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NEGOTIATING INVESTMENT IN THE GATT: A CALL FOR FUNCTIONALISM

Paul Bryan Christy III*

I. INTRODUCTION

In 1986, the Contracting Parties to the General Agreement on Tariffs and Trade (GATT) announced the launch of the eighth round of multilateral trade negotiations — the Uruguay Round. This round was destined from its inception to test the stitching of the patchwork of agreements forming the GATT. In addition to agriculture, subsidies, and other long-time banes to multilateral trade negotiations, several new subjects, including services, intellectual property, and investment, would be discussed. For an agreement and an institution never intended to become a central trade organization, there would seem to be little remaining outside its ambit.

The GATT is a backwater. It began as a series of agreements for the negotiation of tariff reductions and has developed into the only generally accepted forum for the discussion of international economic relations. Originally drafted as a trade agreement, the GATT regulates trade in products. In this respect, the GATT is concerned not with the actors in international trade, enterprises and nationals, but with their output. This output-orientation has shaped much of the development of post-war trade relations. Contracting Parties to the GATT are now at a significant crossroads. New subjects have been raised under its auspices and the pressure to entertain non-traditional, non-output oriented discussions is growing. For some, this pressure is irrelevant — the GATT is an agreement for the negotiation of reductions in barriers to trade in products. For these literalists, it is clear that the GATT, as an agreement and as an institution, lacks the competence to expand its jurisdiction.


The author wishes to express his deepest appreciation to Charles P. Heeter, Jr., Professor John H. Jackson, and Daniel Price, each of whom offered valued advice and each of whom continues to be an inspiration. The author, of course, assumes responsibility for the opinions expressed and for any errors.

Functionalists, on the other hand, view economic liberalization as the *raison d'être* of the GATT; for them, changes in global economic patterns require an evolution in the document which has, by both time and default, become the best practical vehicle for minimizing economic conflicts. The tension between literalism and functionalism — the GATT as an end and the GATT as a means — has shaped the discussion of investment in the Uruguay Round.

In part, this article is about the conflict between literalism and functionalism in the GATT.² It examines an attempt in the Uruguay Round to negotiate rules on foreign direct investment — the so-called trade-related investment measures (TRIMs) negotiations. Foreign direct investment is often a stage in the internationalization of enterprises; it is helpful to the trade of goods producers and necessary to the trade of many services providers. Affected by the output-oriented history of the GATT, however, the Contracting Parties have treated investment as though it were simply one of three legs of an economic triangle: goods, services, investment. In the Uruguay Round, this approach has yielded a hybrid: the TRIMs talks.

Part II of this article provides a background for examining international investment law. This part defines investment, identifies the five national controls on investment, and assesses the current need for multilateral investment rules. Part III examines the current state of international regulation of national investment controls by analyzing the principal bilateral and multilateral agreements on investment: the treaties of friendship, commerce, and navigation (FCNs), bilateral investment treaties (BITs), and the multilateral OECD framework for the discipline of investment controls. Part IV reviews the history of investment and TRIMs discussions in the GATT, describes the nature and incidence of TRIMs, and presents the current TRIMs debate.

In Part V, the major proposals for a TRIMs agreement are ex-

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² One author has described the conflicting interpretations of the purpose of the GATT as a disagreement between “fundamentalists” who believe the GATT “is based on a strictly legal assessment of the scope of the treaty” and a “reformist” group, whose opinion is shaped by an interpretation of the general purpose and intentions of the treaty. [Reformists] do not regard the treaty as having specified any explicit limits as to the areas and aspects of international economic exchange that it applies to [and consider] appropriate and desirable the inclusion of any new measure that is found to obstruct trade. Hence, the fundamentalists rely on a definition of measures, whereas the reformists rely on a definition of effects.

P. NICOLAIDES, LIBERALIZING TRADE IN SERVICES 94-95 (1989).

This article categorizes the conflict as one between “literalists” and “functionalists” rather than “fundamentalists” and “reformists” to emphasize the approaches to legal interpretation taken by these groups. Literalists adhere to the black letter of the GATT; functionalists view the GATT in light of its purpose: to liberalize economic relations. “Functionalist” is preferred to “reformist” to emphasize that the difference between the two schools is in attitudes toward the nature and scope of permissible GATT reforms.
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examined in light of GATT practice. This Part attempts to discover the implications of these proposals for functionalism and the compatibility of a completed TRIMs agreement with existing international trade and investment law. Part VI concludes that the very structure of the TRIMs talks indicates that GATT literalism remains a powerful constraint on the evolution of the General Agreement and that, while a TRIMs agreement may have intrinsic value, the discussion of investment rules would be better left to another day.

Two very important scope limitations of this article must be stated. The first is investment in services. Because of the triangular approach to economic barriers taken in the Uruguay Round, investment issues for services will not be covered by a TRIMs agreement. Instead, investment in services is being treated in the Uruguay Round as part of an effort to create a General Agreement on Trade in Services (GATS). It is beyond the scope of this article to assess how the inclusion of investment in a services agreement will affect a TRIMs agreement or the concept of investment in the GATT. However, discussion about investment under an agreement on trade in goods is likely to be relevant to an agreement on services.³ The second limitation relates to

³ For this author, "investment in services" is a partially redundant phrase. In many cases, service trade is less "trade" than it is direct foreign investment or labor migration or both. See Bagwhati, Economic Perspectives on Trade in Professional Services, 1986 U. CHI. LEGAL F. 45, 48. See Organisation for Economic Co-operation and Development, Introduction to the OECD Codes of Liberalisation 22 (1987) [hereinafter Introduction to the OECD Codes] ("From the viewpoint of liberalising international trade in services, the freedom for international direct investment and establishment occupies a place of special importance.... For such key sectors as banking, financial services and insurance an established presence is essential. ... "). Two studies have found that investment can be more important than trade to international business in the service sector. Sauvant & Zimny, FDI and TNCs in Services, 20 CTC REP., Autumn 1985, at 24; Basche, Eliminating Barriers to International Trade and Investment in Services, 200 CONF. BOARD RES. BULL. 4-5. See infra note 261 and accompanying text for further discussion of the relationship between investment and services in current negotiations. As a result, national controls on foreign investment may be the most significant barriers to international service providers. See, e.g., Noyelle & Dutka, The Economics of the World Market for Business Services: Implications for Negotiations on Trade in Services, 1986 U. CHI. LEGAL F. 57, 77 (listing restrictions on local ownership, international payments, the mobility of professional personnel, technology and information transfers, and the business scope of firms as five of the seven types of restrictions faced by surveyed multinational service firms. Each of these can be classed as a national control on investment). See infra notes 11-17 and accompanying text; Rossi, Government Impediments and Professional Constraints on the Operations of International Accounting Organizations, 1986 U. CHI. LEGAL F. 135, 153 (finding financial restrictions on international payments the most important impediment to international accounting organizations). That the same provisions protecting investors in international investment agreements, discussed infra part III, also generally govern the provision of services indicates a strong link between the two in terms of regulation as well. Accordingly, those seeking to liberalize services might do well to focus on the regulation of national investment controls generally rather than attempt a framework for services modeled after an agreement on tariffs. Political opposition to such an open treatment of investment might conversely lead to a conclusion to treat investment entirely under the guise of services, but negotiators should be aware that is what they are doing. Cf. U.S. National Study on Trade in Services, A Submission by the United States Government to the General Agreement on Tariffs and Trade 37-39 (1984) (empha-
proposals to control the behavior of multinational enterprises (MNEs) and to regulate their restrictive business practices (RBPs). The discriminatory behavior of MNEs is often seen, particularly by developing countries, as a primary reason for nations to guard their powers to control investment. Treatment of RBPs may be necessary in order to obtain a broad consensus on any multilateral investment agreement. However, RBPs relate to discriminatory actions by private enterprise and so will also reluctantly be placed outside the scope of this article.

II. BACKGROUND

Investment has long been a forbidden subject in the context of the GATT. While countries have been able to stomach the relatively small loss in sovereignty that comes with multilateral trade discipline, they have been extremely hesitant to do so in the area of investment. Indeed, few subjects agitate the North-South division between the haves and the have-nots more than the issue of limiting the rights of countries to control foreign investment within their territories. This Part begins by defining investment. It then identifies the five types of controls that nations apply to investors in their territories and concludes with an assessment of the need for investment rules.

