A Journey from Havana to Paris: The Fifty-Year Quest for the Elusive Multilateral Agreement on Investment

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Abstract

This Essay begins with a survey of the protection afforded to foreign investors under customary international law. This survey serves to demonstrate that the changing international political and social order, and international economic forces, affect the formulation of the standard of protection and compensation afforded to investors under international law. Next, the Essay traces the history of the post-World War II attempts to negotiate multilateral investment protection measures as part of the Havana Charter. As a result of the failure to implement the Havana Charter, negotiations over investment measures did not make their way into the General Agreement on Tariffs and Trade’s agenda until the Uruguay Round. This Essay discusses U.S. efforts to put negotiations over investment measures back onto the world stage during the Uruguay Round negotiations, as had happened half a century ago during the Havana Charter negotiations. The results achieved in the Uruguay Round negotiations are discussed, and the reasons why negotiations on investment measures were thereafter moved to the OECD are also described. This Essay highlights some of the irreconcilable positions taken at the OECD during the MAI negotiations that prevented a successful result. Thereafter, this Essay lists the many accomplishments among developed and developing countries in reaching bilateral and regional investment agreements, which, in the long run, should provide the basis for a high standard investment agreement to be negotiated under the auspices of the WTO.
A JOURNEY FROM HAVANA TO PARIS:
THE FIFTY-YEAR QUEST FOR THE ELUSIVE MULTILATERAL AGREEMENT ON INVESTMENT

Riyaz Dattu*

INTRODUCTION

For now, a multilateral agreement on investment ("MAI") with high standards of liberalization and protection remains elusive. The quest for such an agreement can be said to have begun at least fifty years ago with the aborted Charter for an International Trade Organization1 ("Havana Charter").

The recent attempts to negotiate a comprehensive agreement on investment during the Uruguay Round provided limited success. The Agreement on Trade-Related Investment Measures2 (or "TRIMs Agreement"), the General Agreement on Trade in Services3 (or "GATS"), and the Agreement on Trade-Related Aspects of Intellectual Property Rights4 ("TRIPs") contain provisions that confirm that some restrictive investment measures hinder trade in goods and services, as well as the transfer of technology, and attempt to limit the use of such restrictive

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* LL.B. (Univ. of Toronto, 1982), LL.M. (Osgoode Hall Law School, 1984) Mr. Dattu is a partner at McCarthy Tetrault (Toronto, Canada), and heads his firm's international trade law practice. He is a member of the Ontario bar and appears regularly before the Canadian International Trade Tribunal, the Federal Court of Canada, and NAFTA Panels.

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investment measures by the members of the World Trade Organization ("WTO"). These agreements, however, fall far short of providing a comprehensive set of investment-liberalization and investment-protection measures, which many capital-exporting countries wanted to negotiate at the WTO. Anxious to negotiate "a high-quality investment agreement," in 1995 the capital-exporting countries announced at the Council Meeting at the Ministerial level of the Organisation for Economic Co-operation and Development ("OECD") that they would create an MAI by their 1997 Ministerial meeting. This OECD negotiated MAI "would provide a broad multilateral framework for international investment regimes" open to OECD and non-OECD member countries.\(^5\) This decision was reached based on the recommendation of its committees that "the time is ripe to negotiate an MAI in the OECD."\(^6\) The OECD was chosen as the place to negotiate and conclude such an agreement on the basis that its membership, unlike the WTO's membership, consisted of "like-minded" countries with well-established, liberal, and transparent foreign investment policies. This, it was believed, would facilitate a fast-paced set of negotiations leading to a model agreement that would provide a benchmark for investment protection and liberalization. Furthermore, with the "free-standing" nature of the agreement and its openness to OECD and non-OECD countries alike, it could, thereafter, be moved to a multilateral forum such as the WTO.\(^7\) At such time, the many WTO developing-country members that hindered progress on an MAI during the discussions leading up to the Uruguay Round negotiations would face a *fait accompli*, thereby making unlikely the acceptance of their objections and requests for modification. However, the like-minded countries of the OECD failed to reach an agreement, even after an extension of the initial two-year deadline. By October 1998, the negotiations had come to an inauspicious end.

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7. Id.
In the meantime and paradoxically, bilateral and regional agreements on investment have proliferated in all regions of the world not only between developed and developing countries, as was the case in earlier years, but now also between developing countries. Indeed, recently the developing countries have been most active in negotiating regional economic co-operative agreements, many of which provide for investment liberalization and protection measures.

What then is the prognosis for an MAI that provides for high standards of liberalization and protection of investment that includes developed and developing countries among its signatories? This Essay argues that such an agreement can likely be achieved only in a forum such as the WTO and that it can be achieved because of the inclusive nature of the WTO and its comprehensive trade agenda. However, it also will be argued that the time is not yet ripe for negotiating an MAI at the WTO. Many more bilateral and regional agreements on investment have to be negotiated and concluded. Furthermore, only after the benefits of such agreements have been realized by both developed and developing countries will it be time to negotiate an MAI.

Until then, significant advancement opportunities continue to exist at the WTO in the area of investment liberalization. The built-in agenda in GATS should provide a further basis for increasing the liberalization of investment measures as they affect service providers requiring a commercial presence in another country to export their services. The TRIMs Agreement, in addition to setting out its own starting point for further negotiations on investment measures, also requires all member countries, subject to some transition periods, to eliminate notified trade related investment measures ("TRIMs"). Lastly, TRIPs protects intellectual property under the ambit of trade. The benefits of these new Uruguay Round agreements are yet to be fully realized.

This Essay begins with a survey of the protection afforded to foreign investors under customary international law. This survey serves to demonstrate that the changing international political and social order, and international economic forces, affect the

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formulation of the standard of protection and compensation afforded to investors under international law. It has not always been possible to provide a clear formulation of the level of protection and compensation to be accorded to foreign investors whose property has been subject to expropriation measures. This, indeed, is the fundamental basis for the argument exporting countries make that the world needs an MAI providing for a high standard of investment protection.

Next, the Essay traces the history of the post-World War II attempts to negotiate multilateral investment protection measures as part of the Havana Charter. As a result of the failure to implement the Havana Charter, negotiations over investment measures did not make their way into the General Agreement on Tariffs and Trade's⁹ ("GATT") agenda until the Uruguay Round. This Essay discusses U.S. efforts to put negotiations over investment measures back onto the world stage during the Uruguay Round negotiations, as had happened half a century ago during the Havana Charter negotiations. The results achieved in the Uruguay Round negotiations are discussed, and the reasons why negotiations on investment measures were thereafter moved to the OECD are also described.

This Essay highlights some of the irreconcilable positions taken at the OECD during the MAI negotiations that prevented a successful result. Thereafter, this Essay lists the many accomplishments among developed and developing countries in reaching bilateral and regional investment agreements, which, in the long run, should provide the basis for a high standard investment agreement to be negotiated under the auspices of the WTO.

I. PROTECTION AFFORDED TO FOREIGN INVESTORS UNDER CUSTOMARY INTERNATIONAL LAW

It is beyond question that expropriation in one form or another is admitted and practiced by all states. In so far as measures of expropriation only affect the nationals of the state carrying them out, there are no interests of foreigners to be protected and, to date, international law has not limited a state’s jurisdic-

tion in this field. However, where acts of expropriation are directed at, or affect property owned by, foreigners, a question of international law arises whether the expropriation and the extent of compensation afforded are contrary to international law, thereby entitling the home state of the foreign investor to intervene on that investor’s behalf to obtain redress.

It is difficult enough in the presence of a treaty to determine whether measures taken by a state amount to an expropriation without adequate compensation resulting in a breach of international law. The absence of a treaty that sets out the protection agreed to be provided to foreign investments greatly exacerbates the problem. This is because the home state of the foreign investor is required to prove that the host state’s measures, including the manner in which such measures were carried out, constitute an expropriation that is contrary to customary international law and that the amount, if any, of compensa-

10. The recognition of this principle may be found in, among other sources, the statement issued on August 2, 1956 by the Governments of France, the United Kingdom, and the United States of America regarding the Egyptian decree of July 26, 1956, expropriating the Suez Canal Company. Paragraph 2 of the statement reads: “[W]e do not question the right of Egypt to enjoy and exercise all the powers of a fully sovereign and independent nation, including the generally recognized right, under appropriate conditions, to nationalize assets, not imposed with an international interest, which are subject to its political authority.” The Suez Canal Conference, Selected Documents, London, August 2-24, 1956. Egypt No. 1 (1956), Cmd. 9853, p.3. See also the position of the United States in The United States of America on Behalf of George W. Hopkins v. The United Mexican States (Docket No. 39), (1926), 21 A.J.I.L. 160, at 166-7 (1927).

11. In the case of the Mavrommatis Palestinian Concession, the Permanent Court of International Justice said, “[I]t is an elementary principle of international law that a State is entitled to protect its subjects, when injured by acts contrary to international law committed by another State.” Mavrommatis Palestinian Concession Case (Greece v. U.K.) [1924] P.C.I.J. (ser. A) No. 2, at 12.

