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## A Plurilateral Investment Treaty: Marrying Trade and Investment to Re-Establish a Customary International Norm

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# A Plurilateral Investment Treaty: Marrying Trade and Investment to Re-Establish a Customary International Norm

## ABSTRACT

*Despite some inherent risks, foreign direct investment (FDI) is for some the preferred method of investment. The rising number of bilateral investment treaties governing FDI is merely reflective of this investment vehicle's popularity. Since the early-nineteenth century, developed countries have sought to gain protection for investors engaging in these investment opportunities. One such protection, the Hull Doctrine, requires national governments to fully compensate investors in cases of unlawful expropriation. Until World War II, when developing countries began applying their own domestic eminent domain law to foreign investors, the Hull Doctrine was considered binding, customary international law. This Note analyzes the effects of recent trade treaties, the Trans-Pacific Partnership and the Transatlantic Trade and Investment Partnership, and assesses whether these treaties' inclusion of the Hull standard re-establishes the doctrine as a twenty-first century customary international norm.*

## TABLE OF CONTENTS

I. INTRODUCTION .....	500
II. BACKGROUND .....	502
A. <i>When Developed Western Nations Governed         Customary International Law</i> .....	502
B. <i>The Aftermath of World War II: The Rise of         State Sovereignty and a Rejection of the         Norms of Colonizing States</i> .....	505
C. <i>The TPP's and TTIP's Revolutionary Impact on         International Investment Law</i> .....	507
III. ANALYSIS .....	509
A. <i>The TPP's and TTIP's Foreign Investment         Expropriation Provisions</i> .....	509
B. <i>From Paquete Habana to Filartiga:         Discerning Evidence of a Customary         International Law Norm</i> .....	513

	C. <i>The Status of the Hull Doctrine in Twenty-First Century Customary International Law</i> .....	517
IV.	SOLUTION .....	524
	A. <i>How the Adoption of a Comprehensive Plurilateral Treaty on Investment within the WTO Would Establish Customary International Law</i> .....	524
	1. The WTO as a Promising Venue for Concluding the Next Global Investment Treaty .....	525
	2. Concluding a Plurilateral Agreement: On the Road to a Customary International Norm .....	529
	B. <i>Pro-Investor or Pro-Western: Is the Hull Doctrine the Right Solution for Developing Countries?</i> .....	530
V.	CONCLUSION .....	532

## I. INTRODUCTION

Foreign shareholders had invested billions of dollars in one of Russia's largest oil companies, Yukos Oil Company, when suddenly the Russian government rendered that investment practically obsolete.<sup>1</sup> The Russian government "leveled massive [tax] claims against Yukos."<sup>2</sup> Shortly thereafter, Yukos' Chief Executive Officer, Mikhail Khodorkovsky, was arrested under suspicious circumstances and imprisoned for over ten years.<sup>3</sup> Immediately following Khodorkovsky's arrest, Yukos conveniently sold most of its assets to a Russian government-owned oil producer and declared bankruptcy.<sup>4</sup> Yukos shareholders challenged Russia's actions as an unlawful expropriation.<sup>5</sup> Ultimately, the Permanent Court of Arbitration

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1. Danica Kirka, *Russia ordered to pay \$50 billion over Yukos*, ASSOC. PRESS (June 28, 2014), <http://bigstory.ap.org/article/russia-ordered-pay-50b-over-yukos> [<https://perma.cc/7V2T-LY9U>] (archived Dec. 19, 2016).

2. *Id.*

3. *Id.*

4. *Id.*

5. *See id.*; *Yukos Oil Company and Russian Expropriation*, EXPROPRIATION IN RUSSIA, <http://expropriationnewsrussia.com/en/prominent-russian-expropriation-cases/yukos-oil-company/> (last visited Mar. 1, 2016) [<https://perma.cc/45UU-S6YM>] (archived Dec. 19, 2016).

awarded Yukos shareholders over \$50 billion in what remains “one of the largest commercial arbitration awards in history.”<sup>6</sup>

Although the Yukos arbitration is certainly an exceptional case,<sup>7</sup> it demonstrates the relevance of investor protection, investment risk, and expropriation laws in the twenty-first century. Investors engaging in foreign direct investment (FDI), a type of investment in which investors purchase ownership interests in a foreign business, are foremost concerned about investment risks.<sup>8</sup> Investment risks are heightened in FDI because national governments may choose to expropriate a business<sup>9</sup> by nationalizing or otherwise “taking [the] privately owned property.”<sup>10</sup> Before World War II, customary international law dictated that governments pay investors “prompt, adequate, and effective compensation” upon expropriation.<sup>11</sup> This compensation standard was most commonly referred to as the Hull Doctrine.<sup>12</sup> This doctrine has since fallen out of favor, resulting in the absence of a uniform international norm to govern compensation owed to investors as a result of an unlawful expropriation.<sup>13</sup>

This Note will assess the impact of the Trans-Pacific Trade Partnership (TPP) and the Transatlantic Trade and Investment Partnership (TTIP), two massive interregional trade agreements that have yet to be ratified, on the Hull Doctrine’s status as a customary international norm. In particular, this Note analyzes whether these large interregional trade treaties have catapulted the Hull Doctrine once again to the status of a customary international law norm.

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6. Kirka, *supra* note 1.

7. See H. COMM. ON FOREIGN AFFAIRS, 88TH CONG., REPORT ON EXPROPRIATION OF AMERICAN-OWNED PROPERTY BY FOREIGN GOVERNMENTS IN THE TWENTIETH CENTURY (Comm. Print 1963), 2 I.L.M. 1066 (1963) [hereinafter REPORT ON EXPROPRIATION OF AMERICAN-OWNED PROPERTY] (stating that a large number of expropriations have been committed by communist countries).

8. See Justin Kuepper, *What is Foreign Direct Investment?*, THE BALANCE (June 8, 2016), <http://internationalinvest.about.com/od/investinginmultinationals/a/What-Is-Foreign-Direct-Investment.htm> [<https://perma.cc/LV5E-ZF8B>] (archived Dec. 19, 2016) (“On a micro level, the investments [in FDI] have several risks that should be carefully considered.”).

9. See *id.* (“Investors should be aware of the risk of nationalization, political conflicts and other potential problems that may arise.”).

10. *Expropriation*, INVESTOPEDIA, <http://www.investopedia.com/terms/e/expropriation.asp> (last visited Jan. 16, 2017) [<https://perma.cc/V4WF-8722>] (archived Dec. 19, 2016) (defining expropriation as “the act of a government in taking privately owned property, ostensibly to be used for purposes designed to benefit the overall public. In the United States, what is referred to as ‘eminent domain’ provides the legal foundation for expropriation”).

11. See Patrick M. Norton, *A Law of the Future or a Law of the Past? Modern Tribunals and the International Law of Expropriation*, 85 AM. J. INT’L L. 474, 476–77 (1991).

12. See *id.* (“Under the ‘Hull formula,’ state expropriation of foreign-owned property required the payment of ‘prompt, adequate, and effective’ compensation.”).

13. See *infra* Section III.C.

Part II provides a historical background on the law of expropriation and compensation. Part II details how the Hull Doctrine fell out of grace with the international community and explores the competing doctrine, the Calvo Doctrine, which developing countries supported following the world wars. Part III examines the expropriation provisions in the TPP and the TTIP, as well as other sources, to determine whether the Hull Doctrine has gained the requisite support to be considered customary international law in the twenty-first century. Although this Note recognizes a trend toward adopting the Hull Doctrine, it concludes that the Hull Doctrine cannot yet be considered customary international law. This Note then recommends, in Part IV, that states conclude a plurilateral agreement on investment law within the auspices of the WTO to re-establish the Hull Doctrine as a customary norm. Establishing a plurilateral investment agreement would not only be indicative of widely-held support for the Hull Doctrine, but encouraging FDI in a plurilateral investment agreement may also incentivize capital investments abroad and improve economic conditions in developing countries.

## II. BACKGROUND

### A. *When Developed Western Nations Governed Customary International Law*

Twenty-first century developing countries are often adverse to the Western idea, embedded in international investment law treaties, that states fully compensate foreign investors for property a state chooses to expropriate.<sup>14</sup> The historical development of international investment law demonstrates why developing countries are adverse to this international investment norm of expropriation, commonly referred to as “full compensation” or the Hull Doctrine.<sup>15</sup>

International investment laws, particularly those aiming to protect foreign-owned property, first developed in early seventeenth-century Europe when the rise in trade and investment among

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14. See, e.g., Sundaresh Menon, Attorney General of Singapore, Opening Speech at the ICCA 2012 Congress: International Arbitration: The Coming of a New Age for Asia (and Elsewhere) (June 11, 2012), [http://www.arbitration-icca.org/media/0/13398435632250/ags\\_opening\\_speech\\_icca\\_congress\\_2012.pdf](http://www.arbitration-icca.org/media/0/13398435632250/ags_opening_speech_icca_congress_2012.pdf) [<https://perma.cc/7Y8A-P326>] (archived Dec. 19, 2016) (“[International investment arbitration] has the potential to constrain the exercise of domestic public authority in a manner and to a degree perhaps not seen since the colonial era . . . . The pro-investor attitude has even been cited as the reason arbitrators from developing world often rule in favour of investors from traditionally capital-exporting countries, this being the “price” that has to be paid to gain credibility and access to the privileged club of elite international arbitrators.”).

15. See generally Norton, *supra* note 11 (naming the International Law of Expropriation as stated in the Hull Doctrine and the Restatement (Third) of Foreign Relations Law of the United States § 712 “full compensation”).

European nation-states called for a more uniform body of trade law.<sup>16</sup> In the century that followed, colonialism led to the geographic expansion of Europe's investment laws that were rooted in protecting property rights,<sup>17</sup> which naturally favored European interests.<sup>18</sup> As the number of foreign investments surged during the nineteenth century,<sup>19</sup> a new field within international investment law, commonly referred to as "diplomatic protection of aliens," emerged.<sup>20</sup> This field "was premised on the theory that an injury done to a foreigner was an injury done to their state, and, as such, enabled the home state to take action on their nationals' behalf."<sup>21</sup>

The adoption of the "diplomatic protection of aliens" arose, at least in part, because Western states were eager to establish binding customary international law that protected their citizens' investments and ensured that developing nations would fulfill international expectations by adhering to foreign investment commitments.<sup>22</sup> Hence, a state that interfered with a foreign investor's expectations by nationalizing foreign-owned property violated international investment law unless "the following conditions were met: a) the expropriation was carried out for a public purpose; b) it was not arbitrary or discriminatory; and c) prompt, adequate, and effective compensation was paid."<sup>23</sup>

A more familiar recitation of this international norm is articulated in a dispute that arose between Mexico and the United States in 1938.<sup>24</sup> The Mexican government had expropriated oil fields, located in Mexico, that had been owned by Mexican as well as American and British citizens.<sup>25</sup> Initially, the Mexican government refused to

16. KATE MILES, *THE ORIGINS OF INTERNATIONAL INVESTMENT LAW: EMPIRE, ENVIRONMENT AND THE SAFEGUARDING OF CAPITAL 2* (2013).

17. See CHARLES LIPSON, *STANDING GUARD: PROTECTING FOREIGN CAPITAL IN THE NINETEENTH AND TWENTIETH CENTURIES 3–4* (1985).

18. See MILES, *supra* note 16, at 2 ("[F]oreign investment and trade protection rules became part of an array of tools used to further the political and commercial aspirations of European states . . .").

19. See LIPSON, *supra* note 17, at 4.

20. MILES, *supra* note 16, at 47.

21. *Id.*

22. See JESWALD W. SALACUSE, *THE LAW OF INVESTMENT TREATIES 92–94* (2009) (explaining that nineteenth-century investment laws recognized that states had the right to eminent domain, but those states could violate international law by failing to compensate foreign investors for their loss).

