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INVESTORS' RIGHTS: THE EVOLUTIONARY PROCESS OF INVESTMENT TREATIES

David R. Adair

I. INTRODUCTION

The individual investor is often more susceptible to a greater amount of risk when investing in foreign markets than customarily experienced in domestic markets. Often this risk factor includes the inability of the investor to take legal action against the state if a conflict arises in the course of business. In order to understand the position of the domestic investor against the international state, one must look to a series of treaties and agreements that the United States has entered into with various international partners. This is necessary because no single comprehensive set of multilateral rules currently exists for the regulation of foreign direct investment.¹ The origin of these agreements addressing foreign direct investment date back to the founding of the United States. Thus, in order to fully comprehend these agreements the investor must examine them in their historical context and track the evolution of the empowerment of the individual investor.

The framework of this paper follows three timeframes. The first are those agreements which are Pre-North American Free Trade Agreement (hereinafter Pre-NAFTA).² The second stage is the North American Free Trade Agreement (hereinafter NAFTA), which has elevated the status of the individual investor on the world stage. The third stage is the Multilateral Agreement on Investment (hereinafter MAI).³ The MAI is the most

1. See Eric M. Burt, *Developing Countries and The Framework For Negotiations on Foreign Direct Investment In The World Trade Organization*, 12 AM. U. J. INT'L L. & POL'Y 1015, 1016 (1997).

2. North American Free Trade Agreement, Dec. 8 and 17, 1992 U.S.-Can.-Mex., 1993; The implementing legislation is found in the North American Free Trade Agreement Implementation Act, Pub. L. 103-182, 107 Stat. 2057 (1993). (Free trade agreements are not self-executing treaties. They are entered into by the President and require Congressional approval of implementing legislation before they become law in the U.S. The implementing legislation incorporates the trade agreement under consideration and, if not disapproved by Congress, becomes federal law. The approval process is delineated in the Omnibus Trade and Competitiveness Act of 1988, 19 U.S.C. 2902-2903 (1988).

3. Multilateral Agreement on Investment: Consolidated Text and Commentary, Negoti-

recent and far reaching in the regulation of foreign direct investment. Therefore, to date, the MAI is the most ambitious proposal to address the subject of international investment.

A. *The Pre-NAFTA Investment Agreements*

Upon the founding of the United States, it was felt that a legal system was needed to establish commercial relations with other nations. The result of the initiative was the Friendship, Commerce and Navigation Treaty (hereinafter FCN).⁴ The FCN was the first step in the evolutionary process of the regulation of investment. The early FCNs proposed general obligations to protect the property of the nationals of the other party; included were provisions on the subjects of expropriation and repatriation of earnings.⁵ In the 1920's and 1930's, foreign commercial relations began to expand, and the FCN became the primary treaty instrument for the protection for foreign investments.⁶ The result of this use of FCNs as the primary instrument was more comprehensive protections for foreign investment.⁷ Included in FCNs were guarantees of prompt, adequate and effective compensation for the expropriation of property.⁸ Any breach of these modern FCNs could be addressed through pre-existing legal remedies in the treaties' provisions and submitted to the International Court of Justice (hereinafter ICJ).⁹

The FCNs were the first treaties to address foreign investment, but were they are far from acceptable for the risk adverse investor. The ICJ upheld necessary protections established in U.S.-Italy FCN, which supported state standing, on behalf of its nationals.¹⁰ In the Barcelona Trac-

ating Group on the MAI, Directorate for Financial, Fiscal and Enterprise Affairs, Org. for Econ. Cooperation and Dev., OECD Doc. DAF/MAI (97)1/REV2 (September 14, 1998). Also available at <<http://www.citizen.org/gtw/mainewte.htm>> [hereinafter MAI Agreement].

4. FCN refers to all bilateral commercial treaties, negotiated by the United States prior to the beginning of the bilateral investment treaty program. See KENNETH VANDELVELDE, UNITED STATES INVESTMENT TREATIES 15 (1992). Today, FCNs remain in force with Argentina, Austria, Belgium, Bolivia, Brunei, Columbia, Costa Rica, Denmark, Estonia, Ethiopia, Finland, France, Germany, Greece, Honduras, India, Iran, Iraq, Ireland, Israel, Italy, Japan, Korea, Latvia, Liberia, Luxembourg, Madagascar, Malta, Morocco, Nepal, the Netherlands, Norway, Oman, Pakistan, Paraguay, Saudi Arabia, Spain, Suriname, Switzerland, Taiwan, Thailand, Togo, Turkey, the United Kingdom, Vietnam, Yemen, and Yugoslavia. See 20 I.L.M. 565 (1981).

5. See VANDELVELDE, *supra* note 4, at 16.

6. *Id.* at 17.

7. See Christopher N. Camponovo, *Dispute Settlement and the OECD Multilateral Agreement On Investment*, 1 UCLA J. INT'L L. & FOREIGN AFF. 186 (1996).

8. See VANDELVELDE, *supra* note 4, at 19.

9. See, e.g., Treaty of Friendship, Feb. 2, 1948, U.S.-Italy, art. XXVI, 12 U.S.T. 131.

10. See Wendy Huey, *International Litigation: United States and Italy FCN Treaty and I.C.J. Jurisdiction Over Disputes—United States v. Italy 1989 I.C.J. 15 (1989)*, 32 HARV.

tion (*Belgium v. Spain*), the ICJ rejected Italy's claims that neither the U.S.-Italy FCN or the Treaty Supplement extended shareholders any more rights than those established by customary law.¹¹ While an investor may be able to take some value out of this decision, it must be remembered that an investor is without the ability to take claim directly against the state in an investor-to-state dispute.¹² The prospects for an investor relying on the resolution alternative provided for in FCNs are less than desirable.¹³ While the FCN provides a solid foundation for the issue of foreign investment, it must be remembered that the FCN is the first treaty in the evolutionary process.

The second of the Pre-NAFTA investment agreements is the Bilateral Investment Treaty (hereinafter BIT).¹⁴ Initiated in the 1960s, the BIT was created to provide a stable international legal framework for the regulation of direct foreign investment.¹⁵ The BIT, like the FCNs, provides obligations that cover numerous areas, including: (1) Most Favored Nation treatment;¹⁶ (2) expropriation and nationalization of investment;¹⁷ (3) transfer of capital;¹⁸ (4) performance requirements;¹⁹ and (5) dispute resolution.²⁰

The BIT is similar to the FCN in allowing state-state dispute resolution. However, unlike the FCN, the BIT establishes arbitrators for the resolution of conflict between states.²¹ A major difference between the FCN and the BIT is that a national citizen or company has the ability to

INT'L L. J. 236 (1991), Sean D. Murphy, *The ELSI Case: An Investment Dispute at the International Court of Justice*, 16 YALE J. INT'L L. 391 (1991).

11. See Statute of the International Court of Justice, art. 34 (1) which states that "[o]nly states may be parties in cases before the Court."

12. Statute of the International Court of Justice, art. 34 ("only states maybe parties in cases before the Court.")

13. See Camponovo, *supra* note 7, at 189-190.

14. See Jeswald W. Salacuse, *BIT by BIT: The Growth of Bilateral Investment Treaties and Their Impact on Foreign Investment in Developing Countries*, 24 INT'L LAW. 655 (1990). The first bilateral investment treaty was signed in 1959 between West Germany and Pakistan. Treaty for the Protection of Investment, Nov. 25, 1959, F.R.G.-Pak., 457 U.N.T.S. 23.

15. See *id.* at 657.

16. With respect to this obligation, BITs negotiated by the United States create stricter obligations than do BITs of other OECD nations. The U.S. Model BIT requires national or MFN treatment at all stages of investment, from pre-establishment through divestment, whereas other BITs only require national or MFN treatment post-establishment. 1987 U.S. Model BIT at art. II.

