Stanford – Vienna
Transatlantic Technology Law Forum

A joint initiative of
Stanford Law School and the University of Vienna School of Law

TTLF Working Papers

No. 57

Intellectual Property, Investment and the World Trade Organization (WTO): A Historical Account

Pratyush Nath Upreti

2020

TTLF Working Papers

Editors: Siegfried Fina, Mark Lemley, and Roland Vogl

About the TTLF Working Papers

TTLF's Working Paper Series presents original research on technology, and business-related law and policy issues of the European Union and the US. The objective of TTLF's Working Paper Series is to share "work in progress". The authors of the papers are solely responsible for the content of their contributions and may use the citation standards of their home country. The TTLF Working Papers can be found at http://ttlf.stanford.edu. Please also visit this website to learn more about TTLF's mission and activities.

If you should have any questions regarding the TTLF's Working Paper Series, please contact Vienna Law Professor Siegfried Fina, Stanford Law Professor Mark Lemley or Stanford LST Executive Director Roland Vogl at the

Stanford-Vienna Transatlantic Technology Law Forum
http://ttlf.stanford.edu

Stanford Law School
Crown Quadrangle
559 Nathan Abbott Way
Stanford, CA 94305-8610

University of Vienna School of Law
Department of Business Law
Schottenbastei 10-16
1010 Vienna, Austria

About the Authors

Pratyush Nath Upreti is a lawyer admitted to the Nepal Bar Council. He is a Doctoral Researcher at Sciences Po Law School, Paris and currently a visiting research fellow at the Max Planck Institute for Innovation and Competition in Munich, Germany. Previously, he was a visiting researcher at the Centre for Intellectual Property Policy & Management (CIPPM) of Bournemouth University in the UK. He has taught Intellectual Property and International Trade Law at the Europe-North America and the Europe-Asia Programs of Sciences Po. Pratyush also serves as a member on the editorial board for the Global Trade and Customs Journal published by Kluwer Law International. He holds a BSc. LL.B. (Hons) degree from KIIT University, India, and an LL.M. degree from Maastricht University, Netherlands as a UM High Potential Scholar. His interests include intellectual property law, international investment law, and WTO related issues. He has been a TTLF Fellow since June 2018.

Acknowledgements

The author would like to express his gratitude to Professor Michel Vivant and Professor Régis Bismuth for their feedback on a previous draft of this paper. The modified version of this paper is forthcoming in Christophe Geiger (ed), *Research Handbook on Intellectual Property and Investment Law* (Edward Elgar Publishing, 2020).

General Note about the Content

The opinions expressed in this paper are those of the author and not necessarily those of the Transatlantic Technology Law Forum or any of its partner institutions, or the sponsors of this research project.

Suggested Citation

This TTLF Working Paper should be cited as:
Pratyush Nath Upreti, Intellectual Property, Investment and the World Trade Organization (WTO): A Historical Account, Stanford-Vienna TTLF Working Paper No. 57, http://ttlf.stanford.edu.

Copyright

Abstract

Intellectual property (IP) and international investment law are highly self-contained regimes which have their own institutions, actors, and rationales. This paper analyzes the historical narratives of IP, investment and the World Trade Organization (WTO) and provides a comprehensive overview on the historical development of foreign investment protection at the international level. It traces the historical development of international investment agreements (IIAs) by investigating pre- and post- World War II Friendship, Commerce and Navigation (FCN) treaties in order to understand the rationale of including IP in those agreements. It then proceeds to examine the treatification of international investment law and the quest of investment to find a place in the multilateral system with reference to the negotiation of the Multilateral Investment Agreement (MAI) under the Organisation for Economic Co-operation and Development (OECD), followed by attempts to revive a multilateral framework on investment under the auspices of the WTO.

Keywords: Multilateral Investment Agreement (MAI), intellectual property (IP), investment law, World Trade Organization (WTO), Friendship, Commerce and Navigation (FCN) treaties, international investment agreement (IIA)

TABLE OF CONTENTS

1. Introduction

In past decades, the global economy has evolved at a rapid pace. Bilateral, regional, free and mega-regional trade and investment agreements covering intellectual property chapters are on the rise. International investment agreements (IIAs)[1] are the source of international investment law,[2] which was earlier governed by general international law before it became *'exotic'*[3] and highly specialized knowledge.[4] The trade liberalization and a non-trade agenda gave rise to the Agreement on Trade-Related Aspects of Intellectual Property (TRIPS) which commodified intellectual property (IP) as 'tradable' goods, and further, through TRIPS Plus agreements.[5] IP and international investment law are highly self-contained regimes which have their own institutions, actors, and rationales. Thus, potential for friction among these fields is high. The relationship between IP, trade, and investment can be traced back to the period of World War I. However, recent cases like *Philip Morris v Uruguay*,[6] *Eli Lilly v.*

---

[1] For the purposes of this paper, the expression international investment agreements (IIA) refers to an agreement between two sovereign states and includes Free Trade Agreements (FTA), Bilateral Investment Treaties (BITs), Preferential Trade Agreements and Mega- Regional Trade Agreements. It specifically refers to three types of IIAs: (i) bilateral investment treaties, commonly known as 'BITs', (ii) regional investment treaties signed by a group of states within a single region and (iii) chapters of integrated trade and investment agreements that can be signed either at the bilateral or regional level.

[2] For a general discussion of sources of international investment law *see* Rudolf Dolzer and Christoph Schreuer, *Principles of International Investment Law* (Oxford University Press, 2nd edition, 2012) 12-19.

[3] International Law Commission, 'Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law', Report of the Study Group of the International Law Commission, UN Doc. A/CN.4/L.682 (13 April 2006) [Finalized by Martti Koskenniemi] 11, para 8.

[4] *Ibid*.

[5] See generally, Rochelle Dreyfuss and Susy Frankel, 'From Incentive to Commodity to Asset: How International Law is Reconceptualizing Intellectual Property' (2015) 36(4) Michigan Journal of International Law 557-601.

[6] *Philip Morris Brands Sarl, Philip Morris Products S.A and Abal Hermanos S.A v. Oriental Republic of Uruguay*, ICSID Case No: ARB/10/07, Award (8 July 2016).

Government of Canada[7] and ongoing *Bridgestone v. Panama*[8] where intellectual property rights (IPRs) has been sought through international investment law and treaties through investor- state dispute settlement (ISDS) have demonstrated debate and discussion[9] giving rise to the relatively unexplored debate of IPRs–ISDS

[7] *Eli Lilly and Company v The Government of Canada*, UNCITRAL, ICSID Case No. UNCT/14/2, Award (16 March 2017).

[8] *Bridgestone Licensing Services, Inc. And Bridgestone Americas, Inc. v. Republic of Panama*, ICSID Case No. ARB/16/34, Decision on Expedited Objections (13 December 2017)

[9] See generally, Cynthia M. Ho, 'Sovereignty Under Siege: Corporate Challenges to Domestic Intellectual Property Decisions' (2015) 30(1) Berkeley Technology Law Journal 213- 304; Brook K. Baker and Katrina Geddes, 'Corporate Power Unbound: Investor-State Arbitration of IP Monopolies on Medicines- Eli Lilly v. Canada and the Trans-Pacific Partnership Agreement' (2015) 23(1) Journal of Intellectual Property Law 3-54; Henning Grosse Ruse-Khan, 'Litigating Intellectual Property Rights in Investor-State Arbitration: From Plain Packaging to Patent Revocation' (Max Planck Institute for Innovation and Competition Research Paper No. 14-13, 2014); James Gathii and Cynthia H, 'Regime Shift of IP Lawmaking and Enforcement from WTO to the International Investment Regime'(2017) 18(2) Minnesota Journal of Law, Science & Technology 427-515; Bryan Mercurio, 'Awakening the Sleeping Giant: Intellectual Property Rights in International Investment Agreements' (2012) 15(3) Journal of International Economic Law 871- 915; Pratyush Nath Upreti, 'IP Licence as an Investment: Insights from Bridgestone v. Panama' (2018) 1(1) Stockholm Intellectual Property Law Review 16-27; Daniel J. Gervais, 'Investor-State Dispute Settlement: Human Rights and Regulatory Lessons from Lilly v. Canada' (2018) 8 UC Irvine Law Review 459-511; Rochelle Dreyfuss and Susy Frankel, 'Reconceptualizing ISDS: When is IP an Investment and How Much Can States Regulate It? (2018) 21(2) Vanderbilt Journal of Entertainment & Technology Law 377-415 ; Susy Frankel, 'Interpreting the Overlap of International Investment and Intellectual Property Law' (2016) 19(1) Journal of International Economic Law 121-143; Pratyush Nath Upreti, 'Enforcing IPRs Through Investor-State Dispute Settlement: A Paradigm Shift in Global IP Practice' (2016) 19(1/2) Journal of World Intellectual Property 53-82; Lisa Diependaele, Julian Cockbain and Sigrid Sterckx, 'Eli Lilly v Canada: the uncomfortable liaison between intellectual property and international investment law' (2017) 7(3) Queen Mary Journal of Intellectual Property 283-305; Henning Grosse Ruse-Khan, 'Challenging Compliance with International Intellectual Property Norms in Investor-state Dispute Settlement' (2016) 19(1) Journal of International Economic Law 241-277; Pratyush Nath Upreti, 'Philip Morris v Uruguay: A Breathing Space for Domestic IP Regulation' (2018) 40(2) European Intellectual Property Review 277-284; Boris Kasolowsky and Eric Leikin, 'Eli Lilly v. Canada: A Patently Clear-Cut Dismissal on the Facts, but Opening the Door for Future Claimants on the Law' (2017) 34(5) Journal of International Arbitration 889-900; Pratyush Nath Upreti, 'Eli Lilly v. Government of Canada: The tale of promise v expectation' (2018) 21 (3) International Arbitration Law Review 84-89.

interactions. There is existing literature which has touched upon several aspects of the interactions.[10] This paper aims to analyze the historical narratives of IP, investment and the World Trade Organization (WTO). In order to do so, this paper is divided into three further main parts. The first part (section 2) will trace the historical development of IIAs and investigate pre- and post-World War II Friendship, Commerce and Navigation (FCN) Treaties to understand the rationale of including IP in those agreements. The second part (section 3) will discuss the treatification of international investment law and the quest of investment to find a place in the multilateral system. The third part (section 4) particularly looks at the negotiation of the Multilateral Investment Agreement (MAI) under the Organisation for Economic Co-operation and Development (OECD), followed by attempts to revive a multilateral framework on investment under the auspices of the WTO.