23. MILES, *supra* note 16, at 48.

24. See Norton, *supra* note 11, at n.6 ("In a 1938 dispute over Mexico's nationalization of foreign-owned oil fields, U.S. Secretary of State Cordell Hull averred that international law required Mexico to pay 'prompt, adequate, and effective' compensation. This shorthand summary of the standard claimed by the United States is generally called the 'Hull formula.'").

25. *Milestone: 1937–1945, Mexican Expropriation of Foreign Oil, 1938*, U.S. DEPT. OF STATE OFFICE OF THE HISTORIAN, <https://history.state.gov/milestones/1937->

reimburse foreign investors with full compensation.<sup>26</sup> The United States Secretary of State, Cordell Hull, “declared that the property of aliens was protected by an international standard under which expropriation was subject to limitations, which required that there be ‘prompt, adequate and effective compensation.’”<sup>27</sup> In practice, “[c]ompensation is considered to be prompt if paid without delay; adequate, if it has a reasonable relationship with the market value of the investment concerned; and effective, if paid in convertible or freely useable currency.”<sup>28</sup> Consistent with customary international law, the governments of Mexico, Britain, and the United States reached an agreement that resulted in Mexico compensating foreign investors approximately \$159 million.<sup>29</sup> Secretary Hull’s interpretation of this compensation standard is now commonly referred to as the Hull Doctrine.<sup>30</sup>

The Mexican government’s initial rejection of the Hull Doctrine did not necessarily negate its status as a binding customary international norm during the early-twentieth century. During this time, there were approximately sixty cases presented in front of the Permanent Court of International Justice, “many dealing with claims arising out of takings of alien property. Although their reasoning is sometimes obscure, none held that the appropriate measure of compensation was less than the full value of the property taken, and many specifically affirmed the need for full compensation.”<sup>31</sup> In the *Chorzow Factory* case, the Permanent Court of International Justice held that Poland’s unlawful expropriation of a foreign-owned company violated international law and required Poland to compensate investors with “the just price of what was expropriated, measured as the value of the undertaking at the moment of dispossession, plus interest to the day of payment.”<sup>32</sup> Not only did these international tribunals side with Western conceptions of full compensation, but the United States also affirmed the legitimacy of the Hull Doctrine by

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1945/mexican-oil (last visited Dec. 19, 2016) [<https://perma.cc/SVA5-WVZH>] (archived Dec. 19, 2016) [hereinafter *Milestone: 1937–1945*].

26. See Noel Maurer, *The Empire Struck Back: Sanctions and Compensation in the Mexican Oil Expropriation of 1938*, 71 J. ECON. HIST. 590, 591 (2011).

27. See SALACUSE, *supra* note 22, at 68.

28. U.N. CONFERENCE ON TRADE AND DEVELOPMENT (UNCTAD), EXPROPRIATION: UNCTAD SERIES ON ISSUES IN INTERNATIONAL INVESTMENT AGREEMENTS II 40 (2012), [http://unctad.org/en/Docs/unctaddiaeia2011d7\\_en.pdf](http://unctad.org/en/Docs/unctaddiaeia2011d7_en.pdf) (last visited Dec. 19, 2016) [<https://perma.cc/ZRX5-JH65>] (archived Dec. 19, 2016) [hereinafter *Series on Issues in International Investment Agreements II*].

29. *Milestone: 1937–1945*, *supra* note 25, at 608.

30. Norton, *supra* note 11, at 474 n.6.

31. *Id.* at 476–77.

32. *Id.* at 476 (internal citations omitted).

incorporating the doctrine into the Restatement (Third) of the Foreign Relations Law.<sup>33</sup>

B. *The Aftermath of World War II: The Rise of State Sovereignty and a Rejection of the Norms of Colonizing States*

The end of colonialism after World War II led to a new outlook on international investment law and the eventual rejection of the Hull doctrine.<sup>34</sup> Developing states “desire[d] to assume control of the exploitation of their natural resources which had formerly been at the disposition of the colonial powers.”<sup>35</sup> In rejecting the Hull doctrine, developing states rejected a norm that had arguably favored the interests of investors from Western states without concern for a developing nation’s ability to compensate.<sup>36</sup> Moreover, developing nations clung to more defined notions of sovereignty as they argued that domestic law was the more appropriate venue to compensate foreign investors.<sup>37</sup> No doubt, the rise of communism, which repudiated the concept of private property rights, contributed to the growing aversion toward a Western doctrine that steadfastly protected the interests of property holders.<sup>38</sup>

Many developing states in Latin America adopted the Calvo Doctrine, a competing approach to the Hull Doctrine.<sup>39</sup> The Calvo Doctrine provided that, upon expropriation, states should apply their own domestic laws when calculating the compensation owed to foreign investors.<sup>40</sup> For instance, if a state’s domestic laws only required it to

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33. See *id.* (asserting that the Hull doctrine “was recently reformulated in the Restatement (Third)”); see also RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 712 (“A state is responsible under international law for injury resulting from: (1) a taking by the state of the property of nation of another state that (a) is not for a public purpose; or (b) is discriminatory; or (c) is not accompanied by provision for just compensation.”).

34. See, e.g., Francis J. Nicholson, *The Protection of Foreign Property Under Customary International Law*, 61 B.C. L. REV. 391, 391–92 (1965).

35. *Id.* at 391.

36. MILES, *supra* note 16, at 49.

37. Nicholson, *supra* note 34, at 391–92.

38. REPORT ON EXPROPRIATION OF AMERICAN-OWNED PROPERTY, *supra* note 7, at 1067 (“Since the end of the Second World War, expropriations have increased. The most widespread expropriations have occurred in the countries which adopted communism.”).

39. Justine Daly, *Has Mexico Crossed the Border on State Responsibility for Economic Injury to Aliens? Foreign Investment and the Calvo Clause in Mexico After the NAFTA*, 25 ST. MARY’S L.J. 1147, 1150 (1994).

40. *Id.* (“The Calvo Doctrine, named after the famed Argentine jurist, Carlos Calvo, encompasses two basic concepts: (1) the requirement of absolute equality of the treatment of aliens with the treatment of nationals, meaning that aliens have resort to local remedies only, and (2) the policy of nonintervention of the alien’s state of nationality.”).



pay one-half the purchase value of an ownership interest, the Calvo Doctrine suggested that state pay only half of the value rather than “adequate, effective, and prompt” compensation that the Hull Doctrine requires.<sup>41</sup> Thus, foreign investors were put on equal footing with domestic investors.<sup>42</sup> The Calvo Doctrine emphasized state autonomy distinct from Western control and served as a response to concerns that Western states had impeded the sovereignty of developing states.<sup>43</sup>

The rejection of the Hull Doctrine did not have an immediate effect among the consensus of states.<sup>44</sup> During the 1970s, arbitral awards involving the international law of expropriation in Middle Eastern countries cited to “general principles of law,” upholding petroleum concessions previously negotiated.<sup>45</sup> Based on precedent, these arbitral awards reaffirmed the Hull Doctrine’s application in expropriation disputes, demonstrating a continued reliance on the Western states’ compensation approach throughout the 1960s.<sup>46</sup>

The death-knell for the Hull Doctrine’s status as a binding norm of customary international law sounded in 1973 when the United Nations General Assembly issued a resolution affirming:

the application of the principle of nationalization carried out by States, as an expression of their sovereignty in order to safeguard their natural resources, implies that each State is entitled to determine the amount of possible compensation and the mode of payment, and that any disputes which might arise should be settled in accordance with the national legislation of each State carrying out such measures.<sup>47</sup>

This resolution, supported by eighty-six governments, was not the only General Assembly resolution to support state sovereignty to the detriment of the Hull Doctrine.<sup>48</sup>

In the wake of this rejection, attempts to conclude a comprehensive multilateral investment treaty regime also failed.<sup>49</sup> International investment issues had almost exclusively been resolved between two states in bilateral investment treaties (BITs).<sup>50</sup> From

41. *Id.* at 1169.

42. *Id.* at 1150.

43. *Id.* at 1161.

44. *See* Norton, *supra* note 11, at 477 (listing the arbitral awards during the decolonization era that adhered to the Hull Doctrine).

45. *Id.*

46. *Id.* at 477–78.

47. G.A. Res. 3171 (XXVIII), at 52 (Dec. 17, 1973).

48. *See* Norton, *supra* note 11, at 474, 474 n.3 (citing G.A. Res. 3201, Declaration on the Establishment of a New International Economic Order, U.N. Doc. A/5217 (1974) and G.A. Res. 3281, Charter of Economic Rights and Duties of States, U.N. Doc. A/9631 (1974) among others).

49. *See* United Nations Conference on Trade and Dev., Bilateral Investment Treaties 1995–2006, UNCTAD/ITE/IIT/2006/5 (2007) [hereinafter UNCTAD Report].

50. *See id.* at xi.

1995 until 2006, states concluded BITs at a rapid rate, partially as a result of Latin American states' efforts to bring in more foreign direct investment.<sup>51</sup> Even though most of these BITs included "some formula of full or nearly full compensation," developing nations adhered to what they claimed to be the "default rule"—compensation for expropriation relying on the home state's domestic law—unless the "default rule [was] trumped by some domestic law or treaty."<sup>52</sup>

### C. *The TPP's and TTIP's Revolutionary Impact on International Investment Law*

The global landscape in investment law has the potential to dramatically change with the conclusion of the TPP on October 5, 2015<sup>53</sup> and the pending conclusion of the TTIP. These two trade agreements represent a departure from BITs and suggest a rise in the popularity of complex and massive regional trade agreements. To best elucidate the impact of the TPP and the TTIP, if both agreements were ratified by all signatories, the two agreements combined would "govern the investment relations of 65% of the world economy."<sup>54</sup>

The TPP was negotiated between twelve nations "representing two-fifths of the global economy"<sup>55</sup> and has been negotiated as a "living agreement that other trading partners could join."<sup>56</sup> On October 5, 2015, twelve nations signed the TPP. The twelve signatories included: the United States, "Australia, Brunei Darussalam, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, and Vietnam."<sup>57</sup> The United States and the European Union have yet to finalize an agreement.<sup>58</sup> While the TPP is the largest regional treaty

51. Steven R. Ratner, *Regulatory Takings in Institutional Context: Beyond the Fear of Fragmented International Law*, 102 AM. J. INT'L L. 475, 477 (2008); see UNCTAD Report, *supra* note 49, at xi.

52. Ratner, *supra* note 51, at 477.

53. Jackie Calmes, *Trans-Pacific Partnership Is Reached, but Faces Scrutiny in Congress*, N.Y. TIMES (Oct. 5, 2015), [http://www.nytimes.com/2015/10/06/business/trans-pacific-partnership-trade-deal-is-reached.html?\\_r=0](http://www.nytimes.com/2015/10/06/business/trans-pacific-partnership-trade-deal-is-reached.html?_r=0) [<https://perma.cc/G8JT-YLTS>] (archived Dec. 29, 2016).

54. Charles N. Brower & Sadie Blanchard, *What's in a Meme? The Truth about Investor-State Arbitration: Why It Need Not, and Must Not, Be Repossessed by States*, 52 COLUM. J. TRANSNAT'L L. 689, 696 (2014).

55. Calmes, *supra* note 53.

56. SHAYERAH ILIAS AKHTAR & VIVIAN JONES, CONG. RES. SERV., PROPOSED TRANSATLANTIC TRADE AND INVESTMENT PARTNERSHIP: IN BRIEF 3 (2015).

57. *Overview of the Trans Pacific Partnership*, OFFICE OF THE U.S. TRADE REPRESENTATIVE, <https://ustr.gov/tpp/overview-of-the-TPP> (last visited Dec. 29, 2016) [<https://perma.cc/B23T-9SHG>] (archived Dec. 29, 2016) [hereinafter *Overview of TPP*].

