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The Inevitability of National Treatment of Foreign Direct Investment with Increasingly Few and Narrow Exceptions

Don Wallace, Jr.* & David B. Bailey**

Introduction

National treatment for foreign direct investment is a rather modest norm against the background of post-World War II developments in international trade, investment, and related areas at both the national and international levels.¹

The focus of the Cornell International Law Journal Symposium is on the proposed Multilateral Agreement on Investment (MAI) currently being negotiated in the Organisation for Economic Co-operation and Development (OECD). This Article is not, however, limited to the draft provisions of the MAI. It addresses relevant norms and their evolution, regardless of the source.²

This Article does not address the politics of foreign investment and multinational corporations that were much in the air at the symposium. Some people, including environmentalists and those concerned with the conditions of workers, dislike foreign investment. The facts are more complex, however. There is a near universal desire among the ever-growing numbers of people in the world for a better life, including a better material life. Ironically, many people in society take production and producers for granted, but as the late Paul Tsongas once said, "you can't have employees without employers."³ Similarly, it would seem, you can't have the good life

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¹ The international developments started, for all intents and purposes, with the Bretton Woods institutions. These institutions include the World Bank (also called the International Bank for Reconstruction and Development (IBRD)), the International Monetary Fund (IMF), the General Agreement on Tariffs and Trade (GATT), and the World Trade Organization (WTO), although the GATT was not technically conceived at Bretton Woods.

² While the fate of the MAI is uncertain, the comparable provisions of other documents, such as those creating or constituting the WTO, General Agreement on Trade in Services (GATS), GATT, and the North American Free Trade Agreement (NAFTA), are instructive for our purposes.


31 CORNELL INT'L L.J. 615 (1998)
without the producers of it.

Other objective factors are also relevant to this subject. For investors, especially industrial investors, significant factors include the product life cycle, oligopoly and competitive behavior, local competition, and the need for market presence near the customer. For host governments, significant factors include reassessing the legitimacy of their roles, with governments making way for the private sector, even as they assert their "sovereignty" and possibly even improve their regulatory capacity with respect to some economic sectors.

I. Foreign Direct Investment in General

Foreign direct investment (FDI) has been defined as investment where an investor based in one country acquires an asset in another country with the intention to manage that asset.\(^4\) Thus, FDI involves the creation of new businesses and involves the ownership and control of enterprise abroad, whether in branch or subsidiary form. FDI is more than just "portfolio investment" and capital flows. Historically, investment was not part of the GATT agenda, but beginning with the 1958 Treaty of Rome, free investment has been a cornerstone of the movement towards free trade and market access.\(^5\) Most countries want FDI, and most FDI is among advanced countries anyway, so "activist" ideas are somewhat off point.

Negotiations with respect to foreign direct investment no longer exist in isolation. They are now driven by and are part of the larger trade negotiation agenda. It was not always so: in the post World War II era, the initial concern was investment protection against expropriation, followed later by the desire of lesser-developed countries (LDCs) to create a "new international economic order" to replace the Bretton Woods System. LDCs wanted this new international economic order to include codes (the negotiation of which some thought would give rise to "soft law") that would control multinational corporations (MNCs) and their practices and have a general redistributive effect.

The current agenda is broadly a continuation of the Bretton Woods approach of progressive liberalization (i.e. the ultimate elimination of all barriers to market access for all foreign economic actors in all sectors). This involves a "ratchet" principle, in that barriers once removed will not be restored, and continuous rounds of negotiations will whittle away barriers. There may be phase-in periods for LDCs and certain government measures may remain, including national currencies and exchange rates, but their operation must be "non-discriminatory." Private barriers (i.e. anti-competitive conditions) are not yet being challenged, but the day may


\(^{5}\) A crucial fact about FDI is that the lesser-developed countries (LDCs) mostly want and need it desperately. Ironically, most FDI is, with the exception of oil, gas, and minerals, still among developed countries. *See Organisation for Economic Co-operation and Development (OECD), Foreign Direct Investment and Economic Development: Lessons From Six Emerging Economies* (1998).
come when governments will be required to have and enforce anti-trust laws. And with the new WTO GATS, detailed domestic regulation will increasingly become a center of attention.

