

1999

International Investment in the WTO: Prospects and Challenges in the Shadow of the MAI

Pippa Read
Bond University

Follow this and additional works at: <http://ePublications.bond.edu.au/blr>

This Article is brought to you by the Faculty of Law at ePublications@bond. It has been accepted for inclusion in Bond Law Review by an authorized administrator of ePublications@bond. For more information, please contact [Bond University's Repository Coordinator](#).

International Investment in the WTO: Prospects and Challenges in the Shadow of the MAI

Abstract

This paper attempts to canvas the issues which may arise if investment is eventually included for negotiation in the WTO, with particular reference to the challenges previously faced by the MAI and the factors which contributed to its downfall. Part 2 explores the current consensus with regard to international investment principles and outlines those investment protection, liberalization and dispute resolution standards which are commonly contained in bilateral investment treaties. Part 3 briefly deals with the attempt to consolidate this consensus within the MAI, and the reasons for its subsequent demise. Parts 4 and 5 then focus upon the potential inclusion of investment within the WTO.

Keywords

international investment, World Trade Organisation, WTO, Multilateral Agreement on Investment, MAI

INTERNATIONAL INVESTMENT IN THE WTO: PROSPECTS AND CHALLENGES IN THE SHADOW OF THE MAI

*By Pippa Read**

Introduction

Within the last two years, two efforts to establish a multilateral agreement on investment have both failed. The first, an initiative of the OECD known as the Multilateral Agreement on Investment (MAI) was debated for over three years before negotiations came to an abrupt halt in December 1998. The second attempt to bring investment within a multilateral regulatory forum occurred in December 1999, when a number of World Trade Organisation (WTO) Member countries proposed the inclusion of international investment in the next Round of WTO negotiations. The lack of consensus on this issue was just one of the factors contributing to the collapse of the Seattle Ministerial Conference, where WTO Members were unable to agree upon the scope of future negotiations, thereby postponing them indefinitely.¹ The 135-country membership of the WTO, the stubborn negotiating positions taken by some nations, and the short time limit for the Conference made it almost impossible to agree upon an agenda for the next Round.²

Both failures are in stark contradiction to the otherwise strong consensus existing with regard to international investment standards and principles. This consensus is embodied in the common core of a large network of bilateral investment treaties, and in the investment provisions of some limited-scope multilateral treaties. Yet both failures should not be seen as indicative of a worldwide reluctance to submit investment to multilateral regulation. Rather, the inability to achieve consensus on a

* BA, LLB (Hons) (Bond), LLM (International Trade Law) (Bond) candidate. Adjunct Assistant Professor of Law, Bond University.

1 Oxley A, 'Sharing the Blame for WTO Wash-out' (1999) 6 December, *The Australian* 15.

2 Ibid.

INTERNATIONAL INVESTMENT IN THE WTO:
PROSPECTS AND CHALLENGES IN THE SHADOW OF THE MAI

multilateral investment agreement is both a consequence of the inadequacies of each negotiating forum and a symptom of the prevailing climate of uncertainty, and even hostility, towards globalization.

As the United States President Bill Clinton has said however, 'globalization is not a policy choice, it is a fact.'³ Commentators may argue about its benefits and detriments, but ultimately, the power of new technology and its impact upon transportation, telecommunications, financial services and commerce continues to diminish the importance of national boundaries. International trade and investment has consequently become more prevalent, leading in turn to a greater need for international regulation. The regulation of international trade has been substantially achieved by the WTO, particularly through the implementation of its General Agreement on Tariffs and Trade (GATT) and General Agreement on Trade in Services (GATS). International investment, however, is still governed primarily by bilateral treaties. Whilst the common provisions in these treaties have arguably developed into minimal standards of international law, there is still a need for a comprehensive, multilateral framework which both protects and liberalizes international investment. Although the collapse of the WTO Ministerial Conference has postponed negotiations, this does not totally rule out the inclusion of international investment in the next round.

This paper attempts to canvas the issues which may arise if investment is eventually included for negotiation in the WTO, with particular reference to the challenges previously faced by the MAI and the factors which contributed to its downfall. Part 2 explores the current consensus with regard to international investment principles and outlines those investment protection, liberalization and dispute resolution standards which are commonly contained in bilateral investment treaties. Part 3 briefly deals with the attempt to consolidate this consensus within the MAI, and the reasons for its subsequent demise. Parts 4 and 5 then focus upon the potential inclusion of investment within the WTO; Part 4

3 World Trade Organization, 'The WTO Is Not a World Government and No-one Has Any Intention of Making it One, Moore Tells NGO's', (1999) 29 November, *The 3rd WTO Ministerial Conference*, Press Release, Official Ministerial Website at: <http://svca.wto-ministerial.org/english/press_e/press155.htm>, 10 December 1999.

assesses the extent to which existing WTO Agreements already address international investment, whilst Part 5 examines whether the WTO is an appropriate forum to regulate international investment and finally notes the potential challenges which may be faced if international investment is integrated into the current WTO system.

International Investment Principles – Existing Consensus

The call for a multilateral investment agreement stems from a strong existing consensus over key international investment principles. This consensus was and is demonstrated in the content of over 1600 bilateral investment treaties (known as either BITs or IPPAs,⁴) the majority of which were formed in the last 10 years.⁵ Whilst there are obviously some differences in the details of these bilateral agreements, the common inclusion of a number of key investment liberalization, protection and dispute resolution provisions have arguably evolved into minimal standards of customary international law.

Investment Liberalization Standards

Within typical bilateral investment protection agreements, investment is promoted through ensuring that existing foreign investors are not discriminated against by the host state.⁶ Discrimination is prevented through adherence to the principles of most favoured nation (MFN) treatment and national treatment (NT) which ensure that foreign investors are treated no less favourably than either domestic investors or foreign investors from other states. Many BITs will include both

4 Both the UK and Australia refer to bilateral investment treaties as 'Agreements for the Promotion and Protection of Investments' (IPPAs).

5 OECD, 'MAI: The Multilateral Agreement on Investment' (1997) *OECD Policy Brief*, OECD 2/1997 at <http://www.oecd.org/publications/Pol_brief/9702_pol.htm>, 10 December 1999, [15] (hereafter 'OECD Policy Brief No 2') Note however the existence of earlier bilateral agreements known as 'Treaties of Friendship, Commerce and Navigation' (FCN) between developed countries, which provided very limited reciprocal protection of foreign investment. See, for a discussion of the US FCN history, Vandavelde K, 'United States Investment Treaties' (1992) 14–19.

6 Vandavelde K, 'The Political Economy of a Bilateral Investment Treaty' (1998) 92 *Am J Int'l L* 621 at 630 (hereafter 'BIT Political Economy').

INTERNATIONAL INVESTMENT IN THE WTO:
PROSPECTS AND CHALLENGES IN THE SHADOW OF THE MAI

principles,⁷ others will refer only to the MFN principle.⁸ Exceptions are usually made for any concessions resulting from taxation agreements (such as double tax treaties) or regional economic integration agreements such as customs unions or free trade areas.⁹ The MFN and NT principles did not initially derive from customary international law, but have been adopted from the multilateral context of the GATT (and other WTO Agreements). Their widespread inclusion in bilateral agreements may indicate, however, that these standards have now developed into customary international law.

These standards will only apply, however, once an investment has been established; bilateral agreements do not normally extend NT or MFN treatment to the pre-investment or establishment phase.¹⁰ BITs usually provide that investments shall be admitted within each country, but

7 See eg the BIT between the US and Estonia which provides that '*each party shall...treat investment... on a basis no less favourable than that accorded in like situations to investment...of its own nationals or companies, or of nationals or companies of any third country, whichever is the most favourable, subject to the right of each Party to make or maintain exceptions falling within one of the sectors or matters listed in the Annex to this Treaty.*' *Treaty for the Encouragement and Reciprocal Protection of Investment*, Apr 19, 1994, Est-US, Art II(1), S Treaty Doc No 103-38 (1996) (as cited in Vandevelde K, *ibid* at 630).

8 See eg Australia – Phillipines IPPA: *Agreement Between the Government of Australian and the Government of the Republic of the Phillipines on the Promotion and Protection of Investment* TS 1995 No 28. Note also some hybrid provisions, for example, Article III of the China-UK IPPA TS No 33 (1986) Cmnd 9821 which provides that along with MFN treatment, each party is to accord to investment National Treatment to the extent possible in accordance with its laws and regulations (as discussed in Denza E & Brooks S, 'Investment Protection Treaties: United Kingdom Experience' (1987) 36 *ICLQ* 908).

9 Vandevelde K, *above n* 6 at 630. See for e.g. Article IV(1) of the Australian – Indonesian IPPA *Agreement Between the Government of Australia and the Government of the Republic of Indonesia Concerning the Promotion and Protection of Investments* TS 1993 No 19: '*...a Party shall not be obliged to extend to investments or returns any treatment, preference or privilege resulting from: (a) any customs union, economic union, free trade area, regional economic integration agreement, or cross-border trade arrangement or similar economic agreement to which the Party belongs; or (b) a double taxation agreement or arrangement with a third country.*'

10 Vandevelde K, *ibid* at 629–30.

subject to that country's laws.¹¹ This means that rights of establishment, market access, entry of personnel, and even conditional performance requirements are governed by the domestic laws of each State.¹²

Many BITs also contain provisions on transparency, which require the host state to publish or make publicly available any laws, regulations or policies relating to investment.¹³ This transparency provision also achieves a measure of investment liberalization, through enabling investors (both current and future) to better ascertain the prevailing investment standards and market conditions of the host state.