12. The primary sources of international law are treaties, custom, and general principles of law. See Article 38(1) of the Statute of the International Court of Justice, June 26, 1945, 59 Stat. 1055, 1060, T.S. No. 993, which states as follows:

(1) The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:
   (a) international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
   (b) international custom, as evidence of a general practice accepted as law;
   (c) the general principles of law recognized by civilized nations;
   (d) subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

Id.
tion afforded falls below the requirements of customary international law. In order to prove that a rule is part of customary international law, it is necessary to show that the consistent practice of states has evolved into *opinio juris*.

An analysis of the evolution of the customary international law of investment and protection of foreign investment indicates that its formulation at any point in time is affected by current international political and social order, and international economic forces. This then partly serves as the basis for the argument put forward by those advocating a multilateral agreement to protect investments, hoping as they do to codify and establish high standards of treatment for foreign investments by host states. An MAI also can provide for a comprehensive set of principles governing foreign investors and their investments, in addition to the treatment to be accorded to foreign investors in instances of the expropriation of their investments by host states. Among other provisions, an MAI can set out definition for the types of investments deserving of protection, procedures for settling investment disputes, liberalization obligations, non-discriminatory treatment provisions, local content and other performance requirements, repatriation of income and capital, transfer of personnel, and other activities that necessarily accompany the making of foreign investments.

A. The Traditional Formulation

The traditional formulation of international law, as it relates to a host state's duty to a foreign investor, can be traced back to the 1789 French Declaration of the Rights of Man and of the Citizen, which declared property an uninfringeable right, but permitted nationalization in instances of public necessity. The current restatement of this traditional formulation of customary international law relating to foreign investments provides that

13. Merrills points out that "there is some disagreement as to how strictly the requirement of *opinio juris* should be interpreted; the most realistic view will sometimes permit it to be inferred from the context of the actions in question. Be that as it may, it is clear that in practice the requirements of constant and uniform usage and *opinio juris* frequently stand or fall together." J.G. Merrills, *Anatomy of International Law* 4-5 (1981).

expropriation can be effected by a sovereign state when it is for a public purpose, non-discriminatory, and undertaken with due process of law. Further, when a host state expropriates the property of a foreign investor, it is required to pay “prompt, adequate and effective” compensation to the foreign owner. The then-U.S. Secretary of State Cordell Hull articulated this rule at the time of the Mexican nationalization of 1938. In his letters to the Mexican government, Hull declared that a state that is not in the position to afford prompt, adequate, and effective compensation to expropriated foreign investors ought to refrain from enacting measures of expropriation. This formula, dubbed the “Hull Formula,” was again applied in 1960 by the U.S. government in challenging the legality of the Cuban nationalization of various American properties.

The approach of the United Kingdom was similar to that of the United States. In its memorial for the Anglo-Iranian Oil Company Case, the United Kingdom argued that the international lawfulness of the expropriation of foreigners’ property is conditional upon the obligation to make “adequate, effective and prompt” compensation.

15. G.H. Hackworth, DIGEST OF INTERNATIONAL LAW 655-65 (1942). Secretary C. Hull’s initial letter of July 21, 1938, states the issue and the position taken. “During recent years the Government of the United States has upon repeated occasions made representations to the Government of Mexico with regard to the continuing expropriation by Your Excellency’s Government of agrarian properties owned by American citizens, without adequate, effective and prompt compensation being made therefore.” Id.

16. Francesco Francioni, Compensation for Nationalization of Foreign Property: The Borderland between Law and Equity, 24 INT’L & COMP. L. Q. 255, 263-64 (1975). Professor Francioni notes: [This] requirement of prompt, full and effective indemnification was so rigidly adhered to so as to provoke a refusal of an offer of deferred payment made by the Castro Government in the form of bonds bearing 2¼ percent interest. The same pattern was followed by the U.S. Department of State in 1963 in connection with the Ceylonese nationalizations of oil and gas business, which gave arise to a suspension of foreign aid to Ceylon . . . .

Id.

17. Anglo-Iranian Oil Company (U.K. v. Iran), 1951 I.C.J. 106 (Aug. 22). It is to be noted that the actual decision was rendered on the question of jurisdiction and not on the merits.

18. To support its position, the U.K. Memorial refers to the Chorzów Factory, Claim for Indemnity (Ger. v. Pol.), 1928 P.C.I.J. (ser. A) No. 17 (Sep. 13); Goldenberg & Sons v. Germany (Rom. v. Ger.) (1927-28), 4 Ann. Dig. 369; Norwegian Ship Owners’ Claim (Nor. v. U.S.), 1 R.I.A.A. 307 (1922); Spanish Zones of Morocco Case (U.K. v. Spain), 2 R.I.A.A. 615 (1924); and the De Sabla Claim (U.S. v. Pan.), 6 R.I.A.A. 358 (1933). The Memorial also referred to the writings of a significant number of publicists
B. Early Challenges to the Traditional Formulation

The earliest challenge to this traditional formulation began with the Soviet nationalization program following the Revolution of 1917. Despite this major blow to the traditional formulation of "prompt, adequate and effective" compensation, it would be correct to conclude that Secretary Cordell Hull accurately presented the pre-World War II position when, in 1938, he wrote his famous letter to the Mexican Ambassador.

Only later, when the Soviet Union was joined by other nations, could it be said that the traditional formulation encountered severe challenges. The main thrust of these challenges began around the time when Mexico refused to comply with the demands set out in Secretary Hull's letter. Despite strong pressures from the U.S. Department of State and a breach of diplomatic relations with the United Kingdom, the Mexican government insisted that, as a matter of legal obligation, no compensation was due for property that a state had expropriated in the pursuit of a social reform program upon which economic development, as well as the well-being of its people, was dependent.

The Mexican position was based on an inability to pay and on what is commonly referred to as the Calvo doctrine. This Latin American doctrine was based on the notion of the exclusive jurisdiction of any state over its territory and on the view that foreigners have no more rights than nationals of the state in which they live or enjoy personal rights. Therefore, the domestic courts of the host states exclusively decided the rights and claims of aliens against host states. In the context of expropriation of a

who adhered to the traditional view. See B.A. Wortley, Expropriation in Public International Law 34-35 (1959).

19. The effective outcome of this nationalization program was: the outright refusal to pay any compensation, aside from some conventional arrangements made for political reasons. On a doctrinal level, the impact of the Soviet nationalization had the effect of stimulating a critical revision of the... assumption that absolute respect for private property constitutes a general principle of law recognized by civilized nations.

Francioni, supra note 16, at 267.

20. As White explains, "denial of a rule by a single State cannot affect its validity on the international level. It may be otherwise when many States adopt this attitude over a period of years; such practice may well result in the abrogation, or at any rate, the modification of the customary rule." See Gillian Mary White, Nationalization of Foreign Property 9 (1961).


foreigner's property, the doctrine provided that the foreigner had acquired no right to permit his home state to exercise diplomatic protection.23

C. Challenges Based on U.N. General Assembly Resolutions

Thereafter, other less developed and newly independent states, through various resolutions in the General Assembly of the United Nations, challenged the traditional notion of protection over foreign investments driven in part by their dissatisfaction with the concession agreements that the colonial governments had entered into with foreign companies.24 The process started in 1952 with Resolution 626, which stated that "the right of people freely to use and exploit their natural wealth and resources is inherent in their sovereignty."25 This principle appeared in a more elaborate form in General Assembly Resolution 1803 entitled "Resolution of Permanent Sovereignty over Natural Resources."26 The challenges culminated with Resolu-


The jurisdiction of the States within the limits of the national territory, is applicable to all its inhabitants. Nationals and foreigners who are under the same protection of the national legislation and authorities cannot claim rights different from or more extensive than nationals . . . [A]s your government is not aware that our government finds itself unable to pay the indemnity to all affected by the Agrarian Reform, by insisting on payment to American landholders, it demands, in reality, a special privileged treatment which no one is receiving in Mexico.


24. Higgins, supra note 14, at 287.


Nationalization, expropriation or requisitioning shall be based on grounds or reasons of public utility, security or the national interest which are recognized as overriding purely individual or private interests, both domestic and foreign. In such cases the owner shall be paid appropriate compensation in accordance with the rules in force in the State taking such measures in the exercise of its sovereignty and in accordance with international law. In any case where the question of compensation gives rise to a controversy, the national jurisdiction of the State taking such measures shall be exhausted. However, upon agreement by sovereign States and other parties concerned, settlement of the dispute should be made through arbitration or international adjudication.

Id. (emphasis added).
tion 3281, the “United Nations Charter of Economic Rights and Duties of States.”

