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The Legal Framework for Regulating the Global Enterprise Going into the New WTO Trade Round - A Backward and a Forward Glance

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I. INTRODUCTION

There could scarcely be a more propitious moment for the subject matter of this panel. We have just witnessed a landmark event which took place in Doha, Qatar, several months ago, with regard to regulating the global -- or multinational -- enterprise (MNE). On November 14, 2001, in the final moments of the Fourth Ministerial Meeting of the World Trade Organization (WTO), the prospects for international rules on foreign direct investment (FDI) received a 'shot in the arm' with the adoption of paragraphs 20-22 of the final Doha Declaration, assuring that, at last, the subject of investment -- in its own right -- is on the agenda for potential inclusion in a new round of trade negotiations (the so-called 'Development Agenda' or 'Development Round').[1]

The worn-out adage that most things of importance do not occur in a vacuum hardly needs re-articulating; but this again, and emphatically, is the case when it comes to a potential new multilateral framework for regulating the investment activities of the global or multinational enterprise.

Yet such a framework, closer again to reality since the Doha Declaration, would not constitute simply the natural conclusion of a long sequence of monitoring and regulating events surrounding FDI and the MNE; it would not simply represent a logical *continuum* in a developmental progression of international investment rules. It would embody: (1) *certain reversals* from the first wave of serious investment codes of the 1970s; (2) *certain cyclical trends* apparent over that period of time; and finally (3) actual *progressive development* in the formal treatment of FDI issues in a multilateral context.

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1. Of course the earlier GATT Uruguay Round managed to edge investment for the first time onto the agenda in the form of "trade-related investment measures," but the eventual resulting TRIPS Agreement was a very limited and weak instrument, the greatest strength of which has perhaps been the review mechanism which kept the subject alive on the GATT/WTO work program, to the extent that it has now achieved independent status for probable negotiations in the new Development Round.

Certain reversals: Some aspects of the most contemporary efforts at concluding an investment agreement are complete *reversals* from the earlier wave of instruments (the codes and guidelines of the 1970s), which focused on *regulation and control* of FDI and its primary vehicle, the MNE. The contemporary instruments focus rather on *promotion and protection* of FDI in the face of potential host state restraints. Other *reversals* are corollaries to -- and the logical consequences of -- this fundamental turnaround.

Certain cyclical trends: There is some disquieting evidence of a re-emergence of some of the old fears that drove the original wave of MNE-restrictive guidelines, even though such fears proved largely unfounded. Namely, there was the fear that MNEs operated uncontrolled and without restraint all over the globe, unaccountable to any rules of law and somehow escaping all local jurisdictions and controls; the fear of majority ownership *per se* (the old ownership/control debate, void of the enlightened thinking on this issue); the fear of loss of economic sovereignty; the fear of intrusion on national sovereignty; and similar, even if less consequential, fears.[2] We have been over this territory before ('60s, '70s, '80s); and yet it would seem, as indicated in the introductory paragraph for this panel, that: "as we enter the twenty-first century, these [or similar] concerns are likely to come to a head . . . ." i.e. full cycle.

Progressive development: Some aspects of a new initiative to create an agreed multilateral framework do represent a progressive development ('progressive' in the sense of an evolution from a 'soft law' to a 'hard law' instrument; progressive also in the sense of building on the experience of earlier counterparts). It would, therefore, seem useful and wise to take a brief glance backward to see where we have come from, in order to properly evaluate what is currently taking place in the arena of multilateral regulation of global enterprises, before attempting to look forward at where we may be going.

The objective here, then, is to provide something of a 'broad-brush' *bilan* or overview for better appreciating the relevant international legal environment for any new negotiations to regulate the operations of these global enterprises, particularly in light of the new Development Round. The focus will, therefore, be essentially on treaties and sub-treaty instruments that can serve to set in relief the existing legal framework on the eve of the anticipated elaboration of potentially the most legally significant multilateral agreement on investment in history.

