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Where Does the Multilateral Investment Agenda Go from Here?

The failure to conclude the Multilateral Agreement on Investment within the OECD has led to consideration of whether to try again, in some other venue, to negotiate a multilateral instrument on investment. Most eyes have turned to the World Trade Organization, where there has existed a Working Group on Trade and Investment since the WTO ministerial meeting of 1996 (see chapters 1 and 2). Negotiation of such an instrument in the WTO could be part of the agenda of a larger round of multilateral trade and investment negotiations under that organization's auspices.

Indeed, it had been expected that the WTO ministerial meeting in Seattle in late 1999 might authorize such a round (see Schott 1996 on this prospective round and the possible role of investment in it). In particular, the European Union had pressed for initiation of such a round, and inclusion of investment negotiations in it, during the months leading up to that meeting. A number of other WTO members supported the European position on investment or slight variations on it. Other countries expressed views favoring this position but did not formally support it.

On the other hand, a number of countries, from Southeast Asia especially, vocally opposed the proposal. Also, perhaps deterred by labor union opposition as well as continued pressure by antiglobal activists,[1] the US government declined to endorse the European position. As late as October 1999, however, senior US trade officials indicated that the US government was not unequivocally opposed to such negotiations. Rather, the stated position was that the issue was undecided within the government.

1. See, for example, http://www.tradewatch.org/MAI.htm.

As events transpired, the issue of whether to launch negotiations on investment was left undecided at the Seattle meeting (as indeed were all other issues). Major disagreements as to what might be included in a new round emerged and remained unresolved. One reason was that demonstrations by activists disrupted the meeting, reducing the amount of time that ministers could spend trying to resolve their differences. The upshot was that no new round was authorized, but neither was it ruled out for the future.

Discussions between major governments have continued in the aftermath of the Seattle meeting, but as of this writing, they have failed to break the deadlock. Thus a new negotiating round remains a possibility, but only that. The European Commission continues to press for inclusion of investment negotiations but reportedly seeks a scaled-down version, which would include neither preestablishment national treatment nor investor-to-state dispute settlement procedures. This approach would increase the appeal of investment negotiations to developing countries (see chapter 6) but reduce its appeal to the business community in both the United States and Europe.

Given the state of play of efforts to launch investment negotiations, this chapter examines the pros and cons of including negotiations on investment in a new WTO round in the near future, if indeed such a round comes to pass. The chapter concludes that, in light of the deadlock that occurred in the MAI negotiations and the impasse in Seattle, it would be very difficult for negotiations in the WTO to produce a comprehensive agreement on investment that would yield tangible benefits. And in any case, given the huge flows of direct investment that have continued worldwide even as the MAI negotiations were floundering, it is reasonable to ask whether such an agreement is necessary. In light of all this, what should be done next remains an open and perplexing question.

Arguments For and Against Multilateral Investment Rules

The main substantive case for multilateral investment rules remains that presented in chapter 1. This is that such rules can help to remove, or at least reduce, the policy distortions that diminish the global value of economic activity created by international investment and, in particular, direct investment. Reduced to its essence, the case is that world GDP could be increased if these distortions were removed.

However, as chapter 1 noted, direct investment has burgeoned in recent years, even in the aftermath of the failure of the MAI negotiations. The accelerated pace of this investment has been due, at least in part, to unilateral relaxation of restrictions on inward direct investment by many countries worldwide.[2] To the extent that this unilateral liberalization of investment policy continues, and direct investment continues to flow at increased rates in response, the case for a multilateral approach to such liberalization is weakened. It would not be a productive use of countries' scarce political capital to negotiate a multilateral agreement that addressed a problem that does not exist.[3] In other words, if the policy environment for international investment ain't broke, countries shouldn't try to fix it.

