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MASTER THESIS

Investing in development – between
bilateralism and WTO law

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Motto

There are those who see things the way they are and ask why...

I dream of things that never were and ask why not?

(Robert F Kennedy)

Abstract

In a post-crisis context characterized by renewed multilateralism, investment related concerns, the need for international regulation and a development conscious international community, an unresolved issue resurfaced: *Which way ahead for international investment law? Should it try to improve the current patchwork of Bilateral Investment Treaties (BITs) or should the negotiation of a development friendly Multilateral Investment Agreement (MIA) at the WTO be attempted at?*

Answering the question requires an integrated approach that analyses both bilateralism and multilateralism, which takes into account previous attempts (e.g. OECD's Multilateral Agreement on Investment) and explanations for their failure, looking at possible future actions (an MIA at the WTO) and trying to understand their developmental implications.

Although theories addressing the bilateralism vs. multilateralism debate are inconclusive as to which of the two is preferable, history shows BITs were resorted to given the failure of attempts at multilateral lawmaking. They were thus considered second best options and states constantly sought to replace them with an MIA. Since BITs are a sub-optimal form of investment regulation, a multilateral agreement that creates coherence in international investment law is necessary.

Using the example of the MAI, it is shown that the failure of previous attempts at such a multilateral agreement were due to national sensitivities and anti-globalization fears, thus, provided these causes are acknowledged and addressed within the negotiation of an MIA, the success of such an agreement is likely. And since investment is already addressed at the WTO, building on the existing investment provisions in WTO law so as to conclude an MIA appears logical. Since the MIA is also preferable development wise and, despite its temporary suspension, a goal most likely not given up on any time soon, it seems plausible to state that *the negotiation of a development friendly multilateral legal framework for international investment at the WTO should be attempted at.*

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Investing in development: between bilateralism and WTO law

1. Introduction

The worst times for the world economy since The Great Depression – that was the diagnostic most economists agreed upon. Credit crunch, economic meltdown, systemic crisis – the downspiralling of all economic indicators that started with the collapse of the American real estate market was, undoubtedly, disastrous. Yet, it may have not been entirely disruptive. One of the positive consequences of this economic near death experience was a revitalization of international cooperation. De jure, the phrase had never left political discourse, but de facto it had slowly given way to rising unilateralism, whether in foreign security policy (e.g. the war in Iraq or Georgia) or in the economy (e.g. China's aggressive trade policy).

When the economy hit an all time low, our economic survival instinct led to unprecedented international coordination of crisis management - e.g. it was for the first time ever that central banks across the world simultaneously lowered interest rates so as to counter the credit crunch. (Woods, 2010) What followed was a quasi *multilateral* emergency response committee, which met up after the debut of the crisis to discuss solutions that needed coordinated implementation so as to work.

Two were the words that dominated those meetings - *investment*: inappropriately managed investment vehicles (i.e. asset backed securities) had caused the fiasco, investment banks were going bankrupt - and regulation: financial oversight institutions had failed to minimize or at least contain risk, existing *legislation* was neither adequate, nor sufficient, international rules were needed so as to quarantine what had proved to be pandemic financial risk. In the words of UNCTAD (2009) – “The global financial crisis arose amidst the failure of the international community to give the globalized economy global rules. The crisis has made it all too clear that globalization of trade and finance calls for global regulation.”

As a consequence, a century old question resurfaced: *how do we regulate international investment?* Can the current legal framework be improved or is there need for a new system of rules? What form should the latter take – bilateral, multilateral? Who should be responsible for its implementation? International investment law was being asked “*quo vadis?*” And an

answer was imperiously necessary, not only to deal with post-crisis reconstruction, but also to ensure any future crisis prevention.

This context also face lifted the architecture of international relations beyond their structural and linguistic paradigm - in their institutional leadership. **International organizations** that had been sidelined by global market forces, such as the IMF (availability of capital on the private markets having rendered it unnecessary for those in search of funds) found themselves once again at the helm of global economic decision-making.

1.1 The why

Given these circumstances, *the future direction of international investment law* ought to be addressed. For in such a context of renewed multilateralism, dominated by concerns over investment, focused on designing international regulation to deal with the new realities and friendly towards the idea of more decision making power being attributed to international organizations, it seems only natural to *put the words together* and bring forward a still unresolved issue: that of *creating a multilateral framework for investment under the auspices of an international organization*.

From the Havana Charter to OECD's Multilateral Agreement on Investment, there has been a continuous effort to design a system of rules governing international investment comparable to those existent in international trade, with the WTO the most likely candidate for any future agreement on the matter. (Newcombe, Paradell, 2009) But in a world ruled by Bilateral Investment Treaties, is there really need for a multilateral treaty on investment, especially since all earlier attempts failed? If yes, why? And where? Would the WTO be the most appropriate venue? On a different note, would such an agreement have any positive welfare effects for the global community (i.e. foster development) or would it simply sanctify already established privileges of multinational corporations? In other words: *which way ahead for international investment law?*

It is in trying to answer these questions that this paper finds its *raison d'être*. There seems to be no better timing for a discussion about the pros and cons of new investment regulation. Never before has the world found itself at the center of such a complex web of **investment** flows and so sensitive to both the gains and the losses these induce. Never before has the fear of economic disintegration been so strong, nor the need for **multilateral** cooperation so dire. Never before has the world been more aware of the undeniable necessity

to not only **regulate** foreign investment, but to do so in a way that works not for the few, but for the many - i.e. be **development** conscious.

1.2 The what

Therefore, the issue of *development friendly multilateralism in investment law* needs to be addressed.

a) *Research question*

The research question the paper puts forward thus becomes: *should the negotiation of a development friendly multilateral legal framework for international investment at the WTO be attempted at?*

In order to answer adequately, some sub-questions need to be addressed: *How can the prevalence of bilateralism simultaneously with the quest for multilateral forms of investment lawmaking be accounted for – historical compromise or economic reasoning? Are bilateral agreements sufficient in the face of the complexity of international investment flows or is there need for a multilateral solution? Why have previous attempts at a multilateral agreement failed and what is the consequence of their failure for any renewed attempts at a similar agreement? What are the perspectives of a multilateral investment agreement at the WTO? What are the development implications of such an agreement?*

b) *The concepts*

The notions the paper is built around have been mentioned several times so far – some definitions are thus appropriate.

Hence, investment refers to either the „process of exchanging income during one period of time for an asset that is expected to produce earnings in future periods” (Encyclopedia Britannica) or the „property or another possession acquired for future financial return or benefit” (The American Heritage Dictionary of the English Language). Beyond dictionaries, investment is, in the view of investment treaty drafters – and this is the view this paper will work with - „every kind of asset” (UK-US BIT, 1989) - i.e. „movable and immovable property; shares, stock, bonds; intellectual property rights, know-how; rights,

conferred by law or under contract, to undertake any commercial activity, including the search for, or the cultivation, extraction or exploitation of natural resources.” (idem)

Bilateralism – that which “affects two nations or parties” (Merriam Webster) opposes the multilateral approach which means “involving or participated in by more than two nations or parties” (idem) and this opposition takes, in investment matters, the form of Bilateral Investment Treaties (BITs) vs. their variously denominated multilateral counterparts (Multilateral Agreements on Investment - MAIs, Multilateral Investment Treaties – MITs etc.). According to UNCTAD, “Bilateral investment treaties (BITs) are agreements between two countries for the reciprocal encouragement, promotion and protection of investments in each other's territories by companies based in either country.” MAIs/MITs aim at providing the same encouragement, promotion and protection of investments, but they do so at a multilateral level. They are thus slightly different answers to the same issue – the necessity to ensure free and safe investment flows from some countries to others. Why two solutions to one problem? Because a decision as to which one is better has not been yet reached. And this is the main dilemma investment law faces today: *should it try to improve the current patchwork of BITs or give the green light to another attempt at an MAI?*

1.3 The how

The topic of whether a multilateral agreement on investment is desirable has been discussed before in literature, but in a fragmented form, focusing on only some aspects of the issue and in a context lacking an imperious need for a shift of paradigm – i.e. before the crisis. What this paper thus tries to achieve is an integrated approach that analyses both sides of the equation (bilateralism and multilateralism), which takes into account previous attempts (e.g. OECD’s MAI) and the explanation for their failure, looking at possible future actions (a Multilateral Investment Agreement at the WTO) and trying to understand their developmental implications.

a) Theory

The thesis is theoretically eclectic – i.e. it is not based on one theoretical approach, for the dual nature of the topic – economic and legal – requires a multifaceted analysis and none of the existent theoretical models suffices to explain to current status quo. Moreover, the purpose is not to confirm, nor infirm any given theory, but rather critically assess a state of

things using theoretical inputs from economics (Ricardo, Friedman), law and economics (Coase), game theory, international relations (Morgenthau, Waltz) Thus, throughout the paper, theoretical concepts from the above fields will be used: e.g. comparative advantage (Ricardo, 1817), prisoner's dilemma, Pareto efficiency, transaction costs (Coase, 1937), balance of power (Waltz, 1979). The aim is to understand the historical and/or economic explanations behind preferences for given legal frameworks – i.e. bilateral/multilateral.

b) Methodology

The methods used in answering the research question range from economic to historical to legal text analysis and back, so as to best understand various perspectives, relations of causality and presumable consequences of the actions under scrutiny. Given the ambivalent nature of the topic analyzed – the *laws on investment* – economic and legal points of view had to be combined for a proper understanding of the implications and this combination is put into historical perspective so as to capture the shifts in the rationalities and constraints that have shaped investment law.

The sources used are both primary (treaties – final texts and drafts, policy statements) and secondary (research papers, academic articles, media coverage of the issues discussed), so as to create a balanced view on both the intent of the parties (conveyed by the former) and the perception of the intent (revealed by the latter)

The paper is organized as follows – after the present introductory chapter delimiting the research question and choice of research methodology, comes Chapter 2 with a comparative analysis of bilateral/multilateral legal frameworks for investment and their *raison d'être* as seen through the lens of economic theory.

Chapter 3 sets the scene for a discussion about multilateralism by exploring the causes and consequences of the most important instance of its historical evolution: OECD's Multilateral Agreement on Investment. Historical perspective gives way to legal text analysis as we move on to Chapter 4, dedicated to the relation between the WTO and investment, which will be looked into by reference to the investment provisions of WTO Agreements already in place (GATS, TRIMS, TRIPS).

We then round it off by returning to economic arguments in Chapter 5 when trying to understand whether multilateralism in investment law would be in any way beneficial to developing countries or if Bilateral Investment Agreements are more likely to serve their

welfare related interests. Chapter 6 addresses possible ways forward, while the concluding chapter will review main findings and objectively discuss any limitations of the paper, also proposing avenues of further inquiry on the topic of bi/multilateralism and investment law.

2. *Bilateralism vs. multilateralism – an overview*

The story of investment rules is as old as investment itself and unfolded in ebbs and flows depending on the interests and relative power of the main players, until attempts to theorize upon their causes and consequences transformed the struggle for economic supremacy into an academic debate. In order to understand the story, it is thus necessary to get acquainted to its historical plot and, even more so, to its theoretical underpinnings and, in doing so, we will try to answer the first two sub-questions, namely: *How can the prevalence of bilateralism simultaneously with the quest for multilateral forms of investment lawmaking be accounted for - historical compromise or economic reasoning? Are bilateral agreements sufficient in the face of the complexity of international investment flows or is there need for a multilateral solution?*

En route to finding the answers we attempt a brief historical analysis trying to understand how the bilateral/multilateral dilemma came to be in the first place and then explore the theoretical explanations behind preferences for one or other of the solutions.

Consequently, the chapter debuts by dealing with the historical evolution of international investment law, with a view to tracing the primary causes of the current status quo. It is in the changing rationalities behind investment lawmaking that we will find the explanation for the bilateralism/multilateralism dilemma facing investment lawyers today, which is why our historical insights focus less on the chronology of legal documents (some will be given as examples) and more on the evolution of the underlying principles that led to the former being concluded in the first place. The second part of the chapter addresses the antithetic theoretical views on bi\multilateral frameworks for investment. We explore these differences of opinion by analyzing, firstly, the arguments in favor of multilateralism and secondly, those supporting bilateralism, some of which were built as counter-arguments to those seeking to promote multilateral solutions.

The aim is to answer the question of whether bilateralism is a temporary solution resorted to until fully operational multilateralism can be implemented or if BITs are, in fact, the best option for regulating investment. This is a vital question to address for the answer to

it might solve investment law's dilemma as outlined above i.e. should the BIT system be improved or should an MAI be renegotiated?

2.1 Historical insights

Since one can only understand the present and predict the future by looking at the past, with history we shall begin. Thus, before there was foreign investment, there were foreigners, whose status slowly evolved from "complete outlawry, in the days of early Rome and the Germanic tribes" (Borchard, 1915), gradually being awarded rights similar to those of host state nationals until quasi-equality of treatment as is mostly the case today. The rules concerning foreign property followed a similar pattern, from prohibition of ownership to varying degrees of protection guaranteed by the host state up to the point where "a state's mistreatment of foreigners or their property was an injury to the foreigners' home state" (Vattel, 1758) thus requiring the latter's intervention, view that "eventually coalesced into the international legal principle of diplomatic protection" (Newcombe, Paradell, 2009) as applied to economic matters. Emerged in the era of colonies and empires and consequently mostly a prerogative of the powerful, this principle dominated proto international investment law throughout its early history, until the wars of independence in Latin America. As the consequent condemnation of any kind of intervention in the internal affairs of sovereign states brought about a change in the paradigm of international investment law, traditional diplomatic protection proved unsuited for business purposes - thus requiring its replacement with a system of investment rules - and led to what will become one the most heated debates in international investment law: the opposition of two concepts – national treatment vs. a minimum standard of treatment.

The former, put forward by capital importing countries - mostly former colonies - stated that foreigners were entitled to the same rights as host state nationals, but were not to be granted any privileges. The problem with this principle is of paramount importance for everything that followed: what if the rights granted by some host states, even if the same as those that apply to their own citizens, are simply less than those foreigners usually enjoy in their home state? What is a right at home thus becomes a privilege abroad, by comparison to the standards of the host state nationals. Naturally, the foreigner will not perceive a right he is used to as a privilege, but a lack thereof will undoubtedly adversely affect him.

This difference of opinions initially referred to the standard compensation for expropriation, with exporting capital states advertising the "adequate, effective and prompt

payment for the properties seized” (US Secretary of State to Mexican Ambassador, 1938) and importing capital states claiming that compensation should be established in accordance with national laws, that is, less immediate than investors would have preferred. If we build an arch in time, we see it is the same national vs. minimum standard of treatment opposition that is behind today’s dilemmas i.e. which labor standards, environment protection standards etc. should MNCs be obliged to respect – those in their countries of origin or those in the state where the investment is made?

The response was a requirement for the existence of a minimum standard of treatment, put forward by the US and the UK, which was the equivalent of “standards of justice and treatment accepted by ‘civilized states’” (Newcombe, Paradell, 2009) The ideological debate that ensued goes well beyond linguistic antagonisms. It was a clear antithesis between the views of capital importing and capital exporting states, with the latter considering that:

“Each country is bound to give to nationals of another country in its territory the benefit of the same laws [...] neither more nor less: provided the protection which the country gives to its own citizens conforms to the established standard of civilization. There is a standard of justice [...] of such general acceptance by all civilized countries as to form part of the international law of the world. A country is entitled to measure the standard of justice due an alien by the justice it accords its own citizens only when its system of law and administration conforms to this general standard. If any country’s system of law and administration does not conform to that standard of justice, although the people of the country may be content or compelled to live under it, no other country can be compelled to accept it as furnishing a satisfactory measure of treatment to its citizens.” (Root, 1910 – quoted in Newcombe, Paradell, 2009)

But why is this conflict of principles relevant to our discussion of bilateralism vs. multilateralism? Because it is this very impossibility to agree upon which standards ought to be applied to international investment that caused the failure of virtually all attempts at multilateral rule making. And such initiatives were not few – from the 1930 League of Nations draft for a codification of the *‘Responsibility of States for Damage done in their Territory to the Person or Property of Foreigners’* to the 1949 ICC *International Code of Fair Treatment for Foreign Investment*. All failed.

Why were they attempted at to begin with? For one, because the growing complexity of international investment flows required *regulation* and, with the collapse of colonial empires putting an end to extraterritorial jurisdiction, thus allowing new sovereign states to assert their newly found regulatory power, the legislation needed could only be *inter-national*.

What is more, since the necessity to regulate foreign investment appeared after the dusk of imperialism but before the dawn of 20th century superpowers – i.e. in a world where unilateralism was hard to enforce, a multilateral solution was the best option for international economic policy makers. With the post WWII shifts in the world's balance of power, international investment law took a somewhat different path.