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2. For a discussion on other fears driving the first serious wave of 'controls' on FDI, see CYNTHIA DAY WALLACE, THE MULTINATIONAL ENTERPRISE AND LEGAL CONTROL: HOST STATE SOVEREIGNTY IN AN ERA OF ECONOMIC GLOBALIZATION ch. III (The Hague/London: Kluwer Law International, 2002). These fears included: uncertainty generated by foreign-based decision-making; fear of neo-colonialism and economic imperialism; fear of the MNE as instrument of foreign policy; fear of the MNE as a threat to a nation's social welfare; fear of host/MNE conflict of interest; a sense of vulnerability in the face of foreign takeovers and acquisitions; fears of technological dependence; fear of foreign industrial dominance; fear of foreign competitive advantage; fear of foreign monopolistic infiltration; and suspicion of size and growth as equating 'dominant position.'

II. FIRST WAVE OF CODES FOR GLOBAL ENTERPRISES

It does not enhance our present purposes to enter into the details of the first wave of codes generated primarily in the 1970s.[3] At the same time, there are certain trends which merit cursory review because the 'collective memory' may be in need of sharpening on these issues, particularly as some of the fears enumerated above have a way of coming around again, involving largely new players who may not be aware that -- to a significant degree -- we have been this way before.

The most important of these codes include:

- the International Chamber of Commerce (ICC): Guidelines for International Investment ("ICC Guidelines") (1972);
- the Organisation for Economic Co-operation and Development (OECD): Guidelines for Multinational Enterprises ("OECD Guidelines") (1976, *last revised* 2000);
- the International Labour Organization (ILO): Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy ("ILO Declaration") (1977);
- the United Nations (UN): Code of Conduct for Transnational Corporations ("UN Code of Conduct") (1978 -- not concluded).

Other more specialized instruments include:

- the United Nations Conference on Trade and Development (UNCTAD) Code of Conduct on the Transfer of Technology Code ("UNCTAD ToT Code") (1975 -- not concluded);
- the UNCTAD Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices ("UNCTAD RBP Set") (1980).

III. COMMON ELEMENTS OF THE FIRST WAVE OF CODES AND GUIDELINES

Broadly speaking, the codes and guidelines to date represent an attempt to overcome the inability of the world trading community to reach an international law solution in the investment field, primarily because of the perceived threat to national economic sovereignty. While dispensing here with the detailed provisions of these various early codes, it can be useful to summarize what they have in common.

3. For such details, see WALLACE, *supra* note 2, at ch. XIX.

Firstly, most were either directly or indirectly aimed at influencing the draft UN Code of Conduct, which was the central focus of international code efforts at that time, though it never came to closure.

Secondly, all finalized codes were of a 'soft law' character. Although some were in the form of UN resolutions, even the customary international law character of UN resolutions has never been accepted by the community of nations. Of particular significance here is the fact that, of all of the code efforts of that era, the two that did not achieve adoption were the two that did not make it clear from the outset that they were not to be legally binding. Both the UN Code of Conduct and the UNCTAD ToT Code left their legal character "to be determined." Both of these codes failed to achieve the necessary consensus. This is not to imply *per se* that the failure to assure non-binding status was the sole or even major cause of a stalemate, since the legal status itself never became an overt issue with either draft code. Nevertheless, it bears mentioning in light of the difficulties encountered in bringing the more recent Multilateral Agreement on Investment (MAI)[4] to closure as a patently legally binding agreement.

The third common feature of this early wave of codes was their near universal objective to restrict and control the MNE (in contrast to the promotion and protection objectives currently favored). One noteworthy exception to the restrict and control approach was the OECD Guidelines which, although in a sense also characterized by 'control,' were more aimed at self-regulation and conscience-raising on the part of MNEs themselves, and more concerned with the promotion of the concept of 'good corporate citizenship' -- i.e., evidencing a more pro-active than negative approach. The lower profile ICC Guidelines also followed this orientation.

IV. THE OECD GUIDELINES AND THEIR ONGOING RELEVANCE

Among all the adopted soft law codes of that time, the OECD Guidelines[5] have represented the most successful multilateral instrument thus far, and deal with a wide range of international investment matters.[6] They have remained relevant by virtue of periodic updates, the last of which was issued in 2000.[7]

Perhaps the greatest significance of the OECD Guidelines is that they induced MNEs to (voluntarily) 'clean up shop' where they were found wanting. It could be argued that the objectives of this self-restraint were not totally attributable to altruistic motives; they could well have been created, in considerable

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4. *See infra* note 22.