17. See *id.* at art. III, para. 1.

18. See *id.* at art. IV, para. 1.

19. See *id.* at art. II.

20. See *id.* at art. VI.

21. See Camponovo, *supra* note 7, at 193 (citing 1994 U.S. Model BIT at art IX).

present a conflict "arising out of or relating to an investment authorization, an investment agreement or an alleged breach of any right conferred, created or recognized by [the] treaty."²² If an investor should choose to take a state to arbitration, the following forums would be available for adjudication: (1) the International Centre for the Settlement of Investment Disputes (hereinafter ICSID),²³ (2) the ICSID Additional Facility,²⁴ (3) in accordance with the Arbitration Rules of the United Nations Commission on International Trade Law; or (4) if agreed by both parties, to any other arbitration institution or in accordance with any other arbitration rules.²⁵ If an investor pursues the arbitration option the matter may not be pursued in the local courts; likewise if the investor takes action in the local courts, the matter may not be adjudicated through international arbitration.²⁶

The BIT has been an improvement over the FCN in providing an avenue for investor-state disputes. This instrument has proven effective in both establishing substantive guidelines for the protection of foreign investment and in providing an effective framework for the resolution of disputes.²⁷ The BIT is an example of how agreements on investment have continued to evolve for the betterment of the investor.

The third of the Pre-NAFTA investment agreements is the General Agreement on Tariffs and Trade (hereinafter GATT).²⁸ The GATT treaty did not fully address the subject of foreign direct investment, until the Uruguay Round. The Uruguay Round produced twenty-two principal instruments (twenty-one agreements and one Understanding) plus the

22. *See id.* Under the FCN, states are obligated to accord the citizens of the other party national or MFN treatment with regard to access to local courts. This obligation allows for litigation of any investment claim before the courts of one's host state.

23. *See id.* (citing MOSHE HIRSCH, *THE ARBITRATION MECHANISM OF THE INTERNATIONAL CENTRE FOR THE SETTLEMENT OF INVESTMENT DISPUTES* (1993); David A. Soley, *ICSID Implementation: An Effective Alternative to International Conflict*, 19 INT'L LAW 521 (1985)). CSID established binding guidelines under which a nation and a foreign national may prefer to settle any claims. *See* Convention on the Settlement of Investment Disputes between States and Nationals of Other States, Mar. 19, 1965, 17 U.S.T. 1270.

24. *See id.* (citing Rules Governing the Additional Facility for the Administration of Proceedings by the Secretariat of the International Centre for the Settlement of Investment Disputes, reprinted in 21 I.L.M. 1443, 1445 (1982)). "The Additional Facility was initiated in 1978 as an avenue for disputes that are outside the jurisdiction of the Centre." *See id.*

25. *See id.* (citing 1994 U.S. Model BIT at art. IX. *See also*, 1987 U.S. Model BIT, *supra* note 2, art. VII.

26. *See id.*

27. *See* amponovo, *supra* note 7, at 194 (citing Paul Peters, *Dispute Settlement Arrangements in Investment Treaties*, 22 NETH. Y.B. INT'L L. 91, 93 (1991)).

28. General Agreement on Tariffs and Trade, Oct. 30, 1947, 55 U.N.T.S. 188 [hereinafter GATT].

associated Ministerial Decisions and Declarations.²⁹ There are three agreements that were negotiated at the Uruguay Round, that are of particular concern for the investor. These agreements are the Agreements on Trade-Related Investment Measures (hereinafter TRIMs)³⁰, the General Agreement on Trade in Services (hereinafter GATS)³¹ and the Agreement on Trade-Related Aspects of Intellectual Property Rights (hereinafter-TRIPS)³².

The TRIMs agreement was among the new provisions established at the Uruguay Round. This agreement is restricted to trade in goods, but establishes notification, transparency, national treatment, and the phased elimination of TRIMs.³³ A TRIM is any host country investment restriction that affects the making or operation of an investment; a TRIM either restricts imports or exports.³⁴ The TRIMs agreement is only a cautious first step toward the regulation and liberalization of direct investment; it is not a comprehensive investment agreement.³⁵ The TRIMs agreement is void of a provision for the repatriation of capital³⁶, expropriation and compensation issues³⁷. An important achievement of the TRIMs agreement is the establishment in Article 9 of a review of the agreement within five years³⁸. This review provision could provide built-in authority for negotiating the possible expansion of the World Trade Organization's coverage of direct investment.³⁹

29. Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, April 15, 1994, reprinted in *THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS* (GATT Secretariat 1994). Portions of the Final Act also appear in the General Agreement on Tariffs and Trade; Multilateral Trade Negotiations Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, April 15, 1994, 33 I.L.M. 1125.

30. 3 *THE GATT URUGUAY ROUND: A NEGOTIATING HISTORY* (1986-1992), at 700, (Terence P. Stewart ed., 1993).

31. General Agreement on Trade in Services, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1B, Legal Instruments—Results of the Uruguay Round, 33 I.L.M. 1168 (1994).

32. GATT, *supra* note 30, at 851. *See also*, Agreement on Trade-Related Aspects of Intellectual Property Rights, Including Trade in Counterfeit Goods (1993).

33. Thomas L. Brewer, *International Dispute Settlement Procedures: The Evolving Regime for Foreign Investment*, 26 *LAW & POL'Y INT'L BUS.* 633, 645 (1995).

34. *See* Paul Ryan Christy III, *Negotiation Investment in the GATT: A Call for Functionalism*, 12 *MICH. J. INT'L L.* 743, 779 (1991).

35. *See* DANIEL M. PRICE & BRYAN CHRISTY III, *AGREEMENT ON TRADE RELATED INVESTMENT MEASURES (TRIMs): LIMITATIONS AND PROSPECTS FOR THE FUTURE*, in *THE WORLD TRADE ORGANIZATION: THE MULTILATERAL TRADE FRAMEWORK FOR THE 21ST CENTURY AND U. S. IMPLEMENTING LEGISLATION* 439, 453 (Terence P. Stewart ed., 1996).

36. *See Id.*

37. *See Id.*

38. *See* Brewer, *supra* note 33, at 644.

39. *See* World Trade Organization Secretariat, Singapore Ministerial Declaration, para. 20

Many consider the GATS the true investment agreement of the Uruguay Round.⁴⁰ The GATS agreement includes foreign direct investment within the scope of its application by defining trade in services to contain the supply of a service "by a service supplier of one Member, through commercial presence in the territory of any other Member."⁴¹ The phrase "commercial presence" is defined to mean "any type of business or professional establishment, including through (i) the constitution, acquisition or maintenance of a judicial 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."⁴² Topics covered by provisions in the GATS agreement include: notification, transparency, most favored nation treatment, national treatment, market access, subsidies, and foreign exchange restrictions on capital account and current account transactions.⁴³

The GATS agreement is another attempt at the softening of regulation of foreign direct investment. The overall effect of GATS on the liberalization of foreign direct investment is limited. One achievement of the GATS agreement is contained in Article XIX. In Article XIX the requirement of a review of the agreement by the year 2000 seems to ensure the broadening of the agreement powers.⁴⁴

Wt/MIN(96)/DEC (adopted on 13 Dec. 1996), *reprinted* in Singapore Ministerial Declaration, WTO Focus (World Trade Organization, Geneva, Switzerland), Jan. 1997, at 7, 10. Concerning direct investment and the WTO framework, the Ministers stated, "[h]aving regard to the existing WTO provision on matters related to investment and competition policy and the built-in agenda in these areas, including under the TRIM agreement, and on the understanding that the work undertaken shall not prejudice [whether] negotiations will be initiated in the future, we also agree to: establish a working group to examine the relationship between trade and investment In the conduct of the work of the working groups, we encourage cooperation with the United Nations Conference on Trade and Development to . . . ensure that the development dimension is taken fully into account It is clearly understood that future negotiations, if any, regarding multilateral disciplines in these areas, will take place only after an explicit consensus decision is taken among WTO members regarding such negotiations."

40. *See* Investment and the Final Act of the Uruguay Round: A Preliminary Stocktaking, OECD Trade Directorate at 6, OECD Doc. COM/TD/DAFFE/IME(94)56/REEV 1 (1994) (arguing that the GATS "contains the single largest number of investment-related provisions" of the Uruguay Round agreements). *See also* Price & Christy, *supra* note 35, at 454 (considering the GATS the WTO's "real investment agreement").

41. 1 *Law & Practice of the World Trade Organization*, at 341, 342 (Joseph F. Dinnin ed., 1995) General Agreement on Trade in Services, art. I (2) (C) [hereinafter 1 *Law & Practice*].

42. *Id.* at 363.

43. *See* Brewer, *supra* note 33, at 644.

