

1997

Developing Countries and the Framework for Negotiations on Foreign Direct Investment in the World Trade Organization

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Developing Countries and the Framework for Negotiations on Foreign Direct Investment in the World Trade Organization

Eric M. Burt^{*}

Introduction	1016
I. Foreign Direct Investment, Multinational Enterprises, and Host Country Investment Measures	1019
A. Foreign Direct Investment and Multinational Enterprises	1019
B. Potential Benefits and Costs of FDI to Host Developing Countries ..	1021
C. Host Country Investment Measures	1023
D. International Law on Investment Measures	1026
II. The Regulation of Foreign Direct Investment in the GATT Framework ..	1028
A. International Trade Organization and Pre-Uruguay Round GATT ..	1028
1. International Trade Organization	1028
2. FIRA Dispute	1029
B. Uruguay Round and FDI—GATS, TRIMs, and TRIPS	1030
1. GATS	1030
2. TRIMs Agreement	1033
3. TRIPS Agreement and the Dispute Settlement Understanding ...	1039
III. The OECD Multilateral Agreement on Investment (MAI)	1040
A. Origins of the MAI	1040
B. The Particulars of the MAI	1042
1. Definition of Investment	1042
2. The Main Principles: National Treatment, Most-Favored Nation Treatment, and Transparency	1042
3. Investor/Investment Protection	1044
4. Dispute Settlement in the MAI	1045
5. Special Issues: MNE Practices & Developing Country Accession	1046
C. Benefits and Limitations of the MAI	1048
IV. The Setting for WTO Negotiations, Issues, and Recommendations	1049
A. The Setting for WTO Negotiations on Foreign Direct Investment ...	1049
B. Issues and Recommendations for WTO Negotiations on Foreign Direct Investment	1054

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1. Is an Agreement on Direct Investment in the WTO Necessary and Desirable?	1054
2. Reconstituting the MAI in the WTO Framework	1056
3. Incorporating Rules on Restrictive MNE Practices	1057
4. Extent of Liberalization	1059
Conclusion	1061

INTRODUCTION

No single comprehensive set of multilateral rules currently exists for the regulation of foreign direct investment.¹ At the World Trade Organization's ("WTO") Singapore Ministerial Conference in December 1996, member country trade ministers advanced closer to the establishment of multilateral investment rules by forming a WTO working group to study the relationship between trade and foreign direct investment.² The regulation of foreign direct investment became part of the General Agreement on Tariffs and Trade ("GATT") agenda during the Uruguay Round with the General Agreement on Trade in Services ("GATS") and the Agreement on Trade-Related Investment Measures ("TRIMs").³

Developing countries, led by India, have resisted multilateral efforts to regulate

1. See A Level Playing Field for Foreign Direct Investment World-Wide: Communication from the Commission, COM(95)42 final at 4 [hereinafter European Commission Proposal on FDI] (examining the current multilateral framework for FDI and concluding that there are no comprehensive *multilateral* rules).

2. See World Trade Organization Secretariat, *Singapore Ministerial Declaration*, para. 20, WT/MIN(96)/DEC (adopted on 13 Dec. 1996) [hereinafter *Singapore Declaration*], reprinted in *Singapore Ministerial Declaration*, WTO FOCUS (World Trade Organization, Geneva, Switzerland), Jan. 1997, at 7, 10. Concerning direct investment and the WTO framework, the Ministers stated:

Having regard to the existing WTO provisions on matters related to investment and competition policy and the built-in agenda in these areas, including under the [Trade-Related Investment Measures] Agreement, and on the understanding that the work undertaken shall not prejudice whether negotiations will be initiated in the future, we also agree to: establish a working group to examine the relationship between trade and investment. . . . In the conduct of the work of the working groups, we encourage cooperation with [the United Nations Conference on Trade and Development] to . . . ensure that the development dimension is taken fully into account. . . . It is clearly understood that future negotiations, if any, regarding multilateral disciplines in these areas, will take place only after an explicit consensus decision is taken among WTO Members regarding such negotiations.

Id.; see *The Growing Impact of Investment and Trade*, WTO FOCUS (World Trade Organization, Geneva, Switzerland), June-July 1997, at 2, 2 (highlighting the discussions of the first meeting (June 2-3, 1997) of the Working Group on the Relationship between Trade and Investment).

3. See *infra* Parts II.B.1-2 (discussing the GATS and TRIMs Agreements and their provisions relating to foreign direct investment).

direct investment⁴ because they view restrictive investment policy as a sovereign right and an element of national economic policy.⁵ They fear abuse by multinational enterprises⁶ and a loss of sovereign control over national development if investment policies are liberalized.⁷

At the Singapore Ministerial Conference, the coalition of developing countries opposed to an agreement on direct investment⁸ compromised enough⁹ to allow the Ministerial Declaration to establish a WTO working group on direct investment.¹⁰ This developing country coalition, however, insists that the working group only has authority to examine the possible broadening of the TRIMs Agreement, which the Agreement itself mandates.¹¹ India, in particular, insists that it will resist any multilateral agreement on direct investment in the WTO.¹² The developed countries, on the other hand, envision the newly established working group leading to discussions on a comprehensive agreement on direct investment.¹³

Current efforts in this direction outside of the WTO provide a useful negotiating foundation for developed countries.¹⁴ In May of 1998,¹⁵ the member countries

4. See *infra* notes 157-160 and accompanying text (examining developing country positions in the TRIMs negotiations); see also *infra* notes 287-292 and accompanying text (discussing India's resistance to any future negotiations on direct investment in the WTO).

5. See discussion *infra* Parts I.C-D (describing developing country investment measures, the reasons for institution of these measures, and international law permitting such measures).

6. See *infra* notes 45-53 and accompanying text (identifying the potential "costs" to developing country economies from the practices of multinational enterprises).

7. See *infra* notes 54-62 and accompanying text (describing the use of investment measures to harness FDI toward development objectives).

8. See *infra* note 282 (describing the formation and later collapse of the developing country coalition opposed to a WTO agreement on investment).

9. See C. Rammanohar Reddy, *A Familiar Story at WTO Meet*, HINDU, Dec. 14, 1996, at 13 (suggesting that developed countries at the Singapore Conference ignored the legitimate concerns of developing countries on the investment issue). "[A]ll the compromise language on the new issues cannot hide the fact that the developing countries came to Singapore not wanting any reference to these issues in the ministerial declaration." *Id.*

10. See *Singapore Ministerial Declaration*, *supra* note 2, para. 20 (establishing a working group on trade and investment).

11. See *infra* notes 194-196 and accompanying text (discussing the built-in authority for review of the TRIMs and GATS Agreements allowing the possibility to expand the WTO's coverage of direct investment).

12. See *infra* notes 287-292 and accompanying text (discussing India's stance toward investment on the WTO agenda).

13. See *infra* notes 285-286 and accompanying text (discussing the desire of developed countries to pursue an agreement on direct investment in the WTO); see also *infra* notes 293-298 (describing how developed countries can induce developing countries into agreeing to investment negotiations).

14. The EU desires that the forthcoming MAI serve as a foundation for a WTO agreement on direct investment. In the May 1997 draft of the MAI, the EU inserted language to this effect. See *May 1997 MAI Draft*, *infra* note 17, preamble ("Wishing that this Agreement enhances international co-operation with respect to investment and the development

of the Organization for Economic Cooperation and Development ("OECD"), largely a developed country organization,¹⁶ intend to complete negotiations on a Multilateral Agreement on Investment ("MAI").¹⁷ The MAI will be a freestanding international treaty and will become the most comprehensive multilateral investment agreement in existence.¹⁸ It will likely become the benchmark for negotiations in the WTO.¹⁹

This Comment analyzes the framework for negotiations in the WTO for an agreement on direct investment and the conflicting interests of developed and developing countries regarding such an agreement. Part I introduces the concepts of foreign direct investment and multinational enterprises and discusses the various measures taken by developing countries to control direct investment in their economies. Part II examines the regulation of foreign direct investment in the international economic system, from the stillborn International Trade Organization through the Uruguay Round Agreements. Part III analyzes the forthcoming OECD Multilateral Agreement on Investment and assesses its benefits and limitations. Finally, part IV of this Comment describes the setting for negotiations on foreign direct investment in the WTO, discusses important issues for these negotiations, and provides recommendations as to the substance of WTO negotiations. This Comment concludes by recommending that negotiators pursue a gradual and balanced track of investment liberalization that adequately reflects the concerns of developing countries.

of world-wide rules on foreign direct investment in the framework of the world trading system as embodied in the World Trade Organization.").

15. See *Multilateral Agreement on Investment: Report by the Negotiating Group*, OECD Doc., annex (May 21, 1997) [hereinafter *MAI May 1997 Report*] (resolving to complete the MAI before the 1998 OECD Ministerial Meeting).

16. See note 205 (listing the membership of the OECD).

17. See *infra* Part III (analyzing the origins and likely provisions of the OECD MAI); *Multilateral Agreement on Investment: Consolidated Text and Commentary*, Negotiating Group on the MAI, Directorate for Financial, Fiscal and Enterprise Affairs, Org. for Econ. Cooperation and Dev., OECD Doc. DAF/MAI(97)1/REV2 (May 14, 1997) [hereinafter *May 1997 MAI Draft*]; *Multilateral Agreement on Investment: Consolidated Text and Commentary*, Negotiating Group on the MAI, Directorate for Financial, Fiscal and Enterprise Affairs, Org. for Econ. Cooperation and Dev., OECD Doc. DAF/MAI(96)16/REV1 (Jan. 13, 1997) [hereinafter *January 1997 MAI Draft*]. The OECD will distribute the draft text of the MAI to interested non-governmental organizations. It can also be retrieved at <<http://www.citizen.org/gtw/mainewte.htm>>.

18. See *infra* notes 268-272 and accompanying text (analyzing the benefits of the MAI).

19. See *infra* Part IV.B.2 (discussing the possible reconstitution of the MAI in the WTO); *supra* note 14 (noting the EU's insertion of language in the May 1997 MAI Draft with this objective in mind).

I. FOREIGN DIRECT INVESTMENT, MULTINATIONAL ENTERPRISES, AND HOST COUNTRY INVESTMENT MEASURES

A. FOREIGN DIRECT INVESTMENT AND MULTINATIONAL ENTERPRISES

The WTO Secretariat defines foreign direct investment ("FDI") as occurring "when an investor based in one country (the home country) acquires an asset in another country (the host country) *with the intent to manage that asset*."²⁰ World-wide inflows of foreign direct investment are growing at a considerable rate.²¹ In 1995 total FDI inflows amounted to \$315 billion,²² an increase of forty per cent over 1994.²³ Inflows to developing countries reached an all-time high of \$100 billion in 1995.²⁴ FDI is growing faster than both world trade²⁵ and world output.²⁶

20. World Trade Organization Secretariat, *Trade and Foreign Direct Investment*, PRESS/57, at 6 (Oct. 9, 1996) [hereinafter *WTO Report*] (stressing that the management of the asset is what distinguishes direct investment from portfolio investment in stocks and other financial instruments), reprinted in WORLD TRADE ORGANIZATION, ANNUAL REPORT ch. 4 (1996); see also INTERNATIONAL MONETARY FUND, BALANCE OF PAYMENTS MANUAL, para. 408, at 136 (4th ed. 1977) (providing a commonly cited definition of FDI as "investment that is made to acquire a lasting interest in an enterprise operating in an economy other than that of an investor, the investor's purpose being to have an effective voice in the management of the enterprise"), quoted in IBRAHIM F.I. SHIHATA, LEGAL TREATMENT OF FOREIGN INVESTMENT: THE WORLD BANK GUIDELINES 1 n.3 (1993); Edward M. Graham, *Direct Investment and the Future Agenda of the World Trade Organization*, in THE WORLD TRADING SYSTEM: CHALLENGES AHEAD 205, 209 n.9 (distinguishing direct investment from portfolio investment as "active" as opposed to "passive" investment). See generally M. SORNARAJAH, THE INTERNATIONAL LAW ON FOREIGN INVESTMENT 4-8 (1994) (offering a succinct exposition on the various definitions of foreign direct investment and distinguishing it from other forms of investment).

21. See U.N. CONFERENCE ON TRADE & DEV., WORLD INVESTMENT REPORT 1996: INVESTMENT, TRADE AND INTERNATIONAL POLICY ARRANGEMENTS at 3, U.N. Sales No. E.96.II.A.14 (1996) [hereinafter UNCTAD 1996 REPORT].

22. See *id.*

23. See *id.* (figuring an increase of total FDI inflows from \$226 billion in 1994 to \$315 billion in 1995).

24. See *id.* at 3, 4 tbl. I.1 (indicating an increase in FDI inflows to developing countries from \$87 billion in 1994 to \$99.7 billion in 1995).

25. See *id.* at 3 (calculating the growth in exports of goods and nonfactor services at 18% in 1995 compared to a 40% growth in FDI inflows); cf. Director General of the World Trade Organization Renato Ruggiero, Address Before the Argentinean Council on Foreign Relations (Sept. 10, 1996) (transcript available from the WTO Secretariat as PRESS/55) (commenting that foreign investment has become a "necessary precondition" to trade where it was once viewed as a substitute for trade). Trade and foreign investment are "part of a seamless web of international economic activity." *Id.* But cf. *WTO Report*, *supra* note 20, at 7 (admitting that FDI grew faster than trade in 1995, but noting that in the period 1990-1994 the rate of FDI growth was smaller than that of trade because of a worldwide recession).

26. See UNCTAD 1996 REPORT, *supra* note 21, at 3 (computing the growth in world

There are a variety of reasons why a multinational enterprise ("MNE")²⁷ undertakes FDI. An MNE may undertake FDI in a host developing country to enhance product competitiveness in the host country's market through "tariff-jumping" FDI,²⁸ utilize cheaper labor for production facilities,²⁹ secure a supply of natural resources,³⁰ take advantage of a host country's investment incentives,³¹ and for a number of other reasons.³² Each of these motivations for undertaking foreign investment is ultimately based on the search for increased profits.³³

Some argue that there is an "inherent conflict"³⁴ between the MNE and the host country interests. The MNE seeks opportunities where the production costs are lowest and sales where the prices are highest, resulting in repatriation of profits to the home country.³⁵ The host country, on the other hand, seeks to maximize benefits to its economy, which requires the retention of MNE profits within the host economy.³⁶

output at 2.4% in 1995 compared to a 40% growth in FDI inflows).

27. See Jeswald W. Salacuse, *Toward a New Treaty Framework for Direct Foreign Investment*, 50 J. AIR. L. & COM. 969, 970 (1985) (defining an MNE as "a corporation or group of corporations with headquarters in one country and production and marketing facilities in one or more other countries and which, in varying degrees, pursues a transnational, rather than a purely national, strategy in conducting its operations").

28. See Oliver Morrissey & Yogesh Rai, *The GATT Agreement on Trade Related Investment Measures: Implications for Developing Countries and Their Relationship with Transnational Corporations*, 31 J. DEV. STUD. 702, 705 (1995) (defining "tariff-jumping" FDI as the use of direct investment as a vehicle to produce within the country and thereby avoid protectionist tariff levels on the product).

29. See Robert Pritchard, *Introduction: The Contemporary Challenges of Economic Development*, to ECONOMIC DEVELOPMENT, INVESTMENT AND THE LAW: ISSUES OF PRIVATE SECTOR FOREIGN INVESTMENT, FOREIGN INVESTMENT AND THE RULE OF LAW IN A NEW ERA 1, 5 (Robert Pritchard ed., 1996).

30. See *id.*

31. See Morrissey & Rai, *supra* note 28, at 705; see also *infra* note 83 (offering several sources that discuss host country investment incentives in some detail).

32. See, e.g., *WTO Report*, *supra* note 20, at 14 (suggesting that an MNE can realize greater profits by 1) diversifying the location of its production and 2) "internalizing" the use of its property assets, such as intellectual property, in a host country rather than simply licensing the asset to a host country firm).

33. For a review of the theory of MNE investment in developing countries see generally ROBERT GILPIN, U.S. POWER AND THE MULTINATIONAL CORPORATION: THE POLITICAL ECONOMY OF FOREIGN DIRECT INVESTMENT (1975) and Theodore H. Moran, *Multinational Corporations and the Developing Countries: An Analytical Overview*, in MULTINATIONAL CORPORATIONS: THE POLITICAL ECONOMY OF FOREIGN DIRECT INVESTMENT 1 (Theodore H. Moran ed., 1985).

34. Paul M. Goldberg & Charles P. Kindleberger, *Toward a GATT for Investment: A Proposal for Supervision of the International Corporation*, 2 LAW & POL'Y INT'L BUS. 295, 296 (1970) (noting inherent conflict between objectives of the international corporation and the State).

35. See *id.* (noting that corporations seek to take advantage of variations in costs, taxes, and markets).

36. See *id.* (describing the host country interest as seeking investment circumstances

B. POTENTIAL BENEFITS AND COSTS OF FDI TO HOST DEVELOPING COUNTRIES

Despite the conflicting interests of MNEs and host countries, MNE investment can deliver benefits to the host developing country,³⁷ although potential benefits depend, in part, on the nature of the FDI undertaken and the economic condition of the country.³⁸ Host country benefits may include:³⁹ the injection of needed capital; the introduction, transfer, or spillover of technology;⁴⁰ the introduction of sophisticated management skills; increased host country employment;⁴¹ increased competition in the host country market; increased foreign exchange earnings through MNE exports;⁴² and other benefits.⁴³ Notwithstanding the potential of FDI to assist

where the MNE's contribution to the host gross national product, e.g. through local manufacture and export, minus the repatriation of MNE earnings is maximized).