5. *See* Organisation for Economic Co-operation and Development, INTERNATIONAL INVESTMENT AND MULTINATIONAL ENTERPRISES, GUIDELINES FOR MULTINATIONAL ENTERPRISES 11 (Paris: OECD, 1976). The latest revision version of these guidelines is also published separately as THE OECD GUIDELINES FOR MULTINATIONAL ENTERPRISES (Paris: OECD, 4th ed. 2000).

6. For a fuller discussion of the OECD Guidelines, spanning the period from 1976 to 2000, see WALLACE, *supra* note 2, at ch. XIX, § 2(a)(ii).

7. *See The OECD Guidelines for Multinational Enterprises*, Text and Decision, OECD Doc. C(2000) 96/REV1; Commentary, OECD Doc. C(2000)96/ADD1/REV1 (June 27, 2000).

measure, to avoid stricter regulation from external sources, in the recognition that the more the MNEs, themselves, operate responsibly vis-à-vis the local economy, the more likely they would be to defuse the demands for external controls. Even if this were the case, however, their effectiveness is not thereby diminished. Perhaps even to the contrary: where there is genuine motivation, there is a collective will to comply.

Indeed, partially owing to the success of these OECD Guidelines to improve the corporate responsibility of MNEs, the thrust for controls gradually subsided. Other important contributing factors to this growing detraction from 'controlling' the MNE were: (a) the fact that the worst fears had not materialized and (b) the development of a greater equilibrium between eastward and westward investment flows, somewhat leveling the playing field, at least on an east-west axis. Even more importantly, as regards the north-south axis, there came a realization on the part of the developing world of their serious need for private investment capital infused by FDI, as other (more 'public') sources of capital were drying up, and as a result of the deep economic morass into which these most highly restrictive regimes were falling.

All these facts together resulted in a long lull in international regulation efforts relating to the MNE, broken only in 1992 by the issuance of the World Bank Guidelines, which furnished a significant, even if largely 'un-heralded,' bridge between the first wave of (soft law) codes and the more recent hard law/legally binding instrument initiatives.

V. THE WORLD BANK GUIDELINES

Of major significance with regard to the World Bank Guidelines[8] vis-à-vis the earlier instruments was the 'codification' of the 180-degree turnaround in objective and approach to 'regulating' MNEs. Again, while the objective of the codes of the 1970s' wave -- apart from, notably, the OECD (and ICC) Guidelines -- was to *control* the MNE and to *protect* the *host state*, the objective of the World Bank Guidelines (consistent with virtually all contemporary initiatives, including the later MAI effort) was to *attract, promote, protect and facilitate* FDI flows and, to this end, in a sense, to *restrain* the *host state* from enacting over-protective legislation or otherwise using regulatory or administrative roadblocks to impede beneficial and development-enhancing FDI inflows.

This was simply a manifest reflection of the fact that, between the first wave of codes and the World Bank Guidelines, the MNE had begun to be recognized as the single most important agent in global economic integration and as a necessary factor for ongoing Third World economic development. The World Bank Guidelines basically served to identify, amalgamate and consolidate general trends from existing

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8. *See* THE WORLD BANK, LEGAL FRAMEWORK FOR THE TREATMENT OF FOREIGN INVESTMENT (Washington, D.C., The World Bank, 1992), *reprinted in* 7 ICSID REV. FOREIGN INVESTMENT L.J. 295, 297 (1992); *see also* IBRAHIM SHIHATA, LEGAL TREATMENT OF FOREIGN INVESTMENT: THE WORLD BANK GUIDELINES (Dordrecht: Martinus Nijhoff, 1993).

legal instruments, supplemented by "best practice" considerations.[9] The result was guidelines that would represent both *de lege ferenda* and *de lege lata* -- i.e., a sort of 'restatement' of the rules and practice that had grown up over the years around FDI and MNEs.