2. The Rise of Friendship Commerce and Navigation Treaties (FCN)

Before discussing the rise of FCN agreements, it is important to understand the historical development of IIAs that can be traced back to the colonial period where two opposing schools of thought on the trade and investment rights of alien traders existed. One school viewed trade and investment rights as natural rights and therefore held that an alien should be given equal status as a national.[11] Elihu Root narrates the situation as:

> When a man goes into a foreign country to reside or to trade, he submits himself, his rights, and interests to the jurisdiction of the courts of that country. He will naturally be at a disadvantage in litigation against citizens of the country. He is

[10] *Ibid*.
[11] M. Sornarajah, *The International Law on Foreign Investment* (Cambridge University Press, 3rd edition, 2010) 19.

> less familiar than they with the laws, the ways of doing business, the habits of thought and action, the method of procedure, the local customs and prejudices, and often with the language in which the business is done and the proceedings carried on […] so long as the government of that country maintains, according to its own ideas and for the benefit of its own citizens, a system of law and administration which does not violate the common standard of justice that is a part of international law; and so long as, in conformity with that standard, the same rights, the same protection, and the same means of redress for wrong are given to them as are given to the citizens of the country where they are.[12]

The other school viewed that an alien should adhere to higher standards than the national.[13] Both views were based on the idea that trade should be promoted and liberalized within the state and expand overseas.[14] However, in the nineteenth and twentieth centuries, international diplomacy[15] and economic relations on a reciprocal basis[16]were maintained through the bilateral treaty of the FCN.[17] Most of the FCN included all areas of law. For example, the US-Germany FCN[18] of 1954 covers

---

[12] Elihu Root, 'The Basis of Protection to Citizens Residing Abroad' (1910) 4 Proceedings of the American Society of International law at Its Annual Meeting (1907-1917) 26- 27.
[13] Sornarajah, n 11.
[14] *Ibid.*
[15] Herman Walker, Jr. 'Modern Treaties of Friendship, Commerce and Navigation' (1958) 42 Minnesota Law Review 805.
[16] Emily A. Arikaki, 'Appendix 1: Treaties of Friendship, Commerce and Navigation and Their Treatment of Service Industries' (1985) 7(1) Michigan Journal of International Law 344.
[17] John F. Coyle, 'The Treaty of Friendship, Commerce and Navigation in the Modern Era' (2013) 51 Columbia Journal of Transnational Law 306-311.
< https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2150260> accessed 20 August 2019.
[18] United States of America and Federal Republic of Germany– Treaty of Friendship, Commerce and Navigation (with Protocol and exchange of notes) (29 October 1954) [hereafter US-Germany FCN]
<https://treaties.un.org/doc/publication/unts/volume%20273/volume-273-i-3943-english.pdf> accessed 30 August 2019.

intellectual property,[19] property,[20] investment protection,[21] public health,[22] labor rights,[23] taxation,[24] human rights etc.[25] Surprisingly, most of the areas covered by the FCN are currently also being negotiated in new generation IIAs. The artist of the FCN treaty– the United States had signed thirteen treaties preceding World War II[26] and twenty-three post-World War II.[27] It is true that most of the FCN treaties were more visible in the nineteenth and twentieth centuries, but they were already prevalent during the early eighteenth century.[28] However, the meaning and rationale of such treaties changed over time. These older treaties cover areas which are discussed in the present IIAs without the use of the term 'friendship'. The rationale of using 'friendship' in early FCN treaties might have been a way to build trust among the countries involved. One commentator argues that reference to 'friendship' is seen as 'a cynical device for gaining special treatment in competition with other major powers, and access to resources'.[29] To some extent, this makes sense in the context of the post-World War II era where countries aimed for political and economic stability through the principle of non-discrimination. The subsequent shift from FCN to bilateral investment agreements (BITs) removed 'friendship' from these agreements. However,

[19] *Ibid*, art ix, x.
[20] US-Germany FCN, n 15, art v.
[21] US-Germany FCN, n 15, art i (i), art vii.
[22] US-Germany FCN, n 15, art ii (iv).
[23] US-Germany FCN, n 15, art iv.
[24] US-Germany FCN, n 15, art xi.
[25] US-Germany FCN, n 15, art iv.
[26] Todd S. Shenkin, 'Trade-Related Investment Measures in Bilateral Investment Treaties and the Gatt: Moving Toward a Multilateral Investment Treaty' (1994) 55 University of Pittsburgh Law Review 570 and Appendix B.
[27] *Ibid*, see appendix C.
[28] See, for example, Treaty of Friendship, Limits, and Navigation Between Spain and the United States (October 27, 1795); Treaty of Peace and Friendship Between the United States and Morocco (July 6, 1786).
[29] Heather Devere, 'Friendship in International Treaties' in Simon Koschut and Andrea Oelsner (eds), *Friendship and International Relations* (Palgrave Macmillan, 2014) 191.

one may argue that the presence of national treatment and most-favored nation treatment clauses still provide the spirit of 'friendship'.

The pre-World War I FCN treaties were aimed at creating a framework which would mutually benefit both the parties. The treatment based on reciprocal terms was focused on shipping,[30] territorial boundaries,[31] property rights,[32] and doing business[33] among others factors.[34] It is interesting to note that the pre-World War I FCN treaties do not indicate a reference to customary international law, therefore, the host state had no obligation towards preventing any unreasonable interference with an alien's investment.[35]After World War I, the principal source of norms protecting investment agreements was customary international law, which ensured a minimum standard of treatment for the alien's property.[36] However, the emergence of the *Calvo* Doctrine[37]

[30] See generally, Treaty of Peace and Amity Between the United States of America and Algiers (September 5, 1795).
[31] Treaty of Friendship, Limits, and Navigation Between Spain and the United States (October 27, 1795), art ii, iv.
[32] Convention of Friendship, Commerce, and Extradition Between the United States and Switzerland (November 25, 1850), art i, v.
[33] Convention of Peace, Amity, Commerce, and Navigation Between the United States and Republic of Chili (May 16 1832) art iv.
[34] See generally, Treaty of Friendship, Limits, and Navigation Between Spain and the United States (October 27, 1975).
[35] Chester Brown, 'The Evolution of the Regime of International Investment Agreements: History, Economics and Politics' in Marc Bungenberg et al (eds), *International Investment Law: A Handbook* (C.H. Beck, Hart, Nomos Publishing, 2015) 157.
[36] After the US-France FCN (1796) negotiation, John Adams emphasized alien property rights under international law: There is no principle of the law of nations more firmly established than that which entitles the property of strangers within the jurisdiction of another country in friendship with their own to the protection of its sovereign by all efforts in his power.
Cited in Rudolf Dolzer and Christoph Schreuer, *Principles of International Investment Law* (Oxford University Press, 1st edition 2008) 11, 11-24.
[37] See generally, Donald R. Shea, *The Calvo Clause: A Problem of Inter-American and International Law and Diplomacy* (University of Minnesota Press, 1995).

and the disagreement on the minimum standard of treatment[38] by capital importing states proved it to be an inadequate form of protection. The *Calvo Doctrine* gave foreign investors no favorable treatment as compared to nationals and confined investment remedies to its local courts, making domestic courts the only option for settling foreign investment disputes.[39] Hence, the post-World War II FCN treaties were more focused on protecting the investment from discriminatory treatment in a foreign market.[40] The rise of nationalization, expropriation of property and government involvement in business motivated a more extensive protection of foreign investment.[41] As a result, the post-World War II treaties had extended provisions relating to property protection[42] along with investment-related provisions constituting upwards of half the total provisions.[43] Having said that, the post-World War II FCN treaties did not escape criticism for their lack of enforcement mechanisms and remedies.[44] This later became one of the reasons for the proliferation of BITs. To conclude, the pre-World War II era witnessed a rise in FCN treaties consisting of trade and investment together with the primary objective of establishing commercial relations. Although these treaties focused on 'the protection of property rights and the

[38] Jean d'Aspremont, 'International Customary Investment Law: Story of a Paradox' in Tarcisio Gazzini and Eric De Brabandere (eds), *International Investment Law: The Sources of Rights and Obligations* (Leiden; Boston: Martinus Nijhoff, 2012) 11-12
[39] Shea, n 37.
[40] Gerald D. Silver, 'Friendship, Commerce and Navigation Treaties and United States Discrimination Law: The Right of Branches of Foreign Companies to Hire Executives "Of Their Choice"' (1989) 57(5) Fordham Law Review 767.
[41] Arikaki, n 16, 344.
[42] Coyle, n 17, 308.
[43] Herman Walker, Jr. 'Treaties for the Encouragement and Protection of Foreign Investment: Present United States Practice' (1956) 5(2) American Journal of Comparative Law 234.
[44] Arikaki, n 16, 347.

business interest of foreigners',[45] the property protection was then of secondary importance.[46] Whereas post-World War II FCN treaties considered trade and investment as the primary objective of those agreements.

2.1 Intellectual Property in FCN Treaties

The FCN treaties before World War I did not explicitly refer to IP, instead most of the treaties referred to property.[47] The inclusion of 'IP' or 'intangible property' or 'immovable property' became more common in the post-World War II FCN treaties. For example, the 1956 FCN between the US and Korea used expressions like 'patents, trade-marks, trade names, trade labels, industrial property of every kind'.[48] Similarly, it also referred to 'rights in immovable property permitted by the applicable laws of the other Party'.[49] There is very limited literature on the rationale for the inclusion of IP in FCN treaties. Kenneth J. Vandevelde, a prominent and highly acclaimed American scholar in the field reveals that, after World War II the contracting parties were reluctant to include IP in FCN treaties. According to Vandevelde, the US' first FCN

---

[45] Andrew Newcombe and Lluís Paradell, *Law and Practice of Investment Treaties: Standards of Treatment* (Kluwer Law International, 2009) 42-44.

[46] Kenneth J. Vandevelde, 'A Brief History of International Investment Agreements' (2005) 12 U.C. Davis Journal of International Law & Policy 161.

[47] See generally, US-Spain Treaty of Friendship, Limits, and Navigation, 1795; US-Prussia Treaty of Amity and Commerce 1785; US-Argentina Treaty of Friendship, Commerce and Navigation Between 1853; Austria-Hungary and the US Treaty of Commerce and Navigation 1829; US- Chili Convention of Peace, Amity, Commerce, and Navigation 1832; US-Ottoman Empire Treaty of Commerce and Navigation 1862; US-Belgian Treaty of Commerce and Navigation 1845; Brazil-US Treaty of Amity, Commerce, and Navigation 1828; US-Bolivia Treaty of Peace, Friendship, Commerce, and Navigation 1858; Venezuela-US Treaty of Peace, Friendship, Navigation and Commerce 1836.