58. *Transatlantic Trade and Investment Partnership*, OFFICE OF THE U.S. TRADE REPRESENTATIVE, <https://ustr.gov/trade-agreements/free-trade-agreements/>

on investment ever concluded, the TTIP, if ratified, will also have a significant impact on investment since “[t]he two sides account for nearly half of world gross domestic product (GDP), about 30% of global exports, and have investments of more than \$3.7 trillion in each other’s economies.”<sup>59</sup> Furthermore, both the United States and the European Union “have expressed an interest in using the TTIP to present common approaches for the development of globally-relevant rules and standards in future multilateral trade negotiations,”<sup>60</sup> suggesting that the European Union and the United States are working to develop international investment norms through their negotiations of the TTIP.

The future of these two regional multilateral agreements, though, is now uncertain. On January 23, 2017, President Trump formally withdrew the United States as a signatory of the TPP.<sup>61</sup> Following U.S. withdrawal from the TPP, Australia has continued to communicate with other signatories in an effort to push forward on the agreement.<sup>62</sup> Other TPP signatories, including Japan, are instead “turning their focus to the Regional Comprehensive Economic Partnership, an alternative 16-nation deal that includes China and India.”<sup>63</sup> Alternatively, although President Trump’s intentions toward finalizing negotiations on the TTIP are unclear, President Trump has stated a policy in favor of renegotiating BITs rather than conducting trade negotiations at a regional multinational level.<sup>64</sup> Therefore, it is doubtful that the European Union and the United States will become signatories to the TTIP under the Trump Administration.

Even though the future implementation of the TPP and the TTIP is uncertain, it is important to understand the agreements’ underlying policy goals relating to investment as states decide whether to adopt the TPP and the TTIP or begin negotiations on alternative investment treaties. Because the TPP and the TTIP are intended to govern such a large sector of global investment and both have included the Hull

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transatlantic-trade-and-investment-partnership-t-tip/t-tip (last visited Dec. 29, 2016) [<https://perma.cc/8JYL-RLCL>] (archived Dec. 29, 2016).

59. AKHTAR & JONES, *supra* note 56.

60. *Id.*

61. *Presidential Memorandum Regarding Withdrawal of the United States from the Trans-Pacific Partnership Negotiations and Agreement*, THE WHITE HOUSE (Jan. 23, 2017), <https://www.whitehouse.gov/the-press-office/2017/01/23/presidential-memorandum-regarding-withdrawal-united-states-trans-pacific> [<https://perma.cc/6Z7F-XW9K>] (archived Mar. 5, 2017) [hereinafter *Presidential Memorandum Regarding Withdrawal from the TPP*].

62. Isabel Reynolds & Michael Heath, *Australia Pushes for TPP Without U.S. After Trump Exits Deal*, BLOOMBERG POLITICS (Jan. 24, 2017), <https://www.bloomberg.com/politics/articles/2017-01-24/australia-leads-push-for-tpp-without-u-s-after-trump-exits-deal> [<https://perma.cc/29SQ-34DJ>] (archived Mar. 5, 2017).

63. *Id.*

64. *Presidential Memorandum Regarding Withdrawal from the TPP*, *supra* note 61.

Doctrine in their finalized or negotiated texts,<sup>65</sup> it is still necessary to assess whether these two agreements would, if concluded and ratified, re-establish the Hull Doctrine as a binding customary international norm.

### III. ANALYSIS

#### A. *The TPP's and TTIP's Foreign Investment Expropriation Provisions*

Chapter Nine of the TPP details member parties' obligations relating to investment law.<sup>66</sup> TPP Article 9.8 defines when an expropriation can lawfully occur:

No Party shall expropriate or nationalise a covered investment either directly or indirectly through measures equivalent to expropriation or nationalisation (expropriation), except: (a) for a public purpose; (2) in a non-discriminatory manner; (c) on payment of prompt, adequate and effective compensation in accordance with paragraphs 2, 3, and 4; and (d) in accordance with due process of law.<sup>67</sup>

The TPP's expropriation provision only applies to a "covered investment," which includes investments made by a national of a member party "in existence as of the date of entry into force of this Agreement for those Parties or established, acquired, or expanded thereafter."<sup>68</sup>

Article 9.8 of the TPP codifies compensation requirements for member parties when an expropriation of a covered investment occurs:

Compensation shall: (a) be paid without delay; (b) be equivalent to the fair market value of the expropriated investment immediately before the expropriation took place (the date of expropriation); (c) not reflect any change in value occurring because the intended expropriation had become known earlier; and (d) be fully realisable and freely transferable.<sup>69</sup>

While the TPP negotiations have formally been concluded and the text finalized (pending ratification and amendments by the signatories), the United States and the European Union have not concluded negotiations on the TTIP, and the TTIP remains in the

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65. See *infra* Section III.A.

66. TRANS PACIFIC PARTNERSHIP CHAPTER 9 – INVESTMENT, at 9-1, <https://ustr.gov/sites/default/files/TPP-Final-Text-Investment.pdf> (last visited Dec. 29, 2016) [<https://perma.cc/T4VN-27EQ>] (archived Dec. 29, 2016) [hereinafter Trans Pacific Partnership Chapter 9].

67. *Id.* at 9-9.

68. *Id.* at 9-1.

69. *Id.* at 9-9.

drafting stages.<sup>70</sup> Nevertheless, the TTIP's definitions for lawful expropriation and compensation in the European Union's internal TTIP draft present identical obligations for nations seeking to expropriate foreign investment under the TPP.<sup>71</sup>

For instance, Article 5.1 of TTIP's Chapter II draft on investment bans expropriation by a member party unless four conditions are present.<sup>72</sup> The proposed TTIP text states:

Neither Party shall nationalize or expropriate a covered investment either directly or indirectly through measures having an effect equivalent to nationalisation or expropriation (hereinafter referred to as 'expropriation') except: (a) for a public purpose; (b) under due process of law; (c) in a non-discriminatory manner; and (d) against payment of prompt, adequate and effective compensation.<sup>73</sup>

Both the TPP and the TTIP require member states to provide "payment of prompt, adequate and effective compensation" to foreign investors whose covered investments have been either expropriated or nationalized by a member party.<sup>74</sup> Not only does this language appear in both the TPP text and the TTIP draft text, but this language is also an exact textual adoption of the Hull Doctrine.<sup>75</sup> The signatories to both the TPP and the TTIP seek to protect investors from unlawful expropriation,<sup>76</sup> demonstrating that the Hull Doctrine has continued to be the preferred public policy stance of developed countries since the formulation of the doctrine in the 1930's.

The underlying policy objectives of the TPP's and TTIP's investment chapters—as well as the objectives of the Hull Doctrine—derive from similar rationales: "first, to protect foreign investors from political and other risks when they invest abroad; and, second, to

70. Leala Padmanabhan, *TTIP: The EU-US trade deal explained*, BBC (Dec. 18, 2014), <http://www.bbc.com/news/uk-politics-30493297> [<https://perma.cc/FK76-D7ZA>] (archived Dec. 29, 2016).

71. Compare Trans Pacific Partnership Chapter 9, *supra* note 66, with TRANSATLANTIC TRADE AND INVESTMENT PARTNERSHIP, CHAPTER II – INVESTMENT, COMMISSION DRAFT TEXT TTIP, at 5, [http://trade.ec.europa.eu/doclib/docs/2015/september/tradoc\\_153807.pdf](http://trade.ec.europa.eu/doclib/docs/2015/september/tradoc_153807.pdf) (last visited Dec. 29, 2016) [<https://perma.cc/8X3R-K7B2>] (archived Dec. 29, 2016) [hereinafter Transatlantic Trade and Investment Partnership, Chapter II].

72. Transatlantic Trade and Investment Partnership, Chapter II, *supra* note 71, at 5.

73. *Id.*

74. Compare Trans Pacific Partnership Chapter 9, *supra* note 66, at 9-9 (requiring "payment of prompt, adequate and effective compensation") with Transatlantic Trade and Investment Partnership, Chapter II, *supra* note 71, at 4 (also requiring "payment of prompt, adequate and effective compensation").

75. See *infra* Section III.A.

76. *Trans-Pacific Partnership: Summary of U.S. Objectives*, OFFICE OF THE U.S. TRADE REPRESENTATIVE, <https://ustr.gov/tpp/Summary-of-US-objectives> (last visited Dec. 29, 2016) [<https://perma.cc/RCE4-QH5Q>] (archived Dec. 29, 2016).

accelerate investment liberalization and market access.”<sup>77</sup> Critics suggest that the expropriation provisions adopted in the TPP merely reflect United States foreign investment policy and “[do] nothing to promote sustainable investment, to combat corruption, or subject investors to responsible behaviour.”<sup>78</sup> The TPP and the TTIP, however, are forward looking in that their investment provisions ensure even greater protections for foreign investors beyond that of the Hull Doctrine.<sup>79</sup> To ensure that full compensation will be fully awarded, both the TPP and the TTIP contain two additional requirements relating to compensation. First, the calculation for compensation is detailed in the two treaties:

Such compensation shall amount to the fair market value of the investment at the time immediately before the expropriation or the impending expropriation became public knowledge, which is earlier, plus interest at a normal commercial rate, from the date of expropriation until the date of payment. . . . Such compensation shall be effectively realisable, freely transferable in accordance with Article 6 [Transfers] and made without delay.<sup>80</sup>

Second, the two treaties require disputes over expropriated property be resolved through international arbitration, not by domestic courts or administrative agencies within the expropriating country.<sup>81</sup> Similar to the majority of BITs that are concluded on investment, Chapter Nine of the TPP requires that “disputes between private parties and governments over investment interests” be brought under the Investor-State Dispute Settlement,<sup>82</sup> hereinafter referred to as ICSID. The European Union under the TTIP hopes to establish a new arbitration system, the Investment Court System (ICS), which would

77. Nathalie Bernasconi-Osterwalder, *How the Investment Chapter of the Trans-Pacific Partnership Falls Short*, INT’L INST. SUSTAINABLE DEV. (Nov. 6, 2015), <http://www.iisd.org/commentary/how-investment-chapter-trans-pacific-partnership-falls-short> [https://perma.cc/LCS5-ADDN] (archived Dec. 29, 2016).

78. *Id.*

79. Transatlantic Trade and Investment Partnership, Chapter II, *supra* note 71, at 5.

80. The text cited is found in the TTIP. Transatlantic Trade and Investment Partnership, Chapter II, *supra* note 71, at 5. The TPP’s language is almost identical; the most significant different is the TPP’s use of the phrase “not reflect any change in value occurring because the intended expropriation had become known earlier” rather than the TTIP’s version: “became public knowledge.” See Trans Pacific Partnership Chapter 9, *supra* note 66, at 9-9.

81. See Trans Pacific Partnership Chapter 9, *supra* note 66, at 9-21; Transatlantic Trade and Investment Partnership, Chapter II, *supra* note 71.

82. Stuart S. Malawer, *Looking at Dispute Resolution in the Trans-Pacific Partnership*, N.Y. L.J. (Dec. 8, 2015), <http://www.newyorklawjournal.com/id=1202744194514/Looking-at-Dispute-Resolution-in-the-TransPacific-Partnership?slreturn=20160016212654> [https://perma.cc/3XG9-VD84] (archived Dec. 29, 2016).

supplant ICSID.<sup>83</sup> Settling these disputes through international arbitration rather than domestic courts encourages foreign investment because “[f]oreign investors strongly prefer international arbitration to the host country’s courts. One study revealed that, in their investment decisions, investors tend to add a substantial legal risk premium ‘to reflect the contingent risk of subjection to a foreign court rather than a neutral international forum.’”<sup>84</sup> International arbitration as a mechanism for enforcing the TPP’s and the TTIP’s substantive laws is thus critical for effecting an increase in foreign investment.