A. Definition of Investment

Treaties have given several different definitions to investment. The International Monetary Fund defines foreign direct investment, the subject of this article, as an "investment that is made to acquire a lasting interest in an enterprise operating in an economy other than that of the investor, the investor's purpose being to have an effective voice in the management of the enterprise."4 The Canada-United States Free Trade Agreement5 defines investment to mean the establishment of a new business or the acquisition of an existing business. Investment specifically includes this business "as carried on" and controlled by the investor, as well as the investor's original investment interest in the business enterprise.6 The International Centre for Settlement of

6. Id.
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Investment Disputes (ICSID), the principal forum for arbitrating international investment disputes, does not define investment at all in its charter.\textsuperscript{7} Perhaps the most comprehensive definition is attempted by the U.S. bilateral investment treaties (BIT). The Model BIT defines investment as "every kind of investment" and provides a long, but expressly non-exhaustive, list of examples of covered investment as well as a list of covered "activities associated with investment."\textsuperscript{8}

For purposes of this article, investment refers to foreign direct investment — the situation where a national or business entity (such as a corporation or partnership) of one country owns or controls assets or property rights in another country. "Actual control" is difficult to measure. The Department of Commerce has established a threshold of ten percent ownership for classifying investment as foreign direct investment.\textsuperscript{9} As a matter of practice, control can be had at ownership levels below this percentage and can be inconsequential at greater levels. Foreign direct investment is to be distinguished from portfolio investment in which the investor simply establishes some claim on an asset for the purpose of realizing a return.\textsuperscript{10}

B. National Controls on Investment

Countries exercise control on investment in five principal ways: prohibitions or restrictions on the making of an investment (establishment restrictions), limitations or requirements on the operation of an enterprise (operating requirements), restrictions on the right of entry by those connected with the investment (personnel entry restrictions), and limitations or requirements on the financial relationship between an investor and the investment (financial restrictions).\textsuperscript{11} The fifth con-


\textsuperscript{10} Id. at 2. The Department of Commerce defines direct investment abroad as "the ownership or control, directly or indirectly, by one U.S. person of 10 percent or more [the U.S. domestic benchmark for control interests] of the voting securities of an incorporated foreign business enterprise or an equivalent interest in an unincorporated foreign business enterprise." Portfolio investment is any investment that does not fit within that definition.

\textsuperscript{11} These five categories will provide a framework for ordering the array of investment impediments and for comparing the competence of existing and proposed investment agreements. See J. JACKSON & W. DAVEY, INTERNATIONAL ECONOMIC RELATIONS 1021 (1986). The au-
trol, expropriation, is an established sovereign right and poses questions in a trade or investment agreement context principally with respect to the amount of compensation for a taking.12 This article focuses on the first four controls.

Investment barriers are pervasive. The United States cites eighteen countries for their barriers to investment in its 1990 report on foreign trade barriers.13 Establishment restrictions are common. These may take the form of an absolute prohibition of any foreign investment, prohibition of investment in certain sectors, or limits or requirements on the amount or percentage of foreign ownership.14

Limitations or requirements on the operation of enterprises include a vast array of devices by governments intended to direct the conduct of an enterprise in accordance with the economic, health, safety, or political objectives of the host country. These measures include requirements to employ host country nationals, to import or export in specified amounts or to certain destinations, to manufacture goods, and to transfer technology to the host country. These comprise the majority of the measures considered TRIMs.15

Personnel entry restrictions differ from employment requirements by limiting the ability of an investor to bring in the management personnel or professional service people (e.g., accountants, architects, and lawyers) necessary for the planning and conduct of the investment.16

Financial restrictions generally take the form of restrictions or requirements on the ability of the investor to remit profits or earnings (remittance restrictions) or to access foreign exchange (exchange restrictions). They may also be imposed in connection with an expropriation by compensating the home country investor in host country currency or at an unfavorable rate of exchange. Financial restrictions may be imposed to improve a country’s balance of payments position

12. See generally I. BROWNIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 531-45 (3d ed. 1979) (on expropriation); Model BIT, supra note 8, art. III (requiring that expropriation be made only for a public purpose, in a non-discriminatory manner, upon prompt compensation, and in accordance with due process of law).

13. OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE, 1990 NATIONAL TRADE ESTIMATE REPORT ON FOREIGN TRADE BARRIERS 216 (1990) (The list includes both developed and developing countries: Australia, Brazil, Canada, Peoples Republic of China, Colombia, France, Greece, India, Indonesia, Japan, Korea, Malaysia, Mexico, New Zealand, Pakistan, Philippines, Taiwan, Thailand).


15. See infra part IV(B)(2). See generally J. JACKSON & W. DAVEY, supra note 11, at 1021.

16. See, e.g., Rossi, supra note 3, at 154; Noyelle & Dutka, supra note 3, at 80-81.
or to influence the import or export behavior of investors.\(^\text{17}\)

C. The Need for International Investment Rules

In international economic law, rules provide guidance. While agreements may provide recourse for their breach, the practical value of rules is an articulation of objective standards against which governments may judge themselves and may expect to be judged by their treaty partners and by the global community. As neutral guidelines, rules help to minimize power politics, and as articulated obligations, rules operate to restrict caprice. Both of these factors enhance global stability.

As will be seen, international investment rules have historically been established in bilateral agreements. However, those who would continue this past ignore that history can no longer comfortably predict the nationality of today's investor; the size, direction, or nature of her investment; or significantly, the identities of those countries who would use protectionist rules to restrict her investment. The nationality, growth, and direction of investment have changed and, as so often occurs in economic redistribution, so has the politics.

Several economic phenomena make investment rules a more salient topic for trade negotiators today than it was some forty years ago. First, as phrased by Professor Jackson, "[t]he receding waters of tariff and other overt protection inevitably uncovers the rocks and shoals of a variety of other barriers."\(^\text{18}\) To some degree then, the GATT and its Contracting Parties are victims of their past successes.

Perhaps as a result of trade liberalization, the growth of multinational enterprises has cast abroad the net of developed country interests to a degree never before experienced. Total worldwide outflows of investment tripled between 1984 and 1987.\(^\text{19}\) From 1975 to 1985, the value of outward investment by the United States rose from $124 billion to $251 billion\(^\text{20}\) and is today in excess of $370 billion.\(^\text{21}\) The total


\(^{19}\) FDI Flows in the Mid-1980s, 27 CTC Rep., Spring 1989, at 16-17 (note that significant measurement problems exist for investment and so all figures in this section should be considered approximate. The measurement difficulties are explained in the source).


outward investment of Canada, West Germany, Japan, the Netherlands, the United Kingdom, and the United States more than doubled from $225 billion to $580 billion over the ten year period ending in 1985.22

The United States continues to be the world's largest home country, and the share of outflows of both Germany and Japan has increased in recent years.23 The U.S. share of outward global investment has declined steadily since the 1960s and peaked as a percentage of U.S. gross domestic product (GDP) in the late 1970s.24 In contrast, Germany and Japan have rapidly increased their percentages of world investment, and the ratio of outward investment to GDP for Japan, Canada, and nearly all the West European countries has increased sharply.25

Not only does the United States have a high level of exposure to national investment controls, but it also possesses the greatest power to affect investment by other nations. Today, the United States is the world's largest host country.26 In 1985, total investment in the United States was more than six times the level of 1975, rising from $28 billion to $185 billion. Japan's relatively small level of inward investment quadrupled to $6 billion, and investment in Western Europe nearly doubled reaching $184 billion.27

Not only are developed countries increasing their investments among themselves, but also they are decreasing their investments into developing countries. Developing countries' percentage of global inward investment has declined since the mid-1970s.28 Total inflows dropped to $9.5 billion in 1984 from an annual average of $14 billion in the 1975-79 period.29 High external debt, general political and economic instability, as well as a rise in technology intensive investment in developed countries account for part of the relative decline.30 Much of today's investment in developing countries is related either to investment in offshore financial centers or to investment in flags of

23. FDI Flows in the Mid-1980s, supra note 19, at 16.
25. Id.
26. FDI Flows in the Mid-1980s, supra note 19, at 18.
27. Process of Transnationalization, supra note 20, at 8.
convenience.\textsuperscript{31}

Services are a major contributor to increased flows in investment. Investment and trade in services have supplanted manufacturing and trade in goods as the engine for economic growth in developed countries. In 1987, private sector service industries accounted for two-thirds of U.S. GNP while manufacturing contributed only about one-fifth.\textsuperscript{32} Investment by service industries varies between twenty-five and fifty percent of the total stock of investment in most host countries, and it has been estimated that about forty percent of the total world stock, and fifty percent of the annual new flow, of investment is in services.\textsuperscript{33} It is also relevant to the growing importance of investment to trade to note that “maybe half” of the stock of existing investment in services is owned by industrial (goods producing) parent enterprises.\textsuperscript{34} Thus, investment not only is an activity common to goods producers and services providers but also one that links the two.