Moreover, no one really knows exactly how great the economic benefits resulting from a multilateral investment agreement would be. There simply are no comprehensive published estimates of the costs that result from government policies that restrict or distort direct investment.[4] Indeed, one of the more perplexing aspects of the MAI negotiations was that those involved never commissioned any studies to investigate this question, either during the three years of exploratory talks at the OECD or during the three years of the negotiations themselves.[5]

To be sure, such a calculation would not be easy. One reason is that many (perhaps most) such benefits would be dynamic in nature. Among these benefits are those that would accrue from greater competition among firms with the elimination of barriers to entry to international investors and of behind-the-border policies that discriminate against these investors once they have entered a national market.[6] Other benefits include the more rapid diffusion of technology that would result from the elimination of government measures that reduce incentives for technol-

2. See UNCTAD (1995, 1996, 1997, and 1998); European Business Round Table (1999).

3. It would not be a waste of time, of course, to negotiate an agreement that would lock in place measures that are now applied only provisionally. Indeed, the MAI at first would have done essentially no more than this had it been concluded. However, as discussed later in this chapter, the fear of the business community is that a multilateral agreement negotiated today might lock in place standards that are *less* liberal than those actually being applied.

4. A start in this direction has been made by Moran (2000), who has released some preliminary findings.

5. In contrast, numerous times over the years the OECD Secretariat has served to advance the multilateral trade agenda by, for example, performing detailed calculations of the costs of agricultural protection and of subsidies targeted to agriculture. Liberalization of trade and control of subsidies in agriculture remain thorny issues, but negotiators in this domain can no longer be under any illusion that trade barriers and subsidies do not create real costs for the societies that impose them.

6. These barriers to entry and discriminatory policies would have been addressed largely through the national treatment provisions of the MAI. As we have seen, however, the MAI likely would have created minimal policy change, because of the large number of exceptions to national treatment that would have been registered. One exercise that the OECD Secretariat might have embarked upon, but did not, would have been an effort to generate at least crude estimates of the costs of maintaining the listed exceptions.

ogy transfer.[7] In some instances, there might also be benefits from more rapid rates of technological innovation, as liberalization increases the appropriable returns to research and development. Unfortunately, the economic tools used to calculate dynamic benefits of this kind are highly complex, and the results are inevitably imprecise and unreliable.[8]

Moran (1998), for instance, finds that the majority of performance requirements commonly imposed on direct investors by developing countries inhibit the transfer of technology to those countries. But how great are the benefits lost as a result? The honest answer is that they are almost impossible to quantify.[9] In the absence of at least some plausible estimate, however, developing countries (and, indeed, some developed countries) are likely to resist giving up their freedom to impose performance requirements. Indeed, many political leaders still see performance requirements as working to the advantage of the local economy. (See chapters 3 and 6 on this issue.) Until they can be shown convincingly otherwise, these leaders will find little reason to change.

On the other hand, not all gains from an investment agreement are so difficult to quantify. For example, it was argued in chapter 3 that investment incentives, of the kind used most commonly by the governments of developed countries (including at the subnational level), lead to investments being suboptimally located; this can include diversion of investment from developing countries to developed ones. Chapter 3 explains why this diversion reduces the overall benefits from the investment. It follows that the subsidy component of investment incentives serves to compensate investors for this loss of benefits that they would otherwise have captured. If so, then the total costs of reduced efficiency due to suboptimal investment location should at least approximately equal the subsidy value (the producers' subsidy equivalents, or PSEs) of the incentives themselves. The worldwide sum of these PSEs would then be a measure of the long-run benefits to be gained by eliminating investment incentives.

7. In the MAI these would have been addressed largely through prohibitions on government-mandated performance requirements (see chapter 3). Benefits from these prohibitions would largely be realized in developing countries, which, of course, were not included in the MAI negotiations (see discussion below).

8. This is true for the calculation of dynamic gains in general, not just those that might accrue to an investment agreement. It is for this reason that most calculations of the gains associated with trade liberalization are static rather than dynamic in nature. An example is the famous "Cecchini Report" (Cecchini et al. 1988), which attempted to quantify the benefits that would accrue to the measures to be taken by the EU countries in 1992 to further their economic integration. The study used static methods and did find substantial gains, but the report was criticized by, among others, Baldwin (1989), who argued that the omission of dynamic consideration caused these gains to be greatly understated. Baldwin himself produced such estimates, but these in turn were criticized on grounds that the estimation techniques were at best rather crude.