Thus, Article XX of the GATT and its epigone will require a policing of regulation. For example, under the Uruguay Round Agreement on Sanitary and Phytosanitary Measures (SPM), nations cannot discriminate against imports of another country's beef just because it contains "hormones," those hormones must be shown to be scientifically objectionable according to an accepted risk assessment.

Even while regulation is being disciplined, other parts of the WTO require it. GATS requires domestic regulation for sectors such as telecommunications to ensure non-discriminatory and transparent implementation. Meanwhile, environmental protection and core labor rights are struggling, largely unsuccessfully to date, to find their place in this trade agenda.7

While the quotas and tariffs of GATT focused on the border, the focus of trade policy is now moving inland behind border tariffs and quotas, as in TRIPS,8 the AGP (procurement) and GATS. GATS is especially relevant because Articles I and XVI (market access)9 explicitly cover establishment (although not using the word), which is a key to FDI.

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9. GATS Article I provides:

2. For the purposes of this Agreement, trade in services is defined as the supply of a service: (a) from the territory of one Member into the territory of any other Member; (b) in the territory of one Member to the service consumer of any other Member; (c) by a service supplier of one Member, through commercial presence in the territory of any other Member; (d) by a service supplier of one Member, through presence of natural persons of a Member in the territory of any other Member.
Some "progressive liberalization" precedents apply to foreign direct investment, although they are typically of limited coverage and do not include LDCs. These precedents include the 1958 Treaty of Rome as amended, the 1961 OECD Codes on Liberalization of Current Invisibles and of Capital Movements, the 1976 OECD Declaration on International Investment and Multinational Enterprises (including the National Treatment Instrument establishing national treatment), bilateral investment treaties, and the WTO Agreement on Trade-Related Investment Measures (TRIMs) (which does cover LDCs).

These "progressive liberalization" precedents typically include most favored nation (MFN) and national treatment provisions requiring that "like" products receive non-discriminatory treatment. The interpretation of the word "like" is critical to an analysis of these precedents. Although there are some precedents for what "like" means for goods, the term is less clear with respect to matters more intricate than goods. How will these norms play out with respect to services, service providers, and most crucially for the purposes of this article, investments and investors?

This Article assumes that the various concepts and definitions (e.g., "like circumstances") in the MAI, GATS, and NAFTA are in pari materia

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And Article XVI provides:

With respect to market access through the modes of supply identified in Article I, each Member shall accord services and service suppliers of any other Member treatment no less favourable than that provided for under the terms, limitations and conditions agreed and specified in its Schedule.

Id.

10. See, e.g., OECD Code of Liberalisation of Capital Markets (1961), art. 1(a): Members shall progressively abolish between one another, in accordance with the provisions of Article 2 [measures of liberalisation], restrictions on movements of capital to the extent necessary for effective economic co-operation. Measures designed to eliminate such restrictions are hereinafter called "measures of liberalisation."

11. For example, GATS Article XVII provides:

1. In the sectors inscribed in its Schedule, and subject to any conditions and qualifications set out therein, each Member shall accord to services and service suppliers of any other Member, in respect of all measures affecting the supply of services, treatment no less favourable than that it accords to its own like services and service suppliers.

2. A Member may meet the requirement of paragraph 1 by according to services and service suppliers of any other Member, either formally identical treatment or formally different treatment to that it accords to its own like services and service suppliers.

3. Formally identical or formally different treatment shall be considered to be less favourable if it modifies the conditions of competition in favour of services or service suppliers of the Member compared to like services or service suppliers of any other Member.