The new rise of investment into developed countries has not been received with universal favor. One scholar has noted a “role-reversal” in attitude toward foreign investment with developing countries manifesting increased interest in investment by reducing restrictions and major capital exporting countries worrying that investment in their territories will impair their sovereignty, national welfare, or security.\textsuperscript{35} Investment into the United States, by Japanese enterprises in particular, has become a political issue giving rise to cries for heightened scrutiny on national security grounds of foreign acquisitions of United States corporations and for increased reporting requirements for the affiliates of foreign enterprises.\textsuperscript{36} The European Communities have

\begin{footnotes}{
\footnote{31}{\textsc{Organisation for Economic Cooperation and Development, International Direct Investment and the New Economic Environment} 39, 40 (1989).}
\footnote{32}{\textsc{Int'l Trade Admin., U.S. Dep't. of Commerce, United States Trade Performance in 1987}, at 47 (1988).}
\footnote{34}{There is reason to believe that maybe half of the stock of existing FDI in services reflects the establishment of service affiliates by firms whose primary activity is industrial (i.e., goods related) in nature. In large part these investments appear to be directed towards financial and distribution-related activities and are intended to support parent-firm production and sales. Thus, much of the investment in finance and distribution is not independent. \textit{Id.} at 24.}
\footnote{35}{Rubin, \textit{Corporations, Conduct and Codes: Investment and Trade in the Uruguay Round}, 29 CTC REP., Spring 1990, at 20.}
\footnote{36}{See, e.g., \textit{Omnibus Trade and Competitiveness Act of 1988}, Pub. L. No. 100-418, § 5021, 102 Stat. 1107, 1425-26 (codified at 50 U.S.C. app. § 2170 (1988)). This is the Exon-Florio Amendment which authorizes the President to suspend or prohibit any merger, acquisition, or takeover by foreign persons when such an action is determined to threaten to impair national security. For a criticism of the political nature of the Exon-Florio Amendment, see Note, \textit{Proposals for Limiting Foreign Investment Risk Under the Exon-Florio Amendment}, 42 HASTINGS}
}
similarly bristled against Japanese and Southeast Asian investment in low value-added, so-called "screwdriver" operations, which are considered attempts to circumvent EC antidumping rules.37 Japanese companies have responded to actual or threatened trade and investment protectionism by replacing exports with direct investment abroad.38 The politics of investment is growing.

For example, the United States has begun to use its unilateral trade weapon, section 301 of the Trade Act of 1974,39 to achieve its goals in the investment area. Section 301 authorizes the President to retaliate with trade measures against certain unfair trade practices by foreign governments.40 In 1985, the United States initiated an investigation of Brazil with a view toward section 301 actions.41 In 1989, the U.S. government cited India under the so-called Super 301 provisions of the 1988 Trade Act42 for its forty percent limitation on foreign equity ownership and for requiring both export performance and local content commitments of investors.43 Further, section 307 of the Trade and Tariff Act of 1984 authorizes the United States Trade Representa-

L.J. 1175 (1991). See also H.R. 5410, 100th Cong., 2d Sess., 134 CONG. REC. 9605-07 (1988). This, the proposed Bryant Amendment to the 1988 Trade Act, would have required registration and greater reporting by foreign-owned companies in the United States. But see E. GRAHAM & P. KRUGMAN, FOREIGN DIRECT INVESTMENT IN THE UNITED STATES 115 (1989):

The most important point about the Bryant amendment and similar bills is that, although mild in their current form, they would mark a broad departure of US policy from neutrality regarding nationality of ownership. They would impose on all foreign-owned firms a set of reporting requirements purely because they are foreign.

Examples of fodder for those who would discriminate against investment by foreign entities include the Sony acquisition of Columbia Pictures, the Matsushita acquisition of MCA, and Fujitsu's attempted acquisition of Fairchild Semiconductor. Japan has made its U.S. investments in part as a means to circumvent the political tensions arising from the U.S. trade deficit. A shift in focus by the United States should make Japan particularly interested in establishing multilateral investment rules.


38. ORGANISATION FOR ECONOMIC COOPERATION AND DEVELOPMENT, supra note 31, at 22.


40. Id.


43. India's Import Policies are 'Out of Step' with Other Third World Nations, Hills Says, 7 INT'L TRADE REP. (BNA) 508 (1990); U.S. Will Not Retaliate Against India Under Super 301, USTR Hills Announces, 7 INT'L TRADE REP. (BNA) 893 (1990) (U.S. Trade Representative Hills chose not to retaliate under the law because the GATT Contracting Parties were simultaneously negotiating investment rules in the Uruguay Round. The USTR reserved the right to retaliate if the GATT talks are unsuccessful).
tive to impose import restrictions on the products or services of countries maintaining export performance requirements.\textsuperscript{44} Such unilateral measures operate outside of the GATT dispute settlement process and impeach the spirit of multilateralism.

In this environment in which traditional home countries are major host countries, it becomes important to develop a rules-oriented framework for the regulation of investment not only to protect developed countries from the discriminatory practices most often attributed to developing countries, but also to protect developed countries from themselves. Without adequate rules, countries are apt to pursue more politically expedient, power-oriented approaches to investment control. A major contribution of the GATT has been its emphasis on a rules-oriented approach to trade and economic relations; in so doing, the GATT has done much to avoid the economic conflicts which are at the root of so many political frictions.\textsuperscript{45}

III. INTERNATIONAL INVESTMENT AGREEMENTS

There is no international structure for regulating investment or the controls nations apply to investment.\textsuperscript{46} While no overarching disciplines exist, significant efforts have been made bilaterally by many nations and multilaterally by the Organisation for Economic Cooperation and Development (OECD). This part explores existing agreements for the regulation of national investment controls. In addition to the terms of the obligations, the reader should note the object of the protections afforded. Unlike the GATT, each of the agreements analyzed in this part protects actors in international commerce: persons and enterprises. The GATT, in contrast, focuses on the treatment of output: products. There is some question as to whether

\begin{itemize}
\item \textsuperscript{46} E.g., Barcelona Traction, Light and Power Company, Limited (Belg. v. Spain), 1970 I.C.J. 3, 47 (Judgment of Feb. 5). In discussing the status of law on foreign investments, the International Court of Justice commented that "no generally accepted rules in the matter have crystalized on the international plane." The Court did note, however, that "a more thorough examination of the facts" would reveal that "the law on the subject has been formed" at least concerning "essentially bilateral relations." This is still the case today. Sornarajah, \textit{State Responsibility and Bilateral Investment Treaties}, 20 J. WORLD TRADE L. 79, 80-83 ("It would be futile to argue that any rules have crystallized in this area in the fifteen years since the [Barcelona Traction] judgment." The author noted the existence of bilateral treaties but concluded that they constituted lex specialis which could not be generalized into a new law of investment protection). \textit{See also} McCulloch & Owen, \textit{Linking Negotiations on Trade and Foreign Direct Investment}, in \textit{THE MULTINATIONAL CORPORATION IN THE 1980s} 334, 349 (C. Kindleberger & D. Audretsch eds. 1982) ("[T]here is virtually no international framework governing policies toward foreign investment.").
\end{itemize}
investment can be effectively discussed, let alone liberalized, in an output oriented framework.47

A. Bilateral Investment Agreements

There have long been bilateral agreements covering the concerns of investors. The traditional agreement in this regard is the Treaty of Friendship, Commerce, and Navigation (FCN). More recently, the bilateral investment treaty (BIT) has supplanted the FCN as the preferred instrument for regulating investment controls. Both of these agreements address the five controls on investment and oblige host countries to accord minimum levels of treatment to investors.48

1. Treaties of Friendship, Commerce, and Navigation (FCN)

For the United States, the FCN antedates the Articles of Confederation and has long been a mainstay for declaring and conducting relations with other countries.49 The typical FCN covers the entry, travel, and residence of nationals; basic personal freedoms; property rights; the conduct and control of business enterprises; taxation; exchange restrictions on currency conversion; exchange of goods; navigation; and other issues, including dispute settlement.50

After the creation of the GATT, the need for bilateral trade arrangements declined, and the FCN took on greater responsibility for the regulation of national investment controls.51 In the FCNs negotiated in the interwar period, beginning with the German treaty of 1923,52 only one article out of thirty governed the establishment, conduct, and protection of enterprises. In the post-GATT period, investment provisions accounted for roughly half of the total provisions in the FCN.53 The United States, in particular, placed increasing empha-

47. The same doubts are raised with regard to services and with even greater immediacy given the discussion of a services framework, the so-called General Agreement on Trade and Services (GATS), in the Uruguay Round.

48. The U.S. free trade agreement with Canada also addresses investment, but it will not be examined here.


50. Metzger, supra note 49, at 367.


53. Treaties for the Encouragement and Protection of Foreign Investment, supra note 51, at 234.
sis on investment in post-war FCNs as a means to shore up, by articulat-
ing legal principles, the drifting and uncertain sands of customary
international investment law.54

The FCN provides rights and obligations with respect to each of
the five classes of national investment controls: establishment restric-
tions, operating requirements, personnel entry restrictions, financial
restrictions, and expropriation.55 Article VII of the Standard Draft
FCN56 is the core provision for both investment and services.

Article VII limits a party's use of establishment restrictions and
operating requirements by guaranteeing national treatment (treatment
upon terms no less favorable than that accorded by a country to its
like domestic nationals, products, or entities in like situations) and
most favored nation (MFN) treatment (treatment no less favorable
than that accorded by a country, in like situations, to the like nation-
als, products, or entities of any third country) to the other party's na-
tionals and enterprises. National treatment is accorded with respect to
"engaging in all types of commercial, industrial, financial and other
activity for gain."57 By the terms of this article, a company has the
same right as a domestic enterprise to establish and maintain
branches, agencies, offices, factories, and other facilities appropriate to
the conduct of its business; to organize companies under general com-
pany laws; and to control and manage enterprises that it has ac-
quired.58 Thus, the rights to establish and to conduct business are
granted on terms equal to the better of those afforded national or for-
eign enterprises. These rights exist for an enterprise whether its out-
put is a product or a service — the enterprise need only be constituted
under the laws and regulations of a party.59

National treatment of nationals and enterprises is a broad commit-
ment and, as might be expected, is not without exceptions. The excep-
tions to national treatment generally arise only for the service sectors.
Parties may screen the activities of certain service sector aliens on pub-

54. G. SCHWARTZENBERGER, FOREIGN INVESTMENTS AND INTERNATIONAL LAW 135,
187 (1969). This book provides an in-depth tour of the history and development of international
investment law with particular emphasis on attempts to establish multilateral disciplines. It is
oft-cited for its extensive bibliography on the subject of investment.