37. See Resolution on International Investment for Economic Development, Mar. 4, 1955, GATT B.I.S.D. (3d Supp.) at 49-50 (1955) [hereinafter Resolution on Investment] (recognizing that FDI can assist developing countries by injecting needed capital and technology into the developing economy); see also Graham, *supra* note 20, at 206 (arguing that the "benefits of FDI and related activities are almost without dispute").

38. See Salacuse, *supra* note 27, at 976 (noting that benefits can include increased foreign exchange, increased employment, and an increased tax base.); see also *WTO Report*, *supra* note 20, at 28 (submitting that the benefits of FDI to a host economy are conditioned, in part, on the host economy's competitive condition, level of investment in fixed capital and education, and level of restrictions imposed on MNEs).

39. See, e.g., SHIHATA, *supra* note 20, at 11 (outlining potential benefits of FDI to host economies); Michael A. Geist, *Toward a General Agreement on the Regulation of Foreign Direct Investment*, 26 LAW & POL'Y INT'L BUS. 673, 679 (1995) (noting the introduction of new technologies, management skills, capital, and the creation of new jobs); Graham, *supra* note 20, at 206; Salacuse, *supra* note 27, at 976; Jürgen Voss, *The Protection and Promotion of Foreign Direct Investment in Developing Countries: Interests, Interdependencies, Intricacies*, 31 INT'L & COMP. L.Q. 686, 688 (1982).

40. See *WTO Report*, *supra* note 20, at 25-28 (defining technology broadly to include scientific, managerial, and marketing expertise and suggesting that FDI results in higher productivity in the targeted host country sector as a consequence of the introduction, transfer, or spillover of technology). But cf. Ari Kokko, *Technology, Market Characteristics, and Spillovers*, 43 J. DEV. ECON. 279, 290-91 (1994) (concluding that the level or benefit of technology spillovers to a host economy is reduced when the FDI is undertaken in a sector in which local technology is relatively unsophisticated). Technology spillovers are reduced when FDI is undertaken in a sector that can be dominated by the greater productivity and market share of an MNE. See *id.* Kokko suggests that developing countries that want to maximize technology spillover should channel technology-rich FDI into sectors where local technology is already relatively strong or into sectors where economies of scale are not as important to efficient production. See *id.*

41. See *WTO Report*, *supra* note 20, at 29-30 (examining the empirical evidence of the effect of FDI on host country employment and concluding that while the net effect may be positive, the practices of MNEs and the skills of the local labor pool can influence the net effect).

42. But see *infra* notes 47, 51-53 and accompanying text (noting that MNEs may drastically limit any foreign exchange benefits through transfer pricing and other restrictive business practices).

development efforts in a host economy and deliver certain benefits or transfers to the economy, MNE investment can also negatively affect the host economy and profoundly disrupt the host country's development policies. Most developing countries, consequently, view MNE investment as a "mixed blessing"⁴⁴ of potential benefits and potential costs.

The potential costs of MNE investment are numerous. MNE control or domination of host country sectors⁴⁵ can significantly interfere with host country social and economic reforms.⁴⁶ The repatriation of MNE profits to the parent company in the home State depletes host country foreign exchange reserves.⁴⁷ The MNE may also introduce environmentally destructive or hazardous technologies into the host country.⁴⁸

A range of MNE practices known as restrictive business practices⁴⁹ can also significantly negate the value of FDI to a developing host economy. Parent company restrictions on subsidiary licensing of technology⁵⁰ and tied selling restrictions⁵¹ are common MNE practices that reduce the ultimate value of the FDI to the

43. See, e.g., SHIHATA, *supra* note 20, at 11 (suggesting that another benefit is greater access to information and credit through the affiliation with the MNE); Geist, *supra* note 39, at 679 (considering another benefit the fact that foreign investors frequently lobby their home government for more "favorable policies toward the host state in order to protect their investment"); Salacuse, *supra* note 27, at 976 (citing an increased tax base as a benefit to the host State).

44. See Salacuse, *supra* note 27, at 975-76 (arguing that "few, if any, host countries consider foreign investment, in and of itself, as a good thing"). Rather, Salacuse suggests that developing countries consider FDI desirable only if it promises tangible benefits to the host economy. See *id.*

45. See *id.*; Voss, *supra* note 39, at 692 (positing that MNE control over host country industry is "seen as an instrument for perpetuating the economic dependence of the Third World"); see also Peter Hansen & Victoria Aranda, *An Emerging International Framework for Transnational Corporations*, 14 *FORDHAM INT'L L.J.* 881, 885 (1990/1991) (noting that several decades ago many developing countries viewed FDI from their colonial rulers as a threat to newfound political independence).

46. See A. Cristiana Baez, *Should Investment in the Third World be Internationally Protected? What Role for the United Nations?*, 79 *AM. SOC'Y INT'L L. PROC.* 378, 390 (1987) (remarks by Samuel K.B. Asante).

47. See Voss, *supra* note 39, at 689.

48. See Salacuse, *supra* note 27, at 977 (referencing the Union Carbide chemical plant gas leak in Bhopal, India which killed thousands); see also Sudhir K. Chopra, *Multinational Corporations in the Aftermath of Bhopal: The Need for a New Comprehensive Global Regime for Transnational Corporate Activity*, 29 *VAL. U.L. REV.* 235 (1994) (calling for an international legal regime to ensure that MNE technology employed in host countries is non-hazardous).

49. See UNCTAD 1996 REPORT, *supra* note 22, at 185 (defining "restrictive business practices" as "anti-competitive practices by enterprises, that aim at monopolizing markets, creating or abusing a dominant position of market power, or both").

50. See Paul Bryan Christy III, *Negotiating Investment in the GATT: A Call for Functionalism*, 12 *MICH. J. INT'L L.* 743, 786 (1991).

51. See Morrissey & Rai, *supra* note 28, at 706 (defining "tied selling" as parent com-

local economy. Transfer pricing⁵² is another common restrictive business practice. In transfer pricing arrangements, the MNE parent and subsidiary sell inputs or outputs between each other at distorted market prices, affecting host country balance of payments.⁵³

C. HOST COUNTRY INVESTMENT MEASURES

Most developing countries today subscribe to the view that in spite of the potential negative effects of FDI on host country economies, the potential economic benefits of FDI render the investment desirable as long as the potential FDI costs are controlled and the FDI is "properly harnessed."⁵⁴ To this end, developing countries subject inward FDI to various investment measures and performance requirements.⁵⁵ These FDI measures are important elements of host country economic and industrial policy,⁵⁶ and host countries design them to minimize the potential costs of the investment and to integrate the investment with development goals⁵⁷ to achieve certain standards of development.⁵⁸ By giving the host country a greater scope of control over the investment,⁵⁹ investment measures help ensure "credible commitments" by MNEs in terms of the promised benefits to the host economy.⁶⁰ From the perspective of the host country, investment measures repre-

pany restrictions on the parties with whom the host country subsidiary can trade). Tied selling can limit a subsidiary's export abilities, and, further, the parent may limit a subsidiary's ability to source locally and may stipulate that the subsidiary import production inputs from the parent company. *See id.*

52. *See id.* (describing "transfer pricing" as the practice of a parent MNE selling to its subsidiary at an above-market price—thus increasing subsidiary expenses and reducing local taxes—and requiring the subsidiary to sell its output to the parent at below-market prices—thereby reducing host country export revenue). *See generally* UNCTAD 1996 REPORT, *supra* note 22, at 186 (discussing transfer pricing and host country fiscal concerns).

53. *See Baez, supra* note 46, at 390.

54. *See SORNARAJAH, supra* note 20, at 38-50, 94 (characterizing this stance toward FDI as the "middle path" theory, falling in between the "classical theory," which views all FDI as desirable, and the "dependency theory," which views all FDI as harmful).

55. *See infra* notes 63-85 and accompanying text (discussing examples of typical investment measures and performance requirements).

56. *See Rachel McCulloch, Investment Policies in the GATT*, 13 WORLD ECON. 541, 545 (1990) (noting various types of national investment policies).

57. *See Voss, supra* note 39, at 686-87, 689 (discussing the harnessing of benefits from the MNE-host country relationship to serve development goals).

58. *See Edmund M.A. Kwaw, Trade Related Investment Measures in the Uruguay Round: Towards a GATT for Investment*, 16 N.C. J. INT'L L. & COM. REG. 309, 309, 319 (1991).

59. *See SORNARAJAH, supra* note 20, at 89 (asserting that FDI regulations "aim to subject the process of foreign investment to the administrative control of the host state").

60. *See David Greenaway, Trade Related Investment Measures: Political Economy Aspects and Issues for GATT*, 13 WORLD ECON. 367, 373 (1990) (positing that investment measures help lock-in desired benefits for the host economy, including increased employment and increased foreign exchange earnings).

sent a countervailing power to the power of the MNE.⁶¹ In contrast, the MNE may view host country investment measures as a *quid pro quo* for the right to invest.⁶²

Host country investment measures, other than expropriation and other property-affecting measures,⁶³ fall into two general categories:⁶⁴ entry restrictions and operational requirements. Host countries usually impose both types of restrictions on an investment at entry.⁶⁵ In this way, hosts can condition entry on the acceptance of specific operational requirements.⁶⁶

At the entry stage, a host country's administrative agency screens the FDI proposal based on the proposal's general suitability to the host's development objectives and the level or likelihood of its expected benefits.⁶⁷ The host may restrict entry to those investments that satisfy certain government objectives,⁶⁸ such as locating in a particular region of the country, engaging in a particular high-priority sector, or undertaking a particular type of direct investment, such as a joint venture with local partners.⁶⁹ The host government denies entry to proposals that do not satisfy the government's criteria.

61. See Morrissey & Rai, *supra* note 28, at 704; cf. *infra* Part I.D (discussing international law principles on host FDI restrictions and concluding that, unless limited by treaty, a sovereign State has an unlimited right to control or condition entry).

62. See Patrick Low & Arvind Subramanian, *TRIMs in the Uruguay Round: An Unfinished Business*, in *THE URUGUAY ROUND & THE DEVELOPING ECONOMIES* 413, 418 (Will Martin & L. Alan Winters eds.) (World Bank Discussion Papers No. 307, 1995); see also Keith E. Maskus & Denise R. Eby, *Developing New Rules and Disciplines on Trade-Related Investment Measures*, 13 *WORLD ECON.* 523, 524 (1990) (contending that the primary motivation for investment measures is to secure local "rents" from the FDI); Morrissey & Rai, *supra* note 28, at 704 (asserting that FDI will only be undertaken if the MNE foresees gains from the investment and investment measures are a means for hosts to ensure reciprocal gains for the host country).

63. This Comment will not address property-affecting measures, e.g. expropriation, in detail because international regulations and standards for these controls are generally acceptable to developing countries and, therefore, not a likely contested issue in future WTO negotiations except as to the amount of compensation. See UNCTAD 1996 REPORT, *supra* note 21, at 191 (suggesting that issues of expropriation in international agreements essentially only raise the question of the amount of adequate compensation). See generally SORNARAJAH, *supra* note 20, at 95-98 (examining host country property rights guarantees, their effects, and international law principles).

64. See Salacuse, *supra* note 27, at 979-80 (employing a similar categorization of host controls).

65. See *id.* at 981 (examining the approval process).

66. See Kwaw, *supra* note 58, at 318 (discussing specific operational requirements of host countries).

67. See SORNARAJAH, *supra* note 20, at 100-02 (discussing the role of host country administrative agencies).

68. See *id.* at 102 (noting these screening criteria and offering some rationalizations for excluding investment); see also Christy, *supra* note 50, at 748 (identifying common establishment restrictions).

69. See Salacuse, *supra* note 27, at 980-82 (outlining entry controls).

If, however, the host government determines that the proposal contributes to the government's development goals it may, at this stage, impose certain operational restrictions on the direct investment before allowing entry. The range of operational restrictions, also known as performance requirements, is broad,⁷⁰ and the choice of restriction imposed depends upon the particular objectives of the host country.⁷¹ Common operational restrictions include:⁷² local content restrictions,⁷³ trade balancing requirements,⁷⁴ export performance requirements,⁷⁵ limitations on imports,⁷⁶ foreign exchange and remittance restrictions,⁷⁷ minimum local equity restrictions,⁷⁸ technology transfer requirements,⁷⁹ local employment requirements,⁸⁰ personnel entry restrictions,⁸¹ and product licensing requirements.⁸²

70. *But see* discussion *infra* Part II.B.2 (analyzing the TRIMs Agreement). Certain investment measures—namely local content restrictions, trade balancing requirements, export, and import controls—were proscribed under the Trade-Related Investment Measures Agreement (“TRIMs”) of the Uruguay Round negotiations. *See id.*

71. *See* Christy, *supra* note 50, at 748 (noting that economic, health, and political objectives influence the choice of operational restrictions).

72. *See, e.g.,* Christy, *supra* note 50, at 779-80 (presenting an extensive list of investment measures discussed during the Uruguay Round TRIMs negotiations); Greenaway, *supra* note 60, at 368-72 (inventorying host investment measures); Joel W. Messing, *Towards a Multilateral Agreement on Investment*, TRANSNAT'L CORP., Apr. 1997, at 123, 124 n.3 (listing various categories of host country investment obstacles); UNCTAD 1996 REPORT, *supra* note 21, at 174-79 (discussing and comprehensively identifying operational measures). *But cf. infra* notes 168-173 and accompanying text (identifying investment measures prohibited by the TRIMs Agreement).

73. *See* Morrissey & Rai, *supra* note 28, at 708 (defining “local content restrictions” as measures requiring that a certain percentage value of inputs be locally sourced).

74. *See* Kwaw, *supra* note 58, at 319 (defining “trade balancing requirements” as requirements obliging an investor to offset imports of materials with an equal value of product exports).

75. *See id.* (describing “export performance requirements” as stipulating that the MNE apportion a certain amount of output for export, often more than the MNE would export without the restriction).

76. *See* C. Fred Bergsten & Edward M. Graham, *Needed: New International Rules for Foreign Direct Investment*, 7 INT'L TRADE J. 15, 27 (1992) (recognizing that host countries discourage imports in favor of exports in order to maximize their trade balances); *cf. Kwaw, supra* note 58, at 321 (noting that MNE production in a foreign country significantly affects the trade balances of both host and home countries because a major component of MNE trade is intrafirm trade).

77. *See* Christy, *supra* note 50, at 748 (commenting that restrictions on repatriation of earnings and general foreign exchange restrictions seek to improve the host's balance of payments condition).

78. *See* Greenaway, *supra* note 60, at 370 (asserting that local equity restrictions are designed to partly “indigenise” the MNE operation).

79. *See* Kwaw, *supra* note 58, at 320 (noting that technology transfer requirements often obligate the MNE to license the technology to local partners).

80. *See* Bergsten & Graham, *supra* note 76, at 26 (describing the host country's need to protect and promote local employment).

Nearly every developing country desires FDI.⁸³ Allowing FDI without conditions, however, exposes the country to the potential abuses of MNEs and an inequitable distribution of benefits.⁸⁴ The employment of each of these operational requirements is designed to control the potential abuses of MNEs and to harness the potential benefits of the MNE investment to serve the development goals of the host country.⁸⁵

D. INTERNATIONAL LAW ON INVESTMENT MEASURES

FDI penetrates deep into the fibers of an economy and has a lasting effect on a host nation.⁸⁶ Host countries, accordingly, seek to regulate the scope and consequences of FDI penetration through the institution of various investment measures.⁸⁷ A host country's right to regulate inward FDI is a right that emanates from its sovereignty and is based on the State's right to control the entry of aliens.⁸⁸ States have the sovereign right to regulate the entry or establishment of FDI and to determine the role that FDI will play under the State's development policy.⁸⁹ In-

81. See Christy, *supra* note 50, at 748 (defining "personnel entry restrictions" as measures limiting the ability of MNEs to employ expatriates in the host country operation).

82. See Greenaway, *supra* note 60, at 371 (describing "product licensing requirements" as requirements obliging the MNE to license production in the host country, reducing potential MNE profits).

83. Cf. Graham, *supra* note 20, at 213-14 & n.14 (discussing various incentives offered by host countries to attract investment and how this leads to a "prisoner's dilemma" among countries); cf. also Kwaw, *supra* note 58, at 310 (relating the carrot (incentives) and stick (investment restrictions) approach to host country investment regulation). This Comment will not discuss host country incentives in detail, but for a good review of incentives see generally U.N. DIV. ON TRANSNATIONAL CORP. AND INV., U.N. CONFERENCE ON TRADE & DEV., INCENTIVES AND FOREIGN DIRECT INVESTMENT, U.N. Doc. UNCTAD/DTCI/28, U.N. Sales No. E.96.II.A.6 (1996) and Robin W. Broadway & Anwar Shah, *Perspectives on the Role of Investment Incentives in Developing Countries*, in FISCAL INCENTIVES FOR INVESTMENT AND INNOVATION 31 (Anwar Shah ed., 1995).

84. Cf. McCulloch, *supra* note 56, at 541 (claiming that although nearly every country seeks to attract FDI, most limit or restrict MNE investment).

85. See Maskus & Eby, *supra* note 62, at 524-25 (discussing the purpose of operational requirements).

86. See Hansen & Aranda, *supra* note 45, at 882 (claiming that FDI "presuppose[s] a long-term relationship with that country").

87. See *supra* Part I.C (discussing the range of host country investment measures applied to the entry and operation of FDI).