[48] US-Korea Treaty of Friendship, Commerce and Navigation (November 28,1956) art x.
< https://www.wipo.int/edocs/lexdocs/treaties/en/kr-us1/trt_kr_us1.pdf > accessed 2 October 2018.

[49] *Ibid*, art ix.

negotiation[50] after World War II with China received some attention when the Chinese negotiators objected to a provision related to IP. The Chinese delegation was not happy with Article IX of FCN between US-China that reads as:

> The nationals, corporations and associations of either High Contracting Party shall be accorded within the territory of the other High Contracting Party effective protection in the exclusive use of inventions, trademarks and trade names, upon compliance with the applicable laws and regulations, if any, respecting registration and other formalities which are or may hereafter be enforced by the duly constituted authorities; unauthorized manufacture, use or sale of such inventions, or imitations or falsification of such trademarks and trade names, shall be prohibited, and effective remedy therefor shall be provided by civil action. The nationals, corporations and associations of either High Contracting Party Shall be accorded throughout the territory of the other High Contracting Party effective protection in the enjoyment of rights with respect to their literary and artistic works, upon compliance with the applicable laws and regulations, if any, respecting registration and other formalities which are or may hereafter be enforced by the duly constituted authorities; unauthorized reproduction, sale, diffusion or use of such literary and artistic works shall be prohibited, and effective remedy therefor shall be provided by civil action. In any case, the nationals, corporations and associations of either High Contracting Party shall enjoy, throughout the territories of the other High Contracting Party, all rights and privileges of whatever nature in regard to copyrights, patents, trademarks, trade names, and other literary, artistic and industrial property, upon compliance with the applicable laws and regulations, if any, respecting registration and other formalities which are or may hereafter be enforced by the duly constituted authorities, upon terms no less favorable than are or may hereafter be accorded to the nationals, corporation and associations of such other High Contracting Party, and, in regard to patents, trademarks, trade names and other industrial property, upon terms no less

[50] Treaty of Friendship, Commerce and Navigation Between the United States of America and the Republic of China (November 4, 1946). [hereafter US-China FCN]

> favorable than are or may hereafter be accorded to the nationals, corporations and associations of any third country.[51]

The above article was objected by Chinese negotiators under the ground that copyright provisions conflicted with the goal of cultural exchange. In the words of Vandevelde:

> [t]he Chinese negotiators also objected to Article IX, which protected intellectual property rights. Dr. Kan Lee, the commercial counselor to the Chinese Embassy, had told State Department officials at a June 22, 1945, meeting that copyright laws conflicted with the goal of cultural exchange. He suggested that 'the best way for the United States to make information available to China [was] to permit [the] Chinese to translate American books freely.' Because it believed that allowing unrestricted translations was 'essential' to making available to the Chinese people literary and scientific material from around the world, China insisted in all of its treaty negotiations that any writing, once translated into Chinese, be exempted from treaty protection.[52]

The US agreed with the Chinese negotiators and included a provision to the Protocol to the Treaty referring that 'a provision in the protocol that exempted translations from copyright protection'.[53] However, this was later opposed by the American Book Publishers Council on the ground that the IP provision of the treaty did not require payment of a royalty to an author for translations of his or her work.[54] Through this, two scenarios can be drawn. First, there was some reluctance for the inclusion of IP provisions in FCN treaties. Second, IP interactions with societal welfare including

---

[51] *Ibid*, art ix
[52] Kenneth J. Vandevelde, *The First Bilateral Investment Treaties: U.S. Postwar Friendship, Commerce, and Navigation Treaties* (Oxford University Press, 2017) 85-86.
[53] *Ibid*, 86, see US-China FCN n 50, Protocol 5(a) (b) (c).
[54] *Ibid*, 96.

culture were a source of tension among the negotiators. This shows that IP cannot be featured in investment agreements without some kind of flexibilities to safeguard its social objectives.

Looking at the post-World War I and II FCN treaties, one can conclude that IP featured in these treaties. The important question to address is whether the reference to IPRs in FCN treaties was aimed at regulating international IP. Historically, international IP agreements existed before the World War I. However, one important fact that needs to be taken into consideration is that before the Paris and Berne Conventions, bilateral treaties were employed by countries to protect the rights of authors and publishers. For example, France had an international copyright agreement with the Netherlands, Portugal, Great Britain, Belgium, Spain, Russia, Luxembourg, Italy, Prussia, Switzerland, Hanseatic Cities, Bavaria, Sweden, Norway and Portugal among others.[55] It is not clear whether these treaties have the characteristics of bilateral investment treaties.[56] Nonetheless, it is clear that these treaties gave reciprocal protection to each country. Similarly, in the nineteenth century, the United States had agreements with Brazil,[57] Austria-Hungary,[58] and Belgium[59] with regard to the reciprocal protection of trademarks. Coming back to the previous question, as to

[55] For more details *see* Geo. Haven Putnam, A.M., 'The Question of Copyright: Comprising the Text of the Copyright Law of The United States, A Summary of the Copyright Laws at Present in Force in the chief Countries of the World' (G.P. Putnam's Sons, 2nd edition, 1896) 81.

[56] Due to limitation of access to the historical document, I could not examine the nature of historical agreement signed between several states to protect rights of authors before international IP agreements such as the Paris and the Berne Convention.

[57] Agreement Concerning Trade-Marks Between Brazil and the United States (September 24, 1878) <http://avalon.law.yale.edu/19th_century/brazil03.asp> accessed 6 October 2018.

[58] Trade-Mark Convention Between the United States and Austria-Hungary (November 25, 1871) <http://avalon.law.yale.edu/19th_century/aust07.asp> accessed 7 October 2018.

[59] Trade-Mark Convention Between the United States and Belgium (April 7, 1884) < http://avalon.law.yale.edu/19th_century/bel014.asp> accessed 7 October 2018.

whether the reference to IP or the protection of IP through bilateral agreements result in these being investment agreements aimed towards the regulation of international IP, one may conclude that the inclusion of 'IP' in FCN treaties does not seem to aim at regulating the international intellectual property system. Even before the World War I FCN treaties, IPRs were harmonized to some extent through the Paris and Berne Conventions. Later, the TRIPS achieved harmonization globally. Conversely, one may argue that the inclusion of IPRs in FCN treaties or BITs hint at the regulation of IPRs in the absence of a global IP treaty. However, this argument does not make sense because historically many of these fields of law have lacked a global institutional framework, whether it be trade, labor law, intellectual property, human rights, etc. Therefore, in the light of a lack of institutional and minimum standards of protection at the international level, these fields were included in FCN treaties to safeguard foreign investment and to maintain the rule of law. Of course, the number of FCN treaties increased after World War II and were later replaced by BITs, but this does not mean that investment agreements were also a pillar of international IP rulemaking.

2.2 Return of FCN Treaties?

There are scholars who believe that FCN treaties still inform future policymaking.[60] According to Alschner, FCN treaties still offer some guidance for the present challenges in international law.[61] He argues that under a 'single umbrella' FCN treaties

[60] Coyle, n 17, 302; see also O. Thomas Johnson, Jr. & Jonathan Gimblett, 'From Gunboats to BITs: The Evolution of Modern International Investment Law' in Karl P. Sauvant (eds), *Yearbook on International Investment law & Policy* 2010-2011 (Oxford University Press, 2012) 649.

[61] Wolfgang Alschner, 'Americanization of the BIT Universe: The Influence of Friendship, Commence and Navigation (FCN) Treaties on Modern Investment Treaty Law' (2013) 5(2) Goettingen Journal of International Law 458.

incorporated all areas of law, offering a solution to the fragmentation of international law.[62] In addition, Alschner reminds us that FCN treaties could possibly address the current debate on 're-balancing investment treaties' as it was successful in addressing non-investment considerations such as human rights.[63] Some have considered FCN as 'a basic accord fixing the ground-rules governing day-to-day intercourse between two countries'.[64] Likewise, Walker considers FCN treaties 'essentially moderate in their content and purport'.[65] A careful examination of existing research on FCN treaties shows that there are limited studies on FCN treaties.[66] Most of the available studies are focused on the American FCN treaties, and similar 'friendship' treaties which were prevalent in other jurisdictions have gone unnoticed.[67] The question regarding the return of FCN treaties as a new model for negotiation can be considered, but it is also important to realize at the time when FCN treaties proliferated, most areas of law were evolving and there were no harmonized legal standards. Therefore, FCN treaties featured all areas of law with the aim of maintaining the rule of law, but this does not mean that it is the best model to revisit. In particular, considerations that shift from FCN treaties to BITs happened due to the shortcomings of the FCN model. In the early 1980s, the US moved from FCN to BITs, and the last FCN treaty of the US was with Thailand in 1966.[68] There were two main reasons for this change in the US policy.

---

[62] *Ibid*. For more discussion on the fragmentation of international law, see International Law Commission, n 3.
[63] Alschner, n 61.
[64] Coyle, n 17, 306.
[65] Walker, n 43, 247.
[66] Devere, n 29, 193 ('the academic literature on friendship treaties is incomplete. Not all friendship treaties have been analyzed, and some have been analysed more thoroughly than others'.)
[67] *Ibid*,186-192.
[68] Valerie H. Ruttenberg, 'The United States Bilateral Investment Treaty Program: Variations on the Model' (1987) 9 University of Pennsylvania Journal of International Law 124.

First, the broad coverage of complex issues or areas of law removed the importance of 'investment' as a main feature of FCN treaties,[69] while additionally, the broad coverage resulted in difficulty in the negotiation of these treaties. Second, one fundamental difference between FCN treaties and BITs is that the former lacks a proper dispute settlement mechanism.[70] Currently, the ISDS mechanism has come under severe scrutiny and to consider the return of FCN treaties without ISDS does not sound convincing. This is because the whole idea of establishing ad hoc arbitration was to ensure a neutral forum to resolve disputes without undue influence from the host state. Of course, the idea of having permanent judges for investment disputes has been put forward by the European Commission, but it is yet to be tested.