Therefore, multilateralism having been (indefinitely) postponed, the only route towards international investment rulemaking was via regional agreements, which reflected the preference of the parties for one or other of the principles – e.g. the *Convention on the Protection of Foreign Property* (1967 Draft OECD Convention), built around the minimum standard of treatment vs. the *Andean Investment Code* in the 1970s put forward by the Andean Common Market (ANCOM) - faithful to the national treatment principle. What was being created was a minimum standard of treatment loving North vs. a national treatment friendly South.

Capital however, has other “principles” than lawmakers and its interest were not always geographically located along the north-north/south-south investment treaties dominated axes. On the contrary, its preference was more towards a north-south type of investment flow – hence, ways to circumvent the ideological division and inexistence of multilateral investment agreements were needed. They came under the form of Bilateral Investment Treaties (BITs), usually concluded between a northern capital exporting state and a southern capital importing one. The first such BIT ever signed was that between Germany and Pakistan in 1959 – *Treaty between the Federal Republic of Germany and Pakistan for the Promotion and Protection of Investments*. The subsequent explosion of BITs reached its peak in the 1990s, when 1857 BITs had been concluded. By 2005, that figure had reached 2400 (UNCTAD, 2005)

It would be naïve to assume investors had realized the advantages of bilateral agreements over multilateral ones, especially since attempts at multilateralism continued - e.g. OECD's *Multilateral Agreement on Investment* in the 90s, riding the wave of liberalization promoted by the Washington Consensus, just as more BITs were being concluded. Were bilateral agreements merely a temporary solution to be implemented until a multilateral agreement could be reached? Yet, if BITs seemed to so wonderfully promote and protect investment, why was a multilateral treaty necessary anymore? It is in trying to answer these questions that a large body of literature dealing with the theoretical explanations behind preferences for either bilateralism or multilateralism emerged.

2.2 Theoretical overview

The existence, or better still, the prevalence of bilateralism simultaneously with the quest for optimal multilateral forms of investment lawmaking is usually referred to as “the lateralism paradox” (Morin, Gagne 2007) History seems to suggest, as seen before, that this paradox is simply an accident – since multilateralism temporarily failed, BITs had to be concluded – investment could not be left unregulated. But multilateralism seems to be forever failing and resort to bilateralism not so much a compromise, but rather a preference.

Hence, economists tried to come up with explanations for such a strange status quo. In what follows, we review the theories that have had most impact on how investment regulation is viewed by comparing multilateral friendly arguments with those supporting bilateralism. The aim of this comparative analysis is to understand whether BITs are indeed second to none, or if, au contraire, they are accidental and temporary, in which case the renegotiation of an MAI becomes a sine qua non condition for properly functioning investment law.

a) Multilateralism

Since the first attempts at regulating international investment were multilateral, it would seem treaty drafters have an inclination to resort to cooperative solutions to international issues. It did not take long for economists to bring arguments in favor of this initial preference policy makers manifested.

Therefore, the first argument in favor of the necessity of a multilateral investment framework is that it helps overcome “international policy spillovers, i.e. the effect of host country policies on other countries, particularly the home countries of FDI, and vice-versa” (Ferrarini, 2003). Such domestic policies in investment matters can be either pro-investment (incentives) or limitative in nature (performance requirements), both with doubtful positive effects on collective welfare (rents, income distribution inequality etc.)

Briefly, economic theory (Pareto efficiency) states that cooperative action is necessary when the measures (e.g. investment incentives) taken by individual economic agents (e.g. host countries) lead to sub-optimal collective results (e.g. inefficient allocation of resources) – situation described as Pareto inefficient (Ferrarini, 2003). Such cooperative action can take the form of an international agreement acting as “a commitment device” (idem) If we consider that the current web of BITs is a sub-optimal form of international investment law, then a multilateral agreement might be the type of cooperative action we need. Why is

bilateralism sub-optimal? Because it cannot protect parties from international spillovers – i.e. the negative effects of their partners' domestic policies. (Ferrarini, 2003) An example that comes to mind is the American sub-prime turned financial crisis that affected the whole global economic system in the absence of a system of multilateral rules governing risky investment. In theory such an instance is usually referred to as a market failure induced/ not corrected by domestic policies. What a multilateral agreement could do is limit/prohibit these collective welfare reducing domestic policies – which might explain post-crisis call for international financial regulation and, along the same lines, for reconsidering the renegotiation of an MAI.

There is another version of this argument – an international agreement could act as an anchor for “good” domestic policies, especially in countries known for reneging on their commitments, i.e. persecuting investment ex-post. (idem) In such instances, a multilateral treaty could signal to investors that its parties are willing to not only allow foreign investment, but also protect it afterwards. As such, a multilateral agreement could reduce the degree of uncertainty investors face regarding investment in host countries they have never been in business with before.

This uncertainty reducing capacity MAIs possess is a consequence of their ability to bring about transparency in investment relations (i.e. information about the rules of the game regarding investment, as applicable in host country territory). Argument number two thus postulates that “a multilateral agreement would secure transparent, non-discriminatory, stable and predictable conditions for long term investment; this would reduce investor perception of risk and create the necessary conditions among host countries and investors for a level playing field for FDI worldwide” (Ferrarini, 2003).

Thirdly, it is argued that multilateral agreements make capital allocation more efficient. It is a view supported with the argument that some host country governments simply cannot “overcome opposition by local groups that are powerful enough to protect unproductive rents [...] associated with distortions to the efficient allocation of capital” (Ferrarini 2003) An international agreement could help solve this problem by offering “a necessary political scapegoat when reformers face powerful local constituencies” (idem) and would apparently be more binding than a bilateral treaty for it is more credible an anchor and more likely to bring sanctions for non enforcement. With regards to this last idea, it is considered that multilateralism turns a BIT's “bilateral character with an at least formal reciprocity of investment-related concessions into a multilateral instrument with a much more “legislative” character” (Waelde, 2000) due to the “formation and influence of alliances

between groups of countries and the sometimes more "parliamentary" format of the treaty negotiations" (idem)

What is more, economic reasoning suggests an MAI is necessary as it would improve the current web of BITs because "providing a single uniform multilateral regime reduces the transaction costs of foreign investment" (Bubb, Rose-Ackerman, 2007) At the same time, "if the existing set of bilateral relationships does not provide legal protections for investment flows between every country pair, an MAI would be an improvement by extending legal protection to those investment flows." (idem).

Last but not least, a Multilateral Investment Treaty would be broadening the agenda to include other socio-economic matters. Hence, if "BITs are the expression of a bilateral deal reflecting the interests of two parties, the MITs are pursuing much larger, policy-oriented, economic-philosophy imbued efforts at multilateral economic regulation [...] closer to the value-loaded and globally oriented UN resolutions" (Waelde, 2000) An MIT would simply bring more to the table.

b) Bilateralism

Despite what seems a justified inclination for multilateralism, BITs represent the rule in investment law, rather than the exception. Instead of considering them a simple accident and temporary solution, some economists began looking for arguments so as to prove that bilateral agreements are not a compromise, but a preferable form of regulating investment.

On the one hand, some bilateralists have built their explanations as counter-arguments to views expressed by multilateralists, so as to suggest BITs' supremacy over multilateralism.

To begin with, regarding the policy-spillover argument - i.e. the effect of host country policies on other countries (the first pro-multilateral argument the paper put forward) bilateral friendly economists argue that it can turn out to be domestic *politics* that undermines a multilateral solution to problems induced by domestic *politics* - vicious circle. Two things need to be considered when bringing into discussion domestic politics and its influence on the outcomes of international negotiations – ratification procedures and the relative power of non-state participants (Morin, Gagne 2007). The former are rather complicated for the two main players in international investment lawmaking: the EU is not represented as a block in matters regarding investment and negotiations need to be conducted with each member state, whereas the US needs Congress approval for virtually any international agreement. As such, it

becomes obvious that concluding bilateral agreements is infinitely easier for both European countries and the US, as the domestic process of ratification is most likely less complicated.

The same is true for non state actors, most importantly MNCs and NGOs. If non-governmental organizations are more likely to unite and run media campaigns in the case of controversial multilateral agreements, they will probably be less interested in the *n*th BIT their country signs. (Morin, Gagne 2007) Or they will simply not know about it. MNCs take the opposite view, for, although theoretically in favor of a multilateral agreement that is likely to benefit them, they will be more interested in trying to influence bilateral negotiations which are not under public scrutiny and where their relative power is greater. In other words “Multinational corporations support capital liberalization at the multilateral level, << but not with the same enthusiasm with which NGOs attacked it >> (Sikkel 2001:175)” (idem)

Secondly, the suggestion that multilateral agreements reduce transaction costs (multilateralism argument number four) is rejected by game theory. By comparing the surplus achievable through the conclusion of an MAI and the equilibrium payoffs of the current BIT regime, Bubb and Rose-Ackerman (2007) prove that a multilateral treaty would not produce substantial benefits so as to justify – ironically so - the transaction costs induced by its negotiation – i.e. a change in the legal status quo is simply too costly and the potential benefits do not justify the expense. As such, it appears that “in the face of bargaining costs, the proliferation of BITs may well have made it more difficult to conclude an MAI by narrowing the surplus a multilateral framework could create.” (idem)

On the other hand, some bilateralists aimed at finding explanations for the status quo that would suggest that BITs are not accidental.

First of all, a bilateral friendly view seeks to explain a very curious fact: those standards that developing countries found excessive in MAIs and hence rejected in a multilateral setting, were to be found later on as provisions in BITs, with developing countries agreeing to their application – e.g. adequate, effective and prompt compensation for expropriation. The conflict of principles that had led to the failure of multilateralism seemed unproblematic when dealt with in bilateral relations. The explanation proposed for such a strange result is based on power asymmetries (Morin, Gagne 2007) and can be found in the very historical context of the appearance of BITs: at first, it was a developed-developing country deal, with the former’s view obviously prevailing given the significant power inequality and the acute need for funding developing countries were in, coupled with the lack of other alternatives to satisfy it besides FDI. Since it is inequality that “allows the most powerful actor to move a regime forward” (idem), it follows that international investment law

could only be created at the push of developed countries which imposed their will - and their minimum standard of treatment. The reverse means that equality brings lawmaking progress to a halt and since equality can only exist under a multilateral regime, when developing countries can unite and form coalitions strong enough to oppose those of developed states, it becomes obvious why all multilateral initiatives were blocked – neither view was strong enough to impose itself.

Secondly, Guzman (1998) proposes another perspective: a prisoner's dilemma - i.e. a fundamental problem in game theory that “models situations in which it is difficult to get rational, selfish agents to cooperate for their common good.” (Stanford Encyclopedia of Philosophy) Hence, in his view, developing countries are in competition to attract investment and “once a developing country signs a BIT, it secures a competitive advantage over others to attract foreign investments. Then all the other developing countries must follow in order to catch up with this comparative advantage.” (Morin, Gagne 2007). Along the same game theoretical lines, but regarding multilateral agreements, it is argued that developing countries “were essentially acting as a cartel. However, private incentives to cheat on that cartel were strong, and developing countries did so by signing BITs” (Bubb, Rose-Ackerman 2007)

The theory is problematic. Firstly, it is based on the assumption that BITs stimulate investment in the countries that sign them. Although the analysis of the causal (?) relationship between BITs and FDI is beyond the scope of this paper, it needs be said that most empirical studies have shown that “BITs do not, or only marginally, increase investment flows (Hallward-Driemeier 2003; UNCTAD 2003:89; Walter 2002). Market size, strength of legal institutions, political stability and human resources play a far greater role in influencing the location of overseas investment.” (Morin, Gagne 2007) Secondly, even if the first, second, third BIT may have brought a comparative advantage to the developing country that entered it by comparison to others it was in competition with, by the time the number of BITs signed around the world had reached 2400, there were hardly any advantages left to be gained. (idem)

Another approach was through the lens of strategic linkages (Morin, Gagne 2007). This view postulates that “many developed countries link the investment regime with regimes in which their bargaining power is stronger, such as the trade regime” (idem) In the view of former US Trade Representative R Zoellick, signing a BIT is a first step toward a comprehensive free trade agreement. In other words, first BITs, then FTAs – “developing countries make concessions on the investment issue, as a quid pro quo for concessions by industrialized economies in other areas of interest to them, such as market access in

agriculture or industrial products” (Moran, 1998 – in Ferrarini, 2003). This suggests developing countries are in fact in competition for not only FDI, but also for increasing exports, which is why they are so willing to keep on signing BITs.

What is ironic about this perspective is that although it seeks to explain bilateralism, it can work just as well in a multilateral setting. It is the “grand bargain argument allowing countries to define a negotiating set that allows a variety of potential tradeoffs” (Hoekmann, Saggi 1999) And if the tradeoffs involve investment and trade, only one setting for a multilateral deal comes to mind – the World Trade Organization.

2.3 Au lieu of a conclusion

As it seems, the answer to sub-question number one – i.e. *How can the prevalence of bilateralism simultaneously with the quest for multilateral forms of investment lawmaking be accounted for - historical compromise or economic reasoning?* – is difficult, for although our historical analysis seems to support the version of a compromise solution, it is impossible for theory to either confirm or infirm that hypothesis.

The latter is true because although economists are very savvy at finding arguments to support one or the other of the views, unfortunately, none of their arguments is flawless – which is why an apriorically built system of support in favor of either bilateralism or multilateralism, one that would promote the supremacy of one over the other beyond the shadow of a doubt, cannot be accounted for. Fortunately, policy makers do not need invulnerable theories to back their actions – if that were the case, we would still be debating democracy instead of applying it. Just as a society cannot be left ungoverned simply because theories of government may be flawed, international investment could not be left unregulated because the forms of regulation were multiple and none of them perfect.

Consequently, winning some theoretical battle becomes secondary – designing rules that work takes precedence. And here evidence imposes itself. It is not that bilateral agreements are apriorically worse than their multilateral counterparts – they are simply insufficient in today’s globalized economy. This conclusion is based, given the incapacity of economic theory to either confirm it or infirm it, on historical evidence and common sense. Countries couldn’t overcome differences and power asymmetries only allowed for enforcement of the dominant principle on a bilateral level, which is why BITs came to be. Since states had initially preferred multilateralism, it is reasonable to suggest it better served their investment related interests. Multilateralism was choice number one because of what had

become a complex web of economic relations doubled by an increasingly complicated political scene (as a consequence of independence wars). BITs were a compromise. If the complexity of the economy in the early 20th century led treaty drafters to prefer multilateral legal frameworks for investment, it becomes obvious that such a solution is the only one valid in today's global economy.

And hence the answer to sub-question number two – i.e. *Are bilateral agreements sufficient in the face of the complexity of international investment flows or is there need for a multilateral solution?* – is no, BITs are not sufficient and yes, a multilateral agreement is necessary. Multilateral problems need multilateral solutions – and the current crisis is a case in point. As we have seen, multilateralism was never abandoned, regardless of how many BITs were being signed. It was brought under attention whenever it became clear that the complexity of global investment was such that multilateral solutions that would take into account the view of all the players were needed. BITs do promote and protect investment. But they are geographically limited, power asymmetry sensitive and development ignorant. They are not adequate in a world striving to promote equality and cooperation. As such, it seems plausible to assert they could be considered a temporary solution until the context is proper for an MAI to be given another try.

The League of Nations was abandoned until history made the UN possible. The International Trade Organization died before being born and so trade was ruled by means of the GATT until the context allowed for the creation of the WTO. Bilateral political relations flourish, but that does not undermine the UN system. Trade relations between pairs of countries exist still, but multilateral trade rules are nevertheless observed. Perhaps the same might be true for investment – BITs keep being signed, yet states feel there is a need for multilateral investment rules. And whenever the evolution of the world economy creates a favorable context, they bring the topic forward.

The understanding of the necessity of multilateral regulation for investment thus triggers continuous attempts at a multilateral agreement. And probably the most well known and heatedly debated such attempt is OECD's Multilateral Agreement on Investment.

3. MAI – the rise, the fall, the lessons

The 90s were a busy decade in terms of investment law making – the greatest number of BITs was concluded before the end of the millennium. Yet, in 1995, OECD countries decided they needed a multilateral agreement to govern investment relations. So they began

negotiating the Multilateral Agreement on Investment – “the constitution for a single global economy” as R. Ruggerio, then Secretary-General of the WTO, called it. And then, in 1998, after insurmountable differences of opinion between parties and after unprecedented criticism from NGOs, the MAI was officially abandoned.