44. *See* 1 *Law & Practice*, *supra* note 41, at 358. *See* GATS Agreement pt. IV, art. XIX (providing for review of GATS within five years from the date of its entry into force, 1995). The TRIMS agreement also provides for its review within five years and how together with

The third provision of relevance for investors under the Uruguay Rounds is the TRIPs agreement. This agreement provides protection for the distribution of technology through foreign direct investment operations.⁴⁵ This is crucial to foreign direct investors; often investment projects include international technology transfers between firms and their foreign affiliates.⁴⁶ The definition of intellectual property is defined to include "copyrights, trademarks, industrial designs, patents, and the layout designs of integrated circuits."⁴⁷

Under the expanded GATT/WTO framework, any dispute concerning foreign direct investment is subject to the Understand of Rules and Procedures Governing the Settlement of Disputes (hereinafter DSU).⁴⁸ The DSU covers the TRIMS, GATS, and the TRIPs agreements.⁴⁹

The Pre-NAFTA treaties offer a foundation for the regulation of foreign direct investment. The FCNs, BITs, and the various GATT agreements provided future agreements with basic provisions that are initial components of what would be needed in future agreements. The FCN established the need for regulation of foreign direct investment and in its fundamental provision exposed the complexity of the issue. The BITs expand upon the FCN, but were only binding upon the two signatory parties of the agreement. The BITS were crucial in the introduction of the investor-to-state arbitration settlement, but this revision was narrow in applicability and insufficient for the demands of the international business community. GATT, the final of the three pre-NAFTA agreements, began to approach the coverage needed for modern regulation of foreign direct investment, but did not expand the ability of the individual investor to protect their investment via a substantive investor-to-state dispute resolution mechanism. These shortcomings of the pre-NAFTA agreements would soon be addressed in the next phases of this evolutionary process.

II. NAFTA: A CLEAR PROTECTION FOR THE INVESTOR

The second stage of the regulation of foreign direct investment is governed by the well-known NAFTA agreement. NAFTA expands upon

the GATTs five-year review provision this represents built-in authority for negotiating the possible expansion of WTO coverage of foreign direct investment.

45. See Burt, *supra* note 1, at 1039.

46. See Brewer, *supra* note 33, at 644.

47. *Id.*

48. 2 THE GATT URUGUAY ROUND: A NEGOTIATING HISTORY (1986-1992), at 2794 (Terence P. Stewart ed., 1993). Understanding on Rules and Procedures Governing the Settlement of Disputes under Articles XXII and XXIII of the General Agreement on Tariffs and Trade.

49. See Brewer, *supra* note 33, at 645.

the fundamental provisions established in the FCN, BIT and GATT agreements. Although NAFTA is restricted to the signatory parties of the United States, Canada and Mexico, the agreement provides for the most aggressive investor-state dispute resolution settlement provisions to date.

The signatory parties provided rules for trade, investment, and the provision of services created NAFTA.⁵⁰ It was felt that the implementation of NAFTA would create a free trade zone and reduce trade barriers, and preserve the parties' ability to remain competitive in the world market.⁵¹ To ensure the success of the NAFTA agreement, the signatory parties understood that the issue of foreign direct investment needed to be addressed. The United States directly invested sixty-eight billion dollars into Canada and sixteen billion dollars into Mexico in 1992.⁵² Due to increasing amounts of foreign direct investment between the signatory parties, the NAFTA agreement in Chapter 11 covers investment. Chapter 11 has three basic objectives:

[1] establish a secure investment environment through the elaboration of clear rules of fair treatment of foreign investment and investors; [2] remove barriers to investment by eliminating or liberalizing existing restrictions; and [3] provide an effective means for the resolution of disputes between and investor and the host government.⁵³

Chapter 11 of the NAFTA agreement may have been one of the overlooked provisions of the NAFTA agreement, but from an investors standpoint, it may be one of the single most influential documents for years to come.

Chapter 11 of the NAFTA agreement is composed of two parts: Section A and B. These sections apply to all governmental measures relating to investment, with the exception of measures governing financial serv-

50. See Noemi Gal-Or, *Private Party Direct Access: A Comparison of the NAFTA and the EU Disciplines*, 21 BOSTON COLLEGE INT'L COMP. L. REV. 1, 5 (1998).

51. See Jonathan I. Miller, Comment, *Prospects for Satisfactory Dispute Resolution of Private Commercial Disputes Under the North American Free Trade Agreement*, 21 PEPP. L. REV. 1314-1315 (1994).

52. See SIDNEY WEINTRAUB, NAFTA: WHAT COMES NEXT? 43 (1994) (citing "U.S. Direct Investment Abroad: Detail for Historical-Cost Position and Balance of Payments Flows, 1992," Survey of Current Business 73, no. 7 (July 1993): 100.) Relying upon Table 3-5, Weintraub states that "[t]he U.S. Department of Commerce figures for Foreign Direct Investment in Mexico seem low, in part because of the historical-cost measurement technique." Weintraub further states that, "[t]he U.S. embassy in Mexico reports the cumulative level of U.S. Foreign Direct Investment in 1992 as \$23 billion, or \$10 billion more than shown in table 3-5." *Id.*

53. Daniel M. Price, *An Overview of the NAFTA Investment Chapter: Substantive Rules and Investor-State Dispute Settlement*, 27 INT'L. LAW. 727 (1993).

ices, which are governed by Chapter 14. Section A, sets forth the obligations of the parties and designates the beneficiaries of this chapter. Beneficiaries of the chapter are "citizens, permanent resident aliens and other designated persons of the signatory parties."⁵⁴ The broad scope of Section A also refers to all enterprises "'constituted or organized' under Canadian, Mexican or United States law."⁵⁵ Practically every entity imaginable is covered including "corporations, partnerships, trusts, sole proprietorships, joint ventures and associations."⁵⁶

The definition of investment is very inclusive in article 1139 of the NAFTA agreement. Covered under the definition of investment are stocks, bonds, loans, income, profit or asset interest, real estate, tangible or intangible, business property, turnkey or construction contracts, compressions, and licensing and franchising contracts.⁵⁷ Under the NAFTA agreement, treatment of investors and investment are provided important protections.⁵⁸ These articles entail among other things, the same treatment as given to nationals, regarding the "established acquisition, expansion, management, conduct, operation, and sale or other disposition of investments."⁵⁹ An intention of the articles of the agreement is to eliminate discrimination against NAFTA investors and investments. This is achieved by Article 1102, which bars government quotas on equity holding by nationals.⁶⁰ Secondly, to discourage discrimination, there cannot be any law in place that requires the reservation of senior management positions to individuals of any particular nationality.⁶¹ Section A of Chapter 11 also entails others areas including, but not limited to, standards of treatment, performance requirements, transfers, expropriation and compensation, denial of benefits, and environmental measures.⁶²

54. RALPH FOLSOM & W. DAVIS FOLSOM, UNDERSTANDING NAFTA AND ITS INTERNATIONAL BUSINESS IMPLICATIONS 189 (1997) (citing NAFTA at Annex 201.1).

55. *Id.* (citing NAFTA at Annex 201).

56. FOLSOM & FOLSOM, *supra* note 54, at 189.

57. *See id.* (citing NAFTA at art. 1139).

58. *See id.*

59. FOLSOM & FOLSOM, *supra* note 54, at 189 (citing NAFTA at art. 1102).

60. OCEAN PUBLICATIONS, INC., NORTH AMERICAN FREE TRADE AGREEMENTS: TREATY MATERIALS Art. 1102 (James R. Holbein and Donald J. Musch eds., Booklet 3 1994). [hereinafter Ocean Pub. Booklet 3, 1994].

61. *See id.* at art. 1107.

62. *See id.* at arts. 1104-1114. Exceptions to the rules include: "Annex I lists existing measures of a Party that derogate from the national treatment, MFN [most favored nation], or performance requirement obligations. Measures listed in this annex are subject to the so-called "ratchet rule": a measure may not be made more restrictive and, if liberalized, may not later be made more restrictive. Annex II lists sectors such as maritime and basic telecommunications that are not subject to the ratchet rule. Annex III lists Mexico's constitutionally based exceptions. These exceptions are subject to the ratchet rule. In addition, any foreign investment that is or may be permitted in a constitutionally reserved sector will receive the

Section B of Chapter 11 of the NAFTA agreement has been called "the part of NAFTA that no one has read (or understood), the most important part of NAFTA . . ." ⁶³ Some commentators feel this way about Section B for very valid reasons. This section provides the individual investor with the ability to seek arbitration against the state for any breach of an existing obligation. ⁶⁴ This article of the agreement is similar to the investor-state dispute settlement provision of the BIT. ⁶⁵ Section B allows for arbitration for claims covered by Section A of Chapter 11.

