreement between the EC and 13 CARIFORUM countries places emphasis on the development aspects of foreign investment regulation. Moreover, the promotion of a broad and innovative system of rules on foreign investment in association agreements is linked with the EC external policy objective of establishing itself as an important actor in international economic relations.

The breadth and innovative scope of foreign investment provisions illustrates the attempt of the EC to exert its own model of international economic regulation to its partners. The EU takes advantage of its size and economic power in order to somehow impose on its partners international rules on foreign investment and gradually improve its international position, affecting future bilateral and multilateral agreements on foreign investment. Considering the reluctance of states, and in particular developing countries, to assume further international obligations on foreign investment, the EU
promotes a development-friendly legal framework, which arguably takes into account both the economic interests of capital exporting countries and the needs for development of capital importing countries. Consequently, the EU meets less resistance in promoting its own model of international foreign investment regulation and enhances its presence as a key actor in the international field.

Except for the free movements of capital and the freedom of establishment contained in the EC Treaty, there are various sources that produce, if not rules, at least measures that affect the treatment of investors and their investments in EU Member States.

The preliminary observation clearly stated by the EC Treaty cover only a very small part of the investment area, and that the most important rule is still either derived from more general provisions and applied specifically to investment matters, or left to the national authorities to develop. For a more comprehensive structure, creating more legal certainty, there should be a specialized investment-related set of measures. This rule should state not only the original measures, but also the measures based on customary law that one might be tempted to take for granted.

The characteristics of the Treaty provisions include:

- The non-discrimination principle;
- No apparent direct effect;
- A false impression of equal treatment for EU Member States’ nationals and Third countries’ nationals, when in fact there are many exceptions to the initial liberalization principle;
- The aim is more about regulating than liberalizing;
- No reference to international or customary law.

To sum up the EC investment provisions and regionalism in investment, as exemplified by the Economic and Partnership Agreement between the EC and 13 CARIFORUM countries, international investment agreements where the EC is a party present a first significant step towards systematic, complete, and balanced international foreign investment regulation. The Economic and Partnership Agreement between the EC and 13 CARIFORUM countries also illustrates the attempt to introduce new provisions into
international foreign investment regulation which take into consideration the interests of foreign investors, home and host states, and establish a nuanced balance between divergent interests. Such an agreement creates a favorable regulatory environment by liberalizing entry of foreign investment and including commitments concerning investment promotion. This effort is complemented by a network of provisions which guarantees the sustainable-development orientation and effectiveness of foreign investment provisions, aiming at ensuring the maximization of benefits from foreign investment. However, the unwillingness of the EU to include private investor or home state obligations concerning their adherence to sustainable development objectives weakens the effective implementation of development policies and questions the overall development orientation of the Economic and Partnership Agreement between the EC and 13 CARIFORUM countries.

3.2.2. North American Free Trade Agreement

The North American Free Trade Agreement (NAFTA) was a radical experiment in rapid deregulation of trade and investment among the U.S, Mexico, and Canada. Since 1995, NAFTA is considered the symbol of the failed corporate globalization model because its results for most people in all three countries have been negative: real wages are lower and millions of jobs have been lost; farm income is down and farm bankruptcies are up; environmental and health conditions along the U.S.-Mexico border have declined; and a series of environmental and other public interest standards have been attacked under NAFTA. NAFTA’s agricultural provisions have been so extreme that Mexican family farmers are demanding a re-negotiation or nullification of the treaty, after its first phase of initial implementation led to displacement of millions of Mexican farmers.

NAFTA Chapter 11 organizes a very experimental and complete regime for investments. It is the first regional agreement to have a specific chapter on investment. One of the most important innovations of such a regime is the investor-State disputes, which gives the right to investors to directly defend their rights in front of a State that may have violated these rights. This situation is different from the past, where investors had to rely exclusively on the diplomatic protection of their own State.
The main characteristics of the NAFTA regime under Chapter 11 for investment are:

1. The most-favored-nation principle;
2. The national treatment principle;
3. The minimum standard regime (Article 1105);
4. More rules than exceptions: the aim is to liberalize not to regulate;
5. Direct access of private parties to the settlement of disputes system; and
6. Application to all investments, including those of third countries to the provisions of Articles 1106 (performance requirements) and 1109 (environmental measures).

Chapter 11 is one of the most controversial chapters in the NAFTA, dealing with both the mutual obligations that each NAFTA party owes to foreign investors, and the rules for officiating the disputes that arise from time to time. In this fashion, Chapter 11 enables private corporations in one NAFTA country with the right to sue, through an arbitration process, the national government of another NAFTA party where that government’s actions negatively affect the first party’s investment rights under NAFTA. Chapter 11 is divided into two sections: investment (Section A) and dispute settlement (Section B).