Why would countries with relatively similar views in terms of investment liberalization be incapable of agreeing on what was seemingly a mere codification of rules already in place? Why would public opinion – the voice of which became a global coalition of NGOs - oppose a very technical agreement most had probably never even read? Then again, if the agreement was so flawed, why was it attempted at? With all those BITs in place, why was it considered necessary?

This chapter will try to answer these questions by analyzing, firstly, the economic and legal reasons that led to the commencement of the negotiations on the MAI; secondly, the main provisions of the MAI and why they were a step forward from existing BITs; we then try to understand what led to the failure of the MAI and what role NGOs played in its demise and, last but not least, what the implications of the MAI story are for any future multilateral agreements on investment - specifically, why the OECD was chosen as the appropriate venue, why that choice proved erroneous and what lessons ought to be learned should a similar treaty be negotiated at the WTO.

Consequently, this chapter answers sub-question number three – i.e. *Why have previous attempts at a multilateral agreement failed and what is the consequence of their failure for any renewed attempts at a similar agreement?* – by using the example of the MAI.

It needs be said that before the MAI there was NAFTA and its Chapter 11 on investment, the first economic agreement containing advanced provisions on investment, which became the source of inspiration for OECD’s Agreement in many areas (definition of investment, expropriation, dispute-settlement) and continues to influence treaty drafters today. Despite its very important role, it is not an investment agreement per se and, most importantly, it is a *regional* treaty, which is why this paper will only mention it when relevant, rather than dedicating a chapter to its analysis.

3.1 Reasons behind the MAI

With approximately 1500 BITs in place in the mid 90s, investment flows between countries seemed to be properly addressed from a legal point of view. And yet, developed countries, responsible for 85% of investment flows, decided those BITs were insufficient and

a multilateral agreement on investment was needed. What led states to believe that bilateralism was unsuited when faced with their investment related needs of liberalization and protection? A one word answer would be: globalization.

a) Economic background

„The growing economic integration and interdependence of countries resulting from increased international trade in goods and services, the growth of cross-border capital flows, and the rapid diffusion of technology throughout the world” (Chapman, 1997) – i.e. globalization - turned the world into a global village. And this global village – a Mecca of commercial and financial transactions - needed some rules. In other words, “the power of new technology and its impact upon transportation, telecommunications, financial services and commerce [...] led to international trade and investment consequently becoming more prevalent, leading in turn to a greater need for international regulation” (Read, 1999)

Indeed, the unprecedented growth of international trade as compared to world economic output that began in the 1950s was surpassed in the 90s by Foreign Direct Investment flows (Neumayer, 1999), which boomed from 33 billion US\$ in 1986 to 252 billion US\$ in 1997 (idem). It is estimated that 39,000 parent companies had a US\$2.7 trillion stock of FDI invested in some 270,000 foreign affiliates by 1995. (Chapman, 1997)

These developments had consequences both positive and negative – and multilateral rules were considered necessary to address both kinds of outcomes.

On the one hand, it has been argued that an MAI was needed for “harnessing the advantages of globalization” (Chapman, 1997) namely capturing the benefits induced by growing investment transactions – i.e. reduced costs (with labor, primary resources, transportation), increased profits, market access, knowledge transfer, “job creation, increased economic output, increased exports, greater competition, enhanced productivity, higher wages, and stimulation of economic activity in supporting industries.” (idem) The logic was that since FDI come with the above named benefits, their entrance on world markets ought to be facilitated – hence an agreement that encouraged MNCs to invest abroad was considered a sine qua non condition for world economic growth.

On the other hand, multilateral legislation was looked upon as a must for “managing the pressures of globalization” (Chapman, 1997). Among the negative consequences of the internationalization of markets one can name the growing rate of unemployment induced by delocalization of production from developed to developing countries and the consequent

migration of demand for unskilled labor from the north to the south (caused by MNCs locating their production in countries with cheap labor); the lack of obligations for MNCs with regards to human rights, labor standards, environmental policies etc. Hence, a multilateral agreement on investment was considered necessary to not only promote investment so as to reap its benefits, but also introduce social needs friendly investment rules that would counter its negative effects on global welfare.

One question can rightfully be asked – why couldn't these goals be achieved by introducing clauses that dealt with them in bilateral agreements? After all, globalization was not new and investment liberalization policies had been introduced for some time, regionally in some cases, but mostly on bilateral levels. Why was globalization, with both its rights and its wrongs, considered too complicated for bilateralism to regulate it?

b) Legal background

Because even with all those BITs in place, “foreign investors still encounter barriers, discriminatory treatment and legal uncertainties. [...] Bilateral, regional and sectoral agreements have brought clear benefit to FDI. *However, the need for such approaches arises partly because existing multilateral disciplines are insufficient.* Moreover, the lack of an overall cohesive structure may potentially distort the pattern of FDI flows and complicate corporate activity which is increasingly carried out on a global scale.” (William Witherell, Director for Financial, Fiscal and Enterprise Affairs, OECD, 1996).

In other words, “the manifold, but rather uncoordinated steps towards a more liberal and investment-friendly environment provide a justification to make these policy changes more systematic by locking them into an international agreement. An MAI could make the widespread, but rather chaotic, system of BITs more transparent and could make the legal framework in which investment flows operate more certain.” (Neumayer, 1999)

Why would that be necessary? Simply because “It is unlikely that the current patchwork quilt of investment rules will serve multinational enterprises operating increasingly complex businesses across multiple nation-state borders. Competing and sometimes conflicting, or simply vague, rules can create uncertainty in the treatment of foreign direct investment (FDI) by MNEs” (Smith, 1996). In fact, “investment policy makers and international business circles have now perceived the need for a comprehensive framework of binding investment rules. Such a Multilateral Agreement on Investment (MAI) would set

standards for equal competitive opportunities and provide stable and consistent treatment of FDI across all sectors.” (Witherell, 1996)

Hence, one of the main purposes of the agreement was to bring coherence to the patchwork of BITs, which had become insufficient in the light of the increasing complexity of global investment relations. It was time for the historical compromise bilateralism was to finally be replaced with common multilateral standards. Existing rules were too many, too diverse and too complicated for MNCs to comply with. So designing one multilateral agreement was considered the most logical and efficient approach.

An MAI would not, however, have to be drafted from scratch. Au contraire, it would build on existing consensus on international investment principles as already enshrined in concluded agreements. Such consensus “is demonstrated in the content of over 1600 bilateral investment treaties. 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.” (Read, 1999)

Hence, most investment agreements ensure that foreign investors are not discriminated against – this principle goes in two directions: national treatment and most favored nation treatment, which stipulate that foreign investors must not be treated less favorably than domestic ones (the former) or other foreign investors (the latter). These apply to investments already made, pre-establishment and establishment phases of the investment i.e. rights of establishment, market access, entry of personnel, and even conditional performance requirements - being governed by the domestic laws of each State. (Vandevelde, 1998)

Furthermore, BITs also aim at protecting the investment once it has been made, by guarding it against expropriation or measures having similar effects, permitted only “when it is for a public purpose under due process of law, non-discriminatory and accompanied by the payment of prompt, adequate and effective compensation” (idem). At the same time, BITs allow for the transfer and repatriation of investment funds – “investment capital, returns, interest and loan repayments, the proceeds from share sales, compensation for investment losses, asset sale or liquidation proceeds, and employee earnings” (Read, 1999)

Probably the most innovative provision introduced by BITs was the settlement of disputes through binding investor-state arbitration. “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.” (Read, 1999)

And it was to be accepted within the MAI as well, for the Agreement incorporated all of the above provisions while at the same time taking some of them one step further.

3.2 The Constitution of a Single Global Economy

Build on the above-mentioned consensus, the Agreement aimed to “provide a broad multilateral framework for international investment with high standards for the liberalization of investment regimes and investment protection and with effective dispute-settlement procedures” (OECD MAI Draft, 1998 – Preamble) This paragraph summarizes best the intent of the MAI, as it becomes clear when reading the provisions of its last draft – MAI Draft Consolidated Text, 22 April 1998.

Hence, what strikes at a first lecture is the breadth of its coverage, when defining both investors and investments. The former is defined as either “(i) a natural person having the nationality of, or who is permanently residing in, a Contracting Party or (ii) a legal person or any other entity constituted or organised under the applicable law of a Contracting Party [...] and includes a corporation, trust, partnership, sole proprietorship, joint venture, association or organisation.” (MAI Draft, Scope and Application) while the latter can refer to “Every kind of asset owned or controlled, directly or indirectly, by an investor, including [...] an enterprise (corporation, trust, partnership, sole proprietorship, branch, joint venture, association or organisation), shares, stocks, bonds, loans, intellectual property rights, leases, mortgages” (idem) The MAI thus created a set of rules that would govern not just corporations and FDI, but anybody who had anything to invest. It was the most ambitious set of norms economic multilateralism had been faced with and this unprecedented breadth and the ramifications it implied made some fear the Agreement might end up regulating sectors of the economy it normally had little to do with. And they were right. For the MAI was not a sectoral agreement – its scope was limited to investment only and since investment can be made in pretty much anything, the provisions of the text would end up applying to industry, agriculture, financial services or culture.

The provisions of the MAI regarding the promotion and protection of investments were quite similar to those contained in BITs – national treatment, Most Favored Nation treatment (MFN), but the innovation it brought was that it required these principles to apply not only once the investment had been made, but also in its pre-establishment and establishment phases, thus covering “establishment, acquisition, expansion, operation,

management, maintenance, use, enjoyment and sale or other disposition of investments”
(MAI, Treatment of investors and investment)

Also, MAI prohibits performance requirements, normally used by governments when screening and selecting foreign companies that wish to enter the domestic market so as to ensure some of the benefits of the investment accrue to the domestic economy as well. These performance requirements can refer to domestic content, export requirements, local hire, technology transfer, creation of joint ventures etc. Along the same lines, companies were granted the right to transfer their payments “freely and without delay” from the host country of the investment to the home country of the company, such payments referring to “the initial capital and additional amounts to maintain or increase an investment; returns, payments made under a contract, proceeds from the sale or liquidation of all or any part of an investment, earnings and other remuneration of personnel” (MAI Draft, 1998)

With regards to expropriation and dispute settlement, the departure from existing rules was minimal, in that, concerning the former, the MAI promoted prompt, adequate, and effective compensation (the minimum standard of treatment regarding expropriation states had fought over a century before had finally found its way into a multilateral agreement) for expropriation, direct and indirect, or „measures having equivalent effect” (MAI Draft, 1998)

In relation to the latter, it combined both state-state (consultation, mediation, conciliation, arbitration) and investor-state procedures – i.e. submitting the dispute „to any competent courts or administrative tribunals of the Contracting Party to the dispute or in accordance with any dispute settlement procedure agreed upon prior to the dispute arising or by arbitration under the ICSID Convention, UNCITRAL or the Rules of Arbitration of the International Chamber of Commerce” (MAI Draft, 1998)

Unlike other multilateral agreements based on positive lists (sectors to be covered by the text are “offered” by parties) the MAI takes a top down approach to liberalization – i.e. a sector is covered by the Agreement unless it is specifically excluded (exceptions refer to national security, public law and order, and maintenance of international peace) The Agreement was based on two core principles: standstill – “an irreversible minimum standard for liberalisation through the exclusion of new or additional restrictions” (Mechanisms for standstill, rollback and listing of country specific reservations, note by MAI Negotiating Group chairman, 1996) and rollback - “the liberalisation process by which the reduction and eventual elimination of nonconforming measures to the MAI would take place” (idem). The combination of the two created the ratchet effect i.e. the locking in of any new liberalization measures. A country could leave the Agreement no sooner than five years after having signed

it, but its provisions would still cover the investments made for an additional period of 15 years.

Thinking back to the reasons for the MAI, one may argue the text did excellent in “harnessing the advantages of globalization” i.e. promoting and protecting investment, while its efforts at “managing the pressures” were barely visible. Environment and development were mentioned in the Preamble – “[Recognizing that investment, as an engine of economic growth, can play a key role in ensuring that economic growth is sustainable, when accompanied by appropriate environmental policies to ensure it takes place in an environmentally sound manner] [Recognizing that appropriate environmental policies can play a key role in ensuring that economic development, to which investment contributes, is sustainable] and resolving to [desiring to] implement this agreement [in accordance with international environmental law and] in a manner consistent with sustainable development, as reflected in the Rio Declaration on Environment and Development” (MAI Draft, 1998) - but without any mention on how legally binding the stipulations of this part of the Agreement would be and with most of the content within parentheses, for Parties had been unable to reach an agreement concerning its scope. An Additional Clause on Labor and Environment never went beyond the stage of proposal.

In other words, if the agreement did its best to protect investors, it seemed to do very little to ensure protection against the negative externalities their investment decisions might induce – which is why the public opinion (through the NGOs and parliaments – under pressure from the voters) criticized the Agreement and eventually caused it to collapse.

3.3 The failure of the MAI

The phrase that ended the story of the most ambitious agreement ever drafted with a view to regulating the global economy was of disappointing brevity: “Negotiations on the MAI are no longer taking place” (OECD, December 3, 1998) What led to this rather sad outcome, that came to annihilate negotiation efforts that had lasted three years and ruin hopes for the creation of a uniform set of rules for international economic transactions? A simple Internet search might lead to the conclusion that the unprecedented pressure of NGOs worldwide caused the failure of the MAI. A traditional international politics analysis would argue: France’s defection. The truth is, as always, somewhere in the middle.

a) *NGO criticism*

The apparent lack of balance between harnessing the advantages and managing the pressures of globalization translated as an inequality between the rights it conferred to corporations and the obligations it imposed on them. It is this perceived disequilibrium that led a worldwide alliance of developmental and environmental NGOs (inter alia Preamble Center for Public Policy, Third World Network, Friends of the Earth, Oxfam) to consider the Constitution the MAI aimed to be closer to a “Bill of Rights for Multinational Corporations” (Friends of the Earth).

With more than 600 organizations in nearly 70 countries expressing vehement opposition to the treaty, on more than 50 Websites and in 200 news group postings (Kobrin, 1998), the MAI came under enormous pressure. It all started in 1997, when a draft of the agreement reached a public policy group and was soon thereafter published on the Web. The MAI was denounced as “a major threat to democracy, sovereignty, the environment, human rights, and economic development as it would give corporations the "sovereign power to govern countries" and make elected governments "their compliant puppets" (idem) What was the – often radical – criticism aimed at?

First of all, MNCs were considered to have no obligation to respect labor standards, human rights or the environment. The main concern expressed by NGOs was that, given the acute competition for FDI developing countries were in (caused by the lack of alternative sources of funding – aid and development assistance having reduced considerably), these already severely underdeveloped states would enter a bid for attracting foreign investors by lowering environmental and labor standards companies would be obliged to respect, so as to create a more “investment friendly” (i.e. obligations free) investment context for MNCs. This “race to the bottom” of key development indicators was considered not only permitted, but encouraged by the MAI, given the agreement’s lack of provisions concerning environment and labor, except for that vague and ambiguously binding mention in the Preamble.

This critique led negotiators to include a clause regarding “Not lowering standards (labor and environment)” – “[A Contracting Party [shall] [should] not waive or otherwise derogate from, or offer to waive or otherwise derogate from [domestic] health, safety or environmental [measures] [standards] or [domestic] [core] labor standards as an encouragement for the establishment, acquisition, expansion or retention of an investment of an investor.]” (MAI Draft, 1998) This ‘intention’ was difficult to put in practice, which is why the clause ended up having four alternative formulations, none of them agreed on.

Moreover, fear regarding the protection of the environment was not limited to developing countries only, for NGOs considered the governments of developed countries (otherwise prone to improving rules aimed at protecting the environment) would find it impossible to either upgrade existing legislation or introduce new environment friendly measures because of another provision of the MAI – *the expropriation clause*. The ambiguity of the formulation allowed for a whole array of measures – introduced with a view to safeguarding the environment, thus limiting corporations’ space for maneuver and perhaps even raising their costs e.g. polluter pays - to be interpreted as indirect expropriation or measure having an equivalent effect, to the point that any law that adversely affected the income level of a corporation could be seen as action tantamount to expropriation. This ambiguity, combined with the *investor-state dispute settlement mechanism* promoted by the MAI led opponents to believe that “the expropriation clause will allow multinational firms to sue any government that takes any action whatsoever that might impede their right to make a profit” (Kobrin, 1998) How probable was such a situation for opponents of the MAI to fear it so? In the light of the Ethyl Corporation case, it actually seemed very likely.