The right of the investor to bring action against the state and have standing is known as *locus standi*. The signatory parties of NAFTA accepted these obligations to submit disputes to arbitration under the agreement terms. ⁶⁶ The investor-state provisions encompass:

- (1) actions taken by federal, state, and provincial governments; (2) certain actions taken by state enterprises; and (3) actions taken by certain state chartered monopolies when actions are inconsistent with the NAFTA agreement. ⁶⁷

These articles are subject to reservations set forth within the agreement. For an investor to bring a claim against the state, the claim must be brought within a three-year statute of limitations window. ⁶⁸ This time begins to run from the date on which the investor first acquired, or should have first acquired, knowledge of the alleged breach and knowledge that the investor has incurred loss or damage. ⁶⁹ An investor who is submitting a claim to arbitration must provide the other party with notice at least ninety days before the claim is submitted. ⁷⁰ If a single investor should take action under the agreement, one must waive in writing the ability to

benefits of the chapter. Annex IV lists sectors and certain agreements that are excluded from the scope of the most favored nation obligation." See Price, *supra* note 53, at 730-31.

63. Matthew Nolan & Darin Lippoldt, *Obscure NAFTA Clause Empowers Private Parties*, THE NAT'L L. J., April 6, 1998, at B8.

64. FOLSOM & FOLSOM, *supra* note 54, at 194. Mexico has often refused to arbitration in foreign investment disputes, citing the Calvo Doctrine. This doctrine requires that foreigners forfeit protection by their national governments and submit any legal claims to the courts of Mexico. See *supra* note 54.

65. NOLAN & LIPPOLDT, *supra* note 63, at B8.

66. FOLSOM & FOLSOM, *supra* note 54, at 195.

67. PRICE, *supra* note 53, at 732

68. FOLSOM & FOLSOM, *supra* note 54, at 195.

69. See *id.*

70. See *id.* (citing NAFTA at art. 1119). (Other items to be included in the notice include: 1) the name and address of the disputing investor and, where a claim is made under Article 1117, the name and address of the enterprise; 2) the provisions of the agreement alleged to have been breached and any other relevant provisions; 3) the issues and the factual basis for the claim; and 4) the relief sought and the approximate amount of damages claimed.) See *id.*

take any other proceedings regarding the same claim.⁷¹

Any arbitration covered by Chapter 11 can be submitted under: (1) the ICSID Convention, provided that both the disputing party and the party of the investor are parties to the Convention; (2) the Additional Facility Rules of ICSID, provided that either the disputing party or the party of the investor, but not both, is a party to the ICSID Convention; or (3) the UNCITRAL Arbitration Rules.⁷² A NAFTA investment arbitration tribunal is composed of three individuals, two of whom are selected by the opposing parties, and a third presiding arbitrator who is appointed by agreement of the disputing parties.⁷³ If the disputing parties cannot decide on a presiding arbitrator within ninety days and submitting the claim, the Secretary-General will appoint a presiding arbitrator from a roster of previously approved arbitrators.⁷⁴

A NAFTA investment arbitration tribunal has a reasonable amount of flexibility in awarding damages to an investor. A tribunal may order an interim measure of protection to preserve the rights of a disputing party, or to ensure that the tribunal's jurisdiction is made fully effective, including an order to preserve evidence in the possession or control of a disputing party or to protect the tribunal's jurisdiction.⁷⁵ If a tribunal should award damages to an investor, that award can take the form of monetary damages and applicable interest or restitution of property.⁷⁶ If unable to comply, the losing party may pay monetary damages and interest in lieu of restitution.⁷⁷ Often the enforcement of an award is the most difficult part of the any legal process, but the NAFTA agreement provides that an investor may not seek enforcement of award for 120 days from the date of the award.⁷⁸ If a party fails to comply with the award of the tribunal, an investor may engage an arbitration panel under Chapter 20 of NAFTA, to render an opinion on compliance of the award.⁷⁹ It is possible under Chapter 20 that the investor's state could suspend benefits granted under NAFTA to the party in non-compliance.⁸⁰

The importance of the provisions of Chapter 11 of the NAFTA

71. *See id.* at 195. (Included are administrative and judicial proceedings. Investors do not waive their rights to injunctive, declaratory or other extraordinary relief not involving damages, because these remedies cannot be awarded through NAFTA arbitration). *See id.*

72. *See* Ocean Pub. Booklet 3, 1994, *supra* note 60 at art. 1120 (Only the United States currently adheres to the ICSID).

73. *See Id.* at art. 1123.

74. *See Id.* at art. 1124.

75. *See Id.* at art. 1134.

76. *See id.* at art. 1135.

77. *See id.* at art. 1135. (A tribunal may not order a party to pay punitive damages).

78. Ocean Pub. Booklet 3, 1994, *supra* note 60 at art.1136.

79. *Id.*

80. FOLSOM, *supra* note 54, at 197-198.

agreement cannot be underestimated, but the practical experiences of claims brought under these provisions must be examined to give the investor a complete picture of the process. Since the implementation of the NAFTA agreement, there have been three claims brought under the provisions of Chapter 11.⁸¹ These claims are all being pursued by investors against the respective states, who are parties to the NAFTA agreement. The final decisions of the cases are not yet available, but the nature and development of these claims provide the investor with insight into Chapter 11 disputes.

The first of these cases was initiated by three individuals, who are the principals of the company, Desechos Solidos de Naucalpan (hereinafter Desona).⁸² This California based business successfully bid upon and entered into a 15-year contract with the city of Naucalpan de Juarez.⁸³ Desona was to provide management of a solid-waste landfill, until the Naucalpan county council nullified the contract after it was signed.⁸⁴ Desona claimed that \$3 million was spent in the negotiation and bidding of the contract.⁸⁵ The company alleged that the city of Naucalpan de Juarez breached the contract and "appropriated" the business in violation of Chapter 11.⁸⁶ The arbitration heard the dispute on September 26, 1997.⁸⁷

The second case to be brought forth under Chapter 11 of the NAFTA agreement was initiated by Metalclad Corporation (hereinafter Metalclad), a Newport Beach, California company.⁸⁸ Metalclad, a hazardous-waste disposal company, filed this complaint against Mexico, on January 2, 1997.⁸⁹ This is an unusual case because Metalclad was reluctant to pursue the claim for various reasons (as it is often prudent to avoid disputes in international business transactions).⁹⁰ Company officials did not take action based on conduct of the Mexican national government officials;

81. See Nolan & Lippoldt, *supra* note 63.

82. See *id.*

83. See *id.*

84. See *id.*

85. See *id.*

86. See *id.*

87. See Nolan & Lippoldt, *supra* note 63. (The tribunal consists of Benjamin R. Civilette, former Attorney General of the United States; Claus von Wobeser Hoepfner, of Mexico, and Jan Paulsson, of France, who presides.)