2.3 Redefining 'Friendship'

Immediately after the World War II, the economic relation was revived through the means of commerce agreements emphasizing on the term 'friendship'. As we have seen from earlier sections that the FCN treaties are a general agreement between states covering several areas of law but, fundamentally it premise was based on 'friendship'. The reference of the term 'friendship' in the title indicates the intention to establish a mutual relationship between the parties on several areas of law. If one closely looks at the recent IIAs such as Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP),[71] Regional Comprehensive Economic Partnership (RCEP),[72]

[69] Alschner, n 61, 464.
[70] Johnson and Gimblett, n 60, 679.
[71] The Trans-Pacific Partnership Agreement (TPP) is a free trade agreement between New Zealand, Australia, Brunei Darussalam, Canada, Chile, Japan, Malaysia, Mexico, Peru, Singapore, and Vietnam. Originally, the US was part of the Agreement, later withdraw from the Agreement. The Asia-Pacific Economic Cooperation (APEC) summit gave new life to the TPP agreement by renaming it as the Comprehensive and

Comprehensive Economic and Trade Agreement (CETA),[73] one can find few things in common, mainly structure of these agreements. However, the relevant to our discussion is that title of these agreements refer 'comprehensive' and 'progressive'. From the point of view of structure, areas of law covered by the contemporary IIAs and FCN treaties are more or less same. However, the change in the title from 'friendship' to 'comprehensive' or 'progressive' indicates and gives a slight hope to imagine the return of FCN, but not in the form of friendship but in the form of 'comprehensive and progressive' agreements. The relevant question is that whether the sentiments of 'friendship' has been left, while moving towards establishing relationship based on comprehensive and progressive narrative. Perhaps, the asymmetrical power relationship between parties to the IIAs agreements and lack of exceptions safeguarding 'general public policy' or regulatory space of parties clearly indicate that the 'friendship' is not a premise of the mutual relationship between the

---

Progressive Agreement for Trans-Pacific Partnership (CPTPP), limiting the scope of provisions and suspensions of some of the IP provisions in TPP Agreements. < https://www.mfat.govt.nz/en/trade/free-trade-agreements/free-trade-agreements-concluded-but-not-in-force/cptpp/comprehensive-and-progressive-agreement-for-trans-pacific-partnership-text/> accessed 25 March 2018. See Pratyush Nath Upreti, 'From TPP to CPTPP: why intellectual property matters' (2018) 13(2) Journal of Intellectual Property Law & Practice 100,101; Pratyush Nath Upreti, 'CP(TPP) Entered into Force!' *Transatlantic Technology Law Forum (TTLF) Newsletter on Transatlantic Antirust and IPR Developments* (Issue No. 1/2019, February 8, 2019) < https://ttlfnews.wordpress.com/2019/02/26/cptpp-entered-into-force/> accessed 1 July 2019.

[72] For a detailed account on RCEP. See Pasha L. Hsieh, 'Asia's Response to the US Indo-Pacific Strategy: Building the RCEP' (2019) < https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3405701> accessed 1 July 2019. See generally, Pasha L. Hsieh and Bryan Mercurio (eds), *ASEAN Law in the New Regional Economic Order: Global Trends and Shifting Paradigms* (Cambridge University Press, 2019).

[73] Comprehensive Economic and Trade Agreement (CETA) is a trade deal between the EU and Canada, Chapter VIII, Section F, art 8.29 < http://ec.europa.eu/trade/policy/in-focus/ceta/ceta-chapter-by-chapter/> accessed 1 July 2019.

parties to the agreements. Reluctantly, I would like to put that the comprehensive and progressive is new form of 'friendship' in today's global economic relationship.

3. Treatification of International Investment Law

The IIAs truly received an extra-territorial effect after World War II and gave rise to the 'treatification of international investment law'.[74] The aftermath of World War II gave birth to a new international economic order that focused on establishing institutions and promoting policies in order to avoid the interwar experience. This led to the establishment of the General Agreement on Tariffs and Trade (GATT).[75] The post-World War II FCN treaties incorporated principles of equitable treatment, the most favored nation principle, full protection and security as well as investment remedies through dispute settlement under the jurisdiction of the International Court of Justice, thus making investment protection the primary objective of FCN Agreements.[76] However, the rise of GATT diminished the importance of FCN treaties.[77] That being said, it is true that some provisions of FCN treaties were

[74] Many scholars have used the term 'treatification', acknowledging that there is no dictionary meaning of it. See generally, Jeswald W. Salacuse, 'The Emerging Global Regime for Investment' (2010) 51(2) Harvard International Law Journal 429; Andrew Newcombe, 'Developments in IIA treaty-making' in Armand de Mestral and Cèline Lèvesque (eds), *Improving International Investment Agreements* (Routledge, 2013) 15; Jeswald W. Salacuse, *The Three Laws of International Investment: National, Contractual, and International Frameworks for Foreign Capital* (Oxford University Press, 2013) 331.

[75] Douglas A. Irwin, 'The GATT's Contribution to Economic Recovery in Post-War Western Europe' (The National Bureau of Economic Research (NBER) Working Paper No. 4944, 1994) < http://www.nber.org/papers/w4944> accessed 22 September 2018.

[76] Vandevelde, n 46, 162-166.

[77] *Ibid*, 162.

'replicated almost word-for-word' in the GATT.[78] Nevertheless, even post-GATT, FCN treaties existed and made reference to GATT.[79]

The GATT regime did not cover investment, thereby leaving it unregulated. There were several attempts by developed countries to create rules to facilitate and protect foreign investment but these remained only in the form of proposals.[80] It is also important to note that this was an era of decolonization where newly independent states were emerging with sovereign authority. The fear of being expropriated by developed countries and the influence of the socialist bloc led by the Soviet Union discouraged less developed countries from entering into investment agreements.[81] The rules of customary international law on foreign investment allowed expropriation of investment by the host state only with 'prompt, adequate, and effective compensation',[82] commonly referred to as the *'Hull Rule'*.[83] This so-called rule did not gain acceptance by many developing countries.[84] Therefore, the unwillingness to pay

---

[78] Coyle, n 17, 334.

[79] See US- Korea FCN n 48, art. XXI (3):
The provisions of the present Treaty relating to the treatment of goods shall not preclude action by either Party which is required or specifically permitted by the General Agreement on Tariffs and Trade during such time as such Party is a contracting party to the General Agreement.

[80] For example, International Chamber of Commerce's International Code of Fair Treatment for Foreign Investments (1949), the International Convention for the Mutual Protection of Private Property Rights in Foreign Countries (1957) and the OECD Draft Convention on the Protection of Foreign Property (1967).

[81] Vandevelde, n 46,166-168.

[82] Andrew T. Guzman, 'Why LDCs Sign Treaties That Hurt Them: Explaining the Popularity of Bilateral Investment Treaties' (1998) 38 Virginia Journal of International Law 644-646; United Nations Conference on Trade and Development (UNCTAD), 'Bilateral Investment Treaties in the Mid-1990s'(1998) 69.

[83] See generally, Surya P. Subedi, *International Investment Law: Reconciling Policy and Principle* (Hart Publishing, 2008) 16-18.

[84] See Lee A. O'Connor, 'The International Law of Expropriation of Foreign-Owned Property: The Compensation Requirement and the Role of the Taking State' (1983) 6(2/3) Loyola of Los Angeles International and Comparative Law Review 358-539; Patrick Dumberry, 'Are BITs Representing the "New" Customary International Law in

compensation for expropriation was a major difference between developed and developing countries. The newly established states assured their sovereign status through Resolution 626 of 1952[85] and General Assembly Resolution 1803,[86] which entitled all states to permanent sovereignty and the right to exploit their natural wealth and resources as a sovereign authority. Furthermore, the collective efforts of developing countries and the socialist bloc resulted in the United Nations (UN) Declaration of the New International Economic Order[87] and the Charter of Economic Rights and Duties of States (CERDS),[88] which assured permanent sovereignty to nationalize and to transfer the ownership of foreign property subject to the payment of appropriate compensation.[89] However, the meaning of the term appropriate compensation was contested differently. Developed countries viewed 'appropriate compensation' as meaning precisely 'prompt, adequate, and effective' which set against the position taken by developing countries for less stringent compensation requirements.[90]

These events show that there were no common sentiments or consensus to harmonize or initiate an international legal framework for foreign investment. As a result, capital-exporting countries began to negotiate BITs with like-minded countries to protect their foreign investment. Most of these BITs were distinct but nonetheless

---

International Investment Law?' (2010) 28(4) Penn State International Law Review 691.

[85] U.N. Generally Assembly, Resolution 626(VII) on the Right to Exploit Freely Natural Wealth and Resources, 21 December 1952, U.N. Doc.A/RES/626(VII).

[86] U.N. General Assembly Resolution on the Permanent Sovereignty over Natural Resources, Dec14, 1962, U.N. Doc. A/5217.

[87] U.N. Declaration on the Establishment of a New International Economic Order (1 May 1974) U.N. Doc A/RES/S-6/3201.

[88] U.N. General Assembly Resolution 3281(XXIX), Charter of Economic Rights and Duties of States, 12 December 1974, U.N. doc A/RES/29/3281. < http://www.un-documents.net/a29r3281.htm> accessed 14 September 2018.

[89] See UN New International Economic Order n 81 art 4(f); Ibid, art 2(2) (c).

[90] Guzman n 82, 647-650.

had common features. According to Vandevelde, BITs arose from the past experience of developed countries. In his words:

> [T]he BITs were a defensive reaction to past expropriations of existing investments without payment of fair market value […] [T]he United States hoped that the conclusion of a sufficiently large network of treaties embracing that standard would provide evidence that the standard was a norm of customary international law and thus applied to expropriations even in the absence of a treaty.[91]

Similar views are taken by other scholars pointing out that the movement of BITs has reshaped the customary international law governing foreign investment.[92] Others have countered that inefficient customary law was a driving force which resulted in *ad hoc* BITs. As Dolzer and Von Walter put it: 'customary law was deemed to be too amorphous and not be able to provide sufficient guidance and protection' to foreign investment.[93] Since the first BIT between Germany and Pakistan, the number of BITs has grown tremendously, and there are 2,946 BITs globally.[94] The establishment of the International Centre for the Settlement of Investment Disputes (ICSID) an affiliate of the World Bank, in 1966 formally introduced a dispute settlement mechanism which

---

[91] Vandevelde, n 46, 171.

[92] See generally, Stephen M. Schwebel, 'The Influence of Bilateral Investment Treaties on Customary International Law' (2004) 98 the American Society of International Law Annual Meeting, 27; Dumberry, n 84, 676-701.