In 1997, when the Canadian government banned the import of a gasoline additive - MMT - on the grounds that it is a dangerous toxin to human and animal life, the sole producer of the additive – Ethyl Corp. of Virginia, an American company, sued the Canadian government for damages (\$347 mil), claiming that the ban amounted to expropriation and was thus in violation of NAFTA commitments. In the end, the Canadian government lifted the ban and paid nearly US\$13 million in compensation to the company. This outcome led MAI opponents to believe governments were from now on unable to enact any measures aimed at protecting any other interests but those of corporations. The fact that the reason behind the Canadian government’s decision to settle with Ethyl was that it had insufficient scientific evidence that the additive was indeed toxic - “On the day of settlement with Ethyl, the Government of Canada embarrassed itself in issuing a statement that ‘there is no new scientific evidence to modify the conclusions drawn by Health Canada in 1994 that MMT poses no health risk’” (Neumayer, 1999) and that it would thus appear the „environmental” concern was nothing more than a poorly disguised protectionist measure – seemed to matter less to them.

Thirdly, critique was aimed at MAI’s prohibition of performance requirements, considered necessary for selecting companies and allowing market entrance to only those whose presence would benefit the local economy as well – through local hire, domestic content, knowledge transfer, export requirements. The MAI ban of all of the above meant, to

MAI opponents, that investors were free to take advantage of cheap labor, primary resources etc of host countries without having to give back to the community. And the government could do nothing to prevent this hypothetical situation from becoming reality. The worry was not solely about the negative effects of FDI on the host country of the investment, but also about those on the country of origin. For, as explained above, in search of cost reducing production processes, companies could relocate to countries offering cheap labor, thus causing plant closures and inevitably, rising unemployment, in developed countries. And, again, governments could do nothing to prevent such an outcome.

In fact, this obsessively repetitious warning – that governments would find themselves hand tied by the agreement – became the main concern of MAI opponents: the Agreement was an attack on state sovereignty. Democratically elected politicians became unable to enact laws benefiting their voters because they might contravene the clauses of the MAI. In the apocalyptic language of street protesters, the MAI became more powerful than Constitutions and Parliaments became subordinated to OECD technocrats and their economic omniscience.

It is at this point in the story, when the arguments against the MAI become politically sensitive, that a category that had insofar been rather uninterested in the Agreement decides to get involved: politicians.

b) Political implications

If the effect of the MAI on developing countries was mostly a worry of environmental and development NGOs, the negative impact the agreement might have on OECD governments found a lot more appeal within political circles in France, Canada or the US.

The first to react was Canada, already adversely affected by the NAFTA investment chapter – “the Canadian Parliament’s Sub-committee on International Trade, Trade Disputes and Investment called for the expropriation clause of the draft MAI to be narrowly defined so that governments would not run the risk of having to compensate investors for the mere exercise of their normal regulatory power” (Neumayer, 1999) Not before long, the European Parliament reacted as well, requiring not only the limitation of the expropriation clause but also “an inclusion of duties and obligations for foreign investors in the draft MAI so that a better balance between investors’ rights and obligations was achieved.” (idem)

The most powerful reaction came from the host country of the negotiations itself. France had already been very skeptical towards the agreement, being particularly worried about liberalizing investment in its highly subsidized audio-visual industry, for MAI

provisions on national treatment would have left it defenseless in the face of the unmatched financial muscle of Hollywood studios. Consequently, when French citizens expressed reserves of their own regarding the MAI, the government echoed their concern. The result was the so-called Lalumiere Report, an analysis of the MAI, containing recommendations on future actions to be undertaken by the French administration on this topic.

Essentially, the report (written by French MP Catherine Lalumiere and Inspector General of Finance Jean-Pierre Landau in September 1998) recommended that the expropriation clause be limited - "the suppression of the notion of a "measure of equivalent effect"" (Lalumiere Report, 1998); that the only performance requirements to be excluded ought to be those already forbidden through WTO agreements and, very importantly, that negotiations be undertaken in a more appropriate forum, i.e. The World Trade Organization. Their criticism also touched upon the rather secretive manner in which the negotiations had been conducted - "the secrecy which covered the negotiations and the deep motivations of the participants are questioned" (Lalumiere Report) and the lack of cooperation between negotiators and political structures - "In the case of the MAI, this method did not allow governments to exercise their political responsibilities over matters which are essential" (idem). Thus, it was argued the current draft of the Agreement should not be signed, that negotiations on a new agreement ought to commence and should be conducted in a more open manner (Parliaments should be permanently updated on the state of the negotiations) and that the OECD was not the appropriate venue for such negotiations to take place.

France was the first country to announce it would not sign the Agreement, thus effectively ending it, given the OECD consensus procedures. As a consequence, in December 1998, after NGO petitions, mass protests and Parliamentary interpellations, the MAI died.

3.4 Lessons for the WTO

The rationale behind the failure of the single most famous attempt at multilateral economic rulemaking is complex. Despite mass public criticism, the most likely reason behind the demise of the MAI is the Parties' incapacity to agree on certain provisions - "Although some newspapers proclaimed a triumph of civil society over civil servants, the anti-MAI forces could not take all the credit for tabling the talks; the participants' inability to agree also played an important role. The short preamble to the treaty, for example, contains 17 footnotes expressing the concerns of one or more delegations. The latest draft contains almost 50 pages of country-specific exceptions. Harmony appears hard to come by" (Kobrin, 1998)

How is that possible? OECD countries have a long tradition of liberal views on trade and investment and a no less numerous set of BITs regulating mutual economic transactions based on the same principles as the MAI. How could agreement not be arrived at?

a) Why (not) the OECD?

After all, it was this very similarity that supported the choice of the OECD as the most appropriate venue for beginning the negotiations. “Sharing a common outlook towards FDI and long experience in promoting liberalization through existing instruments, OECD is the logical place to pursue discussion on a broad, multilateral investment agreement” (Witherell, 1996) That “common outlook” turned out to be over-rated at best. Countries still had sensitivities concerning certain sectors they’d much rather be protectionist about (e.g. France and culture) and proved to be far more receptive to state interests (i.e. maintaining the legislative supremacy of Parliaments over that of international negotiators) than to those of (their own) corporations.

Another reason behind the OECD becoming the host of the negotiations had to do with it being comprised of the main players in international investment – developed countries. “OECD countries play a major role in the world economy and still account for the bulk of FDI flows and stocks” (idem) Should the Agreement have been meant to apply to developed countries only, perhaps this reasoning would have been accepted. But the “Multilateral” treaty was intended to be open for accession to non-OECD countries as well, without the latter having the option to actually influence its drafting, thus being faced with a *fait accompli*. Designing a treaty that affects developing countries and “recommending” them to sign it without giving them the chance to participate in its design is simply unacceptable. And if developing countries themselves were less vociferous about the unfairness of such a practice, NGOs were less shy. The latter believed the OECD suffered from lack of legitimacy (the elitist drafting of a treaty that would end up affecting the entire global community was not tolerable) and that a more representative location – such as UNCTAD or the WTO, where developing countries could make themselves heard – was necessary.

Preference for the World Trade Organization was expressed by some developed countries themselves. The Lalumiere Report concludes that “The OECD was not created to serve as a location for major international economic agreements” and supports “the opening of a negotiation at the WTO, with the OECD preserving a role of expertise and support”. Naturally, governments had other reasons for replacing the OECD than NGOs. The main one

was that the WTO is more state sovereignty friendly, since transition to Geneva would most likely mean replacing investor-state arbitration France was unsupportive of with panel-centered state-state dispute settlement mechanism and the use of positive rather than negative lists – “The WTO method is, a priori, less problematic from the point of view of sovereignty. On the one hand, the "top down" approach is not used there - negotiations take place according to the principle of positive lists or "offers". On the other hand, only states and not private enterprises have access to the dispute settlement procedures.” (Lalumiere Report)

b) En route to Geneva?

Should another multilateral investment agreement be negotiated at the WTO, two very important lessons taught by the MAI need to be learned.

On the one hand, the rules of the game have changed. Drafting an agreement, however technical, behind closed doors, without consultations with those it will inevitably affect (be it developing countries, politicians or citizens) simply won't work anymore. Because if it is globalization (of investment flows) that prompted the beginning of the negotiations on the MAI, it is another globalization (of communication and non-governmental cooperation) that led to their termination (Kobrin, 1998)

From the website of some unknown US NGO, the MAI draft reached people across countries, economic backgrounds and political views, leading to an unprecedented global protest. It was France's defection that terminated the MAI, but the French government might have chosen a different path had it not been subject to pressure from its own citizens. The Lalumiere Report mentions that “More than any other international agreement of an economic nature, the MAI has raised objections and tensions at the heart of civil society. The MAI thus marks a stage in international economic negotiations. For the first time, one is seeing the emergence of a "global civil society" represented by NGOs which are often based in several states and communicate beyond their frontiers. Organizations representing civil society have become aware of the consequences of international economic negotiations. They are determined to leave their mark on them.”

That NGOs were very much interested in the MAI is obvious, what is less obvious is why. Why would a very technical agreement about investment flows be of such interest to people who “normally might confuse FDI with the FBI”? (Kobrin, 1998) Because the MAI became the symbol of the single most disputed term of the past decades – globalization: the negative effects of economic integration became the negative effects of the MAI and all the

opponents of globalization became fierce adversaries of the MAI. (idem) This is why this treaty, with all its footnotes, amendments, exceptions, and objections which, in the words of a Foreign Policy journalist „does not appear to be the stuff of which revolutions are made” has nevertheless „sparked a widespread grassroots opposition taking the form of Web sites, news groups and even street demonstrations. It prompted 14,000 people to write the U.S. State Department.” (Kobrin, 1998)

With the irreversible process of globalization shifting power from states to markets and from governments to corporations, an agreement that appeared to sanctify this transition, by making it legally binding, could only serve as “a visible rallying point for opposition to a global economy” (Kobrin, 1998) In fact, most of the concerns about the MAI seem to echo worries about globalization: „Globalization compromises national sovereignty (the MAI is said to be part of a transnational regulatory framework that will override national jurisdiction); globalization reduces transparency and accountability, shifting power from elected officials to nonelected international officials (there is an assumption here that OECD secrecy was both purposeful and necessary); globalization limits national and local economic policy choices (the MAI is seen as strictly limiting national regulation of national economies); the state-market balance of power has shifted and corporations have too much power (the MAI seems to put business interests above all competing social concerns)” (idem)

It is highly likely that any other agreement on economic multilateralism will be met with the same concerns, which makes it imperiously necessary for the WTO, should it end up hosting talks on another MAI, to preempt such opposition through a media campaign. The OECD itself came up with a “MAI website” of its own, where it sought to explain its version of the interpretation of the clauses of the treaty, but it was too little, too late. The WTO must not repeat this mistake.

Along the same lines, the MAI made it clear that any multilateral economic agreement will have to take into account labor and environmental standards, human rights, local development and national sensitivities. That will inevitably be very challenging, regardless of the venue chosen for such an agreement, but ignoring the issue is the wrong way to go, for it is now clear anti-globalization supporters will most definitely not ignore it.

One thing is certain – attempts at regulating international investment through the means of a multilateral agreement will most likely continue because, as we have seen, BITs are deemed insufficient and countries seem to be supportive of such a treaty: “Renouncing any international agreement on investment should be avoided” states the Lalumiere Report, for “Under the present disorder in globalization, every country has an interest in the

establishment of stable and fair rules. An agreement can provide the opportunity of advancing towards better regulation of the global economy by stabilizing investment regimes and by achieving progress on social and environmental norms.” The ending of the report leaves no room for doubt “France continues to work actively in favor of a multilateral framework of rules covering international investment.”

OECD’s Agreement having failed, states began looking towards another MAI, this time at a more representative, legitimate and experienced venue – the World Trade Organization.

4. A Multilateral Investment Agreement (MIA) at the WTO

That countries did not renounce negotiating a multilateral agreement addressing investment is not surprising given the fact that the arguments - economic and legal, as outlined at the beginning of the previous chapter - in favor of a multilateral agreement that could regulate the growingly globalized investment flows remained in place. The problem had turned out to be the choice of an inappropriate forum for the negotiation of such an agreement. But would the WTO be a wiser choice? Why? What would an MIA at the WTO imply? In other words: “*What are the perspectives of a multilateral investment agreement at the WTO?*” (sub-question number 4)

This chapter will try to answer the question by reviewing the main arguments in favor of the WTO as MIA host, the evolution of investment related issues throughout WTO history, the investment implications of current WTO agreements and, last but not least, the likely content of an MIA at the WTO.

4.1 Why the WTO

Some of the arguments in favor of the World Trade Organization as the proper host for an MIA have been mentioned above. These include: negotiations through the means of positive lists “The advantage of the positive list approach in comparison with the top-down or negative list approach is greater flexibility of the former. The point is that in some sectors and industries it is very difficult to anticipate their future development at the moment of writing down the negative list. The positive list approach would probably permit a more gradual liberalization, which some countries may be more comfortable with.” (Gugler, Tomsik, 2006); respect for state sovereignty; inclusion of developing countries – “the WTO represents both

developed and developing nations. The process of negotiating WTO Agreements is theoretically more democratic and involves all Member nations” (Read, 1999); state-state dispute resolution mechanism – “As the MAI did not provide for a single integrated dispute resolution procedure, this may have created a ‘plurality of paths for dispute resolution for a single set of events.’” (Read, 1999) thus leading to forum and treaty shopping, in the search for the most convenient one. Consequently, „linking trade and investment under the one regulatory umbrella of the WTO has the advantage of limiting dispute resolution to one forum.” (idem)

Moreover, the relationship between trade and investment gained center stage. “There is increased recognition that trade and FDI are two ways of servicing foreign markets. They are sometimes employed alternatively, but increasingly, they are used as complementary modes of servicing foreign markets.” (Kurtz, 2003) Corporations were quick to perceive the advantages of combining local production (arrived at through investment in local production facilities) with classical export patterns. As such, “intra-firm trade among transnational corporations accounts for approximately one third of world trade, while TNC exports to non-affiliated entities accounts for another one third of world trade” (Kurtz, 2003)

Given this increased inter-dependence between trade and investment, coupled with the need to avoid regulatory overlap, it follows that the most appropriate venue for negotiating the legal framework for investment is the one that currently administrates the rules governing trade – i.e. the WTO.

4.2 Investment *and* the WTO

The idea of regulating investment under the umbrella of the World Trade Organization is not new; in fact, the entire history of trade regulation, from the stillborn Havana Charter to the Marrakesh Agreements and all the way to the Singapore issues and the failed Ministerial meeting in Cancun is inter-linked with investment law-making.

a) From the ITO to the WTO – the GATT years

At the Bretton Woods conference in 1944, an International Trade Organization was envisioned that would supervise international economic relations together with the World Bank and the International Monetary Fund. The Charter of the future organization, discussed at the United Nations Conference on Trade and Employment in Havana, Cuba (1947-1948)

addressed, besides trade, which would be at the core of the Organization's activity, matters related to "employment, economic development, restrictive business practices and dispute resolution under ITO auspices" (Kennedy, 2003) and, most importantly, as far as our discussion is concerned, international investment. To the Charter drafters, investment was a "means of promoting economic development and reconstruction" (Havana Charter, 1948) and the ITO was enabled to "formulate and promote the adoption of a general agreement or statement of principles regarding the conduct, practices and treatment of foreign investment" (Article 11, 2(c), Havana Charter, 1948) Article 12 deals exclusively with "International Investment for Economic Development and Reconstruction" stipulating, inter alia, that "the international flow of capital will be stimulated to the extent that Members afford nationals of other countries opportunities for investment and security for existing and future investments" (Article 12, 1(b), Havana Charter, 1948)

Therefore, the founding fathers of the multilateral trade system considered investment should be promoted, liberalized, protected and properly regulated. Unfortunately the Havana Charter never came into force, not being ratified by Parliaments, most notably the US Congress. It would appear disputes over investment provisions played a central role in the Charter's failure - the main capital exporting country of the day, the US, had aimed for more specific investment liberalization and protection provisions, but developing countries opposed such an approach: "Earlier proposals on the Charter by the US contained extensive rights for investors including the obligation of host countries to extend national treatment and most-favored-nation treatment. But these measures were strongly opposed by other countries. As a result, the US had to dilute several rights granted to foreign investors in its earlier proposals." (Singh, 2003) Since the final version of the Charter appeared too host country friendly to the American business community - for instance, Article 12, 1(c) mentions that "a Member has the right to determine whether and to what extent and upon what terms it will allow future foreign investment" - the latter lobbied against it. Consequently, the Congress never ratified it and the ITO was never created. "Notwithstanding the fact that the US government was the driving force behind the Havana Charter, the US Congress refused to ratify it" (idem)

Thus, the General Agreement on Tariffs and Trade (GATT), which had initially been meant as an interim agreement until the ITO Charter came into force, remained the only text regulating trade flows. It had no provisions pertaining to investment. The regulation of the latter was left to bilateral and regional investment treaties - "The failure to establish the ITO was one of the major reasons which facilitated a shift from multilateral to bilateral investment agreements." (Singh, 2003) - bilateralism thus turning into a historical accident brought about

by the temporary failure of multilateral solutions - until some issues relating to it made it back on GATT parties' negotiating table during the Uruguay Round.