55. See Metzger, supra note 49, at 368.

56. A standard draft FCN has been prepared by Charles H. Sullivan in a study for the Depart-
ment of State (unpublished manuscript) [hereinafter Sullivan Study]. This study is a compre-
hensive work on the history and meaning of FCN provisions.

57. Standard Draft FCN, art. VII, in id. at 11.

58. See, e.g., Treaty of Friendship, Commerce and Navigation, Apr. 2, 1953, United States-

lic policy grounds: 60

Each Party reserves the right to limit the extent to which aliens may establish, acquire interest in, or carry on enterprises engaged within its territories in communications, air or water transport, banking involving depository or fiduciary functions, or the exploitation of land or other natural resources. 61

However, even where these exceptions apply, the parties undertake to accord MFN treatment. 62

The exceptions to national treatment are further qualified to prohibit either party from denying to the other's transportation, communications, and banking companies the "right to maintain branches and agencies to perform functions necessary for essentially international operations in which they are permitted to engage." 63 Parties may give differential treatment with respect to "special formalities" that are immaterial to the investment but that differ from the requirements for national enterprises, e.g., registration requirements for foreign investors. 64

As further evidence of the difficulty of achieving commitments not to discriminate in the services sectors, most FCNs negotiated after 1953 include a reservation to national treatment for "professional services" 65 in an attached protocol. This has been done both because of varied U.S. state laws on professions and as a means to form a "basket" category for the most common concerns of FCN partners about including certain service occupations within the national treatment obligation. 66 The FCN does not define "professional services," 67 the class refers generally to occupations with a "public function." 68

60. Id. at 139.
61. Id., art. VII(2), at 12.
63. Id., art. VII(2), at 12. This provision attempts to ensure that, where a business is not prohibited on policy grounds, its international operations will not be inhibited by restrictions on activities associated with the conduct of its operations. Such activities might include selling tickets, booking cargo, promoting sales for transportation companies, maintaining transmission facilities for communications companies, issuing letters of credit and traveler's checks, and servicing loans in the case of banking enterprises. Id. at 151.
64. Id. at 152.
65. This is paragraph 3 of the Protocol to the Standard Draft FCN. Id. at 48. Paragraph 4 of the Protocol conditions MFN treatment for mining activities in the public domain on reciprocal treatment by the other party. Id. at 48-49. This provision accommodates a requirement in the Mineral Lands Leasing Act, 30 U.S.C. § 181. Sullivan Study, supra note 56, at 159.
67. Id. at 158.
68. Id. at 156. The only exceptions to national treatment in the Standard Draft FCN are made in the services sectors, yet national treatment for services is being negotiated in the Uruguay Round. It is ironic, therefore, that national treatment for investment has been considered by some parties to be an untenable encroachment of sovereignty and outside the scope of the GATT and of the Uruguay Round investment talks, the TRIMs negotiations. See infra part IV.
The Standard Draft FCN proscribes personnel entry restrictions by providing for the free migration of persons connected with an investment. Nationals of either party have a right of entry for, among other purposes, carrying on trade and developing and directing the operations of an enterprise in which they have invested or are in the process of investing. Article VIII provides investors with the right to "engage, within the territories of the other Party, accountants and other technical experts, executive personnel, attorneys, agents and other specialists of their choice" in connection with the planning and operation of the foreign enterprises.

For financial restrictions, article XII obliges each party to accord national and MFN treatment with respect to payments, remittances, and transfers of funds or financial instruments between the two territories or between one party and a third country. The article generally defers to the International Monetary Fund (IMF) and is in fact meant to supplement the IMF Articles of Agreement by giving guidance and priority to even those restrictions permitted by the IMF. Exchange restrictions, defined as "all restrictions, regulations, charges, taxes, or other requirements imposed by either Party which burden or interfere with payments, remittances, or transfers of funds or of financial instruments," must not be imposed "in a manner unnecessarily detrimental or arbitrarily discriminatory to the claims, investments, transport, trade, and other interests of nationals and companies of the other Party, nor to the competitive position thereof." This language is intended to prohibit the use of exchange restrictions as a protective device by limiting their use to times of monetary reserve imbalance.

Finally, the FCN builds upon the general principle of international law requiring compensation in the case of expropriation by requiring that such compensation be "just" and in "an effectively realizable form." National and most-favored-nation treatment are guaranteed

70. Id., art. VIII(1), at 14.
71. Id., art. XII(1), at 22.
72. Id., art. XII(2), at 22. The IMF Articles of Agreement are concerned only with restrictions on current transactions and not capital transactions. Second Amendment of Articles of Agreement of the International Monetary Fund, Apr. 30, 1976, art. VIII(2)(a), 29 U.S.T. 2203, 2223, T.I.A.S. No. 8937. The IMF also does not prioritize restrictions once they are in effect. Standard Draft FCN Article XII attempts to improve investor security by supplementing the IMF Articles of Agreement in this discretionary area. Sullivan Study, supra note 56, at 207.
74. Id., art. XII(4), at 23-24.
75. Id. at 219.
76. Id., art. VI(4), at 10.
as minimum standards for expropriation.\textsuperscript{77}

In sum, the FCN offers a paradigm of a proper investment agreement. The focus of the agreement is on treatment accorded to those who would experience the burden of inequitable treatment: nationals and companies. In contrast, under the GATT, investor rights are derivative of the obligations taken by the Contracting Parties to accord certain tariff and non-discriminatory treatment to products. GATT literalists would require a "link" between a government investment measure and trade in a product before that agreement could be invoked. The FCN avoids this tangle.

The reservation provisions for certain services sectors illustrate the difficulty of achieving blanket commitments not to discriminate. It is clear from this history that any investment agreement in the GATT would have to address these concerns, but given the diversity of FCN parties, it would not appear to be an impossible task to obtain some minimal level of multilateral acceptance for an investment agreement.\textsuperscript{78}

The FCN is a versatile document with a long history in the United States, Europe, Asia, and the rest of the world. A rapid rise in international trade, culminating in the GATT, decreased the FCN's trade function; similarly, an increase in international investment has decreased the apparent efficacy of the agreement for investment. Since 1948, the United States has entered twenty-three FCN treaties; the last were signed with Thailand and Togo in 1966.\textsuperscript{79} Recently, the United States has chosen to forgo the FCN in favor of the bilateral investment treaty as its framework for negotiating investment rights and obligations.

2. Bilateral Investment Treaties (BITs)

In 1982, the United States followed several European countries and Japan in initiating a program of bilateral investment treaties (BITs).\textsuperscript{80} The United States is a relative newcomer to the BIT; Germany was among the first to sign such an agreement in 1960.\textsuperscript{81}

\begin{itemize}
\item \textsuperscript{77} Id., art. VI(5), at 10.
\item \textsuperscript{78} In the post-1940 period, when investment became a more significant issue in the FCNs, the following countries entered FCNs with the U.S.: Belgium, Denmark, Ethiopia, Finland, France, Federal Republic of Germany, Greece, Iran, Ireland, Israel, Italy, Japan, Korea, Luxembourg, Muscat and Oman, The Netherlands, Nicaragua, Pakistan, Taiwan, Thailand, Togo, and Vietnam. \textit{Id.} at 51-54.
\item \textsuperscript{79} Seidman, \textit{Foreign Private Investors and the Host Country}, 19 J. \textit{WORLD TRADE} L. 637, 640-41 (1985).
\item \textsuperscript{80} See generally Original Model BIT, supra note 8, at 273.
\item \textsuperscript{81} Sornarajah, \textit{supra} note 46, at 79.
\end{itemize}
France, the United Kingdom, Switzerland, and Japan are among the other developed countries which maintain BIT programs.\textsuperscript{82} Singapore-Sri Lanka and Kuwait-Iraq are two of the few BITs between developing countries.\textsuperscript{83} Like the Standard Draft FCN, a United States Model BIT has been created\textsuperscript{84} — the first draft of which was released in 1983.\textsuperscript{85}

To a significant extent, the Model BIT represents simply a refinement of FCN provisions. Like the FCN, the agreement provides rights and obligations with respect to each of the five principal controls on investment. For both the establishment and operation of investment, the Model BIT guarantees the better of national or MFN treatment, subject to listed reservations.\textsuperscript{86} The list of reservations is long but, upon examination, appears to be largely a more detailed account of the reservations to national treatment found in the FCN. Under both the FCN and the BIT, parties remain free to maintain nondiscriminatory establishment prohibitions. Unlike the FCN, however, national and MFN obligations do not include benefits accorded by a party to another country by virtue of a free trade area or customs union agreement, or more recently, subsequent obligations negotiated under the framework of the GATT.\textsuperscript{87}

With respect to the operations of an enterprise, the Model BIT also explicitly prohibits performance requirements imposed as a condition of “establishment, expansion or maintenance of investments.”\textsuperscript{88} Proscribed performance requirements are measures that “require or en-

\textsuperscript{82} Original Model BIT, supra note 8, at 275-76; J. JACKSON, supra note 45, at 29.