[93] R. Dolzer and A. Von Walter, 'Fair and Equitable Treatment–Lines of Jurisprudence on Customary Law' in F. Ortino, L. Liberti, A. Sheppard and H. Warner (eds), *Investment Treaty Law: Current Issues II* (British Institute of International and Comparative Law, 2007) 99.

[94] United Nations Conference on Trade and Development (UNCTAD),World Investment Report 2018 at 88. <http://unctad.org/en/pages/PublicationWebflyer.aspx?publicationid=2130> accessed 19 August 2018.

ensured an effective remedy.[95] At the end of the 1990s, developing countries were slowly embracing BITs and were willing to enter into them. The relevant question is what made developing countries participate in BITs which they considered as 'obsolescing bargains'?[96] Jeswald W. Salacuse has identified five motivations for developing countries to join BITs.[97] First, BITs encourage foreign direct investment with a 'promise of protection of capital in return for the [future] prospect of more capital'.[98] Second, they can strengthen the relationship between contracting parties through benefits and favors, creating a foundation for further cooperation in trade, security assistance, technology transfer, foreign aid, and other benefits.[99] Third, they may facilitate the liberalization of their economies. Fourth, an investment agreement may serve as a 'signaling device' to domestic private sectors, informing them of a changing government's attitude towards private capital and a way to gain the trust of local investors.[100] Last, investment treaties may serve as a tool to improve or rectify developing countries' own governance institutions. For example, an investment treaty that prevents the host country from acting in an arbitrary or abusive manner towards a foreign investor may trigger reforms at the domestic level in ensuring the same treatment to its own nationals.[101] Besides, the debt crisis of the 1980s and the reduction

[95] ICSID Convention is a treaty ratified by 153 Contracting States and entered into force on October 14, 1966. <https://icsid.worldbank.org/en/Pages/icsiddocs/ICSID-Convention.aspx> accessed 1 September 2018.
[96] Raymond Vernon, *Sovereignty at Bay: The Multinational Spread of U.S. Enterprises* (Basic Books, 1971) 46, cited in Jeswald W. Salacuse, 'The Treatification of International Investment Law' 2007 (13) Law and Business Review of the Americas 156.
[97] Salacuse, 'The Emerging Global Regime for Investment', n 74, 441-444.
[98] *Ibid*, 441.
[99] Salacuse, n 74, 442.
[100] Salacuse, n 74, 444.
[101] *Ibid*.

in the development assistance fund[102] also made foreign direct investment (FDI) a more attractive and desirable source for developing countries.

Undoubtedly, treatification has created an investment regime but also fragmented international investment practices as a result of diverse arbitral decisions and treaty provisions. IIAs saw an exceptional growth from 1992 to 2001.[103] Interestingly, from 2004 onwards there has been a decline in growth of IIAs, particularly in the last few years since 2010. In 2017, the number of IIAs has rapidly declined. In fact, the 2018 UNCTAD Report highlights that in 2017 only 18 IIAs were concluded, which was the lowest since 1983.[104] In addition, the report shows that in 2017 itself, there were at least 22 terminations entered into effect.[105] Furthermore, the report notes that for the first time the number of terminated[106] IIAs exceeded the number of newly concluded treaties.[107] The 2010 UNCTAD Report highlights that an average of between 9 to 15 BITs were renegotiated each year between 2000 to 2008.[108] Similarly, the report finds that in 2013, 148 BITs were terminated, of which 105 were replaced by a new treaty, 27 were unilaterally denounced and 16 were terminated by consent. The increasing termination and renegotiation of IIAs narrates a scenario that

---

[102] Salacuse, n 74, 441.
[103] UNCTAD World Investment Report 2018, n 94, Figure III.3 at 89.
[104] UNCTAD World Investment Report 2018, n 94, 88.
[105] *Ibid*.
[106] There are legal issues highlighted by scholars on the termination of BITs. See generally, Tania Voon and Andrew D. Mitchell, 'Denunciation, Termination and Survival: The Interplay of Treaty Law and International Investment Law' (2016) 31(2) ICSID Review-Foreign Investment Law Journal 413-433.
[107] UNCTAD World Investment Report 2018, above n 94, 88. See also, the previous year's report of UNCTAD which showed that only five BITs were terminated in 1995, and the number reached a total of 20 BITs in 2003. See UNCTAD, Recent Developments in International Investment Agreements, UNCTAD/WEB/ITE/2005/1 of 30 August 2005 at 6.
[108]United Nations Conference on Trade and Development (UNCTAD), World Investment Report 2010 at 86 < http://unctad.org/en/Docs/wir2010_en.pdf> accessed 1 October 2018.

international investment law is in transition and marks an era of reformation and reconceptualization of the system.[109] As a matter of fact, countries are rethinking their first, second and third generation of IIAs and are slowly moving toward fourth generation agreements. The debates regarding over protection of investors, the risk of regulatory chill through ISDS and the rise of agreements with deeper integration of investment and IP chapters are a testimony of this transition and a movement towards a new generation of IIAs. According to Nowort, the transition from the first generation to the second generation of IIAs is characterized by: (i) improved substantive protection of investors, ISDS provisions, and mixed arbitration clauses[110] and (ii) most of the IIAs resulting from the broad political consensus of protecting a foreign investor as the sole or primary purpose of international investment law.[111] Furthermore, Nowort explains that the period between the second and the third generation of IIAs was mostly dominated by the efforts of the state to regain its regulatory space.[112] The increasing number of ISDS cases related to public health,[113] the environment[114] and natural resources among others, support the states' concern with regulatory chill. In fact, the report suggests that ISDS claims of more than $55 billion are pending under

[109] Karsten Nowrot, 'Termination and Renegotiation of International Investment Agreements' in Steffen Hindelang and Markus Krajewski (eds), *Shifting Paradigms in International Investment Law: More Balanced, Less Isolated, Increasingly Diversified* (Oxford University Press, 2016)
[110] *Ibid*, 230.
[111] *Ibid*.
[112] *Ibid*, 231. See also generally, José E. Alvarez, 'The Return of the State' (2011) 20(2) Minnesota Journal of International Law 223-264; Christophe Geiger, 'The TTIP and Its Investment Protection: Will the EU Still Be Able to Regulate Intellectual Property?' (2018) 49(6) International Review of Intellectual Property and Competition Law 631-635.
[113] *Philip Morris*, n 6.
[114] Tamara L. Slater, 'Investor-State Arbitration and Domestic Environmental Protection' (2015) 14(1) Washington University Global Studies Law Review 145.

the North American Free Trade Agreement (NAFTA)[115] and other US FTAs which are non-trade related and mostly relate to the environment, energy, finance, public health, land use and transportation policies.[116] The new, or fourth, generation IIAs are moving towards a balanced approach to protecting investors *vis*-à-*vis* safeguarding the host state's regulatory rights and transplanting sustainable development and human rights principles. Fourth generation IIAs attempt to achieve this balance by introducing innovative treaty provisions and international mechanisms for the resolution of investment disputes and a number of new elements not seen in older generations of IIAs. For example, the recently concluded Canada-EU CETA has incorporated a provision of an investment court system (ICS)[117] with an appellate mechanism.[118] Thereby it offers an alternative to ISDS and it consists of provisions relating to corporate social responsibility standards along with the protection of the life or health of humans, animals or plants.[119] The challenge for international investment law is that there is no standard model for an investment agreement. Most countries adopted each

---

[115] North American Free Trade Agreement (NAFTA) is a trilateral trade bloc agreement signed by Canada, Mexico, and the United States, entered into force on January 1, 1989 <https://www.nafta-sec-alena.org/Home/Texts-of-the-Agreement/North-American-Free-Trade-Agreement> accessed 14 October 2018.

[116] Table of Foreign Investor-State Cases and Claims under NAFTA and other U.S. 'TRADE' Deals (Public Citizen, August 2018) <https://www.citizen.org/sites/default/files/investor-state-chart-aug-2018.pdf> accessed 5 September 2018.

[117]European Commission, 'The Multilateral Investment Court Project' <http://trade.ec.europa.eu/doclib/press/index.cfm?id=1608> accessed 19 August 2018. Also see European Parliament, 'From Arbitration to the Investment Court System (ICS): The Evolution of CETA rules' (2017) <http://www.europarl.europa.eu/RegData/etudes/IDAN/2017/607251/EPRS_IDA(2017)607251_EN.pdf> accessed 29 September 2018.

[118] Comprehensive Economic and Trade Agreement (CETA) is a trade deal between the EU and Canada, Chapter VIII, Section F, art 8.29 <http://ec.europa.eu/trade/policy/in-focus/ceta/ceta-chapter-by-chapter/> accessed 1 October 2018.

[119] *Ibid*. Chapter III, Section B, art. 3.4

other's model BIT before starting a negotiation.[120] When the NAFTA was implemented in 1994, it became a template for a new generation of investment agreements.[121] Having said that, the current negotiation of NAFTA 2.0 in the form of the US-Mexico-Canada Agreement (USMCA)[122] could again offer a template for next-generation IIAs. However, this debate is beyond the scope of this paper. In the next section, I will discuss the struggle of 'investment' to find its place in the WTO framework.