9. But, again, Moran himself attempts to do so (Moran 2000).

These PSEs are, in principle, calculable, but so far no effort has been made to actually calculate them. One reason is that detailed information on investment incentives is not generally available. For example, in the United States, most investment incentives are granted at the level of state or local government. Yet, surprisingly for a country that so prides itself on the transparency of its policies, information on the value of these incentives is very limited. There is no detailed source on the magnitudes of incentives granted that could be used to calculate their effective subsidy component. One clear implication is the need for more transparency regarding such subsidies.

Without good estimates of the costs (including the dynamic costs) to the world economy of extant policies that restrict or distort FDI, it is impossible for negotiators to know how much a multilateral agreement that would curtail these policies would be worth.[10] Perhaps worse, in the absence of plausible estimates of the gains from such an agreement, it is difficult to counter the perceptions of politicians (or of the government officials who administer the interventions) that the interventions result in local capture of some sort of benefit.[11]

To summarize, the substantive argument is sound that new multilateral investment rules would remove distortions that now reduce the efficiency of FDI and that lead to unnecessary loss of world output. However, the magnitude of this loss is unknown, and hence the strength of this argument is uncertain. Also, recent unilateral liberalization of investment policies has doubtless reduced this loss and thus weakened (but not eliminated) the case for a multilateral approach to liberalization. Indeed, the fact that FDI has burgeoned in recent years in the absence of multilateral rules has been taken as indicating that the need for such rules is actually diminishing.[12]

10. One can be sure, however, that this value would not be trivial. For example, if these policies reduce the annual value added by the existing stock of direct investment worldwide by only 5 percent (a guess), this lost output would amount to $130 billion per year.

11. For example, it is easy for a government official to claim that, by offering an investment incentive, the government was able to induce an investor to locate a new facility inside its territory, bringing with it jobs and creating tax revenue. The counterargument is, of course, that the investor would almost surely have placed the facility somewhere in the world even had no incentives been offered, and that another location might have created higher global benefits than the current location. But a counterargument based on the magnitude of global benefits will not play well to the residents of the country or region where the investment actually was located. Likewise, local officials can argue that a local content requirement brings a tangible gain in the form of local production of inputs and hence, again, job creation. That the opportunity cost of these jobs is excessive is, again, a hard sell at best.

12. But it is equally possible that, as a consequence of burgeoning FDI, the distortions created by subsidies and performance requirements are burgeoning as well. This underscores further the need for greater transparency and for a calculation of the magnitudes of the distortions associated with these policies.

Even if the substantive case for new multilateral rules were stronger than these arguments suggest, an international negotiation to create such rules is unlikely to be concluded successfully unless major political constituencies actively seek such rules. The next section explores whether such a constituency now exists.

Is There a Constituency for Multilateral Investment Rules?

The short answer to this question appears to be no. Indeed, the only strong call for such rules recently has come from the European Commission. The motives of the Commission are not entirely clear, but they include matters of bureaucratic politics as well as substance. Bureaucratic politics enters the picture because of the issue of which body or bodies will have authority, or "competence," within the European Union over investment policy. At present, competence for international trade negotiations in the European Union resides at the level of the Commission and the political bodies to which the Commission answers: the Council of Europe and, to a much lesser extent, the European Parliament. Competence for most other international negotiations resides at the level of the individual national governments.

The question is whether the negotiation of multilateral investment rules falls within the Commission's competence to negotiate on international trade matters. It seems that the answer depends on the venue in which the negotiations take place. As chapter 1 noted, the countries of the European Union were represented in the MAI negotiations by their national government officials. But if negotiations on the same issues were to be undertaken at the WTO, the negotiators would be from the Commission. Hence, the Commission has strong bureaucratic reasons for preferring that such negotiations take place at the WTO.

However, the Commission's preference is almost surely not motivated by this matter of bureaucratic turf alone. There is some consensus within the European business community that a multilateral agreement would be of value, and the Commission's position reflects this view. Also, the Commission doubtless anticipates that, in a future negotiating round, it will have to offer concessions on agriculture and perhaps some other issues as well. To get the EU member countries to agree to these concessions, the Commission will have to show that it has wrung concessions in Europe's favor out of other parties at the table. Conclusion of an agreement on investment could be claimed as one such concession.