Investment Protection Standards

Along with promoting investment, BITs also aim to ensure that existing investments are protected, primarily against state interference such as expropriation, currency and exchange controls, war and civil disturbances.¹⁴ To begin with, investments are promised fair and equitable treatment, full protection and security according to the laws of the host state.¹⁵ Specific protection is provided against expropriation, which is only permitted when it is i) for a public purpose under due process of law, ii) non-discriminatory; and iii) accompanied by the payment of prompt, adequate and effective compensation.¹⁶ Expropriation

11 See for eg Article 2(1) of the Germany-Dominica BIT: *Treaty concerning the Encouragement and Reciprocal Protection of Investments*, Oct 1, 1984, Dominica-Ger, reprinted in 2 ICSID, *Investment Promotion and Protection Treaties* (loose-leaf) (cited in Vandeveld K, *ibid* at 629)

12 Vandeveld K, *ibid* at 629-30. He notes however at 630 fn 96-7 the divergent US BITs which do provide for the entry of personnel and prohibit the imposition of performance requirements.

13 Vandeveld K, *ibid* at 633. He cites the example of Article II(5) Albania - US BIT: *Treaty Concerning the Encouragement and Reciprocal Protection of Investment*, Jan 11, 1995, US - Alb, S Treaty Doc No 104-19 (1995). See also Article X of the Australia - Indonesia IPPA above n 9.

14 Vandeveld K, *ibid* at 632.

15 *Ibid*. See also Article II (2) & (3) Australia - Indonesia IPPA, above n 9.

16 See eg Article VI Australia - Indonesia IPPA, above n 9. See also Vandeveld K, *ibid* at 631 citing Article III(1) of the Jamaica - US BIT: *Treaty Concerning the Reciprocal Encouragement and Protection of Investment*, Feb 4, 1994, US - Jam, S Treaty Doc No 103-35 (1994). Note however that some BITs contain other equivalent formulations for

INTERNATIONAL INVESTMENT IN THE WTO:
PROSPECTS AND CHALLENGES IN THE SHADOW OF THE MAI

is usually defined to cover both direct acts of nationalisation or expropriation as well as ‘measures having effect equivalent to nationalisation or expropriation.’¹⁷ BITs can therefore potentially protect investments from indirect forms of expropriation such as ‘creeping’ expropriation or ‘regulatory takings’. Most BITs also require compensation to be paid for any losses sustained as a result of war or civil disturbance, on MFN and/or NT terms.¹⁸ In addition, the common inclusion of a provision on subrogation permits a state who has paid an indemnity to one of its investors to take over all rights and claims of that insured investor and to receive the same treatment as the investor would have received.¹⁹

Transfer or repatriation provisions are also inserted which allow investors to transfer their investment funds freely and without unreasonably delay, and in any freely convertible currency.²⁰ Such investment funds will normally include investment capital, returns, interest and loan repayments, the proceeds from share sales,

appropriate compensation: see Vandeveld K, ‘United States Investment Treaties: Policy and Practice’ (1992) at 120-37.

- 17 See eg Article 5(1) United Kingdom – Egypt IPPA: ‘*Investments of nationals or companies of either Contracting Party shall not be nationalised, expropriated or subjected to measures having effect equivalent to nationalisation or expropriation...*’ TS No 97 (1976), Cmnd 6638. See also Article VI of the Australia – Indonesia IPPA, above n 9.
- 18 Vandeveld K, above n 6 at 631. He cites the example of the Latvia – US BIT which provides in Article III(3) that: ‘*Nationals or companies of either Party whose investments suffer losses in the territory of the other Party owing to war or other armed conflict, revolution, state of national emergency, insurrection, civil disturbance or other similar events shall be accorded treatment by such other Party no less favourable than that accorded to its own nationals or companies or to nationals and companies of any third country, whichever is the most favourable treatment, as regards any measures it adopts in relation to such losses.*’ Cf Article V Australia – Indonesia IPPA above n. 9 whereby compensation measures must be ‘*no less favourable than that which it accords to investors of any third country.*’
- 19 See eg Article 9 UK – China IPPA, above n 8 and Article VIII of the Australian – Indonesia IPPA, above n 9.
- 20 Vandeveld K, above n. 6 at 631.

compensation for investment losses, asset sale or liquidation proceeds, and employee earnings.²¹

Whilst the BIT investment protection provisions are quite comprehensive, Kenneth Vandeveld notes that the protection is primarily afforded against State interference rather than private infringement.²² Protection against intellectual and industrial property rights infringement is therefore not guaranteed under BITs.²³

Dispute Resolution Standards

The investment protection and promotion standards outlined above are enforced through comprehensive state-state and investor-state dispute resolution procedures established within BITs. Generally a BIT will provide for binding arbitration between parties to a dispute, after a period of consultation or negotiation. Such arbitration may be through an organisation such as the International Centre for the Settlement of Investment Disputes (ICSID)²⁴ (if both parties are members to the Convention), or the International Chamber of Commerce,²⁵ or it may be *ad hoc* arbitration under a body of rules such as the United Nations Commission on International Trade Law (UNCITRAL) Rules of Arbitration.²⁶

21 See eg Article VII Australia – Indonesia IPPA, above n 9. See also Vandeveld K, *ibid* at 631, fn. 108 citing Article V(I) of the United States – Uzbekistan BIT: *Treaty Concerning the Encouragement and Reciprocal Protection of Investment*, Dec 16, 1994, US – Uzb, S Treaty Doc No 104-25 (1996).

22 Vandeveld K, *ibid* at 632.

23 *Ibid*.

24 See eg Article XI(2)(b) Australia – Indonesia IPPA, above n 9.

25 See eg Article 7(3) of the United States – Haiti BIT: *Treaty Concerning the Encouragement and Reciprocal Protection of Investments*, 12 Dec 1983, US – Republic of Haiti.

26 See eg Article XI(3) Australia – Indonesia IPPA, above n 9. See also Article 11(2) Spain – Algeria BIT: *The Agreement on the Promotion and Reciprocal Protection of Investments*, 23 Dec 1994, Algeria–Spain (as discussed in Unegbu OC, ‘BITS and ICC Arbitration: Portent of a New Wave?’ (1999) 16(2) *J Int'l Arb* 93).

INTERNATIONAL INVESTMENT IN THE WTO:
PROSPECTS AND CHALLENGES IN THE SHADOW OF THE MAI

The right of an investor to sue a State for a breach of an obligation under a treaty is contrary to the general position in international law which governs relations between states. Despite its novelty however, the investor's right of direct recourse has been generally accepted as a norm in the context of BITs.²⁷

The Rise and Demise of the MAI

The Development of the MAI

The initiation of the Multilateral Agreement on Investment (MAI) by the OECD in May 1995 was an attempt to consolidate the existing consensus by providing a 'broad multilateral framework with high standards for the liberalization of investment regimes and investment protection and with effective dispute settlement procedures.'²⁸

Whilst the precise scope of much of the MAI was left undecided, the key provisions of the final MAI negotiating text largely reflected those common BIT principles discussed above. Investment liberalization was to be achieved through MFN, NT and transparency obligations. Importantly, however, unlike BITs the MFN and NT principles applied to both the pre-establishment and post-establishment phase of investments.²⁹ Whilst the MAI permitted countries to take out certain general and country-specific exceptions with regard to MFN and NT obligations, the application of the 'standstill' principle prevented the addition of any new exceptions after the conclusion of the agreement and the proposed 'rollback' principle required countries to periodically review and abolish

27 Note however, the view taken by China in the UK-China IPPA, as discussed in Denza & Brooks, above n 8 at 921: 'The Chinese...took the view that, given that a foreign investor - individual or company - does not have the same status as a State, the investor's recourse to arbitration should remain much more limited...they were able to accept only that a dispute between an investor and a host State concerning an amount of compensation should be submitted to arbitration.'

28 The OECD Multilateral Agreement on Investment (MAI) Negotiating Text (April 1998), *Preamble*. (hereafter 'MAI Negotiating Text') at <<http://www.oecd.org/daf/cm/mai/maitext.pdf>>, 10 December 1999.

29 *Ibid*, Part III, Articles 1 & 2.

their exceptions over time.³⁰ In addition, the MAI regulated such matters as the entry of investors and key personnel,³¹ nationality,³² employment³³ and performance³⁴ requirements, privatization³⁵ and monopolies/concessions.³⁶

The investment protection provisions of the MAI were aimed at providing absolute guarantees to existing investment with respect to such matters as expropriation and compensation,³⁷ repatriation of capital and transfers of benefits.³⁸

Like the practice under BITs, the MAI dispute resolution procedure provided for the resolution of both state-state and investor-state investment disputes. Under this system, subject to prior consultation and negotiation, investors could choose either to submit the dispute to the courts or tribunals of the host country,³⁹ or alternatively submit it to binding arbitration.⁴⁰

30 The MAI proposed two schedules of exceptions; Annex A would contain those exceptions subject to 'standstill' commitments. Annex B would list those sectors, sub-sectors or activities where future non-conforming measures or exceptions may be added. The principle of 'roll-back' ('the liberalisation process by which the reduction and eventual elimination of non-conforming measures to the MAI would take place') was included in the draft MAI but the means of implementation was not agreed upon. For the proposed methods see OECD, *The Multilateral Agreement on Investment: Commentary to the MAI Negotiating Text* (1998) April 24 (hereafter MAI Commentary) 60 at: <<http://www.oecd.org/daf/cmism/mai/maicome.pdf>>, 10 December 1999.

31 'MAI Negotiating Text', above n 28, Part III, Article 3.