4. From the Failure of MAI to Struggles within the WTO

4.1. The Relationship between Trade and Investment

At the heart of today's globalized economy and fragmented supply chain, the linkage between international trade and investment is a widely researched area. One could argue that conceptually there is a difference between trade and investment transactions. In trade transactions, the legal relationship between buyer and seller is completed following an exchange of goods and services for some consideration, usually money.[123] On the other hand, the nature of investment transactions is different as the relationship between an investor and an enterprise, or in the case of foreign investment with a host state, can endure over a long period of time if the behavior of the host state

[120] See generally, Wolfgang Alschner and Dmitriy Skougarevskiy, 'Mapping the Universe of International Investment Agreements' (2016) 19(3) Journal of International Economic Law 561-588.
[121] M. Angeles Villarreal and Ian F. Fergusson, 'The North American Free Trade Agreement (NAFTA)' (Congressional Research Service, 2017) < https://fas.org/sgp/crs/row/R42965.pdf> accessed 10 October 2018.
[122] United States-Mexico-Canada Agreement (USMCA) <https://ustr.gov/trade-agreements/free-trade-agreements/united-states-mexico-canada-agreement/united-states-mexico#> accessed 8 October 2018.
[123] Salacuse, *The Three Laws of International Investment*, n 74, 23.

is conducive to sustaining that relationship.[124]As we have seen from the previous discussion, pre-World War II treaties incorporated both trade and investment provisions, but trade was the primary objective of those agreements. During the post-war regime, international trade evolved remarkably, followed by globalization. A commentator highlights globalization and trade patterns in two categories. According to the author, in the 'first wave of globalization' countries' export products were very different from what they imported.[125] Similarly, in the 'second wave of globalization'; countries' export and import products were largely similar goods.[126] Over the time, the question revolving around whether trade leads to FDI or vice versa has faded. Rather, in an interconnected global market, the firm's access to resources has become more relevant. This view is supported by UNCTAD in its World Investment Report,[127] which reads:

> [T]he issue is no longer whether trade leads to FDI or FDI to trade; whether FDI substitutes for trade or trade substitutes for FDI; or whether they complement each other. Rather, it is: how do firms access resources—wherever they are located—in the interest of organizing production as profitably as possible for the national, regional or global markets they wish to serve? In other words, the issue becomes: where do firms locate their value-added activities? In these circumstances, the decision where to locate is a decision where to invest and from where to trade. And it becomes a[n] FDI decision, if a foreign location is chosen. It follows that, increasingly, what matters are the factors that make

[124] *Ibid* (discussing foreign investment is subject to risks such as political risk which may not arise in the case of trade).
[125] Esteban Ortiz-Ospina and Max Roser, 'International Trade' (2018)
< https://ourworldindata.org/trade-and-globalization > accessed 1 August 2018.
[126] *Ibid*.
[127] UNCTAD, World Investment Report 1996
< http:/unctad.org/en/Docs/wir1996_en.pdf> accessed 14 August 2018.

particular locations advantageous for particular activities, for both domestic and foreign investors.[128]

From the above paragraph, it is clear that in the context of trade and investment, the question of complements or substitutes is no more relevant than it used to be in the post-war regime. Dolzer and Schreuer remind us that there may be commonalities between trade and investment, but in terms of legal methodology both are distinct and whenever an analogy is proposed or a solution is transferred from one field to the other, a detailed examination must be made to find whether 'their different nature is amenable to an assumption of commonality'.[129] The authors further argue that although trade and investment at the conceptual level appear 'to be in common', they turn out to have 'different shades and characteristics upon more detailed analysis, taking into account the peculiar business nature of long-term foreign investment projects'.[130] However, the recent trends highlight the importance and need for 'deeper integration' between trade and investment agreements, which is the demand of the new economic environment. According to the report[131] of the International Trade Centre (ITC), trade agreements with deeper integration have an advantage over general trade agreements. The report finds that, whereas 'trade agreements that include investment provisions are associated with a 2% increase of the domestic content in value-chain export, stand-alone bilateral investment treaties do not have an effect on domestic

[128] *Ibid*.
[129] Dolzer and Schreuer, n 2, 19.
[130] *Ibid*.
[131] 'Deeper and Wider Trade Integration More Beneficial for Small Business' (Press Release, International Trade Centre, 4 October, 2017) <http://www.intracen.org/news/Deeper-and-wider-trade-integration-more-beneficial-for-small-businesses/> accessed 8 October 2018; See SME *Competitiveness Outlook 2017- The region: A door to global trade* (International Trade Centre (ITC), Geneva, 2017).

value added'.[132] In addition, the report highlights that a country whose trade agreement covers 'investment, dispute settlement, competition policy, intellectual property or environmental' provisions has a 2.5% increase in its integration into the value-chain trade.[133] Therefore, trade and investment hold a stronger relationship in today's economic environment.

4.2 The WTO and Foreign Investment

'If goods do not cross frontiers, soldiers will'.[134] With these words, one scholar summed up the mindset of countries in the immediate aftermath of World War II.[135] There was some sense of collective effort to revive the economy, stimulate post-war recovery and promote growth through economic liberalization. Economists such as David Ricardo, Heckscher-Ohlin, and Paul Samuelson, etc. were vocal advocates of openness to trade and investment which could promote growth and economic liberalization.[136] The nineteenth and twentieth-century FCN treaties featured both trade and investment. However, post-World War II there was a need for an international instrument which would regulate international trade relations. Thus, with the establishment of GATT, trade negotiations shifted from bilateral to multilateral agreements, but investment remained unregulated and never received a multilateral status.

---

[132] *Ibid*.
[133] *Ibid*.
[134] Peter Van de Bossche, *The Law and Policy of the World Trade Organization-Text, Cases and Materials* (Cambridge University Press, 2nd edition, 2008) 19.
[135] *Ibid*.
[136] Simon Lester et al., *World Trade Law- Text, Materials and Commentary* (Hart Publishing, 2008) 12-13.

The first attempt to create a multilateral treaty-based rule on foreign investment was initiated through the Havana Charter.[137] The Havana Charter, which finalizes a multilateral agreement on a Charter for an International Trade Organization (ITO) never came into existence but made reference to investment in its objective. The objective read: 'to foster and assist industrial and general economic development, particularly of those countries which are still in the early stages of industrial development, and to encourage the international flow of capital for productive investment'.[138] In particular, there were two articles dealing with investment. First, Article 11 argued that no member 'shall take unreasonable or unjustifiable action' against investment and that 'just and equitable treatment' should be afforded without discrimination. Second, Article 12 entitled 'International Investment for Economic Development and Reconstruction' with an overall summary read:

> Public and private international investment can be of great value in promoting development and reconstruction. But Members have the right, without prejudice to existing international agreements, to ensure that foreign investment *is not used as a basis for interference in their internal affairs or national policies and to determine to what extent and upon what terms they will allow future foreign investment.* Members also have the right to prescribe, on just terms, requirements as to the ownership of existing and future investments. Subject to those rights, Members undertake to provide reasonable opportunities for investments acceptable to them and adequate security for existing and future investments. They also agree that it is desirable to avoid discrimination as between foreign investments. Members also undertake, upon request, to participate in

[137] Havana Charter for an International Trade Organization, March 24, 1948 (Here after Havana Charter)
< https://www.wto.org/english/docs_e/legal_e/havana_e.pdf> accessed 10 August 2018.
[138] *Ibid*, art 1(2).

negotiations for bilateral and multilateral agreements on the subject of investments.[139] [emphasis added]

The above paragraph highlights the concern and tussle over foreign investment for both developing and developed countries, in particular as regards *investor obligations versus host state sovereign rights*. The subsequent events, such as unsuccessful Congressional approval of the ITO in the United States[140] and the US withdrawal from ITO, made other countries reluctant to join the ITO. As a result, GATT received the consensus for governing international trade relations, which was initially proposed to govern trade rules under the ITO. Scholars have viewed that the narrow foreign direct investment provision in the Havana Charter was also a reason for the failure to obtain Congressional approval for the ITO.[141] For several years after this event, the investment agenda was overlooked, although the international movement of capital was increasing.[142] Still, there was a lack of international rules governing foreign investment. This was also identified by the International Court of Justice (ICJ) in its decision through the wise words – 'it may [….] appear surprising that the evolution of

[139] Havana Charter, n 137, collective reading of art 12.
[140] Richard Toye, 'International Trade Organization' in Amrita Narlikar, Martin Daunton and Robert M. Stern (eds), *The Oxford Handbook on The World Trade Organization* (Oxford University Press, 2012) 85-98.
[141] Daniel Drache, 'The Short but Significant Life of the International Trade Organization: Lessons for Our Time' (Centre for the Study of Globalization and Regionalisation (CSGR) Working Paper No 62/00, 2000) 6 <http://wrap.warwick.ac.uk/2063/1/WRAP_Drache_wp6200.pdf > accessed 29 August 2018. (Drache writes: 'By 1949, US elites had reached the consensus that American interests and investment rights were not well protected in the ITO Charter. What had begun as an 'American project' did not remain one once the developing countries became involved in designing the ITO').
[142] See generally Arthur I. Bloomfield, 'Postwar Control of International Capital Movements' (1946) 36(2) American Economic Review 687-709; Catherine R. Schenk, *International Economic Relations since 1945* (Routledge, 2011) 18-19.

law has not gone further'.[143] Investment did not become part of the discussion in the multilateral framework for some time, until the Uruguay round of WTO negotiations. In other words, until the Uruguay round, trade and investment remained distant from the institutional regulation point of view. One may take note that besides the Havana Charter, there were attempts to negotiate an international investment agreement at the UN. In 1972, the adoption of *Resolution 1721* was adopted the United Nations Economic and Social Council (ECOSOC) with the aim of creating a study group[144] and to create an international code of conduct for international investors.[145] However, this aim was not achieved and after twenty years of negotiation the endeavour was abandoned in 1992.[146] Moreover, the International Chamber of Commerce (ICC) and the International Law Association (ILA) also initiated a draft proposal on the protection of foreign investment with no success.[147]

---

[143] Barcelona Traction Company (*Belg.*v.*Spain*), 1970. I.C.J. 3 (Judgment of Feb. 5) 89 ('considering the important developments of the last half-century, the growth of foreign investments and the expansion of international activities of corporations, in particular of holding companies, which are often multinational, and considering the way in which the economic interests of States have proliferated, it may at first sight appear surprising that the evolution of law has not gone further and that no generally accepted rules in the matter have crystallized on the international plane.) See also Jeswald W. Salacuse, 'The Energy Charter Treaty and Bilateral Investment Treaty Regimes' in Thomas W. Wälde (eds), *The Energy Charter Treaty: An East-West Gateway for Investment & Trade* (Kluwer Law International, 1996) 324.

[144] *See UN Reports on the Impact of Multinational Corporations on the Development Process and on International Relations: The Report of the Secretary-General to the Economic and Social Council*, (1974) 13(4) International Legal Materials 791-869, 791(The Report was outcome of ECOSOC Resolution 1721 request to 'study the role of multinational corporations and their impact on the process of development, especially that of the developing countries, and also their implication for international relations, to formulate conclusions which may possibly be used by Governments in making their sovereign decision regarding national policy in this respect, and to submit recommendations for appropriate international action').

[145] Susan Ariel Aaronson, 'International Investment Carousel' (2004) International Economy 58.

[146] *Ibid*.