\textsuperscript{83} Sornarajah, supra note 46, at 79.

\textsuperscript{84} Model BIT, supra note 8.

\textsuperscript{85} Original Model BIT, supra note 8.

\textsuperscript{86} Model BIT, supra note 8, art. II. In the annex to the Model BIT, the United States reserves the right to “make or maintain limited exceptions to national treatment” in the following sectors or matters:

- air transportation; ocean and coastal shipping; banking; insurance; government grants; government insurance and loan programs; energy and power production; custom house brokers; ownership of real property; ownership and operation of broadcast or common carrier radio and television stations; ownership of shares in the Communications Satellite Corporation; the provision of common carrier telephone and telegraph services; the provision of submarine cable services; use of land and natural resources; mining on the public domain; maritime services and maritime-related services; and primary dealership in U.S. government securities.

\textit{Id.}, annex, para. 1.

- The United States reserves the right to “to make or maintain limited exceptions” to MFN in “ownership of real property; mining on the public domain; maritime-related services; and primary dealership in United States government securities.” \textit{Id.}, annex, para. 2.

\textsuperscript{87} Model BIT, supra note 8, art. II, paras. 9(a), 9(b).

\textsuperscript{88} “Neither party shall impose performance requirements as a condition of establishment, expansion or maintenance of investments, which require or enforce commitments to export goods produced, or which specify that goods or services must be purchased locally, or which impose any other similar requirements.” \textit{Id.}, art. II, para. 5.
force commitments to export goods produced, or which specify that goods or services must be purchased locally, or which impose any other similar requirements. 889 Moreover, the agreement includes a general obligation to accord "fair and equitable" treatment at all times, and prohibits either party from "in any way impair[ing] by arbitrary and discriminatory measures the management, operation, maintenance, use, enjoyment, acquisition, expansion, or disposal of investments." 890

The Model BIT provides for a right of entry by personnel for the purpose of operating or establishing an investment. 92 The BIT builds upon the FCN with an explicit grant of a right to engage "top managerial personnel" regardless of nationality. 93

When dealing with financial transfers, the Model BIT states that a party shall permit "all transfers related to an investment to be made freely and without delay into and out of its territory." 94 This is a higher standard than the national and MFN treatment accorded by the FCN. Here, a right of transfer is guaranteed. The FCN ensured only nondiscriminatory treatment, but gave no fundamental right to free transfers. Transfers expressly include: returns, compensation for expropriation, payments arising out of an investment dispute, payments made under a contract (including amortization of loan principal and accrued interest payments), proceeds from the sale or liquidation of an investment, and contributions to capital. 95 Transfers are to be made in a "freely usable currency" at the prevailing market exchange rate on the transfer date. 96

The BIT subjects the sovereign right of a nation to expropriate property to the requirements that it be for a public purpose, in a nondiscriminatory manner, and upon payment of "prompt, adequate and effective compensation" which is equivalent to the fair market value of the expropriated property in accordance with due process. 97

Finally, the Model BIT makes substantial change to the FCN in the event of a dispute by enabling a national or company of a party to

89. Id.
90. Id., art. II, para. 2(a).
91. Id., art. II, para. 2(b).
92. Id., art. II, para. 3.
93. Id., art. II, para. 4.
94. Id., art. IV, para. 1.
95. Id.
96. Id., art. IV, para. 2. Exception is made for transfers upon expropriation in which case the provisions covering expropriation apply, i.e., "prompt, adequate and effective compensation" shall be paid. Id., art. III, para. 1.
97. Id., art. III, para. 1.
invoke its settlement provisions. The Model BIT refers investment disputes to the International Centre for Settlement of Investment Disputes (ICSID). The Standard Draft FCN makes no provision for the nationals or companies of a party to invoke its provisions. The BIT further asserts its competency for investment vis-à-vis the FCN by defining investment and by specifically including activities associated with investment.

Like the FCN, the object of the obligations undertaken in the BIT relate to treatment accorded to companies and nationals of the parties. The BIT makes its focus on investment more explicit by obligating parties to “permit and treat investment, and activities associated therewith, on a nondiscriminatory basis.” Investment includes “every kind of investment” and associated activities include the operation of enterprises.

98. Paragraphs two and three of article VI of the Model BIT provide that if a dispute cannot be resolved through consultation and negotiation between the parties, a “national or company” concerned may choose to submit the dispute to the International Centre for the Settlement of Investment Disputes (ICSID). Id., art. VI, paras. 2-3. An investment dispute is defined as:

a dispute involving (a) the interpretation or application of an investment agreement between a Party and a national or company of the other Party; (b) the interpretation or application of any investment authorization granted by a Party’s foreign investment authority to such national or company; or (c) an alleged breach of any right conferred or created by this Treaty with respect to an investment.

Id., art. VI, para. 1.

99. Id., arts. VI, VII.

100. See Original Model BIT, supra note 8, at 293.

101. “Investment” means every kind of investment in the territory of one Party owned or controlled directly or indirectly by nationals or companies of the other Party, such as equity, debt, and service and investment contracts, and includes without limitation:

(i) tangible and intangible property, including rights such as mortgages, liens and pledges;
(ii) a company or shares of stock or other interests in a company or interests in the assets thereof;
(iii) a claim to money or a claim to performance having economic value, and associated with an investment;
(iv) intellectual property which includes, inter alia, rights relating to:
   literary and artistic works, including sound recordings, inventions in all fields of human endeavor, industrial designs, semiconductor mask works, trade secrets and confidential business information, and trademarks, service marks, and trade names; and
(v) any right conferred by law or contract, and any licenses and permits pursuant to law.

Model BIT, supra note 8, art. I, para. 1(a).

“[A]ssociated activities” include the organization, control, operation, maintenance and disposition of companies, branches, agencies, offices, factories or other facilities for the conduct of business; the making, performance and enforcement of contracts; the acquisition, use, protection and disposition of property of all kinds including intellectual and industrial property rights; and the borrowing of funds, the purchase, issuance, and sale of equity shares and other securities, and the purchase of foreign exchange for imports.

Id., art. I, para. 1(e). Associated activities are specifically included. Id., art. II, para. 1.

102. Id., art. II, para. 1. Investment is defined at id., art. I, para. 1(a). Associated activities are defined at id., art. I, para. 1(e).

In addition, the Model BIT contains a nonexhaustive list of examples of “associated activities” which mentions the granting of franchises or rights under licenses; access to registrations,
Obligations with respect to personnel entry restrictions, financial restrictions, and expropriation are phrased in terms of the link between the person, financial instrument, or expropriated asset, and the covered investment. In this way, both the establishment and the operation of investments are protected from countries attempting to circumvent their investment obligations with immigration, financial, or takings measures or practices.

For the United States, the BIT marks an improvement over the FCN in both the clarity and substance of its rights. For a developing country BIT partner, acceptance of a BIT entails significant obligations not to use many of the restrictive devices common to the development plans of similarly situated countries. Thus, for a significant commitment by a developing country, the United States pays only its right to deliberate its market. For the partner, the BIT represents a seal of approval on the country as an investment site for capital exporters.

It is difficult to say whether the U.S. BIT program has been successful — only seven U.S. BIT agreements are in force as of this writing. Although the United States has entered negotiations with twenty-three countries since 1983, only those with Bangladesh, Cameroon, Grenada, Panama, Senegal, Turkey, and Zaire are in force today. Those with the Congo, Haiti, and Tunisia await U.S. Senate approval. Negotiations are currently underway

with the Soviet Union, Argentina, Bolivia, Czechoslovakia, Uruguay, and Yugoslavia, and, more recently, formal talks have been initiated with Bulgaria, Hungary, Jamaica, and Nigeria. Egypt (the first country to enter BIT negotiations with the United States), Morocco, and Poland have yet to ratify their BITs.

While overcoming many of the limitations of FCNs, BITs are not perfect. It has been asserted that the value of bilateral investment treaties lies in the articulation of customary international investment law. Yet from the list above it is clear that the U.S. BIT partner countries are not representative of the world, nor, arguably, of the developing world. The United States has no BIT agreements with developed countries, though Canada and Australia allow significant levels of foreign investment. Also, significant developing countries such as India and Mexico have not entered BIT talks with the United States. For one commentator, variations in the terms of the agreements make the value of the BIT as a statement of customary international law suspect. These terms have differed according to such factors as the level of nationalist opposition to making concessions to foreigners and concerns about loss of economic sovereignty, including the right to counter the restrictive practices of multinational enterprises. Many of these criticisms may be applied to non-U.S. BITs as well.

### B. Multilateral Investment Agreements

Though several attempts have been made since World War II, there exists today no GATT-equivalent multilateral agreement for the

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115. "This extensive activity [in BIT negotiations] of states has attracted some scholarly literature. The large number of the commentators view these treaties as entrenching what they describe as customary principles of international law relating to the protection of foreign investment." Sornarajah, supra note 46, at 79-80. Sornarajah, however, rejects the notion that investment treaties embody any definite principle of international law. Id. at 97.