As already noted, some other countries have joined the European Union in calling for investment negotiations. Among these are Japan, the Hong Kong Special Administrative Region of China, and South Korea. It is not clear, however, that such negotiations are a high priority for any of these three except perhaps Hong Kong, which is not a sovereign state but a part of China (which is not, at the time of this writing, yet a WTO member). Nor is it clear that the government of China supports the Hong Kong position on investment. For their part, although Japan and South Korea would support an investment agenda at the WTO, neither appears prepared to fight to achieve this.

As discussed in chapter 6, many developing countries today seek to attract FDI, and one consequence is a greater willingness of many of these countries to consider binding themselves to international rules than in the past. However, with the exception of a small number of countries that might bind themselves to new rules eagerly, this willingness does not go so far as to make any of these countries *demandeurs* for such rules. Indeed, some developing countries remain opposed to any such rules at the level of the WTO. Furthermore, at the WTO's ministerial meeting in Seattle, the majority of developing countries expressed the hope that existing obligations under the Agreement on Trade-Related Investment Measures might be phased in more slowly than the agreement itself calls for. This would not seem to augur well for developing-country support for the creation of new investment obligations.

Arrayed against this narrow and mostly unenthusiastic constituency for new rules are, of course, the antiglobal activists. Chapters 4 and 5 examined the positions these activists and other opponents have taken on investment liberalization and concluded that, on matters of substance, these positions are largely in the wrong. Nonetheless, it is clear that these constituencies will remain strongly opposed to the negotiation of multilateral investment rules at the WTO.

Indeed, the AFL-CIO and its affiliated unions have long sought to curtail US direct investment abroad. During the late 1960s and early 1970s, two AFL-CIO-affiliated unions attempted to use the National Labor Relations Act to challenge specific instances of US direct investment abroad, but failed because no link could be established between the foreign investment and reductions in employment in the United States (Kujawa 1981). Then, in 1971, the AFL-CIO worked with staff of the US Congress to draft the Burke-Hartke bill, which sought to impose four significant restraints on the ability of US firms to make direct investments abroad (Bergsten, Horst, and Moran 1978). The bill failed passage, although changes in US tax law in 1975 accomplished a small part of what was sought. In more recent times, the AFL-CIO has played a major role in defeating reauthorization of the fast-track trade negotiating powers of the president (Destler 1997b).

The position of most environmental NGOs remains essentially as described in chapter 5: that multilateral investment rules would serve to enrich the profits of multinationals at the expense of environmental quality. The environmentalists' main fear is that such rules would serve, in effect, to cancel out national laws and policies implemented to protect the environment. Chapter 2 argued that that this fear had some basis in the case of the MAI, because of the way that agreement might have treated regulatory takings. And although it is not entirely clear that the NGOs have fully done their homework with regard to investment issues other than regulatory takings, these groups remain stridently opposed to multilateral investment rules in the WTO.

Opposition by labor and environmental groups doubtless affected the US position on whether to seek a negotiation on investment in the WTO. This position, as already suggested, was essentially to sit on the fence. The US government did not express unequivocal opposition to such a negotiation, but it certainly expressed no enthusiasm either.

The one constituency in the United States with the means to offset the opposition and to knock the US government off the fence and into advocacy of an investment agreement is the business community. But this constituency has to date not emerged as a strong supporter of a new initiative to negotiate investment rules at the WTO. This lack of enthusiasm reflects several fears on the part of the US business community. One is that inclusion of investment issues in a new WTO round would create, as did the MAI negotiations, a new lightning rod for labor and environmental activism that could jeopardize the whole round. This might be true even if the WTO were to take up issues posed by labor and environmental activists directly, that is, if these were separated from the investment agenda and dealt with effectively elsewhere, there might still be activist opposition to new investment rules. A second fear is that, even if a negotiation to create multilateral investment rules could be launched within the WTO, the outcome might be not further liberalization but rather what the business community would see as backsliding. On this point, the US business community does not find the experience of the MAI reassuring. As noted in chapters 2 and 3, by the time the MAI negotiations ended, they had produced no new liberalization but rather only a codification of existing law and policy.