[147] See Resolution of the 16th Congress of the ICC (May 1957), published in ICC Brochure no 193, as cited in Arthur S. Miller, 'Protection of Private Foreign

The first instance of linking trade and investment within the multilateral framework was achieved through GATT. In 1955, the GATT contracting parties adopted a *Resolution on International Investment for Economic Development,* which portrayed bilateral agreements as the best way to stimulate the international flow of capital and to encourage BITs to provide protection and security to foreign investors.[148] During that time, the US was a key actor contending for strong protection of investment. In pursuance of this objective, the US used dispute settlement to infuse 'investment protection' under the GATT system. The US challenged the provision of the Canadian Foreign Investment Review Act[149] which allowed foreign investment in Canada only if it fulfilled local content and export performance requirements. In particular, the US challenged the local content requirements, which required purchasing certain products from a domestic source, whereas the export performance requirement referred to the export of a certain amount or percentage of goods. Pursuant to this regulation, the GATT panel was asked to measure the consistency of these

---

Investment by Multilateral Convention'(1959) 53(2) American Journal of International Law 371-372 (The ICC Congress highlights the intention of forming binding foreign investment principles under the UN- 'Agreements, whether bilateral or multilateral, arising out of a model convention of this kind, would be of inestimable value to capital-importing countries as well as to investors. By making clear in advance in an agreed and binding form under United Nations' auspices the treatment to be applied to foreign capital in their territories, the former would improve their prospects of attracting capital from over-seas. At the same time investors would be in a better position to assess some at least of the non-economic risks involved in a particular area').

[148] See WTO Draft Resolution on International Investment for Economic Development (W.9/198)<https://www.wto.org/gatt_docs/English/SULPDF/91860248.pdf> accessed 4 October 2018. See M. Koulen 'Foreign Investment in the WTO' in E.C. Nieuwenhuys and M.M.T.A. Brus (eds), *Multilateral Regulation of Investment* (Kluwer Law International, 2001) 182.

[149] For a detailed discussion on the Canadian Foreign Investment Review Act, see James M. Spence Q.C, 'Canada's Foreign Investment Review Act and the Problem of Industrial Policy' (1984) 6(1) Michigan Journal of International Law 133-154.

provisions in the light of GATT obligations. The Panel judiciously ignored the question as to how Canada's measure affected investors. In the words of the Panel:

> [T]he Panel does not consider it relevant nor does it feel competent to judge how the foreign investors are affected by the purchase requirements, as the national treatment obligations of Article III of the General Agreement do not apply to foreign persons or firms but to imported products and serve to protect the interests of producers and exporters established on the territory of any contracting party.[150]

After unsuccessful attempts to infuse investment into GATT, the US started to negotiate the 'investment' agenda under the aegis of the WTO. During the GATT Tokyo Round Negotiations, the US pushed to incorporate investment issues in the agenda but failed.[151] However, in the Uruguay Round, the US again proposed multilateral rules for investment, but only succeeded in achieving the incorporation of rules related to investment aspects of trade through Trade-Related Investment Measures (TRIMs).[152] One may argue that the incorporation of rules related to the TRIMs Agreement is the outcome of two opposing positions within the WTO, aiming

---

[150] Canada-Administration of the Foreign Investment Review Act (FIRA), Report of the Panel adopted on 7 February 1984 (L/5504-30S/140) para 6.5.
< https://www.wto.org/english/tratop_e/dispu_e/gatt_e/82fira.pdf> accessed 2 August 2018.

[151] Thomas L. Brewer and Stephen Young, *The Multilateral Investment System and Multinational Enterprises* (Oxford University Press, 1998) 122.

[152] The Trade-Related Investment Measures (TRIMs) which was negotiated during the Uruguay Round, applies only to measures that affect trade in goods. For more information on TRIMs
<https://www.wto.org/english/tratop_e/invest_e/trims_e.htm> accessed 8 October 2018.

to facilitate investment in trade in goods.[153] However, in reality, this was not the ideal outcome for the US as TRIMs was not an agreement which protected investment, and therefore is not per se rules constitute the rules governing investment protection.

4.3 Multilateral Agreement on Investment within the OECD

As one of the main proponents of the multilateral investment regime, the US adopted a '*two-track approach*'[154] to pursue its investment agenda in the WTO system. First, it introduced 'investment' as a separate agenda in the Uruguay Round. Second, it separately initiated negotiation on the Multilateral Investment Agreement (MAI) under the Organization for Economic Co-operation and Development (OECD), which was one of the most ambitious projects in international economic law during the 1990s.[155] The project started in 1995[156] and was abandoned at the end of 1998. The MAI was negotiated with the aim to formulate a free standing international treaty open to accession by the European and non-OECD members.[157] According to Geiger[158] the

[153] Riyaz Dattu, 'A Journey from Havana to Paris: The Fifty-Year Quest for the Elusive Multilateral Agreement on Investment' (2000) 24(1) Fordham International Law Journal 291.
[154] Stephen Woolcock, 'The Singapore Issues in Cancun: A Failed Negotiation Ploy or a Litmus Test for Global Governance?' (2003) 38 (5) Intereconomics 249-255.
[155] Before negotiations for the MAI, the possibilities of international agreement on investment were studied by the World Bank. The Multilateral Investment Guarantee Agency (MIGA) upon the request of the Joint Ministerial Committee of the World Bank and the International. Monetary Fund, created a set of guidelines known as 'the World Bank Guidelines on Foreign Investment. See Sornarajah, n 8, 257.
[156] Joachim Karl, 'The Negotiations on the OECD Multilateral Agreement on Investment' in Marc Bungenberg et al (eds), *International Investment Law: A Handbook* (C.H. Beck, Hart, Nomos Publishing, 2015) 342-360, 344 (The preparatory work for the MAI negotiations was undertaken in the OECD Committees on International Investment and Multilateral Enterprises (CIME) and on Capital Movements and Invisible Transactions (CMIT) – the two predecessors of the OECD's present Investment Committee.)
[157] OECD Begins Negotiations on a Multilateral Agreement on Investment, OECD Press Release (SG/Press (95) 65) 27 September 1995.

MAI aimed to create: (i) a state of the art with higher standards of treatment than, existing bilateral, regional and sectoral agreements,[159] (ii) a comprehensive text covering all categories of investment sectors that obligatorily applied to all levels of government[160], (iii) an evolutionary step which ensured regulatory rights in a framework of progressive liberalization,[161] (iv) balance by incorporating provisions related to social concerns such as labor standards, etc.[162] Moreover, the MAI was open to all OECD non-member countries with the same obligations.[163] One may question the intention of negotiating the MAI only with OECD countries. The industrialized countries were interested in 'like-minded' countries which had liberal investment regimes.[164] Also the fact that the US was skeptical about negotiating with developing countries because of ideological differences on investment protection, might have been a hindrance in finding consensus.[165] Therefore, the OECD was the best option as its members then represented 85 percent of global FDI,[166] notwithstanding that in the early 1990s the US had higher standards for investment protection through NAFTA. The MAI was based on the investment provisions of NAFTA[167]which aimed to formulate standards that would liberalize foreign investment, replacing BITs as

---

<http://www.oecd.org/daf/inv/internationalinvestmentagreements/43389907.pdf> accessed 17 August 2018.

[158] Rainer Geiger, 'Towards a Multilateral Agreement on Investment' (1998) 31(3) Cornell International Law Journal 467-475.

[159] *Ibid*, 468.

[160] *Ibid*, 469.

[161] *Ibid*.

[162] *Ibid*.

[163] *Ibid*.

[164] Aaronson, n 145, 58.

[165] *Ibid*.

[166] Stephen J. Kobrin, 'The MAI and the Clash of Globalizations' (1998) 112 Foreign Policy 100.

[167] Geiger, n 158, 468.

governing rules on foreign investment.[168] The intention of the US was to create the MAI as a model which would be presented as a *fait accompli*[169] to the developing countries and ultimately become the investment standard for the WTO.[170] However, the MAI negotiations stalled in 1998 as it failed to find consensus among the developed countries. There were many factors[171] which led to the failure of the MAI, the most notable of which was the lack of consensus[172] among negotiating countries and strong NGOs' opposition by NGOs, which some refer to as the NGO's torpedoes,[173] which galvanized resistance on the global level. The negotiation struggle is evident from the UNCTAD Report which noted the following:

> The main outstanding issues related to the topics of definition of investment, exceptions to national and most-favored-nation treatment, intellectual property, cultural exception, performance requirements, labor and environmental issues, regulatory takings, and settlement of disputes. These issues are likely to be

[168] Robert Z Lawrence, 'International Trade Policy in the 1990s' in Jeffrey A. Frankel and Peter R. Orszag (eds), *American Economic Policy in the 1990s* (Cambridge: MIT Press, 2002) 289.
[169] Sornarajah, n 11, 257.
[170] Lawrence, n 168.
[171] For a detailed dissection of the factors that contributed to the demise of MAI, *see* Institute for International Economics, 'The MAI and the Politics of Failure: Who Killed the Dog?' 15-49 <https://piie.com/publications/chapters_preview/91/2iie2725.pdf> accessed 14 September 2018; Katia Tieleman, 'The Failure of the Multilateral Agreement on Investment (MAI) and the Absence of a Global Public Policy Network' (1999) (U.N. Vision Project on Global Public Policy Networks) <http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.627.7992&rep=rep1&type=pdf> accessed 27 September 2018
[172] One of the contingent issues was exceptions to the Agreement. See Nagesh Kumar, 'WTO's Emerging Investment Regime: Way Forward for Doha Ministerial Meeting' (2001) 36 (33) Economic and Political Weekly 3151-3158, 3154 (Kumar writes that the 'list of exceptions submitted by different countries to the negotiations ran to 700').
[173] *Ibid*.

difficult issues in any other future negotiations, be it at the bilateral, regional or multilateral levels.[174]

In addition, cases related to public interest such as *Ethyl v Canada*[175] where a Canadian measure to ban an additive to petroleum – which causes pollution and danger to human health – was challenged under the NAFTA. This case may have given rise to concerns as to the effect of the MAI in limiting the rights of states to regulate on issues relating to the public interest, and certainly played an important role in galvanizing the protests against the MAI. For developing countries, the MAI was a club consisting of all the members of the OECD, coming together to formulate an international regime on foreign investment, which had been a source of tension over the years. Therefore, it provided sufficient grounds for developing countries to protest and boycott the agreement. To conclude, in the words of the United States Trade Representative (USTR), the reason behind the suspension of the MAI negotiation was a 'significant difference of view in the nature and extent of acceptable exceptions to the agreement, and the need for further consideration of concerns raised by environment and labor interests'.[176]