32 Ibid, Part III, Article 4.

33 Ibid, Part III, Article 5.

34 Ibid, Part III, Article 6.

35 Ibid, Part III, Article 7.

36 Ibid, Part III, Article 8.

37 Ibid, Part IV, Article 2.

38 Ibid, Part IV, Articles 4, 5 & 6.

39 Ibid Part V, Article D2 (b).

40 Ibid, Part V, Article D2 (c). An investor could choose Arbitration in accordance with the ICSID Convention, the UNCITRAL Arbitration Rules, or the ICC Arbitration Rules.

INTERNATIONAL INVESTMENT IN THE WTO:
PROSPECTS AND CHALLENGES IN THE SHADOW OF THE MAI

The Demise of the MAI – Why?

Whilst the MAI was viewed by many as a valuable contribution which had the potential to promote international investment and therefore increase global prosperity, on December 3rd 1998, senior OECD officials stated that negotiations on the MAI were no longer taking place.⁴¹ Despite three years of negotiations and the existence of a final negotiating text which was more balanced and realistic than earlier versions,⁴² the inability of the participants to reach agreement and the withdrawal of France from the negotiations on October 14, 1998 were both factors which contributed to the cessation of MAI negotiations. However, the demise of the MAI can be primarily attributed to the mounting political pressure which was felt by the OECD member countries. This political pressure resulted from widespread public disapproval of the MAI, caused by a number of diverse social and political factors.

Lack of Public Input and Debate

The MAI, as an initiative of the OECD, was primarily negotiated at Ministerial level, without substantial exposure to public scrutiny. As a result, when an early draft of the MAI was leaked to a U.S. public interest group and subsequently published on the web, the MAI was viewed as a ‘closed-doors’ conspiracy amongst the governments of capital exporting countries which would threaten democracy, sovereignty, the environment, human rights and economic development.⁴³ Once on the internet, the MAI issue was targeted by a variety of non-governmental organisations (NGOs) and public interest groups⁴⁴ who all

41 OECD, ‘Informal Consultations on International Investment’ (last modified Dec 7, 1998) at <<http://www.oecd.org/daf/cm/mai/mainindex.htm>>, 12 December 1999.

42 Geiger R, ‘Direct Investment: Towards a Multilateral Agreement on Investment’ (1998) 31 *Cornell Int’l L* 467 at 475.

43 Kobrin SJ, ‘The MAI and the Clash of Globalizations’ (1998) 112 *Foreign Policy* 97.

44 Such NGOs included the AFL-CIO, Amnesty International, Australian Conservation Foundation, Friends of the Earth, Oxfam, Public Citizen, Sierra Club, Third World Network, United Steelworkers of America, Western Governor’s Association and World Development Movement (cited in Kobrin, *ibid*).

rallied their supporters to publicly oppose the MAI.⁴⁵ Whilst the OECD countered with an informative MAI web-site of their own, this was unable to negate the effect of anti-MAI internet propaganda which soon developed into media coverage and alternative forms of protest such as petitions, advertisements and even street demonstrations.⁴⁶ Politicians began to give the MAI closer scrutiny than it previously warranted, leading in turn to more protracted negotiations and longer lists of specific exceptions to the MAI.⁴⁷

Whilst the MAI negotiations were not conducted in secrecy,⁴⁸ it would appear that conventional methods of negotiating treaties without opportunity for public debate are no longer appropriate in this age of global electronic communication. If important multilateral agreements are to be effectively concluded, regard must be had to the influential role of NGO's, heightened by the power provided by global electronic communication channels.

Lack of Developing Country Input

The MAI negotiations were limited to the 29 OECD members (ie, developed, capital exporting nations). It was hoped, however, that non-member nations would ratify the Agreement once it was completed. Accordingly, eight non-member countries joined the negotiations as observers,⁴⁹ whilst other non-member nations were made aware of the

45 By October 1998 approximately 600 groups, mostly through the internet, were signed on in opposition to the MAI. See Morton P, 'MAI Gets Tangled in Web: Foes to the Trade Deal Were Marshalled Worldwide' (1998) October 22, via the Internet, *Fin Post (Toronto)* 1 at 3 (cited in Baumgartner C, 'Trade and the Environment: The Demise of the Multilateral Agreement on Investment' (1998) *Colo J Int'l Envt'l L & Pol'y* 40 at 44).

46 Kobrin, above n 43.

47 The last MAI draft contained almost 50 pages of country-specific exceptions.

48 Geiger, above n 42 at 474.

49 Argentina, Brazil, Chile, Estonia, Hong Kong, China, Latvia, Lithuania and the Slovak Republic participated as observers to the MAI Negotiations. See OECD *Ministerial Statement on the Multilateral Agreement on Investment (MAI)* (1998) April 28 at <http://www.oecd.org/news_and_events/release/nw98-50a.html>, 12 December 1999.

INTERNATIONAL INVESTMENT IN THE WTO:
PROSPECTS AND CHALLENGES IN THE SHADOW OF THE MAI

negotiations and were consulted through regional meetings in Latin America, Asia and Africa.⁵⁰ Despite these efforts, the MAI was still viewed by developing third world nations as having a wealthy developed nation, (and therefore pro-investor) bias.⁵¹

This criticism was refuted by MAI proponents who pointed to the fact that OECD countries were responsible for 85% of investment inflows and 60% of outflows,⁵² which justified the selection of the OECD as a negotiating forum. Traditionally however, in the context of negotiating bilateral investment protection treaties, it was recognised early that there was little need for the OECD nations to reach agreement on international law principles applicable to international investment, as few of these nations had problems retaining foreign investor confidence.⁵³ The real need for bilateral investment treaties in the late 1970s and 1980s stemmed from the divergent attitude of developing nations, strongly influenced by the principles of the New International Economic Order (NIEO), which threatened foreign investment, particularly in relation to expropriation.⁵⁴ More recently, NIEO principles have been significantly abandoned by many developing countries,⁵⁵ primarily because these countries have perceived the benefits of foreign investment and the heightened competition to attract scarce foreign

50 Geiger, above n 42 at 474.

51 Khor M, 'The MAI – Insult Plus Injury to Developing Nations' *Third World Network Features*, at <<http://www.twinside.org.sg>>, 12 December 1999.

52 OECD 'Policy Brief No 2', above n 5.

53 See Denza & Brooks, above n 8.

54 The New International Economic Order was established by a United Nations General Assembly Resolution in 1974. (GA Res 3201 and 3202 (S VI) adopted May 1974). It recognised a number of principles including in particular:

'(e) Full permanent sovereignty of every State over its natural resources and all economic activities. In order to safeguard these resources, each State is entitled to exercise effective control over them and their exploitation with means suitable to its own situation, including the right to nationalisation or transfer of ownership to its nationals, this right being an expression of the full permanent sovereignty of the State. No State may be subjected to economic, political or any other type of coercion to prevent the free and full exercise of this inalienable right.'

55 See Waelde T, 'A Requiem for the New International Economic Order' in Gerhard Hafner et al (eds), *Festschrift Ignaz Seidle-Hohenveldern* (1998) (Kluwer International, The Hague at 771-804.

capital has provided an incentive to raise standards of investor protection.⁵⁶ However, there is still a gulf between the ideologies of developed and developing nations which must be addressed in any negotiation of a multilateral agreement pertaining to investment. Negotiation of such an agreement would therefore require the active participation of developing nations in a truly representative forum, such as the World Trade Organisation.⁵⁷

Content Criticisms

Along with the unsuitable manner in which it was negotiated, the content of the MAI also received criticism from a range of organisations on a number of grounds. Although the content of the MAI largely reflected the content of BITs, the higher publicity given to the multilateral nature of the MAI made it vulnerable to attacks which would not have occurred in a bilateral context. Broadly speaking, the MAI was viewed as an assault upon national sovereignty, as any State who became a party to the Agreement would be bound immediately by its provisions up to a minimum period of five years, with no phasing-in of obligations.⁵⁸ Even if a Party withdrew after the initial five years, all existing investments at that time would be governed by the MAI for a further 15 years.⁵⁹ The 'standstill' principle, which required all exceptions to be submitted before conclusion of the Agreement, raised concerns that future regulation of unforeseen circumstances would be prohibited, effectively tying the hands of the government. These concerns were made evident by the extensive lists of exceptions existing at the time of the final MAI negotiations. In addition, the 'rollback' principle, combined with 'standstill' could produce a 'ratchet effect' whereby each new

56 See Vandeveld K, 'Sustainable Liberalism and The International Investment Regime' 19 *Mich J Int'l L* 373 at 384-390 for a historical analysis of developing nations' transition from economic nationalism to liberalism.

57 See Fitzgerald E, Cubero-Brealey R & Lehmann A, 'The Development Implications of the Multilateral Agreement On Investment', (1998) UK Department for International Development, Finance and Trade Policy Research Centre at <<http://www.oecd.org/daf/cm/mai/ukreport.pdf>>, 12 December 1999.

58 'MAI Negotiating Text', above n 28, Part XII, Article 8 'Withdrawal' at 105.