This round of negotiations changed the landscape of economic multilateralism in two ways. Firstly, it led to the creation of the World Trade Organization; secondly, it brought investment, although in a somewhat fragmented form, under the umbrella of the third pillar of economic governance. (Kurtz, 2003) With regards to the latter issue, three Agreements related to investment were concluded: The General Agreement on Trade in Services (GATS), the agreement on Trade Related Investment Measures (TRIMS) and the one on Trade Related Intellectual Property rights (TRIPS), none exclusively dealing with investment, but all containing provisions that impact the way investment is carried out (a detailed analysis of these agreements in section 4.3) – “By incorporating TRIMS and GATS in the Final Act of the Uruguay Round, developed countries were successful in bringing investment issues under the ambit of GATT.” (Singh, 2003)

b) Singapore, Seattle, Doha, Cancun

The changing economic realities – globalization, growth of investment flows relative to trade flows, the complicated legal environment (approx 1950 BITs in the mid 90s) led WTO Member States to reconsider the opportunity of enlarging the investment legislation WTO had come up with during the Uruguay Round and address foreign investment regulation within a specific agreement. The issue was first brought under the attention of WTO Members at the Ministerial Meeting in Singapore in 1996, together with competition policy, government procurement and trade facilitation. These four topics were to remain known as the “Singapore issues” for their negotiation proved to be far more complicated than initially envisioned. No investment agreement was concluded, but the topic was to be analyzed in a Working Group on Trade and Investment (WGTI) – “Having regard to the existing WTO provisions on matters related to investment [...] we agree to establish a working group to examine the relationship between trade and investment” (Singapore WTO Ministerial Declaration, 1996) The issue was to be readdressed at the following Ministerial Meeting in Seattle, in 1999.

This meeting, however, did not only not advance the discussion on the topic, but turned into absolute chaos as anxiety over the consequences of globalization – the WTO, as the absolute champion of trade, and now possibly investment, liberalization, became the symbol of – translated into street anti-globalization protests. What had been bitter criticism in

the case of the MAI turned into violently making a point in Seattle: “Anti-globalization activists made headlines around the world in 1999, when they forced the Seattle WTO Ministerial Conference of 1999 to end early with direct action tactics. The goal that they had, shutting down the meetings, was directly accomplished by placing their bodies and other debris between the WTO delegates and the building they were meant to meet in.” (WTO website) These events put pressure on Members’ negotiators, who were already suspicious about investment liberalization treaties in the light of the recent and no less controversial demise of the MAI “A week before the meeting, delegates admitted failure to agree on the agenda and the presence of deep disagreements with developing countries” (idem) The context was thus adverse to any negotiation of investment liberalization and countries had such differences of opinion that agreement could not be reached on any topic, including the launch of a new round of negotiations.

The problems were thus dealt with at Doha, in 2001 – successful commencement on an investment agreement escaped delegations once more, but promises were made for the issue to remain on the agenda throughout the new round of negotiations – the so-called Doha Development Round. Hence, Member States agreed to begin negotiations on investment issues at the following Ministerial Session, should agreement to proceed so be reached: “Recognizing the case for a multilateral framework to secure transparent, stable and predictable conditions for long-term cross-border investment [...] we agree that negotiations will take place after the Fifth Session of the Ministerial Conference on the basis of a decision to be taken, by explicit consensus, at that session on modalities of negotiations.” (Doha WTO Ministerial Declaration, 2001) A practical translation of the diplomatic language of the declaration leads to the conclusion that, in fact, not much was accomplished at Doha, except for an agreement to continue research in the area of investment within the WGTI until the Ministerial in Cancun: “In the period until the Fifth Session, further work in the Working Group on the Relationship Between Trade and Investment will focus on the clarification of: scope and definition; transparency; non-discrimination; modalities for pre-establishment commitments based on a GATS-type, positive list approach; development provisions; exceptions and balance-of-payments safeguards; consultation and the settlement of disputes between members.” (idem)

The next Ministerial Meeting (Cancun, 2003) only managed to sanctify the impossibility of reaching agreement on investment regulation by turning what had been postponement ad infinitum into undeniable failure: “More work needs to be done *in some key areas* to enable us to proceed towards the conclusion of the negotiations in fulfillment of the

commitments we took at Doha.” (Ministerial Statement, Cancun, 2003) The „further work” undertaken in relation to the key area of investment only led to the conclusion that, for the time being, differences of opinion among Members are such that negotiations on an investment agreement cannot commence. Three of the four Singapore issues were abandoned: “There was no consensus, and the members agreed on 1 August 2004 to proceed with negotiations in only one subject, trade facilitation. The other three were dropped from the Doha agenda.” (WTO website) As a consequence, the issue of investment was not addressed at the following Ministerials – in Hong Kong (2005) and Geneva (2009)

What could best explain this outcome? Perhaps the fact that “resistance to investment negotiations among developing countries grew significantly over the few months before Cancun. There were continuing debates about the effects of the investment chapter of the North American Free Trade Agreement (NAFTA)” (von Moltke, 2003) It was as if the scare the Ethyl case had been for the MAI drafters was slowly becoming a symptom of investment agreements phobia.

Yet, renouncing investment at Cancun may have been less an expression of what countries truly believed and more of a tactic to overcome differences that threatened to kill Doha altogether, like “the last-minute offer by EU Trade Commissioner Pascal Lamy to drop the EU's long-standing demand for launching investment negotiations in return for tacit agreement that the rest of the Cancun package – especially a possible compromise on agriculture – would survive” (Hancock, 2005) Therefore, there is reason to believe that, should all other issues be solved, investment may, at some point, become the subject of negotiation at the WTO. It will most likely not happen very soon – i.e. before the conclusion of the Doha Round, but believing that investment will simply be forgotten seems naïve in light of its constant presence in virtually all former Rounds and Ministerial Meetings. For “neither of these approaches – drop investment altogether or negotiate immediately – had much support prior to Cancun and it still does not appear to be where the majority of WTO Members would choose to position themselves normally on the issue. All want to attract more foreign investment, and most see value in negotiating investment treaties to help them do that (as demonstrated by the proliferation of bilateral and regional investment agreements). Many seem to feel that negotiating multilaterally can offer them a more favourable result than they are likely to achieve by negotiating with their main trade and investment partners bilaterally or regionally. Their position on negotiating investment in the WTO appears to be closer to "eventually yes" than to "no never" (idem)

Another argument in support of the idea that investment will end up being regulated at the WTO is the fact that, in certain sectors and with regards to certain aspects, it already is. For the result of its being a constant concern for WTO Members and a constant point, though controversial, on their negotiating agenda, consists of a series of agreements dealing, albeit in a fragmented form, with investment, agreements analyzed below.

4.3 Investment *at* the WTO

Even if investment per se was never the object of a GATT/WTO agreement, other agreements deal with certain aspects of foreign investment, whether in certain sectors or in certain phases of the investment process. There are two major agreements that address investment directly: the General Agreement on Trade in Services (GATS) and the Agreement on Trade-Related Investment Measures (TRIMS).

Three further agreements – the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), the Government Procurement Agreement (GPA), the Agreement on Subsidies and Countervailing Measures (ASCM) - have only indirect effects on investment. Since their impact is limited, they will not be analyzed in dedicated sections.

Briefly, the TRIPS agreement brings intellectual property under the umbrella of the WTO by linking a very specific type of investment vehicles – i.e. “intangible assets” (Read, 1999) - with trade. “The linkages between enforceable IPRs, investment and trade are highly complex. A firm that wants to have access to a foreign market can rely on either trade, FDI, or licensing. The protection of IPRs aims at the elimination of distortions in the choice of instrument for market access.” (Vocke, 1997) Recognizing this linkage and “Desiring to reduce distortions and impediments to international trade, and taking into account the need to promote effective and adequate protection of intellectual property rights, and to ensure that measures and procedures to enforce intellectual property rights do not themselves become barriers to legitimate trade” (TRIPS Agreement, Preamble), WTO Members created an agreement that “not only requires national treatment and MFN treatment, but also provides for a dispute settlement procedure and minimum standards of protection. The agreement covers patents, copyright and related rights, trademarks (including service marks), industrial designs, layout designs of integrated circuits, undisclosed information (including trade secrets) and geographical locations (including appellations of origin)” (Vocke, 1997) What is more, TRIPS addresses a fundamental issue related to investment – i.e. expropriation - which

“should be in accordance with international law requirements, which provides for detailed definitions of compensation standards.” (Gugler, Tomsik, 2006)

The Agreement on Government Procurement addresses public procurements and services, not included in the GATS, which relate to foreign investments (e.g. services provided by foreign MNCs present in the host country). “Both national treatment and most-favoured-nation treatment providing to products, services and suppliers are granted with respect to all laws, regulations, procedures and practices regarding government procurement covered by this Agreement.” (Gugler, Tomsik, 2006)

The Agreement on Subsidies and Countervailing Measures, by broadly defining the term subsidy, may come to regulate what is commonly known as investment incentives – fiscal, financial and indirect measures taken by a Member to attract FDI. „Such incentives could be contrary to provisions of the SCM Agreement on prohibited and/or actionable subsidies when linked to export performance or the use of domestic over imported products, or when they cause injury or serious prejudice to other WTO members” (Mosoti, 2003)

However, investment is tackled more extensively in two WTO agreements – TRIMS and GATS, discussed in detail below.

a) The Agreement on Trade Related Investment Measures (TRIMS)

Despite the long and most often controversial history of investment provisions in WTO texts, it wasn't until the Uruguay Round that an agreement that dealt directly with investment was concluded, as a consequence of a growing belief that certain investment issues are inevitably linked to trade.

For the first time, the issue of whether investment measures were allowed under the GATT was brought up when the United States alleged that certain such measures taken by Canada in relation to American investors under its Foreign Investment Review Act were in violation of GATT. (Banerji, Jain, 2007) The FIRA case that ensued “exposed the need for clarifying GATT's relationship with investment measures (Shenkin, 1994) relying upon which, the United States advocated (Civello, 1999) that TRIMs should be included within the scope of the proposed negotiations”. (idem) What followed was negotiation of investment measures and their effects on trade within the Uruguay Round, which led to the conclusion of the TRIMS Agreement.

A definition of TRIMs is in order, even though the text of the Agreement itself does not provide one (a definition of what is understood by “investment” is also lacking). Briefly,

they are measures imposed by a host country as a condition for investing in that country that end up affecting trade patterns – i.e. investment measures with an impact on trade. (Gugler, Tomsik, 2006) This definition thus limits the effect of the agreement to those investment measures that can be directly related to trade (unlike the MAI which tackled them without distinction) Incentives (fiscal, financial, operational) which aim to attract investment are not addressed within the agreement, solely measures that condition the entrance of FDI – i.e. performance requirements (a definition of which was provided in the previous chapter) that directly affect trade. “They can include behavioral guidelines or requirements in respect of local purchases of capital goods, raw materials, intermediate goods and services, the proportion of output exported, the type of value added (e.g. R&D) undertaken by affiliates, information provided on intra-firm pricing practices, conditions attached by MNEs on the use of technology transferred.” (idem)

In order to underline its trade related focus, the TRIMS Agreement “applies only to investment measures related to trade in goods. Under Article 2 of TRIMS, a Member is prohibited from applying any trade related investment measure that is inconsistent with Article III or Article XI of GATT 1994.” (Read, 1999) The respective GATT articles refer to national treatment and the general elimination of quantitative restrictions. An illustrative list (unlike NAFTA’s extensive one) of such TRIMs contains examples ranging from the requirement of “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 products, or in terms of a proportion of volume or value of its local production” (TRIMS, Annex, 1a) to the restriction of “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” (TRIMS, Annex, 2a)

If national treatment is mentioned by reference to the GATT, Most Favored Nation treatment is not addressed. Transparency is covered in Article 6: “Each Member shall notify the Secretariat of the publications in which TRIMs may be found, including those applied by regional and local governments and authorities within their territories”

Dispute settlement is to be addressed in accordance with the provisions of the Dispute Settlement Understanding “The provisions of Articles XXII and XXIII of GATT 1994, as elaborated and applied by the Dispute Settlement Understanding, shall apply to consultations and the settlement of disputes under this Agreement.” (TRIMS, Article 8) thus granting the right to bring investment related issues in front of a WTO panel to Member States only.

Existing TRIMS were to be identified and gradually eliminated, with a special and differential treatment applicable to developing countries and least developed ones, in line with WTO's standard policy in the matter „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. 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.” (Read, 1999).

The Agreement thus does two very important things: it identifies and prohibits certain investment measures that are incompatible with GATT and requires that they be eliminated within a specific time frame. Moreover, it upgrades BITs – as discussed in previous chapters, bilateral agreements do not address pre-establishment issues (such as investment measures), the latter being regulated by domestic laws. TRIMS thus brings those distinct areas into a multilateral setting, even if in a rather limited form.

The agreement has a number of shortcomings. First of all, it does not prohibit all TRIMS (the way the MAI did). The measures that are identified and prohibited are those already in violation of GATT. What is more, it fails to define investment and consequently the exact understanding of “trade related investment measure” remains diluted; it does not stipulate MFN treatment; it does not address key points of typical investment agreements (establishment, expropriation and compensation, repatriation of profits, technology transfer) and it deals exclusively with TRIMS affecting trade in goods. (Banerji, Jain, 2007)

Yet, despite its limited scope and incomplete provisions, TRIMS manages to bring investment issues within the jurisdiction of the WTO – and that in itself represents its most important merit. If TRIMS deals exclusively with trade in goods, it is another Uruguay Round agreement that addresses services, namely GATS.

b) General Agreement on Trade in Services (GATS)

Considered the agreement that contains the “single largest number of investment-related provisions found in the Final Act of the Uruguay Round” (Sauve, 1999), GATS “has considerably expanded the scope of the WTO's regulatory power, particularly in relation to investment” (Read, 1999)

The provision that makes this agreement (supposedly covering **trade** in services) so important investment-wise is Article I.

At I.2c it is stated that: “For the purposes of this Agreement, trade in services is defined as the supply of a service by a service supplier of one Member, through commercial presence in the territory of any other Member” This mode of supply, the so-called Mode 3 – i.e. commercial presence - is in fact synonymous with foreign direct investment. For, according to Article XXVIII (d) "commercial presence" means „any type of business or professional establishment, including through (i) the constitution, acquisition or maintenance of a juridical person, or (ii) the creation or maintenance of a branch or a representative office, within the territory of a Member for the purpose of supplying a service” “Therefore, through this mode of service, the GATS covers certain aspects of the entry, establishment, and treatment of foreign investors” (Banerji, Jain, 2007)

At I.2d, Mode 4 of supply is defined: “trade in services is defined as the supply of a service by a service supplier of one Member, through presence of natural persons of a Member in the territory of any other Member” Hence, “Mode 4 also tackles investment issues because it deals with the temporary entry of managerial and other key personnel.” (Gugler, Tomsik, 2006)

GATS tackles the main points of a typical investment agreement.

MFN is granted – “With respect to any measure covered by this Agreement, each Member shall accord immediately and unconditionally to services and service suppliers of any other Member treatment no less favourable than that it accords to like services and service suppliers of any other country.” (GATS, Article II.1) but Members are allowed to list specific sectoral exceptions – negative list approach (all is included unless specifically excluded). “Members may maintain a measure inconsistent with MFN treatment provided that such a measure is listed in, and meets the conditions of, the Annex on Article II Exemptions.” (Gugler, Tomsik, 2006)

National treatment is covered under Article XVII, but this time the positive list approach is preferred – „In the sectors inscribed in its Schedule, and subject to any conditions and qualifications set out therein, each Member shall accord to services and service suppliers of any other Member, in respect of all measures affecting the supply of services, treatment no less favourable than that it accords to its own like services and service suppliers” (Article XVII.1) The access of foreign investment in the sectors listed in Members’ schedules is most likely to increase in time, for the commitments made “are to be subject to ‘rollback’ in the

sense that periodic negotiations will take place with the object of further liberalization” (Read, 1999)

With regards to market access, the GATS stipulates that “each Member shall accord services and service suppliers of any other Member treatment no less favourable than that provided for under the terms, limitations and conditions agreed and specified in its Schedule.” (Article XVI. 1) and goes on to list “the measures which a Member shall not maintain or adopt, unless otherwise specified in its Schedule, in sectors where market-access commitments are undertaken” (Article XVI. 2) – e.g. „limitations on the number of service suppliers whether in the form of numerical quotas, monopolies, exclusive service suppliers or the requirements of an economic needs test; limitations on the participation of foreign capital in terms of maximum percentage limit on foreign shareholding or the total value of individual or aggregate foreign investment” (Article XVI. 2a and 2f) As Read (1999) points out „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”

Article III covers transparency: “Each Member shall publish promptly and, except in emergency situations, at the latest by the time of their entry into force, all relevant measures of general application which pertain to or affect the operation of this Agreement.”