88. See *id.*

89. See *id.*

90. Mark Thompson, *O.C. Firm Applies for Investment Protection*, L.A. DAILY J., Jan. 29, 1998, at A1. (Metalclad operates facilities in eight Mexican states. Metalclad waited to file its NAFTA dispute until the last day of a three-year statute of limitations that would have barred some of the company's claims. Company officials met with Mexican trade officials, ambassadors, and cabinet ministers, trying every political and diplomatic avenue possible.)

instead, the actions of Mexican State governor Horacio Sanchez Uncueta were the grounds for the complaint.⁹¹ In 1995, former Governor Sanchez ordered state police officers to prevent the opening of a fully approved Metalclad facility.⁹² Metalclad now alleges under Chapter 11 of the NAFTA agreement, that Mexico, by the actions of former Governor Sanchez, illegally expropriated the hazardous waste landfill, which is property of the company.⁹³ According to Clyde Pearce, a lawyer for Metalclad, the defense "is claiming that it followed some normal procedures" in canceling the project.⁹⁴ Mr. Pearce states "even if it did, that doesn't matter because those procedures violate the guarantees of NAFTA. Under the provisions in the agreement, it is Mexico that pays for these variances, not the investor."⁹⁵ Metalclad's \$90 million claim for damages, includes fair-market value of the landfill and compensation for lost revenue since being blocked in 1995.⁹⁶ In the summer of 1997, Metalclad presented 1200 pages of material to the arbitration tribunal that contained the facts on which complaint is based.⁹⁷ In response, Mexico failed to meet the original due date of January 1998, but successfully requested an extension until February 17, 1998.⁹⁸ Metalclad chief executive officer Grant Kesler feels that Mexico could suffer, if Metalclad should lose the case. Kesler stated, "[i]f we get screwed, who else is going to take the risk of going down there?"⁹⁹ Mr. Kesler is confident that Metalclad would be able to collect on any award by the tribunal because "we have the right to attach Mexican assets in the United States, which would include their account at the World Bank. There is no way to avoid paying a NAFTA award."¹⁰⁰ This whole dispute could have been avoided, according to Mr. Kesler, except for the actions of "a single Mexican governor."¹⁰¹ Kesler

91. *See id.*

92. *See id.* (Governor Sanchez took this action, after he had declared the site an ecological preserve.)

93. NOLAN & LIPPOLDT, *supra* note 63.

94. THOMPSON, *supra* note 90, at A10.

95. *Id.*

96. *See* NOLAN & LIPPOLDT, *supra* note 63.

97. *See* THOMPSON, *supra* note 90, at A10. (This claim is pending before the International Center for the Settlement of Investment Disputes, which is specified by NAFTA as a forum for resolving disputes. The tribunal is composed of former U.S. Attorney General Benjamin Civiletti, chosen by Metalclad, Jose Luis Zacaros, a Mexican jurist chosen by the Mexican government, and Elihu Lauterpacht, a law professor at Cambridge University, who was agreed upon by both sides.)

98. *See* NOLAN & LIPPOLDT, *supra* note 63. (Because Mexico failed to timely file certain translations of portions of its response, Metalclad had asked the tribunal to rule on this issue before determining the need for further pleadings).

99. Thompson, *supra* note 90, at A1.

100. *Id.* at A1, A10.

101. *Id.* at A10.

further noted that "the defendant has to be the government of Mexico and not this particular state or the individual governor."¹⁰² While the Metalclad dispute is yet to be decided, it is clear that the investor in this situation feels confident of the investor-state provision provided within Chapter 11 of NAFTA. The Metalclad case could be an example for investor to follow, if they should find themselves in a similar situation.

The third claim to be alleged under Chapter 11 of the NAFTA agreement is Ethyl Corporation dispute. The Ethyl Corporation (hereinafter Ethyl) of Richmond, Virginia, initiated proceedings under Chapter 11 of NAFTA against the Canadian government.¹⁰³ The process began in April 1997, when the Canadian Parliament decided to ban the import and inter-provincial transport of the gasoline additive MMT.¹⁰⁴ Ethyl filed its case on April 14, 1997, and is seeking at least \$250 million in damages.¹⁰⁵ Ethyl is the only manufacturer of MMT, which is produced in the United States and processed in Canada by a Canadian subsidiary of Ethyl.¹⁰⁶ Only after the refusal by the United States Trade Representatives office to pursue the claim under the governmental dispute resolution system of NAFTA, did Ethyl decide to pursue this claim under the investor-state dispute mechanism in Chapter 11 of NAFTA.¹⁰⁷ Ethyl, in the allegation, equates the ban on MMT to illegal expropriation, thus justifies the need for compensation for actual and future earnings losses, including damage to the corporate image.¹⁰⁸ It is the company's position that the action by the Canadian government is a violation of Ethyl's investment rights and reduces the company to an inferior position of Canadian companies.¹⁰⁹

102. *Id.*

103. See Ruth Abramson, *Paying the Polluters?*, MACLEANS, Sept. 1, 1997.

104. See Michelle Sforza & Mark Vallianatos, *Ethyl Corporation v. Government of Canada: Chemical Firm Uses Trade Pact to Contest Environment Law*, Preamble Center Briefing Paper. See <http://www.rtk.net/preamble>. (MMT is a manganese-based compound added to gasoline to enhance octane and reduce engine knocking. Canadian legislators were concerned that the manganese in MMT emissions posed a significant public health risk. Furthermore, automobile manufacturers have argued for many years that MMT damages emissions diagnostics and control equipment in cars, which increases fuel emissions in general. The Environmental Defense Fund has reported that this additive is only used in Canada. The United States EPA has banned its use in reformulated gasoline, which includes approximately 1/3 of the U.S. gasoline market. California has imposed a total ban on MMT).

105. Nolan & Lippoldt, *supra* note 63.

106. *Id.*

107. Testimony of Lori Wallach, Congressional Hearing on MAI, March 5, 1998. (Lori Wallach is the director of Public Citizen's Global Trade Watch, a national consumer group founded in 1971 by Ralph Nader.) (visited Feb. 8, 1999) <<http://www.citizen.org/pctrade/MAI/What%20is/maitest.htm>>.

108. See Sforza & Vallianatos, *supra* note 104, at 2.

109. See Nolan & Lippoldt, *supra* note 63. (The ban will completely eliminate Ethyl's Canadian business.)

The Ethyl case is seeking the largest amount of damages ever under Chapter 11 of NAFTA. This case should establish several precedents when finally adjudicated by a tribunal. Such potential important precedent includes the definition of expropriation and the granting of possibly the largest award ever under Chapter 11 of NAFTA.

The NAFTA agreements were conclusively a major step in the process of regulation of foreign direct investment. While NAFTA is only restricted to the three signatory parties, its revolutionary approach and successes provide a framework for future investment agreements. The individual investor received unparalleled empowerment in the ability to take claim against the breaching state under Chapter 11 of NAFTA. As evidenced by the previously mentioned cases, the individual investors are now able to take claim against the state, which is a substantial move in providing the necessary security for foreign direct investment. The NAFTA agreement goes beyond all previous investment treaties and unknowingly foreshadows the future of investment treaties.

III. MAI: THE MOST RECENT OF THE INVESTMENT AGREEMENTS

The final stage of the evolutionary empowerment of the individual investor is still in the drafting and negotiating stages. A majority of this new treaty has been settled upon and drafted by the different states, which are intending to be signatories to this revolutionary document.

This document is now titled the Multilateral Agreement on Investment¹¹⁰ (hereinafter MAI) and is being constructed under the supervision of the Organization for Economic Cooperation and Development¹¹¹ (hereinafter OECD). The OECD had been considering the development of a new multilateral investment framework, which would benefit all parties who are signatories to the agreement.¹¹² The OECD has actively been a catalyst for the liberalization of foreign investment since its founding, but the MAI would be the first multilateral agreement that the organization has completed.¹¹³ The member states of the OECD were able to recognize the need for an agreement on investment, after experiencing the growth and the constant need for increased foreign direct investment.¹¹⁴

110. MAI Agreement, *supra* note 3.

111. See *OECD Web Page* (visited Sept. 23, 1998) <<http://www.oecd.org/about/member-countries.html>>. The OECD was established in 1961 as a forum for the discussion and attempted coordination of the economic policies of the world's industrial democracies.

112. See Camponovo, *supra* note 7, at 182.

113. See *id.*

114. See *OECD Web Page, OECD Member Countries* (visited Sept. 23, 1998) <<http://www.oecd.org/about/member-countries.html>>. (The OECD is primarily a developed country organization. Its membership includes the following 29 countries: Australia, Austria, Belgium, Canada, the Czech Republic, Denmark, Finland, France, Germany, Greece, Hun-

In order to address this need, the OECD ministers established a Negotiating Group at the OECD 1995 Ministerial meeting to begin negotiating the MAI. The beginning of this process was of particular importance to the United States because of the numerous private investors from the U.S. who participate through foreign direct investment.¹¹⁵ Other OECD members are equally interested in the completion. Countries such as France, Germany, Japan, the United Kingdom, along with the U.S., increased their outflows from \$32 billion in the early 1980s to an estimated \$146 billion in 1993.¹¹⁶ It is these billions of dollars that the OECD hopes to continue and increase with the implementation of the MAI.