GATS, supra note 9, art. XVII, at 1601; see also NAFTA, supra note 7, art. 1102.

unless otherwise noted. With respect to the MAI itself, the operation of the
dispute resolution provisions may in the future provide some uniformity of
meaning.\footnote{MAI Negotiating Text Article V provides for dispute settlement procedures for
state-state disputes and for investor-state disputes. State-state disputes may be resolved
by consultations between parties or by arbitration in an ad hoc tribunal, whose
members may be appointed by the parties or by the International Center for the Settlement of
Investment Disputes (ICSID). The ad hoc tribunal shall decide disputes in accordance
with the MAI as interpreted in accordance with the applicable rules of international law.
Investor-state disputes should be settled, if possible, by negotiation or consultation, or
by any competent court of the State Party or by arbitration in accordance with the ICSID
Convention. \textit{MAI Negotiating Text, supra} note 7, art. V.}

II. National Treatment of FDI

A number of possible norms might apply to FDI: total laissez faire for both
domestic and foreign investors, with no government measures (similar to
the U.S. situation); absolute minimum standards for foreign (and domes-
tic) investors (e.g., no expropriation, or none without compensation); or no
discrimination (e.g., MFN and national treatment, whichever yields the
best result for the investor). The MAI and other treaties call for the last
option.

Article 1 of the MAI, for example, provides:

1. Each Contracting Party shall accord to investors of another Contracting
Party and to their investments, treatment no less favorable than the treat-
ment it accords [in like circumstances] to its own investors and their invest-
ments with respect to the establishment, acquisition, expansion, operation,
management, maintenance, use, enjoyment, and sale or other disposition of
investments.

2. Each Contracting party shall accord to investors of another Contracting
party and to their investments, treatment no less favorable than the treat-
ment it accords [in like circumstances] to investors of any other Contracting
Party or of a non-Contracting Party, and to the investments of investors of
any other Contracting Party or of a non-Contracting Party . . . .

3. Each Contracting Party shall accord to investors of another Contracting
Party and to their investments the better of the treatment required by Arti-
cles 1.1 and 1.2, whichever is the more favorable to those investors or
investments.

The national treatment provisions of the MAI apply to all three phases
of FDI — entry, operations, and breakdown.

This Article first discusses national treatment. It then proceeds to the
subject of exceptions, both general and specific.

A. A Modest Norm

As people learn more about national treatment,\footnote{Historically, trade lawyers dealt much more with MFN. \textit{See generally} \textsc{Stanley Metzger}, \textsc{Trade Agreements and the Kennedy Round} 39-54 (1964); \textsc{Michael Borrus} \& \textsc{Judith Goldstein}, \textsc{United States Trade Protectionism: Institutions, Norms, and Practices}, 8 \textsc{J. Int'l L. Bus.} 328 (1987).} they may begin to appreci-
ate the true "modesty" of this modest norm. The MAI provision makes
clear, as do most versions of national treatment, that it applies only in cases of "like circumstances" (MFN is also limited to "like circumstances"). Of course, the determination of "like circumstances" lies in the application.

Although the GATT never directly addressed foreign investment until the Uruguay Round, earlier cases suggest some movement towards national treatment for FDI. In the GATT Panel Report on the U.S.-Canada Dispute on the Administration of Canada's Foreign Investment Review Act (Canada Act), the United States alleged that the Canada Act resulted in differential treatment of imports by U.S. investors in manufacturing operations in Canada. The United States claimed this differential treatment prevented their imports from competing fairly with Canadian products. The GATT Panel found that the requirements of the Canada Act were inconsistent with the national treatment provisions of Article 110(4) of GATT. The Panel's holding was limited to the issue of whether less favorable treatment was accorded to imported products than that accorded to like products of Canadian origin, but bore directly on FDI because the injured parties were U.S. investors and because the decision removed a "performance requirement" from foreign investment.

Examples abound of countries moving toward national treatment even outside the framework of GATT/WTO. The United States has entered into numerous bilateral investment treaties with other nations, which typically provide for national treatment for direct and indirect investment. There has been significant liberalization of investment with Mexico since the 1973 Investment Treaty. Other bilateral investment treaties (BITs), most


17. The Canada Act required foreign investors, such as those who sought to set up manufacturing operations in Canada, (a) to purchase goods of Canadian origin in preference to imported goods, and (b) to manufacture in Canada goods which would be otherwise imported. Id. at 13.