59 *Ibid.*

INTERNATIONAL INVESTMENT IN THE WTO:
PROSPECTS AND CHALLENGES IN THE SHADOW OF THE MAI

liberalization measure would be locked in, preventing any Party from rescinding or limiting the scope of any measure over time.⁶⁰

This apparent limitation upon state sovereignty was subsequently politicized by organisations, who targeted those sectors of the public already apprehensive about the effects of globalization. In particular, it was suggested that the MAI would prevent governments from effectively regulating the environment, particularly due to the broad scope of the expropriation clause which would arguably require governments to provide compensation for any environmental regulations that indirectly reduced the profitability of a foreign investment. Canada was particularly vocal in this regard, pointing towards the controversial Ethyl Corporation case as support for its reservations.⁶¹ In this case, Ethyl Corporation, a US manufacturer of petrol additive 'MMT' sued the Canadian government after they enacted a Bill prohibiting the use of the additive on the grounds that it was hazardous to human health and the environment. Ethyl Corporation claimed that the Bill amounted to expropriation of its product in violation of the NAFTA investment provisions. The case was settled on the terms that Canada reverse its prohibition of MMT. Accordingly, there was concern that the MAIs expropriation and dispute resolution provisions, which were substantially similar to those of NAFTA, would subject governments to direct suit from foreign businesses for any 'regulatory taking' caused by environmental (or other) regulation.⁶²

There were also concerns that compliance with obligations under current multilateral environmental agreements (MEAs) would breach MAI provisions, especially the MFN requirement, as the MAI would not permit discriminatory treatment often called for under MEAs.⁶³ The application of National Treatment would also threaten the protectionist stance taken

60 'MAI Commentary' above n 30 at 60.

61 See Baumgartner, above n 45.

62 See Graham EM, 'National Treatment of Foreign Investment: Exceptions and Conditions' (1998) 31 *Cornell Int'l L J* 599.

63 See McDonald J, 'The Multilateral Agreement on Investment: Heyday or MAI-Day for Sustainable Development?' (1998) 22 *MULR* 617 at 627-9; OECD Secretariat, 'Relationship between the MAI and Selected Multilateral Environmental Agreements (MEA's)' (1998) 17 March, *Report for the Negotiating Group on the MAI* at <<http://www.oecd.org/daf/cm/mai/eaenv.htm>>, 12 December 1999.

by certain nations over key sectors or industries. France in particular opposed the MAI on the ground that the NT obligation would subject France's highly protected film industry to competition from foreign (primarily United States) film studios.⁶⁴ Under the MAI, neither domestic subsidies nor foreign investment requirements could be applied if they effectively discriminated between local and foreign businesses.

Other critics focused upon the lack of additional protection afforded in the MAI either to the environment,⁶⁵ human rights⁶⁶ or labour standards.⁶⁷ Whilst the MAI provided considerable protection *for* investors, there was no equivalent binding code of conduct required *from* investors, in relation to their foreign transactions.

The MAI was attacked from a multitude of directions, on many different levels. The combined political effect of these attacks however, was strong enough to permanently derail the MAI negotiations. The important issue left for determination is whether any of the consensus existing prior to, and developed further during the negotiations, can be salvaged in the future? Arguably, this consensus can still be consolidated if the topic of international investment is admitted for negotiation within the WTO. If this occurs, it will be necessary to determine which aspects of investment will be regulated, and consequently, which existing principles

64 Elliott L et al, 'French Scupper 'Charter for Multinationals'; Investment Pact in Tatters,' (1998) October 15 *Guardian (London)* at 20 (cited in Baumgartner, above n 45 at 46).

65 See McDonald J, above n 63; Weisbrot M, Naiman R & Watkins N, 'New OECD Study Ignores Evidence That Trade and Investment Liberalization Policies Have Hurt Workers and the Environment' *Preamble Centre Briefing Paper* at <<http://www.citizen.org/pctrade/publications/look.htm>>, 12 December 1999.

66 See 'MAI and Human Rights: The Multilateral Agreement on Investment: A Step Backward in International Human Rights', a report prepared by researchers and students of Human Rights Clinical Project Program, Harvard Law School, at <<http://www.citizen.org/pctrade/mai/What%20is/maiharvard.htm>>, 12 December 1999.

67 See Compa L, 'The Multilateral Agreement on Investment and International Labour Rights: A Failed Connection' (1998) 31(3) *Cornell Int'l LJ* 683; Bender R, 'MAI Fails to Address Even The Most Fundamental of Labour Standards to Protect Workers', (1998) April 24, Statement by Washington State Labor Council President, AFL-CIO at <<http://www.citizen.org/pctrade/MAI/Bender.htm>>, 12 December 1999.

INTERNATIONAL INVESTMENT IN THE WTO:
PROSPECTS AND CHALLENGES IN THE SHADOW OF THE MAI

or minimal standards will be adopted by the WTO. The logical starting point for such an assessment is to examine the extent to which current WTO Agreements already provide some regulation of international investment.

International Investment Principles In Current WTO Agreements

Whilst investment *per se* was never included in the last round of WTO negotiations (Uruguay Round), many of the Agreements concluded in that round indirectly provided some regulation of international investment.⁶⁸ Should investment be included for discussion in the next round, it is likely that any regulatory measures will build upon the existing framework. This framework is established primarily in two of the Agreements concluded in the Final Act of the Uruguay Round; the Agreement on Trade Related Investment Measures (TRIMS Agreement) and the General Agreement on Trade in Services (GATS). Other agreements such as the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement) and the Understanding on Rules and Procedures Governing the Settlement of Disputes (Dispute Settlement Understanding) also indirectly impact upon investment, although this is not their primary focus and as such, will not be individually addressed in this paper.⁶⁹

TRIMS

The TRIMS Agreement was inserted as an Annex to the General Agreement on Tariffs and Trade (GATT) 1994, after it was recognised that certain investment measures can cause trade-restrictive and

68 For a discussion of the investment coverage in the Uruguay Round see Suave P, 'A First Look at Investment in the Final Act of the Uruguay Round' (1994) 28(5) *J World Trade* 5.

69 For a brief discussion of these two Agreements and their impact upon international investment, see Suave, *ibid* at 13-15. Generally, the TRIPS Agreement provides minimal standards of protection over Intellectual and Industrial Property Rights; an important consideration for international investors. The DSU establishes a generic system for the settlement of disputes between Member States arising from all WTO Agreements and Rules.

distorting effects upon international trade in goods. In accordance with the scope of GATT, the TRIMS Agreement therefore applies only to investment measures related to trade in goods.⁷⁰ Under Article 2 of TRIMS, a Member is prohibited from applying any trade related investment measure (TRIM) that is inconsistent with Article III or Article XI of GATT 1994. Article III imposes the obligation of National Treatment whilst Article XI requires the general elimination of quantitative restrictions on imports and exports. An illustrative (non-exhaustive) list of TRIMs which are inconsistent with these obligations are set out in an Annex to TRIMS. The list outlines those measures which are mandatory or enforceable under domestic law or under administrative rulings, or compliance with which is necessary to obtain an advantage and which require:

- the purchase or use by an enterprise of products of domestic origin or from any domestic source, whether specified in terms of particular products, in terms of volume or value of its local production; or
- that an enterprise's purchases or use of imported products be limited to an amount related to the volume or value of local products that it exports.⁷¹

or restrict:

- the importation by an enterprise of products used in or related to its local production, generally or to an amount related to the volume or value of local production that it exports;
- the importation by an enterprise of products used in or related to its local production by restricting its access to foreign exchange to an amount related to the foreign exchange inflows attributable to the enterprise; or
- the exportation or sale for export by an enterprise of products, whether specified in terms of particular products,

70 Agreement on Trade-Related Investment Measures (TRIMS); General Agreement on Tariffs and Trade (1994) Annex 1, (hereafter TRIMS) at: <http://www.wto.org/wto/legal/finact.htm>, 12 December 1999, Article 1.

71 TRIMS, Annex, Illustrative List Paragraph (1).

INTERNATIONAL INVESTMENT IN THE WTO:
PROSPECTS AND CHALLENGES IN THE SHADOW OF THE MAI

in terms of volume or value of products, or in terms of a
proportion of volume or value of its local production.⁷²

In relation to those measures ‘with which compliance is necessary to obtain an advantage’ according to one commentator, Pierre Suave, the term ‘advantage’ is understood to cover all forms of advantage, including those that are tax-related.⁷³

Within 90 days of TRIMS’ entry into force, all Members were required to notify the Council for Trade in Goods of all existing non-conforming TRIMS.⁷⁴ In addition, Article 6 of TRIMS entitled ‘Transparency’ requires that members continue to notify the WTO Secretariat of the existence and whereabouts of any TRIMs. In line with the WTO’s usual staggered approach to the phasing-in of Agreements, developed country members were required to eliminate any non-conforming TRIMS within two years of the entry into force of the Agreement, developing country members within five years, and least-developed country members within seven years.⁷⁵ The Council for Trade in Goods has the discretion to extend the transitional period for developing or least-developed countries upon request, taking into account the development, financial and trade needs of the Member country. Article 4 also permits any developing country to temporarily deviate from the Agreement for Balance-of-Payments purposes, in accordance with the requirements in Article XVIII of GATT 1994 and the Declaration on Trade Measures Taken for Balance-of-Payment Purposes (1979). Article 8 provides that disputes concerning TRIMS will be settled in accordance with the provisions of Articles XXII and XXIII of GATT 1994, as elaborated in the Dispute Settlement Understanding. According to these provisions, only Member States have standing to pursue disputes through the WTO dispute resolution body.

The TRIMS Agreement has therefore addressed one of the important issues facing international investment liberalization; namely that of performance requirements. As noted above, apart from the general obligations of MFN and/or NT for established investors, bilateral investment treaties do not normally prohibit establishment or

72 Ibid, Paragraph (2).

73 Suave, above n 68 at 8.

74 TRIMS Article 5(1).

75 TRIMS Article 5 (2).

performance requirements,⁷⁶ preferring to leave these matters to the governance of domestic law. Although the TRIMS Agreement suffers from a number of shortcomings (for instance its limited application to measures affecting trade in goods alone)⁷⁷ it has established a framework for the notification and gradual elimination of trade-restrictive (and also investment-restrictive) investment requirements, with access to an appropriate dispute resolution system and with due regard being had to the special needs of developing countries.