While the General Assembly resolutions, unlike those of the Security Council, are not imbued with obligatory effect, it is indisputable that they have heavily influenced the course and direction of the international law of foreign investment. Sole Arbitrator Mahmassani in *Libyan American Oil Co. v. The Government of the Libyan Arab Republic* (“LIAMCO Arbitration”) opined that, while the General Assembly resolutions were not a unanimous source of law, they were “evidence of the recent dominant trend of international opinion concerning the sovereign right of States over natural resources.” This decision followed the reasoning of Sole Arbitrator Dupuy’s reasoning in *Texaco Overseas Petroleum Co. v. The Government of the Libyan Arab Republic* (“Texaco-Libya Arbitration”) who, in order to determine the state of international law on the subject of investment protection, analyzed the voting pattern of General Assembly resolutions. Dupuy noted that Resolution 1803 had been passed by an eighty-seven to two vote, with twelve abstentions. Dupuy also noted that a number of developed Western countries with market economies, including the United States, had voted in favor of the principles in Resolution 1803, which had been stipulated to by a majority of states representing all geographic regions and economic systems.

Thus, while no simple answer can be given as to the effect of these General Assembly resolutions, they undoubtedly rendered a severe blow to the traditional formulation of protecting foreign investments and the acceptance of this formulation as articulating customary international law relating to expropriations. These U.N. General Assembly resolutions confirm that interna-

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28. It was never intended that the General Assembly be a legislative organ. At the San Francisco Conference in 1945, the Philippine delegation suggested that the General Assembly be vested with legislative authority to enact rules of international law that would become effective and binding upon members after such rules had been approved by a majority vote of the Security Council. When the resolution was put to a vote, it was rejected 26 to 1.


31. Id. at 487.
national law is essentially an evolutionary process and that, internationally, norms are not immutable or static. They are influenced and shaped by the changing needs and realities of the international community.32

D. A Return to the Traditional Formulation

By the mid-1980s, it could be argued that international opinion on the protection afforded to foreign investors began to revert closer to the traditional formulation. As the less-developed countries sought to attract foreign investment, they also adopted, in a number of bilateral treaties, some of the international law principles, including the Hull Formula, that are demanded of the home countries of foreign investors—predominantly the Western industrialized countries. It is still open for debate as to whether the incorporation of principles that accord with the traditional formulation of the law of expropriation into bilateral investment treaties have had an effect on the current principles of customary international law relating to foreign investments. While bilateral treaties are generally recognized as sources of international law, such investment treaties also can be characterized simply as the reciprocal arrangements of the parties engaged in advancing their own isolated trade and financial gains.33

Further concessions to, and acceptance of, the traditional formulation of the treatment of foreign investors emerged in the wake of the opening of markets in much of Eastern Europe. An example of such concessions, on the part of formerly socialist states, is the Energy Charter Treaty34 ("Energy Charter"). Part III of the Energy Charter, entitled "Investment Promotion and Protection," creates a multilateral investment regime for private investors in the energy sector, and provides many benefits to such investors including an investor-state dispute settlement


mechanism. In addition, Article 13(1) of the Energy Charter incorporates the traditional formulation of the law on investment protection when it defines the conditions under which a state may carry out an expropriation.\(^5\)

The proliferation of bilateral investment treaties and regional investment agreements over the last decade may be a reflection of a movement back towards a more traditional formulation of protection to be afforded to foreign investors by international law. Thus, international customary law, as it relates to expropriation of foreign investments, continues to be fluid and uncertain and calls for the formulation of new standards.\(^3\) This may explain the efforts by Western industrialized countries to formulate and codify in multilateral fora investment provisions that protect foreign investors, and the strong resistance they have faced from those most likely to be challenged for taking measures amounting to an expropriation with less than prompt, adequate, and effective compensation. However, as noted earlier, the disagreements as to the full scope of protection to be afforded to foreign investors may not be limited to the schism between the developed and the less-developed countries. As the recently failed MAI negotiations at the OECD indicate, divisions exist even among the developed countries as to the full scope of protection to be afforded to foreign investors.

II. HISTORY OF INVESTMENT MEASURES—HAVANA CHARTER TO WTO

At the end of World War II, and prompted mainly by the United States, members of the United Nations began to negotiate a Charter for an International Trade Organization ("ITO") under the auspices of the United Nations Economic and Social

35. \textit{Id.} art. 13. Article 13(1) of the Energy Charter states in part as follows:
Investments of Investors of a Contracting Party in the Area of any other Contracting Party shall not be nationalized, expropriated or subjected to a measure or measures having effect equivalent to nationalization or expropriation (hereinafter referred to as "Expropriation") except where such Expropriation is:

(a) for a purpose which is in the public interest;
(b) not discriminatory;
(c) carried out under due process of law; and accompanied by the payment of prompt, adequate and effective compensation.

\textit{Id.}

Council. The negotiations, which culminated in Havana, Cuba, envisaged the ITO as the third component of the post-war Bretton Woods system, in conjunction with the International Bank for Reconstruction and Development (now the World Bank) and the International Monetary Fund. Prior to finalizing the Havana Charter, however, the United States and the United Kingdom urged the negotiation of GATT, in order to set out multilateral tariff concessions. As such, GATT was devised as a part of the ITO system and not as a free-standing agreement.37

A. An Inauspicious Start

At the strong instigation of the U.S. delegation, the Havana Charter negotiators included investment measures in their discussions. The intention of the United States was to provide a multilateral code focused on protecting foreign investment from discrimination and nationalization by host countries. However, the resulting negotiated text was quite inimical to this goal. Indeed, in their final form, the investment measures contained in the Havana Charter did not limit the rights of host states to restrict foreign investment, reflecting the significant offsetting pressure to that of the United States from the capital importing states within the ITO negotiations.38 Article 12 of the Havana Charter, entitled “International Investment for Economic Development and Reconstruction,” recognized the value of investment in promoting development, and encouraged countries to afford investors from other countries opportunities and security for their investments without discrimination on the basis of nationality. The Havana Charter, however, also codified the right of any member to “take any appropriate safeguards necessary” to ensure that foreign investment does not interfere in a country’s internal affairs. The Havana Charter allowed members to “determine whether and to what extent and upon what terms it will allow future foreign investment” and to establish “other reasona-


ble requirements" with respect to foreign investments. Under the foregoing provisions domestic policy goals were to be prioritized over international standards for investment policy.

The emphasis on economic development over international standards for protection of foreign investment sparked opposition to the Havana Charter from the very U.S.-based, multinational enterprises that had initially spearheaded the initiative to include investment provisions in an international economic agreement. In their view, the Havana Charter's investment provisions gave too much protection to developing countries. On the other hand, developing countries viewed the provisions as too permissive to multinational enterprises. It was partly as a result of these disagreements that the Havana Charter was eventually abandoned. Since GATT was not initially conceived as a comprehensive multilateral agreement, it did not contain any provisions related to investment measures.

B. Waiting Half a Century for Another Start

Investment discussions did not make their way on to the GATT negotiating agenda until the Uruguay Round. The only attempt to introduce the subject of investment in GATT happened in 1955 when, at the suggestion of the Chilean delegation, the Contracting Parties adopted the Resolution on International Investment for Economic Development ("Resolution"). The Resolution, however, did no more than urge capital-exporting and capital-importing countries to "use their best endeavours to create conditions calculated to stimulate the international flow of capital" by entering into bilateral and multilateral agreements to provide for security for investments, avoidance of double taxation, and facilitation of the repatriation of funds of foreign investments.

A proposal dealing with investment submitted by the United

40. Burt, supra note 37, at 1029; Shenkin, supra note 37, at 556.
41. Spero, supra note 38, at 137. For a discussion of the reasons for the demise of the Havana Charter, see Shenkin, supra note 36, at 556-57.
43. Id.; see also Price & Christy, supra note 39, at 444-45.
States to the Preparatory Committee for the 1982 Tokyo Round was greeted with indifference even from the industrialized countries of the EEC.\textsuperscript{44}

Nevertheless, in March 1982, the United States managed to make investment a matter of significant importance at the Tokyo Round when it referred to the Contracting Parties the Canadian \textit{Foreign Investment Review Act}\textsuperscript{45} ("FIRA"). Pursuant to this legislation, foreign investment was allowed into Canada only if the Canadian government determined that the investment was or was likely to be of "significant benefit to Canada." Whether an investment was of significant benefit was determined by looking at, \textit{inter alia}, the effects of the proposed investment on employment within Canada, satisfying Canadian content requirements in goods produced in Canada, and evaluating the effect of the foreign investment on Canadian technological development.\textsuperscript{46}

Under the FIRA, foreign investors could also be asked to propose voluntary performance undertakings ("written undertakings"), requiring them to satisfy local content and export performance requirements, which became legally binding on the investors once the investment was approved. The central issue in the GATT dispute became whether the local content and export performance requirements were inconsistent with Canada’s GATT obligations.\textsuperscript{47}