The goals of the OECD in establishing the MAI, include liberalization of investment measures, post-establishment investment protection and an effective dispute settlement mechanism providing for both state-to-state and investor-to-state disputes.¹¹⁷ The OECD feels that the MAI, in providing these protections, will foster the growth of foreign direct investment. The need for foreign direct investment is greatest among emerging economies to develop and improve the infrastructure.¹¹⁸ It is estimated by the World Bank that Asia alone will require \$1.5 billion in the next ten years.¹¹⁹ The reality is that these funds will be unavailable from public sources; only private investors will be able to provide the needed amounts of capital.¹²⁰ In order to provide these funds, the private

gary, Iceland, Ireland, Italy, Japan, Korea, Luxembourg, Mexico, The Netherlands, New Zealand, Norway, Poland, Portugal, Spain, Sweden, Switzerland, Turkey, the United Kingdom, and the United States).

115. United Nations Conference on Trade and Development, Division on Transnational Corporations and Investment, *World Investment Report 1995*, at 15 (1995). (In 1993 approximately \$69 billion in capital flowed out of the United States into foreign markets, far surpassing prior estimates which placed the amount of United States capital invested abroad at \$50 billion. The United Nations estimates the outflow of investment from the United States to be \$46 billion in 1994, approximately 23 per cent of global investment capital).

116. See *id.* (The United Nations expects this figure to decrease somewhat in 1996, estimating the contribution of investment capital provided by these five countries to be \$132 billion).

117. Communiqué of the Meeting of the OECD Council at Ministerial Level, at 3, OECD Doc. SG/PRESS(95) 41 (1995); Robert Ley, *The Multilateral Agreement on Investment: Some Questions and Answers*, OECD OBSERVER, Dec. 1996, at 28,29 (special edition for the WTO Ministerial Conference explaining that high standards refers primarily to the quality of the investment environment in terms of market access and legal security). [hereinafter Communiqué].

118. Joanna R. Shelton, *The OECD Web Page*, (visited Sept. 23, 1998), <<http://www.oecd.org/daf/crmis/mai/shelton.htm>>. (These remarks are from the keynote address of the OECD Deputy Secretary-General Joanna R. Shelton at the Symposium on the MAI, October 20, 1997 in Cairo, Egypt).

119. See *id.*

120. See *id.*

investor would prefer a stable multilateral discipline guaranteeing for liberal and non-discriminatory treatment, thus the MAI.¹²¹ The OECD intends to address non-discrimination and treatment, through the familiar principal of national treatment, that is established in bilateral treaties.¹²² This national treatment is applied to both the pre-establishment and post-establishment phases, thus protecting the investor.¹²³

The MAI will be of a freestanding international treaty with an existence separate from the other OECD instruments, and it will be open to membership to all interested countries, both OECD members and non-OECD members.¹²⁴ The structure of the MAI will be composed of fundamental pillars of construction. These pillars of MAI will include the definition of investment, obligation of the parties, and the dispute settlement system. The definition of investment is at the core of the MAI agreement, which is the intention of the OECD members. The OECD intends to create a broad asset-based definition, covering not only direct investment, but also includes portfolio investment.¹²⁵ Both tangible and intangible assets are to be covered under the MAI.¹²⁶ The obligations of the agreement contribute to the structural framework of the MAI and provide the needed stability when considering the complex issue of foreign direct investment. These important obligations are to include national treatment and most-favored nation provisions.¹²⁷ There has been introduction of a special topic provision to be considered in the agreement, which are based upon the results of other policies and their affect on individual investors.¹²⁸

Another important obligation provided for in the MAI is that of non-

121. *See id.*

122. *See id.*

123. *See id.*

124. *See Burt, supra* note 1, at 1041. (Argentina, Brazil, Chile, Hong Kong, China, and Slovakia are countries that are non-members of the OECD, but are seriously considering being signatories of the MAI).

125. *See* May 1997 MAI Draft, *supra* note 3, at art. II § 2. (Although the MAI will define investment broadly, the May draft indicates that an interpretative note will be inserted into the agreement to indicate that in order to qualify as an investment under the MAI, an asset must have the characteristics of an investment, such as the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk.) *See also* United States Model Bilateral Investment Treaty, *supra* note 16. (Distinct from direct investment is portfolio investment, over which the investor exercises no control. Although international investment agreements tend not to address portfolio investment, there is no universal consensus as to the scope of Model Bilateral Investment Treaty considers intellectual property and rights conferred under licenses and permits as protected investments).

126. *See* Communiqué', *supra* note 117, at 13. (Note that the MAI will use an asset based definition versus a more restrictive enterprise based definition).

127. *See* Shelton, *supra* note 118, at 3.

128. *See id.*

discrimination in privatization. This obligation includes the ability to bring in key personnel and create equal rights for foreign investors to compete for the ownership of state enterprises.¹²⁹ The dispute settlement system, as set forth in the MAI, is considered to be one of the strongest parts of the agreement.

The scope of the MAI will include all forms of investment coming from MAI investors.¹³⁰ The OECD intends to apply MAI discipline to all sectors and to all forms of governments.¹³¹ The establishment of enterprises and the activities of established foreign-owned or controlled businesses will be within the parameters of the MAI scope provision.¹³² The OECD is predicting that the MAI will extend beyond traditional foreign direct investment to include portfolio investment and intangible assets.¹³³ The possibilities include discussion on property rights, indirect investment, concessions, public debt and real estate.¹³⁴

The OECD has made it clear that the MAI is intended to provide sweeping protection for investors and investment of signatory countries. The investor and investment protection provision of the MAI was one of the initial agreements of the negotiation sessions.¹³⁵ These provisions will be similar to the standards of treatment for investments established in BITs.¹³⁶ According to the OECD, the latest draft contains the following elements: "(1) general treatment of the investor and the investments; (2) expropriation and compensation; (3) protection from strife; (4) transfer of funds; (5) subrogation; and (6) protection of existing investment."¹³⁷ The MAI will closely resemble numerous BITs, as it was never the intention

129. *See id.*

130. *See* Report by the MAI Negotiating Group, May 1997, (visited Sept. 23, 1998), <<http://www.oecd.org/daf/cmisis/mai/MAIRAP97.htm>>. (This progress report was presented by the MAI Negotiating Group to the OECD Council meeting at the Ministerial level in May 1997.) [hereinafter MAI Negotiating].

131. *See* Dr. Joachim Karl, *The OECD Web Page*, (visited Sept. 23 1998), <http://www.oecd.org/daf/cmisis/mai/Karl.htm>. (From the comments of Dr. Joachim Karl, Federal Ministry of Economics, Germany at the Symposium on the MAI October 20, 1997 in Cairo, Egypt. Dr. Karl was speaking on the topic of protection in investors and investment in the MAI).

132. *See* MAI Negotiating, *supra* note 130, at 2.

133. *See id.*

134. *See id.*

135. *See* Multilateral Agreement on Investment: Progress Report by the MAI Negotiating Group, OECD Doc. OECD/GD/(96)78 (1996).

136. *See* Burt, *supra* note 1, at 1049.

137. Karl, *supra* note 131. (Discussions are going on of whether to include a provision protecting the investor rights arising from individual contracts that have been concluded between an investor and the host country. Furthermore, a final decision still has to be made on how the MAI provisions on investment protection relate to the respective rules in other agreements, e.g. the bilateral investment protection agreements).

of the negotiators to “re-invent the wheel;” however, it was necessary to add “more spokes in order to strengthen the whole vehicle.”¹³⁸

The introductory article of general treatment provides that the MAI will require that investment receive fair and equitable treatment as well as full and constant protection with security.¹³⁹ The members have agreed that the operation, and management, maintenance, use, enjoyment, or disposal of an investment shall be protected.¹⁴⁰ There is still debate as to these activities, considering if unreasonable and discriminatory state measures shall be prohibited, or whether it is sufficient that these measures are either unreasonable or discriminatory.¹⁴¹ Supporters of this cumulative approach felt it would go too far to prohibit measures that are only unreasonable.¹⁴² Those who are also against this new argument say it would be too restrictive to cover only discriminatory measures because a host country may severely interfere with the activities of an investor without discrimination necessarily taking place.¹⁴³

The expropriation and compensation provisions are firmly established in the MAI. The OECD members have declared that expropriation is only permitted if its: 1) for a purpose which is in the public interest; 2) non-discriminatory; 3) against payment of prompt, adequate and effective compensation; 4) and in accordance with due process of law.¹⁴⁴ One of the questions to arise concerns what is compensation the investor can claim in case payment has been delayed.¹⁴⁵ It was also decided that the host country would pay the interest at a commercial rate established on a market bases for the currency of payment from the date of expropriation until the date of actual payment.¹⁴⁶ There has been some discussion on the notion of including language to cover exchange rate risk on the amount of compensation.¹⁴⁷

138. *Id.*

139. *See id.*; *See also* Burt, *supra* note 1, at 1045. (Treatment must in no case be less favorable than that required by international law.)