Importantly, Article 9 of TRIMS requires that no later than five years after the date of entry into force, the Council for Trade in Goods shall review the operation and as appropriate, propose to the upcoming Ministerial Conference any amendments, with particular consideration of the inclusion of provisions on investment policy and competition policy. It is apparent therefore, that the TRIMS Agreement is the natural framework within which to expand the international regulation of investment.

GATS

The General Agreement on Trade in Services (GATS) was a major development in international trade regulation.⁷⁸ Up until the point of its establishment, the GATT and its subsidiary agreements were concerned only with trade in goods. The GATS has therefore considerably expanded the scope of the WTO's regulatory power, particularly in relation to investment. The GATS has been described by Suave as containing the

single largest number of investment-related provisions found in the Final Act of the Uruguay Round. Such provisions relate both to matters of investment liberalization and investment protection, albeit with differing degrees of comprehensiveness.⁷⁹

76 Note however that the US BIT's are an exception, see Vandeveld K, above n 12.

77 See Suave, above n 68 at 8.

78 For a comprehensive analysis of the GATS and its development, see: Footer M.E, 'The International Regulation of Trade in Services Following Completion of the Uruguay Round' (1995) 29 *Int'l Law* 453.

79 Suave, above n 68 at 9.

INTERNATIONAL INVESTMENT IN THE WTO:
PROSPECTS AND CHALLENGES IN THE SHADOW OF THE MAI

Although the GATS is focused broadly upon all forms of trade in services, it importantly covers the supply of services through direct 'commercial presence'⁸⁰ in the territory of another Member. Accordingly, it regulates many instances of foreign direct investment in services. The other three modes of service supply⁸¹ entail cross-border supply, the movement of supplier, and the movement of consumer. There will often be an overlap between the commercial presence and movement of the supplier modes in relation to foreign direct investment, as the presence of intra-company personnel, such as managers, executives and specialists will often be necessary in order to establish a commercial presence.⁸²

The GATS is similar to the GATT in that it imposes the broad obligations of MFN⁸³ and Transparency⁸⁴ upon all Members, across all sectors. However, the GATS' liberalization provisions are much more limited than those of the GATT; firstly, it allows Members to list specific sectoral exceptions to MFN treatment,⁸⁵ and secondly, there is no general requirement for national treatment. Instead, it permits each Member to list their positive commitments on market access and national treatment in specific service sectors or sub-sectors, subject to any terms,

80 GATS Article 1.2(c).

81 GATS Article 1.2 states that 'For the purposes of this Agreement, trade in services is defined as the supply of a service:

- a) from the territory of one Member into the territory of any other Member;
- b) in the territory of one Member to the service consumer of any other Member
- c) by a service supplier of one Member, through commercial presence in the territory of any other Member;
- d) by a service supplier of one Member, through presence of natural persons of a Member in the territory of any other Member.

82 Suave, above n 68 at 10-11. He notes that in practice, many of the commitments scheduled by Members in the 'commercial presence' mode of supply have been linked to complementary commitments under the 'movement of supplier' mode which provide for temporary entry of key personnel.

83 GATs Article II(1).

84 GATS Article III.

85 GATS Article II(2).

conditions or qualifications.⁸⁶ These commitments are to be subject to 'rollback' in the sense that periodic negotiations will take place with the object of further liberalization.⁸⁷ Existing commitments can be increased by Members at any time through amendment of the Member's GATS schedule. In addition, a number of specific service sectors (such as financial services and telecommunications) have been targeted separately in negotiations taking place outside the formal negotiating rounds.

86 See GATS Part III: Specific Commitments; Articles XVI 'Market Access' and XVII 'National Treatment'. Note however, that all exceptions had to be lodged by Members before the Final Act of the Uruguay Round was concluded.

87 See GATS Part IV: Progressive Liberalization. Article XXIX 'Termination' also states that MFN exceptions in principle should not exceed 10 years and in any event will be subject to subsequent rounds of negotiations.

INTERNATIONAL INVESTMENT IN THE WTO:
PROSPECTS AND CHALLENGES IN THE SHADOW OF THE MAI

Provisions Affecting Investment Liberalization

In the context of international investment, the GATS provides the following investment liberalization standards:

MFN Treatment

Article II ensures a foreign investor supplying services MFN treatment. This obligation is however subject to any specific exemptions listed by each Member in its Schedule and some general exceptions, including any measures taken in accordance with an economic integration agreement,⁸⁸ double taxation agreement or measures taken to protect public order or health.⁸⁹ Whilst these general exceptions are consistent with those normally included in BITs, the ability of a Member to list specific MFN exceptions is contrary to most BIT practice.

Market Access

With respect to market access, an investor will receive treatment no less favourable than that provided for in each Member's Schedule. Whilst market access is not defined, a negative list of six categories of prohibited treatment serve to illustrate the scope of market access contemplated under the GATS. These measures (which are prohibited unless otherwise specified in a Member's Schedule) include:

- Limitations on the number of service suppliers (through quotas, monopolies, etc)
- Limitations on the total value of service transactions or assets (through quotas or the requirement of economic needs tests)

88 GATS Article V provides an exception to MFN for measures implemented in accordance with an economic integration agreement.

89 GATS Article XII provides an exception for measures taken to safeguard balance of payments. Article XIV contains a number of general exceptions, including measures to safeguard public order and health, and measures taken in accordance with a double taxation agreement.

(1999) 11 BOND LR

- Limitations on the total number of service operations or on the total quantity of service output (in terms designated numerical units in the form of quotas or economic needs tests)
- Limitations upon the total number of natural persons that may be employed in a particular service sector or that a service supplier may employ
- Measures which restrict or require specific types of legal entity or joint venture through which a service supplier may supply a service; and
- Limitations upon the participation of foreign capital in terms of maximum percentage limit on foreign shareholding or the total value of individual or aggregate foreign investment.⁹⁰

In addition, when any market access commitments are made in relation to the commercial presence mode of supply, there is a concomitant positive requirement to allow related transfers of capital into the Member's territory.⁹¹

As noted by Suave, the prohibition of measures which restrict or require certain types of legal entity, and those which impose limitations on the level or value of foreign capital participation, may have particular significance for foreign investment, in relation to establishment requirements or investment screening.⁹² These are not general obligations, however, and are reliant upon Members' individual commitments. As such, they do not markedly improve upon BIT practice, which usually leaves issues of market access and investment establishment to be determined by each host country's law. Yet, the recognition by Members that their GATS market access commitments are subject to negotiation and increased liberalization over time is an improvement upon BITs which contain no such obligation.

90 GATS Article XVI(2).

91 GATS Article XVI(1) footnote 8.

92 Suave, above n 68 at 11.

INTERNATIONAL INVESTMENT IN THE WTO:
PROSPECTS AND CHALLENGES IN THE SHADOW OF THE MAI

National Treatment

Like market access, National Treatment is only guaranteed for those service sectors listed in each Member's Schedule, and is subject also to any express limitations and conditions in those Schedules. This can be contrasted with many BITs, which impose a NT obligation upon all investment within the host country's territory.⁹³ Under the GATS, in those service sectors which are voluntarily subjected to national treatment, each Member is required to accord to foreign service suppliers treatment no less favourable than it accords to its own service suppliers.⁹⁴ Less favourable treatment exists when it 'modifies the conditions of competition in favour of services or service suppliers of the Member compared to like services or service suppliers of any other Member.'⁹⁵ Foreign investors are therefore not guaranteed treatment identical to that given to domestic service suppliers. As with market access however, the number of service sectors where investors are accorded national treatment will increase over time due to further liberalization negotiations expected under GATS.

Transparency

Like other WTO Agreements and BITs, the GATS imposes a transparency obligation upon Members to publish and to notify the Council for Trade in Services of all existing or new measures relevant to the Agreement (such as laws, regulations or administrative guidelines) which affect trade in services.⁹⁶ Notably, however, there is no notification or transparency requirement for those measures which affect services not covered in individual Schedules.

Provisions Affecting Investment Protection

Payments and Transfers

93 As mentioned above, however, this is not a universally accepted obligation, and many BIT's contain a conditional NT provision, or do not contain a NT provision at all.

94 GATS Article XVII(1).

95 GATS Article XVII(3).

96 GATS Article III(3).

The right of a foreign service supplier (and therefore investor) to make international payments or transfers is covered by Article XI of the GATS. Under this Article, Members are not to apply restrictions on international transfers and payments, but only in respect of current transactions relating to its Scheduled specific commitments.⁹⁷ This obligation is subject to a further general exception in cases of serious balance-of-payments situations.⁹⁸ The protection of foreign transfers or payments under the GATS is therefore very limited as compared with the general protection usually provided in BITs.

Notably, the GATS does not provide any further provisions relating to investment protection which would normally be included in BITs, such as provisions dealing with expropriation, compensation for losses due to war or civil disturbance and subrogation.

Provisions Relating to Investment Dispute Settlement

Article XXIII of GATS provides that all disputes shall be governed by the WTO Dispute Settlement Understanding (DSU).⁹⁹ In particular, if a benefit which was expected to accrue from a Member's specific Scheduled commitment has been annulled or impaired, the Member affected shall be entitled to a mutually satisfactory compensatory adjustment, achieved either through negotiations,¹⁰⁰ or if agreement cannot be reached, through arbitration.¹⁰¹ Importantly however, only Member States can pursue a claim under the WTO's Dispute Settlement Board, therefore

97 GATS Article XI(2) states that 'Nothing in this Agreement shall affect the rights and obligations of the members of the International Monetary Fund under the Articles of Agreement of the Fund, including the use of exchange actions which are not in conformity with the Articles of Agreement, provided that a Member does not impose restrictions on any capital transactions inconsistently with its specific commitments regarding such transactions...'