88. See SORNARAJAH, *supra* note 20, at 83 (noting that the right of a State to control FDI is based on the international law regarding aliens); A.A. Fatouros, *Towards an International Agreement on Foreign Direct Investment?*, 10 ICSID REV. FOREIGN INV. L.J. 181, 193 (1995) (stating that "[s]tates are free to allow or prohibit the entry of aliens in their territory and the establishment in it of aliens in general, including traders and foreign investors"). The MNE voluntarily subjects itself to the laws of the host State by entering the jurisdiction of the host State. See SORNARAJAH, *supra*, at 83.

89. See Hansen & Aranda, *supra* note 45, at 884 (claiming that this is "the position of classic customary international law"); see also SORNARAJAH, *supra* note 20, at 100 (assert-

vestment measures for controlling or harnessing the penetration of FDI, therefore, are a principal sovereign right.⁹⁰

The principles of a liberal international economic system, however, directly conflict with the principle of unlimited sovereign control over FDI.⁹¹ Not surprisingly, therefore, the development of international law restricting a State's control over FDI has been gradual.⁹² A State, however, may voluntarily constrain or qualify its sovereign ability to control FDI by participating in an international treaty that specifically limits the State's rights.⁹³ In fact, most of the current liberalization of host investment measures is the result of a plenitude of bilateral investment treaties.⁹⁴ Negotiations in the Uruguay Round attempted to establish a foundation for a set of *multilateral* rules limiting a host country's control of FDI.⁹⁵ The devel-

ing that a State may deny entry to foreign investment that it deems detrimental to its development interests). *But cf.* Kwaw, *supra* note 58, at 310 n.4 (explaining that certain customary international law principles restrict the host's unlimited control over FDI after the investment is made). International law principles such as minimum international standards, *pacta sunt servanda*, acquired rights, and expropriation standards restrict a host country's ability to control FDI once it has entered the economy. *See id.*

90. *See* McCulloch, *supra* note 56, at 541 (asserting that investment measures are a "core issue in terms of national sovereignty"); *see also* Salacuse, *supra* note 27, at 980. Salacuse argues:

It is well settled in international law that the host state has the right to control the movement of capital into its territory, to regulate all matters pertaining to the acquisition and transfer of property within its national boundaries, to determine the conditions for the exercise of economic activity by natural or legal persons, and to control the entry and activity of aliens, [including MNEs].

Id.

91. *See* SORNARAJAH, *supra* note 20, at 85 (noting the conflict between the two).

92. *See* Barcelona Traction, Light and Power Co. (Belg. v. Spain), 1970 I.C.J. 3 (Feb. 5). The International Court of Justice reasoned:

Considering the important developments of the last half-century, the growth of foreign investments and the expansion of the international activities of corporations . . . 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.

Id. at 46-47; *see also* Geist, *supra* note 39, at 675 (stating that chapter 3, article 12, paragraph 1 of the Havana Charter for the International Trade Organization recognized a host country's sovereign right to regulate FDI).

93. *See* SORNARAJAH, *supra* note 20, at 90 (explaining how an international treaty can limit a State's sovereignty over a domestic matter); *see also* Hansen & Aranda, *supra* note 45, at 885 (recognizing that developing countries may also unilaterally limit their control over FDI).

94. *See* SORNARAJAH, *supra* note 20, at 86 (discussing the results of bilateral investment treaties). *See generally* Todd S. Shenkin, Comment, *Trade-Related Investment Measures in Bilateral Investment Treaties and the GATT: Moving Toward a Multilateral Investment Treaty*, 55 U. PITT. L. REV. 541 (1994) (examining various BITs and calling for a multilateral investment treaty). *But cf.* Geist, *supra* note 39, at 685 (noting that "the general unwillingness of BITs to encroach upon established national law may be one explanation for the fact that they have not been found to significantly affect investment flows").

95. *See infra* Parts II.B.1-2 (discussing the Uruguay Round GATS and TRIMs Agree-

opment of a comprehensive multilateral set of rules for FDI, however, is still in its early stages.⁹⁶

II. THE REGULATION OF FOREIGN DIRECT INVESTMENT IN THE GATT FRAMEWORK

A. INTERNATIONAL TRADE ORGANIZATION AND PRE-URUGUAY ROUND GATT

1. International Trade Organization

The jurisdiction of the General Agreement on Tariffs and Trade ("GATT")⁹⁷ did not include the regulation of FDI until the Uruguay Round.⁹⁸ The early-proposed embodiment of GATT, the International Trade Organization ("ITO"),⁹⁹ did, however, cover issues of foreign direct investment. Articles 11 and 12 of Chapter III of the ITO Charter contained the primary provisions relating to FDI.¹⁰⁰ The ITO investment provisions, however, were not demanding in their liberalization requirements.¹⁰¹ They required only that States "give due regard to the desirability of avoiding discrimination as between foreign investments."¹⁰² There was no obligation for national treatment or right of establishment in the ITO provisions, and the provisions did not cover investment incentives or performance re-

ments that deal with aspects of host country FDI regulation).

96. See *infra* notes 180-187 (examining the shortcomings of the Uruguay Round's TRIMs Agreement).

97. General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A-11, T.I.A.S. 1700, 55 U.N.T.S. 194.

98. See *infra* Part II.B (discussing the Agreement on Trade-Related Investment Measures ("TRIMs") and the General Agreement on Trade in Services ("GATS"), which both regulate aspects of foreign direct investment).

99. Charter for the International Trade Organization, Final Act and Related Documents, U.N. Conf. on Trade and Employment, Mar. 24, 1948, U.N. Doc. ICITO/1/4 (1948) [hereinafter ITO Charter]; see JOHN H. JACKSON, *RESTRUCTURING THE GATT SYSTEM* 12 (1990) (positing that the ITO died stillborn because the United States, its chief supporter, did not ratify it). The ITO was to become the third pillar of the world economic system along with the World Bank and the International Monetary Fund. See *id.* at 10. GATT was simply a treaty that was instituted to solidify tariff reductions prior to the establishment of the ITO, and GATT was to become part of a member State's obligations under the ITO. See *id.* at 10, 12. Because the ITO never came into existence, GATT continued on in its original treaty form. See *id.* at 15.

100. See ITO Charter, *supra* note 99, ch. III, arts. 11, 12. Article 11 is entitled "Means of Promoting Economic Development and Reconstruction." Article 12 is entitled "International Investment for Economic Development and Reconstruction." See also Christy, *supra* note 50, at 773-76 (discussing the negotiations over investment provisions for the ITO Charter).

101. See EDWARD M. GRAHAM, *GLOBAL CORPORATIONS AND NATIONAL GOVERNMENTS* 70 (1996) (noting that the ITO investment provisions were "rather weak").

102. ITO Charter, *supra* note 99, ch. III, art. 12, para. 2(a)(ii).

quirements.¹⁰³ Essentially, the ITO investment provisions only codified international law principles regarding the sovereign right of States¹⁰⁴ to restrict the entry of FDI into their territories.¹⁰⁵ The failure of the ITO was, in part, related to its investment provisions.¹⁰⁶ Developing countries considered them too protective of MNEs, and developed countries considered them too protective of host countries.¹⁰⁷ Nevertheless, because the ITO never came into being and only the trade-oriented GATT remained,¹⁰⁸ the initial GATT framework did not cover investment issues.¹⁰⁹

2. FIRA Dispute

GATT's first real foray¹¹⁰ into investment issues came in a 1982 dispute brought by the United States against Canada¹¹¹ alleging that Canada's administration of its Foreign Investment Review Act ("FIRA")¹¹² violated GATT obliga-

103. See GRAHAM, *supra* note 101, at 70 (noting the absence of investment provisions in the ITO Charter covering certain direct investment regulatory issues).

104. See *supra* Part I.D (discussing the international law right of States regarding restrictions on the entry and treatment of FDI).

105. See Geist, *supra* note 39, at 680 (noting that under the ITO each State had the right to institute investment restrictions and to refuse the admission of FDI).

106. See McCulloch, *supra* note 56, at 544 (recognizing that United States based MNEs, which were concerned that the ITO provisions favored host countries, influenced the United States decision to not ratify the agreement); see also JOAN EDELMAN SPERO, *THE POLITICS OF INTERNATIONAL ECONOMIC RELATIONS* 69 (4th ed. 1990) (suggesting that business groups feared that the ITO allowed government over-management in trade and investment matters).

107. See SPERO, *supra* note 106, at 69.

108. See JACKSON, *supra* note 99, at 15 (noting that the GATT filled the void in the international economic system after the failure of the ITO and that it has become a de facto organization).

109. See *id.* at 10 (stating that GATT constituted only a framework for reciprocal tariff reductions and did not cover investment, per se).

110. But see Resolution on Investment, *supra* note 37, at 49-50 (recognizing, in 1955, that increased investment flows to developing countries assist development efforts and calling on both home and host countries to create FDI-friendly conditions).

111. See Canada Administration of the Foreign Investment Review Act, GATT B.I.S.D. (30th Supp.) at 140 (1984) [hereinafter FIRA Dispute]; see also Daniel M. Price & P. Bryan Christy, III, *Agreement on Trade Related Investment Measures (TRIMS): Limitations and Prospects for the Future*, in *THE WORLD TRADE ORGANIZATION: THE MULTILATERAL TRADE FRAMEWORK FOR THE 21ST CENTURY AND U.S. IMPLEMENTING LEGISLATION* 439, 445 (Terence P. Stewart ed., 1996) (analyzing the purchase undertaking requirement in the FIRA case).

112. See FIRA Dispute, *supra* note 111, at 142 (noting that Section 2 of the FIRA required that the Canadian government review foreign direct investment proposals under a set of factors and permit entry only if the reviewing body determined that the investment proposal was of "significant benefit to Canada").

tions.¹¹³ FIRA essentially imposed a local content requirement¹¹⁴ on foreign investors requiring them to purchase Canadian goods instead of importing goods of their choice.¹¹⁵ Although the panel found that the requirement of FIRA violated Article III, paragraph 4 national treatment obligations,¹¹⁶ it based its decision on the discriminatory effects on those countries that would lose the opportunity to export goods to the investor.¹¹⁷ The panel did not consider the discriminatory treatment to the foreign investor, per se, as important to the decision.¹¹⁸ Thus, the FIRA panel carefully avoided applying the GATT national treatment obligation to FDI. It was not until the Uruguay Round of multilateral trade negotiations that FDI was squarely on the GATT agenda and GATT agreements applied GATT principles to FDI.

B. URUGUAY ROUND AND FDI—GATS, TRIMS, AND TRIPS

A significant part of the negotiations in the Uruguay Round dealt with so-called “new issues,” including services, trade-related investment measures, and intellectual property protection. Negotiations on each of these issues resulted in agreements that cover aspects of FDI.

1. GATS

Many consider the General Agreement on Trade in Services (“GATS”)¹¹⁹ the

113. See *id.* at 146–48 (stating that the United States argued that the FIRA requirements that foreign investors purchase Canadian goods instead of importing goods of their choice violated GATT’s Article III, paragraph 4 national treatment obligation).

114. See *id.* at 143 (describing that under FIRA foreign investors *may* submit purchase undertakings which then obligates them to purchase from Canadian sources). Although FIRA did not expressly require these undertakings, the purchase undertakings became necessary commitments because of competition for investment approvals, and, therefore, the Act essentially “required” them. See *id.*; see GRAHAM, *supra* note 101, at 71 (noting that the effect of FIRA amounted to what is known as a local content requirement); Morrissey & Rai, *supra* note 28, at 708 (defining a “local content requirement” as requiring that a certain percentage value of inputs be locally sourced).

115. See FIRA Dispute, *supra* note 111, at 143.

116. See *id.* at 159, 165.

117. See *id.* at 161.

118. See *id.* at 167 (stating that the “[p]anel does not consider it relevant nor does it feel competent to judge how the foreign investors are affected by the purchase requirements” because the national treatment obligation only applies to imported products, not foreign investors).

119. General Agreement on Trade in Services, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1B, LEGAL INSTRUMENTS—RESULTS OF THE URUGUAY ROUND, 33 I.L.M. 1168 (1994) [hereinafter GATS Agreement]; see Thomas L. Brewer & Stephen Young, *The Multilateral Agenda for Foreign Direct Investment. Problems, Principles, and Priorities for Negotiations at the OECD and WTO*, WORLD COMPETITION, June 1995, at 67, 72 (noting that the GATS Agreement is significant because it is the first to cover services, the fastest growing sector in terms of FDI). See generally

true investment agreement of the Uruguay Round.¹²⁰ GATS covers FDI in services by defining trade in services as encompassing the supply of a service through the establishment of a "commercial presence" in the territory of another GATS signatory.¹²¹ Negotiators chose the term "commercial presence" over "commercial establishment" because developing countries sought to avoid the possible interpretation of the commercial presence mode of delivery as constituting an absolute right of establishment.¹²²

The liberalizing principles of most-favored nation treatment ("MFN"),¹²³ transparency,¹²⁴ and national treatment¹²⁵ constitute the foundation for the GATS

Richard B. Self, *General Agreement on Trade in Services*, in THE WORLD TRADE ORGANIZATION: THE MULTILATERAL TRADE FRAMEWORK FOR THE 21ST CENTURY AND U.S. IMPLEMENTING LEGISLATION, *supra* note 111, at 523 (offering a synopsis of the GATS provisions and signatory commitments).

120. See *Investment and the Final Act of the Uruguay Round: A Preliminary Stocktaking*, OECD Trade Directorate at 5, OECD Doc. COM/TD/DAFFE/IME(94)56/REV 1 (1994) [hereinafter *OECD Uruguay Round Stocktaking*] (arguing that the GATS "contains the single largest number of investment-related provisions" of the Uruguay Round agreements); see also Price & Christy, *supra* note 111, at 454 (considering the GATS the WTO's "real investment agreement").

121. See GATS Agreement, *supra* note 119, art. I, para. 2(c); see also *id.* art. XXVIII, para. 2(d) (defining "commercial presence" as "any type of business or professional establishment, including through (i) the constitution, acquisition or maintenance of a juridical person, or (ii) the creation or maintenance of a branch or a representative office, within the territory of a member for the purpose of supplying a service").

122. See Ansgar M. Wimmer, *The Impact of the General Agreement on Trade in Services on the OECD Multilateral Agreement on Investment*, WORLD COMPETITION, June 1996, at 109, 113-14 (noting the semantic preference for "presence" in the GATS negotiations, yet arguing that the provision can still be equated with FDI); see also *OECD Uruguay Round Stocktaking*, *supra* note 120, at 5 (suggesting that the scope of the commercial presence provision is significantly more narrow than an asset-based definition of investment); cf. *infra* note 219 (noting that the OECD's Multilateral Agreement on Investment will use the more encompassing asset-based definition of investment). The GATS's coverage of FDI in services and the most-favored-nation requirement of GATT may pose a problem in relation to the OECD Multilateral Agreement on Investment (MAI) in that GATS signatories, who are also MAI signatories, may be required to extend any MAI liberalization of FDI in services to all GATS signatories, even those that are not signatories to the OECD MAI. See Wimmer, *supra*, at 110-11.

123. See GATS Agreement, *supra* note 119, pt. II, art. II, para. 1 (defining "MFN treatment" as "treatment no less favorable than [the member State] accords to like services and service suppliers of any other country").

124. See *id.* art. III (establishing the obligations of transparency as the prompt publication and notification of laws or measures affecting trade in services).

125. See *id.* pt. III, art. XVII, para. 1 (defining "national treatment" as the member State "accord[ing] to services and service suppliers of any other member, in respect of all measures affecting the supply of services, treatment no less favorable than that it accords to its own like services and service suppliers"). The national treatment obligation, however, is applicable only to the sectors included in the particular member State's schedule of commitments. See *id.*

Agreement. The Agreement imposes general obligations of MFN¹²⁶ and transparency on all members in all service sectors.¹²⁷ National treatment obligations, however, are specifically limited by the Agreement to the sectors and modes of supply inscribed in the national schedules of commitments.¹²⁸

The Agreement also limits certain other disciplines relevant to FDI to the various national commitments. These include restrictions on payments and transfers¹²⁹ and various restrictions on market access, including limitations on the total value of inward direct investment¹³⁰ and the type of entity undertaking the direct investment.¹³¹ The national schedules of commitments qualify each of these prohibitions. In addition, investment screening and performance requirements are subject only to the member's MFN obligation,¹³² which means that a member State may subject FDI in services to certain rigorous evaluation factors and conditions as long as the member subjects all inward FDI to these requirements.¹³³

Developing country liberalization of FDI in services in GATS is predictably limited through the national schedules of commitments. Article IV of GATS, however, encourages greater developing country liberalization by seeking to strengthen the domestic service capacity in these countries.¹³⁴ Article IV appeals to members to facilitate developing country access to technology¹³⁵ and information and distribution networks¹³⁶ and to liberalize market access in sectors with developing country export potential.¹³⁷ Article XIX, however, qualifies the liberalization expectations for developing countries by stating that subsequent liberalization shall

126. *But see id.* pt. II, art. II, para. 2 (allowing a member to qualify MFN obligations by listing exemptions to MFN treatment in the Annex on Article II (MFN) Exemptions).

127. *See id.* arts. II-III (listing the MFN and transparency articles under the Part II heading "General Obligations and Disciplines").

128. *See* GATS Agreement, *supra* note 119, pt. III, art. XVII, para. 1.

129. *See id.* pt. II, art. XI, para. 1 (limiting the applicability of the prohibition on payment and transfer restrictions to those sectors inscribed in a member's specific schedule of commitments).

130. *See id.* pt. III, art. XVI, para. 2(f).

131. *See id.* para. 2(e).