116. Id. at 82.

117. Id. at 97.

118. Id. at 82-83.

119. United Nations Centre on Transnational Corporations, Bilateral Investment Treaties 112-14 (1988). This work provides a good summary of the international BIT programs.
regulation of national investment controls. The OECD, an organization of twenty-four developed nations, has produced the most significant framework for the liberalization of national investment controls.

The OECD framework for the regulation of national investment controls consists of three principal instruments: the 1976 Declaration on International Investment and Multinational Enterprises (Declaration), the Code of Liberalization of Capital Movements (Capital Movements Code), and the Code of Liberalization of Current Invisible Operations (Invisibles Code). These three agreements are supplemented by binding OECD Decisions. Both the Capital Movements Code and the Invisibles Code are binding on OECD member countries; the Declaration is only hortatory.

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121. Several other international agreements relate to investment but do not attempt to regulate national investment controls directly. These include the UN Code of Conduct on Transnational Corporations, U.N. Doc. E/1988/39/Add.1 (Feb 1, 1988) and the MIGA Convention (Convention Establishing the Multilateral Investment Guarantee Agency, Oct. 11, 1985, reprinted in 24 I.L.M. 159). Also, the treaties which established the European Economic Community (Treaty Establishing the European Economic Community (Treaty of Rome), Mar. 25, 1957, art. 52-58, 298 U.N.T.S. 11, 37-38) and the European Free Trade Association (Convention Establishing the European Free Trade Association (Stockholm Convention), Jan. 4, 1960, art. 16, 370 U.N.T.S. 1, 16) each contain provisions liberalizing national investment controls. See generally Establishment: The Bergen Agreement Explained, 7 EFTA BULL., Dec. 1966, at 11 (discussion of the right of establishment in EFTA). For further discussion, see infra note 125.


124. ORGANISATION FOR ECONOMIC COOPERATION AND DEVELOPMENT, CODE OF LIBERALISATION OF CAPITAL MOVEMENTS (1986) [hereinafter CAPITAL MOVEMENTS CODE].

125. ORGANISATION FOR ECONOMIC COOPERATION AND DEVELOPMENT, CODE OF LIBERALISATION OF CURRENT INVISIBLE OPERATIONS (1986) [hereinafter INVISIBLES CODE]. See also J. JACKSON & W. DAVEY, supra note 11, at 1035; Schott, Protectionist Threat to Trade and Investment in Services, 6 WORLD ECON. 195, 212 (1983). In addition, both the Treaty of Rome and the Stockholm Convention contain provisions related to national investment controls. See supra note 121. While these agreements are multilateral, customs union and free trade agreements pose unique issues in trade and will not be addressed here.

126. INTRODUCTION TO THE OECD CODES, supra note 3, at 12. See DECLARATION ON INTERNATIONAL INVESTMENT AND MULTINATIONAL ENTERPRISES, supra note 123, at 11-13 (using non-imperative language).
1. OECD Declaration on International Investment and Multinational Enterprises

The Declaration consists of four instruments: Guidelines for Multinational Enterprises, National Treatment, International Investment Incentives and Disincentives, and Consultation Procedures. The National Treatment and International Investment Incentives and Disincentives instruments cover investment.

The National Treatment instrument is a short, four paragraph document which states that Member countries "should" accord national treatment under their laws, regulations, and administrative practices to the foreign-controlled enterprises of other Members operating in their territories. Members need only "consider" applying such treatment to the enterprises of non-Members, and need only "endeavour to ensure" that their territorial subdivisions apply national treatment. New or expanded investment by already established foreign-controlled enterprises (e.g., investment by an established subsidiary of a foreign company) is covered, regardless of the relationship of the new/expanded investment to the economic sector of the existing investment. However, new investments, so-called "green field" investments, by non-resident enterprises are not covered by the National Treatment principles; they are instead dealt with by the Capital Movements Code.

The National Treatment instrument thus introduces a qualified national treatment principle: national treatment is accorded to established investment with respect to further investment, but need not be given to enterprises not yet established within the territorial bounds of


128. Id. at 12 ("Foreign-Controlled Enterprise" refers to an enterprise that is owned or controlled, directly or indirectly, by nationals of another Member country).

129. Id.

130. 1984 Review, supra note 122, at 42-43. Thus a foreign-controlled computer manufacturing (goods) concern in a Member country would be accorded national treatment in the establishment of a consulting (services) subsidiary.

131. Distinguishing "residence" from "nationality," the Committee on Capital Movements and Invisibles Trade (CMIT) offers a description of "resident" including the following:

As a rule, individuals living permanently in a country and enterprises located in that country are considered by the authorities to be residents. Branches and subsidiaries of enterprises, including those owned or controlled by non-residents or foreigners, are normally considered to be residents of the country in which they operate.

Introduction to the OECD Codes, supra note 3, at 30 n.7.

132. The National Treatment instrument provides that "[t]he Declaration expressly does not deal with the right of Member countries to regulate the entry of foreign investment or the conditions of establishment of foreign enterprises." Declaration on International Investment and Multinational Enterprises, supra note 123, at 12.
a Member.\textsuperscript{133} This is a less liberal guarantee than that contained in the FCNs and BITs which do not distinguish national treatment rights based on the location of an investor with respect to a party, but it is conceptually similar to the border orientation of the national treatment provisions in the GATT.\textsuperscript{134}

Otherwise inconsistent measures may be taken under the instrument to maintain public order, to protect essential security interests, or to fulfill peace and security obligations. Under a Decision of the Council on National Treatment, each Member Country must notify the OECD of measures taken by it that constitute exceptions to national treatment.\textsuperscript{135} Thus the Declaration emphasizes transparency and may, despite its non-binding character, achieve the attendant pressure to conform that public exposure of discriminatory practices often brings.

The International Investment Incentives and Disincentives instrument\textsuperscript{136} is shorter still. In its three paragraphs, OECD Members recognize the need to strengthen their cooperation in the field of international direct investment; recognize the need to give “due weight” to the interests of other Members affected by measures providing official incentives and disincentives to investment; and agree to endeavor to make such measures as transparent as possible. In a related Decision, the Council on International Investment Incentives and Disincentives has provided a forum for any Member Country which considers that “its interests may be adversely affected by the impact on its flow of international direct investments” due to the “sig-

\textsuperscript{133} See infra notes 139-53 and accompanying text describing the Capital Movements Code which covers investment by enterprises not already established in the host country.

\textsuperscript{134} GATT article III contains the national treatment obligation which applies to the “products of the territory of any Contracting Party imported into the territory of any other Contracting Party” but does not apply to products not yet imported. GATT, supra note 1, art. III(4). For a recent example of the consequences of this distinction, see United States-Canada Free Trade Agreement Binational Panel, Majority View, Lobsters from Canada, Final Report of the Panel, USA 89-1807-01, May 21, 1990 (When quantitative restrictions otherwise prohibited under article XI are applied to both domestic and foreign products, the restrictions are considered internal measures, not restrictions on importation under article XI, and are subject to the arguably more forgiving article III national treatment standard). Cf ORGANISATION FOR ECONOMIC COOPERATION AND DEVELOPMENT, NATIONAL TREATMENT FOR FOREIGN-CONTROLLED ENTERPRISES 54, n.3 (1985) [hereinafter NATIONAL TREATMENT FOR FOREIGN-CONTROLLED ENTERPRISES] (“[T]he GATT principle of National Treatment refers to non-discrimination between products of local and foreign origin, while the OECD principle of National Treatment refers to non-discrimination between domestic and foreign-owned or -controlled enterprises operating in the country in question.”).

\textsuperscript{135} I.e., those which do not relate to public order, security, etc. Second Revised Decision of the Council on National Treatment, in DECLARATION ON INTERNATIONAL INVESTMENT AND MULTINATIONAL ENTERPRISES, supra note 123, at 31.

\textsuperscript{136} DECLARATION ON INTERNATIONAL INVESTMENT AND MULTINATIONAL ENTERPRISES, supra note 123, art. III.
nnificant official incentives and disincentives to international direct investment” provided by another Member.137

Incentives and disincentives are not defined by the International Investment Incentives and Disincentives instrument. In a survey of the investment incentive policies of Member Countries, the following broad definition was used: “[A]n incentive (or disincentive) will be understood as any government measure designed to influence an investment decision, and increasing (or reducing) the profit accruing to the potential investment or altering the risks attached to it.” 138

2. The OECD Codes of Liberalization

The OECD Capital Movements Code139 and Invisibles Code140 “complement and reinforce” the GATT and the IMF in the promotion of a liberal international economic environment.141 “The ultimate objective [of the Codes], broadly speaking, is that residents of different Member countries should be as free to transact business with each other as are residents of a single country.”142 These two Codes, both adopted in 1961, have the same binding legal status on OECD members as OECD Decisions.143 The Code obligations apply only to national controls affecting operations between the residents of OECD Member countries adhering to the Codes and to new investment by nonresidents. The Codes do not cover operations between either nonresidents or the residents of a single Member. Here, the National Treatment instrument of the Declaration might apply.144

The Capital Movements Code covers most of the common forms of medium- and long-term operations, and by a 1989 amendment, many short-term capital movements, as well.145 Members are required to “progressively abolish . . . restrictions on movements of capital to the extent necessary for effective economic co-operation.”146 In particular, Members are to endeavor to “treat all non-resident-owned assets

137. Second Revised Decision of the Council on International Investment Incentives and Disincentives, in id. at 33.
139. CAPITAL MOVEMENTS CODE, supra note 124.
140. INVISIBLES CODE, supra note 125.
141. INTRODUCTION TO THE OECD CODES, supra note 3, at 10-11.
142. Id. at 12.
143. Id.
144. Id. at 13.
146. CAPITAL MOVEMENTS CODE, supra note 124, art. 1.
in the same way,” to “permit the liquidation of all non-resident-owned assets and the transfer of such assets or of their liquidation proceeds,” and to “avoid . . . exchange restrictions on the movement of capital or the use of non-resident-owned funds.”147 The Code applies to a wide range of both foreign direct investment and portfolio investment.