Still worse from a business perspective, some of the negotiating parties, including the US government, were pressing for additional provisions in the MAI that could be seen as *de*liberalizing. And given the greater divergence of views on investment among the member countries of the WTO than among those of the OECD, the US business community judges that a WTO negotiation would be even more likely to result in significant backsliding than occurred in the MAI negotiations.[13] Thus, especially in light of the burgeoning of FDI that has taken place in recent years, the business community has judged that a negotiation on investment at the

13. These views were expressed to the author by a senior official of an organization that speaks for US business on multilateral issues, who wishes not to be identified. This same official noted that part of the reason for the business community's attitude was mistrust of the current US administration and a fear that it might be more willing than another administration to agree to measures that business would see as deliberalizing.

WTO simply is not needed. In its view, such a negotiation at this time would pose considerable downside risk while offering relatively little prospect for actual liberalization.

This is not to say that the US business community does not seek investment policy liberalization. Clearly it does. But given the current trend for many countries around the globe to liberalize their investment policies unilaterally, from the business community's point of view there seems at present little compelling need for a multilateral agreement to achieve this same end. This would be especially so if there is some risk that such an agreement could lock into place provisions that are less liberal than those that many countries already are applying de facto.

What specific measures does the US business community seek in the domain of investment policy? The United States Council for International Business canvassed its members in late 1999 and found that the priority of most was greater transparency in investment policies and how they are applied.[14] Members also indicated a high priority for some means by which governments could be held accountable for violation of their own laws and policies. This would suggest potential support for an investor-to-state dispute resolution mechanism. But as already noted, the European Commission, the one *demandeur* for a WTO investment negotiation among the WTO members, is not pressing for inclusion of this issue on the WTO agenda. There would thus seem to be a mismatch between the priorities of those WTO members that most favor investment negotiations and those of the constituency that would be the largest potential supporter of such negotiations.

The views of the European business community, at least as expressed by the European Round Table of Industrialists (ERT), are quite parallel to those of the US community. As stated by Herbert Oberhänsli, formerly of the ERT, who has worked to help develop that organization's positions on trade and investment, the whole issue of rules on investment in the WTO is one that "can be postponed for tactical reasons."[15] But as he further elaborates, "[for the WTO] to be coherent, [investment rules] must come one day as part of the global architecture." The ERT has performed a number of surveys of investment policy in developing countries since 1987 and finds that conditions for investment have steadily improved. Thus, according to Oberhänsli, "these countries do not need guidance on best practices as defined by OECD diplomats. It would, however, be useful but not indispensable to fit . . . [investment rules] into a global framework."

The bottom line is that, except for the European Commission, there is no strong constituency pressing for negotiations on multilateral invest-

14. This sentiment was largely directed toward developing countries. But as suggested earlier, there is plenty of scope for greater transparency in developed countries as well, especially with regard to subsidies.

15. Interview with this author, 30 March 2000.

ment rules at present. The constituency that would seem to have the most to gain from a WTO investment agreement, the business community, is not firmly behind such a negotiation at this time. There is little perceived need for such a negotiation in light of ongoing favorable changes in the global environment for international business. On the other hand, there is fear that its inclusion in a round of multilateral trade negotiations in the near future would so galvanize antiglobal activists as to jeopardize the whole round. And without a larger constituency behind the investment negotiations on one hand, and the certainty of strong opposition on the other, the chances that a full-blown agreement on investment could soon be negotiated at the WTO seem rather slim. In light of this reality, some have proposed more limited investment negotiations at the WTO. These proposals are examined next.

Going for Less Than the Full Monty

Two proposals for limited negotiations have been advanced that are diametrically different from each other in substance. Neither, however, would require that WTO members authorize a new initiative to negotiate an investment agreement. Rather, each could be carried out as part of the WTO's "built-in agenda": the work already committed to under the Uruguay Round agreements to complete tasks left unfinished at the conclusion of that round.

One proposal, offered by Moran (1998), calls for restricting the agenda largely to performance requirements and investment incentives. This, Moran argues, could be done in the context of a review of the existing TRIMs agreement. Such a review was in fact agreed to at the conclusion of the Uruguay Round and thus is part of the built-in agenda. Among other things, the review was meant to consider enlargement of the agreement.