18. The panel understood that there were larger effects on foreign investment, but did not address them because they were not provided for in GATT.

As to the extent to which purchase requirements reflect plans of the investors, the 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.

Id. at 61.

19. See, e.g., Treaty Concerning the Reciprocal Encouragement and Protection of Investment:

Each Party shall permit and treat investment, and activities associated therewith, on a basis no less favorable than that accorded in like situations to investment or associated activities of its own nationals or companies, or of nationals or companies of any third country, whichever is the more favorable, subject to the right of each Party to make or maintain exceptions falling within one of the sectors or matters listed in the Protocol to this Treaty.
notably NAFTA Chapter 11, provide for national treatment of FDI in "like circumstances." Although LDCs have long resisted unrestricted FDI by multinational enterprises (MNEs), LDCs like India have taken independent measures towards liberalization. India recently has begun to increase the allowable percentage of foreign equity ownership for FDI in some sectors. What does national treatment in "like circumstances" require? Some recent examples from the WTO's GATS are instructive.

Recently, members of the WTO implemented the so-called Basic Telecommunications Agreement (BTA). Some have suggested that the BTA violates the national treatment requirements of GATS Article XVII, but is this critique correct? The Reference Paper, and the November 1997 Federal Communications Commission (FCC) Foreign Participation Order, which implemented U.S. compliance with the BTA, seem to free the United States from both MFN and national treatment obligations where a foreign applicant poses a "high competitive risk" to the U.S. market.

A closer examination suggests that the United States may not be so free. There are at least two possible scenarios. The first scenario is that of a foreign "crook" attempting to infiltrate the U.S. market. However, a U.S. national "crook" would no more get a license than a foreign one. The second scenario may be more subtle. For example, a foreigner with "deep pockets" may operate in a home country that does not freely admit foreigners, with the result that it may be uniquely protected, even subsidized. In

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1. Each Party shall accord to investors of another Party treatment no less favorable than that it accords, in like circumstances, to its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.

4. For greater certainty, no Party may:

   (a) impose on an investor of another Party a requirement that a minimum level of equity in an enterprise in the territory of the Party be held by its nationals, other than nominal qualifying shares for directors or incorporators of corporations; or

   (b) require an investor of another Party, by reason of its nationality, to sell or otherwise dispose of an investment in the territory of the Party.

NAFTA, supra note 7, art. 1102.


24. FCC Foreign Participation Order, IB Docket No. 97-142 (Nov. 25, 1997).

25. The Foreign Participation Order provides:

   [I]n exceptional circumstances, entry into the U.S. market by an applicant affiliated with a foreign telecommunications carrier from a WTO Member may pose
such a case, a foreign applicant attempting to enter the U.S. market is surely not in "like circumstances" with a U.S. national competitor.

Additionally, some suggest that the reference to "prudential measures" in both the MAI and the GATS Annex on financial services is an exception to national treatment. But, again, a closer examination suggests that this may not be so. If Bank of Credit and Commerce International (BCCI) had been restricted in some ways by the "prudential measures" language, would not Continental Illinois also have been in "like circumstances"?

Similar instances of seeming non-national treatment will likely occur, and the related market access provisions of the GATS and other treaties will seemingly be violated. Thus, U.S. anti-trust laws may limit foreigners, but the critical issue will be whether U.S. nationals receive the same treatment in like circumstances. There will be other questions of the application of national treatment. For example, what does "national treatment" mean for an American company in the Canadian province of Manitoba? Should it be given the same treatment as a Manitoban, or will the same treatment as a company from British Columbia suffice?

III. Exceptions

The matter of exceptions is a vexing part of the ongoing MAI negotiations. However, the exceptions will likely be kept to a minimum and narrowed, both in negotiations and in application. While the proposed MAI goes farther than most of its predecessors in narrowing the exceptions to national treatment, commentators have noted several variables that allow flexibility competitive risks by virtue of the applicant's ability to exercise market power in a relevant foreign market. We find that our safeguards will be adequate to detect and deter such conduct in virtually all circumstances. In the exceptional case where an application poses a very high risk to competition in the U.S. market, where our safeguards and conditions would be ineffective, we reserve the right to deny an application. We therefore will presume that an application does not pose a risk of competitive harm that would justify denial unless it is shown that granting the application would pose such a very high risk to competition.