132. *See id.* arts. XVI, paras. 2(b) & 2(e) (subjecting certain restrictions related to investment screening and performance requirements to MFN obligations, yet limiting the prohibition to measures affecting a sector inscribed in the member's schedule of commitments); *see also* OECD Uruguay Round Stocktaking, *supra* note 120, at 12 n.10 (noting that investment screening and performance requirements are subject to article II MFN obligations).

133. *Cf.* GATS Agreement, *supra* note 119, pt. II, art. II, para. 1 (defining "MFN treatment" as "treatment no less favorable than [the member State] accords to like services and service suppliers of any other country").

134. *See id.* pt. I, art. IV; *see also* Self, *supra* note 119, at 529 (providing a synopsis of GATS article IV).

135. *See id.* para. 1(a).

136. *See id.* para. 1(b).

137. *See id.* para. 1(c).

give due respect to national policy objectives and development levels.¹³⁸ Further, it accepts the likelihood that developing country members will undertake liberalization commitments only commensurate with their level of development.¹³⁹

With the national schedules of commitments qualifying most of the obligations of the Agreement, FDI liberalization through the GATS Agreement, in effect, is limited to the extent that members choose to enter upon specific liberalization commitments.¹⁴⁰ The overall effect of GATS on the liberalization of FDI in services is, therefore, very limited. Article XIX, accordingly, seeks greater liberalization by requiring a review of the agreement by the year 2000¹⁴¹ with the intention of broadening its scope.¹⁴²

2. TRIMs Agreement¹⁴³

Trade-Related Investment Measures ("TRIMs")¹⁴⁴ were another of the so-called new issues in the Uruguay Round. Before the Uruguay Round, GATT's jurisdiction did not include investment measures because they were not considered tariffs or subsidies and were, therefore, outside of GATT's scope.¹⁴⁵ During the Uruguay Round negotiations, however, negotiators viewed investment measures

138. See GATS Agreement, *supra* note 119, pt. III, art. XIX, para. 2 (providing for "flexibility" in subsequent developing country liberalization and accepting liberalization in fewer sectors and fewer transactions).

139. See *id.*

140. See Wimmer, *supra* note 122, at 115 (noting the careful framework of obligations and limitations of the GATS); see also *OECD Uruguay Round Stocktaking*, *supra* note 120, at 8 (highlighting that the provisions of GATS do not cover expropriation and related compensation).

141. See GATS Agreement, *supra* note 119, pt. III, art. XIX (providing for review of GATS within five years from the date of its entry into force, 1995); cf. *infra* notes 194-196 and accompanying text (noting that the TRIMs Agreement also provides for its review within five years and how together with the GATS five-year review provision this represents built-in authority for negotiating the possible expansion of WTO coverage of FDI).

142. But see *supra* notes 134-139 and accompanying text (discussing the flexibility allowed for subsequent developing country liberalization in services and requiring attention to developing country national policy objectives).

143. Agreement on Trade-Related Investment Measures, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, LEGAL INSTRUMENTS—RESULTS OF THE URUGUAY ROUND (1994) [hereinafter TRIMs Agreement]. See generally, Price & Christy, *supra* note 111, at 439 (reviewing the benefits and limitations of the TRIMs Agreement).

144. See *supra* Part I.C (discussing host country investment measures, both trade and non-trade related).

145. See Mohamed Ariff, *TRIMs: A North-South Divide or a Non-Issue?*, 12 *WORLD ECON.* 347, 348 (1989) (noting that GATT was perceived as an organization solely for the regulation of trade); see also Christy, *supra* note 50, at 785 (citing India's submission to the TRIMs negotiations, which suggested that investment measures were outside of GATT's competence).

that affected trade simply as another form of non-tariff trade barrier.¹⁴⁶ A TRIM is essentially any host country investment restriction that directly affects trade flows; a TRIM either restricts imports or exports or requires imports or exports.¹⁴⁷ The TRIMs negotiations sought to apply existing GATT Articles¹⁴⁸ to proscribe these trade-distorting investment measures.¹⁴⁹ Yielding to pressure from developing countries, negotiators sharply circumscribed the scope of the TRIMs negotiations to include only those investment measures having direct trade distorting effects.¹⁵⁰ This "direct trade effects" focus excluded many investment measures from scrutiny and removed attention from the policies behind the measures.¹⁵¹

Developed countries argued that TRIMs represented nothing but host government interference with a liberal trade regime.¹⁵² Accordingly, the United States presented a comprehensive list of TRIMs that it considered trade-distorting,¹⁵³ including local content requirements, export performance requirements, trade balancing requirements, product mandating requirements, domestic sales restrictions, foreign exchange and remittance restrictions, local equity requirements, technology transfer and licensing requirements, and investment incentives.¹⁵⁴ The European Union supported the United States in all but technology transfer requirements and local equity restrictions.¹⁵⁵ Japan supported all but local equity restrictions.¹⁵⁶

146. See Christy, *supra* note 50, at 779 (theorizing that the "TRIMs concept is a creation of those wishing to rationalize the discussion of investment without broadening the context of an agreement on tariffs and trade"); see also Kwaw, *supra* note 58, at 312 (asserting that developed countries considered TRIMs to have the same trade-distorting effect as non-tariff trade barriers).

147. See Christy, *supra* note 50, at 779 (employing this useful description).

148. See, e.g., Greenaway, *supra* note 60, at 379 (identifying GATT articles that are applicable to certain TRIMs); Maskus & Eby, *supra* note 62, at 531-33 (identifying applicable GATT articles); Morrissey & Rai, *supra* note 28, at 711-16 (noting GATT articles that apply to various TRIMs).

149. See Ministerial Declaration of 20 Sept. 1986, GATT B.I.S.D. (33d Supp.) at 19; 25 I.L.M. 1626 (1987). The Punta del Este Declaration stated on TRIMs: "Following an examination of the operation of GATT Articles related to the trade restrictive and distorting effects of investment measures, negotiations should elaborate, as appropriate, further provisions that may be necessary to avoid such adverse effects on trade." *Id.*

150. See Ariff, *supra* note 145, at 349 (noting that the TRIMs negotiations represented a compromise between the developed and developing countries because not all investment measures were analyzed—only those with direct trade effects).

151. See McCulloch, *supra* note 56, at 543.

152. Cf. Low & Subramanian, *supra* note 62, at 416 (stating that developed countries argued that TRIMs greatly affected an MNE's normal trade decisions but also noting that firms are affected much less than the developed countries suggest).

153. Cf. Kwaw, *supra* note 58, at 323 (citing a discussion on trade-related investment measures in Delphi, Greece in 1989). "[I]t is hard to imagine any measure applied to investment which is not in some way and to some extent related to trade." *Id.*

154. See Maskus & Eby, *supra* note 62, at 527 (listing and defining each of the TRIMs put forward by the United States).

155. See GRAHAM, *supra* note 101, at 72.

156. See *id.*

Developing countries, on the other hand, argued that TRIMs are necessary measures to counter abusive MNE practices, and if an agreement were to prohibit TRIMs without addressing the trade-distorting practices of MNEs, it would result in an inequitable, one-sided agreement.¹⁵⁷ They argued, therefore, that GATT should consider an agreement subjecting trade-distorting restrictive business practices to GATT principles to accompany any agreement that subjected TRIMs to GATT principles.¹⁵⁸ Developing countries also emphasized the importance of investment measures in channeling FDI to national development objectives.¹⁵⁹ Furthermore, developing countries asserted that the negotiations should only examine those measures with direct and significantly adverse trade effects,¹⁶⁰ thus leaving many investment measures untouched. An examination of the TRIMs Agreement reveals that the developing countries were successful in substantially limiting the scope of the prohibitions of investment measures.

Article 1 of the TRIMs Agreement states that the agreement only applies to investment measures affecting trade in goods.¹⁶¹ The GATS Agreement covers investment measures affecting trade in services.¹⁶² The GATT principles of national treatment,¹⁶³ prohibition on quantitative restrictions,¹⁶⁴ and transparency¹⁶⁵ estab-

157. See Christy, *supra* note 50, at 785 (citing India's submission to the TRIMs negotiations).

158. See Kwaw, *supra* note 58, at 329; Low & Subramanian, *supra* note 62, at 416 (stating that developing countries viewed constraints on TRIMs as leaving no policy options for dealing with abusive MNE practices); see also *supra* notes 49-53 and accompanying text (describing restrictive business practices from a developing country perspective).

159. See Kwaw, *supra* note 58, at 329 (revealing that developing countries argue that such channeling measures are necessary because of the practices of MNEs); see also Low & Subramanian, *supra* note 62, at 418 (justifying TRIMs as developing country tools for promoting industrialization, export enhancement, technology transfer, and general development); Kwaw, *supra* note 58, at 312 (considering TRIMs an element of national investment policy rather than trade policy and noting that investment control is within the sovereign right of states).

160. See Kwaw, *supra* note 58, at 328 (postulating that such a focus would include local content requirements, export requirements, and trade balancing requirements but would not include local equity requirements, foreign exchange or remittance limitations, technology transfer and licensing requirements, and incentives because the latter group does not have significantly adverse trade effects).

161. See TRIMs Agreement, *supra* note 143, art. 1; Morrissey & Rai, *supra* note 28, at 714 (suggesting that Article 1 of TRIMs excludes technology transfer and licensing requirements and incentives because they are not "related to trade in goods only").

162. See *supra* Part II.B.1 (discussing the GATS Agreement).

163. See TRIMs Agreement, *supra* note 143, art. 2 (referencing the GATT Article III, para. 4 national treatment provision); cf. GATS Agreement, *supra* note 119, pt. III, art. XVII, para. 1 (defining national treatment in the GATS Agreement context).

164. See TRIMs Agreement, *supra* note 143, art. 2 (referencing the GATT Article XI, para. 1 provision on the prohibition of quantitative restrictions).

165. See *id.* art. 6, para. 1 (referencing the GATT Article X provision on transparency and notification); cf. GATS Agreement, *supra* note 119, pt. II, art. III (defining transparency in the GATS Agreement context).

lish the foundation for the TRIMs Agreement. The agreement states that members shall not apply TRIMs inconsistently with existing GATT articles III (national treatment) and XI (prohibitions on quantitative restrictions),¹⁶⁶ and the annex to the agreement lists investment measures that violate these GATT principles.¹⁶⁷ Investment measures violative of a member's national treatment obligation include local content requirements¹⁶⁸ and trade balancing requirements.¹⁶⁹ Investment measures violative of GATT's prohibition on quantitative restrictions include general import restrictions¹⁷⁰ and trade balancing restrictions,¹⁷¹ foreign exchange balancing restrictions on imports,¹⁷² and domestic sales requirements (export restrictions).¹⁷³ The transparency obligation of the TRIMs Agreement requires members to notify the WTO Secretariat of existing TRIMs¹⁷⁴ and to provide additional information to a member upon request.¹⁷⁵

166. See TRIMs Agreement, *supra* note 143, art. 2, para. 1; Price & Christy, *supra* note 111, at 451 (arguing that the TRIMs Agreement is simply an interpretation of GATT Articles III and XI in relation to investment measures); see also Low & Subramanian, *supra* note 62, at 417 (providing an excellent list of investment measures, both those prohibited by the TRIMs Agreement and those not covered).

167. See TRIMs Agreement, *supra* note 143, annex (titling the annex section "Illustrative List").

168. See *id.* annex, para. 1(a) (prohibiting requirements on "the purchase or use by an enterprise of products of domestic origin or from any domestic source, whether specified in terms of particular products, in terms of volume or value of products, or in terms of a proportion of volume or value of its local production"); see also Morrissey & Rai, *supra* note 28, at 708 (defining "local content restrictions" as measures requiring that a certain percentage value of inputs be locally sourced); cf. *supra* Part II.A.2 (discussing the FIRA Dispute and the local content requirement of the Canadian investment act).

169. See TRIMs Agreement, *supra* note 143, annex, para. 1(b) (prohibiting requirements "that an enterprise's purchase or use of imported products be limited to an amount related to the volume or value of local products that it exports"); see also Kwaw, *supra* note 58, at 319 (defining "trade balancing requirements" as requirements obliging an investor to offset imports of materials with an equal value of product exports).

170. See TRIMs Agreement, *supra* note 143, annex, para. 2(a) (prohibiting restrictions on "the importation by an enterprise of products used in or related to its local production, generally").

171. See *id.* para. 2(a) (prohibiting, based on the quantitative restrictions prohibition, restrictions on "the importation by an enterprise of products used in or related to its local production . . . to an amount related to the volume or value of local production that it exports").

172. See *id.* para. 2(b) (prohibiting restrictions on "the importation by an enterprise of products used in or related to its local production by restricting its access to foreign exchange to an amount related to the foreign exchange inflows attributable to the enterprise," i.e. export levels).

173. See *id.* para. 2(c) (prohibiting restrictions on "the exportation or sale for export by an enterprise of products, whether specified in terms of particular products, in terms of volume or value of products, or in terms of a proportion of volume or value of its local production").

174. See *id.* art. 6, para. 2.

175. See TRIMs Agreement, *supra* note 143, art. 6, para. 3 (requiring disclosure of in-

Developing countries receive slightly more favorable treatment than developed countries under the TRIMs Agreement. Article 4 allows developing countries to temporarily resuscitate an investment measure that is prohibited by the Agreement in order to combat a balance of payments crisis.¹⁷⁶ In addition, Article 5 grants developing countries a five-year waiver from application of the Agreement.¹⁷⁷ However, unlike the GATS Agreement, which allows selective liberalization through a country's schedule of commitments, the TRIMs prohibitions apply to all members after the phase-in periods have expired.¹⁷⁸

As with the GATS Agreement,¹⁷⁹ the TRIMs Agreement is only a modest first step toward the regulation and liberalization of direct investment.¹⁸⁰ The Agreement essentially codifies the GATT panel's conclusions in the FIRA Dispute.¹⁸¹ The prohibition of only a limited number of investment measures attests to the pressure of developing countries in the negotiations.¹⁸² The Agreement's limited focus on "trade-distorting" investment measures leaves many other investment measures outside of its scope and, therefore, unaccountable to the multilateral trading system.¹⁸³ Investment measures not covered by the TRIMs Agreement include:¹⁸⁴ local equity requirements, technology transfer and licensing requirements,

formation to a member upon request except when disclosure would "impede law enforcement or otherwise be contrary to the public interest or would prejudice the legitimate commercial interests of particular enterprises, public or private").

176. See *id.* art. 4 (referring to GATT 1994 Article XVIII and other balance of payments provisions and stipulating that the institution of a prohibited investment measure must comply with the balance of payments provisions requirements).

177. See *id.* art. 5, para. 2 (providing that developing countries shall eliminate prohibited TRIMs within five years of the date of entry into force of the TRIMs Agreement); see also *id.* para. 3 (allowing a further extension beyond the five year period for a developing country having "particular difficulties" implementing the provisions).

178. See TRIMs Agreement, *supra* note 143, art. 5, para. 2 (granting least developed countries a seven year phase-in period). Because the TRIMs Agreement entered into force in 1995, developing countries must be in compliance by the year 2000 and least-developed countries by the year 2002. See *id.*

179. See *supra* notes 140-142 and accompanying text (suggesting that the GATS Agreement is limited in its liberalization of FDI in services).

180. See Price & Christy, *supra* note 111, at 439 (claiming that the TRIMs Agreement "represents a first significant, and ultimately unsuccessful attempt to negotiate an agreement on investment within the context of the multilateral trading system").

181. See GRAHAM, *supra* note 101, at 72; OECD *Uruguay Round Stocktaking*, *supra* note 118, at 5; see also *supra* Part II.A.2 (discussing the FIRA Dispute and the panel's findings).

182. See GRAHAM, *supra* note 101, at 72 (positing that the limited prohibition is the result of "bowing" to developing country pressure); see also *supra* notes 157-160 and accompanying text (describing developing country positions in the negotiations).

183. See OECD *Uruguay Round Stocktaking*, *supra* note 120, at 5 (noting that the annex's "Illustrative List" only prohibits a limited number of TRIMs).

184. See Greenaway, *supra* note 60, at 379 (noting investment measures that do not have clear trade-distorting effects); see also Price & Christy, *supra* note 111, at 453-54 (pointing out that the TRIMs Agreement does not address several establishment and operational con-

local manufacturing requirements, personnel entry restrictions, local employment requirements, remittance restrictions, and export performance requirements, among others. The absence of a prohibition on export performance requirements,¹⁸⁵ in particular, is a substantial failure of the agreement¹⁸⁶ because export subsidies, which are closely related, are prohibited under the international trading system.¹⁸⁷

The TRIMs Agreement is not a complete investment agreement. The TRIMs Agreement contains no rules on screening and establishment issues.¹⁸⁸ There are no provisions for the repatriation of capital or the free movement of personnel.¹⁸⁹ TRIMs also does not cover expropriation and adequate compensation issues.¹⁹⁰

Nevertheless, developing countries are constrained in dealing with MNEs by the TRIMs Agreement's prohibition of several common investment measures.¹⁹¹ Developing countries argue that the TRIMs Agreement is deficient because it focuses only on the outcomes of investment measures and ignores the underlying causes for the imposition of such measures in the first place—the benefit-distorting practices of MNEs.¹⁹²

The greatest achievement of the TRIMs Agreement is that it clearly placed direct investment issues onto the WTO agenda.¹⁹³ Article 9 requires that the Council for Trade in Goods review the TRIMs Agreement by the year 2000 with a view to determining, at that time, whether the WTO should negotiate provisions on investment and competition policy.¹⁹⁴ The five-year review provisions of both GATS¹⁹⁵ and TRIMs together provide built-in authority for negotiating the possi-

trols).