Thus although the World Bank Guidelines were not legally binding, it was anticipated that they, just as earlier examples, would play a significant role in influencing the progressive development of international law and practice as regards FDI.

Unlike the OECD, the World Bank, in fact, has no power to issue legally binding rules -- even to govern the conduct of its own members. In addition, unlike the OECD's MAI effort that later followed, the World Bank Guidelines are not a negotiated instrument. Nevertheless, the drafters did strive for near universal participation in both the consultation and drafting stages of the guidelines, in an effort to achieve a high level of acceptance.

In addition, although not, themselves, often cited in arbitral proceedings, the World Bank Guidelines clearly pointed the way toward a legally binding multilateral agreement and served as a model for national legislation, in its attempt to harmonize and consolidate broadly accepted norms in international state practice.

VI. THE ROLE OF BILATERAL INVESTMENT TREATIES (BITS)

A prime example of a legally binding international instrument bearing on FDI issues is the bilateral investment treaty (BIT). BITs serve as a current and viable legal model, in that they establish standards of treatment that each signatory is legally bound to accord the other state party's investors and investments.

It is neither time-efficient nor particularly important to the present overview to enter into an analysis of specific BIT provisions.[10] Moreover, it is generally conceded that bilateral treaties have little influence or effect on customary international law, partly owing to their lack of *opinio juris* and their *lex specialis* character. Nevertheless they can and do provide an important model for legally binding provisions between nations, dealing directly with investment issues.

Firstly, the very proliferation of such agreements by so many nations is evidence of a certain number of commonly recognized issues and principles, even if short of a customary law standard.

Secondly, negotiations successfully concluded between only two parties at one time can facilitate the resolution, in such limited forum, of highly contentious and more universal issues that might otherwise have to be threshed out for the first time in a more politically complex multilateral context.

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9. For more details on the elaboration and provisions of these Guidelines, see WALLACE, *supra* note 2, at ch. XX, § 2(a) and accompanying footnote references.

10. For a fuller discussion on BITs, with particular regard to their impact on multilateral agreements, see WALLACE, *supra* note 2, at ch. XX, § 1.

Thus for the present, BITs remain a primary source of normative rules on FDI, pending the successful conclusion of an international or multilateral regime. BITs have indeed been viewed as "the bilateral agreement of choice for codifying investment agreements between countries in the world today"[11] and are a contributory factor in an emerging general acceptance of more uniform standards for the treatment of FDI.

At the same time, not only do many industrialized countries lack BITs with one another, but bilateral solutions are seen to be less and less able to deal with the ever-accelerating and irreversible globalization of the 'marketplace.' BITs still fail to provide a uniform and comprehensive set of rules adequate to cover the multitude of issues involved in the growing phenomenon of global economic integration.

VII. NAFTA AS A MULTILATERAL MODEL?

At the regional level, the 1992 North American Free Trade Agreement (NAFTA)[12] is similar in its approach and scope to most U.S.-concluded BITs,[13] resembling a sort of "tripartite" BIT. Again, while time constraints and primary focus preclude entering into details on this regional agreement,[14] two noteworthy features bear mentioning.

Firstly, NAFTA is the only multilateral instrument concluded thus far that sets binding obligations to grant entry of FDI on the better of national or most-favored-nation treatment. This feature could serve to inform a possible future WTO-negotiated agreement, in a forum which, consistent with its predecessor the GATT over its entire history, has honored non-discrimination as one of its fundamental principles.

Secondly, NAFTA's Chapter XI investment provisions for the first time in a multilateral instrument (though patterned after certain modern BITs which do the same) accorded private investors the right to take complaints on violations of treaty rights directly before a signatory government, with a binding ruling, rather than to seek relief in the host state's courts or tribunals or to try to get the

11. Michael R. Reading, Note, *The Bilateral Investment Treaty in ASEAN: A Comparative Analysis*, 42 DUKE L.J. 679, 682 (1992).