**Investment**

Section A of Chapter 11 covers the measures adopted by a Party (i.e., any level of the government) that affect investors of another Party; investment of investors of another Party; and for purposes of the provisions on performance requirements and environmental measures, all investments in the territory of the Party.

Article 1101 of the NAFTA also recognizes the right of a Party to perform functions (law enforcement) and to provide services (social welfare and health). Some exceptions concerning Mexico are also stated. There are two different types of measures are found: liberalizing measures (Articles 1102 to 1104 and 1106) and protecting measures (Articles 1105 and 1110).

Investment liberalization measures – Articles 1102 to 1104 and 1106 of the NAFTA: Article 1102 sets out the obligation of national treatment for investors and their investments with respect to establishment, expansion, management, conduct, operation,
and sale or other disposal. National treatment means that a Party will treat investors of other Parties and their investments as favorably as it treats its own investments, in like circumstances. It actually means the best treatment provided by a government to any investor or investment, both in the pre- and post-establishment phases. In Article 1103, the second most important principle of the NAFTA – the most-favored nation (MFN) principle – is to be found. Article 1104 requires the better of the treatment between national treatment and the most-favored-nation treatment. Article 1106 prohibits the imposition and enforcement of a certain number of specified performance requirements and the use of specified performance requirements as conditions attached, including preference for domestic sourcing of goods and restricting domestic sales by tying such sales to export performances. Permitted measures include the necessity to protect human, animal, and plant life or health.

Investment Protection Measures – Articles 1105 and 1110 of the NAFTA: Investment protection measures are highly important as they reduce any sort of risk in investment. Article 1105 is one of the most original creations of the NAFTA Chapter 11. It provides for treatment in accordance with international law, aiming at settling a minimum standard of treatment for investments of NAFTA investors. The treatment is based on longstanding principles of customary international law. Article 1110 provides that no party may expropriate investments of investors of another Party, except for a public purpose on a non-discriminatory basis, in accordance with due process of law, and on payment of compensation.

Settlement of Disputes

Section B of Chapter 11 sets out the dispute settlement procedures necessary to resolve complaints between investors and NAFTA party governments, and attempts to establish a mechanism for the settlement of investment disputes that assures equal treatment with the principle of international reciprocity and due process before an impartial tribunal. Even though the NAFTA system is mainly based on a State-to-State settlement of disputes system, Chapter 11 has the particularity of introducing an investor-State system: an investor from a NAFTA State may commence arbitral proceeding for breach of any of the provisions in section A of Chapter 11.
As Kreklewetz (2007) argues, it is important to recognize that not everyone may bring a claim for dispute settlement, and that the Chapter 11 mechanism is effectively limited to investors of a Party to NAFTA, and more specifically, a national or corporation of a NAFTA Party that “seeks to make, is making or has made an investment,” in another NAFTA country. Also important to note is that, generally speaking, investors may not bring NAFTA claims against their own governments for harm to investments made in their own country.

The initial process is governed by Article 1116(2), which requires that claims must be brought within three years of when the investor “first acquired, or should have first acquired, knowledge of the alleged breach and knowledge that the investor has incurred loss or damage.” One should also note that Article 1118 indicates that parties “should” first attempt to settle a claim through consultation or negotiation, and that should this consultation or negotiation process fail, then the disputing investor is required to file a notice of intention to submit a claim to arbitration at least 90 days before the claim is submitted, provided that six months have elapsed since the event giving rise to the claim.

There is therefore first an intention to solve disputes through consultation or negotiation. If this consultation does not solve the problem, then the investor may begin an arbitration procedure under any of the following sets of rules: (1) International Center for the Settlement of Investment Disputes Convention (ICSID); (2) Additional Facility Rules of ICSID; (3) United Nations Commission on International Trade Law (UNCITRAL) Arbitration Rules. Note that Article 1130 requires that (unless the disputing parties agree otherwise) the arbitration occur in the territory of a Party that is a party to the 1958 New York Convention, selected in accordance with the rules of the arbitration forum. The dispute shall be decided in accordance with NAFTA provisions and any applicable rules of international law. The final award is binding only on the disputing parties and with respect to the particular case.

To sum up on the NAFTA investment provisions and regionalism, Graham and Wilkie (1998) have argued that “The investment provisions of the NAFTA have instituted the
most comprehensive rules on investment to date for multinational corporations and nation states. These provisions represent a further step towards a new *lex mercatoria* and international legal standing those nation-states and increasingly globalized firms are seeking. More broadly, the NAFTA investment provisions have further endorsed a rules based international system in which the complementarity of trade and investment issues is implicitly recognized.”