In its ruling, the GATT Panel stressed the fact that the dispute concerned the consistency of specific trade-related measures taken by Canada under its foreign investment legislation with GATT, as opposed to Canada’s right to regulate foreign investment.\textsuperscript{48} The Panel agreed with the United States that the written undertakings requiring an investor to satisfy local content requirements contravened the national treatment obligation of GATT Article III(4).\textsuperscript{49} On the other hand, the Panel ruled that the FIRA’s export performance requirements were

\begin{footnotes}
\footnotetext{44. See Mina Mashyekhi & Murray Gibbs, \textit{Lessons from the Uruguay Round Negotiations on Investment}, 33 J. of World Trade 1, 7 (1999).}
\footnotetext{46. Id. § 2(2).}
\footnotetext{48. See World Trade Organization, TRIMS: Background, available at http://www.wto.org/english/thewto_e/whatis_e/eol_e/wto05/wto05_3.htm.}
\footnotetext{49. See FIRA Panel Report at 160.}
\end{footnotes}
not inconsistent with GATT.\textsuperscript{50} The Panel’s reluctance to pass judgment on Canada’s treatment of foreign investors can be gleaned from the following passage:

\begin{quote}
[T]he Panel does not consider it relevant nor does it feel competent to judge how foreign investors are affected by the purchase requirements, as the national treatment obligations of Article III of the General Agreement do not apply to foreign persons but to imported products and serve to protect the interests of producers and exporters established on the territory of any contracting party.\textsuperscript{51}
\end{quote}

\section{C. A Compromise Leading to the Uruguay Round}

At the fourth meeting of the Preparatory Committee leading up to the Punta Del Este Ministerial Meeting in March 1986, the United States again tabled the subject of investment measures for negotiation. As was the case in previous attempts,\textsuperscript{52} the U.S. initiative to include investment negotiations in the Uruguay Round did not enjoy sufficient support. However, this time a careful compromise was reached,\textsuperscript{53} and the 1986 Punta del Este Ministerial Declaration that launched the Uruguay Round\textsuperscript{54} contained a commitment to include trade-related investment measures among the new subjects for negotiation.

The negotiations on TRIMs were largely split along the lines of developed capital-exporting and developing capital-importing countries. The former, led by the United States, sought to achieve a strong agreement in GATT for the protection of investment, while the latter, led by India, maintained that rules on TRIMs would not allow them to implement their own development strategies. Furthermore, developing countries argued that the prohibition of TRIMs failed to take into consideration the

\textsuperscript{50} Id. at 164.

\textsuperscript{51} Id. at 167.

\textsuperscript{52} For a description of prior instances when the United States attempted to discuss investment measures within GATT, see Price & Christy, supra note 39, at 446.

\textsuperscript{53} The inclusion of TRIMs in the Uruguay negotiating agenda was part of a careful compromise that was drafted as follows in the Ministerial Declaration of Punta Del Este, GATT Doc. 86-1572, B.I.S.D. (30th Supp.) at 9 (1986) [hereinafter the Punta Del Este Declaration]. “Following an examination of the operation of GATT Articles related to the trade-restrictive and trade-distorting effects of investment measures, negotiations should elaborate, as appropriate, further provisions that may be necessary to avoid such adverse effects on trade.” Id. (emphasis added).

\textsuperscript{54} Id.
restrictive business practices of multinational enterprises.\textsuperscript{55}

D. The Results of the Uruguay Round

1. Agreement on Trade Related Investment Measures

The agreement that resulted from the Uruguay Round sets out the compromise reached between the two opposing positions within GATT on investment measures. Therefore, while the preamble of the TRIMs Agreement includes the goal of “facilitat[ing] investment across international frontiers so as to increase the economic growth of all trading partners, particularly developing country members, while ensuring free competition,” Article 1 specifies that the TRIMs Agreement “applies to investment measures related to trade in goods only.” As such, the 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.”\textsuperscript{56}

Article 2, which contains the central obligation of the TRIMs Agreement, provides that Members shall not apply TRIMs that contravene the national treatment requirement in Article III and the prohibition on quantitative restrictions in Article XI of GATT. In addition, the TRIMs Agreement provides in an Annex an “illustrative list” of TRIMs that are inconsistent with Articles III and XI of GATT. The illustrative list covers local content requirements, trade-balancing measures (i.e., measures that limit an enterprise in purchasing imported product in accordance with the amount of domestic products that the same enterprise exports), foreign-exchange balancing requirements, and measures that restrict exports. Consistent with the GATT Panel decision in FIRA, the illustrative list does not cover export incentives and export performance requirements.

Measures inconsistent with the TRIMs Agreement were to be notified to the Council for Trade in Goods within ninety days

\textsuperscript{55} For a detailed description of the positions of the various countries on TRIMs at the Uruguay Round’s GATT Negotiating Group on Trade-Related Investment Measures, see Price & Christy, supra note 39, at 447-51.

\textsuperscript{56} Pierre Sauv\é, \textit{Regional Versus Multilateral Approaches to Services and Investment Liberalization: Anything to Worry About?}, in \textit{REGIONALISM AND MULTILATERALISM AFTER THE URUGUAY ROUND} 429, 437(1997).
of the entry into force of the Marrakesh Agreement Establishing the World Trade Organization57 ("WTO Agreement"). However, the TRIMs Agreement provides for a transitional period to eliminate TRIMs so notified. Developed country Members were given two years from the entry into force of the WTO Agreement to eliminate their GATT-inconsistent TRIMs, while developing country and least-developed country Members were afforded five and seven years, respectively.58 The transition period for developing countries to eliminate TRIMs that were notified to the Council for Trade in Goods ended on January 1, 2000. Some of those countries are currently seeking an extension of their deadline for certain sectors of their economies.59

Despite its limitations, the TRIMs Agreement provides WTO members certain advantages. First, the TRIMs Agreement, by setting out, in detail, the types of measures prohibited under Articles III and XI of GATT 1994, provides a further degree of clarification. It is also important to note that the non-exhaustive character of the Illustrative List allows additional prohibited measures to be added in the future.60 Second, by providing for notification requirements, transition periods for the elimination of prohibited TRIMs and for the creation of a Committee on TRIMs,61 the TRIMs Agreement increases transparency. Finally, the TRIMs Agreement, in contrast to the Panel decision on FIRA, confirms the extent of limitations on TRIMs that apply to developing countries.62

Most importantly, the strength of the TRIMs Agreement is that it provides the starting point for multilateral negotiations on investment measures, particularly through Article 9, which reads as follows:

57. TRIMs Agreement art. 5.1; WTO Agreement art. V.
58. TRIMs Agreement art. 5.2; WTO Agreement art. V.
60. UNITED STATES GENERAL ACCOUNTING OFFICE, GENERAL AGREEMENT ON TARIFFS AND TRADE: URUGUAY ROUND FINAL ACT SHOULD PRODUCE OVERALL U.S. ECONOMIC GAINS 106 (1994).
61. TRIMs Agreement art. 7.
Not later than five years after the date of entry into force of the WTO Agreement, the Council for Trade in Goods shall review the operation of this Agreement and, as appropriate, propose to the Ministerial Conference amendments to its text. In the course of this review, the Council for Trade in Goods shall consider whether the Agreement should be complemented with provisions on investment policy and competition policy.  

2. General Agreement on Trade in Services

GATS also negotiated during the Uruguay Round at the urging of the United States, has been labelled the WTO’s true investment agreement. GATS applies GATT principles of national treatment and most-favoured nation (“MFN”) treatment to the following four methods of providing an international service: (i) cross-border supply, (ii) consumption abroad (e.g., tourism), (iii) commercial presence, and (iv) presence of natural persons. Under GATS, however, national treatment applies only if a country has made a specific commitment with respect to a service, and certain exemptions are allowed. With respect to MFN treatment, if a country allows foreign competition in a service sector, equal opportunities in that sector should be given to service providers from all other WTO members, with special temporary exemptions allowed in certain cases.

Of particular relevance to the liberalization of investment are two provisions of GATS. First, the concept of “commercial

63. TRIMs Agreement art. 9 (emphasis added).

64. The impetus to negotiate GATS came again from the United States. In 1974, in the context of the Tokyo Round of GATT negotiations, the U.S. Congress gave authority to the President to negotiate a multilateral services agreement. This mandate was reconfirmed in 1984 to pursue the elimination or reduction of barriers and distortions to trade in services in bilateral and multilateral trade negotiations. Thus, the conclusion of the GATS in the Uruguay Round represents a triumph of the U.S. position. It should be noted, however, that the inclusion of GATS in the Uruguay Round came only after the United States threatened to leave GATT if there were no services negotiations. See U.S. General Accounting Office, supra note 60.

65. Burt, supra note 37, at 1031; Price & Christy, supra note 39, at 454.

66. WTO Secretariat, An Introduction to the GATS, at http://www.wto.org/english/tratop_e/serv_e/gsintro_e.doc. When GATS came into effect, a number of countries already had preferential agreements for services that they had signed with trading partners, either bilaterally or in small groups, which WTO members felt were necessary to maintain temporarily. They gave themselves the right to continue giving more favourable treatment to certain countries in particular service activities by listing “MFN exemptions.” These exemptions could only be made once, were to be reviewed after five years, and would normally last no more than 10 years.
presence” introduces into the WTO the idea that trade can be carried out through investment. Second, GATS requires governments not to restrict the transfers of funds received as payment for services out of their countries once a commitment has been made to open a certain service sector to foreign competition. The only limited exception to this principle provided under the GATS is when a country encounters balance-of-payments difficulties.