185. See Kwaw, *supra* note 58, at 319 (defining an "export performance requirement" as a condition imposed on MNEs requiring that a certain amount of output be apportioned for export, often more than what the MNE would export without the restriction).

186. See Low & Subramanian, *supra* note 62, at 421 (explaining that larger countries, such as India, resisted the prohibition of export performance requirements because they wanted the ability to secure the benefits of increased exports in return for allowing MNEs into their large, protected markets).

187. See *id.* (calling this "an unjustifiable anomaly").

188. For a discussion of investment screening and host government criteria see *supra* notes 67-69 and accompanying text.

189. Cf. *infra* notes 247, 256 and accompanying text (discussing, respectively, the MAI provisions for profit repatriation and movement of personnel).

190. Cf. *infra* notes 241-246 and accompanying text (discussing the MAI provisions on expropriation and investment protection).

191. See Morrissey & Rai, *supra* note 28, at 703.

192. See *id.* at 711.

193. See *OECD Uruguay Round Stocktaking*, *supra* note 120, at 5 (asserting that the "incorporation of specific investment-related disciplines in the multilateral trading system" is the primary achievement of the TRIMs Agreement).

194. See TRIMs Agreement, *supra* note 143, art. 9; see also *Singapore Declaration*, *supra* note 2, para. 20 (establishing a working group to examine the relationship between trade and investment and competition policy).

195. See *supra* notes 141-142 and accompanying text (noting that the GATS Agreement

ble expansion of the WTO's coverage of direct investment.¹⁹⁶

3. TRIPS Agreement and the Dispute Settlement Understanding

Two other Uruguay Round agreements are important to the current WTO framework regarding FDI. The Agreement on Trade-Related Aspects of Intellectual Property Rights ("TRIPS")¹⁹⁷ provides basic protection for the transfer of technology through FDI operations.¹⁹⁸ This is an important protection for FDI because nearly all FDI undertakings involve technology transfer from the MNE to a subsidiary in the host country.¹⁹⁹ Protection of this technology will provide additional incentive for such a transfer.²⁰⁰ TRIPS grants developing countries a five-year waiver in applying the provisions.²⁰¹

The Uruguay Round Understanding on Rules and Procedures Governing the Settlement of Disputes ("Dispute Settlement Understanding")²⁰² is also relevant to the current FDI framework because each of the above discussed agreements—GATS, TRIMS, and TRIPS—is subject to the strengthened WTO dispute settlement process.²⁰³ Disputes concerning FDI-related provisions in any of these agreements can be swiftly arbitrated in the new system.²⁰⁴

provides for its review before the year 2000).

196. See *Singapore Declaration*, *supra* note 2, para. 20 (referring to the "built-in agenda" under the TRIMS Agreement); see also DeAnne Julius, *International Direct Investment: Strengthening the Policy Regime*, in *MANAGING THE WORLD ECONOMY: FIFTY YEARS AFTER BRETTON WOODS* 269, 281 (Peter B. Kenen ed., 1994) (describing the dual five-year provisions as a "natural opening for broadening the WTO's coverage of investment issues").

197. Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, *LEGAL INSTRUMENTS—RESULTS OF THE URUGUAY ROUND VOL. 31, 33 I.L.M. 1197 (1994)* [hereinafter *TRIPS Agreement*].

198. See *id.* pt. I, art. 7 (establishing the facilitation and protection of technology transfers as the primary objective of the agreement).

199. See Brewer & Young, *supra* note 119, at 75.

200. See *TRIPS Agreement*, *supra* note 197, pt. I, art. 7 (aiming to facilitate technology transfers).

201. See *id.* pt. VI, art. 65, para. 2 (granting developing countries a five year delay in applying the TRIPS provisions, except for the national treatment provision of Article 3 and the MFN treatment provision of Article 4). For a general review of the TRIPS Agreement and its implications for developing countries, see U.N. CONFERENCE ON TRADE & DEV., *THE TRIPS AGREEMENT AND DEVELOPING COUNTRIES*, U.N. Sales No. E.96.II.D.10 (1996) and Frederick M. Abbott, *The WTO TRIPS Agreement and Global Economic Development*, 72 *CHI-KENT L. REV.* 385, 387-389 (1996) (examining developing country interests in the negotiations over intellectual property protection).

202. Understanding on Rules and Procedures Governing the Settlement of Disputes, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, *LEGAL INSTRUMENTS—RESULTS OF THE URUGUAY ROUND VOL. 1, 33 I.L.M. 1226 (1994)* [hereinafter *Dispute Settlement Understanding*].

203. See generally PIERRE PESCATORE ET AL., *HANDBOOK OF GATT DISPUTE SETTLEMENT* (4th ed. 1994) (periodically updated) (offering a comprehensive analysis of

can be swiftly arbitrated in the new system.²⁰⁴

III. THE OECD MULTILATERAL AGREEMENT ON INVESTMENT (MAI)

A. ORIGINS OF THE MAI

Outside of the GATT/WTO framework, the Organization for Economic Cooperation and Development ("OECD")²⁰⁵ has dealt extensively with investment issues.²⁰⁶ Recognizing the tremendous growth and increasing importance of FDI to

dispute settlement procedures and the evolution of the GATT dispute settlement system and providing texts of GATT dispute settlement decisions).

204. See Dispute Settlement Understanding, *supra* note 202, art. 1 (stating that the understanding applies only to disputes between WTO members). See generally Thomas L. Brewer, *International Investment Dispute Settlement Procedures: The Evolving Regime for Foreign Direct Investment*, 26 LAW & POL'Y INT'L BUS. 633 (1995) (discussing WTO dispute settlement as it applies to FDI disputes under the covered agreements). But cf. *infra* Part III.B.4 (discussing the certain inclusion of an investor-to-state dispute settlement mechanism in the OECD's Multilateral Agreement on Investment). MNEs cannot bring a dispute on their own behalf challenging host country treatment of their investment as violative of a WTO agreement. See Dispute Settlement Understanding, *supra* note 202, art. 1. MNEs must either challenge the host country's laws or policies in the courts of the host country or seek to have their home government bring a case on their behalf in the WTO. Cf. Price & Christy, *supra* note 111, at 453 (noting that the home government may have different priorities and interests, and, therefore, the ability of an MNE to challenge an action in the WTO may be limited).

205. See OECD, *OECD Member Countries* (last modified May 5, 1997) <<http://www.oecd.org/about/member-countries.html>>. The OECD is primarily a developed country organization. Its membership includes the following 29 countries: Australia, Austria, Belgium, Canada, the Czech Republic, Denmark, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Italy, Japan, Korea, Luxembourg, Mexico, The Netherlands, New Zealand, Norway, Poland, Portugal, Spain, Sweden, Switzerland, Turkey, the United Kingdom, and the United States. See *id.*

206. See, e.g., ORG. FOR ECON. COOPERATION AND DEV., NATIONAL TREATMENT FOR FOREIGN-CONTROLLED ENTERPRISES (1993) (providing that OECD members should grant national treatment to enterprises of other members operating within their territory); ORG. FOR ECON. COOPERATION AND DEV., CODE OF LIBERALIZATION OF CAPITAL MOVEMENTS (1993) (calling on members to abolish restrictions on the establishment of direct investment, except under a limited number of exceptions); ORG. FOR ECON. COOPERATION AND DEV., CODE OF LIBERALIZATION OF CURRENT INVISIBLE OPERATIONS (1993) (covering repatriation of profits from direct investment); ORG. FOR ECON. COOPERATION AND DEV., THE OECD GUIDELINES FOR MULTINATIONAL ENTERPRISES (1994) (containing a voluntary code of conduct for MNEs). For a review of these instruments and their relation to OECD foreign direct investment regulation, see generally MARIE-FRANCE HOUDE, OECD INSTRUMENTS FOR PROMOTING THE LIBERALIZATION OF FOREIGN DIRECT INVESTMENT (OECD Working Paper Vol. III, No. 24, 1995) and William H. Witherell, *Towards an International Set of Rules for Investment*, in ORG. FOR ECON. COOPERATION AND DEV., TOWARDS

the international economy, the OECD Ministers established a Negotiating Group in the OECD 1995 Ministerial meeting²⁰⁷ to begin negotiating a Multilateral Agreement on Investment ("MAI").²⁰⁸ The OECD goal is to complete negotiations by the 1998 ministerial meeting²⁰⁹ and for the Agreement to enter into force by January 1, 1999.²¹⁰ The OECD MAI seeks "high standards"²¹¹ for the liberalization of investment measures and post-establishment investment protection and an effective dispute settlement mechanism providing for both state-to-state and investor-to-state disputes.²¹² MAI will be a freestanding international treaty with an existence separate from the other OECD instruments.²¹³ It will be open for accession to all interested countries, both OECD members and non-OECD members.²¹⁴

MULTILATERAL INVESTMENT RULES 17 (1996).

207. See *Communiqué of the Meeting of the OECD Council at Ministerial Level*, at 3, OECD Doc. SG/PRESS(95)41 (1995) [hereinafter *OECD 1995 Communiqué*]; *OECD Begins Negotiations on a Multilateral Agreement on Investment*, OECD Doc. SG/PRESS(95)65 (1995) (stating that actual discussions among members began in September 1995); see also Alan Larson, *The Multilateral Agreement on Investment: Origins and State of Play*, in *MULTILATERAL AGREEMENT ON INVESTMENT: STATE OF PLAY AS OF JULY 1996* 4, 4-5 (OECD Doc. OCDE/GD(96)157, 1996) (noting that OECD working groups have been studying the feasibility of an MAI since 1991).

208. See David Robertson, *The OECD Investment Mandate of 1995: Catching Up With the Market*, in *TOWARDS MULTILATERAL INVESTMENT RULES*, *supra* note 206, at 75 (recognizing that the WTO is the preferable forum for an investment agreement because of its broad membership, but asserting that the OECD has greater experience with investment issues); see also *Observer: Painful Shuffle*, *FIN. TIMES*, May 3, 1995, at 21 (noting that the Agreement was originally to be known as the Multilateral Investment Agreement (MIA) but was changed to the Multilateral Agreement on Investment (MAI) because the United States delegation wanted to avoid the acronym MIA, which is commonly known to signify "Missing in Action").

209. See *MAI May 1997 Report*, *supra* note 15, annex (resolving to complete the MAI before the 1998 OECD Ministerial Meeting). The OECD holds its Ministerial meetings in either May or June of each year.

210. Cf. Alastair Newton, *Accession by Non-OECD members, Institutional Arrangements and Implementation of the Agreement*, in *MULTILATERAL AGREEMENT ON INVESTMENT: STATE OF PLAY AS OF JULY 1996*, *supra* note 207, at 28, 31 (suggesting that the MAI will undergo a ratification process similar to the Uruguay Round Agreements and suggesting that January would allow sufficient time for a critical mass of governments to have completed their domestic ratification requirements for the MAI to enter into force).

211. See *OECD 1995 Communiqué*, *supra* note 207, at 5; Robert Ley, *The Multilateral Agreement on Investment: Some Questions and Answers*, OECD OBSERVER, Dec. 1996, at 28, 29 (special edition for the WTO Ministerial Conference) (explaining that "'high standards' refers primarily to the quality of the investment environment" in terms of market access and legal security).

212. See Ley, *supra* note 211, at 29.

213. See, e.g., *supra* note 206 (listing OECD instruments that deal with investment issues).

214. See *Non-Member Countries and Institutional Issues*, in *TOWARDS MULTILATERAL INVESTMENT RULES*, *supra* note 206, at 157-58.

B. THE PARTICULARS OF THE MAI

Although the MAI negotiation is still ongoing,²¹⁵ the basic framework of the MAI is discernable.

1. Definition of Investment

The MAI will define "investment" broadly to enable a comprehensive application of the agreement.²¹⁶ The definition will fall somewhere between the classical definition of FDI²¹⁷ and the definition of portfolio investment.²¹⁸ The objective is to cover all forms of tangible and intangible investment that create an actual stake in the host economy.²¹⁹

2. The Main Principles: National Treatment, Most-Favored Nation Treatment, and Transparency

The MAI liberalization provisions for host country investment measures and

215. The agreement was originally supposed to be concluded in May 1997. Several issues, however, particularly related to exceptions, could not be finalized. For draft texts of the agreement, see *May 1997 MAI Draft*, *supra*, note 17 and *January 1997 MAI Draft*, *supra*, note 17. See generally Frans Engering, *The Multilateral Agreement on Investment*, TRANSNAT'L CORP., Dec. 1996, at 147 (offering an overview of the MAI by the Chairperson of the Negotiating Group).

216. See *May 1997 MAI Draft*, *supra*, note 17, art. II, § 2 (defining "investment" for purposes of the agreement). Although the MAI will define investment broadly, the May draft indicates that an interpretative note will be inserted into the agreement to indicate that "in order to qualify as an investment under the MAI, an asset must have the characteristics of an investment, such as the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk." *Id.* n.2; cf. Edward M. Graham, *Investment and the New Multilateral Trade Context*, in *MARKET ACCESS AFTER THE URUGUAY ROUND: INVESTMENT, COMPETITION AND TECHNOLOGY PERSPECTIVES* 35, 55 (OECD ed. 1996) (realizing that the "broader the definition of investment, the greater the degree of protection and liberalization afforded by the Agreement").

217. See *supra* note 20 and accompanying text (offering several common definitions of FDI and relating them to portfolio investment).

218. See Thierry Francq, *Definition and Treatment of Investment and Investors*, in *MULTILATERAL AGREEMENT ON INVESTMENT: STATE OF PLAY AS OF JULY 1996*, *supra* note 207, at 13.

219. See *id.* (noting that the MAI definition will use an "asset-based" definition of investment instead of a more restrictive "enterprise-based" definition); *id.* at 13-14 (identifying types of investment likely to be included and excluded from the definition); see also Graham, *supra* note 20, at 209 (suggesting that a broad definition of "investment" is desirable in order to cover the many ways an MNE can undertake investment in a host country, including, inter alia, through a joint venture, a subsidiary, or a turnkey operation); cf. *OECD Uruguay Round Stocktaking*, *supra* note 120, at 5 (suggesting that the scope of the commercial presence provision of GATS is a significantly more narrow definition than an asset-based definition of investment).

performance requirements²²⁰ will be based on the principles of national treatment,²²¹ most-favored nation treatment (MFN),²²² and transparency,²²³ and will apply to both the pre- and post-establishment stages of investment.²²⁴ Mechanisms for a standstill and rollback of investment measures are already in place.²²⁵ The MAI would go much further than the TRIMs Agreement in prohibiting investment measures and performance requirements²²⁶ because the MAI seeks to eliminate all "investment-distorting"²²⁷ measures rather than the more limited set of "trade-distorting" measures addressed in the TRIMs Agreement.²²⁸ At a minimum the MAI will prohibit all of the measures suggested by the United States in the TRIMs negotiations,²²⁹ except perhaps for investment incentives.²³⁰ Furthermore, while the TRIMs and GATS Agreements employ a bottom-up approach²³¹ the MAI will

220. See *supra* Part I.C (identifying and discussing various host country investment measures and performance requirements).

221. See Larson, *supra* note 207, at 6 (defining national treatment as "non-discrimination as between domestic and foreign investors").

222. See *id.* (defining MFN treatment as non-discrimination "among foreign investors from different nations").

223. See Francq, *supra* note 218, at 15 (defining transparency as "ensur[ing] adequate information for foreign investors on the legal framework of each state"). The Agreement will require disclosure of all investment laws and policies, including those not formally recorded. See *id.*

224. See *Multilateral Agreement on Investment: Progress Report by the MAI Negotiating Group*, OECD Doc. OCDE/GD(96)78 (1996) [hereinafter *1996 MAI Progress Report*]. Thus, the MAI seeks to eliminate both entry and operational controls. See *supra* Part I.C (discussing the use of entry and operational controls by host countries).

225. See Francq, *supra* note 218, at 15 (claiming that the MAI will prohibit the introduction of additional non-conforming measures (standstill) and allow only future liberalization of measures (rollback)).

226. See *supra* Part II.B.2 (discussing the modest liberalization of the TRIMs Agreement in this area).

227. See Anders Ahnliid, *Special Topics, in MULTILATERAL AGREEMENT ON INVESTMENT: STATE OF PLAY AS OF JULY 1996*, *supra* note 207, at 17-18 (stating that negotiators believe that national treatment and MFN obligations may not, in and of themselves, be adequate to remove all efficiency-robbing performance requirements); see also Larson, *supra* note 207, at 6 (stating that negotiators seek to discipline even those performance requirements that are applied without discrimination).

228. See Ley, *supra* note 211, at 29.

229. See GRAHAM, *supra* note 101, at 114 (noting that the MAI negotiators are discussing all of the measures, except incentives, contained in the United States submission to the TRIMs negotiations plus manufacturing limitations); see also *supra* note 154 and accompanying text (identifying the investment measure list of the United States in the TRIMs negotiations).

230. See Ahnliid, *supra* note 227, at 19 (stating that "it may—regrettably for some—be difficult to develop far-reaching new disciplines on investment incentives within the time frame of the MAI negotiations."); see also Larson, *supra* note 207, at 7 (claiming that many countries consider investment incentives "legitimate tools" to attract investment).