By implementing the Hull Doctrine and striving to form the ICS, the European Commission recognizes that the TTIP incentivizes FDI by increasing investment stability and “by making it easier for EU companies to invest in the US, and for US companies to invest in the EU.”<sup>85</sup> These advantages arising from the TTIP enable “European companies [to] expand globally and remain competitive internationally.”<sup>86</sup> In contrast to investment laws adopted by countries such as India, Indonesia, and Brazil, the signatories to the TPP and the TTIP have incorporated a robust investment arbitration mechanism. In a Brazil-Mozambique BIT, for instance, the two countries criticized arbitration as too investor friendly and adopted to use “conciliatory settlement of disputes” rather than a neutral arbitrator.<sup>87</sup>

The status of Vietnam as a TPP signatory<sup>88</sup> also demonstrates the rising preeminence of the Hull Doctrine since the doctrine’s fall from customary international law. Since World War II, “[t]he most widespread expropriations have occurred in the countries which adopted communism.”<sup>89</sup> Vietnam was not an exception. In 1975, the Vietnamese government expropriated American-owned property and nationalized private businesses owned by South Vietnamese individuals.<sup>90</sup> However, in 1992, Vietnam changed its policy toward

83. *Investment: Creating more investment opportunities in the EU and the US*, EUROPEAN COMMISSION, [http://trade.ec.europa.eu/doclib/docs/2015/november/tradoc\\_153996.5%20Investment.pdf](http://trade.ec.europa.eu/doclib/docs/2015/november/tradoc_153996.5%20Investment.pdf) (last visited Dec. 29, 2016) [<https://perma.cc/8HZY-8327>] (archived Dec. 29, 2016) [hereinafter *Investment: Creating more investment opportunities in the EU and the US*].

84. Note: *Protection of Foreign Direct Investment in a New World Order: Vietnam—A Case Study*, 107 HARV. L. REV. 1995, 2007 (1994) [hereinafter *Vietnam Case Study*].

85. *Investment: Creating more investment opportunities in the EU and the US*, *supra* note 83.

86. *Id.*

87. Sonia E. Rolland & David M. Trubek, *Brazil’s New Model Investment Treaty May Challenge U.S. Approach on ISDS*, 118 Daily Rep. Execs (BNA) B-1 (Jun. 19, 2015).

88. See *Overview of TPP*, *supra* note 57.

89. REPORT ON EXPROPRIATION OF AMERICAN-OWNED PROPERTY, *supra* note 7, at 1066.

90. Thomas J. Lang, *Satisfaction of Claims against Vietnam for Expropriation of U.S. Citizens’ Property in South Vietnam in 1975*, 28 CORNELL INT’L L. J. 265, 295 (1995).

expropriation in the Hien Phap Constitution, arguably “adopting an approach even more protective [for investors] than the Hull formula.”<sup>91</sup> Vietnam’s continued support of the Hull Doctrine since the 1990’s demonstrates the increasing acceptance of the Hull Doctrine by a communist country that had previously rejected the idea of full compensation and pro-investor policies.<sup>92</sup> Even though Vietnam is now a proponent of the Hull Doctrine, more evidence of other nations’ acceptance is needed to ascertain whether this former norm has been re-instated as customary international law during the last decade.

*B. From Paquete Habana to Filartiga: Discerning Evidence of a Customary International Law Norm*

Customary international law is unwritten, binding international law comprised of: “(1) a general and consistent practice of states and (2) some sense of legal obligation to engage in that practice, otherwise known as *opinio juris*.”<sup>93</sup> There is no established method for determining whether a customary international law norm exists. U.S. case law and customary international law scholars rely on different types of evidence (be it treaties, UN resolutions, or domestic law, etc.) to determine the global prevalence of a norm.<sup>94</sup> This Note will first turn to two U.S. Supreme Court cases; both offer guidance on which types of international or legal documents may be used to demonstrate a “general and consistent practice of states” and how that type of evidence has changed over time.<sup>95</sup>

One of the seminal cases outlining the evidence used to establish a customary international norm is the *Paquete Habana*. In the *Paquete Habana*, the U.S. Supreme Court determined that capturing fishing vessels as prizes of war violated customary international law.<sup>96</sup> The Supreme Court traced the history of this contested norm and relied on the following evidence that the norm was binding customary

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91. *Vietnam Case Study*, *supra* note 84.

92. Michael Scaturro, *Vietnam Joins EU Initiative Pushing for Investor Court*, 32 Int’l Trade Rep. (BNA) 2130 (Dec. 10, 2015) (claiming that Vietnam even supports the ICS over concerns for investor protection).

93. THOMAS M. FRANK ET AL., U.S. FOREIGN RELATIONS LAW 98 (2012).

94. *See id.* at 124 (“Customary international law is widely considered to be more difficult to ascertain than some of other forms of law, and the more controversial the means for establishing that law, the more questions may be raised about its hierarchical status.”).

95. *See id.* at 98. For an alternative analysis of these two cases’ incorporation of CIL evidence see Jack L. Goldsmith & Eric A. Posner, *Understanding the Resemblance Between Modern and Traditional Customary International Law*, 40 VA. J. INT’L L. 639, 643–44, 666–68 (2000).

96. *See generally* *The Paquete Habana*, 175 U.S. 677 (1900) (holding that the capture of two fishing vessels during a blockade around Cuba was unlawful).



international law: English orders in Council of 1806 and 1810, international law jurists, rulings in prize courts, "the opinions of eminent statesmen," the domestic laws of foreign nations, treatises, domestic courts of foreign nations, historical practice, military commanders, and military manuals.<sup>97</sup>

Although the *Paquete Habana* Court relied on a variety of sources to determine the existence of a customary international law norm, this evidence was far from comprehensive. The Court almost exclusively looked to European and U.S. jurists, treatises, war history, and statements from government officials to reach its conclusion.<sup>98</sup> The only exceptions included the Court's reference to the Japanese Empire's prize courts and the writings of an Argentine jurist, Carlos Calvo.<sup>99</sup> The Court, however, considered Japan a "civilized nation" and therefore viewed the country's laws as evidence of customary international law.<sup>100</sup> The *Paquete Habana* Court's focus on civilized nations suggests that at the dawn of the twentieth century only the practices of "civilized nations" were relevant in U.S. jurisprudence as evidence of customary international law.<sup>101</sup>

A more contemporary perspective on the evidence used to determine customary international law can be found in *Filartiga v. Pena-Irala*.<sup>102</sup> In *Filartiga*, the plaintiffs sued under the Alien Tort Statute, 28 U.S.C. § 1350, requiring the Second Circuit to determine whether torture constitutes a violation of customary international law.<sup>103</sup> In holding that torture violates customary international law, the *Filartiga* court examined the following evidence: General Assembly Resolutions and Declarations, "the constitutions of over fifty-five nations" that specifically ban torture, international agreements including the International Covenant on Civil and Political Rights and the European Convention for the Protection of Human Rights & Fundamental Freedoms, the U.S. Department of State's memoranda and amicus curiae, as well as "judicial opinions and the works of jurists."<sup>104</sup>

97. *Id.* at 700–08.

98. *See id.* (citing French treatises, the United States war with Mexico, French war conduct during the French Revolution, German books on international law, and statesmen opinions of the Netherlands Ambassador to China, the captain of the Austrian navy, Italian jurists, and Spanish Naval officers).

99. *Id.* at 700, 703–05.

100. *Id.* at 700.

101. *See id.* at 708 ("[B]y the general consent of the civilized nations of the world, and independently of any express treaty or other public act, it is an established rule of international law . . . that coast fishing vessels . . . are exempt from capture as prize of war.").

102. *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980).

103. *See id.* at 889 ("Among the rights universally proclaimed by all nations, as we have noted, is the right to be free from physical torture.").

104. *Id.* at 882–85.

There are two critical issues that arise out of the *Filartiga* court's interpretation of customary international law. First, the *Filartiga* court considered the stances of foreign states, none of whom would have been considered "civilized nations" for purposes of the *Paquete Habana's* opinion.<sup>105</sup> The more inclusive nature of the evidence used by the *Filartiga* court, such as the references to Paraguay's Constitution and the General Assembly declaration that was "adopted without dissent," demonstrates that contemporary customary international law relies on the consensus of all nations, not just developed Western countries.<sup>106</sup> Second, the *Filartiga* court stressed the need to "interpret international law not as it was in 1789, but as it has evolved and exists among the nations of the world today,"<sup>107</sup> rather than tracing the history as the *Paquete Habana* Court insisted.<sup>108</sup>

Legal scholars Jack L. Goldsmith and Eric A. Posner explain that the different sources used to identify customary international law in the *Paquete Habana* and in *Filartiga* suggest that there are two distinct approaches in customary international law.<sup>109</sup> Goldsmith and Posner refer to these two approaches as (1) "traditional" customary international law and (2) "modern" customary international law.<sup>110</sup> The traditional customary international law approach, embodied in the *Paquete Habana* decision, acknowledges that customary international law exists "only if it influences the behavior of states in some identifiable way."<sup>111</sup> Identifying a norm using the traditional approach is a difficult task because states choosing to act as a result of coercion<sup>112</sup> or a "coincidence of interest"<sup>113</sup> should not inform the existence of binding law.<sup>114</sup> States that act in either such way do not evidence "instances of international cooperation, and so labeling the resulting behavior patterns 'norms of [customary international law]

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105. *Paquete Habana*, 175 U.S. at 700.

106. *Filartiga*, 630 F.2d at 882–85.

107. *Id.* at 881.

108. *Paquete Habana*, 175 U.S. at 700–08.

109. Goldsmith & Posner, *supra* note 95, at 640.

110. *See generally id.* (noting that "[e]very two hundred years, it seems, the jurisprudence of customary international law ("CIL") changes" and that *The Paquete Habana* represents the traditional CIL approach while *Filartiga* utilized modern CIL in its analysis).

111. *Id.* at 651.

112. *See id.* at 657 ("Behavior regularities among nations might arise because a powerful state (or coalition of powerful states) has forced a weaker state to engage in actions that are contrary to the interests of the latter state.")

113. *See id.* at 655 ("A coincidence of interest is a behavioral regularity that occurs when nations follow their immediate self-interest independent of any consideration of the actions or interests of other nations.")

114. *See id.* at 654–55 (explaining that to properly establish a customary international law, a state must act out a sense of legal obligation, not because it is convenient or because a state has been coerced).

CIL' is misleading even if it is tempting to characterize every case where conflict is avoided as manifestation of international order."<sup>115</sup>

Goldsmith and Posner acknowledge that the modern customary international law approach is different because this approach emphasizes "looking to technically non-legal sources of law (such as unratified treaties and U.N. General Assembly Resolutions) in identifying CIL."<sup>116</sup> Although many domestic and international courts have adopted this approach in the years since *Filartiga*, there are several conceptual issues that arise when using the modern approach to identify a binding norm.<sup>117</sup> First, the modern customary international law approach "fails to [appropriately] reflect state practice."<sup>118</sup> For example, although the Second Circuit in *Filartiga* found that customary international law bars torture, many states in practice use torture to suit their needs despite openly repudiating the act.<sup>119</sup>

Second, customary international law "is often unwritten, the necessary scope and appropriate sources of 'state practice' are unsettled, and the requirement that states follow customary norms from a 'sense of legal obligation' is difficult to verify."<sup>120</sup> The unwritten nature of customary law and the resulting difficulty in clearly identifying a binding norm is especially problematic in the modern approach, which relies heavily on treaties as evidence.<sup>121</sup> Although treaties can provide written, codified evidence of a norm,<sup>122</sup> treaties and customary international law are not entirely overlapping. For instance, treaties are not binding on non-signatory parties and a provision in a treaty may be a consequence of a *quid-pro-quo* negotiation of which parties do not consider a binding norm.<sup>123</sup> Moreover, "[c]ustomary law must be not only general, but also practiced. No such practice requirement, however, applies to the recognition of treaties."<sup>124</sup> Therefore, it is probably most appropriate to

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115. *Id.* at 658.

116. *Id.* at 667.