GATS is based on a “positive list” approach, where Members make specific commitments to open their markets to foreign competition in specific sectors. These commitments appear in separate national schedules that set out the sectors being opened, the extent of market access being given in those sectors, and the mode by which the services in question are to be provided, as well as any limitations on national treatment. In addition to the national schedules of specific commitments, GATS contains a number of annexes for different sectors that recognize the diversity of trade in services. The subject matter addressed in the GATS annexes include: (i) the movement of natural persons with negotiations on individuals’ rights to stay temporarily in a country for the purpose of providing a service, (ii) air transport services, under which traffic rights and directly related activities are excluded from coverage, (iii) specific commitments in financial services negotiations, which continued after the end of the Uruguay Round and concluded in late 1997, and (iv) specific commitments in telecommunications negotiations, which resumed after the Uruguay Round and led to a new agreement in February of 1997.

3. Agreement on TRIPs

Another important development in the area of investment during the Uruguay Round was the negotiation of TRIPs, which provides for the protection of intellectual property under the ambit of trade. A transfer of technology accompanies the great majority of foreign investment from multinational enterprises in home countries to their subsidiaries in host countries. The protection of such technology removes another source of insecurity for foreign investors and promotes the transfer of technology be-

67. GATS art. 1(2)(d).
68. Id. art. 12.
tween countries, in particular between developed and developing countries.\[69\]

E. Dissatisfaction with the Results of the Uruguay Round

Despite the negotiations and achievements of the TRIMs Agreement, GATS, and TRIPs during the Uruguay Round, most industrialized countries, particularly the members of the OECD, left the Uruguay Round with a sense that they had been defeated by the developing world in their quest to achieve a high degree of investment liberalization within the WTO. In the view of the OECD Members, the proliferation of bilateral investment treaties and regional economic integration agreements, which included high standards of investment protection (e.g., the North American Free Trade Agreement\[70\] ("NAFTA") and the Energy Charter), demonstrated that the time was ripe to negotiate a multilateral investment treaty.

As a result, in May 1995, the OECD Ministers established a negotiating group to begin consultations on an MAI that would set out high standards for the liberalization of investment and protection of investors. While the MAI would be open for signature to all countries, the OECD Members opted to negotiate within their organization while granting other interested countries, such as Brazil and Argentina, observer status. The motive for confining the MAI negotiations to the OECD, with the stated objective of a stipulated time frame for the conclusion of the MAI (May 1997), was to achieve an investment agreement within the confines of industrialized countries, which would then be opened for signature to other countries.

III. THE OECD MULTILATERAL AGREEMENT ON INVESTMENT

Prior to the decision to initiate negotiations on the MAI, the OECD undertook a number of initiatives to promote the liberalization of foreign investment among its members. From its inception, the OECD received the mandate from its members to work toward the liberalization of cross-border flows of goods, capital, and services. As such, in 1961, the year of the OECD’s

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69. Burt, supra note 37, at 1039.
inception, the Code of Liberalisation of Capital Movements and the Code of Liberalisation of Current Invisible Operations (together the "Codes of Liberalisation") were proclaimed. Although the Codes of Liberalisation are not identical in all respects, they share the general objective of the removal of restrictions on specified lists of current invisible operations and capital movements. The ultimate goal is that residents of different OECD members be "as free to transact business with each other as are residents of a single country."

While the Codes of Liberalisation have the legal status of an OECD decision, which is binding on all OECD members, implementation of the Codes of Liberalisation entails "peer pressure" exercised through policy reviews and country examinations. The aim is to encourage members to undertake unilateral, rather than negotiated, liberalization. As a result, enforcement of the Codes of Liberalisation consists of a framework of notification, examination, and consultation, with the purpose of monitoring observance with the liberalizing prescriptions. Furthermore, the commitments made by OECD members under the Codes of Liberalisation do not bind them to specific liberalizing measures. In accordance with this principle of autonomy, members are also permitted under Article 2 of both Codes to enter their own list of reservations, so that they will not be bound to introduce liberalizing measures in certain sectors of their choosing. In addition, Article 7 of the Codes entitles members to register temporary derogations for which specific justifications must be presented.

Despite the Codes' shortcomings, when OECD members


"Invisible" is the general term applied to all exchanges in which no merchandise is involved. Within this group there are current and capital operations and most of these consist of a transaction between two parties and a related transfer of money. The OECD has not attempted to give theoretical definitions of current and capital operations and distinguishes them by reference to lists.

Id.

72. Id.

left the Uruguay Round feeling that their aspirations with respect to investment protection and liberalization had not been fulfilled, they believed the OECD had the most extensive expertise in the area of investment liberalization.

A. The Start of the OECD MAI Negotiations

In May 1995, the Committee on International Investment and Multinational Enterprises ("CIME") and the Committee on Capital Movements and Invisible Transactions ("CMIT") presented a report at an OECD Council meeting at the Ministerial level. This report indicated that the time was "ripe to negotiate an MAI in the OECD." The conclusion of the CIME and CMIT was based on work conducted by both committees since 1991, and by five working groups which had been set up in 1994 to undertake technical and analytical work on (i) liberalization obligations under existing OECD instruments, (ii) liberalization obligations in new areas, (iii) investment protection, (iv) dispute settlement, and (v) the involvement of non-members of the OECD. The solutions devised by these working groups were partly inspired by investment-related agreements negotiated during that period, such as NAFTA, the Energy Charter, and bilateral investment agreements.

Based on its report, the CIME and the CMIT requested and obtained, from the OECD Council, the mandate to begin negotiations with the aim of concluding an MAI by the time of the Ministerial-level OECD Council meeting in 1997.

B. The Objectives of the OECD MAI

In light of the WTO's perceived failure to create a framework for the regulation of foreign, direct investment, the objectives for the MAI, reaffirmed by the OECD Ministers at the May 1996 OECD Council, were as follows:

(i) the creation of a strong and comprehensive multilateral legal framework for foreign direct investment ("FDI") among participating countries;


74. OECD, supra note 6.
75. OECD, supra note 6.
76. OECD, supra note 5.
(ii) the reduction of barriers to FDI and an increase in legal security for international investors;
(iii) "level the playing field" by providing for national treatment;
(iv) a legally binding treaty containing effective provisions for the settlement of disputes; and
(v) a free-standing treaty open to all OECD countries and the European Union, and to accession by non-OECD countries.77

As is evident from the tight timeline for completion of the treaty, the OECD Members had anticipated a smooth negotiation of the MAI in light of the involvement of industrialized economies in the process, who seemed to agree on the main goals for the agreement. However, the large amount of square brackets and footnotes in the MAI Negotiating Text of April 1998 proves that the contrary was true.78 Some of the most relevant aspects of the draft MAI Negotiating Text included the following:

1. Scope of the Treaty

MAI negotiators set out an extremely broad definition of investment, which included every kind of asset owned or controlled, directly or indirectly, by an investor, including direct and portfolio investments, real estate, intellectual property rights, rights under contracts, and rights conferred under authorizations and permits. Most importantly, the MAI was designed to cover established, as well as future investments. All such investments would have received the better of national and MFN treatment.79


2. Investment Protection

As in most bilateral investment agreements between industrialized countries, the MAI would have required that all investments receive fair and equitable treatment, and full and constant protection and security. Furthermore, expropriations or other measures tantamount to expropriation were not to be permitted, except where such measures were taken in the public interest, in a non-discriminatory fashion, accompanied by the payment of prompt, adequate, and effective compensation and in accordance with due process of law. Compensation would have to be paid without delay, equal the fair market value of the investment before the expropriation occurred, and be fully conceivable and freely transferable. The standards of compensation adopted in the MAI negotiating text provide a codification of developed countries’ views on the customary international law on expropriation and compensation.  

Despite the general agreement among MAI negotiators to the terms of investment protection, a number of non-governmental organizations (“NGOs”) forcefully opposed these provisions in light of the increasing number of NAFTA Chapter 11 challenges brought by U.S. businesses with respect to Canada’s environmental regulations under the investor-state dispute resolution mechanism. In their view, the protection of investment against government environmental regulatory measures would provide higher priority to individual property rights and the profit-making capacity of corporations over the right of the state to regulate in the area of environment or labor.  

3. Performance Requirements and Investment Incentives

The MAI negotiators agreed to prohibit the use of performance requirements (e.g., export and local sourcing requirements) under the agreement. In addition to the similar prohibitions contained in the TRIMs Agreement and in NAFTA, the MAI’s Negotiating Text extended the prohibition to trade in ser-

80. See id.
81. Ethyl Corp. v. Canada, 38 I.L.M. 708 (NAFTA ch. 11 Arb. Trib. 1998). This case was settled in July 1998 for US$13,000,000.
vices and to non-trade related performance requirements, such as technology transfers.