Id. ¶ 51.

26. See MAI Negotiating Text, supra note 7, art. VII(1) ("a Contracting Party shall not be prevented from taking prudential measures with respect to financial services, including measures for the protection of investors, depositors, policy holders or persons to whom a fiduciary duty is owed . . . or to ensure the integrity and stability of its financial system").


in the implementation of the MAI.\textsuperscript{30} Regarding exceptions, the experience of GATT offers instructive lessons.

The exceptions under consideration are of two types: general, across-the-board exceptions (applied on an MFN basis, without reciprocity); and country-specific exceptions, which are sometimes applied reciprocally against countries with similar exceptions. The former exception type will often arise from applying domestic regulation to foreign and domestic investors and may not necessarily violate national treatment because of "unlike circumstances." Such domestic regulation will be the increasing focus of many market access questions.

A. General Exceptions

Among the general exceptions much bruited are national security, culture, and public order/police power.

1. National Security

National security exceptions arose from Cold War concerns. During the Cold War, the GATT allowed countries to define national security restrictions on their own terms.\textsuperscript{31} National security is, however, a relative concept that changes as international relations change. For instance, the U.S. Department of Defense approved a license for production of F-16 fighters by the same Japanese company that built the Zeros that bombed Pearl Harbor during World War II.\textsuperscript{32}

Today, a national security exception may still be proper, but not when its scope is unreasonably broad. Instead, an exception premised on national security should be narrowed or fine-tuned. For example, the U.S. Department of Defense "security clearance" can be satisfied by foreign contractors through "voting trusts" and other means.\textsuperscript{33} Similarly, the Exon-Florio Amendment would bar otherwise permissible foreign investment in...
Intel if foreign ownership would constitute "clear interference" with U.S. national security interests.\textsuperscript{34}

Article VI(1)-(2) of the MAI Negotiating Text still provides a general exception for national security concerns:

Nothing in [the MAI] shall be construed:

a. to prevent any Contracting Party from taking any action which it considers necessary for the protection of its essential security interests . . . ;\textsuperscript{35}
b. to require any Contracting Party to furnish or allow access to any information the disclosure of which it considers contrary to its essential security interests;
c. to prevent any Contracting Party from taking any action in pursuance of its obligations under the United Nations Charter for the maintenance of international peace and security.\textsuperscript{36}

2. Culture

General cultural exceptions are sometimes allowed. NAFTA provides for an exception to national treatment of foreign investment between Canada and the United States for "cultural industries."\textsuperscript{37} Cultural industries include those involved in the production, distribution, and sale of publications, audio and video recordings, music, and broadcasting.\textsuperscript{38} In the Canada-U.S. dispute on Certain Measures Concerning Periodicals, the United States won the right to publish a Canadian edition of Sports Illustrated by appealing directly to the WTO Dispute Settlement Panel, thereby avoiding the NAFTA cultural industries exception.\textsuperscript{39}

Similarly, the European Community responded to what it perceived as an imminent cultural crisis by enacting the "Television Without Frontiers" directive in 1989. The Directive required public and private networks of member states to set aside at least fifty percent of their total airtime for