The substantive basis for Moran's proposal rests on the fact that investment incentives are used most intensively by developed countries, whereas performance requirements are imposed most often by developing countries.[16] Developed countries' investment incentives adversely affect developing countries if they divert investment from the latter to the former.[17] But likewise, developing countries' performance requirements can adversely affect developed countries if these requirements cause developed-country exports to be displaced by developing-country exports. Thus, Moran reasons, each group of countries has an interest in curtailing the

16. As discussed in chapter 3, in developed countries performance requirements are most often used as conditions for the receipt of investment incentives rather than as conditions for entry. In developing countries, by contrast, performance requirements often are imposed as conditions for entry.

17. The empirical evidence on whether this actually happens, however, is rather scant.

practices of the other. And this opens the way to a "grand bargain" of reciprocal concessions: developing countries would give up performance requirements if developed countries would give up investment incentives.[18]

This proposal makes eminent good sense from a substantive perspective because, even though the potential gains are not known, it is reasonable to expect that they would be quite large. But is there any chance for such a grand bargain to be concluded? For this even remotely to be a possibility, either the developing countries or the developed countries must act together as a bloc to propose the bargain to the other. Neither bloc, alas, seems to be forming. As noted in chapter 2, the United States in essence took investment incentives off the table on the grounds that the US federal government could not obligate state governments not to offer these incentives. Other federal states (e.g., Canada and Germany) might also have had problems with binding their subfederal governments to restrict incentives, and hence they tacitly approved the US move. There has been no movement on the part of other, nonfederal developed countries to counter this action, either within or outside the context of a grand bargain. In particular, the European Commission has not advanced this particular agenda. And as noted in the previous chapter, a number of developing countries remain staunchly opposed to the ending of performance requirements.

Nor is this agenda likely to be driven by the business community. Multinational firms, of course, benefit from investment incentives, and thus would not enthusiastically endorse an agenda calling for their curtailment. These firms regard performance requirements largely as a nuisance, but in the words of one executive, they are a nuisance that most firms can live with. Interestingly, constituencies that should favor the curtailment of performance requirements include labor unions and the environmental NGOs, on the grounds that these requirements might have an adverse impact on jobs in multinationals' home countries, and certainly have an adverse impact on the environment. (See the discussions in chapters 4 and 5.) Labor unions, in fact, supported the TRIMs agreement during its negotiation, but have yet to be heard from on Moran's grand bargain. However, the silence of the environmental NGOs on this issue is simply puzzling, and one reason why it seems to this author that these groups have yet to finish their homework.

The second proposal, advanced by Sauvé and Wilkie (2000), is substantively quite different from that of Moran. These authors agree that politi-

18. Moran also believes, largely on the basis of case studies, that most performance requirements, except possibly export performance requirements, fail to achieve their objectives in developing countries and in some cases might actually cause them economic harm. Thus there is a case for developing countries to unilaterally curtail their use of performance requirements. As developed in chapter 3, however, any case to be made for developed countries to give up use of investment incentives unilaterally is weak because of the prisoner's dilemma. A multilateral agreement might be the only effective way to achieve elimination or reduction of these incentives.

cal considerations render any grand bargain between developing and developed countries at best a remote possibility, whatever its substantive merits. They argue, however, that a politically feasible way to further liberalize investment policy through a multilateral approach would be to expand upon the obligation by WTO countries, under the General Agreement on Trade in Services, to apply postestablishment national treatment in the services sector.[19] (See chapter 3 for a detailed explanation of national treatment in this context.) Although the embryo of such an obligation already exists in the GATS, it is quite circumscribed as currently applied (see below). Sauvé and Wilkie argue that most laws and policies that are inconsistent with national treatment are in fact to be found in those service industries that are potentially covered under the GATS.[20] Thus, they argue, there are gains to be had from enlarging and deepening the coverage of the GATS.

In fact, the GATS is a rather complex agreement. It is a "bottom up" agreement, in the sense that it applies only to those activities that a country lists in the agreement (see chapter 3). A top-down agreement, in contrast, would apply to any activity that is *not* listed (i.e., as an exception). Thus, under the GATS, a service industry must be explicitly listed by a country in order for national treatment of investments (or other obligations) to apply to activities in that industry. Furthermore, even if an industry is listed, it can be subject to exceptions ("reservations") exempting the country from some obligations for some specific activities. As a hypothetical example, a country could list financial services as an industry bound by the GATS, but could exempt itself from the obligation to provide national treatment to foreign-owned banks.