140. *See* Karl *supra* note 131.

141. *See id.*

142. *See id.*

143. *See* Dr. Joachim Karl, *The OECD Web Page*, (visited Sept. 23 1998), <<http://www.oecd.org/daf/cm/mai/Karl.htm>>.

144. *See id.* (There is agreement on the following definitions: “prompt” means without delay; “adequate” means that compensation must be fully equivalent to the fair market value immediately before the expropriation takes place, without any deduction due to the fact that the pending expropriation became publicly known in advance; “effective” means that compensation shall be fully reliable and freely transferable; “due process of law” includes the right of an investor to have its case reviewed by a judicial authority or any other independent body in the host country). *Id.*

145. *See id.*

146. *See id.*

147. *See id.* (It is unclear whether an additional provisions according to which the host

The protection from strife provision covers investors when they have suffered losses in the host country due to war, any other armed conflict, state of emergency or similar events.¹⁴⁸ The host country will have an obligation to compensate the investor in two situations: (1) in the case that the armed forces of the host country requisition the property of the investor; and (2) in the case that the armed forces of the host country destroy the property (excluding any destruction necessary by the circumstances).¹⁴⁹

Another major stabilizer of the MAI is the transfer of funds provision, which establishes that all currency related to an investment may be freely transferred without delay.¹⁵⁰ The broad definition of payments includes: "initial capital, returns, compensation, proceeds from the sale or liquidation of the investment, earnings and other remuneration of personnel."¹⁵¹ There are some points of debate for the members of the OECD, which include: (1) a safeguard clause which would only be allowed in exceptional circumstances (*i.e.*, serious balance-of-payment); (2) the currency in which transfers may be made; and (3) whether a clause is needed dealing with the extension where there is no market rate of exchange.¹⁵²

Subrogation and protection of existing investment provisions are equally important in the creation of the MAI. The subrogation provision accepts the principle that if the home government compensates an inves-

country would also bear the exchange rate risk in the case of a delay. This means that in case of a devaluation of the host country's currency between the time of expropriation and the time of actual payment, the host country would have to compensate the investor for this devaluation as well. After lengthy discussions the large majority supports the idea that the MAI should not contain an explicit provisions on the subject. However, an interpretive statement would be added to the text according to which adequate compensation includes compensation for devaluation losses).

148. *See id.*

149. *See* Dr. Joachim Karl, *The OECD Web Page*, (visited Sept. 23 1998), <<http://www.oecd.org/daf/cmisi/mai/Karl.htm>>. (In principle, the host country shall not be obliged to pay compensation in such cases. Rather, the Mai stipulates that if the host government decides to pay compensation, the principles of national treatment and most favored nation treatment shall apply).

150. *See id.*

151. *See id.*

152. *See id.* (First any restriction has to be in conformity with the obligation of the host country under the IMF Agreement. Furthermore, any restriction would be temporary, and subject to review every six months. Second the two options for such a definition are currently discussed. While the first alternative defines a "freely convertible currency" as one which is widely traded in international foreign exchange markets and widely used international transactions, the second option refers to such a currency which is, in fact, widely used to make payments for international transactions and is widely traded in the principle exchange markets. Thirdly it has been suggested that in such a situation, the rate to be used shall be the most recent exchange rate for conversion of currencies into Special Drawing Rights).

tor with regard to a loss it has occurred in the host country, the former country enters into all rights and claims that the investor has, *vis-à-vis* the host country.¹⁵³ The delegates agree in principal that the MAI should cover investments, whether or not the investments were entered into before or after the complementary of the agreement.¹⁵⁴

Discussion continues on the MAI regarding protection of investors' rights from individual contracts involving the host country and the investor. The language of the provision may establish that each contracting party respects any other obligation it has undertaken in an individual investment contract, with a specific investor.¹⁵⁵ According to the OECD, there are currently three options receiving consideration: (1) the MAI would not contain such a provision; (2) only the MAI dispute settlement mechanism would be available in a breach of the contract; and (3) the MAI would contain a respect clause, providing the possibility of recourse through the MAI dispute settlement mechanism.¹⁵⁶

The most important aspect of the MAI for the individual investor is the dispute mechanism. The members of the OECD intend to establish the MAI as an agreement with high standards for the treatment and protection of investments.¹⁵⁷ To ensure that the intentions are integrated into the MAI, an effective dispute settlement mechanism has been established. The dispute settlement provision provides for both state-to-state arbitra-

153. *Id.* (Two issues are still under consideration; first, a few delegations believe that the provision should make it clear that it deals only with compensation of non-commercial risks. Second, one delegation has serious difficulties to allow the home country of the compensated investor to proceed – as the latter's successor in rem – under the rules of investor-state-arbitration).

154. See Karl, *supra* note 131. (Some delegations would like to add a provision to the effect that the MAI does not apply to claims arising out of events which have occurred, or to claims that have been settled, prior to its entry into force. Furthermore, some delegations suggested yet another addition according to which a change in the form in which assets are invested does not affect their character as investments.)

155. See Dr. Joachim Karl, *The OECD Web Page*, (visited Sept. 23 1998), <<http://www.oecd.org/daf/cmisi/mai/Karl.htm>>.

156. *Id.* (The main difference between the first and the second option on the one hand, and the third option on the other had, would be that only in the latter case, the breach of the investment a contract by the host country would always amount to a violation of the MAI. Consequently, the investor and its home country would be entitled to the remedies that the Mai provides in such a case).

157. See Marino Baldi, *The OECD Web Page*, (visited Sept. 23, 1998) <<http://www.oecd.org/daf/cmisi/mai/baldi4.htm>>. (Ambassador Marino Baldi is the Deputy-Director of the Federal Office of External Economic Affairs in Bern, Switzerland and the Chairman of the Expert Group N-1 on Dispute Settlement and Geographical Scope. Ambassador Baldi outlined these points at the Symposium on the MAI, October 20, 1997 in Cairo, Egypt).

tion and the increasingly important investor-to-state arbitration.¹⁵⁸ The state-to-state dispute mechanism has little effect on the individual investor, because the investor stands little chance of ever receiving the national support that is needed for such a claim. The investor-to-state dispute settlement mechanism will be covered in greater detail, because of its direct impact upon the investor.

The state-to-state arbitration provision is primarily composed of five basic points.¹⁵⁹ The first follows the precedent set forth by the World Trade Organization, which regains parties to resolve their dispute through consultations.¹⁶⁰ If the parties fail to come to an agreement, then at the request of any of the contracting parties of the dispute, the dispute can be submitted to an arbitration committee.¹⁶¹ The second fundamental provision is that all arbitration panels will consist of either three or five members.¹⁶² The three members of the panel will be selected by the agreement of the parties to the claim, based on a proposal made by the Secretary-General of ICSID.¹⁶³ Either of the parties to the dispute can choose the five-member panel. If this avenue is pursued then each party will appoint one additional member.¹⁶⁴

The third point allows the parties to a dispute to modify the rules, if the parties to the action agree.¹⁶⁵ The fourth point establishes that the substantive law application of the MAI would be relied upon for disputes, but international law and domestic law could be considered for certain relevant situations.¹⁶⁶ The final pillar of the state-to-state arbitration provision, is that the awards issued by an arbitral panel would be final and binding upon the parties to the dispute.¹⁶⁷ Remedies available to the state include: a declaration that the action is in contravention of a provision of the MAI; a pecuniary award; a recommendation that a party bring its

158. See Burt, *supra* note 1, at 1045, 1046.

159. See Baldi, *supra* note 157.

160. See *id.*

161. See *id.*

162. See *id.*

163. See *id.*

164. See *id.* (This represents a compromise between those favoring an arbitrator being appointed by each of the two disputing parties, as in most bilateral investment agreements, and those believing that a majority of non-party arbitrators is preferable for a multilateral agreement, which should develop an institutional jurisprudence).