117. *See id.* at 667 ("Other national and international courts have in recent years embraced a similar approach to CIL.").

118. *Id.*

119. *See id.* at 666 ("The [*Filartiga*] Court acknowledged that this holding was not based on state practice, because many nations of the world torture their citizens.").

120. Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 HARV. L. REV. 815, 855 (1997).

121. *See* Hiram E. Chodosh, *An Interpretive Theory of International Law: The Distinction Between Treaty and Customary Law*, 28 VAND. J. TRANSNAT'L L. 973, 1041 (1995) (explaining "a modern tendency . . . to define customary law in terms of treaty . . .").

122. *Id.* at 1015, 1023.

123. *See id.* at 979.

124. *Id.* at 1027.

view treaties as a source of customary international law that “alone do[es] not make customary law.”<sup>125</sup>

### C. *The Status of the Hull Doctrine in Twenty-First Century Customary International Law*

In *Banco Nacional de Cuba v. Sabbatino*, the U.S. Supreme Court acknowledged that “[t]here are few if any issues in international law today on which opinion seems to be so divided as the limitations on a state’s power to expropriate the property of aliens.”<sup>126</sup> The Supreme Court in recent years has provided no guidance on its views of the Hull Doctrine’s status as an international law canon. In determining whether the Hull Doctrine has been reinstated as customary international law since the conclusion of the TPP and the pending conclusion of the TTIP, this Note will look to an array of evidence, all of which has been vetted by the *Paquete Habana* and *Filartiga* courts.<sup>127</sup>

Although the majority of legal analysts at the turn of the twenty-first century agreed that the Hull Doctrine had not been followed by a consensus of states out of a sense of legal obligation, there have been significant developments since the norm fell out of global graces in 1973.<sup>128</sup> At that time, “[e]ighty-six governments supported a resolution” that nullified the Hull Doctrine’s standing as customary international law.<sup>129</sup> Recently, some scholars have pointed to “current international practice as reflected in national investment laws, bilateral investment treaties, multilateral conventions, and international arbitral awards” to suggest that the Hull Doctrine’s “prompt, adequate, and effective” compensation requirement has returned to prominence in international investment law.<sup>130</sup>

Perhaps the most convincing evidence that the Hull Doctrine has been re-established as customary international law is the sheer

125. See *id.* at 1041 (relying on Article thirty-four of the Vienna Convention on the Law of Treaties, which states that a “treaty does not create either obligations or rights for a third State without its consent”) (internal citations omitted).

126. *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 428 (1964).

127. See *supra* Section III.B.

128. See Norton, *supra* note 11 at 475; *supra* Section II.A.

129. See Norton, *supra* note 11 at 474 (“Eighty-six governments supported a resolution holding that a state expropriating foreign property ‘is entitled to determine the amount of possible compensation and the mode of payment . . . in accordance with the national legislation of [that] State.’”) (alteration in original).

130. *Vietnam Case Study*, *supra* note 84, at 1996. See also ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT (OECD), INTERNATIONAL INVESTMENT LAW: A CHANGING LANDSCAPE 44 n.1 (2005) (“Nowadays, the Hull formula and its variations are often used and accepted and considered as part of customary international law.”).

number of BITs that have required full compensation for investors of expropriated property.<sup>131</sup> As of 1991, a “survey of 335 of these treaties [BITs] then in force found that they all required compensation to be paid without undue delay (the ‘prompt’ component of the Hull formula) and to be freely transferable (the ‘effective’ component).”<sup>132</sup> Developed countries as well as developing countries have incorporated the Hull Doctrine in BITs. For instance, BITs “between Argentina and El Salvador, between Ethiopia and Sudan, and between the Russian Federation and Turkey” have all integrated the Hull Doctrine’s favorable investment standard.<sup>133</sup> The inclusion of the Hull Doctrine in the BITs by Argentina and El Salvador are particularly suggestive of a trend toward adoption of the Hull Doctrine because it was precisely these Latin American countries that resisted the Hull Doctrine in favor of the Calvo Doctrine during the era of decolonization.<sup>134</sup>

The recent trend adopting the Hull doctrine can be explained by two rationales. First, “the primary purpose of BITs is to promote foreign investment” and the Hull Doctrine is more favorable to investor interests than the Calvo Doctrine.<sup>135</sup> Second, “capital-exporting states drove the movement to enter BITs, and they understandably sought to have the language of these treaties be in terms most favorable to their citizens.”<sup>136</sup>

Nevertheless, not all BITs have included the exact formulation of the Hull Doctrine. Both the Oman-Netherlands BIT (2009) and the Chile-Tunisia BIT (1998) included a “just compensation” provision as opposed to “payment of prompt, adequate, and effective compensation.”<sup>137</sup> In the Oman-Netherlands BIT “rather than requiring that compensation be based on an investment’s value immediately before the expropriation measures become public knowledge, the [2009] BIT provides that the value ‘shall represent the *real market* value of the investments affected immediately before the decision for the expropriation was taken or became publically

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131. See *Vietnam Case Study*, *supra* note 84, at 1998.

132. *Id.* at 2000.

133. Shain Corey, *But Is It Just? The Inability for Current Adjudicatory Standards to Provide ‘Just Compensation’ for Creeping Expropriations*, 81 *FORDHAM L. REV.* 973, 991 (2013).

134. See *id.* (discussing the growing popularity of BITs); Daly, *supra* note 39, at 1150 (explaining the popularity of the Calvo doctrine in Latin America during decolonization).

135. See Corey, *supra* note 133, at 991.

136. *Id.*

137. U.N. Conference on Trade and Development (UNCTAD), *Expropriation: UNCTAD Series on Issues in International Investment Agreements II*, UNCTAD/DIAE/IA/2011/7, 28 (2012) (quoting Article 4 of Oman–Netherlands BIT).

known.”<sup>138</sup> The China-Peru BIT requires “appropriate compensation,” which an international arbitration panel later interpreted to mean that “the amount needed should place the claimant in the same position he or she would have been without the act of expropriation.”<sup>139</sup> Another BIT between Uzbekistan and Bangladesh required “fair and equitable compensation.”<sup>140</sup> This BIT stands in contrast with the Italy-Bangladesh BIT, which incorporates the “prompt, adequate and effective”<sup>141</sup> wording and suggests that Italy, a developed Western state, may have influenced the precise wording of this compensation provision with Bangladesh.

These examples demonstrate that, while the majority of BITs adhere to the Hull doctrine, several BITs have adopted different standards such as just compensation, appropriate compensation, or fair and equitable compensation.<sup>142</sup> The World Bank Guidelines—often cited as proof that the Hull Doctrine has successfully re-surfaced as customary international law<sup>143</sup>—acknowledge that “[t]he point of significant disagreement over the conditions of permissible expropriations has concerned the measure of compensation for such expropriations.”<sup>144</sup> In particular, the World Bank Guidelines assert that although countries have incorporated different standards in BITs, “[t]he two approaches [the Hull Doctrine and then the alternative approaches] are not, of course, mutually exclusive—for example, compensation that is prompt, adequate and effective may also be the most appropriate.”<sup>145</sup> Thus, the World Bank Guidelines recognize a distinction between the various compensation approaches employed by BITs.

The World Bank Guidelines, however, too easily conflate the Hull Doctrine and the alternative approaches. At the height of the Hull

138. Edward G. Kohoe & Paul B. Maslo, *Trends in International Investment Agreements, 2009/2010*, in YEARBOOK ON INTERNATIONAL INVESTMENT LAW & POLICY 2010–2011, 50 (Karl P. Sauvant ed., 2012).

139. LEON E. TRAKMAN & NICOLA W. RANIERI, REGIONALISM IN INTERNATIONAL INVESTMENT LAW 240 (2013).

140. Agreement between the Government of the People’s Republic of Bangladesh and the Government of the Republic of Uzbekistan on Reciprocal Protection and Promotion of Investments, Bangl.–Uzb., art. 6.2, Feb. 14, 1998, <http://investmentpolicyhub.unctad.org/Download/TreatyFile/279> [<https://perma.cc/H7LN-QYD5>] (archived Jan. 16, 2017).

141. August Reinish, *How Narrow Are Narrow Dispute Settlement Clauses in Investment Treaties?*, 2 J. INT’L DISP. SETTLEMENT 115, 157 (2011).

142. See *Vietnam Case Study*, *supra* note 84, at 2000 (referring to the survey completed during the 1990s discussed above).

143. See, e.g., *id.*

144. LEGAL FRAMEWORK FOR THE TREATMENT OF FOREIGN INVESTMENT, WORLD BANK GROUP 25 (1992), <http://documents.worldbank.org/curated/en/955221468766167766/pdf/multi-page.pdf> [<https://perma.cc/S62L-9Y9E>] (archived Jan. 16, 2017).

145. *Id.*

Doctrine's decline, "developing countries formally challenged the United States' standard of prompt, adequate, and effective compensation" in the Charter of Economic Rights and Duties of States, which advocated for the use of an "appropriate compensation" approach.<sup>146</sup> This interpretation of the "appropriate compensation" during the 1970s demonstrates that the meaning of that standard was intended to diverge from the Hull Doctrine.

Even BITs that do not explicitly incorporate the Hull Doctrine calculate interest and allow for direct recourse by private foreign investors to the international arbitration system.<sup>147</sup> These changes demonstrate that BITs during the 1990s and early twenty-first century have undeniably moved toward a more investor-friendly compensation approach. It remains, though, that not all BITs adopt the Hull Doctrine.<sup>148</sup>

A large part of the TPP's and the TTIP's significance is the inter-regional nature of these two treaties.<sup>149</sup> During the General Agreement on Tariffs and Trade (GATT) Uruguay Round, developed states "attempt[ed] to negotiate a comprehensive agreement on investment," intending for such agreement to "provid[e] a comprehensive set of investment-liberalization and investment-protection measures."<sup>150</sup> Although the WTO member states concluded the Agreement on Trade-Related Investment Measures (TRIMs) as a companion multilateral treaty to the WTO, the TRIMs' application is narrow and not commonly invoked.<sup>151</sup> No other large scale multilateral investment treaties have been concluded. The TPP and the TTIP thus suggest a departure from the BIT-centric nature of investment law.<sup>152</sup> The TPP in particular demonstrates a more global trend in investment law because its signatories include Asian, South Pacific, and North American countries, all of which have agreed to the expropriation provisions of the agreement.<sup>153</sup> As an inter-regional investment agreement, the

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146. Patricia M. Robin, Comment, *The BIT Won't Bite: The American Bilateral Investment Treaty Program*, 33 AM. U.L. REV. 931, 952 (1984) (citing the Charter of Economic Rights and Duties of States, G.A. Res. 3281, 29 U.N. GAOR Supp. (No. 31) U.N. Doc A/9631 (1974)).

147. See generally *Series on Issues in International Investment Agreements II*, *supra* note 28.

148. See *supra* Section III.C; see, e.g., *Series on Issues in International Investment Agreements II*, *supra* note 28, at 28.

149. See *Overview of TPP*, *supra* note 57.

150. Riyaz Dattu, Essay, *A Journey From Havana to Paris: The Fifty-Year Quest for the Elusive Multilateral Agreement on Investment*, 24 FORDHAM INT'L L.J. 275, 276 (2000).

151. See *id.* at 291 ("[T]he TRIMs Agreement has been widely criticized as being 'extremely limited in scope and . . . largely attuned to the concerns of an era in policy-making characterized more by suspicion of—and the need to control—foreign investment than by keenness to compete for and attract such investment.'") (alteration in original).