231. See Francq, *supra* note 218, at 15 (describing that a bottom-up approach, also known as a positive list approach, liberalizes only those sectors or measures specifically

utilize the more encompassing top-down approach to liberalization of investment measures.²³² Parties to the MAI will be required to liberalize all measures or sectors unless a measure or sector is specifically excluded from the liberalization obligations.²³³

Although the objective of any agreement is to keep exceptions and derogations²³⁴ to the general obligations at a minimum, the MAI negotiators are discussing certain standard exceptions to the general obligations of national treatment and MFN treatment. Negotiators are discussing the inclusion of exceptions for reasons of national security,²³⁵ public order, and international peace and security.²³⁶ An exception for the protection of "linguistic and cultural diversity" is also being considered.²³⁷ The Agreement will also allow specific national reservations, listing measures that a State will maintain, although not conforming to the general obligations.²³⁸ In addition, the Negotiating Group is considering whether to allow a temporary derogation from the general obligations for serious balance of payments difficulties.²³⁹ On the whole, the MAI promises to significantly advance the liberalization of investment measures and performance requirements far beyond the limited level of liberalization achieved in the Uruguay Round agreements.²⁴⁰

3. Investor/Investment Protection

The MAI provisions on investor and investment protection were among the first agreed to in the negotiating sessions.²⁴¹ The MAI will borrow from the standard of

listed).

232. See *id.* at 15-16 (characterizing the MAI's top-down approach, also known as a negative list approach, as liberalizing all measures or sectors unless specifically excluded by the agreement); see also Low & Subramanian, *supra* note 62, at 423 (asserting that a top-down approach (negative list approach) can have the effect of a bottom-up approach (positive list) if too many exceptions are allowed).

233. Francq, *supra* note 218, at 15-16.

234. In common international legal usage an "exception" allows a postponement of obligations for an unlimited amount of time, while a "derogation" allows only a temporary postponement of obligations. GRAHAM, *supra* note 101, at 48 n.1.

235. See Graham, *supra* note 216, at 40-41 (arguing that determining the reasonable scope of a national security exception is the primary issue).

236. See 1996 MAI Progress Report, *supra* note 224, at 4.

237. See Francq, *supra* note 218, at 16; Graham, *supra* note 216, at 41 (suggesting that a cultural exception is most often discussed for the video and motion picture industries based on the fear that foreign domination of these industries will affect the cultural "identity" of host countries).

238. See Francq, *supra* note 218, at 16.

239. See *id.*

240. See *supra* Parts II.B.1-2 (discussing the liberalization of investment measures in the GATS and TRIMs Agreements, respectively).

241. See 1996 MAI Progress Report, *supra* note 224, at 4 (noting that draft provisions on standards of treatment, compensation for expropriation, protection from strife, subrogation, and transfer of funds have been prepared).

treatment for investments provided for in most bilateral investment treaties.²⁴² The MAI will require "fair and equitable treatment" at least as favorable as required by international law along with "constant protection and security" for investments.²⁴³ Expropriation will be prohibited except if it is "in the public interest, on a non-discriminatory basis, against payment of prompt, adequate and effective compensation, and in accordance with due process of law."²⁴⁴ Negotiators are considering whether to include language to cover exchange rate risk on the amount of compensation.²⁴⁵ The MAI will also contain provisions for compensation under certain circumstances of loss due to strife.²⁴⁶ Finally, all payments to and profits from an MNE investment will be freely transferable under the MAI at the market rate of exchange.²⁴⁷ A balance of payments derogation from this free transferability obligation is being considered.²⁴⁸

4. Dispute Settlement in the MAI

The MAI will provide for WTO-style state-to-state dispute settlement,²⁴⁹ with

242. See Hansen & Aranda, *supra* note 45, at 884 (noting that most BITs require "fair and equitable treatment, national and most-favoured-nation treatment" with international law standards on expropriation and the transfer of funds).

243. See Joachim Karl, *The Multilateral Agreement on Investment and Investor Protection*, in MULTILATERAL AGREEMENT ON INVESTMENT: STATE OF PLAY AS OF JULY 1996, *supra* note 207, at 9, 9 (describing the introductory article in the MAI section on investment protection).

244. See *id.* at 10 (describing the expropriation provision and noting that the terms "prompt, adequate and effective" and "due process of law" will be clarified in the Agreement); see also Messing, *supra* note 72, at 130 n.15 (explaining that the standard "prompt, adequate, and effective compensation" is known as the *Hull Formula* after United States Secretary of State Cordell Hull who, in a 1938 dispute with Mexico over Mexico's nationalization of oil fields, asserted that Mexico must, under international law, pay "prompt, adequate, and effective compensation" to the foreign owners of the nationalized oil fields).

245. See *id.* (discussing the issues of devaluation of a host country's currency and payment of compensation in a hard currency).

246. See *id.* at 10-11 (defining strife as when the investor incurs a loss as the result of war, a state of emergency, or other similar events and noting that the host country will not be required to pay compensation under such circumstances unless the host government expropriates the investor's property or directly and unnecessarily causes the loss).

247. See *id.* at 11 (noting that several parties would like a provision ensuring that capital transfers can be made in a hard currency).

248. See Karl, *supra* note 243, at 11 (stating that several negotiating parties believe that there should not be an exception for balance of payments difficulties while others believe that restrictions in line with the IMF Agreement should be permissible).

249. See Marino Baldi, *A Conceptual Framework for an MAI Dispute Settlement Mechanism*, in MULTILATERAL AGREEMENT ON INVESTMENT: STATE OF PLAY AS OF JULY 1996, *supra* note 207, at 21, 24-26 (describing a WTO-like model for MAI state-to-state arbitration); Graham, *supra* note 216, at 54-55 (positing that the MAI will likely follow the "WTO model" for state-to-state disputes and describing the stages in the WTO model); Dispute Settlement Understanding, *supra* note 202 (defining the WTO's dispute settlement

stages for consultation, conciliation, mediation, and, if necessary, binding arbitration by a panel of experts.²⁵⁰ There is also a consensus to include provisions for investor-to-state dispute settlement in the MAI.²⁵¹ Binding investor-to-state arbitration that would empower an arbitration panel to order a change in the host country's laws, however, would raise loss of sovereignty concerns.²⁵² Some have suggested that a NAFTA-style investor-to-state dispute settlement mechanism may be appropriate to remedy sovereignty concerns.²⁵³ Such a mechanism would allow the investor to recover monetary damages from the host country government but would not empower the arbitration panels to order changes in a host country's laws.²⁵⁴ The final elements of the MAI's investor-to-state dispute settlement mechanism are still being negotiated, but it is certain that the MAI will provide some sort of investor-to-state arbitration mechanism. The provision for investor-to-state dispute settlement, by itself, will be significant because it offers more than what is currently available under the WTO system.²⁵⁵

5. Special Issues: MNE Practices & Developing Country Accession

MAI negotiators are also considering a number of sub-issues and whether and how they should be provided for in the Agreement. Among the additional issues being discussed are provisions for the free movement of personnel,²⁵⁶ privatization and state enterprise issues, and MNE practices.²⁵⁷ The issue of restrictive MNE practices is particularly important, considering that the OECD hopes to secure the accession of developing countries to the MAI²⁵⁸ and the control of restrictive busi-

rules and procedures).

250. See Baldi, *supra* note 249, at 24-26.

251. See Larson, *supra* note 207, at 6; see also Graham, *supra* note 216, at 53 (arguing that investors will deem the MAI ineffective if it does not include investor-to-state arbitration provisions).

252. See Graham, *supra* note 216, at 53-54.

253. See *id.*; Christopher N. Camponovo, Comment, *Dispute Settlement and the OECD Multilateral Agreement on Investment*, 1 UCLA J. INT'L L. & FOREIGN AFF. 181, 212 (1996) (recommending that the MAI follow the NAFTA model of investor-to-state dispute settlement, which provides for an effective dispute settlement forum and protects State sovereignty).

254. See Graham, *supra* note 216, at 53-54 (describing the NAFTA-style investor-to-state dispute settlement mechanism).

255. See Larson, *supra* note 207, at 6; Julius, *supra* note 196, at 280-81 (stating that MNEs cite the lack of an investor-to-state dispute settlement mechanism in the WTO as the greatest drawback of the WTO system); see also *supra* notes 202-204 and accompanying text (discussing the WTO dispute settlement process and noting that it only provides for state-to-state disputes).

256. See Ahnlid, *supra* note 227, at 18 (stating that the MAI will contain provisions for movement of personnel, but the extent of liberalization in this area has not yet been determined).

257. See *id.* at 17-20 (discussing the state of negotiations on these additional issues).

258. See *infra* notes 263-265 and accompanying text (describing the provisions and goals of the MAI in terms of developing country accession to the Agreement).

ness practices²⁵⁹ is a primary concern for developing countries.²⁶⁰ Although the MAI Negotiating Group recognizes that MNE practices can negatively affect investment,²⁶¹ the majority of the negotiators believe that it is not appropriate for the MAI to contain provisions on MNE practices.²⁶²

Nevertheless, the MAI will be open to accession by non-OECD countries, including developing countries.²⁶³ The OECD has undertaken a commitment to actively pursue those non-OECD countries interested in acceding to the Agreement²⁶⁴ and has theorized that all countries, including developing countries, desiring to attract further direct investment will benefit from accession to the Agreement.²⁶⁵ After the Agreement enters into force, acceding countries will be required to accept certain "core" conditions of the Agreement.²⁶⁶ Negotiators,

259. See *supra* notes 45-53 and accompanying text (discussing restrictive business practices and the effect on developing countries).

260. See *supra* Part I.C (discussing the investment measures and performance requirements that developing host countries institute, in part, to counteract the practices of MNEs).

261. See Ahnliid, *supra* note 227, at 20 ("It is not only government measures that may distort investment flows between countries, but also actions taken by individual firms . . . which can negatively impact on foreign investment.").

262. See *id.* (stating that the majority "feels it is neither appropriate nor possible for MAI to interfere with the private practices and decisions of specific companies . . . [W]hat private entities decide to do in their own right is not, and should not according to the majority, be covered by MAI.").

263. See *OECD 1995 Communiqué*, *supra* note 207, at 3. Non-OECD countries joining before the ratification period will be allowed to negotiate their own specific reservations to the general obligations. See Newton, *supra* note 210, at 30-31 n.12 (defining the ratification period as the time between the 1997 OECD Ministerial meeting and January 1, 1998). Non-OECD countries will have the same ability as OECD members to negotiate reservations before the presentation of the MAI to the 1998 OECD Ministerial meeting. See *id.* Those countries acceding after the presentation of the MAI at the 1998 OECD Ministerial meeting will not be able to negotiate country-specific reservations. See *id.* at 30 & n.11 (asserting that the MAI will follow the Uruguay Round model).

264. See *Communiqué of the Meeting of the OECD Council at Ministerial Level*, at 5, OECD Doc. SG/COM/NEWS(96)53 (May 1996) (calling for an "intensified dialogue with non-member countries").

265. See Ley, *supra* note 211, at 29-30 (claiming that accession to the MAI will generate additional inward direct investment for any acceding country because the high standards of market access and investor protection contained in the Agreement appeal to investors); Larson, *supra* note 207, at 5 (believing that the investment liberalization and protection standards in the MAI will increase the general economic welfare of all countries who are a party to the Agreement); Messing, *supra* note 72, at 134 (asserting that it is in developing countries' "long-term self-interest . . . to prepare to work their way up the graduated liberalization ladder to the high platform of investment policy that will attract the capital (especially the lower-cost, long-term, conservative capital) that they need"); cf. Graham, *supra* note 20, at 206 (suggesting that developing countries with greater ties to OECD countries statistically have a higher productivity and growth rate than those developing countries without such ties).

266. See Newton, *supra* note 210, at 32 (suggesting that the MAI will require adherence

however, are considering whether to allow a transition period or temporary reservations to the obligations for developing countries acceding at this stage.²⁶⁷

C. BENEFITS AND LIMITATIONS OF THE MAI

The MAI will become the most comprehensive set of multilateral²⁶⁸ rules on foreign direct investment in existence. Its provisions go much further than the current multilateral agreements in this area, GATS and TRIMs,²⁶⁹ in liberalizing investment measures and in providing rules for the protection of investments.²⁷⁰ The MAI's coverage of "investment-distorting" investment measures will result in the liberalization of a much broader array of measures than the more limited coverage of "trade-distorting" investment measures in the TRIMs Agreement.²⁷¹ Furthermore, the Uruguay Round agreements do not deal with issues of expropriation and the free transfer of capital.²⁷² The MAI's coverage of these issues is, thus, unique to the multilateral economic system. The MAI is a welcome addition to the field.

The Agreement, however, has several shortcomings that will limit its ultimate value to the world economic system. The OECD is an organization comprised primarily of developed countries²⁷³ and tends to view FDI issues from a developed country perspective.²⁷⁴ Only these developed country OECD members have been able to participate in the negotiation of the Agreement.²⁷⁵ Although the MAI will be a free-standing international treaty open to accession of all countries, it is

to a certain benchmark level of liberalization).

267. See Ley, *supra* note 211, at 30.

268. But see Graham, *supra* note 20, at 207 (asserting that the MAI is more correctly termed a "plurilateral" agreement rather than a "multilateral" agreement).

269. See *supra* Parts II.B.1-2 (analyzing the modest liberalization of FDI in the GATS and TRIMs Agreements).

270. See *supra* Part III.B.2-3 (analyzing the likely MAI provisions for investment measure liberalization and investment protection); see also *supra* notes 188-190 and accompanying text (noting the absence of rules on establishment issues and investment protection in the TRIMs Agreement).

271. See *supra* notes 168-173 and accompanying text (identifying the investment measures prohibited by the TRIMs Agreement).

272. See *supra* notes 189-190 and accompanying text (noting the absence of provisions on expropriation and capital transfers in the TRIMs Agreement).

273. See OECD, *OECD Member Countries* (last modified May 5, 1997) <<http://www.oecd.org/about/member-countries.html>>. The OECD membership includes the following 29 countries: Australia, Austria, Belgium, Canada, the Czech Republic, Denmark, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Italy, Japan, Korea, Luxembourg, Mexico, The Netherlands, New Zealand, Norway, Poland, Portugal, Spain, Sweden, Switzerland, Turkey, the United Kingdom, and the United States. See *id.*

274. See SORNARAJAH, *supra* note 20, at 69-72 (examining the institutions shaping international law on FDI).

275. But cf. *supra* notes 264-265 and accompanying text (noting that the OECD has undertaken a vigorous effort to educate non-OECD members on the Agreement's provisions and the benefits of acceding to it); see also *supra* notes 263-267 and accompanying text (describing the accession process for non-OECD countries).

doubtful that the Agreement will secure the accession of many non-OECD countries,²⁷⁶ especially developing countries,²⁷⁷ because of the developed-country orientation of the Agreement. The decision of MAI negotiators to exclude provisions regulating the restrictive business practices of MNEs²⁷⁸ is an additional weakness of the Agreement in its effort to attract developing countries.

The absence of developing country participation in the Agreement will greatly diminish its value to the international economic system.²⁷⁹ The subjection of developing countries to the liberalization requirements of the MAI would yield much greater benefits to the international economic system. The capital-exporting developed countries, more or less, already maintain relatively few barriers to foreign direct investment.²⁸⁰ It is the developing countries who maintain substantial barriers to investment²⁸¹ and whose participation would, therefore, generate greater benefits through the corresponding liberalization of these barriers.

IV. THE SETTING FOR WTO NEGOTIATIONS, ISSUES, AND RECOMMENDATIONS

A. THE SETTING FOR WTO NEGOTIATIONS ON FOREIGN DIRECT INVESTMENT

Negotiations for a comprehensive agreement on direct investment in the WTO have not yet begun. The language of the Singapore Ministerial Declaration, inserted at the insistence of the developing country coalition²⁸² opposed to such an

276. See Graham, *supra* note 20, at 207 (suggesting that few non-OECD countries are likely to join the Agreement).

277. See Wimmer, *supra* note 122, at 111-12 (fearing the absence of developing country accession to the Agreement and favoring the WTO as the forum with greater possibility for a more inclusive Agreement).

278. See *supra* notes 257-262 and accompanying text (discussing the decision to not include provisions on restrictive MNE practices in the MAI); see also *supra* notes 45-53 and accompanying text (describing the various practices of MNEs and the costs to developing economies resulting from these practices).

279. See Graham, *supra* note 20, at 207 (stating that greater "benefit . . . would result from reform by nations whose policies toward investment are not in conformity with the agreement. . . . [S]uch nations . . . are not currently OECD members").

280. See, e.g., Geist, *supra* note 39, 688 (recognizing that the United States permits entry to nearly all inward FDI and does not subject FDI proposals to review unless the MNE seeks to invest in an industry related to defense or national security). But see Exon-Florio Amendment to the 1988 Omnibus Trade & Competitiveness Act, 50 U.S.C. app. § 2170 (1994) (granting the executive the power to deny an inward FDI proposal on the grounds that it threatens national security).

281. See *supra* Part I.C (discussing host developing country investment measures and performance requirements).

282. At a meeting of developing countries in New Delhi, India in September 1996, 13 developing countries expressed opposition to comprehensive investment talks in the WTO: Bangladesh, Cuba, Egypt, Ghana, India, Indonesia, Kenya, Malaysia, Mauritius, Tanzania, Thailand, Venezuela, and Zimbabwe. See *13 Developing Nations Oppose Investment Pact*,

agreement,²⁸³ qualified the prospects for the initiation of negotiations. On investment, the Singapore Declaration stated that the establishment of the working group on investment "shall not prejudice whether negotiations will be initiated in the future" and that negotiations will only begin after an "explicit consensus decision."²⁸⁴ Nonetheless, most developed countries continue to believe that such an agreement is necessary,²⁸⁵ and these countries will push for the working group to

TIMES OF INDIA, Oct. 1, 1996, at 15. Pakistan and Sri Lanka also conveyed their support for the stand. *See id.* Closer to the Singapore Conference, this developing country coalition had decreased in number to include only Egypt, India, Indonesia, Malaysia, Pakistan, and Tanzania. *See* Frances Williams, *WTO Push for Investment Rules Pact: Developing Countries Divided Despite Ruggiero's Assertion of a 'Compelling Case,'* FIN. TIMES, Oct. 17, 1996, at 4; Frances Williams, *US May Block WTO Draft,* FIN. TIMES, Nov. 4, 1996, at 6.