---

[174] UNCTAD, 'Lessons from the MAI' (United Nations: New York, Geneva, 1999) 1 < https://unctad.org/en/Docs/psiteiitm22.en.pdf> accessed 17 September 2018.
[175] *Ethyl v Canada* (1999) 38 ILM 708.
[176] Lawrence, n 168. See also Karl, n 156 at 346 ('Unfortunately, for a number of reasons, things were not as good as they appeared. First, although negotiators had similar views about the basic structure and content of the three main treaty pillars– investment liberalization, investment protection, and dispute settlement– there was considerable disagreement when it came to drafting details. However, without agreement on each and every aspect of a treaty provision, consensus on the core principles was of limited avail. Second, even with regard to those treaty provisions where consensus was close, such as the ones on investment protection, these could not be taken for granted, since negotiators worked under the hypothesis that 'nothing' is agreed upon, until everything is agreed upon'. There was thus no 'lock-in' mechanism that would have prevented a re-opening of seemingly 'settled' issues. Third, negotiators did not stop adding new policy issues to an increasingly overloaded

4.3.1 Revival of 'MAI' agenda in WTO

The failure of the MAI negotiations did not bury the idea of a multilateral framework on investment. It was revived later within the WTO framework. Although, at the time when the MAI was negotiated in a different forum, the EU and Canada floated a Proposal of the Multilateral Framework on Investment (PMFI) at the WTO first Ministerial Meeting in Singapore.[177] As a result, a working group was established to examine the relationship between trade and investment.[178] It is interesting to note that after the failure of the MAI and unsuccessful attempts to incorporate investment in the WTO, the US was not vocal on the subject of integrating investment under the WTO framework. In the third Ministerial Conference held in 1999, Costa Rica, the EU, Japan, Korea, Poland, and Switzerland argued for a multilateral framework for regulating investment within the WTO without any success.[179] The Fourth WTO Ministerial Conference held in Doha (2001) did not resolve the investment issues but recognized the 'multilateral framework to secure transparent, stable and predictable conditions for long-term cross border investment, particularly foreign direct

---

agenda. Examples include the idea to add specific provisions for financial services; to deal with monopolies, state enterprises, concessions and privatization; to develop rules for the treatment of public debt; to address international laws. As a consequence, the initial recipe for success –the plan to basically limit the negotiations to a consolidation of the existing OECD investment rules and instruments–was gradually abandoned, thereby significantly diminishing the chances for a successful outcome'.)

[177] Kumar, n 172.

[178] Singapore WTO Ministerial Declaration 1996, WT/MIN(96)/DEC (13 December 1996) para 20 <https://www.wto.org/english/thewto_e/minist_e/min96_e/wtodec_e.htm> accessed 1 June 2018.

[179] Preparations for the 1999 Ministerial Conference, Compilation of Proposal Submitted in Phase 1 of the Preparatory Process: (Informal Note by the Secretariat, WTO Job (99)/4797/Rev.3, 18 November 1999).

investment'.[180] The Ministerial Declaration assured modalities of negotiations by explicit consensus in the fifth Ministerial Conference.[181] The language of the Ministerial Declaration clearly reflects that the investment framework should aim to achieve a balance between an investor and the host state:

> Any framework should reflect in a *balanced manner the interests of home and host countries, and take due account of the development policies and objectives of host governments as well as their right to regulate in the public interest*. The special development, trade and financial needs of developing and least-developed countries should be taken into account as an integral part of any framework, which should enable members to undertake obligations and commitments commensurate with their *individual needs and circumstances*. Due regard should be paid to other relevant WTO provisions. Account should be taken, as appropriate, of existing bilateral and regional arrangements on investment.[182]

The above paragraph reflects that the multilateral framework for investment in the WTO cannot be accommodated without considering the interests of developing countries. The WTO negotiation history suggests that even before the third Ministerial Conference, there was a difference of opinion on the coverage of the agreement and responsibility of investors.[183] The WTO Secretariat note submitted by the WTO members before the third Ministerial Conference shows that the European

---

[180] WTO Ministerial Declaration, adopted on 14 November 2001, WT/MIN(01)/DEC/1 (20 November 2001) para 20. <https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S009DP.aspx?language=E&CatalogueIdList=37246&CurrentCatalogueIdIndex=0&FullTextSearch> accessed 18 April 2019.

[181] *Ibid*, para 22.

[182] *Ibid*.

[183] Preparations for the 1999 Ministerial Conference, Compilation of Proposal Submitted in Phase 1 of the Preparatory Process: (Informal Note by the Secretariat, WTO Job (99)/4797/Rev.3, 18 November 1999) 119-122.

Communities (EC), Kenya, and Korea, among others, were vocal about balancing investor rights and state rights in terms of to regulation. Regarding the proposal related to trade and investment, the EC backed an investment agreement within the WTO but not at the cost of the state's policy space:

> The European Community and its member States believe that the time has come for the WTO to establish a multilateral framework of rules governing international investment, with the objective of securing a stable and predictable climate for foreign direct investment world-wide. Notwithstanding the difficulty of drawing precise distinctions in this area, such a framework should focus on FDI, to the exclusion of short-term capital movements. Moreover, it should preserve the ability of host countries to regulate the activity of investors (whether foreign or domestic) on their respective territories, taking also into account the concerns expressed by civil society in many WTO Members, including those regarding investors' responsibilities.[184]

Similarly, Kenya argued that it 'would not consider undertaking commitments under any agreement that would curtail the right of host governments to direct investment in priority areas consistent with their economic and development objectives'.[185] On the same lines, Korea also emphasized that:

> the agreement should aim at facilitating flow of international investment through enhanced transparency and predictability. Such a goal, however, should be

[184] *Ibid*, 119. Also see WTO 'EC Approach to Trade and Investment: Communication from the European Communities'(WT/GC/W/245).
[185] Preparations for the 1999 Ministerial Conference, n 183, 120; See WTO 'Contribution to the Preparatory Process–Communication from Kenya' (WT/GC/W/233).

> reconciled with the need to respect the host country's right to set its own policies, in particular development policies of developing countries.[186]

On the other hand, the US was well aware that even if an investment framework were to be established in the WTO, it would result in lower standards than they aimed for. Therefore, the US continued to raise its investment standards through strengthening NAFTA.[187] Therefore, after the demise of the MAI, the US was no longer interested in bringing an investment agenda in the WTO. Thus, the US search for multilateral identity for investment died, and so the search for investment liberalization moved from the WTO to investment treaties.

Other countries, including the EU, did not lose hope of including investment in the multilateral framework. The tension over investment issues continued in the Cancun Ministerial Conference of 2003, where many developed countries, including the EU, argued for negotiating investment and related issues. In particular, it was contended that since the Singapore Round issues (which included investment) were affirmed in the Doha Round, they should take priority in the negotiation. On the contrary, developing countries held that 'there is no clear consensus to start negotiation as required by the Doha Declaration, and thus the issues have to be sent back to Geneva'.[188] Ultimately, developed countries had to give up their investment agenda,

---

[186] Ibid, Preparations for the 1999 Ministerial Conference, 121. See also WTO 'Trade and Investment- Communication from Korea' (WT/GC/W/267).

[187] See the report of the Ministry of Economy, Trade and Industry, Japan, The Seattle Ministerial Conference 349 <http://www.meti.go.jp/english/report/downloadfiles/gCT0017e.pdf> accessed 19 August 2018 (The United States also remained cautious because of the failure of the OECD to negotiate the MAI).

[188] 'Cambodia and Nepal Membership Sealed as Ministers Start Negotiations' (WTO, 11 September 2003) <https://www.wto.org/english/thewto_e/minist_e/min03_e/min03_11sept_e.htm> accessed 3 October 2018.

which then was never discussed in the subsequent Ministerial Conference. Thus, the mandate established by Doha for modalities of negotiations on investment, was officially closed and the working group on the relationship between trade and investment policy is no longer part of the Work Programme, and no efforts towards negotiation have been made in the WTO since then.[189]

To conclude, the quest for a multilateral investment framework under the WTO is still ongoing, although an outcome seems far away. At the Eleventh Ministerial Conference held in December 2017, 90 members did not support the Multilateral Agreement on Investment facilitation.[190] However, there has been an initiative taken by some WTO members to generate discussion on investment facilitation.[191] The initiative is focused on four key areas– (i) improving regulatory transparency and predictability; (ii) streamlining and speeding up administrative procedures; (iii) enhancing international cooperation and; (iv) addressing the needs of developing members. The initiative clearly indicates that the discussion does not address market access, investment protection and ISDS.[192] It is evident therefore that the 'investment' discussion at the WTO framework is limited to the facilitation of investment rather than investment protection. Consequently, recent IP interactions with trade and investment agreements

[189] Doha Work Programme, Decision Adopted by the General Council on 1 August 2004 (WT/L/579) (2 August 2004).
[190] Kavaljit Singh, 'Investment facilitation: Another fad in the offing?' (Columbia FDI Perspectives: Perspectives on topical foreign direct investment issues No. 232, August, 2018)<http://ccsi.columbia.edu/files/2016/10/No-232-Singh-FINAL.pdf> accessed 2 October 2018.
[191] See WTO, 'Joint Ministerial Statement on Investment Facilitation For Development (WT/MIN(17)/59 <https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S009DP.aspx?language=E&CatalogueIdList=240870&CurrentCatalogueIdIndex=0&FullTextHash=371857150&HasEnglishRecord=True&HasFrenchRecord=True&HasSpanishRecord=True> accessed 2 October 2018.
[192] *Ibid*, para 4.

will never be addressed at the multilateral level and, perhaps, the solution needs to be found outside the WTO.

5. Conclusion

This paper has offered a comprehensive overview of the historical development of foreign investment protection at the international level. Historically, developed countries succeeded in marrying trade with IP but failed to incorporate the investment aspects of IP. The relationship between IP and investment is old, but the debates are new. The pre-World War II FCN treaties covered 'IP' as a subject matter but did not aim to regulate international IP. After the failure of the MAI, there was an attempt to incorporate the investment agenda under the WTO framework. The lack of support by developing countries eventually killed the investment issues in the WTO with minimum success in the form of TRIMS. The recent ISDS cases on IPRs have once again generated new debates on the interactions between IP and investment agreements. Considering that IP chapters will continue to feature in IIAs, we might observe more IPRs issues in ISDS. Needless to say that IP cases litigated in ISDS may undermine the flexibilities or balance achieved in the IP system. It seems to me that there is a shift in the traditional debate, which was initially focused on *IP and investment*. Perhaps, the recent cases demonstrate a new debate in the form of *IP as an investment* and its interaction with ISDS. Unfortunately, the WTO does not seem to be a forum that is offering a solution to this problem, and other platforms may need to be considered to supply the answers.