152. *Overview of TPP*, *supra* note 57

153. *Id.*

TPP's impact offers powerful evidence of customary international law and "[a] promising trend in the quest for further liberalization of investment rules, [which] is found in the expansion of inter-regional trade and investment agreements."<sup>154</sup>

The BITs', TPP's, and TTIP's impact on customary international law may be reduced, however, because it is questionable whether treaties are reliable indicators of customary international law.<sup>155</sup> Since treaties are often negotiated on a *quid-pro-quo* basis, treaties may be more indicative of coercion or concession than of customary law.<sup>156</sup> In contrast, some international legal scholars "view [treaties] as vehicles that entrench customary principles of international law relating to the protection of foreign investment."<sup>157</sup> One scholar suggests that "where bilateral investment treaties 'express a duty which customary law imposes or is widely believed to impose, they give very strong support to the existence of such a duty and preclude the contracting States from denying its existence."<sup>158</sup>

In addition to BITs, international arbitral awards have overwhelmingly favored investors by requiring states that have expropriated property to pay "prompt, adequate, and effective compensation."<sup>159</sup> The adoption of the Hull doctrine in these arbitral awards, however, is not demonstrative of a recent shift away from the Calvo doctrine. Arbitral Awards even in the 1970s adhered to the Hull doctrine's idea of full compensation.<sup>160</sup> For instance, many arbitrations of the Iran-U.S. Claims Tribunal adopted the Hull Doctrine.<sup>161</sup>

The decision to award "prompt, adequate, and effective compensation" in the Iran-U.S. Claim Tribunals, however, was by no means unanimous.<sup>162</sup> The dissent of several Iran-U.S. Claims Tribunals decided in favor of Iran by "cit[ing] the recent General Assembly resolutions and favorable commentaries on them as evidence of a new international standard," the Calvo Doctrine.<sup>163</sup> In an arbitration on the expropriation of Libyan American Oil Company, the panel rejected the application of the Hull Doctrine; the arbitrators "held that, although 'the classical formula of [prompt], adequate and effective compensation remain[s] as a maximum and a practical guide

154. Dattu, *supra* note 150, at 311.

155. *See supra* Section III.B.

156. *See id.*; *see also* Chodosh, *supra* note 121, at 979.

157. Bernard Kishoiyian, Note, *The Utility of Bilateral Investment Treaties in the Formulation of Customary International Law*. 14 NW. J. INT'L L. & BUS. 327, 327 (1994).

158. *Id.* at 328

159. *See* Norton, *supra* note 11, at 502 (internal quotations omitted).

160. *See id.* at 477-78.

161. *See id.* at 483 ("All of the majority opinions have required the payment of full compensation.") (emphasis in original).

162. *Id.* at 486.

163. *Id.*



for . . . assessment,' it was not the only compensation standard applicable under international law."<sup>164</sup> In valuing the arbitration award, the panel applied an "appropriate compensation" standard, which can be "construed to permit compensation of less than full value."<sup>165</sup> The Libyan American Oil Company award and the dissents in the Iran-U.S. Claims Tribunals demonstrate that some arbitrators supported the Calvo Doctrine and alternative compensation approaches such as "appropriate compensation" as valid substitutions to the typically Western compensation approach, the Hull Doctrine.<sup>166</sup>

Although there have been inconsistencies in the computation for compensating foreign investors,<sup>167</sup> examples where arbitration panels applied the Hull Doctrine are abundant. The commonality of the Hull Doctrine can be ascribed to the growing popularity of BITs, the great majority of which call on panels to award "prompt, adequate and effective compensation."<sup>168</sup> In perhaps the most high-profile arbitration in the last decade, Yukos Oil Company ("Yukos") brought a claim against the Russian Federation for unlawful expropriation.<sup>169</sup> The Arbitration panel found that the Russian Federation indirectly expropriated Yukos' assets and violated Article 13 of the Energy Charter Treaty, which required states to provide "prompt, adequate and effective compensation" upon expropriation of a foreign investor's property.<sup>170</sup> Applying the Hull Doctrine, the panel awarded \$66.6 billion to the investors, which the panel reduced by 25 percent to \$50 billion for contributory negligence.<sup>171</sup>

Even in *Alpha Projektholding GmbH v. Ukraine* ("Alpha"), where a tribunal did not explicitly adopt the Hull formula, the tribunal awarded "payment of adequate compensation."<sup>172</sup> The panel, however,

164. *Id.* at 481 (alterations in original).

165. *Id.* at 488.

166. *Id.* at 486, 488.

167. See generally Joshua B. Simmons, *Valuation in Investor-State Arbitration: Toward a More Exact Science*, 30 BERKELEY J. INT'L L. 196, 208–13 (2012) (claiming that although arbitrators adopt the common "prompt, adequate and effective" compensation standard, in more than half the arbitral awards studied in expropriation cases, tribunals "split the baby" by awarding less than the full amount of compensation claimed by successful claimants).

168. 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, 666–68 (explaining that developing countries that had previously rejected the Hull formulation are now signing BITs that "require prompt, adequate and effective compensation").

169. MEETING OF THE ENERGY CHARTER INDUSTRY ADVISORY PANEL (IAP) 2 (2015), [http://www.energycharter.org/fileadmin/DocumentsMedia/IAP/20150721/IAP20150721-S1-Fact\\_Sheet\\_Yukos.pdf](http://www.energycharter.org/fileadmin/DocumentsMedia/IAP/20150721/IAP20150721-S1-Fact_Sheet_Yukos.pdf) [<https://perma.cc/J57B-YMRA>] (archived Jan. 14, 2017).

170. *Id.*

171. *Id.*

172. *Alpha Projektholding GmbH v. Ukraine*, ICSID Case No. ARB/07/16, Award, ¶ 404 (Nov. 8, 2010), <http://www.italaw.com/sites/default/files/case-documents/>

did not interpret “adequate compensation” as the panel did in the Libyan American Oil Company arbitration.<sup>173</sup> In the Alpha arbitration, the tribunal held that “the amount of compensation must put Claimant in the situation, in which it would have been if Respondent had not breached the UABIT,”<sup>174</sup> exhibiting a policy favorable toward investors that in practice mirrors the application of the Hull Doctrine. This trend shows that developing countries recognize the benefits of policies, such as the Hull Doctrine, that encourage foreign investment. Moreover, one may posit that countries that had previously rejected the Hull Doctrine are now finding favor with it because “[f]oreign investments in these countries no longer involve pre-existing long-term concessions ceded on unfavorable terms to former colonial authorities, but rather new investments invited on freely negotiated terms.”<sup>175</sup> Because developing countries are no longer subject to such colonial pressures, “these countries lack their previous justification for expropriating the new foreign investments with only partial compensation.”<sup>176</sup>

Even though many developing countries since the 1990s have submitted to investment arbitration, some have expressed disdain for this investment dispute system.<sup>177</sup> For instance, countries including Bolivia, Venezuela, and Ecuador have either limited ICSID’s jurisdiction in investment matters or have rejected the ICSID arbitration system outright.<sup>178</sup> The former Attorney General and current Chief Justice of Singapore, Sundaresh Menon, expressed aversion to investment arbitration when, in 2012, he exclaimed: “ruling[s] in favor of investors from traditionally capital-exporting countries [are] the ‘price’ that has to be paid to gain credibility and access to the privileged club of elite international arbitrators.”<sup>179</sup> Not only is Menon’s commentary indicative of developing countries’ views that the Hull doctrine is not obligatory under international law, but it also supports the criticism previously discussed regarding the use of treaties as evidence of customary law.<sup>180</sup> Menon implies that Singapore subjects itself to pro-investor awards in investment arbitrations as a compromise to gain access to the benefits of economic relations with developed countries that insist on using ICSID and the Hull Doctrine to protect foreign investment.<sup>181</sup>

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ita0026.pdf [https://perma.cc/L3W8-SEK5] (archived Jan. 14, 2017) [hereinafter *Alpha*].

173. See *supra* Section III.C.

174. See *Alpha*, *supra* note 172, at ¶ 436.

175. *Vietnam Case Study*, *supra* note 84, at 1998.

176. *Id.*

177. Brower & Blanchard, *supra* note 54, at 692.

178. *Id.*

179. *Id.*

180. See *supra* Section III.B.

181. Brower & Blanchard, *supra* note 54, at 692; see also *supra* Section III.B.

Certainly the evidence provided by the thousands of BITs, the TPP, the TTIP, investor-state arbitral awards, and the practice of nation-states demonstrates, at the very least, a trend toward implementing the Hull Doctrine and safeguarding the rights of investors. In fact, this evidence suggests that, as of 2016, there may be a consensus of states (the first requirement in establishing customary international law) that have incorporated the Hull Doctrine into their investment law policies.<sup>182</sup> However, the statements made by officials of developing states as well as the *quid-pro-quo* nature of treaty negotiations in BITs, the TPP, and the TTIP indicate that developing states do not feel obligated to provide “payment of prompt, adequate and effective compensation.”<sup>183</sup> This Note thus posits that the second requirement necessary to establish a customary international law, *opinio juris*, has not yet been met.

#### IV. SOLUTION

The TPP and the TTIP, as large inter-regional treaties,<sup>184</sup> have initiated a new era in international investment law, resulting in developing countries’ continued incorporation of the Hull Doctrine.<sup>185</sup> Still, a lack of *opinio juris* among developing countries has impeded the Hull Doctrine’s re-emergence as a customary international norm.<sup>186</sup> This Note proposes that adopting a new plurilateral treaty, as opposed to a multilateral treaty, under the framework of the WTO would likely result in the Hull Doctrine’s acceptance in twenty-first century customary international law. Before delving into the substantive analysis of this proposal, this Note will first address the difference between WTO multilateral and plurilateral treaties.

##### *A. How the Adoption of a Comprehensive Plurilateral Treaty on Investment within the WTO Would Establish Customary International Law*

The conclusion of the Uruguay Round of Trade in 1995 culminated in the Marrakesh Agreement, the constitutive document of the WTO.<sup>187</sup> The substantive and procedural rules governing the WTO

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182. See *supra* Section III.B.

183. See SALACUSE, *supra* note 22, at 68.

184. Overview of the TPP, *supra* note 57.

185. See e.g., Vietnam Case Study, *supra* note 84, at 2005 (describing Vietnam’s changing position on investment law).

186. See Brower & Blanchard, *supra* note 54, at 692 (highlighting government officials from developing countries and their public statements rejecting pro-investment policies); *supra* Section III.C.

187. Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994 1867 U.N.T.S. 154.

consist of the Marrakesh agreement and four annexes.<sup>188</sup> Those four annexes consist of both multilateral and plurilateral treaties.<sup>189</sup> Multilateral agreements include the WTO's primary substantive rules and are binding upon all WTO member states.<sup>190</sup> Plurilateral treaties, instead, cover limited, specific topics, and WTO member states have no obligation to become parties to these treaties.<sup>191</sup> Both plurilateral and multilateral treaties consist of multiple signatory parties.<sup>192</sup> Although four plurilateral agreements were established after the Uruguay Round, only two plurilateral agreements—trade in civil aircraft and government procurement—remain effective.<sup>193</sup>

### 1. The WTO as a Promising Venue for Concluding the Next Global Investment Treaty

One legal scholar, Kevin Kennedy, has claimed that “a strong argument can be made that the WTO is the proper forum for concluding a multilateral investment agreement.”<sup>194</sup> Since the formation of the WTO in 1995, 164 states have become members.<sup>195</sup> Many of the WTO's members are states that have been skeptical of the Hull Doctrine;<sup>196</sup> these states include Bangladesh, Ukraine, and Venezuela, among others.<sup>197</sup> If a WTO agreement were to include a provision requiring “prompt, adequate, and effective compensation,” the number of developing countries in the WTO that had previously been proponents of the Calvo doctrine could become members of this

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188. WORLD TRADE ORGANIZATION (WTO), UNDERSTANDING THE WTO 23 (2015), [https://www.wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/utw\\_chap2\\_e.pdf](https://www.wto.org/english/thewto_e/whatis_e/tif_e/utw_chap2_e.pdf) [<https://perma.cc/BL5W-CMEG>] (archived Jan. 14, 2017).

189. *Id.* at 34, 36, 51.