As far as investment protection goes, GATS recognizes an investor’s rights concerning payments and transfers “for current transactions relating to its specific commitments” (Article XI) But this is the only provision relating to protection mentioned in GATS. The agreement is silent on subjects such as expropriation or compensation for expropriation.

All disputes that might arise are to be governed by the WTO Dispute Settlement Understanding (DSU) so that investors will have to request their home State to sponsor any claim.

c) At the crossroads

The combination of the aforementioned agreements, especially TRIMS and GATS, results in a body of international investment rules administrated by the WTO. It is of course incomplete, given the fact that regulating investment was not the *raison d’être* of these agreements, but rather a side effect: “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 NAFTA. The ability of Members to list

exceptions to the general MFN obligation in the GATS erodes much of its intended liberalizing effects. There are also inherent limitations in the sector-specific approach to national treatment and market access obligations in GATS” (Read, 1999)

The existing framework for investment at the WTO is thus nowhere near the broad coverage provided by OECD’s MAI. Nevertheless, the combined effects of these agreements impact international investment and inevitably bring certain aspects of it under the umbrella of WTO law, constituting the basis for a prospective MIA under WTO auspices.

4.4 An MIA at the WTO

What would such an MIA look like, *content wise*? That it will build on existing investment related agreements is evident, but that simply putting together what already exists in other WTO texts will not suffice is also evident. Since TRIMS et alia only provide for partial coverage of investment, as discussed above, it is necessary for an MIA to address certain key issues.

First of all, a definition of investment is in order. The choice between a definition as broad as OECD’s MAI or one referring to FDI alone is tricky. The latter option will avoid the endless disputes OECD could not fix and take into account the preference certain OECD negotiators expressed towards excluding portfolio investment from the MAI – it would thus most likely favor speedier consensus. Apparently this is the solution most countries opt for: “In terms of the scope and definition of investment, in the Working Group on Trade and Investment, there was a predominant opinion (with the exception of the US) that only long-term cross-border investment should be protected” (Braun, 2004) Yet, in the light of the very recent crisis, induced by unregulated flows of speculative investment flows, perhaps regulating those together with FDI might prove the wiser strategy, on the long term – hence, an all-inclusive definition of what constitutes investment might be preferable.

Secondly, it is likely that an MIA at the WTO would cover, unlike BITs, the pre-establishment and establishment phases of investment, the way the MAI did. But contrary to the MAI approach based on negative lists, WTO is most likely to opt for a GATS type, positive list focused procedure – opening up sectors and liberalizing market access would be done according to specific Schedules proposed by Members. Should the MIA allow, like the GATS, not only MFN à la carte (i.e. positive lists) but also National Treatment opt-out clauses (i.e. negative lists but accompanied by a multitude of exceptions) the liberalization of

investment (like the sectoral liberalization of services) will undoubtedly take a very long time. But if the failed MAI is any lesson, slower is always better than not at all.

What is more, this approach is very likely to be found more “sovereignty friendly” – allowing governments to conduct investment liberalization according to their own timetable and in tune with their broader public policy agenda. After all, this bottom up approach was one the main reasons countries moved negotiations for a multilateral agreement from the OECD to the WTO.

The same concern for state sovereignty is the reason why dispute resolution in the case of investment disputes is most likely to remain subject to the WTO Dispute Settlement Understanding and thus be addressed on a state-state level. This is problematic in terms of how this panel-centered dispute resolution mechanism will relate to investor-state arbitration procedure - currently the norm in existent investment agreements, be it BITs of NAFTA’s Chapter 11. The DSU does cover binding arbitration, administered by the WTO: “[...] the matter shall be referred to arbitration. Such arbitration shall be carried out by the original panel, if members are available, or by an arbitrator appointed by the Director-General” (DSU, Article 22.6), but it does so only at state level.

Hence, investor-state arbitration would be an entirely different affair. Which route will have priority? Will there be a choice to be made, should a dispute arise, between the DSB and e.g. the ICSID? Or would the DSB be the default choice? It would be perhaps useful to see how this issue was dealt with in NAFTA – “a NAFTA party must elect whether to proceed under the NAFTA or in the WTO in any case where the dispute concerns “any matter arising under both agreements”. Failure to comply with this obligation would itself constitute a violation of the NAFTA.” (Houde, Yannaca-Small, 2004) MAI drafters themselves were faced with the problem and they „examined two choices: a) to require an investor to make an exclusive choice when essentially the same rights (e.g. MFN or national treatment) regarding the same investment were in dispute; or b) to require the investor to make that choice when the same economic interest or investment is being litigated, even under different core rights.” (idem) The failure of the MAI left the question unanswered. The issue is complex and answering the above questions requires a dedicated analysis that goes beyond the scope of this paper. Suffice it to say this is one of the topics that the WTO needs to address with a maximum of caution.

Another very important issue that an MIA has to tackle is that of expropriation and compensation for expropriation. This is a very thorny issue, as both NAFTA and MAI have shown: “with 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” (Read, 1999) Given this topic was one of those that undermined consensus at the OECD negotiations for an MAI, the WTO will have to proceed with extra care.

Along the same lines, the WTO will need to be cautious about another sensitive issue that caused disputes at the OECD – development. Prima facie, this topic has to do with balancing investor rights and investor obligations, something the MAI, as we have seen, failed to do. More in depth, the question is whether an investment agreement at the WTO can address environment, labor and human rights. Neither BITs, nor regional investment agreements, even less so OECD’s MAI, dealt with such issues directly. Yet, the growing pressure from public opinion and NGOs is for these issues to be addressed. This pressure can become quite powerful, as not only OECD negotiators learned the hard way, but even WTO participants at the Seattle Ministerial experienced first hand. An MIA has to, *volens nolens*, include development provisions, fact acknowledged during the Doha *Development Round* - such inclusion making the MAI a lesson learnt.

The same could be true *context wise* – i.e. the WTO should (as discussed in the previous chapter) aim at a more transparent negotiation, consult with politicians and NGOs and update their stakeholders via press releases and web platforms. This is vital because „multilateral regulation is becoming a highly controversial political issue, as a result of public confusion and hostility towards globalization.” (Read, 1999)

4.5 In conclusion

What are the perspectives of an MIA at the WTO? Such an agreement appears the natural next step in the evolution investment, as interlinked with trade, has known ever since the ITO and all the way to the Ministerial in Cancun. It would pool the investment provisions existent in current WTO texts, plus cover investment issues raised during the negotiations at the OECD, thus creating a comprehensive legal instrument with almost global jurisdiction. But if the controversial history of investment at the WTO and the stalemate the Doha Round turned into are any lessons, then the conclusion of an MIA will be a long war to wage. And the story of the MAI is no optimism infusion either.

Yet, “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” (Read, 1999) What triggers such hopes? In the words of John Hancock, WTO Secretariat (2005): „the case for rule-making on foreign investment in the WTO is based on anticipating continued economic integration worldwide, with foreign investment playing an increasingly important role in that process. [...] like trade, foreign investment should be encouraged to flow internationally, not just bilaterally or regionally, and it needs to be addressed by policymakers from that perspective. The 2300 bilateral investment treaties in existence today are, by their nature, preferential and therefore inherently discriminatory. Such a large number of separate agreements already gives pause for thought about the cost involved in negotiating and administering them and their potential for legal inconsistency.”

As it appears, an MIA at the WTO is to be expected – it has been attempted at since 1948 and despite the controversies that have so far postponed its conclusion, remains a goal for many WTO Members. But would such an agreement be development friendly? That an MIA at the WTO will have to meet the concerns of developing countries is obvious – developing countries are WTO members and they have gradually become stronger and more united in supporting their views. Just how this participation will translate into a development friendly framework for international investment at the WTO is another story – a story for the next chapter to tell.

5. Investment and development

The importance of investment for development is quasi axiomatic – “foreign direct investment can play a key role in the development process. FDI is considered to be an instrument through which economies are being integrated [...] into the globalizing world economy by bringing capital, technology, managerial capacities and skills, and access to foreign markets. It also stimulates technological capacity-building for production, innovation and entrepreneurship within the larger domestic economy” (UNCTAD, 1996a)

If investment is per se is supportive of development, why does FDI sometimes have adverse effects on the host country of the investment? “There are areas in which the impact of FDI can be negative, e.g. in cases where competition is stifled, restrictive business practices

are used or transfer prices are manipulated.” (UNCTAD, 1999) Could it be that the rules that govern the investment process are inadequate? Or perhaps even lacking?

It might be more a question of the relation between investment law and development, rather than investment – development and this is the view this chapter takes in trying to understand what undermines the positive effects one can rightfully expect FDI to have and what could be done to address the issue – i.e. how does the current legal framework for investment affect development and how could it be improved? Should development provisions be included in international investment agreements? If yes, how? And most importantly, should an MIA be signed at the WTO, *what are the development implications of such an agreement?* (sub-question number five)

In order to answer these questions, the connection between development linked areas of international law (human rights, labor, environment) and international investment law is firstly assessed, followed by an analysis of the current provisions in BITs in relation to development goals and current provisions in WTO investment related texts and their developmental impact. Finally, the effects of an MIA on development are looked into so as to see if developing countries are better off, development wise, with a bilateral legal setting or if a multilateral agreement on investment at the WTO would enhance their welfare more.

5.1 Investment, development and law

Before analyzing the interactions between the above mentioned notions, a conceptual delimitation of what is to be understood by development is in order. This paper favors the definition of the United Nations Development Program - “development is concerned with enlarging choices and enhancing their outcomes and with advancing basic human freedoms and rights” (UNDP, 2003) It is the most complex view on development to date for it implies both human rights – “Development shares a common vision with human rights [...] development and human rights are mutually reinforcing” (UNDP, 2010) and environment protection – “Choices are important for current as well as future generations. For human development to be sustainable, today’s generations must enlarge their choices without reducing those of future generations” (UNDP, 2003)

a) Cross-cutting issues

How does development link with investment? According to UNCTAD (1999) “By its very nature, FDI brings into the recipient economy [...] technology, management know-how, skilled labour, access to international production networks, access to major markets and established brand names. These assets can play an important role in the modernization of the national economy and in the acceleration of economic growth.”

And yet, the impact of FDI on host country economies is not always positive – greed, corruption, unethical business practices sometimes undermine the pro-development role investment should play. What can law do? Briefly, regulate. Most current investment agreements grant, as discussed in earlier chapters, a wide array of rights to investors – but most remain silent on their obligations. BITs and the MAI addressed investment liberalization and protection, but carefully avoided controversial topics such as human rights, labor standards and environment protection, until NGOs and street protesters brought such contentious issues on the international investment agenda.

But would it be possible to link investment provisions with human rights or sustainable development? Should investment law address topics that fall under the jurisdiction of other areas of international law? If yes, should the approach be substantive or procedural?

b) Investment law for development

The argument that development issues – e.g. human rights, labor rights, environment protection - and investment ought to be linked stems from the fact that “any argument for human rights necessarily encompasses economic activity (the cost of providing due process, the formation of trade unions, the proper training of personnel, the cost of building classrooms) and any justification for economic policy relies on promised social improvements (the generation of wealth, the protection of ownership rights, the decrease of unemployment)” (Zia-Zarifi, 2000)

Conceptually, linking investment and development within a single international instrument is „a matter of stating the sometimes unstated premise that the point of international investment is improvement of human welfare” (idem) The two concepts relate to the same extent as economics and social issues do – that is, the point of economic efficiency is increasing human welfare, raising the standard of living, expanding people’s range of choices – i.e. foster development. As a consequence -“International institutions whose focus is

international trade and investment have begun to accept that their missions are intertwined with social considerations.” (Zia-Zarifi, 2000)

Instrumentally, translating the conceptual convergence into a common pro-development modus operandi proves difficult for even though economists and lawyers „may agree that their ultimate goal is the creation of a better society where people lead better lives, the two groups diverge sharply over the means necessary for bringing about these improvements.” (idem) The former praise the effectiveness of the invisible hand and opt for the minimalist state, whereas the latter support governmental intervention so to regulate economic activity. It’s a case of marketocracy vs. democracy. The solution is most likely in the middle – certain rules are necessary to protect investments on the one hand (e.g. from expropriation) and limit their negative impact on e.g. human rights (child labor, forced labor etc) on the other. These become “The two instrumental reasons in support of linking international investment and human rights within the same treaty – avoiding negative effects of investment regulation and strengthening the positive effects” (Zia-Zarifi, 2000)

Politically, linkage seems inevitable, in the shadow of the MAI and of the Seattle protests. Yet politics is geography sensitive. Hence, in the West, an investment agreement obviously needs to accommodate the interests of „important groups pushing labor rights, nondiscrimination, environmental and health protection, sustainable development.” (idem) But “governments in newly developed countries, such as Mexico, South Korea and Brazil, would view regulations regarding labor relations as inimical to their economic development plans, which typically involve the attraction of massive private FDI” (idem) based on exploitation of comparative advantages such as cheap labor. The jury is still out on this point.

Institutionally “Economists, as well as social activists like environmental and labor NGOs seem to agree that economic institutions are not the best places to address social issues.” (Zia-Zarifi, 2000) Yet there might no other choice because, firstly, “The reason that trade bodies have increasingly faced pressure for linkages to social issues is that there are no other legitimate alternatives; for instance, the ILO lacks any input on international trade policy.” (idem) Secondly, “an alternative forum for analyzing the intersection of economic and human rights policies would immediately face problems of competing jurisdiction with economic bodies. For example, it is unclear what international body would rule on the validity of new affirmative action policies aimed at increasing women’s participation in the workforce, if such policies seemed to contravene economic liberalization mandated by a Multilateral Investment Treaty.” (Zia-Zarifi, 2000) Thus, since the need to address issues that relate to both investment and development is steadily becoming more and more urgent “the

current predominance of economic bodies marks them as the natural fora for addressing these problems.” (idem)

c) Development for investment – and law

How could this linkage be arrived at in practice? Perhaps through a shift of perspective regarding the relation between the terms. Hence, recently, the classical stance (outlined above) whereby aspects of development – e.g. human rights - are hurt by economic policies – e.g. investment - has been replaced by a new perspective on the relation between investment law and development that reverses the relation of causality – i.e. it is violations of e.g. human rights that negatively impact the benefit normally expected from an economic activity. Taking the example of human rights and the GATS, one researcher argues that “Similarly to the UN considering gross human rights violations a threat to peace, the WTO should consider certain human rights violations an impediment to free trade.” (Panizzon, 2006) It is suggested that “Human rights violations have a trade restrictive effect when service suppliers, including investors, lose trading opportunities abroad. When a WTO Member receiving services violates the human rights of the foreign service supplier, such a violation may have the effect of nullifying or impairing existing trading opportunities because it offsets the value of the GATS commitment the sending country had relied upon when sending the service supplier abroad.” (idem) An example of such a context is the Google - China case.

„The Telecommunications Regulations of the People’s Republic of China, Article 57 states that: “No organization or individual may use telecommunications networks to make, duplicate, issue, or disseminate information containing the following: (2) Material that jeopardizes national security, reveals state secrets, subverts state power, or undermines national unity; (6) Material that spreads rumours, disturbs social order, or undermines social stability” Such regulations curb the freedom of expression of both domestic and national internet and other telecommunication services providers. While it is China’s sovereign right to restrict free speech, China is responsible for the effects of this piece of legislation may have on the GATS commitments it has entered into. China would then be held accountable not for violating human rights of foreign service suppliers per se, but for having violated GATS law by frustrating the legitimate expectations of its trading partners in the assurances of a free market it had given to foreign service suppliers in its GATS commitments. When google.com was threatened with closure of their services provided in China, unless they self-restrict the

content their search machine was able to offer, the filtering of that search engine's content could have formed the basis of a complaint under the WTO/GATS. Instead, google.com decided to comply with the Chinese government's request. Even though google.com has cooperated with the Chinese government, it is argued here that the restriction on freedom of expression and information and the threat of closure has negatively impacted on the depth and reach of foreign internet search services providing services in China." (Panizzon, 2006)

Should Google have required the US to sponsor a claim against China at the WTO, it would have done so to protect an economic benefit its investment was expected to yield and it would have thus obliged China to modify its regulation. Such a modification, brought about by the necessity to protect investments abroad, would have nevertheless positively impacted the situation of human rights protection in China and would have thus played, from that perspective, a positive development role. This is how, it is argued, economic law can work for development, even if the improvement of human welfare would not be its main aim, but rather a byproduct. This shift of perspective – development is necessary for liberalization to work, for lack of it undermines economic benefit – can be applied to human rights, labor rights, environment protection, so as to create an incentive for international economic organizations – e.g. the WTO – to address development issues on economic grounds, thus preserving their specificity and at the same time meet the demands civil society faces it with when criticizing the negative effects its policies have on development.