The prohibition on investment incentives was a much more controversial issue among MAI negotiators. While some parties believed that such a prohibition avoided costly programs whereby countries compete to attract foreign investment, others argued that certain incentives were needed to promote regional, social, environmental, and developmental goals.

4. Exceptions and Reservations

The availability of certain exceptions and reservations to the MAI was the source of a great deal of disagreement among MAI negotiators. Even with respect to the standard national security and international peace exception, some parties expressed concern about the scope of this exception. In particular, MAI negotiators were concerned with the repeated use of this ground for non-compliance with treaty obligations.83

Other grounds for non-compliance with the MAI discussed during the negotiations were the exclusion of fiscal and taxation measures from the MAI’s realm, prudential measures in relation to the financial services industry, as well as temporary derogation for balance-of-payment reasons.

Canada was the most vocal proponent of a general cultural exception clause in the MAI that would have exempted any measure to regulate investment of foreign companies and the conditions of activity of these companies, so long as such measures were taken “to preserve and promote cultural and linguistic diversity.”84 In addition to Canada’s sweeping proposal, a number of negotiators, including those from France, suggested that cultural industries be excluded from the MAI. However, the parties never agreed on the scope to be granted to a cultural exception.

Finally, the availability and scope of country-specific exceptions continued to be the source of heated debate even at the time that the Negotiating Text was made public.85 The MAI envisaged a List A of country-specific exceptions that would include

83. Dattu & Boscariol, supra note 79, at 52. See also R. Dattu & J. Boscariol, GATT Article XXI, Helms Burton and the Continuing Abuse of the National Security Exception, 28 CAN. BUS. L. J. 198 (1997); 1999 World Investment Report, supra note 82, at 135.
84. 1999 World Investment Report, supra note 82, at 133.
85. Id. at 133; see also Negotiating Text, supra note 78.
existing non-conforming measures. In addition, there was a proposal contemplating a List B of exceptions. This category would include a limited number of new, but unspecified, non-conforming measures to be excepted from the MAI obligation of national and MFN treatment. Among potential areas to be covered by List B were preferential economic policies for aboriginal peoples, minorities, and cultures.  

5. Dispute Settlement

Like most bilateral investment agreements and Chapter 11 of NAFTA, the MAI was to provide for both state-to-state and investor-state dispute settlement mechanisms by means of arbitration. The MAI would be governed by the procedures established by the International Centre for the Settlement of Investment Disputes ("ICSID"), the United Nations Commission on International Trade Law ("UNCITRAL"), or the International Chamber of Commerce ("ICC") Court of Arbitration. As of the publication of the Negotiating Text, there had not been an agreement among the MAI negotiators on whether certain MAI provisions (e.g., the pre-establishment rights of investors and investments) would be excluded from the private dispute resolution mechanism.

6. Sub-national Authorities

With respect to sub-national authorities, divergent views arose with respect to two issues. First, federal states, such as Canada, referred to the constitutional difficulty of binding their provinces to the MAI without a prior consultation process. Second, and more controversial, was the question raised by the United States as to whether the MAI's national treatment requirements would be met by applying the treatment accorded to investors in any one of the other states.

7. Regional Economic Integration Organizations

The EU proposed the addition of a regional economic inte-
gration organization exception, dubbed the "REIO clause," to the treaty, whereby the EU would have been allowed to grant preferential treatment to its members without having to extend the same treatment to all MAI signatories. While the EU argued that this clause would apply to fields not covered by the MAI, the disagreement continued until the end of the MAI negotiations, as the other parties felt that a REIO clause ran counter to the main goals of the MAI.89

8. Labor and Environmental Issues

In response to the vociferous concerns raised by NGOs with respect to the social and environmental impact of the MAI, negotiators began to consider the possibility of including provisions on labor and the environment to the agreement. The issue, including whether a commitment not to lower labor and environmental standards in the MAI would be binding on governments, and thus subject to the MAI's dispute resolution mechanisms, remained unresolved at the end of 1998 when MAI negotiations broke down.90

As the foregoing discussion reveals, despite the absence of developing countries from the negotiating process—a factor that had been anticipated to facilitate agreement among all parties—the like-minded economies of the OECD and the EU were unable to overcome a large number of the obstacles that arose in a number of areas of the MAI.

C. The Lessons from the MAI's Failure at the OECD

The lessons of the MAI's failure at the OECD are:

1. The willingness of countries to enter into regional and bilateral investment agreements does not necessarily signify the unconditional willingness to sign onto a global investment agreement that grants all states, and all investors of all states, rights *vis-à-vis* all other potential host states of investments.

2. An attempt to negotiate an MAI that provides high standards of liberalization and protection among countries that already have well-established, liberal, and transpar-

89. 1999 World Investment Report, supra note 82, at 132.
90. Id. at 134.
ent foreign investment policies is likely to result in failure, because the benefits to be yielded from such an agreement are expected to be marginal. However, the political cost to the governments of the negotiating countries can be quite significant.  

3. The WTO, with its broad mandate over trade matters (and the give and take that this permits during trade negotiations), rather than the OECD, is a more conducive forum for negotiating an MAI that is likely to yield relatively significant benefits, which can then be expected to provide the necessary political impetus to the governments of signatory countries.

4. Furthermore, it is to be expected that in a difficult and controversial area, such as investment liberalization and protection, patience and diligence will be required. This is confirmed by the recent experience of the Uruguay Round negotiations, which at least resulted in pared-down versions of investment liberalization and protection measures in the TRIMs Agreement, GATS, and TRIPs. On the other hand, the OECD's overly ambitious and fast-paced negotiations in Paris could not arrive at any sort of agreement even among like-minded countries.

IV. BILATERAL AND REGIONAL INVESTMENT AGREEMENTS

A. Bilateral Investment Agreements

The precursor to the modern version of the bilateral investment treaty ("BIT") was the Treaty of Amity and Commerce signed between the United States and France in 1778, which governed their commercial relations.  

91. Dymond, supra note 8, at 26.
to protect the property of the nationals of the other state.\textsuperscript{93}

After World War II and Europe’s economic recovery, European countries negotiated investment protection treaties with non-market economies and their former colonies. Germany signed the first of these Bilateral Investment Protection Agreements ("BIPAs") with Pakistan in 1959 and many other European countries followed thereafter.\textsuperscript{94}

While the United States increasingly began including provisions for the protection of investments in its FCN treaties after the war, the expansion of the European network of BIPAs was the driving force behind the BITs that the United States entered into in the 1960s and thereafter. The increasing number of BITs provided greater protection for United States nationals' investment in foreign countries. As of January 1997, however, the United States was not among the ten countries that had signed the largest number of BITs.\textsuperscript{95}

Since the 1960s, BITs—called BIPAs in Europe and Foreign Investment Protection and Promotion Agreements ("FIPAs") in Canada\textsuperscript{96}—have spread as the principal means of ensuring reciprocal protection of foreign, direct investment between countries. At the end of 1996, 155 countries had signed 1330 BITs, 822 of which had been concluded by developed countries.\textsuperscript{97} By 1999,
the number of BITs signed was 1856. Of these 1856 BITs, the United States has signed 46 BITs, in addition to its commitments, vis-à-vis Canada and Mexico, with respect to foreign investment contained in Chapter 11 of NAFTA.

This web of bilateral agreements for the protection of investment offers each signatory reciprocal rights and obligations that are negotiated on a case-by-case basis in accordance with the needs and requirements of the signatory to a particular agreement. While it may be more costly and time-consuming for each country to enter into a multitude of bilateral agreements, it provides a means, particularly for countries that are hosts of foreign investment, to attract investment flows from the investor country in exchange for relinquishing a certain degree of autonomy over their economic policy.

B. Regional Investment Agreements

The trend noted at the bilateral level of the proliferation of BITs is replicated in the regional sphere across all continents. The willingness of countries to enter into regional investment treaties, therefore, contrasts sharply with the reluctance of those same countries to sign onto an MAI.

1. North America and Europe

In the Western hemisphere, NAFTA was the first regional treaty that contained far-reaching investment provisions, including an investor-state dispute settlement procedure. What is also significant about NAFTA is the fact that its membership, composed of Canada, the United States, and Mexico, combines developed and developing countries, which are all bound by high standards of investment protection.

The investment provisions that provide for the regulation


99. Michael Hart, A Multilateral Agreement on Foreign Direct Investment: Why Now?, in INVESTMENT RULES FOR THE GLOBAL ECONOMY: ENHANCING ACCESS TO MARKETS 36, 89-90 (Pierre Sauve & Daniel Schwanen eds., 1996); see also Asante, supra note 31, at 607 (stating that the bilateral investment treaties concluded by developing countries with capital-exporting states constitute little more than "assurances and privileges conceded to foreign companies in return for the bundle of benefits expected from a purely bilateral relationship").