190. WTO, THE WTO MULTILATERAL TRADE AGREEMENTS 3 (2014), [https://ecampus.wto.org/admin/files/Course\\_622/CourseContents/MTA-E-R3-Print.pdf](https://ecampus.wto.org/admin/files/Course_622/CourseContents/MTA-E-R3-Print.pdf) [<https://perma.cc/L964-TJPH>] (archived Jan. 14, 2017).

191. *Plurilaterals: of minority interest*, WTO, [https://www.wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/agrm10\\_e.htm](https://www.wto.org/english/thewto_e/whatis_e/tif_e/agrm10_e.htm) (last visited Jan. 14, 2017) [<https://perma.cc/TA4K-MFMV>] (archived Jan. 14, 2017) [hereinafter *Plurilaterals: of minority interest*].

192. *Id.*

193. *Id.*

194. Kevin C. Kennedy, *A WTO Agreement on Investment: A Solution In Search of A Problem?*, 24 U. PA. J. INT'L ECON. L. 77, 180 (2003).

195. *Understanding the WTO – Members*, WTO, [https://www.wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/org6\\_e.htm](https://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm) (last visited Jan. 14, 2017) [<https://perma.cc/EY7D-JBJK>] (archived Jan. 14, 2017) [hereinafter *WTO Members*]; see also Kennedy, *supra* note 194, at 179 (recognizing the “broad-based membership” of WTO member states).

196. See *supra* Section III.C.

197. See *WTO Members*, *supra* note 195 (listing the 164 WTO member states and observer governments).

new agreement, thus furthering the Hull Doctrine's acceptance under international law.<sup>198</sup>

Concluding an investment treaty within the WTO's existing framework is sensible "because of the close link between trade and liberalized investment rules."<sup>199</sup> The WTO's structure would naturally facilitate a future negotiation on a trade and investment treaty because the WTO already has in place the Working Group on Trade and Investment.<sup>200</sup> In this working group, representatives from member states have "conduct[ed] analytical work on the relationship between trade and investment" since 1996.<sup>201</sup> Here, a negotiation could spark interest in an investment agreement with global implications. Continuing such discussion during a WTO trade round would also naturally advance negotiations on an investment agreement.<sup>202</sup> Although the current trade round, the Doha Round (2001–present), has not made investment law a priority, the mere ability to discuss trade and investment terms in a trade round likely increases the feasibility of concluding such a deal.<sup>203</sup>

The WTO's dispute settlement system offers yet another favorable benefit for effectively adjudicating investment law disputes.<sup>204</sup> The WTO's dispute settlement body (DSB) is arguably the most successful judicial organ in international law. Member states have initiated 518 disputes within the DSB as of January 2017,<sup>205</sup> demonstrating the DSB's legitimacy among member states in comparison with other

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198. See *Plurilaterals: of minority interest*, *supra* note 191 (becoming a member of a plurilateral agreement is voluntary); *supra* Section III.C.

199. Kennedy, *supra* note 194, at 180.

200. *Trade and Investment*, WTO, [https://www.wto.org/english/tratop\\_e/invest\\_e/invest\\_e.htm](https://www.wto.org/english/tratop_e/invest_e/invest_e.htm) (last visited Jan. 14, 2017) [<https://perma.cc/9B5D-R8BR>] (archived Jan. 14, 2017).

201. *Id.*

202. See *The Uruguay Round*, WTO, [https://www.wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/fact5\\_e.htm](https://www.wto.org/english/thewto_e/whatis_e/tif_e/fact5_e.htm) (last visited Jan. 14, 2017) [<https://perma.cc/23ED-BXA6>] (archived Jan. 14, 2017) (detailing the negotiations that occur during trade rounds, such as the Uruguay Round).

203. WTO, AID FOR TRADE AT A GLANCE 2015 258 (2015), [https://www.wto.org/english/res\\_e/booksp\\_e/a4t11\\_2\\_chap\\_e.pdf](https://www.wto.org/english/res_e/booksp_e/a4t11_2_chap_e.pdf) [<https://perma.cc/S3WB-KWML>] (archived Jan. 14, 2017) ("[A]greement and implementation of the Doha Round . . . and, eventually, an agreement on investment, would provide multilateral or plurilateral support for high-quality trade facilitation.").

204. See *Introduction to the WTO dispute settlement system*, WTO, [https://www.wto.org/english/tratop\\_e/dispu\\_e/disp\\_settlement\\_cbt\\_e/c1s5p1\\_e.htm](https://www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/c1s5p1_e.htm) (last visited Jan. 14, 2017) [<https://perma.cc/P66P-SATE>] (archived Jan. 14, 2017) ("[T]he applicability of the DSU to those Plurilateral Trade Agreement is subject to the adoption of a decision by the parties to each of these agreements setting out the terms for the application of the DSU to the individual agreement. . . .").

205. *Current status of disputes*, WTO, [https://www.wto.org/english/tratop\\_e/dispu\\_e/dispu\\_current\\_status\\_e.htm](https://www.wto.org/english/tratop_e/dispu_e/dispu_current_status_e.htm) (last visited Jan. 14, 2017) [<https://perma.cc/6UZU-S66E>] (archived Jan. 14, 2017).

international institutions.<sup>206</sup> The current international arbitration system to which the majority of BITs adhere, the ICSID, receives frequent criticism because its arbitration panels have not been consistent in the valuation of compensation when applying the Hull Doctrine.<sup>207</sup> This Note posits that bringing investment disputes under the DSB may lead to a more uniform application of the Hull Doctrine. Even though the WTO's DSB has not adopted a formal system of precedent, the WTO's system incorporates quasi-precedent and appellate review.<sup>208</sup> These features of the DSB would likely lead to more consistent results than the ICSID, where arbitral panels frequently use different valuation techniques for calculating damages.<sup>209</sup>

Even though the WTO's dispute settlement system may positively contribute to a more consistent application of the Hull Doctrine, the DSB as it currently operates is perhaps the largest stumbling block to feasibly concluding an investment treaty. The WTO's DSB allows only states to seek recourse against other sovereign states.<sup>210</sup> If a comprehensive investment agreement were to be concluded, the current standing conditions in the DSB would bar investors from seeking relief against states for unlawful expropriation.<sup>211</sup> There are two possible alternatives to this predicament. First, member states of such an investment agreement could negotiate an exception, allowing

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206. See David Davenport, *International Criminal Court: 12 Years, \$1 Billion, 2 Convictions*, FORBES (Mar. 12, 2014), <http://www.forbes.com/sites/daviddavenport/2014/03/12/international-criminal-court-12-years-1-billion-2-convictions-2/#2715e4857a0b40186ff36440> [<https://perma.cc/RAR3-G2S5>] (archived Jan. 14, 2017) (pointing to the ICC's limited legitimacy where there has only been two successful convictions in twelve years).

207. See Simmons, *supra* note 167, at 200, 208 (explaining that some panels have calculated interest differently, while other panels have used different valuation methods such as discounted flow analysis or "splitting the baby," leading to inconsistencies in the application of the "payment of prompt, adequate and effective compensation" standard).

208. *Legal effect of panel and appellate body reports and DSB recommendations and rulings*, WTO, [https://www.wto.org/english/tratop\\_e/dispu\\_e/dispu\\_settlement\\_cbt\\_e/c7s2p1\\_e.htm](https://www.wto.org/english/tratop_e/dispu_e/dispu_settlement_cbt_e/c7s2p1_e.htm) (last visited Jan. 14, 2017) [<https://perma.cc/47GT-X6K8>] (archived Jan. 14, 2017) [hereinafter *Legal effect of panel and appellate body reports*] ("Although unadopted panel reports have no formal legal status in the GATT or WTO system, the reasoning contained in an unadopted panel report can nevertheless provide useful guidance to a panel or the Appellate Body in a subsequent case involving the same legal question.").

209. See Simmons, *supra* note 167, at 200; *Legal effect of panel and appellate body reports*, *supra* note 208; see also Rafael Leal-Arcas, *The Multilateralization of International Investment Law*, 35 N.C.J. INT'L L. & COM. REG. 33 (2009) (The Hull "formula has not been applied literally [by ICSID panels]: 'Prompt' has not excluded payments over time, and 'adequate' has often not been the equivalent of full value").

210. Todd S. Shenkin, Note, *Trade-Related Investment Measures in Bilateral Investment Treaties and the GATT: Moving Toward a Multilateral Investment Treaty*, 55 U. PITT. L. REV. 541, 544 (1994).

211. *Id.*

recourse for private individuals to the DSB only in unlawful expropriation claims against a foreign government.<sup>212</sup> This solution, however, is problematic because it undermines the political aspect of the WTO that centers on negotiation among sovereign states, often behind closed doors.<sup>213</sup> A second alternative solution would allow states to take up their own nationals' cases and seek remedies for those nationals who have been harmed by unlawful expropriations of other nation-states.<sup>214</sup> This solution would likely be detrimental to investors and the public. Investors would probably encounter difficulties in collecting compensation from their own government, and the government would have to expend its own money in advocating investor claims.<sup>215</sup> Negotiations on such an issue could have the consequence of derailing an investment agreement within the WTO.

The trade negotiations themselves are yet another impediment to the conclusion of a new investment treaty because the successful conclusion of such an agreement is likely dependent on the Doha Trade Round. The Doha Round, which began in 2001, has been deemed a failure by many legal scholars.<sup>216</sup> It is unclear when a new trade round will begin. The year 2016 became "the first time in a decade and a half, [in which] the World Trade Organization (WTO) [began] its year in Geneva without a consensus mandate to complete the 2001 Doha Round."<sup>217</sup> Because negotiating and concluding a comprehensive investment agreement under the directive of the WTO would need the support of its members, this Note recommends that a new round of trade negotiations be initiated to address investment policies.

Despite the aforementioned obstacles to concluding an agreement, unifying investment and trade policies in a single international

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212. *Id.* at 544–45 (promoting the "eventual inclusion of private rights within the GATT's trade dispute settlement system").

213. JOHN W. HEAD, *LOSING THE GLOBAL DEVELOPMENT WAR* 87 (2008) (criticizing the WTO because it "is a closed, non-transparent organization that operates in secret . . .").

214. Suggesting an alteration to the character of DSB disputes is not unprecedented. See generally SAIF AL-ISLAM ALQADHAFI, *REFORMING THE WTO: TOWARD MORE DEMOCRATIC GOVERNANCE AND DECISION-MAKING* 2 (2007), [https://www.wto.org/english/forums\\_e/ngo\\_e/posp67\\_gaddafi\\_found\\_e.pdf](https://www.wto.org/english/forums_e/ngo_e/posp67_gaddafi_found_e.pdf) [<https://perma.cc/AG2D-FHFP>] (archived Jan. 14, 2017) (offering "a radical solution involving more direct involvement of civil society and the private sector in WTO governing structures").

215. Raúl Torres, *Use of the WTO Trade Dispute Settlement Mechanism by the Latin American Countries – Dispelling Myths and Breaking Down Barriers* 9 (WTO Staff Working Paper ERSD-2013-03, 2012), [https://www.wto.org/english/res\\_e/reser\\_e/ersd201203\\_e.pdf](https://www.wto.org/english/res_e/reser_e/ersd201203_e.pdf) [<https://perma.cc/7ZAR-4HC3>] (archived Jan. 14, 2017) ("[I]nitiating a WTO dispute is a costly exercise in terms of both time and money.").

216. See, e.g., Andrew Charlton, *The collapse of the Doha trade round*, CENTREPIECE (Autumn 2006), <http://cep.lse.ac.uk/pubs/download/CP210.pdf> [<https://perma.cc/GE2N-9LSY>] (archived Jan. 14, 2017).