The opening statements from trade ministers from these developing countries highlight their concerns over the inclusion of investment negotiations on the WTO agenda. *See, e.g.,* World Trade Organization Secretariat, *India: Statement by Dr. B.B. Ramaiah, Minister of Commerce*, WT/MIN(96)/ST/27 (Ministerial Conference Dec. 9, 1996) [hereinafter *India's Singapore Conference Statement*] (questioning the WTO's competence in the area of investment and suggesting that the U.N. Conference on Trade & Development ("UNCTAD") is the more appropriate forum for investment issue discussions); B.B. Ramaiah, *Towards a Multilateral Framework on Investment*, TRANSNAT'L CORP., Apr. 1997, at 117 (offering a revised version of Mr. Ramaiah's speech to the UNCTAD Global Investment Forum in October 1996); World Trade Organization Secretariat, *Indonesia: Statement by H.E. Mr. Tungky Ariwibowo, Minister of Industry and Trade*, WT/MIN(96)/ST/22 (Ministerial Conference Dec. 9, 1996) (claiming that the "issue of [a] multilateral framework for investment is essentially outside the scope and competence of the WTO" and that the WTO should not "duplicate the work of UNCTAD in this area"); World Trade Organization Secretariat, *Malaysia: Statement by the Honorable Dato' Seri Rafidah Aziz, Minister of International Trade and Industry*, WT/MIN(96)/ST/64 (Ministerial Conference Dec. 11, 1996) (stating that "Malaysia cannot accept or subscribe to any move towards the formulation of multilateral investment rules in the WTO, although work on an educative process can be supported, provided it does not lead to a negotiating process").

During the Singapore Conference, however, every country except India and Pakistan had yielded to pressure by the developed countries on the issue of investment to allow at least the establishment of a WTO working group on the issue. *See* Guy de Jonquières & Frances Williams, *WTO Close to IT Deal*, FIN. TIMES, Dec. 11, 1996, at 4. By the close of the Singapore Conference and the final drafting of the Ministerial Declaration, both India and Pakistan had also yielded to allow the inclusion of language in the Declaration referring to the establishment of a WTO working group on investment. *See Singapore Ministerial Declaration, supra* note 2, para. 20.

283. *See* Anita Gabriel, *WTO Process: A Clash of Widely Divergent Agendas*, BUS. TIMES (MALAYSIA), Dec. 6, 1996, at 4 (examining the conflicting views of developed and developing countries on an investment agreement in the WTO).

284. *Singapore Ministerial Declaration, supra* note 2, para. 20 (qualifying the prospects for future negotiations on a comprehensive investment agreement).

285. *See, e.g.,* World Trade Organization Secretariat, *European Communities, Commission of the European Communities: Statement by Sir Leon Brittan Q.C., Vice-President of the European Commission*, WT/MIN(96)/ST/2 (Ministerial Conference Dec. 9, 1996) (considering investment the "top priority for [the] WTO in the years ahead" and asserting that the establishment of comprehensive multilateral rules on investment in the WTO is of inter-

lead to negotiations on a comprehensive investment agreement.²⁸⁵

India stands as perhaps the primary obstacle to the commencement of negotiations on direct investment. Although India eventually agreed to the establishment of a working group on investment, bowing to pressure from developed countries and the isolation created by the collapse of the developing country coalition,²⁸⁷ it maintains that it will resist the start of any new negotiations on direct investment in

est and benefit to all WTO members and calling for negotiations to begin by the year 2000). The EU desires that the forthcoming MAI serve as a foundation for a WTO agreement on direct investment. In the May 1997 draft of the MAI, the EU inserted language to this effect. See *May 1997 MAI Draft*, *infra* note 17, preamble ("Wishing that this Agreement enhances international co-operation with respect to investment and the development of worldwide rules on foreign direct investment in the framework of the world trading system as embodied in the World Trade Organization."); see also World Trade Organization Secretariat, *Japan: Statement by H.E. Mr. Yukihiko Ikeda, Minister for Foreign Affairs*, WT/MIN(96)/ST/34 (Ministerial Conference Dec. 10, 1996) (supporting work on investment in the WTO framework); World Trade Organization Secretariat, *United States: Statement by the Honourable Charlene Barshefsky, Acting United States Trade Representative*, WT/MIN(96)/ST/5 (Ministerial Conference Dec. 9, 1996) (agreeing to a working group on investment "as part of a balanced overall agenda for the WTO").

286. See European Commission Proposal on FDI, *supra* note 1, at 6 (urging the European Community to "actively pursue the establishment of multilateral rules for FDI"). The report suggests pushing for WTO negotiations on the subject "as soon as possible." *Id.* at 13; see also Sir Leon Brittan, *Investment Liberalization: The Next Great Boost to the World Economy*, TRANSNAT'L CORP., Apr. 1995, at 1, 9 (asserting that "it would be perverse . . . to claim that truly multilateral rule-making in the investment field would somehow be less advantageous than multilateral rule-making in the many fields covered by the [Uruguay Round]"). Brittan suggests that the WTO is the best forum for an agreement on investment because the WTO membership includes virtually all countries, and WTO rules are binding and enforceable. See *id.* at 9; see also *EU Leads Push for Investment on Post-Singapore Agenda*, EUR. REP., Dec. 7, 1996, available in LEXIS, Busfin Library, Eurppt File (discussing the EU proposal for investment talks in the WTO).

287. See Priya Ranjan Dash, *India Will Not Compromise on WTO Investment Pact*, TIMES OF INDIA, Dec. 12, 1996, at 13 (reporting that even only a few days before the close of the Conference, India was maintaining its stand on the investment issue). India stated that it would not allow even a reference to investment in the Declaration because it believed that the WTO was not the competent or appropriate forum for negotiations on investment. See *id.* An Indian trade official stated, "Even if we are isolated [on the decision of including a reference to investment in the Declaration], it will be splendid isolation. We will not compromise our principled stand." *Id.* India eventually did allow the reference to investment and the establishment of the working group. See *India Softens its Stand; Agrees to Include Labor, TRIMs in Final Pact*, TIMES OF INDIA, Dec. 13, 1996, at 13 [hereinafter *India Softens its Stand*]; see also *supra* note 282 (detailing the collapse of the developing country coalition opposed to investment negotiations in the WTO).

Prior to agreeing to the investment reference in the Declaration, India shrewdly suggested that if the WTO seeks to reduce barriers to investment as distortive of trade, the WTO should, with equal vigor, look into the trade-distorting effects of national immigration policies. See Priya Ranjan Dash, *India Poses Immigration to Offset Investment Pact*, TIMES OF INDIA, Dec. 13, 1996, at 13.

the WTO.²⁸⁸ It views further restrictions on investment measures and policies as an unacceptable encroachment on host country sovereignty.²⁸⁹ India points to the "explicit consensus" principle attached to the investment language in the Declaration and interprets this principle as requiring the unanimous vote of all WTO member countries before beginning any new negotiations on investment issues.²⁹⁰ India accepted the Declaration's reference to investment, it claims, only because the TRIMs Agreement requires review before the year 2000.²⁹¹ India suggests that the working group will, therefore, only have the authority to examine the TRIMs Agreement.²⁹²

Realistically, the ability of developed country trade ministers to achieve their agenda through political maneuvering and a linkage of concessions²⁹³ will likely enable the developed countries to set a course for negotiations on direct invest-

288. See Michael Battye, *India Declares Victory, But FM is Not Too Happy*, TIMES OF INDIA, Dec. 14, 1996, at 13 (citing Commerce Secretary Tejandra Khanna as declaring that India will not participate in any consensus for beginning negotiations on investment).

289. See Robert Evans, *Trade Ministers Will Face Uphill Task at WTO Meet*, TIMES OF INDIA, Dec. 9, 1996, at 17 (reviewing the new issues on which developed countries are seeking to secure negotiating commitments); see also Greenaway, *supra* note 60, at 377 (asserting that for the WTO system to take up investment measures beyond the scope of those directly related to trade would be an extension of its competence and scope).

290. See Priya Ranjan Dash, *Consensus Principle at WTO is Victory for India*, TIMES OF INDIA, Dec. 16, 1996, at 15 (quoting Indian Commerce Secretary Tejandra Khanna as asserting that any single WTO member country will be able, because of the "explicit consensus" language, to block the start of any negotiations on direct investment). Indian trade ministers suggest that an "explicit consensus" can only be interpreted as requiring a "formal expression of concurrence with a proposal." *Id.* It is a much more demanding standard than the simple WTO "consensus" principle, which requires only a "general view" among WTO member countries. *Id.*

If an "explicit consensus" is required and if it is interpreted as India suggests, India may maintain its opposition even in the face of isolation, like it did in the Comprehensive Test Ban Treaty talks ("CTBT"). See *LS, RS Adjourned: MPs Peeved at 'Volte-Face' in Singapore*, TIMES OF INDIA, Dec. 14, 1996, at 1 (noting that several members of parliament were upset that India allowed the reference to investment and suggested that India should have maintained its stand like it did over the signing of the CTBT).

291. See TRIMs Agreement, *supra* note 143, art. 9.

292. See Sunil Jain, *Not Out of the Woods Yet*, INDIA TODAY, Jan. 15, 1997, at 78-79 (noting that India is under a contractual obligation to participate in a review of the TRIMs Agreement before the year 2000); see also *India Softens its Stand*, *supra* note 287, at 13 (discussing how India would not have accepted the reference to investment had the Declaration characterized direct investment as a "new issue" for the WTO).

293. See Guy de Jonquières, *It's a Funny Old World Trade Organization*, FIN. TIMES, Dec. 12, 1996, at 5. This experienced WTO follower notes:

[T]he thrill of the game is linkage—trading demands in one area for concessions in another. That logic apparently dictated the intransigent public stance struck by many developing countries on contentious issues such as investment. . . . Such opposition may then be softened in exchange for movement on, say, agriculture or textiles.

Id.

ment.²⁹⁴ The limiting language in the Singapore Declaration will not have its current effect in a few years.²⁹⁵ Developed countries will determine the areas where developing countries will accept concessions²⁹⁶ in return for allowing the start of direct investment negotiations. The TRIMs Agreement, to which many developing countries were opposed,²⁹⁷ was hammered out in a similar fashion.²⁹⁸

While the Singapore Declaration's reference to comprehensive investment negotiations in the WTO mandates only negotiations for the establishment of a working group,²⁹⁹ both the GATS³⁰⁰ and TRIMs³⁰¹ Agreements contain "built-in"³⁰² authority for review before the year 2000. Developed countries will use this built-in authority along with the conclusions of the investment working group to seek the beginning of negotiations on direct investment as early as 1999.³⁰³

294. See Muchkund Dubey, *The WTO and India—II*, HINDU, Jan. 17, 1997, at 12 (claiming that India will not be able to permanently block the start of new negotiations on investment and suggesting that India begin formulating a strategy to minimize the loss of sovereign control over FDI that a new agreement on direct investment would certainly entail); see also C. Rammanohar Reddy, *Rich Nations Have Their Way at WTO Meet*, HINDU, Dec. 13, 1996, at 14 (stating that although the language in the Singapore Declaration does not mandate the immediate start of negotiations on investment, the reference to investment and the establishment of the working group "is a clear sign that the developed world has largely got what it wanted").

295. See de Jonquières, *supra* note 293, at 5 (recalling a quote from a trade minister who stated that the Singapore Declaration will "largely be forgotten by January [1997] and in five years' time, nobody will be able to recall what all these arguments were about").

296. See, e.g., D. Ravikanth, *Issues Before the Singapore Meeting*, TIMES OF INDIA, Dec. 9, 1996, at 10 (stating that India and Pakistan, in particular, feel that the WTO has not adequately enforced the implementation of the Uruguay Round agreements in textiles and agriculture); cf. Ariff, *supra* note 145, at 360 (writing during the TRIMs negotiations and suggesting that developing countries can give a little on investment issues if developed countries give a little on certain trade issues).

297. See *supra* notes 152-160 and accompanying text (reviewing the positions of developed and developing countries in the TRIMs negotiation).

298. One can legitimately surmise that most of the liberalization achieved to date through the GATT/WTO system has been achieved through a strategy of concession/demand linkage.

299. See *Singapore Ministerial Declaration*, *supra* note 2, para. 20.

300. See GATS Agreement, *supra* note 119, pt. III, art. XIX.

301. See TRIMs Agreement *supra* note 143, art. 9.

302. See *Singapore Declaration*, *supra* note 2, para. 20 (referring to the "built-in" agenda of the GATS and TRIMs Agreements).

303. The next WTO ministerial meeting will occur on May 18-20, 1998 in Geneva, Switzerland. See *Next WTO Ministerial on 18-20 May 1998*, WTO FOCUS (World Trade Organization, Geneva, Switzerland), June-July 1997, at 1, 1. The conclusions of the investment working group will be presented at that time. See *The Growing Impact of Investment and Trade*, WTO FOCUS (World Trade Organization, Geneva, Switzerland), June-July 1997, at 2, 2 (highlighting the discussions of the first meeting (June 2-3, 1997) of the Working Group on the Relationship between Trade and Investment). Negotiations for a WTO agreement on direct investment could feasibly begin immediately thereafter. The

B. ISSUES AND RECOMMENDATIONS FOR WTO NEGOTIATIONS ON FOREIGN DIRECT INVESTMENT

1. Is an Agreement on Direct Investment in the WTO Necessary and Desirable?

In an effort to attract greater inflows of FDI, most developing countries have individually taken recent steps to liberalize their investment regimes.³⁰⁴ Even India has begun to liberalize its investment policies by increasing the allowable percentage of foreign equity ownership for FDI in many sectors³⁰⁵ and publishing the review criteria of its administrative screening process in an effort to make its policies more transparent.³⁰⁶ This unilateral liberalization by developing countries has occurred despite the absence of a comprehensive multilateral investment agreement.³⁰⁷ This trend begs the question of whether a comprehensive multilateral in-

MAI will be concluded around the time of the 1998 WTO Ministerial Conference and will undoubtedly become a reference in WTO negotiations. See *MAI May 1997 Report*, *supra* note 15, annex (resolving to complete the MAI before the May 1998 OECD Ministerial Meeting); *The Move Toward Global Rules on Investment: An Interview with Alan P. Larson*, Assistant Secretary of State for Economic and Business Affairs, ECON. PERSP. Apr. 1997, at 6, 6 (available in portable document format (pdf) at <<http://www.usia.gov/journals/ites/0497/ijee/ijee0497.htm>>) (suggesting that the "OECD exercise" provides a model for future WTO negotiations); Daniel M. Price, *The Benefits of a Multilateral Agreement on Investment*, ECON. PERSP. Apr. 1997, at 13, 15 (available in portable document format (pdf) at <<http://www.usia.gov/journals/ites/0497/ijee/ijee0497.htm>>) ("The essential next step is to broaden MAI membership through accession and eventually to incorporate its rules into an agreement within the framework of the WTO.").

304. See Graham, *supra* note 20, at 206 (noticing a shift toward greater liberalization in the investment policies of developing countries). Developing nations, who twenty years ago viewed MNE investment as imperialistic, now actively compete for investment in their economies and have liberalized their investment policies in an effort to attract greater amounts of FDI. See Low & Subramanian, *supra* note 62, at 421 (asserting that "for the most part, countries now exert greater efforts in attracting FDI than they do in constraining investors").

305. See Mark Nicholson, *India Expands Scope of Foreign Investment*, FIN. TIMES, Jan. 22, 1997, at 6 (reporting that India has increased the allowable foreign equity stake to 100% in transportation, tourism, oil, and power projects; 49% in telecommunications projects; 51% in the pharmaceutical industry; and 20% in the banking sector). The Indian Government also broadened the list of sectors in which FDI proposals of up to 74% foreign ownership do not require administrative screening. See *id.*

306. See *Aiming for Transparency: New Guidelines Address Problems Faced by Foreign Investors*, INDIA TODAY, Feb. 15, 1997, at 64, 64 (stating that the Foreign Investment Promotion Board made its entry acceptance criteria publicly available for the first time).

307. See Americo Beviglia Zampetti & Pierre Sauvé, *Onwards to Singapore: The International Contestability of Markets and the New Trade Agenda*, 19 WORLD ECON. 333, 333 (1996) (noting that countries have exhibited an increased desire to liberalize FDI regimes as part of the general integration of the world economy).

vestment agreement is necessary or even desirable at this point in time.³⁰³ Negotiations would give interest groups an opportunity to frustrate liberalization efforts and request carve-outs and other exceptions, and the level of liberalization in the resulting agreement could actually be negative.³⁰⁹

An agreement is desirable, however, for a number of reasons. Although developing countries have begun to liberalize their investment regimes, this liberalization has been only partial. Furthermore, without an underlying standstill or roll-back obligation of a multilateral investment agreement, this modest liberalization can be easily reversed.³¹⁰ A truly multilateral agreement on foreign direct investment in the WTO,³¹¹ therefore, would, at a minimum, lock-in the current levels of liberalization. For this result alone, an agreement is desirable.