100. NAFTA ch. 11.
and liberalization of investment within the EU are contained in Title III of the Treaty Establishing the European Community, 101 entitled "Free Movement of Persons, Services and Capital." In particular, Chapter Four sets out the requirement that all restrictions be removed on the movement of capital and on payments, not only among EC Member States, but also between Member States of the European Community and third countries. 102

In addition to the foregoing agreements, the 1990s also saw a sharp increase in the number of regional economic arrangements between developing countries that included investment clauses as part of their co-operation initiatives.

2. South and Central America

In South America, the member countries of the Andean Community 103 approved on March 21, 1991, Decision 291 on the Treatment of Foreign Capital of the Cartagena Agreement. On January 17, 1994, members of the Southern Cone Common Market ("MERCOSUR") 104 approved the Colonia Protocol for the Promotion and Protection of Investments in MERCOSUR. The endorsement of a Framework Agreement for the Creation of a Free Trade Area between the Andean Community and MERCOSUR on April 16, 1998, achieved further economic integration, coupled with investment regulation.

The Caribbean Community ("CARICOM") 105 approved the


102. Id. arts. 56-60.

103. The member countries of the Andean Community are Bolivia, Colombia, Ecuador, Peru and Venezuela.

104. The MERCOSUR members are Argentina, Brazil, Paraguay, and Uruguay. Chile and Bolivia are MERCOSUR associates.

105. CARICOM member countries are: Antigua, Bahamas, Barbados, Belize,
Principles and Guidelines on Foreign Investment at the CARICOM Heads of Government Conference in 1982. During the 1990s, two Protocols—Protocols II (Establishment, Services and Capital) and III (Industrial Policy) Amending the Treaty Establishing the Caribbean Community—were introduced, which include liberalizing investment provisions.

In turn, members of CARICOM entered into a Free Trade Agreement with the Dominican Republic, which contains an Agreement on Reciprocal Promotion and Protection of Investments. Earlier agreements between CARICOM and Colombia, on the one hand, and Venezuela, on the other, contain provisions that recognize the importance of investment stimulation; however, no specific investment rules are provided for in those agreements.

The so-called Group of Three (Colombia, Mexico, and Venezuela) entered into a free trade agreement in 1995 that includes a chapter exclusively dedicated to investment. Mexico also entered into a free trade agreement with El Salvador, Guatemala, and Honduras, which contains an investment chapter. In addition, the Free Trade Agreement Between Central America and the Republic of Chile dedicates a chapter to the regulation of investment.

3. Asia

The previously discussed trend in Latin America toward regional economic integration arrangements, and the inclusion of investment measures in such agreements, is now prevalent in Asia. As such, the Ministers of the Association of South East

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Dominica, Grenada, Guyana, Jamaica, Monserrat, St. Kitts-Nevis-Antigua, St. Lucia, St. Vincent and the Grenadines, and Trinidad and Tobago.


111. Treaty on Free Trade ch. XIV.

Asian Nations ("ASEAN") signed on October 7, 1998, a Framework Agreement on the ASEAN Investment Area ("AIA"), which had been ratified by all ASEAN members. This Framework Agreement complements the 1987 ASEAN Agreement for the Promotion and Protection of Investments and its 1996 Protocol.\textsuperscript{113} The commitments set out under the AIA include the opening of all industries and the grant of national treatment—other than those excluded under a Temporary Exclusion List ("TEL") or a Sensitive List ("SL")—to ASEAN investors by 2010, and to all investors by 2020.\textsuperscript{114}

The South Asian Association for Regional Cooperation ("SAARC") is currently considering a Regional Agreement on Promotion and Protection of Investments within the region as a trade facilitation measure.\textsuperscript{115} Similarly, BIMSTEC ("Bangladesh, India, Myanmar, Sri Lanka, Thailand Economic Cooperation"), a unique organization in that it groups two members of ASEAN with three countries from South Asia, was formed in late 1997 for the purpose of facilitating economic cooperation among its members. BIMSTEC is currently discussing a Free Trade Agreement that would include rules on investment liberalization.\textsuperscript{116}

4. Africa

Even in Africa, which is characterized for its historical opposition to the liberalization of foreign direct investment, a number of regional organizations have begun to include investment provisions in their existing trade agreements, or to discuss standalone investment agreements to attract more foreign direct investment.

Members of the Central African Economic and Monetary...
Community ("CEMAC"), which succeeded the Central African Customs and Economic Union in 1999, are currently negotiating the CEMAC Community Charter on Investment, as part of CEMAC's ultimate goal of attaining the free circulation of capital and goods among its members.\textsuperscript{117} On October 31, 2000, the Common Market for Eastern and Southern Africa ("COMESA"), established in 1994, launched the first ever African Free Trade Area ("COMESA FTA"), which includes rules on investment.\textsuperscript{118} The previously negotiated Treaty Establishing the Southern African Development Community ("SADC"), signed in 1992, binds all countries of the region to coordinate, harmonize, and rationalize their policies and strategies for sustainable development in all areas of human endeavour. The SADC created a Finance and Investment Sector working group charged with drafting a Protocol on Finance and Investment to be developed over a period of five years from July 1999, and culminating in the Protocol's ratification by July 2004. Furthermore, sectoral sub-committees are currently developing memoranda of understanding in each of their respective areas that will feed into the development of the Protocol and specific annexes.\textsuperscript{119}

The West African Economic and Monetary Union ("UEMOA"), whose founding treaty came into force on August 1, 1998, was drafting a Community Code on Investment scheduled for adoption on January 1, 2000.\textsuperscript{120} Finally, the Treaty establishing the East African Community ("EAC"), signed on No-

\textsuperscript{117} Member countries of CEMAC are Cameroon, Central African Republic, Chad, Congo, Equatorial Guinea, and Gabon. See Les Journees Cemac, Programmes, at http://www.arh.fr/cemac.htm; see also Africabiz, Brief on CEMAC, at http://businessafrica.hispeed.com/africabiz/ezine/ca/newscaf.htm#cemac.

\textsuperscript{118} COMESA's member countries are Angola, Burundi, Comoros, Democratic Republic of Congo, Djibouti, Egypt, Eritrea, Ethiopia, Kenya, Madagascar, Malawi, Mauritius, Namibia, Rwanda, Seychelles, Sudan, Swaziland, Uganda, Zambia, and Zimbabwe. COMESA, established in 1994, replaced the Preferential Trade Area for Eastern and Southern Africa (PTA), which had been in existence since 1981, to take advantage of a larger market size, to share the region's common heritage and destiny and to allow greater social and economic co-operation, with the ultimate objective of creating an economic community. See http://www.comesa.int/backgrnd/back-index.htm.

\textsuperscript{119} Member countries of SADC are Angola, Botswana, Democratic Republic of Congo, Lesotho, Malawi, Mauritius, Mozambique, Namibia, Seychelles, South Africa, Swaziland, Tanzania, Zambia, and Zimbabwe. See http://www.sadc.int; see also http://www.sadcreview.com/Default.htm.

\textsuperscript{120} The UEMOA consists of Burkina Faso, Benin, Cote d'Ivoire, Guinea Bissau,
November 30, 1999, includes certain investment rules.\textsuperscript{121}

C. Inter-Regional Investment Agreements

In addition, a number of economic organizations that encompass countries from different continents are in the process of including investment provisions as part of their treaties of integration. One such example is the Indian Ocean Rim Association for Regional Cooperation\textsuperscript{122} ("IOR-ARC"), whose objectives include the removal of impediments to trade and investment within the region and the promotion of trade liberalization. As a result, at the Extraordinary Ministerial Meeting, held in Oman in January 2000, the trade and investment agenda was put in place, symbolized by the holding of an inaugural Trade and Investment Working Group meeting. In Oman, Ministers adopted a plan of action, which included an agreement that a set of investment regulations be completed before the next Ministerial meeting in March 2001.\textsuperscript{121}

The Asia-Pacific Economic Co-operation ("APEC"), which includes countries from different continents in its membership, is another international organization that negotiated an investment agreement among its members.\textsuperscript{124}

\textsuperscript{121} Member countries of the EAC are the United Republic of Tanzania, the Republic of Kenya, and the Republic of Uganda. See The East African Community, at http://www.newafrica.com/eac/treaty/principles.htm.

\textsuperscript{122} Mali, Niger, Senegal, and Togo. See Union Economique et Monetaire Quest Africaine, at http://212.52.130.131/Index.htm.

\textsuperscript{123} Id.