98 GATS Article XII.

99 For an analysis of the GATS cases submitted to the Dispute Resolution Board, see: Sciarra VP, 'The World Trade Organisation: Services, Investment, and Dispute Resolution' (1998) 32(3) *Int'l Lawyer* 923.

100 See GATS Article XXIII 'Dispute Settlement and Enforcement' and Article XXI(2) 'Modification of Schedules'.

101 Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU), Article 22(6).

INTERNATIONAL INVESTMENT IN THE WTO:
PROSPECTS AND CHALLENGES IN THE SHADOW OF THE MAI

requiring affected individual service suppliers (investors) to petition their home State to adopt any claim.

Summary

From the above analysis, it is apparent that a degree of international investment regulation is achieved through the combined effect of the TRIMS and GATS Agreements.¹⁰² Although investment was not the primary focus of these Agreements, they have indirectly imposed both investment liberalization and investment protection obligations upon WTO Members. TRIMS prohibits an (albeit limited) category of performance requirements, whilst the GATS provides investors with MFN treatment, National Treatment, Market Access, Movement of personnel and Transfer/Payment rights in some nominated service sectors. Both Agreements impose a broad obligation of transparency.

There are, however, considerable gaps in the current system of WTO regulation as regards international investment. Further investment-specific regulation is necessary if the WTO is to adequately codify the broadly accepted minimal standards of investment protection and liberalization as reflected in the MAI negotiations and the existing BIT network. In particular, key issues of investment protection such as expropriation, compensation and subrogation need to be addressed. Additionally, TRIMS currently only covers those investment measures connected with trade in goods, and is quite limited in scope when compared with the performance requirements ban contained in the North American Free Trade Agreement (NAFTA).¹⁰³ The ability of Members to list exceptions to the general MFN obligation in the GATS erodes much of its intended liberalizing effect; a shortcoming which may eventually be overcome by future pro-liberalization rounds of negotiations. There are also inherent limitations in the sector-specific approach to national

102 As noted earlier, the contribution of other WTO Agreements, such as TRIPS, the DSU and the Agreement on Subsidies and Countervailing Measures will also indirectly affect international investment.

103 Suave, above n 68 at 8 notes that the TRIMS Illustrative List of prohibited measures addresses only a limited sub-set of TRIMs as compared to the more comprehensive ban on performance requirements found in the investment chapter (Article 1106) of the North American Free Trade Agreement (NAFTA).

treatment and market access obligations in GATS (although admittedly this limited agreement is preferable to the negotiating stalemate and long lists of exceptions which resulted from the MAI's 'top-down' imposition of general obligations upon all sectors.)

Despite these shortcomings, if international investment is adopted for discussion in the next Round of WTO negotiations, there is a strong existing framework within which to further develop investment-specific rules and principles. The next section examines the potential prospects and challenges which may be faced if an investment agreement is negotiated within the WTO.

International Investment in the WTO

Is the WTO an appropriate forum?

Bilateral or Multilateral Regulation?

In discussing whether the WTO is an appropriate forum to establish a multilateral investment code, a preliminary question must firstly be answered; namely whether international investment requires a multilateral agreement, or whether the existing bilateral network is sufficient, and perhaps, preferable? Whilst much has been written on this subject,¹⁰⁴ it is generally thought that a multilateral investment agreement is preferable to the current system of BITs for a number of reasons. Although the proliferation of BITs and their core of common provisions have developed minimum standards for the treatment of foreign investors under customary international law,¹⁰⁵ it is felt that greater certainty and specificity is required in the form of a multilateral investment code.¹⁰⁶

104 See eg Shenkin TS, 'Trade Related Investment Measures in Bilateral Investment Treaties and the GATT: Moving Toward A Multilateral Investment Treaty' (1994) 55 *U Pitt L Rev* 541; Vandeveld K, above n 56; Waelde T, 'International law of foreign investment: towards regulation by multilateral treaties' (1999) 1 *BLI* 50.

105 Waelde, *ibid* at 51.

106 *Ibid* at 52.

INTERNATIONAL INVESTMENT IN THE WTO:
PROSPECTS AND CHALLENGES IN THE SHADOW OF THE MAI

A multilateral agreement would attempt to establish a 'level playing field' between foreigners and nationals and between various groups of foreigners, in a manner similar to that established by the GATT and GATS for trade in goods and services. BITs on the other hand, are reciprocal in nature and are focused more narrowly upon the protection of foreign investors' property rights.¹⁰⁷ As noted by Waelde, '(a) review of the preambular language...reveals that BITs are presented as the expression of a bilateral deal reflecting the interests of two parties...'.¹⁰⁸ This deal is usually the result of considerable intra-agency debate and bargaining, but also tends to be influenced by the practice and current model used by the sponsoring, (normally developed) country.¹⁰⁹ Thus, whilst there is consensus with respect to the common core of BITs, there are still jurisdictional discrepancies which reflect local political and economic interests. These discrepancies could only be eliminated through representative multilateral negotiations and the formation of a multilateral agreement.

In Vandeveldel's opinion, a multilateral investment agreement is also necessary to achieve long-term, sustainable liberalism in international investment.¹¹⁰ He argues that the existing national consensus about the desirability of investment liberalization is not permanent, but is rather the result of recent political and economic trends.¹¹¹ With respect to developing countries in particular, the growing awareness of the economic benefits of attracting foreign investment, and the resulting need to compete for it, left these countries with no alternative but to liberalize their investment regimes.¹¹² If that liberalization fails to deliver the expected economic development, it is possible that it may be ultimately rejected. Accordingly, a multilateral investment treaty which entrenched principles of sustainable investment liberalization, (with particular attention to market facilitation and effective redistribution of wealth), would ensure that this momentary trend 'can endure beyond the unique historical circumstances that gave birth to it.'¹¹³

107 Waelde, *ibid* at 53, Shenkin, *above n* 104 at 577.

108 Waelde, *ibid* at 52.

109 *Ibid* at 52-3.

110 See Vandeveldel K, *above n* 56.

111 *Ibid*.

112 *Ibid* at 390.

113 *Ibid* at 398.

Multilateral Investment Agreement in the WTO

If a multilateral agreement on investment is therefore deemed necessary, is the World Trade Organisation the appropriate forum to negotiate such an agreement? In assessing the suitability of the WTO, reference must be had to the criticisms faced by the OECD in the MAI negotiations, and the extent to which the WTO would overcome these deficiencies.

Representative of Developing Nations

A prominent advantage which the WTO has over the OECD is its truly global representative capacity. Whilst the OECD is essentially a network of developed countries, the WTO represents both developed and developing nations. The process of negotiating WTO Agreements is theoretically more democratic and involves all Member nations. The special needs of developing countries are specifically recognised in WTO Agreements, which provide for longer phasing-in periods of commitments, dependant upon a country's level of development.

In light of the stalemate which occurred in the Seattle Ministerial Conference however, some doubt can be expressed as to whether the WTO is in fact an effective negotiating forum. As Martin Khor, spokesperson of the Third World Network stated:

The WTO is not democratic or transparent. Developing countries in reality won't have much say in determining the final outcome. Nor will most of them be able to participate in the real negotiations, that often take place in 'informal meetings' to which a few key countries may be invited.¹¹⁴

Many of the developing nations adhered to this view in the Seattle WTO Ministerial Conference, when the united African, Latin American and Caribbean countries indicated that they would not sign any agreement reached behind their backs.¹¹⁵ This, and the insistence of some

114 Khor M (Third World Network), 'The Need to Oppose the Emergence of an MAI in the WTO' in *Public Citizen Global Trade Watch: MAI in the World Trade Organization (WTO)* at <<http://citizen.org/pctrade/mai/wto/twn.htm>>, 12 December 1999.

115 See 'Spectre of Failure at Trade Talks' (1999) December 5, *Sun-Herald* 59.

INTERNATIONAL INVESTMENT IN THE WTO:
PROSPECTS AND CHALLENGES IN THE SHADOW OF THE MAI

developed countries to include controversial issues such as labour standards and investment in the agenda,¹¹⁶ effectively contributed to the lack of consensus. Yet, this outcome may ironically illustrate the benefits of the WTO as a negotiating forum, as it demonstrates that developing countries, if they stand united, have the power to block any Agreements contrary to their interests. Should an investment agreement ultimately be concluded within the WTO therefore, it is more likely to produce, amongst all participants, some kind of international consensus and willingness to be governed,¹¹⁷ than an alternative agreement concluded in a less-representative forum and later imposed upon developing countries.

Opportunity for Public Input and Debate

It is hoped that the WTO negotiations on investment, if they eventuate, will also be more open to public input and scrutiny than the MAI. This is of considerable significance in light of the recent protests and riots which contributed to the failure of the Seattle WTO Ministerial Conference in early December. These protests, which were organised by various NGOs and public interest groups,¹¹⁸ illustrate the growing public awareness of the importance of multilateral negotiations. International trade and investment have been shifted from the realm of politicians and economists, to the public arena, where they have become key issues linked to the controversial topic of globalization. As aptly noted by Kobrin:

116 The US insisted upon the creation of a Working Group on the relationship between trade and core labour standards, with a view to using trade sanctions to enforce labour standards in the future. See Oxley, above n 1.

117 See Hiscock M, 'Transcript (24 July 1998)' 221-2 cited in The Parliament of the Commonwealth of Australia, Joint Standing Committee on Treaties Report 18: *Multilateral Agreement on Investment: Final Report* (March 1999) at 134.