12. North American Free Trade Agreement, Dec. 8-Dec. 17, 1992 (Wash. D.C.), Dec. 11-Dec. 17, 1992 (Ottawa), & Dec. 14-Dec. 17, 1992 (Mexico City), Can.-Mex.-U.S., *reprinted in* 32 I.LM. 289, 605 (1993) [hereinafter NAFTA] (entered into force Jan. 1, 1994).

13. There are some important differences between U.S. and European-style BITs, notably as regards scope of application, standards of treatment, performance requirements, capital transfers, and expropriation. Perhaps the most significant difference is that U.S. BITs cover both pre- and post-establishment investment activities. In most other countries' BITs, the protection applies only subsequent to the granting of entry. This is an important distinction.

14. For further details on dispute settlement in the investment chapter of NAFTA, see Cynthia Day Wallace, *The Legal Framework for a Multilateral Framework on Investment and the Potential Role of the WTO*, 3 J. WORLD INVESTMENT 289, 299 (2002).

investor's own government to espouse his claim.[15] The particularly innovative aspect of this NAFTA provision was the absence of the requirement of a pre-existing arbitral agreement between the parties for the provision to operate. (This investor to government dispute-settlement feature was later also incorporated into the Energy Charter Treaty).

VIII. THE ENERGY CHARTER TREATY AS A FORERUNNER

At the multilateral level, another significant instrument that preceded the MAI and raised aspirations for success in realizing a more comprehensive legally binding instrument was the 1994 Energy Charter Treaty.[16] The Energy Charter Treaty was an important step in the acceptance of legal rules for FDI -- a milestone along the route from legally binding bilateral and regional instruments to a legally binding international or plurilateral instrument. It has been seen as one of the most significant of the contemporary agreements in this regard.

In general terms, the principal provisions on foreign investment deal with the full range of the usual areas of admission (or entry), treatment (or operations), expropriation (or disinvestment) and currency transfer (or capital movements).[17] As noted above, the Energy Charter Treaty's dispute settlement provisions[18] significantly include -- like BITs and NAFTA -- disputes between an investor and a state contracting party, allowing private companies to bring an action against any government party to the Treaty, as well as the European Commission, without the need first to submit to an arbitral tribunal.[19]

Foreign investment protection here is, of course, confined to the energy sector. Yet it is again an important precedent in setting legally binding norms for FDI. It has been called "the first major multilateral treaty imposing extensive obligations on governments with respect to the protection and treatment of foreign investment which is directly enforceable by private companies."[20] Moreover, the Treaty's geographic scope is more extensive than any previous multilateral binding agreement dealing explicitly with FDI. Sir Leon Brittan called it "an important agreement, which proves that it is possible to agree useful rules for investment . . ."[21] This brings us up to the most recent and most ambitious initiative to

15. NAFTA, *supra* note 12, at ch. XI, arts. 1116, 1117.

16. The Energy Charter Treaty, Dec. 17, 1994, Energy Charter Conference Doc. EECH/AI/enl, *reprinted in* 34 I.L.M. 360 (1995).

17. *See id.* at pt. III. For more on the investment provisions of The Energy Charter Treaty, see WALLACE, *supra* note 2, at ch. XX, § 2(b) and accompanying footnote references.

18. *See* The Energy Charter Treaty, *supra* note 16, at pt. V.

19. *See id.* art. 26.

20. *See* Thomas W. Waelde, *International Investment Under the 1994 Energy Charter Treaty: Legal, Negotiating and Policy Implications for International Investors Within Western and Commonwealth of Independent States/Eastern European Countries*, 29 J. WORLD TRADE 5, 56 (1995).

21. *Barriers to Investment, Business Law Europe*, FIN. TIMES, June 29, 1995, at 8.

multilaterally regulate global enterprises: the OECD's draft MAI, to which several references have already been made.

IX. THE OECD DRAFT MULTILATERAL AGREEMENT ON INVESTMENT (MAI)

Once again, in an effort to stay within the time constraints (which I am already pushing to the limits, or even already transgressing), as well as for the sake of consistency, I will not enter into details of the provisions or of the actual negotiations of the MAI[22] (which took place between 1995 and 1998), but will simply note briefly: (1) the intent/objective; (2) its significance; and (3) reasons behind its failure.