\textsuperscript{124} The Joint Statement issued at the 12th APEC Ministerial Meeting in Brunei Darussalam in November, 2000 expressed support for APEC's Trade and Investment Facilitation Program and endorsed the work of the Committee on Trade and Investment. The members of APEC are Australia, Brunei Darussalam, Canada, Chile, the People's Republic of China, Hong Kong, China, Indonesia, Japan, Korea, Malaysia, Mexico, New Zealand, Papua New Guinea, Peru, Philippines, Russia, Singapore, Chinese Taipei, Thailand, the United States of America, and Vietnam. APEC's Official Observers are ASEAN, Pacific Economic Cooperation Council ("PECC") and South Pa-
A promising trend in the quest for further liberalization of investment rules is found in the expansion of inter-regional trade and investment agreements, which has proven to be successful. For example, the EU and MERCOSUR are in the middle of far-reaching negotiations toward an Inter-regional Association Agreement that would not only cover the liberalization of trade in goods and services, but would also deal with government procurement, competition policies, intellectual property rights, trade defense instruments, and a dispute settlement mechanism, in addition to investment.\textsuperscript{125}

The EU has been the undeniable leader in establishing cooperation frameworks with other regional organizations. In South America, in addition to MERCOSUR, the EU signed a Framework Co-operation Agreement between the EEC and the Cartagena Agreement and its member states, Bolivia, Ecuador, Peru, and Venezuela in 1993, which became effective in 1998. The agreement has the objective of expanding the areas of cooperation between the two regions in the political, economic, trade, and investment sectors.\textsuperscript{126}

The EU has also established a close relationship with ASEAN, based on a Co-operation Agreement between the parties signed in 1980. Under the framework of this agreement, a Joint Co-Operation Committee ("JCC") was created, which meets approximately every eighteen months. At the June 1999 meeting of the JCC in Bangkok, a Work Program for the Implementation of the New Dynamic was adopted, which focuses on increasing the business and trade ties between the two regional associations including, \textit{inter alia}, the topic of investment and capital flows.\textsuperscript{127}

Also in the context of its close relationship with Asian countries, the Asia-Europe Meeting ("ASEM") was started as "an informal process of dialogue and cooperation bringing together the fifteen EU member states and the European Commission, with

\begin{itemize}
\item \textsuperscript{126} European Union, \textit{The EU & the Andean Countries}, at http://www.europa.eu.int/comm/external_relations/andean/intro.
\item \textsuperscript{127} European Union, \textit{The EU & ASEAN}, at http://www.europa.eu.int/comm/external_relations/asean/intro.
\end{itemize}
ten Asian countries (Brunei, China, Indonesia, Japan, South Korea, Malaysia, the Philippines, Singapore, Thailand, and Vietnam).”

In the economic and financial field, the activities that have received priority attention at ASEM include the reduction of barriers to trade and investment. In this context, in 1998, ASEM adopted a Trade Facilitation Action Plan (“TFAP”) and an Investment Promotion Action Plan (“IPAP”). The latter “aims at promoting two-way investment flows between [the] two regions” by addressing investment promotion, as well as investment policy issues.

The relationship between the EU and SAARC has not advanced as far as both sides would have desired, mainly as a result of the conflicts within SAARC, in particular because of both India and Pakistan’s presence in the association. However, the parties continue to work towards deepening their economic cooperation.

Having the energy sector as the basis for co-operation, the investment provisions of the Energy Charter constitute a prime example of inter-regional integration. The Energy Charter sets out investment protection and liberalization requirements to be implemented by countries of different geographic regions from the OECD, as well as CIS and East European countries.

Another testament to the proliferation of inter-regional investment agreements is the recently developed cooperation framework between Japan and CARICOM, entitled “A New Framework for Japan-CARICOM Cooperation for the Twenty-first Century,” which contemplates an increased flow of investment and trade between Japan and CARICOM Members. Similarly, the European Free Trade Area (“EFTA”) and Mexico initialled on November 3, 2000, in Geneva, a free trade agreement that, in addition to public procurement, competition policy, intellectual property, and an effective dispute settlement system, will cover services and investment. Under the agreement, EFTA

will benefit from the same level of access to the Mexican market that is enjoyed by the EU, the United States, and Canada.133

Canada also has led the effort to establish trade and investment links with other regional associations. As part of its expanding relationship with Latin American economies, in 1998, Canada signed a Memorandum of Understanding on Trade and Investment ("MOUTI") with Costa Rica, El Salvador, Guatemala, Honduras, and Nicaragua, which are members of the Central American Common Market ("CACM").134 In the same year, Canada signed a Trade and Investment-Cooperation Arrangement ("TICA") with MERCOSUR,135 while it negotiated another TICA with the Andean Community.136

A prime example of Canada's efforts to liberalize investment through inter-regional or bilateral means is the Canada-Chile Free Trade Agreement, which Canada signed in 1996; Part Three sets out the obligations of the two parties in the areas of investment, services, telecommunications, competition policy, and the entry of business persons.137 With respect to the treatment of investors and their investments, the Canada-Chile agreement provides for the better of national and MFN treatment138 and the minimum standard of treatment in accordance with international law. In the Canada-Chile agreement, the latter standard concerns fair and equitable treatment, full protection, and security.139 In respect of international law standard adopted for the purposes of expropriation, the Canada-Chile agreement incorporates the Hull Formula. The agreement requires that expropriation be for a public purpose and non-discriminatory, in accordance with due process of law and international law (as set out in Article G-05), and contingent on compensation equivalent to the fair market value of the expropriated investment immediately before the expropriation took place payable

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135. Id. The TICA with MERCOSUR was signed in Buenos Aires, Argentina, on June 16, 1998.
136. Id.
138. Id. arts. G-02, G-03, and G-04.
139. Id. art. G-05.
without delay and fully realizable.\textsuperscript{140}

It is interesting to note that, while the Canada-Chile agreement includes a provision for investor-state dispute settlement, this mechanism is restricted to matters concerning state enterprises and monopolies.\textsuperscript{141} Furthermore, in light of the numerous NAFTA, investor-state disputes against Canada, which allege that governmental environment measures have resulted in something tantamount to expropriation, the Canada-Chile agreement clarifies in Article G-14 that nothing in the investment chapter of the agreement is to be construed so as to prevent a party from adopting, maintaining, or enforcing measures that it considers appropriate in order to ensure that investment activity in its territory is undertaken in a manner sensitive to environmental concerns.\textsuperscript{142}

\section*{V. THE AFTERMATH OF SEATTLE}

Subsequent to the failure of the MAI negotiations at the OECD, the collapse of the Seattle Ministerial Meeting of the WTO in December 1999 sent a cautionary message to trade negotiators worldwide concerning all areas of trade policy.

With particular regard to investment, the lesson seems to be that in order to continue the liberalizing trend, the best route may be to achieve incremental gains with bilateral investment treaties and regional agreements. Furthermore, progress in the multilateral arena can still be achieved within GATS and TRIMs by taking advantage of the built-in agenda in these agreements for further negotiations. However, as with bilateral and regional agreements, further liberalization under these agreements needs to be undertaken incrementally. Extensive studies should be conducted in advance of WTO negotiations or meetings in order to understand the extent to which a consensus may be obtained in the critical areas where to date there has been lack of consensus. The unresolved, long list of issues from the MAI negotiations at the OECD should generate the necessary topics on which extensive studies need to be undertaken before the launch of any new negotiations for securing an MAI.

\begin{thebibliography}{99}
\bibitem{140} \textit{Id}. art. G-10.
\bibitem{141} \textit{Id}. arts. G-16-G-18.
\bibitem{142} \textit{Id}. art. G-14.
\end{thebibliography}
CONCLUSION

The quest for an MAI, with high standards of liberalization and protection, has remained elusive for more than half a century. Meanwhile, the recent proliferation of bilateral, regional, and inter-regional agreements that provide for investment measures suggests that in recent years, the vast majority of WTO members have developed a significant interest in maintaining investment policies hospitable to foreign investors. The degree of antipathy to foreign investors and foreign investments in the world community that existed for close to thirty years since the 1950s, when many of the developing countries began to receive their independence, no longer exists.

However, the developing countries, having embarked on the road towards welcoming and protecting foreign investments under the framework of bilateral and regional agreements with reciprocal benefits obtained during the negotiations of such agreements, are in no rush to embrace an MAI. It is unlikely that a multilateral agreement will provide the same reciprocal bargaining position and ability to attract investment flows from capital exporting countries, as do bilateral agreements where such investment flows are bargained for in exchange for the relinquishment of a certain degree of autonomy over the host country’s economy.

With the passage of time, and an increasing web of investment liberalization and protection agreements, the relative merit of an MAI will become more evident to most WTO member countries. Indeed, the very existence of a web of agreements, which will have advanced liberal and hospitable foreign investment policies on a more universal basis, should inevitably lead to the logic of a universal set of rules on investment measures.

The OECD member countries worked from the same type of logic when, in 1995, they determined that the time was ripe for negotiating an MAI. However, their mistake was their preemptive decision to embark on a MAI—more time needed to pass before it is time. Furthermore, the choice of the OECD as the negotiating forum among like-minded countries also provided a significant basis for the failure of the MAI.

The WTO, with its broad trade mandate, its inclusive nature, and its experience in providing incremental gains through
rounds of negotiations that build upon a series of compromises reached during each previous negotiating round, provides the best forum for negotiating and concluding an MAI. With the successful achievement of the TRIMs Agreement, GATS, and TRIPs, during the Uruguay Round, the first significant set of steps have already been taken.