The Code covers direct investment in a Member Country by non-residents or abroad by a Member’s residents; a Member is required to grant “any authorization required” for the creation or extension of an enterprise, for participation in a new or existing enterprise, or for a long-term loan.148

In this respect, the Capital Movements Code complements the National Treatment instrument. The Code covers investment by nonresidents while the National Treatment instrument covers investment by “foreign controlled enterprises” already established in Member countries.149 So, for example, a first-time creation of a subsidiary by a firm of one Member in the territory of another would be covered by the Capital Movements Code while both the operations of the subsidiary established and any further investments by it would be covered by the National Treatment instrument. Where a branch is established by a nonresident parent, the Capital Movements Code would also apply. However, it is unclear under the agreements whether further investments by such a branch should be attributed to the foreign parent and covered by the Code or should be considered an act of a resident and covered by the National Treatment instrument.150 The Captial Movements Code prohibits discriminatory investment controls on inward direct investment.151 However, all Members have taken a reservation for inward direct investment and establishment in certain sectors,152 and many maintain reciprocity requirements.153

The Invisibles Code requires Members to eliminate all restrictions

147. Id.
148. Id., art. 2(a), at 12.
151. The authorities of Members shall not maintain or introduce:
   Regulations or practices applying to the granting of licenses, concessions, or similar authorisations, including conditions or requirements attaching to such authorisations and affecting the operations of enterprises, that raise special barriers or limitations with respect to non-resident (as compared to resident) investors, and that have the intent or the effect of preventing or significantly impeding inward direct investment by non-residents.
CAPITAL MOVEMENTS CODE, supra note note 124, at 26, annex A.
152. Id., annex B.
153. See infra note 169 on reciprocity.
on specified current invisible operations of other Members. Covered operations are listed in an annex under the headings: business and industry, foreign trade, transport, insurance, films, income from capital, travel and tourism, personal income and expenditure, public income and expenditure, and "general" which includes advertising, professional services, and the registration of patents and trademarks. Countries maintain reservations to these obligations principally for insurance, films, and air, land, and sea transport. The United States has made reservations for maritime freight, inland waterway freight, road transport, and printed films and other recordings. The United States and Canada have also been granted exceptions for acts taken by their states and provinces.

The OECD has attempted to strengthen the Invisibles Code with a series of sectoral agreements added to the annex of the Code. Three amendments have been made to provide detailed treatment of insurance, tourism, and audiovisual works, and a fourth on banking and financial services will go into effect this year. These agreements overlap the Capital Movements Code and, potentially, the National Treatment instrument. The insurance agreement, for example, not only details the types of insurance covered (goods, life, reinsurance, etc.) but also attempts to discipline the use of financial and prudential requirements on the insurer and on the insurer's investments and deposits. With respect to establishment, the agreement provides freedom of choice to the investor regarding form: subsidiary, branch, or agency. For establishment by a branch or agency, "[a]ll statutory and administrative controls of insurance shall ensure equivalent treatment for national insurers and insurers from other Member States so that the latter shall not be liable to heavier burdens than those imposed on national insurers." The insurance agreement also ensures national treatment for establishment authorizations to branches or

154. "Members shall eliminate between one another . . . restrictions on current invisible transactions and transfers. . . ." INVISIBLES CODE, supra note 125, art 1(a). "Members shall grant any authorisation required for a current invisible operation specified [in the annex]." Id., art. 2(a).

155. Id. at 25-31, annex A.

156. INTRODUCTION TO THE OECD CODES, supra note 3, at 16.

157. INVISIBLES CODE, supra note 125, at 85-86, annex B.


159. Ley, supra note 145, at 22.

160. INVISIBLES CODE, supra note 125, at 39-40, part III of annex I to annex A.

161. Id. at 39, part III.
agencies and provides security for transfers. For direct operations, it reiterates the Invisibles Code guarantee of the freedom to transfer profits.

From the standpoint of national investment controls, the Invisibles Code and its annexes provide protection to investors in two fundamental ways: directly to some service providers, and indirectly to all investors. Protection is extended directly to service industry investors by generally prohibiting restrictions on their branch or agency operations and financial transfers and, at least in some cases, on the establishment of subsidiaries (e.g., insurance). The second protection extends indirectly to all investors who depend on free access to these covered services in order to establish or operate their investments. Entry restrictions on professional service people is a control governments apply to investments. By granting cross-border freedoms to services, however, the Invisibles Code effectively limits the ability of OECD members to restrict an investor's use of such essential nonresident services as accountants, consultants, engineers, lawyers, etc. Similarly, freedoms granted to financial services could conceivably operate to limit the financial restrictions governments apply to manufacturing investments.

Under both Codes, many avenues exist for those who would avoid their obligations. In addition to the right to reserve against specific obligations, members may take otherwise Code-inconsistent measures in order to maintain public order, health, morals, or safety as well as for "essential security interests," and to fulfill international peace and security obligations. Exceptions to the nondiscrimination principle are allowed for participants in special customs or monetary systems and a member is also permitted to derogate from either Code if "its economic and financial situation justifies such a course" or for balance of payments reasons. Significantly, the Capital Movements Code does not apply to acts by states of the United States, nor does the Invisibles Code apply to acts of the sub-governments of either the United States.

162. Id.
163. Id. at 45, part IV.
164. See supra text at Section II(B) for a discussion of personnel entry restrictions and the five types of national investment controls.
165. INVISIBLES CODE, supra note 125, art. 2; CAPITAL MOVEMENTS CODE, supra note 124, art. 2.
166. INVISIBLES CODE, supra note 125, arts. 2, 3; CAPITAL MOVEMENTS CODE, supra note 124, arts. 2, 3.
167. INVISIBLES CODE, supra note 125, art. 10; CAPITAL MOVEMENTS CODE, supra note 124, art. 10.
168. INVISIBLES CODE, supra note 125, art. 7; CAPITAL MOVEMENTS CODE, supra note 124, art. 7.
United States or Canada. Finally, in recognition of the practice of many members to require reciprocity before according national treatment to inward investment, an annex was added to the Capital Movements Code in order to treat such requirements separately from measures that are reserved under article 2.

As compared to the GATT, the dispute settlement mechanism of the Codes is weak. The Codes provide no right of retaliation or other means of positive enforcement, but instead seek compliance through a system of notification, examination, and consultation. A committee on Capital Movements and Invisible Transactions (CMIT) is the oversight committee for the Codes and conducts periodic examinations of members’ reservations and derogations. For those seeking redress against a member for improperly invoking a derogation or for frustrating or violating its liberalization commitments, there exists only a right to notify the Organisation, and in the case of an improper derogation, to have the situation examined by a “special Ministerial Group.” The CMIT considers these complaints, but the Codes provide neither “carrot” nor “stick” to ensure compliance.

Taken together, the Declaration and the Codes form a framework covering most of the five national controls on investment. For establishment restrictions, the National Treatment instrument protects resident investors while the Capital Movements Code prohibits these restrictions when applied to nonresidents. The sector-specific annexes of the Invisibles Code partially overlap these guarantees with their own limits on establishment restrictions. Operating requirements placed on enterprises operating in another member are covered by the


170. Decision of the Council Regarding Measures and Practices Concerning Reciprocity and/or Involving Discrimination Among Investors Originating in Various OECD Member Countries in the Area of Inward Direct Investment and Establishment, in CAPITAL MOVEMENTS CODE, supra note 124, at 117-22, annex E. Members are required to notify the OECD of their reciprocity requirements. Apparently members do not have to make the same reservations for reciprocity requirements (which are given a “different status”) as they would for other discriminatory rules, though the review procedures for both are essentially the same. See INTRODUCTION TO THE OECD CODES, supra note 3, at 13-14. Empirically, the reciprocity notifications have all related to services industries, primarily banking and financial services, but also to insurance, airlines, and tourism. CAPITAL MOVEMENTS CODE, supra note 124, at annex E. According to U.S. Deputy Assistant Treasury Secretary Newman, the number of members with reciprocity requirements is growing, and at least eighteen of the twenty-four members will have such powers by 1993. U.S. Proposal on Foreign Banks Unwarranted—La Ware, Reuters, April 24, 1991 (outlining debate in United States over proposals to require reciprocity for foreign banks).