118 These groups included the Direct Action Network, the Ruckus Society, Public Citizen Global Trade Watch, the Sierra Club, the American Federation of Labour-Congress of Industrial Organisations, the Jubilee 2000 coalition, the Washington Association of Churches United Church Council, the Humane Society and Fair Play For Cuba. See Forbes C, 'The Battle for Seattle' (1999) Dec 2, *The Australian* 1.

...globalization cannot be a top-down or elite-driven project. Policymakers cannot assume that all reasonable people share their assumptions and values. Not everyone believes that a constitution for a new global economy or a new international economic order is desirable. Not everyone believes that an open international economy, with free flows of trade, capital and direct investment promotes the general welfare. Consequently, there will be a continuous public referendum of sorts on these issues.¹¹⁹

Like the internet onslaught against the MAI which effectively brought about its demise, similar internet opposition has been targeted against the WTO. Unlike the MAI, however, the WTO acted early in its internet counter-attack. It dedicated a specific web-site to the Seattle Round of Negotiations, with access to information on all aspects of the Ministerial Conference.¹²⁰ A live internet Public Forum, 'Network Earth' was also established which allowed members of the public to express their views on issues relevant to the Ministerial Conference and the next round of WTO Negotiations.¹²¹ Transcripts of the Forum were printed and distributed to the Ministerial Conference Members each day, providing a unique opportunity to communicate directly on international trade issues.¹²² Additionally, much of the information contained in anti-WTO web-sites was openly criticised by the WTO, as being both misleading and mis-informed. Whilst this pro-active approach did not prevent the collapse of the Ministerial Conference, it does signal a recognition of the importance of global electronic communication channels and the need for public input and debate. It can be expected that this recognition will prompt similar pro-active measures for the next WTO Round, (if it eventuates), which will in turn eliminate some degree of public pressure and increase the probability of smooth and successful negotiations.

Consistency with Existing Obligations and Standards

The integration of investment principles into the current WTO framework would also avoid any clashes with nations' existing multilateral and

119 Kobrin, above n 43 at (5).

120 See the WTO Ministerial Conference web-site at <<http://svca.wto-ministerial.org/>>, 12 December 1999.

121 See <<http://www.globalspeak.com/html/discussions/htm>>, 12 December 1999.

122 Ibid.

INTERNATIONAL INVESTMENT IN THE WTO:
PROSPECTS AND CHALLENGES IN THE SHADOW OF THE MAI

bilateral obligations.¹²³ Under the existing WTO framework, WTO obligations prevail over any conflicting obligations under bilateral or regional treaties, unless otherwise provided for.¹²⁴ This principle would also extend to any inconsistent provisions in bilateral investment treaties. In addition, an interpretative note to Annex 1A of the Agreement Establishing the WTO (WTO Agreement) indicates that if there is a conflict between GATT 1994 and any of the other agreements in Annex 1A (including TRIMS) the other Agreement shall prevail. Such specific provisions dealing with potential intra-WTO conflicts could also be negotiated as part of a new Investment Agreement or extension of TRIMS.¹²⁵

Established Dispute Resolution Procedure

Linking trade and investment under the one regulatory umbrella of the WTO also has the advantage of limiting dispute resolution to one forum. One of the difficulties which would have been encountered if the MAI had been completed is that there would have been an overlap between the MAI obligations and obligations under other WTO Agreements such as the GATS. As the MAI did not provide for a single integrated dispute resolution procedure, such as that established by the WTO's DSU, this may have created a 'plurality of paths for dispute resolution for a single set of events.'¹²⁶ If investment is regulated within the WTO, disputes may be brought to the DSU notwithstanding any overlap with other WTO Agreements. This overlap has not proved to be a practical problem in the context of the GATT and GATS, with nations bringing complaints to the DSU for conduct which could potentially amount to a breach of either GATT or GATS obligations.¹²⁷

123 See Hiscock, above n 117.

124 See, for example the list of specific exceptions to MFN treatment in GATT Article 1.2.

125 This would not have been the case under the Draft MAI, where nations were permitted to make exceptions with respect to obligations already required under existing WTO Agreements such as TRIMS. See Hiscock M, 'Submission No 831' to the Joint Standing Committee on Treaties, Parliament of Australia discussing the Draft OECD Convention on Multilateral Agreement on Investment, 2201 at 2202.

126 Hiscock, *ibid* at 2202.

127 See Sciarra, above n 99.

One possible shortcoming of the DSU from the perspective of the investor is that it fails to provide for investor-state dispute settlement. As with WTO trade-related disputes, an investor would have to get State sponsorship for a claim to proceed under the DSU. This is contrary to the current position in BIT's (and the proposed process under the MAI), where investors may submit any investor-state dispute to binding arbitration. The BIT position is clearly more favourable for investors, as they do not have to rely upon home states who often weigh up competing foreign affairs concerns when determining whether to sponsor an individual's claim.¹²⁸

One commentator, Todd Shenkin, has argued that not only should the investor-state dispute resolution process be implemented at a multilateral level, but that the WTO should recognise private rights in trade-related disputes as well.¹²⁹ The highly interconnected nature of international trade and investment in the global economy requires that their standards of regulation and dispute settlement be synchronised.¹³⁰ At present this is not the case.

However, those WTO Member nations who have been eager to establish a WTO Investment Agreement have also been firmly against the implementation of any investor-state dispute resolution process.¹³¹ This perhaps reflects a growing awareness of the threat which investor-state dispute resolution poses to state sovereignty, particularly in relation to the ever enlarging scope of expropriation claims over government regulatory action.¹³² Some NGO's claim that this fear of being sued prevents many governments from effectively regulating important areas which may impact upon investment, such as the environment.¹³³ If a WTO Investment Agreement was governed by the DSU, then this would certainly synchronise the dispute settlement procedures for both trade

128 Waelde, above n 104 at 67.

129 Shenkin, above n 104.

130 Ibid.

131 See: World Trade Organization, 'Trade and Investment: Negotiate or continue to study?' *Briefing Note, The Third WTO Ministerial Conference*, Official Ministerial Website at: <http://svca.wtoministerial.org/english/about_e/14inve_e.htm>, 12 December 1999.

132 Waelde, above n. 104 at 67-8.

133 Ibid.

INTERNATIONAL INVESTMENT IN THE WTO:
PROSPECTS AND CHALLENGES IN THE SHADOW OF THE MAI

and investment-related disputes, but arguably, this would be a step backwards from accepted international investment practice.

Investors would still have recourse to investor-state dispute resolution under existing BITs, but this would raise concerns similar to those expressed in the context of the MAI, as to whether this right is an investment preference which then must be given to all WTO nations under an MFN obligation.¹³⁴ WTO Members without the benefit of a BIT may theoretically be able to insist on the same procedures available to a BIT Party, creating a 'free-rider problem.'¹³⁵ If this was seen as a problem, however, rights of investor-state dispute resolution could be an express exception to any MFN obligation in a WTO Investment Agreement.

WTO Treatment of MAI Sensitive Issues

The WTO therefore appears to be an appropriate forum within which to negotiate the topic of international investment regulation. This has been recognised by the 29 WTO Members who tabled their 8 proposals to the Seattle Ministerial Conference, recommending the negotiation of a WTO Agreement on Foreign Direct Investment (FDI).¹³⁶ In these proposals, Members agreed that '(d)evelopment provisions would be central to the framework of rules and disciplines, which otherwise would be based on similar WTO principles such as transparency and non-discrimination.'¹³⁷

If such an Agreement were negotiated within the next WTO Round, certain challenges may arise with regard to those controversial or sensitive issues exposed during MAI negotiations. If the MAI negotiations are any guide, the WTO will be called upon specifically to i) balance investment liberalization with State sovereignty, ii) address environment, labour and human right concerns, iii) provide rules on expropriation and compensation, and iv) link investor rights to investor responsibilities.

134 See Aldonas GD, 'Multilateral Investment Agreements' at 452 discussing this issue in the context of the MAI.

135 Ibid.

136 WTO Briefing Note, 'Trade and Investment' above n 131.

137 Ibid.

Sovereignty v Investment Liberalization

One of the strongest objections to the MAI concerned the extent to which it would erode State sovereignty by limiting the power of the State to regulate investment (and other conduct) within its territory. This concern was also reflected in the eight Proposals on an Investment Agreement submitted to the Ministerial Conference (Ministerial Investment Proposals) where it was acknowledged that '(t)he ability of host governments to regulate the activities of investors should be respected.'¹³⁸

The conflict between sovereignty and liberalization has been integral to all prior trade negotiations in the WTO, however, and the success of the GATT and GATS Agreements to date indicates that an appropriate balance can be found, given the right framework. The GATS in particular, with its overlap into investment, serves to provide an illustration of how future investment-focused negotiations may be structured to avoid any major infringement upon sovereignty. The Ministerial Investment Proposals considered that 'commitments on access to investment opportunities in host countries should be negotiated 'bottom-up'' in an approach similar to that used in the GATS.¹³⁹ In GATS, the specific sectoral approach to commitments provided a starting point from which to progressively liberalize trade in services. Those service sectors which required continued protection or differential regulation, (eg cultural services) were simply not included in sectoral commitments. Members are, however, subject to a 'roll-back' commitment in the sense that further negotiations will take place with a view to opening up more sectors. A similar approach could be taken with respect to investment opportunities, including market access, right of establishment and national treatment. Arguably, this approach would serve to alleviate much of the concern about infringement of sovereign rights, whilst also achieving considerable investment liberalization.