The Sauvé and Wilkie proposal, then, is that countries agree to list industries and reservations such that these reflect the full extent of liberalization as embodied in law and policy toward foreign investors and their investments as currently applied. The principal goal is, to use their own words, "to secure the regulatory status quo." This might at first blush not seem like much of a step forward, but in fact countries often do not list sectors under the GATS even when these countries are open to foreign investment in these sectors and foreign investors receive national treatment (or something close). Furthermore, listed sectors are often subject to reservations that simply are not applied in practice. Thus the proposal would codify at the multilateral level the actual law and policy of countries as practiced, including their regulatory policy.

19. This argument is expanded in Sauvé (2000).

20. Evidence for this is, however, rather scant. Sauvé and Wilkie cite Rugman and Gestrin (1994), who examine the exceptions to national treatment for investment contained in NAFTA chapter 11, and conclude that a majority of these exceptions apply to services. NAFTA, however, covers only three countries, two of which (the United States and Canada) maintain rather few exceptions to national treatment at all. Sauvé is currently engaged in research to determine if the same results can be obtained for a larger group of countries.

Would this be useful? Business firms seem to think so. As Herbert Oberhänsli, the former ERT official, put it, "the international institutional framework is . . . far behind business reality today." If it could catch up, it would serve the function of locking in the very considerable liberalization that has already taken place around the globe, and this would be one stopgap to prevent backsliding. However, as Oberhänsli also noted, this catch-up would be "useful but not indispensable."

Sauvé and Wilkie believe that their proposal can be carried out in the context of the ongoing GATS and GATS-related negotiations, which, like the TRIMs review, are part of the WTO's built-in agenda. What is vexing, however, is that, in these negotiations, countries have been hesitant to put into a binding international agreement those liberal practices that they have already implemented de facto.[21]

Sauvé and Wilkie also advance some other ideas for improving the "investment friendliness" of the GATS. For example, the GATS speaks of "commercial presence" and defines this so as to include most forms of direct investment. Sauvé and Wilkie believe that this definition could be clarified and broadened. They note that the investment protection provisions are commitment specific (that is, they apply only to industries that have been listed) and that these could be made into general commitments that would apply to any "commercial presence," even in an unlisted industry. They suggest that there "remains scope for much greater legal clarity, precision, and uniformity with respect to how investment-related commitments are lodged and restricted." This scope exists because significant and undesired inconsistencies can be found in different countries' schedules. That is, negotiators might have sought to have these lists provide for equivalent treatment, but in practice the inconsistencies are sometimes sufficiently great that quite divergent practices among countries could be interpreted as consistent with their GATS commitments. This leaves room for precisely the discriminatory or differential treatment of foreign investors that the negotiators had intended to eliminate.

Significantly, the Sauvé and Wilkie proposal would, if successfully implemented, primarily serve to reduce the remaining discriminatory policies that are maintained by developed countries. (The proposals would apply to developing countries as well, especially as the services sector in these countries grows in importance. But Sauvé and Wilkie suggest "sunset" provisions for these countries that would enable them to phase in

21. For example, this situation is mirrored in GATT Article II bindings, which place ceilings, by import category, on the tariff rates that countries may apply to imports. For many countries and many categories, these bound tariff rates are higher than the rates that countries actually apply. Exactly why countries are not willing to bind themselves to the rates they currently apply remains something of a mystery. The usual story is that countries wish to reserve the right, in some cases at least, to raise tariff rates in the future. Presumably this is to mollify protectionist interests or to preserve their options in the event of a balance of payments crisis.

obligations rather slowly.) The Moran proposal, by contrast, involves developing countries directly.

In the absence of quantitative estimates of the welfare gains that might be created by investment liberalization, it is impossible to assess which of the two proposals is to be preferred on these grounds. One suspects that the potential welfare gains from either would be substantial.[22] But as already noted, no constituency seems to be backing either proposal. In contrast, a very considerable business constituency (at least in the United States) is backing further liberalization in the services sector. Given this reality, the Sauvé and Wilkie proposals seem to stand a much better chance than the Moran proposal of actual implementation in the foreseeable future.