Intent: The intent of the MAI negotiators was to consolidate the results already achieved from the existing relevant OECD codes and guidelines,[23] then proceed to the creation of new disciplines[24] so as not to perpetuate the limitations of the earlier instruments, in order to provide a "strong and comprehensive multilateral legal framework"[25] for international investment.

Objective: The MAI was envisaged to add the force of law to investment liberalization, in addition to applying disciplines to areas of liberalization not satisfactorily covered by the earlier instruments. Thus, from the outset of the MAI mandate, the OECD aimed to ensure "high standards of investment liberalization and protection and effective dispute settlement procedures . . ."[26] and generally to increase legal security for international investors.[27] When it came to negotiating the MAI as a legally binding international agreement, despite: (1) the influence of the earlier OECD instruments and a possible resultant advantage of the OECD in negotiating another such instrument, and (2) the bridge furnished by the World Bank Guidelines, none of these furnished an adequate legal source for a legally binding international instrument. For this, the MAI negotiators turned to BITs, opting to base their own draft provisions on the principles enshrined in this successful bilateral model, and to draw upon the latter's strongest features, along

22. *See The MAI Negotiating Text,* OECD Directorate for Financial, Fiscal and Enterprise Affairs, Paris (as of April 24, 1998); *see also Commentary to the MAI Negotiating Text,* OECD Directorate for Financial, Fiscal and Enterprise Affairs, Paris, 1998 (as of 24 April 1998). For a fuller discussion of these negotiations, see WALLACE, *supra* note 2, at ch. XX, § 2(e) and accompanying footnote references.

23. The major OECD investment instruments are the OECD Declaration and Decisions on International Investment and Multinational Enterprises. *See* OECD Guidelines, *supra* notes 5 & 7; *see also* WALLACE, *supra* note 2, at ch. XIX, § 2(a)(ii). For the Codes of Liberalisation of Capital Movements and of Current Invisible Transactions, see *id.* at ch. X, § I(a). The two Codes are legally binding by virtue of the fact that member countries are bound by decisions of the OECD Council, once the members have accepted the Council's decision.

24. Organisation for Economic Co-operation and Development, *Multilateral Agreement on Investment: Progress Report by the MAI Negotiating Group,* OECD Doc. OECD/GD(96)78 (1996), at 3.

25. William H. Witherell, *An Agreement on Investment,* THE OECD OBSERVER, Oct./Nov. 1996, at 6.

26. Organisation for Economic Co-operation and Development, *Communiqué of the Meeting of the Council at Ministerial Level,* OECD Communications Division, Paris, May 21-22, 1996.

27. Witherell, *supra* note 25, at 6.

with those of other existing investment codes and agreements -- sectoral and regional or supranational.[28]

Reasons for Failure: The failure to bring to closure this agreement was attributable, in part, to: (1) strong opposition from interested NGOs to many aspects of both substance and procedure of the negotiations, and (2) the loss of interest on the part of the business community, largely coincident with the carving out of taxation issues from the agreement, together with the fact that (3) for the majority of the countries directly involved, there were no major problems in their (inward or outward) investment activities, resulting in a lack of political will to carry on indefinitely to try to overcome chronic difficulties and opposition.[29]

In addition, although the main categories of provisions closely reflected those found in traditional BITs, the introduction of new disciplines which extended to areas that had hitherto not been addressed in an international agreement was perhaps, in retrospect, overly ambitious for a first serious attempt at a legally binding multilateral agreement. In addition to the failure to reach consensus on a broad range of issues,[30] what appeared to be developing into an excessive number of reservations and exceptions would have so compromised the provisions as to surrender much of the sought-after value and objectives as a "high standards" agreement.

Even as in the case of the earlier UN Code of Conduct 'failure,' however, the very exercise itself served to provide additional and valuable insights into the more complex issues, and to pave the way for the next step in systematically structuring an international framework for investment. Proponents of the MAI called it "the most comprehensive and complex negotiations on investment that have ever taken place."[31]

X. THE NEW WTO DEVELOPMENT ROUND

This brings us at last back to the WTO Ministerial Declaration of November 2001 at Doha. One might well ask: What chances does a new Trade Round have of being more successful at producing binding rules for FDI than the OECD effort to conclude the MAI?