Environment, Labour and Human Rights Concerns

One of most controversial issues facing the WTO at present is the extent to which it should include environment, human rights, and particularly

138 Ibid.

139 Ibid.

INTERNATIONAL INVESTMENT IN THE WTO:
PROSPECTS AND CHALLENGES IN THE SHADOW OF THE MAI

labour standards in its regulation of international trade. Many developed countries (especially the United States), have argued for the creation of a Working Group to study the issue of trade and core labour standards.¹⁴⁰ By linking labour rights to trade in the WTO, these countries believe this will provide an incentive for WTO member governments to improve labour standards around the world.¹⁴¹ The US has gone one step further; it has expressed an intention to use trade sanctions to enforce labour standards.¹⁴² Developing countries on the other hand, are strongly opposed to this submission, as they view the imposition of labour standards as a disguised form of protectionism which would allow developed nations to undermine the comparative advantage of lower-wage countries.¹⁴³ Similar submissions were made for the inclusion of labour standards within the MAI,¹⁴⁴ and it can be assumed that this issue will also be relevant to any potential WTO Agreement on Investment.

Whilst the creation and scope of any future WTO Agreement encompassing labour, human rights or environment standards will be determined by the consensus of the Ministers, the WTO has, to date, been reluctant to address any issues which are best left to other international organisations. For instance, at the first WTO Ministerial Conference in Singapore in 1996, Ministers stated that:

We renew our commitment to the observance of internationally recognized core labour standards. The International Labour Organization (ILO) is the competent body to set and deal with these standards, and we affirm our support for its work in promoting them.¹⁴⁵

The same position has been taken with regard to environmental and human rights standards. As the WTO Director General Mike Moore said

140 World Trade Organization: 'Trade and Labour Standards: Subject of Intense Debate', *Briefing Note, The Third WTO Ministerial Conference*, Official Ministerial Website at: <http://svca.wtoministerial.org/english/about_e/18lab_e.htm>, 12 December 1999.

141 Ibid.

142 See Oxley, above n 1.

143 WTO Briefing Note, 'Trade and Labour' above n 140.

144 See Compa L, above n 67.

145 First WTO Ministerial Conference, Singapore (Dec 1996) (as cited in WTO Briefing Note, 'Trade and Labour', above n 140).

to the NGOs in the opening of the Seattle Ministerial Conference: 'The WTO is not a world government, a global policeman or an agent for corporate interests.'¹⁴⁶ In Moore's view the WTO can lift labour standards, improve human rights and help the environment through liberalizing international trade and thereby improving development and living standards globally.¹⁴⁷ Further regulation of these interests could be achieved through alternative international organisations or multilateral treaties on the environment¹⁴⁸ or human rights.¹⁴⁹

This separation of regulation is all very well in theory, but the enormous pressure placed upon the MAI (and also NAFTA¹⁵⁰) negotiations by environmental, labour and human rights NGOs indicates that modern multilateral economic treaties must sometimes accommodate other interests in order to win acceptability.¹⁵¹ Perhaps compromise will be required in the context of the WTO as well.

Expropriation and Compensation

Whilst existing WTO Agreements (such as GATS and TRIMS) indirectly regulate many aspects of international investment, further regulation is necessary in relation to investor protection, specifically dealing with matters of expropriation and compensation. Unfortunately, the categorisation of conduct which constitutes expropriation, and the calculation of appropriate compensation, have become increasingly

146 WTO Press Release, above n 3.

147 Ibid.

148 See eg Convention on International Trade of Endangered Species (CITES); the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal (The Basel Convention); the Montreal Protocol on Substances that Deplete the Ozone Layer (the Montreal Protocol); the United Nations Convention on Biological Diversity; and the United Nations Framework Convention on Climate Change (UNFCCC).

149 See eg Universal Declaration on Human Rights; the International Covenant on Civil and Political Rights; the International Covenant on Economic Social and Cultural Rights; the Convention on the Elimination of All Forms of Discrimination Against Women; the Convention on the Rights of the Child; and the International Convention on the Elimination of All Forms of Racial Discrimination.

150 Waelde, above n 104 at 75-6.

151 Ibid at 76.

INTERNATIONAL INVESTMENT IN THE WTO:
PROSPECTS AND CHALLENGES IN THE SHADOW OF THE MAI

difficult and controversial issues. Over the years, the definition of expropriation has expanded from traditional notions of direct expropriation or nationalisation, to now include instances of 'regulatory takings'. A 'regulatory taking' occurs when government regulation affects an investor's property rights in such an intensive way as to amount to expropriation. The Canadian Government's environmental ban on MMT in the Ethyl Corporation case provides an example.¹⁵² It is often difficult, however, to distinguish between a legitimate exercise of regulatory power on the one hand, and a 'regulatory taking' deserving compensation on the other.¹⁵³ Another controversial issue is the extent to which a government, (acting in a non-commercial capacity) who breaches an undertaking to an investor can be held to have expropriated that expected right.¹⁵⁴ As noted by Waelde;

(w)ith a much wider notion of propriety rights and a much wider notion of 'expropriatory' or 'confiscatory' action, the relatively simple identification of a governmental 'taking' of tangible property no longer works. Instead, one needs to identify and develop complex processes of balancing where individual interests in the normal commercial functioning of rights and assets are weighed up against the community's claim to powers to define and regulate the exercise of and the environment for such rights and assets.¹⁵⁵

It will be the WTO's role to achieve such a difficult balance in the event that investment protection principles are included within the scope of investment regulation in the WTO.

Investor Rights v Investor Responsibilities

Another criticism leveled at the MAI was that whilst it provided investors with extensive rights and protection, it failed to impose reciprocal investor responsibilities. This criticism is indicative of an emerging trend whereby NGO's attempt to instigate restrictions upon international investment (and generally globalization) within the investor's home state.¹⁵⁶ Rather than allow the host state to regulate the conduct of

152 See Baumgartner, above n 45.

153 Waelde, above n 104 at 59.

154 Ibid at 60.

155 Ibid at 61.

156 Ibid at 73-4.

international investors, they assert that investors are subject to a 'higher morality' on issues such as the environment, labour standards and human rights, as contained in 'emerging' international law and extraterritorial domestic law of the home state.¹⁵⁷ Accordingly, within the MAI, NGOs sought the inclusion of a binding code of investor responsibilities, which could theoretically allow home states to impose these standards of 'higher morality' upon the foreign conduct of its investors. This proposal was not accepted, although the OECDs non-binding Guidelines for Multinational Enterprises was potentially to be annexed to the MAI text.¹⁵⁸

In the context of the WTO, it is unlikely that an investor code of conduct will be implemented, for similar reasons that environmental, labour and human rights standards will not be directly assimilated into WTO Agreements. The focus of the WTO is upon trade facilitation and liberalization. Primarily, this is achieved at State level, through prohibition of trade-distorting practices. Whilst individuals ultimately benefit from and are affected by this regulation, they are not the target of the WTO Agreements. If investment is regulated by the WTO, it is also likely that the focus will be upon State practices relevant to investment protection and liberalization, rather than on individual investor responsibilities.

Conclusion

Whilst the international political climate may not at present seem conducive to the establishment of a multilateral framework for investment, it is simply a matter of time before such a framework is negotiated. Even if investment is not included in the next Round of WTO negotiations for political reasons, the current consensus regarding investment standards paired with an emerging awareness of the relationship between trade and investment,¹⁵⁹ will eventually result in an Investment Agreement being negotiated in subsequent Rounds.

157 Ibid.

158 'MAI Negotiating Text', above n 28, Annex 2 'Chairman's Proposals on Environment and Related Matters and On Labour.'

159 A Working Party on the Relationship between Trade and Investment has been assessing the advantages and disadvantages of a WTO Investment

INTERNATIONAL INVESTMENT IN THE WTO:
PROSPECTS AND CHALLENGES IN THE SHADOW OF THE MAI

To some extent, the foundation of an investment framework has already been laid by the TRIMS and GATS Agreements, which indirectly regulate many aspects of international investment. However, in order to bring a multilateral agreement in line with existing BIT standards of investment liberalisation and protection, further work is necessary.

To begin with, such preliminary issues as the type of investment covered (ie foreign direct investment or portfolio/loan investment) and the stage of investment covered (ie pre-establishment or post-establishment phase) by the Agreement need to be determined. The current prohibition on investment measures in TRIMS could be expanded to apply to a larger range of performance requirements, affecting investment generally rather than just trade in goods. The scope of investment protection could also be expanded; the existing transfer and payment right in GATS should be broadened to apply to all sectors, whilst new comprehensive provisions dealing with expropriation, compensation and subrogation need to be added. The current investment liberalisation provisions such as the MFN, NT and Market Access obligations in GATS could be potentially strengthened in investment-specific negotiations.

As a relatively transparent, democratic and globally representative organisation, with an established and effective dispute resolution system, the WTO is a natural forum within which to negotiate and implement a multilateral investment agreement. Those nations who have tabled proposals for such an Agreement have made it clear that negotiations should begin with a clean slate; the WTO Agreement will therefore not be the MAI under a different name.¹⁶⁰ However, the MAI experience can serve to educate and prepare the WTO for some of the challenges that it will inevitably face throughout the initiation and negotiation phase of a multilateral investment agreement. Increasingly, multilateral regulation of any sort is becoming a highly controversial political issue, as a result of public confusion and hostility towards globalization. This, combined with the perception of foreign investors as commercial 'vikings' who 'rape and pillage' each nation and then take the spoils home, will not make the negotiation of a multilateral agreement promoting foreign investment

Agreement since 1997. See WTO Briefing Note, 'Trade and Investment', above n 140.

160 WTO Briefing Note, 'Trade and Investment' above n 140.

(1999) 11 BOND LR

easy. However, if these political hurdles can be overcome, it is highly likely that the current consensus can be consolidated within a WTO Investment Agreement, which will in turn promote international investment and increase global prosperity.