In conclusion, knowledge gained from the use of regional agreements will benefit the establishment of a multilateral framework for investment for two reasons. First, there is a real need for multilateral rules in the FDI field. This, however, does not suggest the replacement of the current regional investment regime nor that the existing regional regimes are inadequate. Second, there is a difficulty in designing coordinated rules between the NAFTA and the EU. The approaches to investment of the NAFTA and of the EU are completely different. Interestingly enough, the aim of these two approaches is the same, i.e., the protection and liberalization of investments. Nevertheless, the mechanisms developed are very different and, for a possible multilateral investment agreement, it is important to see how these two conceptions could converge.

The NAFTA approach to investment is based on international law principles and aims both at the liberalization and protection of investments. NAFTA Chapter 11, which creates a very complex regime for investment, elaborates it on the basis of the main principles of international law. This dual approach (liberalization and protection) is also observed in the BITs signed by the United States. The deciding issues of the NAFTA for a potential multilateral framework for investment are its top-down approach, the fact that it possesses an anti-expropriation protection which is both too strong and ambiguous, a very broad definition of foreign investment, as well as the absence of investment incentives regulation. The European Union regime, on the other hand, is not only more basic, but also focuses essentially on the protection of investment. It is organized around the principles of free movement of capital and freedom of establishment. After the failure of the MAI, the EU prefers a bottom-up, positive list approach to treat the establishment of FDI.
3.3. MULTILATERALISM

Multilateralization refers to the process of transferring an issue from the unilateral action of the host country to the multilateral field. It also implies the international responsibility of the country. The issue of a multilateral framework for investment (MFI) is a very broad and complicated one. There are two positions that divide the international community: those States that continuously support the initiative of an MFI, i.e., mainly the countries of the European Union (EU) and the United States, and those who are quite reticent to this initiative, i.e., developing countries. The solution is either to lower the standards for investment or to proceed to a trade-off with other areas of negotiation. Moreover, MFI is a moving target. For instance, if we consider that a WTO round is going on at the moment, i.e., the Doha Round, and that there are no certitudes concerning its results. As of now, there is no coherent regime concerning investment at the multilateral level.

There have been attempts to liberalize and regulate investment, but they have either failed or been developed only at a bilateral or regional level. In this sense, it is pertinent to bear in mind the failure of the multilateral agreement on investment (MAI) in 1998 in the framework of the OECD, and the impact of this bad experience on the Parties to this Agreement. Developing countries have shown that they find it difficult to move on from the MAI shadow. These facts, however, should not be interpreted as a signal to abandon the search for a multilateral framework for investment. Rather, one should infer that governments have not yet identified an adequate negotiating agenda. We will analyze the TRIMs Agreement under WTO and the Energy Charter Treaty as examples moving toward a multilateral framework for investment.

3.3.1. TRIMS Agreement

The focal point of analysis in this section will be the multilateral approach to investment law from the WTO perspective. However, there are other ways to tackle the multilateral approach to investment law, such as the Energy Charter Treaty or human rights regimes. As a matter of fact, one could argue that the Energy Charter Treaty of 1994 is in effect a multilateral agreement for the protection of investment in the energy sector.
The WTO’s Agreement on Trade-Related Investment Measures (TRIMs) sets certain rules relating to foreign direct investment. TRIMs indicate an investment related measure that has an impact on international trade. The TRIMs rules forbid countries from maintaining performance requirements on investors. These are governmental policies regulating investment, for instance, requiring local content. The TRIMs does not contain the expansive definition of investment or the extensive new investor right which exist in the NAFTA and were proposed for global application through the Multilateral Agreement on Investment. However, expanding the scope of the WTO’s investment rules and the nature of investor rights granted by the WTO were part of the push by the EU to launch new negotiations at the Cancun WTO Ministerial Conference on the so-called new issues (also referred to as the Singapore issues).

The Agreement requires mandatory notification of all non-conforming TRIMs and their elimination within two years for developed countries, within five years for developing countries and within seven years for least-developed countries. It establishes a Committee on TRIMs which will, among other things, monitor the implementation of these commitments. The agreement also provides for consideration, at a later date, of whether it should be complemented with provisions on investment and competition policy more broadly.

There are a few problems with the TRIMs Agreement that make it a problematic model for a multilateral investment framework. First, the TRIMs Agreement does not govern different investment laws, but only designs regulations on trade in goods. The Agreement recognizes that certain investment measures restrict and distort trade. It provides that no contracting party shall apply any TRIM inconsistent with GATT Articles III (national treatment) and XI (prohibition of quantitative restrictions). To this end, an illustrative (i.e., non-exhaustive) list of TRIMs agreed to be inconsistent with these articles is appended to the agreement. The list includes measures which require particular levels of local procurement by an enterprise or which restrict the volume or value of imports such an enterprise can purchase or use to an amount related to the level of products it exports. Second, there is no generic definition of a TRIM, and that a temporary deviation for balance of payments purposes is allowed for developing
countries. Third, the illustrative list of TRIMs is inconsistent with the obligations of national treatment. And fourth, the TRIMs Agreement does not apply to services and is a compromise between developed and less-developed countries.