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28. *See id.* at 7. For a view on the interdependence between the MAI and BITs, see Joachim Karl, *Das Multilaterale Investitionsabkommen (MAI)*, RECHT IM WIRTSCHAFT (RIW) 432, 438-40 (1998).

29. For more details on why the MAI failed, see *Lessons from the MAI*, United Nations Conference on Trade and Development (Geneva 1999) (UNCTAD Series on issues in international investment agreements).

30. Outstanding issues which defied eventual consensus included the very definition of "investment," the foundation upon which all other rules would hang. Additional unresolved issues revolved around national and most-favored-nation treatment, performance requirements, intellectual property, cultural safeguards (especially sensitive to the French and the Canadians), regulatory takings, dispute settlement, and labor and the environment.

31. R.C. Longworth, "*Treaty to Govern International Investment Granted a Reprieve*," CHI. TRIB., Feb. 18, 1998, *reprinted at* http://www.ofii.com/newsroom/news/ct981802.html (copy on file with author).

Some obvious assets of the WTO over the OECD as a forum for such an agreement include:

- the virtual global representation of WTO membership;
- an established multilateral dispute settlement mechanism (with an appeals process, and the political effects of the very consciousness of same);
- the sheer force and momentum of the globalization process (which is virtually unstoppable);
- the political will on the part of some of the major players to navigate this through to a successful conclusion;
- the future negotiating members' heightened motivation to avoid the repetition of the previous failure to bring such an agreement to closure.

At the same time, there is a certain potential liability for the WTO that is over and above that experienced by the OECD, at least at the outset of its MAI mandate. The MAI was originally conceived in a rather more euphoric period of the globalization era, with a clarity of purpose, namely to increase the rights of investors vis-à-vis host states, i.e. a clear call for the liberalization of investment. The new Development Round, on the other hand, was born in a period of high and apparently unabated anti-globalization sentiment on the part of many vocal NGOs, which had indeed already begun to seriously impact the final phases of the MAI, even partially contributing to its breakdown and eventual demise. The WTO is not unaware of these liabilities, but may be the one organization capable of overcoming them, for the very reasons noted above.

XI. Conclusion

It would be unproductive to attempt here to look more closely at the WTO's potential new role in this exercise, as it would entail moving into the uncertainties and inexactitudes of raw speculation. Although the WTO Working Group on investment issues is making progress in its ongoing work toward this goal, actual investment negotiations cannot be launched prior to late 2003 at best. It seems preferable, therefore, simply to sum up here by submitting that what all nations should be seeking, through general international law norms, specific international agreements, and other compatible mechanisms, is to maximize the well recognized benefits of FDI, via the ongoing liberalization trends already well underway, while decreasing and eliminating any remaining potentialities for abuse by the global enterprises that are the major conveyors of these sought-after benefits, and removing any discriminatory or otherwise unreasonable restraints on the part of governments hosting these enterprises. Such should be the primary aim of any international regulatory regime or framework. Prevention of abuse of economic or political power in or through international commerce, in one form or another, is the one common thread in all international regulatory efforts from the 1970s onward. This most fundamental objective has never changed. What *has* changed is that now more of the responsibility has been shifted to the host governments.

It must at the same time be acknowledged that the basic political 'instinct' of a state for maintaining sovereign control, especially where its national defense and economic welfare are at stake, will rightly never completely disappear, however widely accepted the truths about the welfare-enhancing and economic-development benefits of FDI. The major obstacles to a global investment agreement are still political more than they are economic, and however much certain objectives of MNEs may even coincide with certain policy prerogatives of sovereign governments, there are equally as many areas of discrepancy and divergence.

This is not likely to change substantially. Nevertheless, the momentum for a multilateral or plurilateral agreement is underway, presumably now to be determined by negotiating members of the WTO as the forum of choice. Thus, in anticipation of the elaboration -- in the most appropriate form -- of a twenty-first century multilateral investment framework, we surely stand at the threshold of a new era in responsible international investment freedom.