\begin{itemize}
\item {35. Subsection 2(a) limits these interests to those:
(i) taken in time of war . . . ;
(ii) relating to the implementation of national policies respecting the non-proliferation of weapons of mass destruction;
(iii) relating to the production of arms and ammunition.
\item {MAI Negotiating Text, supra note 7, art. VI(2)(a).}
\item {36. Id. art. VI(2).}
\item {37. NAFTA, supra note 7, annex 2106 (Cultural Industries):
Notwithstanding any other provision of this Agreement, as between Canada and the United States, any measure adopted or maintained with respect to cultural industries, except as specifically provided in Article 302 (Market Access — Tariff Elimination), and any measure of equivalent commercial effect taken in response, shall be governed under this Agreement exclusively in accordance with the provisions of the Canada — United States Free Trade Agreement.
\item {38. Id. art. 2107.}
In the pre-Uruguay Round world, this restriction was not prohibited by GATT because broadcasting represented a "service" and not a "product." France and Canada carried over their existing reservations in their Uruguay Round commitments to the GATS and have sought a broad cultural industries exception in the MAI. Most delegations, however, do not support a cultural industries exception in the MAI, and the MAI Negotiating Text does not provide for one.

3. Public Order/Police Power

Exceptions for "public order" and police powers seem to be the key area of contention. Public order is vulnerable to being exaggerated beyond reasonable bounds. The public order exception is the subject of GATT Article XX, GATS Article VI, and the proposed MAI Article VI.

A broad exception for public order is becoming an anachronism. The concept of "big government" dissolved during the Reagan and Thatcher era, so it is less likely that national treatment will result in any loss of sovereignty. But in the era of shrinking government power, there will always be regulation. The Federal Drug Administration (FDA), the Environmental Protection Agency (EPA), and GATT Article XX, among others, still allow trade protection, either explicitly or implicitly. The Uruguay Round Agreements on the Application of Sanitary and Phytosanitary (SPM) and on Technical Barriers to Trade (TBT) narrow this substantially, but still allow for escape valves. How will this apply to national treatment of FDI?

GATT Article XX(2), for example, provides:

Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of [necessary measures to protect public order].

GATS Article VI likewise requires the even-handed application of

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42. See WTO Agreement, supra note 8.
43. GATT, supra note 15, art. XX(2). These "necessary measures" include those:
   (a) necessary to protect public morals;
   (b) necessary to protect human, animal or plant life or health;
   (c) relating to the imports or exports of gold or silver;
   (d) necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement, including those relating to customs enforcement, the enforcement of monopolies operated under paragraph 4 of Article II and Article XVII, the protection of patents, trade marks and copyrights, and the prevention of deceptive practices...
domestic regulation.\textsuperscript{44} Even in the era of privatization of infrastructure, regulation will continue in such sectors as telecommunication rates, road safety, and road expansion.

But regulation may still be condemned if it rises to the level of a "regulatory taking," or "creeping expropriation" of an investment. As Justice Holmes defined the "regulatory taking" concept in \textit{Pennsylvania Coal v. Mahon}, "the general rule at least is that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking."\textsuperscript{45} Holmes also noted that some property values "are enjoyed under an implied limitation and must yield to the police power . . . [b]ut obviously the implied limitation must have its limits. . . ."\textsuperscript{46} Such " takings" fall within the coverage of the International Bank for Reconstruction and Development (IBRD), Multilateral Investment Guarantee Agency (MIGA), and "expropriation insurance" under the Overseas Private Investment Corporation (OPIC).\textsuperscript{47}

The proposed MAI illustrates a conscious narrowing of the public order exception. The MAI Negotiating Text Article VI(3) provides:

Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between Contracting Parties, or a disguised investment restriction, nothing in this Agreement shall be construed to prevent any Contracting Party from taking any measure necessary for the maintenance of public order.\textsuperscript{48}

The Commentary to the MAI Negotiating Text illustrates the ambivalence among the delegations towards the necessity and scope of the public order exception. Some delegations feel an exception for public order is necessary to ensure the application of a country's criminal laws, anti-terrorist measures, and money laundering regulations.\textsuperscript{49} Other delegations