165. See Baldi, *supra* note 157. (If gaps in the MAI rules appear during a dispute and the parties are not able to agree on supplementary rules, the PCA Optional Rules for Arbitration Disputes between two state UNCITRAL rules serve as default rules).

166. See *id.*

167. See *id.* (An award shall be provided first to the parties as a draft to give them the opportunity to comment. This procedural safety valve should help to avoid aberrant decisions, particularly with respect to question of fact).

measures into conformity with the MAI; or any relied to which the party against who the award is made consents.¹⁶⁸

The vitally important investor-to-state arbitration provision is agreed upon by the members and should provide the investor with the broadest powers for taking a dispute directly against the breaching state.¹⁶⁹ The investor-to-state provision will borrow heavily from the previously discussed BITs.¹⁷⁰ According to the OECD, an investor may choose to submit claim for resolution: (1) to any competent court or administrative tribunal of the contracting party to the dispute; (2) in accordance with any dispute settlement procedure agreed on prior to the dispute arising; or (3) under the procedures provided for by the MAI.¹⁷¹ The parties to the dispute will consent to arbitration through adoption of the MAI agreement, and thus be subject to either: (1) the ICSID rule of arbitration; (2) the rules of the ICSID additional facility; (3) the UNCITRAL; or (4) the ICC Court of Arbitration.¹⁷² Included will be a provision for consolidating multiple claims, thus giving investors whose claims are subject to consolidation the chance to agree on the nomination of arbitrators and on the choice of the arbitration system.¹⁷³ The remedies available on the investor-to-state arbitration have broadened when compared with the state-to-state remedies.¹⁷⁴ These available remedies include: a declaration when the contracting party has failed to comply with its obligations under the MAI; pecuniary compensation; restitution in kind; and with the consent of the parties to the dispute, any other form of relief.¹⁷⁵ If restitution in kind were unavailable due to practicality circumstances, then the party would be able to substitute damages.¹⁷⁶

The MAI is a controversial agreement for a number of reasons including national sovereignty, environmental concerns, and skepticism to the accession of non-developed countries. There is concern that these problems will limit the ultimate value of the MAI to the world economic

168. *See id.* (This may include restitution in kind).

169. *See* Burt, *supra* note 1, at 1046.

170. *See* Mauritz Lugard, *Toward An Effective International Investment Regime*, 91 AM. SOC'Y INT'L L. PROC. 485, 498. (This was a panel convened at 10:15 A.M., Saturday April 12, 1997. Mr. David H. Small offered an insiders perspective on the OECD negotiations, with particular emphasis on the dispute resolution provisions of the MAI. Mr. Small is the former Assistant Legal Advisor on Economic and Business Affairs at the State Department, where he supervised all investment treaty negotiations. He currently serves as Deputy Legal Counsel to the OECD in Paris, France).

171. *See* Baldi, *supra* note 157.

172. *See id.*

173. *See* Lugard, *supra* note 170, at 498.

174. *See id.*

175. *See* Baldi, *supra* note 157.

176. *See* Lugard, *supra* note 170, at 499.

community.¹⁷⁷ The OECD often looks at foreign direct investment from a biased perspective, because of its members, who are the developed countries of the world.¹⁷⁸ While there may be substance to the aforementioned agreements, it cannot be dismissed that many countries throughout the world need foreign direct investment. The implementation of the MAI would provide the availability of capital, technology, managerial and market skills, and information flows to host countries at unprecedented levels.¹⁷⁹ These resources would create opportunity for non-developed countries to make up economic ground through these avenues.¹⁸⁰ The contribution of foreign direct investment is crucial to capital formation, but other benefits include: the promotion of local entrepreneurs and business through backward and forward linkages; the enhancement of access to foreign markets through the distribution networks of multinational enterprises and through facilitating exports by domestic firms; the promotion of competition on the domestic market; and the modernization of basic infrastructure services (such as in the areas of finance and telecommunications).¹⁸¹ The OED has considered studies, in the creation of the MAI, which address the policy environment that would be the most successful in attractive foreign direct investment.¹⁸² In looking at the various studies, the OCED has concluded that open trade regimes are conducive not only to attracting more foreign direct investment, but also to reaping greater benefits from it than are closed trade regimes.¹⁸³

The concept that should be clear to the non-developed countries of the world is that the capital that was once available from public sources is no longer easily accessible. In order for non-developed countries to continue to improve their existence, they must pursue capital from previous investors. Thus, in order to increase the amounts of capital available from

177. See Burt, *supra* note 1, at 1049.

178. See *id.*

179. See Adrian Otten, *The OECD Web Page*, (visited Sept. 23, 1998) <<http://www.oecd.org/daf/cmismai/otten1.htm>>. (Adrian Otten is the WTO Secretariat who was speaking on the benefits of Foreign Direct Investment at the Symposium on the MAI, October 20, 1997 in Cairo, Egypt).

180. See *id.*

181. See *id.* (In regard to the effect of foreign direct investment on the balance of payments, the situation of course varies according to the type of foreign direct investment, but the overall situation that emerges from the studies is that foreign direct investment is generally associated with an expansion of home country exports and can play an important role in their diversification).

182. See *id.* (These include political and macro-economic stability, open and stable trade and investment regimes, improvements in transport and telecommunications infrastructure, adequate protection of property rights and a predictable institutional environment without excessive red tape).

183. See *id.*

private investors, these countries must agree upon a standard that is acceptable to the individual investor. The MAI goes far in providing the necessary provisions and protections that many risk adverse investors demand before making a financial leap of faith. This agreement assures the investor of the ability to bind and enforce a contract with the state, under the investor-to-state arbitration provision. The unavailability of capital has, in effect, strengthened the bargaining position of the investor, and perpetuated the creation of the investor friendly MAI. While the MAI has yet to be implemented, it will eventually effect the ever-changing world of foreign direct investment. The MAI is beneficial to the investor in different respects, but leave no doubt that the beneficiaries will be the citizens of the signatory parties to the agreement.

IV. CONCLUSION

Beginning with the FCN and continuing through the MAI, investment treaties have protected and elevated the international investor. The evolution of the investment treaties has consistently improved the international business environment for the private investor, thus enabling the investor to reduce risk and provide the necessary finances for development. The evolutionary process of the investment treaty was introduced by a series of agreements established in the Pre-North American Free Trade Agreement phase. The first of these agreements, the FCNs, provided a solid foundation for investors. FCNs identified specific areas of concern in international investment that would become cornerstones for future agreements. While the FCNs value to the investor cannot be underestimated, the agreement failed to address many of the modern investors' needs. The second agreement, the BIT, introduced the investor-to-state arbitration mechanism, thus releasing the investor from reliance on their state, in time of dispute. The GATT, the third agreement, failed to substantially address investment until the Uruguay Round. One of the improvements established in the GATT Uruguay Round was the inclusion of intellectual property.

The second phase of this evolutionary process, the NAFTA agreement, made substantial steps to empower the investor. The investor-to-state dispute mechanism was the most comprehensive to date and has since been the avenue followed for three precedent setting claims. Only restricted to the signatory parties of Canada, Mexico and United States, the NAFTA agreement provides the necessary treaty mold for the final phase of the evolutionary process.

The third and most recent phase of the investment treaties is the MAI. While the MAI is yet to be adopted, it will be unquestionably the most comprehensive investment treaty. With the adoption of the MAI, the investor of one of the current twenty-nine member countries would have

access to unparalleled protections. Similar to NAFTA, the MAI investor-to-state provision would extend the ability of the investor to take any of the breaching parties to arbitration.

The initiation of the MAI and future treaties should continue to provide expanded opportunities for the international investor and the necessary finances for expansion of the world economy. Expansion of the world economy should promote political stability and an increased standard of living for the citizens of the international community.