Dispute resolution under the TRIMs Agreement has revealed that WTO Members may not apply investment measures that are inconsistent with the principle of national treatment (GATT Article III) or otherwise violate the general prohibition of quantitative restrictions on imports and exports (GATT Article XI).

3.3.2. Energy Charter Treaty

The Energy Charter Treaty (ECT) provides a multilateral framework for energy cooperation that is unique under international law. It is designed to promote energy security through the operation of more open and competitive energy markets, while respecting the principles of sustainable development and sovereignty over energy resources. In the early 1990s, public debates took place on how to improve energy cooperation between Eastern and Western Europe. Russia was rich in energy but in great need of investment to be able to reconstruct its economy at the same time as West European countries were trying to diversify their sources of energy supplies. Therefore, there was a recognized need to set up a commonly accepted legal framework for energy cooperation among countries of the Eurasian region, out of which the Energy Charter process saw the light. The Energy Charter Treaty is therefore the only binding multilateral legal instrument dealing with intergovernmental cooperation in the energy sector.

The first step in the Energy Charter process was the adoption and signing of the European Energy Charter in The Hague in December 1991. The European Energy Charter was a political declaration of principles and therefore did not constitute a legally binding treaty. That said it contained guidelines for the negotiation of a subsequent binding treaty, later to become the ECT. The Energy Charter Treaty and the Energy Charter Protocol on Energy Efficiency and Related Environmental Aspects were eventually signed in December 1994 and entered into force in April 1998. All 27 EU Member States and the European Communities have ratified the ECT. Russia, however, has signed it but not yet ratified it.
3.4. CONCLUDING REMARKS

The current fragmented international investment regime shows the degree of complexity and confusion of the system, with very many contracting parties, some bilateral, others regional or even multilateral, as we have seen in the case of WTO Agreements. This fragmented regime may encourage regulatory competition among the various models of international investment agreements. This fragmentation of the international investment regime may also create an incentive for treaty shopping by those foreign investors who seek protection even in situations where their country has not concluded or ratified investment agreements that offer the same level of protection as those achieved in other countries.

Moreover, as mentioned above, the proliferation of investor-state arbitrations is evidence of the fact that, for the time being, bilateral and regional governance of investment via BITs and investment chapters of FTAs will be the prevailing means of governing FDI. That said, so much investor-state arbitration is causing issues of conflicting arbitral awards and forum shopping. All of this would be solved with the creation of a stable, non-discriminatory multilateral investment treaty. Hence it is desirable to create a multilateral investment treaty.

Furthermore, as analyzed above, environmental and labour standards – which until now have only been treated marginally in international investment agreements – are increasingly seen as inseparable from foreign investment and therefore, from a substantive point of view, it is key to ensure that they are incorporated in a future multilateral framework for investment. This will be even more justified as globalization continues to be a reality that affects the social and environmental responsibility of foreign investors.

A comprehensive multilateral framework for investment would serve as a template for a new generation of bilateral and regional investment treaties. It would help to reduce transaction costs and enhance the economic benefits of FDI. Regarding the design of such a multilateral framework for investment, the WTO has the opportunity to encapsulate years of development of an international framework for investment in the first truly multilateral agreement for investment. Such an agreement in the WTO
context would not replace current bilateral and regional investment regulatory regimes, but could clarify the relationship among the GATS, the TRIMs Agreement, and BITs. Although the success of this project remains an unknown, much work has already been inherited via the BITs, the GATS, the NAFTA, the Energy Charter Treaty, the TRIMs Agreement, and the failed MAI. The WTO has the chance to build upon these experiences. One of main failing of MAI is that unlike the BITs, it does not address the basic issues of admission, standard of treatment, transfer etc.

Since there is no consistent MAI that is applicable globally, it is not possible to explain an international FDI patterns with the help of the policy framework except the most general principles of WTO- MFN, National Treatment and level playing field. On the other hand, the lack of such a common framework may be the reason (to some extent) that gives us somewhat inconsistent results that vary across country groupings (developed vs. developing), top ten and other countries and in terms of stock and flows of FDI, as has been found in the subsequent chapters of this thesis.

This section provides an overview of the regulatory systems related to investment. This overview is laid down the existing rules related to international investment environment. This chapter presents the layers of FDI regulation which includes bilateral investment treaties, regional approaches to investment regulation and multilateral approaches to investment regulation. This chapter is followed by the general trends and patterns of FDI in terms of flows and stock.