\textsuperscript{44} Id.
\textsuperscript{45} \textit{Pennsylvania Coal v. Mahon}, 260 U.S. 393, 415 (1922). This concept was expressed even more succinctly in \textit{Virginia Surface Mining and Reclamation Assoc. v. Andrus}, 443 F. Supp. 425 (W.D. Va. 1980) ("the power to regulate is also the power to destroy").
\textsuperscript{46} \textit{Pennsylvania Coal}, 260 U.S. at 413.
\textsuperscript{47} OPIC defines expropriation as "any abrogation, repudiation, or impairment by a foreign government of its own contract with an investor with respect to a project, where such abrogation, repudiation, or impairment is not caused by the investor's own fault or misconduct, and materially adversely affects the continued operation of the project." 22 U.S.C. § 2198(b) (1998).
\textsuperscript{48} \textit{MAI Negotiating Text}, supra note 7, art. VI(3). Note 2 of this section further narrows the exception by providing that it may only be invoked "where a genuine and sufficiently serious threat is posed to one of the fundamental interests of society."
\textsuperscript{49} The MAI Negotiating Text also provides for a general exception for transactions in pursuit of monetary and exchange rate policies. MAI Article VI(2.1) provides: "Articles XX (National Treatment), YY (Most Favored Nation Treatment) and ZZ (Transparency) do not apply to transactions carried out in pursuit of monetary or exchange
argue that no discrimination between foreign and domestic investors is necessary to protect these goals. As discussed above, a foreign crook who is subject to a nation's criminal laws is still receiving "national treatment." The MAI exception is further narrowed because it is not self-defined and is subject to rigorous scrutiny under the MAI's dispute settlement procedures.

B. Country-Specific Exceptions

Are there international patterns of country-specific exceptions? Government research grants, foreign assistance programs, restrictions with respect to nuclear areas, French films, droit d'auteur, cabotage, minerals, land, and media have all been subjects of country-specific exceptions. Questions remain as to how countries should handle these. In the field of public procurement, countries still protect minority set-asides, as well as domestic preferences and set-asides. For example, should Indonesia unconditionally award preferential contracts to Indonesian firms if their bids are no more than ten percent above a foreign bid? We can see that such programs are being narrowed by the BTA, the MAI Financial Services Annex, and the European Union (EU). A future goal will be to fine tune these exceptions, and then narrow them even more.

In the United States, there are several degrees of restriction on FDI. There may be total prohibition from FDI in certain sectors (nuclear power, maritime activities), allowed subject to strict regulation (airlines, financial services, communications), and allowed subject to limits on equity ownership (limit to minority shares). The United States has already narrowed restrictions even in these areas. Financial services has moved furthest of any sector in the direction of national treatment in the United States.

The United States has also shown its willingness to support WTO liberalization measures.

The MAI allows country-specific exceptions. The MAI Negotiating Text provides that national treatment and MFN shall not apply to: "(a) any existing non-conforming measure as set out by a Contracting Party in its schedule to Annex A of the Agreement, to the extent that the measure is maintained, continued or promptly renewed in its legal system." The MAI Negotiating Text notes that this language is intended to clarify that foreign investors should benefit from any liberalization measure as soon as the relevant law, regulation, or practice enters into force.

rate policies by a central bank or monetary authority of a Contracting Party." MAI Negotiating Text, supra note 7, art. VI(2.1).
50. Id. art. VI(3) cmt.
53. See id.
54. MAI Negotiating Text, supra note 7, art. IX(Country-Specific Exceptions), ¶ A (emphasis added).
55. Id.
Thus we see the "ratchet" effect once again. The MAI Negotiating Text further provides that each listed exception must set out a number of elements to ensure the greatest possible transparency of the exception. In negotiations, strong support existed for requiring, among the elements, an explanation of the motivation or rationale for the given exception.56

IV. History and Prospects

While extrapolating from history is often unwise, the unmistakable pattern of recent history with respect to the relevant international norms and the underlying material and economic forces make extrapolations appropriate in this case.

A. History

Historically, FDI has been approached differently by customary public international law, on the one hand, and the WTO, on the other hand. In considering the history of customary international law, it is useful to distinguish entry, operations, and breakdown for FDI. Customary international law did not regulate countries' approaches to entry and operations as they did with respect to breakdown. In recent years, treaties, as opposed to customary law, have filled this void by regulating countries' approaches to entry and operations.