217. Bryce Baschuk, *WTO Begins to Ponder a Future Beyond Doha*, 33 Int'l Trade Rep. (BNA) 55 (Jan. 14, 2016).

framework is not a revolutionary idea. WTO member states are already obligated to adhere to TRIMs.<sup>218</sup> The TRIMs Agreement, however, is extremely limited in scope and does not include any provisions connected to expropriation of foreign investment.<sup>219</sup> TRIMs primarily restricts the avenues that a state could employ in regulating the free-movement of goods.<sup>220</sup> Because TRIMs is limited to regulations affecting trade in goods, “only 6% of all overseas affiliates of U.S. companies are affected by TRIMs.”<sup>221</sup> This statistic demonstrates the limited effects that TRIMs has on international investment. In addition, the TRIMs Agreement has been narrowly applied and does not “creat[e] a framework for the regulation of all aspects of FDI.”<sup>222</sup> An international investment agreement that includes many of the common BIT provisions safeguarding FDI would thus expand the scope of the WTO’s involvement with investment issues.<sup>223</sup>

## 2. Concluding a Plurilateral Agreement: On the Road to a Customary International Norm

Although this Note agrees with Kennedy’s assertion that the WTO is a favorable setting for concluding an investment agreement with global implications,<sup>224</sup> this Note finds that a plurilateral agreement—rather than a multilateral agreement—would be more successful in establishing the Hull Doctrine’s status as customary international law. There are three primary reasons to support the argument that a plurilateral investment agreement is a more appropriate mode of garnering support for customary international law than a multilateral investment agreement.

First, only WTO member states that voluntarily become parties to a plurilateral agreement are bound by its terms.<sup>225</sup> The voluntary nature of plurilateral agreements<sup>226</sup> arguably offers a strong indication that the signatories endorse the provisions of the agreements and feel legally obligated to act accordingly. This Note asserts that the adoption

218. See generally Agreement on Trade-Related Investment Measures arts. 1-9, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1868 U.N.T.S. 186 [hereinafter TRIMs Agreement].

219. See *id.*

220. See Kennedy, *supra* note 194, at 139 (describing the limited nature of TRIMs and calling for a multilateral investment agreement).

221. *Id.*

222. *Id.* at 101.

223. See *id.*

224. See generally *id.* (arguing that trade and investment are inter-related and that the WTO is a proper venue to concluding an agreement containing both trade and investment issues).

225. *Plurilaterals: of minority interest*, *supra* note 191.

226. See *id.*



of a plurilateral agreement by a number of WTO member states of their own volition would be highly indicative that the Hull Doctrine has been reinstated as customary international law.<sup>227</sup>

Second, the apparent failure of the Doha Round may offer a promising opportunity to begin negotiations on investment issues since “WTO members are expected to begin a series of discussions—both inside and outside the WTO’s negotiating umbrella—to determine which issues they may be able to advance on a plurilateral level.”<sup>228</sup> Because trade negotiations during the Doha Round have subsided, many WTO experts have suggested that plurilateral agreements may yield more liberalizing trade results.<sup>229</sup> As a result, member states have turned to new issues to be negotiated as WTO agreements.<sup>230</sup> This openness to negotiating plurilateral agreements may offer the greatest opportunity to establish new investment law norms.

Third, plurilateral agreements are usually conceived from negotiations by a small number of WTO member states, each with the goal of devising a new set of trade policy norms.<sup>231</sup> Thus, there is no need to garner the support of all 164 WTO members to conclude a plurilateral agreement.<sup>232</sup> Plurilateralism is also beneficial because it has the additional effect of liberalizing trade gradually, one of the WTO’s most important policy goals.<sup>233</sup>

### B. *Pro-Investor or Pro-Western: Is the Hull Doctrine the Right Solution for Developing Countries?*

Western developed countries have favored the inclusion of “prompt, adequate, and effective compensation” provisions in investment treaties since Secretary Hull’s articulation of the doctrine

227. If this were to occur, *opinio juris* would likely be present among a consensus of states. See FRANK ET AL., *supra* note 93, at 98.

228. Baschuk, *supra* note 217.

229. Corina Berceanu, *Why has the unsuccessful Doha round resulted in bilateral and inter-regional FTAs and what are the consequences for global trade?*, GEOPOLITICS, <http://english.geopolitics.ro/why-has-the-unsuccessful-doha-round-resulted-in-bilateral-and-inter-regional-ftas-and-what-are-the-consequences-for-global-trade/> (last visited Jan. 14, 2017) [<https://perma.cc/9AH9-RVGY>] (archived Jan. 14, 2017).

230. Pedro da Motta Veiga & Sandra Polnia Rios, *Should the WTO Deal with Private Sector Initiatives*, in THE FUTURE AND THE WTO: CONFRONTING THE CHALLENGES 147 (Ricardo Meléndez-Ortiz et al. eds., 2012) (discussing Brazil’s objectives to bring investment rules under the umbrella of the WTO).

231. WTO, *Plurilateralism Against Multilateralism? A Multi-Stakeholder Perspective* (2012) (unpublished presentation), [https://www.wto.org/english/forums\\_e/public\\_forum12\\_e/session29agah\\_e.pdf](https://www.wto.org/english/forums_e/public_forum12_e/session29agah_e.pdf) (last visited Jan. 16, 2017) [<https://perma.cc/L3W7-E9GM>] (archived Jan. 16, 2017).

232. *See id.*

233. *See id.*; see also MARC BACCHETTA & MARION JANSEN, *WTO, ADJUSTING TO TRADE LIBERALIZATION* 7 (2003), [https://www.wto.org/english/res\\_e/booksp\\_e/special\\_study\\_7\\_e.pdf](https://www.wto.org/english/res_e/booksp_e/special_study_7_e.pdf) [<https://perma.cc/A5H8-HRNA>] (archived Jan. 16, 2017).

during the 1930s.<sup>234</sup> Developed countries' positions on this issue may be economically justified because rules favoring investors increase foreign direct investment and have the effect of encouraging capital formation.<sup>235</sup> Whether pro-investor provisions like the Hull Doctrine benefit developing countries, though, is important in determining whether developing countries will have the incentive to support the Hull Doctrine as customary international law.

Several studies indicate that developing countries with emerging economies and functional education systems have economically benefited from the influx of FDI.<sup>236</sup> However, “[s]ome of the poorest regions continue[] to see declines in FDI flows.”<sup>237</sup> For example, Sub-Saharan Africa has received less than 3 percent of FDI, and the little FDI they have received does not have the same positive effects on “infrastructure development” and return on capital as in other developing countries.<sup>238</sup>

Nevertheless, the economic benefits for many developing countries, particularly those in Asia, cannot be ignored.<sup>239</sup> Proponents of FDI cite a laundry list of benefits for developing countries. For instance, the IMF explains that FDI “is different from other major types of external private capital in that it is motivated largely by the investors’ long-term prospects for making profits in production activities that they directly control.”<sup>240</sup> Given that investors providing FDI are most concerned about long-term gains, “[n]ot only can FDI add to investible resources and capital formation, but, perhaps more important, it is also a means of transferring production technology, skills, innovative capacity, and organizational and managerial practices between locations, as well as of accessing international marketing networks.”<sup>241</sup> Other benefits include technology and “knowledge transfers.”<sup>242</sup>

234. See *supra* Section II.A.

235. See Padma Mallampally & Karl P. Sauvant, *Foreign Direct Investment in Developing Countries*, INT’L MONETARY FUND (IMF) (1999), <http://www.imf.org/external/pubs/ft/fandd/1999/03/mallampa.htm> [<https://perma.cc/9MAG-LFFU>] (archived Jan. 16, 2017).

236. Prakash Loungani & Assaf Razin, *How Beneficial is Foreign Direct Investment for Developing Countries?*, IMF (June 2001), <http://www.imf.org/external/pubs/ft/fandd/2001/06/loungani.htm> [<https://perma.cc/9UN5-69RR>] (archived Jan. 16, 2017).

237. UNCTAD, *WORLD INVESTMENT REPORT 2011* (2011), [http://unctad.org/en/PublicationsLibrary/wir2011\\_en.pdf](http://unctad.org/en/PublicationsLibrary/wir2011_en.pdf) [<https://perma.cc/BZX8-68EM>] (archived Mar. 5, 2017).

238. Elizabeth Asiedu, *On the Determinants of Foreign Direct Investment to Developing Countries: Is Africa Different?*, 30 *WORLD DEV.* 107, 109, 115–16 (2002).

239. Mallampally & Sauvant, *supra* note 235.

240. *Id.*

241. *Id.*

242. Henrik Hansen & John Rand, *On the Causal Links between FDI and Growth in Developing Countries* (Inst. of Econ. Univ. of Copenhagen, Discussion Paper 04-30, 2004), <http://www.econ.ku.dk/wpa/pink/2004/0430.pdf> [<https://perma.cc/MB2L-NEWX>] (archived Dec. 29, 2016).

FDI, as opposed to other types of investment vehicles, has also benefited markets during economic downturns.<sup>243</sup> During the 1997-98 financial downturn, FDI inflows remained steady in East Asia.<sup>244</sup> During that same recession, “other forms of private capital flows— portfolio equity and debt flows, and particularly short-term flows— were subject to large reversals during the same period . . . .”<sup>245</sup> Not only has FDI stabilized investment for developing countries in Asia, but it has also been shown to increase domestic investment.<sup>246</sup>

Not all FDI has advanced the economies of developing states. For instance, some investors see FDI as a method for gaining control and leverage in a country, and others have conducted fire sales of their investments.<sup>247</sup> Critics have pointed to the large number of BITs negotiated between developed and developing countries. In such BITs, “the benefits that developing countries can obtain in North-South bilateral negotiations are circumscribed by their usually weaker bargaining power and the limited negotiating flexibility of their developed-country partner.”<sup>248</sup>

Despite FDI’s negative consequences, “[a]t present, the consensus view seems to be that there is a positive association between FDI inflows and growth provided receiving countries have reached a minimum level of educational, technological and/or infrastructure development.”<sup>249</sup> Assuming these economic justifications for FDI are true, developing countries would benefit from adopting international obligations that are investor-friendly. These obligations, of course, include the Hull Doctrine.

## V. CONCLUSION

International investment norms collapsed during the era of decolonization, an era that vehemently rejected Western values and promoted the sovereign rights of developing countries.<sup>250</sup> The world in 2017, though, has drastically changed since the era of decolonization. Developing countries’ rationales for rejecting international investment norms have since become less persuasive. In the modern globalized world, investors seek protection when contributing capital to

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243. Loungani & Razin, *supra* note 236.

244. *Id.*

245. *Id.*

246. *Id.*

247. *Id.*

248. *Trade and Development Report, 2007*, UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT, 2007 IX UNCTAD, [http://unctad.org/en/docs/tdr2007\\_en.pdf](http://unctad.org/en/docs/tdr2007_en.pdf) (last visited Dec. 29, 2016) [<https://perma.cc/PUX7-DZRG>] (archived Dec. 29, 2016); *see also* MILES, *supra* note 16, at 91 (BITs “continue[] to be an instrument used to entrench unequal power relations”).

249. Hansen & Rand, *supra* note 242.

250. Daly, *supra* note 39.

corporations in foreign countries.<sup>251</sup> For developing countries, these investments can provide capital to lift individuals out of poverty and improve the overall economic condition of the country.<sup>252</sup> This Note emphasizes that, as a normative goal, re-establishing the Hull Doctrine as a customary international law norm would likely be beneficial to developing countries and would have positive economic effects on their economies.

Although fraught with political obstacles, this Note argues that the most promising method for reintroducing the Hull Doctrine as customary international law involves the conclusion of a plurilateral investment agreement. Even though most WTO members would have to become parties to such a plurilateral agreement in order to achieve this goal, the voluntary membership of plurilateral agreements<sup>253</sup> among other considerations is strongly indicative of *opinio juris*. As of yet, this solution is far from implementation, but if achieved, may offer the best evidence of a global trend favoring the Hull Doctrine.

\*Kellie Travis

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251. Mallampally & Sauvart, *supra* note 235.

252. *Id.*

253. *Plurilaterals: of minority interest, supra* note 191.

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