In addition, by eliminating investment-distorting measures, a WTO investment agreement will generate a net gain in world welfare.³¹² Those in favor of an agreement on direct investment emphasize the net world welfare gain that such an agreement would generate.³¹³ Those opposed focus on the potential welfare loss to

308. See Low & Subramanian, *supra* note 62, at 430 & n.40 (asking "If it ain't broken, why fix it?").

309. See *id.* at 422.

310. See Graham, *supra* note 20, at 208 (suggesting that a multilateral agreement can prevent "policy backsliding").

311. See *WTO Report*, *supra* note 20, at 59 (asserting that "[o]nly a multilateral negotiation in the WTO . . . can provide [the necessary] global and balanced framework" for an investment agreement); GRAHAM, *supra* note 101, at 102 (positing that the WTO is the preferable forum because the WTO membership includes most countries of the world and will likely also include China).

312. See Bergsten & Graham, *supra* note 76, at 24-25, 27-28 (viewing the world system from the perspective of world economic welfare maximization). Even if investment measures give the host developing country a better share of the benefits of MNE investment, some party must assume the cost of the investment measure. See *id.* at 27-28. Investment barriers drive MNEs away from the host country, and this reduces the optimization of world capital resources. See *id.* at 24. Game theory suggests that the only way to force host countries to remove investment barriers and incentives to achieve a maximum net welfare gain is to prohibit the investment measures and incentives through an enforceable set of rules. See *id.* at 28-29. Only under an enforceable system of rules, whereby the certain punishment for breaking the rules is enough to deter cheating on the agreement in the hopes of securing individual benefits, can every country "win" from the arrangement. See *id.*

313. See Brewer & Young, *supra* note 119, at 79 (recognizing net welfare gains from international agreements because they reduce investors' uncertainty over the investment environment); McCulloch, *supra* note 56, at 552 (asserting that an agreement, in whatever forum, prohibiting all "efficiency-robbing" investment measures is necessary); Renato Ruggiero, *Foreign Direct Investment and the Multilateral Trading System*, TRANSNAT'L CORP., Apr. 1996, at 1, 7 (asserting that the negotiation of investment rules in the WTO should not revolve around a North/South debate because it is in the interests of all countries to create a more secure international environment for direct investment); see also Low & Subramanian, *supra* note 62, at 422-23 (offering a list of six reasons why a comprehensive multilateral agreement on investment is desirable to the world economy); Zampetti & Sauv , *supra* note 307, at 340-41 (positing that the completion of a comprehensive agree-

their own economies.³¹⁴ In an international system still dominated by political concerns, pure welfare maximization is not possible, and political concerns will prevent a welfare maximizing agreement on direct investment.³¹⁵ In WTO negotiations on direct investment, therefore, negotiators will have to achieve a balancing of interests and a trade-off of benefits. There are a number of issues that will become central to this balancing of interests in WTO negotiations on direct investment.

2. Reconstituting the MAI in the WTO Framework

Because the MAI promises to be the most comprehensive and the most liberalizing multilateral investment agreement in existence, it will figure prominently in negotiations at the WTO.³¹⁶ Although the provisions and principles of the MAI will significantly influence negotiations in the WTO framework,³¹⁷ it is not practicable for WTO negotiators to simply impose the MAI on all WTO member countries.³¹⁸ Developed countries are negotiating the MAI,³¹⁹ and the MAI, consequently, accommodates developed country concerns. The MAI provisions represent the interests and desired liberalization levels of developed countries.

Developing countries are not economically or politically prepared for the rapid liberalization and almost complete relinquishment of sovereign control over FDI required by the MAI. Negotiators will need to accommodate these developing

ment on direct investment in the WTO would provide "one-stop shopping" benefits). The horizontal development of WTO rules in goods, services, and investment will increase transparency and reduce transaction costs. *See id.*

314. *See supra* notes 44-53 and accompanying text (discussing developing country concerns over the unequal distribution of benefits from an MNE investment). *But see* Zampetti & Sauvé, *supra* note 307, at 333-34 (asserting that developing countries have an equal stake in the establishment of multilateral investment rules to promote efficiency and that such an exercise is a logical development given the increasing integration of the world economy).

315. *See supra* notes 293-298 and accompanying text (describing the demand/concession trade-offs in WTO negotiations).

316. *See supra* Part IV.C (analyzing the benefits of the MAI agreement).

317. *See The Move Toward Global Rules on Investment: An Interview with Alan P. Larson, Assistant Secretary of State for Economic and Business Affairs, supra* note 304, at 6 (suggesting that the "OECD exercise" provides a model for future WTO negotiations); Daniel M. Price, *supra* note 304, at 15 ("The essential next step is to broaden MAI membership through accession and eventually to incorporate its rules into an agreement within the framework of the WTO."); *cf.* 1996 MAI Progress Report, *supra* note 224, at 4 (noting that the WTO is a permanent observer in the MAI Negotiating Group).

318. Even the OECD admits that it is not practicable for the MAI to be imposed on members of the WTO. *See Ley, supra* note 211, at 30 ("The MAI would no doubt be an important reference for WTO negotiations. . . . But any WTO agreement would have to be designed for the WTO membership and in the framework of WTO disciplines and institutional arrangements."); *cf.* Graham, *supra* note 20, at 215 & n.17 (arguing that because the MAI was negotiated by developed countries in the OECD framework, WTO countries will distrust the MAI because they did not participate in its negotiation).

319. *See supra* note 205 (listing the 29 OECD member countries).

country concerns in any WTO agreement.³²⁰ Consequently, the MAI should only be used as a reference agreement. It is not a practical model for a multilateral agreement in the WTO.³²¹

One option, however, that would allow the MAI's provisions of "high standards" to remain intact in the WTO framework is for the MAI signatories to reconstitute the MAI in the WTO as a plurilateral agreement³²² and, subsequently, seek to gain the participation of a number of non-OECD members.³²³ This approach would maintain the MAI's "high standards" of investment liberalization and investment protection. The resulting plurilateral agreement, however, would not include the majority of countries, and its ultimate value to the international system would be minimal because of the limited number of participants.³²⁴ Negotiators could seek the progressive addition of countries to the plurilateral agreement and, therefore, pursue a gradual process of multilateral liberalization. Developed countries, however, seek a more immediately inclusive and a more rapidly negotiated agreement.³²⁵ A progressively enlarged WTO plurilateral agreement would not meet these developed country objectives. The ultimate role of the MAI in WTO negotiations, therefore, should only be one of useful reference for multilateral negotiations.

3. Incorporating Rules on Restrictive MNE Practices

To achieve a meaningful multilateral investment agreement and to secure the active participation of developing countries, WTO negotiators should take a balanced approach, seeking to understand the positions of both developed and developing countries on the issue of direct investment. As part of this balanced ap-

320. Cf. Salacuse, *supra* note 27, at 989 ("In general, Western governments have not shown great understanding of the reasons for [investment measures] and barriers, nor have they sought to accommodate the legitimate concerns of the Third World.").

321. Cf. Brittan, *supra* note 286, at 9-10 (suggesting a two-track approach to the negotiation of investment rules: the OECD MAI and separately in the WTO).

322. A WTO plurilateral agreement is an agreement covered under the WTO system and subject to WTO rules, including dispute settlement, but without the participation of all WTO members. See Robertson, *supra* note 208, at 81 (suggesting that the MAI and the Uruguay Round TRIMs Agreement can be reconciled by making the MAI a WTO plurilateral agreement); see Graham, *supra* note 20, at 209 (asserting that OECD countries did not have to negotiate a stand-alone agreement to achieve their goal of "high standards"). The MAI could have been negotiated as a plurilateral WTO agreement. See *id.* Graham suggests that if at least one non-OECD country had joined such a plurilateral WTO agreement it would have been an improvement over the OECD MAI. See *id.* at 209, 216-17.

323. Cf. Zampetti & Sauvé, *supra* note 307, at 340 (believing that "novel rule-making initiatives at the plurilateral level"—specifically reconstituting the MAI in the WTO—should not be avoided because of a lack of multilateral participation).

324. Cf. *id.* (asserting that there is an "economy of scale in rulemaking" which is achieved when an agreement includes the greatest number of countries possible).

325. See *supra* notes 285-290 and accompanying text (offering statements from developed country trade ministers who seek comprehensive investment rules as soon as possible).

proach, negotiations should include the extension of WTO rules to cover the practices of MNEs. Developing countries cite restrictive MNE practices as the primary reason for the imposition of investment measures.³²⁶ Developing countries argue that MNE practices result in a lopsided allocation of FDI benefits and hamper development objectives.³²⁷ Any WTO agreement that removes important development policy tools—investment measures—without remedying the underlying problem for which the tools are employed—restrictive MNE practices—will not obtain the support of developing countries. Thus, bringing MNE practices under the jurisdiction of the WTO system is a necessary and natural evolution for the WTO system if it hopes to significantly advance the liberalization of direct investment.

An extension of the WTO's rules to cover MNEs would be a noteworthy development in the evolution of the WTO system.³²⁸ The GATT/WTO system regulates only products, not actors.³²⁹ Its obligations apply only to governments, not firms. The GATT, however, never dealt with investment issues;³³⁰ it only covered trade issues. The extension of the WTO system in the Uruguay Round to cover investment issues³³¹ was, itself, a radical development because the economic effects of and political sensitivities to foreign direct investment in host countries are far greater than the effects of trade.³³² If developed countries earnestly desire comprehensive investment rules in the WTO, then they must be prepared to discuss the chief impediment to an agreement on such rules—uncontrolled MNE practices.

In negotiating rules covering MNE practices negotiators should adhere to the mandate of the Singapore Declaration and cooperate with the United Nations Con-

326. See *supra* notes 44-85 and accompanying text (discussing the potential costs of FDI to developing countries and the use of investment measures to control these costs).

327. See *supra* notes 56-62 and accompanying text (discussing the policy role of developing country investment measures).

328. GATT actually did consider the issue of MNE practices shortly after its inception. See Resolution of Nov. 5, 1958, GATT B.I.S.D. (7th Supp.) at 29 (1959) (recognizing that the "activities of [MNEs] may hamper the expansion of world trade and economic development in individual countries and thereby frustrate the benefits of tariff reductions and the removal of quantitative restrictions or otherwise interfere with the objectives of the General Agreement."). The Group of Experts set up to examine the practices of MNEs, however, concluded that an agreement regulating MNE practices was unacceptable at that time. See *Restrictive Business Practices: Arrangements for Consultations*, June 2, 1960, GATT B.I.S.D. (9th Supp.) at 170-71 (1961). The GATT Contracting Parties settled for an arrangement that allowed individual government-to-government consultations regarding harmful MNE practices. See *GENERAL AGREEMENT ON TARIFFS & TRADE, THE ACTIVITIES OF GATT 1960/61 29-30* (1961).

329. See Christy, *supra* note 50, at 743.

330. See discussion *supra* Part II (tracing the evolution of GATT coverage of direct investment issues, including the addition of investment rules in the GATS and TRIMs Agreements of the WTO).

331. See *supra* Part II.B.2 (analyzing the TRIMs Agreement).

332. See *supra* Part I.B (examining the benefits and costs of FDI to developing economies).

ference on Trade and Development ("UNCTAD").³³³ UNCTAD's work includes instruments that essentially encapsulate the positions of developing countries on the regulation of MNEs.³³⁴ Negotiators should also look to the OECD instrument covering the practices of MNEs³³⁵ as a set of guidelines reflecting developed country positions on the issue. Only through a genuine understanding of both developed and developing country positions on the regulation of MNE practices can negotiations in the WTO achieve meaningful rules in this area. Coverage of MNE practices is a prerequisite, or at least a co-requisite, to any comprehensive WTO investment agreement.

4. Extent of Liberalization

Any agreement in the WTO will not match the comprehensiveness or liberalization levels of the MAI. It is simply an unattainable goal for the time being, given the greater number of countries and views in the WTO and, in particular, the concerns of developing countries to FDI liberalization.³³⁶ When negotiations on direct investment begin at the WTO, negotiators will have to determine how far the agreement should advance the modest liberalization of the GATS and TRIMs Agreements.³³⁷ Whether rules covering MNE practices are included in the negotiations will determine the ultimate extent of possible liberalization. If MNE practices are covered, then developing countries will be more inclined to negotiate greater liberalization obligations and greater investment protection provisions. If MNE practices are not covered, then the level of liberalization, at least initially, will be minimal.

The objective of WTO negotiations should initially be to produce "good standards." The objective should be to negotiate an agreement that advances the WTO coverage of investment, yet with a minimum of exceptions and country-specific reservations. The "high standards" of the MAI³³⁸ should be a longer-term goal.

333. See *Singapore Declaration*, *supra* note 2, para. 20 (espousing a desire to cooperate with UNCTAD in the framework of the working group on investment).

334. See THE SET OF MULTILATERALLY AGREED EQUITABLE PRINCIPLES AND THE RULES FOR THE CONTROL OF RESTRICTIVE BUSINESS PRACTICES, U.N. Doc. TD/RBP/CONF/10, U.N. Sales No. E.81.II.D.5 (1981), *reprinted in* 19 I.L.M. 813 (1980); U.N. CTR. ON TRANSNATIONAL CORP., THE UNITED NATIONS CODE OF CONDUCT ON TRANSNATIONAL CORPORATIONS, U.N. Sales No. E.86.II.A.15 (1986). The Code of Conduct has not been adopted by the U.N. General Assembly, and efforts to obtain its adoption were largely abandoned in 1992. Julius, *supra* note 196, at 278.

335. See ORG. FOR ECON. COOPERATION AND DEV., THE OECD GUIDELINES FOR MULTINATIONAL ENTERPRISES (1994).

336. See *supra* notes 44-85 and accompanying text (discussing the potential costs of FDI to developing countries and the use of investment measures to control these costs).

337. See Part II.B.1-2 (examining the GATS and TRIMs Agreements, their benefits, and their limitations).

338. See *supra* note 211 and discussion Part III.B (explaining what is meant by the OECD's stated goal of "high standards" and summarizing the likely provisions of the MAI).

The WTO, therefore, should take a gradual approach to the liberalization of direct investment.³³⁹ Hurried negotiations or negotiations that do not adequately reflect the concerns of developing countries risk producing an agreement that is riddled with exceptions and reservations and, therefore, of little real value to the international economic system.

WTO negotiators should begin by confining investment negotiations around an enterprise-based definition of investment,³⁴⁰ covering MNE subsidiaries and other tangible investments in a host country. Future investment negotiations can broaden the definition of investment so as to extend the liberalization commitments applied to tangible investments to less tangible forms of investment such as intellectual property assets.

As part of the mandated five-year TRIMs evaluation, negotiators should include export performance requirements in the list of prohibited *trade-distorting measures*. An export performance requirement is a trade-distorting measure that should have been included in the original TRIMs prohibitions.³⁴¹ The initial focus of investment negotiations should then be on incrementally extending WTO coverage to the more encompassing set of *investment-distorting investment measures*. The agreement should initially employ a positive list approach,³⁴² prohibiting only those measures specifically listed in the agreement. In the future, after successive agreements to eliminate the bulk of investment measures, negotiators can draft a new agreement subjecting all investment measures to the principles of national treatment and most-favored nation treatment under a negative list approach. Developing countries, however, are not prepared to relinquish complete control over investment policy in the initial investment negotiations.

Finally, to prevent redundancy and to promote the manageability of WTO rules, the FDI provisions of both the GATS and TRIMs Agreements³⁴³ should be lifted from the two Agreements and incorporated into the new investment agreement.

339. Cf. Julius, *supra* note 196, at 274 (stating that "[t]he necessarily voluntary nature of any regime that is compatible with national sovereignty means that universality can only be approached incrementally. Coverage will expand only as countries perceive the net benefits of participation."); cf. also Goldberg & Kindleberger, *supra* note 34, at 322 (writing in 1970 the authors argue that a giant step to create a comprehensive investment agreement is unwise). The authors suggest an agreement on fundamental principles which would progressively grow deeper. See *id.* It is important to note that part of the reason for the failure of the International Trade Organization was that it sought an *immediate* agreement on *advanced levels* of liberalization. See *id.*

340. But cf. *supra* notes 216-219 and accompanying text (discussing how the MAI will employ the more encompassing asset-based definition of investment).

341. See Low & Subramanian, *supra* note 62, at 421 (explaining that export subsidies, which are closely related to export performance requirements, are already prohibited by GATT rules).

342. Cf. Francq, *supra* note 218, at 15 (asserting that the MAI will employ a negative list approach).

343. See *supra* Parts II.B.1-2 (analyzing the FDI provisions in the GATS and TRIMs Agreements).

GATS will remain as a trade in services agreement and the TRIMs Agreement can be discarded. The WTO can then focus on progressively adding further liberalization commitments to the investment agreement and broadening the scope of its coverage with the goal of some day achieving the comprehensiveness and level of liberalization of the MAI.

CONCLUSION

Although an initial agreement on direct investment in the WTO will not measure up to the comprehensiveness and level of liberalization of the MAI, the general prospects for an agreement on direct investment in the WTO are favorable, at least for an agreement that advances the modest liberalization of the GATS and TRIMs Agreements. Developing country attitudes toward FDI have changed since the end of the Uruguay Round and many now actively pursue direct investment. Developing countries, however, still have concerns over restrictive MNE practices and diminished control over national development.

Developed country negotiators should make a sincere effort to understand and incorporate the concerns of developing countries into WTO investment discussions rather than rushing to secure an investment agreement or simply trying to impose their MAI "high standards" on developing countries. Hasty and one-sided negotiations produce agreements riddled with exceptions and reservations and, therefore, of little real value to the international economic system. The development of WTO investment rules should be gradual and should include the incorporation of rules covering MNE practices. Only through developed-developing country cooperation and a reciprocal understanding of concerns will WTO negotiations for an agreement on direct investment yield the quality instrument that all parties desire.