A Comprehensive WTO Investment Agreement: A Bridge Too Far?

Following the successful Allied invasion of Normandy in June 1944 and the subsequent breakout of Allied forces at the Battle of Falaise, the combined US and British forces attempted in September to take and secure a bridge across the Rhine at Arnhem, in the Netherlands. The ultimate objective was to attempt something of a reverse execution of the von Schliefen plan that the Germans had used to invade France via the Low Countries in 1914 and again in 1940. The Allies' idea was to end the war quickly with a rapid sweep into Germany and encirclement of the German defensive forces.

The initial operation, conducted by about 35,000 paratroopers, succeeded in the sense that the bridge and the nearby towns were taken. But after less than a week the Germans recaptured the bridge, and the Allied forces, having suffered heavy casualties, were forced to retreat toward France. The resources squandered on the attempt at Arnhem arguably set back the ultimate Allied victory in Europe, which finally occurred the following spring.

The Arnhem operation failed largely because the forces needed to secure the bridge and the routes leading to it were unable to reach the beleaguered paratroopers in time. The failed operation was the subject of a 1970s movie, *A Bridge Too Far,* which explored whether the plan to take the Arnhem bridge was strategically correct but failed only in the execution. In fact, the movie argued, the operation failed because the resources needed to achieve the objective, given the resources that the Germans

22. The existing evidence indicates that the benefits from full opening of the services sector to investment and trade could be quite substantial; Warren and Findlay (2000) review some of the relevant studies.

could bring to bear to prevent it, simply were not available. Furthermore, the Allied leaders had enough information at their disposal regarding their own available resources and those of the enemy to have correctly concluded that the operation should not have been attempted at the time it was.

This chapter concludes that to seek a comprehensive investment agreement in the WTO would be, like the assault on the bridge at Arnhem, a "bridge too far." Although such an agreement might in fact increase world welfare, it is a matter of serious doubt whether it could be achieved. (One reason the issue remains in doubt is that no quantification of these benefits has ever been seriously attempted.) As at Arnhem, it is not clear that the needed resources, in this case the necessary consensus and political will among the negotiating countries, are available to achieve the objective. And meanwhile the resources that almost surely would be marshalled against such an effort are substantial and could well prevail.

No analogy should be pushed too hard, however. In the case of the Arnhem operation, there was complete consensus among the Allied commanders about the objective, the capitulation of Germany. There was also consensus that, to achieve this objective, a sweep into Germany was necessary. What went wrong was that the sweep was attempted too soon. In contrast, there is not even consensus among the WTO member countries that an agreement on investment is necessary. This bolsters the case that, even if ultimately desirable, a negotiation now would be premature. And whereas at Arnhem the identity of the enemy was clear, in the case of an investment agreement the only real "enemy" is ignorance of what might be the benefits—and the costs—of such an agreement. In particular, it is not the constituencies who oppose the agreement who are in any sense the enemy. Rather, they are simply interested parties who believe, for whatever reason, that any such agreement would create costs in excess of the benefits.

Thus, this author finds himself largely in agreement with Hoekman and Saggi (1999), who argue that:

> the major potential gain from a multilateral agreement is avoidance of wasteful competition for FDI. . . . However, to be effective, such an agreement would need to be highly comprehensive and would be costly to negotiate. At present, this does not seem like a promising prospect.

In other words, Hoekman and Saggi agree that an agreement would be, at this time, a "bridge too far." In line with Sauvé and Wilkie, they therefore call for efforts to center on further market access liberalization through the GATS.

But should work on an investment agreement stop at such efforts? Clearly it should not. The benefits and costs of a comprehensive investment agreement are largely uncharted waters. Indeed, as matters stand, debate over the desirability of an investment agreement has taken place largely in the dark. The priority now should be to obtain reasonable estimates of what the magnitudes and distributions of these benefits and costs might be. Only once these are available will it make sense for countries to attempt once again to reach consensus on an attempt to negotiate a multilateral investment agreement in the WTO, and what the priorities to be addressed by such an agreement should be.