This approach that does favor a linkage between economic and development issues, does so not only by looking at the issue through a different conceptual lens (development *for* investment) but also from a different instrumental point of view – it is procedural, rather than substantive. But is it enough?

d) Substance vs. procedure

The line of argument is that "instead of expanding on the traditional substantive law linkage between trade and human rights" (Panizzon, 2006), preference should be given to „the procedural actions of the WTO dispute settlement understanding to address not so much the fact of violations itself (which a substantive legal approach to trade and human rights would do), but rather the effects of human rights violations, on the negotiated levels of trade liberalization." (idem) But wouldn't that limit WTO's role in fostering development by limiting it to that of guardian of rules already in place rather than that of innovative norm-setter?

While it is true that “Human rights have significant economic welfare enhancing effects [...] thus the acquis of trade liberalization law and the WTO dispute settlement should be put to use to protect human rights.” (Panizzon, 2006) the argument used – “Since there is evidence that human rights promote growth through trade, trade rules should be used to prosecute human rights violations that affect trade” is merely utilitarian and thus stands little chance of improving the way economic law can support development friendly investments. It is a first step in bringing development issues under the jurisdiction of WTO law, but a complete ban on a substantive approach is a limitation on the ambition of linking development and investment law. A procedural approach will be efficient on the short run, but it seems plausible to affirm that affirmative action – i.e. including development provisions in economic agreements (e.g. an MIA) would be more beneficial on the long run.

Of course, it is a very complicated path to travel. Certain issues arise – does an economic organization have the jurisdiction to decide on human rights matters? Most likely no – “WTO should only prosecute the economic effect of human rights violations. It does not have the mandate nor should it aim at having one to pursue human rights violations as such, the latter being the domain of the UN Covenants and the ICJ.” (Panizzon, 2006) This is true with one exception – violations of jus cogens.

“Jus cogens as defined by Article 53 of the Vienna Convention on the Law of Treaties stands for a category of international legal norms that prevail in all circumstances over all other norms of international law. Violations of such jus cogens human rights preempt violations of other, non-jus cogens international obligations, because jus cogens stands hierarchically superior to international treaty law (e.g. WTO treaty obligations). WTO Members’ obligations to comply not only consist of respect for the law of the WTO Agreements but include the peremptory norms of jus cogens. Thus, disrespect for jus cogens can be equally brought before the WTO DSU similar to a claim of non-compliance with GATS obligations” (Panizzon, 2006) Although this concept is probably not “the “master key” to open the flood gates and wash away all limits of jurisdiction and applicable law and rewrite the parties’ obligations, it does allow for the introduction of a certain degree of harmonization into the various sub-fields of international law.” (Jacob, 2010)

This procedural approach based on obligations erga omnes that could be factored in investment dispute settlement resolutions is indeed useful; unfortunately it will be a long time before certain other development connected issues besides basic human rights, such as certain labor rights and especially environmental standards, will achieve jus cogens status. Therefore,

instead of searching for circuitous ways for development provisions to enter “the legal bloodstream” (Jacob, 2010) of investment treaties, it would perhaps be more efficient to simply include such clauses in both BITs and an MIA.

Before discussing what could be done to bring development issues within the range of investment agreements, it is useful to see what has already been accomplished, on both bilateral and multilateral levels.

5.2 BITs and development

Most existing bilateral investment agreements avoid the topic of development – no mentioning of, e.g. human rights, can be found in the Model BITs of Germany (2008), France (2006), China (2003), India (2003), the United Kingdom (2005) or the United States (2004) (Jacob, 2010) Still, „certain societal issues such as labour standards, environmental protection, anti-corruption are occasionally mentioned in BITs” (idem) But these topics are addressed mostly in the Preamble, thus not being legally binding.

De facto, most BITs focus on investor rights, less so on investor obligations and therefore „state regulation that affects foreign investments negatively, usually by way of a future change of law or administrative action, is susceptible to challenge under certain BIT provisions. This might also be the case when such regulation is motivated by human rights concerns or obligations.” (Jacob, 2010) This is achieved through broad interpretation: of what constitutes expropriation and actions tantamount to expropriation, the implications of which have been discussed in detail before; of what is to be understood by minimum standard of treatment/Fair and Equitable Treatment – „FET provisions are extremely flexible and context-specific. An FET clause could intersect with human rights whenever administrative, legislative, or judicial activity by the host state that is motivated by human rights concerns or norms fails to observe the minimum standard, hence sparking an investment claim. Given the vast extent of modern governmental regulation and the broadness of the FET standard, such conflicts could arise in many spheres, including labour rights, indigenous rights, public health and safety, environmental regulation.” (Jacob, 2010); of the exact meaning of non-discriminatory treatment (National Treatment, MFN) – for instance „it would be difficult under MFN clauses to successfully pursue divestment strategies (e.g. as in the 1980s regarding apartheid South Africa), since it would be impermissible to impose restrictions on a specific group of investors only.” (idem) Also, certain other provisions such as the ban on

performance requirements most BITs promote „will prevent certain progressive state measures seeking to foster sustainable local development through the involvement of foreign investment.” (Jacob, 2010)

The negative effect BITs have on development is due to not only substantive factors, but also to systemic approaches. „The investment regime is one-sided; [...] investors are privileged in traditionally only being afforded rights without being subject to obligations” (Jacob, 2010) Participation deficit is also problematic, for „despite the ultimately far-reaching impact of major international investments (e.g. power plants, water and sewage infrastructure, landfills, mining pits etc.), the BITs providing the basic legal framework for such large-scale projects have traditionally been negotiated and concluded outside the public sphere.” (idem) Moreover, there is also the ever present of risk of the “race to the bottom” of development standards, induced by a host state’s attempt at constructing an investment friendly legal context. Also, the investor-state dispute settlement procedure BITs rely on is sub-optimal given its lack of transparency (most cases are discussed behind closed doors) and uncertainty “Investment disputes are arbitrated in a variety of fora under diverse procedural rules.” (Jacob, 2010)

The status quo is, as it seems, rather development unfriendly at a bilateral level. The picture is quite blurred at a multilateral level too.

5.3 WTO investment law and development

WTO texts dealing with investment have come under heavy criticism, especially from NGOs, as they are seen as liberalization instruments that undermine development.

a) TRIPS

The fiercest attack was channeled against TRIPS due to what was seen as its “negative social and health-care consequences to developing countries” (Shi, 2004) for, it is argued, „the direct outcome of TRIPs is the conferment of monopoly power, hence reducing competition and increasing prices of the patented products.” (idem) Why health-care losses? Because IP rights on essential medicines make them too expensive for developing countries to afford. The ones to blame for this development adverse role attributed to TRIPS are Northern corporations, particularly those in the pharmaceutical industry – „pharmaceutical companies

tend to spend less on the quest for essential drugs if they are unable to recoup their investments through the monopoly power guaranteed by IP rules” (idem) The fact that R&D is indeed highly expensive and the sunk costs incurred throughout the drug-development process need to be covered seemed to go unnoticed, along with the almost axiomatic belief that property right – intellectual or otherwise – is one of the fundamental rights a democratic society is based on.

At the same time, it is true that access to medicines is central to development; so ways to ease developing country access to such drugs is necessary. The TRIPS - development relationship was addressed at Doha, when the Parties adopted The Declaration On The TRIPS Agreement And Public Health which states that „the Agreement should be interpreted and implemented in a manner supportive of WTO Members' right to protect public health and, in particular, to promote access to medicines for all.” In practice, this means that Members retain the right to „to use, to the full, the provisions in the TRIPS Agreement, which provide flexibility for this purpose” (idem) such as compulsory licensing – i.e. „when the authorities license companies or individuals other than the patent owner to use the rights of the patent — to make, use, sell or import a product under patent without the permission of the patent owner.” (WTO website) That there is still room for improvement is true, but what is paramount is that TRIPS shortcomings were acknowledged in the DDA and ways to make the agreement more development friendly are under analysis – “We instruct the Council for TRIPS to find an expeditious solution to this problem” (Declaration, 2001)

b) TRIMS

TRIMS came under fire as well, for the very core of the agreement – i.e. the prohibition of performance requirements, was considered an attack on state sovereignty, the government’s policy space being severely restricted and the possibility it has to discipline FDI seriously limited. The role of performance requirements for public investment policies has been discussed elsewhere in the paper, suffice it to say, here, that prohibiting states’ capacity to influence the way investment is carried out and the percentage of its benefit that would accrue to the domestic economy through conditions placed ex-ante on investments was indicated as the main negative effect TRIMS had on development. Yet, performance requirements can be economically sub-optimal, for they lead to the distribution of capital not according to market principles such as efficiency and productivity, but along the lines of often economic rationale ignorant, but crowd pleasing political measures. Clearly, these are extreme

views – neither a complete ban on performance requirements, nor their stimulation is feasible. The line should be drawn at the intersection of economically efficient and development conducive investment promotion strategies.

c) GATS

NGOs opposed GATS on the grounds that it “restricts governments’ ability to manage foreign investment for the benefit of their citizens [...] there is a real danger that highly developed, subsidised service providers from industrialised countries will crowd out service providers in developing countries [...] given the high degree of concentration and market dominance by a very limited number of companies” (ActionAid, 2003) The flexibility given by GATS’ positive list approach and especially the introduction of generous exception lists (as discussed in the dedicated chapter) is „a myth” for „expecting all governments to have the required knowledge to list all potentially GATS incompatible regulations is unrealistic, particularly for the poorest countries with their over-stretched administrative and negotiating staff.” (idem)

Developing countries’ lack of expert knowledge and resources, both financial and human, to properly manage WTO law is a valid point, not just in relation to GATS, but to WTO agreements in general. A response from the institution with a view to addressing the issue has come under the form of trainings conducted by experts of the Secretariat in developing countries. While it is a slow process, it is a step in the right direction.

Another line of action was that against GATS Mode 4 of Supply of services – i.e. movement of persons. „Several developing countries have made requests for increased mobility of labour in the current GATS negotiations. This 'mode 4' liberalisation would expand the opportunities for individuals to move to foreign countries to supply services on a temporary basis. The bulk of these potential gains to the poorest countries would come as a result of greater mobility of semi-skilled and unskilled workers. However, discussions of mode 4 liberalisation at the WTO have been strictly confined to increasing the mobility of intra-corporate transferees and highly skilled contract service suppliers. Any suggestion that this could be expanded to include greater access for less skilled workers has been emphatically rejected.” (ActionAid, 2003) And rejected it will most likely continue to be, for the simple reason that regulating the free entrance of people into a country’s territory is a prerogative of that country’s government (through its immigration policy) – it is domestic policy space, the integrity of which NGOs are usually so eager to protect.

Overall, these arguments make the critique against WTO investment related law, just like in the case of OECD's MAI, become part of the discourse against economic liberalization and globalization in general.

5.4 An MIA – development friendly?

This anti-globalization stance manifested itself rather promptly as soon as the MAI failed at the OECD and there were voices suggesting the commencement of negotiations of an MIA at the WTO. The discussion about a possible WTO sponsored legal framework for investment had barely transitioned from a “Singapore issue” to a point on the Doha agenda, that criticism against the possible provisions of the agreement surfaced, based on the proposals put forward by the demandeurs of the agreement, particularly the EU.

a) The MAI revisited

This criticism was aimed at the way an MIA would handle the problems raised by the MAI, hence most of the arguments brought against it sound familiar. Therefore, the issues raised dealt with MFN and national treatment (that will create a level playing field between foreign and domestic firms, thus prohibiting positive discrimination benefiting local companies); the ban on performance requirements; the focus on investor rights unmatched by investor responsibilities; standstill and rollback; the expropriation clause. The proposed MIA was seen as an MAI revisited and that stands to explain why the reaction was strikingly similar in both substance (i.e. arguments raised) and process (i.e. anti-MIA web pages, leaflets, online campaigns) In the view of some NGOs, the MIA would be “a return to a colonial era situation, where the master country governments through force enabled their companies to enter and take over the land, minerals and other resources of colonies, and took over the colonies' markets as well” (Martin Khor, The Third World Network)

And yet, the proposed MIA did not seem like a new MAI – for it had introduced state-state dispute resolution at the WTO (thus easing the pressures on state sovereignty), proposed a GATS like positive list approach to liberalization and moreover, even supported the introduction of labor and environmental clauses. Some of these innovations were met with criticism, the arguments – e.g. against the development effect of positive lists/exception lists - being borrowed from the anti-GATS discourse (see above). Other innovations – highly pro-development and in a clear departure from the MAI approach – such as environment

protection standards, were met with enthusiasm by the NGOs but, ironically enough, were completely opposed by developing countries themselves.

Therefore, the push for environmental standards to be included in the agreement, backed by the EU, was seen by developing countries' governments as a means of *discriminating* against goods/services sold/provided using inputs obtained through environmentally harmful processes, most of them originating in developing countries (with lax environmental standards). Even so, it would nevertheless be an instance of *positive discrimination* with the direct effect of triggering an upgrade of environmental laws in developing countries, failure to do so being sanctioned through economic mechanisms. At Doha, developing countries said no – “developing countries opposed the inclusion of environmental rules in the WTO, an area promoted strongly by the EU.” (Kurtz, 2003)

This story is similar to the labor standards vs. cheap labor as comparative advantage situation described elsewhere (5.1 b) It also brings forward to very important issues – first of all, the self-proclaimed apostles of developing countries' interests and the (democratically) elected representatives of the said developing countries – i.e. their governments – disagree as to what is development enhancing for those they (allegedly) speak on behalf of. Sometimes this difference of opinion goes very far, up to the point where certain developing countries' political leaders accuse NGOs of undermining the chances developing countries have at – well, development – and place them among the anti-globalization forces with ulterior motives: “A peculiar alliance has recently come to life. Forces from the extreme left, the extreme right, environmentalist groups, trade unions of developed countries and *some self-appointed representatives of civil society*, are gathering around a common endeavor: to save the people of developing countries from development.” (Ernesto Zedillo, President of Mexico)

Secondly, the main beneficiaries of development provisions within an MIA – i.e. developing countries – are opposed to their inclusion in the agreement. Needless to point out just how much this stance undermines the chances of a development friendly investment agreement at the WTO. As counter-intuitive as it sounds, it will take carefully crafted arguments to convince developing countries of the positive long term effects development provisions will have on their countries chances at welfare and raised standard of living.

The issue is thus complicated. The position taken by NGOs is based on argumentation seen by some economists as „marred by logical fallacies, sheer economic nonsense, a whole load of meaningless babble, and assertions devoid of any attempt at empirical justification” (Kageboushi, 2004) On the other hand, the economists and trade lawyers behind the draft of the agreement are considered loyal advocates of corporate interests without any concern for

raising global welfare. These views are both extreme. And hardly of any help in creating an investment framework that fosters development.

Therefore, between renouncing an MIA altogether – the way NGOs suggest: “negotiations towards an investment regime within the WTO should not be pursued” (WWF, 2001) and pursuing it unconditionally, a middle way needs to be found – one that transcends globalization fears and political discourse – an approach based on economic and legal considerations.

b) The way forward

An objective analysis of an MIA and its impact on development shows it can have a positive role in improving welfare, provided some pro-development adjustments are made.