With regard to entry, customary international law supported the position that nations were always free to keep foreigners out. Today, the movement is towards liberalization, in the form of IBRD FDI Guidelines,57 BITs, and NAFTA, which establish national treatment. This signals a departure from customary international law.

With regard to operations, customary international law dealt with regulation if it had the effect of a "creeping expropriation." However, the real development came from the OECD Codes on Liberalisation in the 1960s, the National Treatment Instrument in 1976, and various treaties.

The breakdown of foreign investment (expropriation, repudiation of contracts, etc.) under customary international law was often an issue among colonial powers rather than a real north-south interchange.58 Protection against expropriation under customary international law included both national treatment standards and a minimum standard of prompt,

56. Id. art. IX, § 2(g) (Introduction to Annex A of the Agreement Listing Country-Specific Exceptions).
58. The differences between the colonial powers were in the nineteenth and early twentieth centuries. During the middle of the twentieth century, expropriations occurred in the communist countries. Recently, however, prominent North-South cases have occurred, such as the "nationalization" of Exxon oil fields in Peru in 1969 and the taking of Kennecott Copper mines by the Chilean government in 1971. See Michael W. Gordon, Predictability of Nationalization of Foreign Private Investment in Latin America, 1 Syracuse J. Int'l L. & Commerce 123 (1973).
adequate, and effective compensation. The Latin American “Calvo doctrine,” for example, allowed for only national treatment with no minimum standard of compensation and barred foreigner investors’ resort to diplomatic remedies. The Charter of Economic Rights and Duties of States (CERDS), voted by the U.N. General Assembly in 1974, represented an attempt by LDCs to extend such an approach beyond Latin America. But the Calvo doctrine and CERDS have subsided and there is now a larger movement towards universalizing a minimum standard of compensation for expropriation.

B. More History and Prospects

The WTO system, from its Bretton Woods heritage (including the OECD and the EU), strives towards progressive liberalization. The law is now almost entirely treaty-driven. The movement to eliminate exceptions from the principles of national treatment and MFN has been building momentum. Liberalization has come about by means of absolute requirements, such as elimination of quotas, disciplining of subsidies, import relief safeguards, MFN, and national treatment standards. In the field of services, GATS Article II calls for MFN treatment unless a country lists specific exceptions, and GATS Article XVII calls for national treatment and is structured to make it very difficult for a country to impose exceptions and conditions.

Recent efforts towards liberalization observe a common pattern: limit the exceptions to national treatment and gradually narrow those exceptions. For example, government procurement had been explicitly excluded from the 1947 GATT in its Article III(8), and represented a major gap in multilateral trade negotiations. Procurement was not addressed until the Agreement on Government Procurement (AGP) in the Tokyo Round in 1979 and its subsequent enlargement in the Uruguay Round in 1994. In its present form, the AGP sets out detailed obligations that procuring entities must fulfill to ensure the effective application of its national treatment principles and ensure open access. A similar sort of liberalization can be seen in the development of GATS, the BTA and the WTO Annex on Financial Services.

59. The latter standard in U.S. BITs is sometimes called the “Hull formula.”
62. GATS Article XVII provides:
   1. In the sectors inscribed in its Schedule, and subject to any conditions and qualifications set out therein, each Member shall accord to services and service suppliers of any other Member, in respect of all measures affecting the supply of services, treatment no less favourable than that it accords to its own like services and service suppliers.
GATS, supra note 9, art. XVII.
For these developments, the system follows a process that the MAI describes as "standstill" plus "rollback," whereby non-conforming measures to the national treatment principle are reduced and eventually eliminated.\textsuperscript{64} The MAI views this as a three-step process.\textsuperscript{65} First, specific exceptions are to be kept consistent with new liberalization measures. Second, non-conforming measures are to be periodically examined. Finally, successive rounds of negotiations are to permanently remove remaining non-conforming measures.

As the globe spins, international trade and norms roll on. National treatment, increasingly free of crippling exceptions, will become more and more inevitable.


\textsuperscript{65} This is the "ratchet" principle: any new liberalization measures are locked in and cannot be rescinded over time ("standstill"), and then liberalized further ("rollback").