On the environmental front, it is argued that investment „has major implications for the prospects of achieving greater sustainability.” (Moltke, 2000) for „current economic activities are known to be unsustainable. Often, alternatives are available but they require investment. In other words, without investment, sustainability is unattainable.” (idem) What is thus called for is investment regulation – „Insecure or severely distorted conditions of investment are risk factors, which are reflected in expected rates of return. Countries perceived as high risk will only attract investment for projects that offer exceptional rates of return. Under such conditions, many important projects will remain unfunded, and funds that are available will be used in ways that are not as efficient as they could be. Lack of clear rules also creates an incentive for side-payments and corruption, which again exacts an economic penalty on projects and investment flows.” (Moltke, 2000)

These investment rules need to be codified into an international investment agreement, but one “that facilitates a balancing of private interests and public goods [...] a framework agreement on investment combined with a number of sectoral agreements (for example, on climate change), in which it becomes possible to identify the public interest being served by providing private investors with additional rights.” (idem) Linking an MIA with other non-WTO texts (such as the Rio Declaration or UN’s Global Compact) is a very interesting area to explore, especially since some of these treaties may be voluntary – e.g. OECD’s Guidelines for MNCs. It would be perhaps necessary for those to become binding themselves before being referred to in an MIA. The analysis of these cross linkages goes beyond the aim of this paper, therefore they will not be addressed in further detail; suffice it say they do represent one of the most potentially innovative areas of WTO investment law.

On the developing-countries-must-be-able-to-voice-their-opinion front, the very fact that these developing countries managed to take investment off the Doha Agenda against the will of developed (hence presumably more powerful) countries stands to prove that the WTO is indeed the most democratic organization that could host an MIA because capital exporting countries do not have power asymmetries working in their favor the way they do on a bilateral level. Hence the failed Cancun Ministerial “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.” (Read, 1999) An MIA would thus, inevitably, reflect the interests of developing countries.

An MIA would also have to balance investor rights with investor obligations, something the MAI failed to do. That is to say, voluntary codes of best practices – from OECD’s Guidelines for MNCs to the specific corporate approaches spelled out in each MNC’s CSR policy statement – are apparently not viewed as sufficient. An analysis of voluntary codes’ effectiveness in regulating investment so as to make it development friendly is beyond the scope of this paper. What can be stated, however, is that an MIA would have to codify what MNCs can and cannot do so as to be considered development friendly and thus worthy of public support.

Overall, it would seem, extreme views aside, that an MIA at the WTO is a good way to not only regulate international investment, but to do so in a development friendly manner provided: it does not repeat the mistakes of the MAI, in terms of either content or context; it includes existing investment provisions in current WTO law by amending those Articles perceived as undermining development; it addresses developmental issues by direct reference to human rights, labor standards, environment protection and provides for sanctions for failure to implement them; it offers enough flexibility so as to respect a state’s sovereign right to domestic policy space; and it is concluded in a transparent manner, with proper PR in place.

It seems quite a complicated task. So the question arises – would it not be easier to introduce changes into BITs (which are, themselves, at present, development ignorant, as shown before)? It is highly likely for this route to be less controversial – NGOs’ silence on bilateral investment regimes and their developmental impact is deafening. But would it be more efficient on the long run?

5.5 In the mirror

Econometrics says no, BITs would not be more efficient development wise. A comparative study on “The Welfare Effects of Bilateral versus Multilateral Trade and Investment Liberalization” (Egger, Larch and Pfaffermayr, 2003), shows that „Bilateral investment liberalization between a developed and a developing country increases the insiders' welfare but reduces the welfare of a developing outsider. A multilateral investment liberalization between these economies tends to benefit all involved countries, even after a bilateral liberalization at an earlier stage.” It can hardly be made any clearer. This conclusion reinforces the theoretical assumptions put forward at the beginning of the paper that BITs lead to suboptimal outcomes making at least one player (i.e. the developing country) worse off, whereas an MIA is Pareto-improving for it raises collective welfare without making any player worse off. Hence, “multilateral liberalisation dominates bilateral liberalisation in welfare terms” (Egger, Larch and Pfaffermayr, 2007)

Consequently, in answering sub-question number five - *what are the development implications of such an agreement?* it can be said that an MIA seems to be preferable development wise. The arguments against it seem overly political and unsupported by economic measurements.

6. *The way ahead*

As it seems, the situation in international investment law is complex; and complicated. History suggests multilateralism was the default choice and BITs were simply a compromise. Theory finds it hard to prove whether bilateralism is the best option for international investment law or if multilateral is the way to go. Practice shows BITs prevail, but multilateral agreements are forever attempted at. Hence, it seems plausible to say that it was OECD's MAI that failed, not multilateralism per se. A wiser choice of venue might solve the problem. And since investment is already addressed at the WTO, building on the existing investment provisions in WTO law so as to conclude an MIA appears logical. If the MIA is also preferable development wise and, despite its temporary suspension, a goal most likely not given up on any time soon, where does that leave the bilateralism vs. multilateralism debate?

6.1 Bilateralism vs. multilateralism revisited

Revisiting the debate brings forth a dramatic change of perspective. It appears that multilateralism's never fading mirage as a means of regulating global investment (as evidenced by the forever revisited perspective of an MIA) has led bilateralists to argue that BITs are preferable not because they are better than an MIA, but because, counter-intuitively so, already represent one. The argument that now dominates the BITs side is not that bilateralism per se is better, but that, in reality, the network of BITs represent "a de facto multilateral agreement" (Chalamish, 2009) What is thus advanced is the „the paradoxical thesis that international investment law is developing towards a multilateral system of investment protection on the basis of bilateral treaties." (Schill, 2008)

a) Multilateralism via bilateralism

First of all, it is pointed out that the substance of BITs is strikingly similar across the various national models and one can observe "a convergence in structure, scope and content of existing investment treaties. Almost all investment treaties provide for national treatment, most-favored-nation treatment, fair and equitable treatment and full protection and security, contain prohibitions on direct and indirect expropriation and grant the free transfer of capital; most investment treaties allow investors to initiate arbitration proceedings against the host State for violating the treaty." (idem)

Admitting "the interest of States in creating uniform rules for investment" (Schill, 2008) it is suggested that these common principles already agreed on should be "multilateralized" through the MFN clauses which "multilateralize the bilateral inter-State treaty relationships and harmonize the protection of foreign investments." (idem)

Another route towards multilateralism via bilateralism is multilateralization through investment treaty arbitration, seen as either a compliance mechanism which „does not only consolidate international investment law as a functioning legal regime, but also ensures that the general and uniform principles that investment treaties establish are implemented without contortions in the enforcement stage." (Schill, 2008) or as investment law making for it „assumes a significant norm-generative function. This mainly results from the vagueness of the substantive provisions of investment treaties. [...] arbitral tribunals emerge as the essential law-makers in international investment law when transforming the broad principles of international investment law into more precise rules." (idem)

b) Implications

On the one hand, this new perspective is flawed in a number of ways.

The first argument – i.e. the convergence of BITs provisions - is not new, in fact it was considered one of the reasons why the MAI should be attempted at and why its conclusion would be easy – it would be a multilateral codification of rules already in place (see **3.1.b**) Needless to restate how and why this multilateralization of bilaterally agreed principles failed.

The second argument – multilateralization through MFN – is difficult to put in practice for “Although this multiplication of international instruments covers a broad set of issues, even taken together, they do not create a coherent and complete international framework for FDI. Around 7,500 BITs would be necessary to link all WTO member countries.” (Raynal, 2001)

Last but not least, this theory supports MFN clauses that “prevent States from shielding bilateral bargains from multilateralization and disable them to make exclusive or preferential promises to specific States and its nationals and have the effect of reducing leeway for specificities in bilateral investment relations” (Schill, 2008) It is difficult to see how this stance could be reconciled with development needs, considering how special and differential treatment is the cornerstone of development friendly multilateralism.

On the other hand, this theory changes the paradigm completely, for it annihilates the case for bilateralism altogether. This view proposes multilateralization so as to „break with the bilateralist rationale” (Schill, 2008) and enhances “the crucial role uniform rules have for the creation of a level-playing field that enables investment to flow in a global economy to wherever capital is most effectively allocated“ (idem) because “uniform rules governing international investment relations are not only beneficial for developed countries as a group, but are in the interest of every single State, whether developed or developing” (idem) Multilateralism won the war. Bilateralism should be replaced because it is inadequate in today’s global economy. Renouncing bilateralism would only be natural because, it is argued, it wasn’t more than a historical accident anyway – BIT provisions “have not been developed independently by the different capital-exporting countries, but go back to concerted efforts in the 1950s and 1960s to establish a multilateral investment treaty.” (Schill, 2008) When these efforts failed to bear fruit, BITs were resorted to. As suggested in the beginning of the paper. Q.E.D.

If these theorists’ preference for multilateralism is so clearly expressed, why are they still “bilateralists”? Because to them “BITs function increasingly analogously to a truly

multilateral system.” (idem) and hence an MIA is no longer necessary: ”given the relatively harmonious character of this network, the limited additional value of an MAI may not justify the utilization of precious resources for the adaptation of existing bilateral treaties; the current BIT movement serves as a de facto MAI” (Chalamish, 2009)

Yet harmonious may not be the best way to describe the current legal spaghetti bowl BITs create. While there are areas of convergence, fragmentation is also present, a fact which, paradoxically, bilateralists themselves admit: „The potential for incoherence in the law governing international investment relations is indeed abundant. Due to the large number of BITs, one and the same State measure might be assessed differently under two existing investment treaties depending on the nationality of the investor affected. Inconsistent decisions can also result from the possibility of having multiple proceedings relating to an identical set of facts that can arise from independent claims by shareholders at different levels of a corporate structure.” (Schill, 2008)

Would it not be, therefore, infinitely easier to conclude an MIA that would contain the provisions that are similar in all BITs, while at the same time adjust those that cause divergence? Contradiction could best describe the answer bilateralists come up with - for even though „the BIT network can be a reliable long-term solution” (Chalamish, 2009) still „the implementation of BITs is fraught with several structural problems. Thus, the international community should act to establish a World Investment Organization to develop, execute, and monitor an MAI based on a credible, legal, and diplomatic consensus, and supported by the BIT network.” (idem) No comment. Since a World Investment Organization does not currently exist, wouldn't the WTO be the best solution for an MIA? „An intermediate solution is for BITs to be supervised by a multinational organization that includes a permanent arbitral or judicial tribunal and for all BITs to then select this institution to handle monitoring and dispute settlement.” (idem) The WTO and its DSB? Apparently yes.

c) *Quo vadis?*

This new view is clearly marred by contradictions and inconsistencies. Still, what becomes obvious is that this view on the bilateral – multilateral debate shifts the balance in favor of the latter. The question thus becomes not if multilateralism is better, because it clearly is, but which way towards it is preferable – a network of BITs or an MIA? An objective assessment of all the pros and cons put forward in this paper indicates the most likely answer would be an MIA.

6.2 Conflict vs. complementarity

Such an MIA would however not be created in a legal vacuum, for the web of BITs will continue to exist. The question thus is – would an MIA order the legal chaos in investment law?

An analysis of the current International Investment Agreements (IIAs) identifies various areas of overlap. "Post-establishment MFN treatment and national treatment are a common denominator of IIAs. Pre-establishment and market access provisions, however, are usually found only in "US model" bilateral investment treaties and the investment chapters of some recent bilateral free trade agreements, regional agreements (RAs) such as NAFTA and the GATS. The promotion and protection of investments remains mainly the realm of BITs and those RAs which aim at a high level of economic integration (such as NAFTA). Virtually all IIAs allow for MFN and national treatment exceptions of various sorts and general exceptions covering national security concerns. Some may contain general exceptions based on public order and balance of payments considerations. Dispute settlement mechanisms exist in all cases for state-to-state disputes. Investor-to-state dispute settlement mechanisms are found only in BITs and some RAs." (Houde, Yannaca-Small, 2004)

Since an MIA will not lead to the annulment of BITs, NAFTA or WTO's investment law related texts, how will these IIAs be hierarchically organized? According to The Vienna Convention on the Law of Treaties "in the case of successive agreements relating to the same subject matter and involving the same parties the later of the two agreements would apply, if the two agreements are incompatible. However, an earlier agreement with higher standards would not necessarily be considered incompatible with a later one with lower standards, particularly if the intent of the later one is to state the parties' minimum obligations, not preclude other, more favourable, treatment." (idem)

Hence, an MIA would essentially mean that „A basic set of investment principles, agreed at multilateral level, would consolidate in a transparent and consistent way the principles already enshrined in BITs and build up on the basic non-discriminatory WTO principles on trade. A multilateral framework could constitute a floor of FDI principles, allowing for countries that want to go further to do it through BITs. In the same way, Dispute Settlement mechanism could be fitted according to each BIT. The one of the WTO (State-to-State) could be complemented upon wish of Contracting States in the BIT." (Raynal, 2001)

Legal compatibility is of course a very complex issue, the in depth analysis of which will not be attempted at here. But, overall, it appears an MIA could be made compatible with

already existing IIAs and discipline the current chaos investment law is. And in an economy still in recovery from economic meltdown induced by lack of proper regulation, legal discipline is exactly what is needed.

7. Concluding remarks

It would thus appear the answer to the research question this paper put forward - *should the negotiation of a development friendly multilateral legal framework for international investment at the WTO be attempted at?* - is yes.

In reaching this answer an analysis of history, economics, law and politics was undertaken. As a result of this analysis, it appears *the prevalence of bilateralism simultaneously with the quest for multilateral forms of investment lawmaking is a historical compromise rather than the result of economic reasoning*. Although theories addressing the bilateralism vs. multilateralism issue are inconclusive as to which of the two approaches is preferable, history suggests that BITs were resorted to given the failure of earlier attempts at multilateral lawmaking. They were thus considered second best options and states constantly sought to replace them with an MIA.

Therefore, when deciding whether *bilateral agreements are sufficient in the face of the complexity of international investment flows or a multilateral solution is needed* - only one answer is supported by reality: that BITs are insufficient to regulate globalization. Hence, a multilateral agreement that accommodates the interests of all the players while at the same time creating a level playing field for international investment is preferable.

For such an agreement to be successful, it is necessary to understand *why previous attempts at a multilateral agreement failed and what the consequence of their failure is for any renewed attempts at a similar agreement*. Using the example of the MAI, it was shown that the failure of a multilateral agreement can be caused by national sensitivities, anti-globalization fears and poorly managed communication. Thus, provided the causes that undermined the MAI are acknowledged and addressed within the negotiation of a new MIA, the success of such an agreement is by no means impossible.

Most voices suggested such an agreement be undertaken in Geneva. *What are the perspectives of a multilateral investment agreement at the WTO?* Considering the long history investment has at the WTO, from the Havana Charter to the Doha Round and the fact that current WTO Texts (particularly TRIMS, GATS, TRIPS) contain investment provisions, negotiating an MIA at the WTO seems natural.

One last issue needs to be addressed - *the development implications of such an agreement*. Since there are various reasons for and possibilities of linking investment provisions with development in an investment agreement, the question is whether one should do so within a BIT or within an MIA. Economic analysis indicates more powerful welfare enhancing effects as far as an MIA is concerned, which makes it the proper instrument for addressing the development implications of investment lawmaking.

Moreover, an MIA is the more faithful expression of functional multilateralism (as compared to multilateralization through BITs) and poses little problems in terms of compatibility with other IIAs.

In conclusion, it seems plausible to state that *the negotiation of a development friendly multilateral legal framework for international investment at the WTO should be attempted at*. The BITs vs. an MIA dilemma facing international investment law today seems to have found its solution. Multilateralism is *the way ahead for international investment law* because it is the expression of what states have wanted since the 1950s, it is preferable to a patchwork of development ignorant BITs, it builds on existing consensus in terms of economic liberalization, it orders the current legal spaghetti bowl and thus creates predictability and stability and last, but not least, because it promotes development.

These latter two reasons are paramount. In a global economy hurt by a crisis exacerbated by improper regulation and in a world striving to foster development, law needs to discipline investment so as to make sure the positive effects this engine of growth can have on the economy actually materialize and so enhance welfare where it is most direly needed.

This goal is so important and the ways to achieve it so complex, that research on the topic is likely to continue. This paper has by no means exhausted neither the questions that can be asked, nor the answers that can be provided on the topic of development friendly multilateral investment law making. It has, more humbly so, offered an overview of the current status quo, addressed main problems and suggested ways to address them, creating an entry into fields that can be further explored by subsequent research in interlinked areas, some hinted at throughout the paper – i.e. investor-state vs. state-state dispute resolution; a national treatment vs. a minimum standard of treatment in development related issues (labor rights, environmental standards); the codification of such a minimum standard in an MIA vs. its voluntary application as part of an MNC's CSR policy; ways of including development provisions in an MIA – directly or indirectly – e.g. by reference to other codes that should become binding – such as OECD's Guidelines for MNCs etc).

An MIA is a goal most likely to be achieved at a given point – until then, it is useful to explore as many approaches to its final version as possible, so as to address both the shortcomings that might undermine its efficiency and the advantages that could be translated into a globalization whose creation of wealth will actually translate into a better life for the people of the world.

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