171. INTRODUCTION TO THE OECD CODES, supra note 3, at 12.

172. INVISIBLES CODE, supra note 125, arts. 13, 15-17; CAPITAL MOVEMENTS CODE, supra note 124, arts. 13, 15-17.
National Treatment instrument and, for certain sectors, by the Invisibles Code annexes. Operating requirements in the form of incentives and disincentives are discouraged under the International Investment Incentives and Disincentives instrument. Personnel entry restrictions are subject to the national treatment instrument and are also indirectly limited with respect to those services covered by the Invisibles Code. The framework similarly subjects financial restrictions to national treatment and further liberalizes financial transfers in the Capital Movements Code and in the Invisibles Code and its 1989 amendment. Expropriation is not expressly treated within the framework.

The weaknesses of the framework are apparent. The National Treatment and International Investment Incentives and Disincentives instruments are nonbinding, and the Codes lack a credible dispute settlement mechanism. Recent efforts to elevate the National Treatment instrument to legally binding status have failed. In what bodes poorly for any significant advances on investment in the more heterogeneous GATT, Ministers at the June 1991 OECD Ministerial Meeting not only failed to agree to a legally binding commitment to apply the National Treatment instrument, but also failed even to agree to a non-binding, but symbolic, “political” commitment to do so. The language of the framework instruments is vague, and in terms of their marginal contribution to the discipline of national investment controls, all three instruments are limited in application to only the twenty-four Members, developed countries with generally liberal investment regimes. The lack of strong enforcement procedures should not be over-emphasized, however. More than one commentator on international practice has recognized a value in the simple articulation of standards, regardless of their character. Finally, the framework allows Members numerous avenues of escape from obligations. Much of the criticism of the framework has centered on the ease of derogations. However, the OECD reports that such exceptions are few.

173. Telephone Interview with James Heg, USOECD, Paris, June 21, 1991. This effort foun-
dered on the same issues as a year earlier: European objection, particularly French, to a qualified commitment by members with federal systems to bind their subordinate governments, and U.S. objections to Canada's desire for a “cultural identity” exception. Id. Cf. OECD Countries Unable to Reach Agreement on Guidelines Covering National Treatment, 7 INT'L TRADE REP. (BNA) 808 (June 6, 1990). See also Text: Final Communique of the Organisation for Economic Cooperation and Development Ministerial Meeting, released in Paris June 5, 8 INT'L TRADE REP. (BNA) 913, 917 (June 12, 1991).

174. See, e.g., J. JACKSON & W. DAVEY, supra note 11, at 862. With respect to exchange restrictions, the authors note that, despite the broad exceptions to Code obligations, the subjecting of national restrictions to international scrutiny on a regular basis has probably played an important role in recent liberalizations.

175. See, e.g., id.
and declining and that they are also less widespread as a matter of practice than the lists of reservations would imply.\textsuperscript{176} In this environment of bilateral agreements and limited multilateral discipline, concerned countries have turned their attention to the GATT as a forum for discussing the regulation of national investment controls.

IV. INVESTMENT IN THE GATT

In terms of the five classes of national investment controls, the GATT provides little coverage. It grants no rights or obligations with respect to establishment. If such rights are to be found anywhere, they must be derived from general principles of nondiscrimination found scattered throughout the document. As to the operation of enterprises, protection against discriminatory treatment is only derivative of obligations undertaken not to discriminate against the products of another. Article XV of the GATT calls upon the Contracting Parties not to frustrate the intent of the agreement by exchange action.\textsuperscript{177} No provision is made in the GATT for personnel entry restrictions or for the conduct of parties in the case of expropriation.

A. History of Investment in the GATT

The GATT has its origins in a proposal by the United States for the establishment within the United Nations of an International Trade Organization (ITO). The United States tabled its proposal as a means to expand world trade and employment and “to promote the solution of problems in the field of international commercial policies and relations.”\textsuperscript{178} The scope of the proposed ITO Charter was broad, including provisions for the discipline and promotion of employment, commercial policy (including trade restrictive measures), restrictive business practices, and intergovernmental commodity arrangements. In its original submission, however, the United States did not propose any rules for the treatment of investment.

In the view of the United States, it was both unnecessary and dangerous to negotiate investment in a multilateral framework.\textsuperscript{179} FCNs already provided for investment security, and the threat that multilat-

\textsuperscript{176} INTRODUCTION TO THE OECD CODES, supra note 3, at 14-19.
\textsuperscript{177} GATT, supra note 1, art. XV(4). This article gives recourse to the IMF for those experiencing exchange restrictions on transfers in connection with imports. As a matter of practice, the GATT has been incapable of distinguishing trade effects from exchange effects, and has consequently deferred to IMF jurisdiction on the few occasions these issues have arisen. See GATT Analytical Index, art. XV(6)-XV(8), GATT Doc. Leg/2 (1989).
\textsuperscript{178} U.S. DEPARTMENT OF STATE, SUGGESTED CHARTER FOR AN INTERNATIONAL TRADE ORGANIZATION OF THE UNITED NATIONS art. I (Commercial Policy Series No. 93, Sept. 1946).
\textsuperscript{179} C. WILCOX, A CHARTER FOR WORLD TRADE 146 (1949).
eral negotiation of investment rules would result in a lowest common denominator of acceptable discipline discouraged the United States from attempting to include investment in the ITO. 180 Nevertheless, at the London Conference, fearful of the excessiveness of calls by less-developed countries (LDCs), notably Colombia, for greater attention to their economic development needs, the United States broached the subject of investor rights as a counterweight to these claims. 181

At the London Conference, an entire chapter was added to the Charter to account for "economic development." Under this chapter, members agreed to "impose no unreasonable impediments that would prevent other members from obtaining access to facilities required for their economic development." 182 A concomitant to this predevelopment provision was included for investors. Under it, members agreed to "take no unreasonable action injurious to the interests of ... other Members, business entities or persons." 183 This was the first introduction of rights for enterprises into the GATT/ITO framework.

Subsequently, at the Geneva Conference, the United States tabled amendments espousing three principles for investment: (1) national treatment, except where a country has given advance notice of the treatment to be accorded; (2) unqualified most-favored-nation treatment; and (3) effective, adequate, and prompt compensation in the event of expropriation. 184 The U.S. proposals sparked an extended debate which carried over to the Final Conference at Havana.

In the Havana Charter, members recognized that "international investment, both public and private, can be of great value in promoting economic development and reconstruction, and consequent social progress." 185 However, the interests of developing countries not only dominated the provisions on investment, but did so in a manner contrary to the interests of the United States, the United Kingdom, and other capital-exporting nations.

Under article 12 of the Charter, a member was permitted to "take any appropriate safeguards necessary to ensure that foreign investment [was] not used as a basis for interference in its internal affairs or

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180. Id.
181. Id. at 143-48.
183. Id., art. 12, para. 4.
national policies." Further, a member was granted the right to determine the terms upon which it would allow future foreign investment, if at all; to "prescribe and give effect on just terms to requirements as to the ownership of existing and future investments"; and to provide other reasonable requirements with respect to existing and future investments.

Subject to the above provisions for economic development, members undertook two obligations to foster investment: "to provide reasonable opportunities for investments acceptable to them and adequate security for existing and future investments, . . . and to give due regard to the desirability of avoiding discrimination as between foreign investments." This obligation is obviously replete with words subject to interpretation such as "reasonable," "acceptable," "adequate," and "due regard." One commentator considered this rule to fall "considerably short of the minimum standard of international customary law on the protection of foreign property."

In article 11, a second, broader commitment was undertaken by each member not to "take unreasonable or unjustifiable action within its territory injurious to the rights or interests of nationals of other members in the enterprise, skills, capital, arts or technology which they have supplied." Finally, for those who viewed their rights under the ITO to have been nullified or impaired, recourse was available to the dispute settlement provisions, chapter VIII of the Havana Charter.

The framework countenanced by the ITO for regulating measures applied to investment was rooted in a recognition of the importance of investment to economic development. It has also been asserted that these provisions represented an attempt to use both procedural and substantive rules to stem a decline in arbitration disciplines in the post-war period. The U.S. Congress never accepted the Charter, in part because of the dissatisfaction of the U.S. Senate with the investment provisions. This sounded the death knell for both the ITO and multilateral investment discipline in a GATT/ITO context.

186. Id., art. 12, para. 1(c).
187. Id.
188. Id., art. 12, para. 2(a).
189. G. SCHWARTZENBERGER, supra note 54, at 136.
190. Havana Charter, supra note 185, art. 11, para. 1(b).
Compared to the ITO Charter, the GATT is a narrow document. It was created as an interim trade agreement to allow tariff reduction negotiations to proceed while the more inclusive, more time consuming ITO was being negotiated.\textsuperscript{195} Accordingly, the GATT refers only to rights and benefits accorded to products and incorporates primarily the commercial policy provisions of the Havana Charter. There are no substantive references to investment, to services, or to the enterprises of Contracting Parties.

This is not to say, however, that GATT investment discussions are entirely novel. In 1955, the Contracting Parties adopted a seldom-discussed Resolution on International Investment for Economic Development in which they recommended that the contracting parties who are in a position to provide capital for international investment and the contracting parties who desire to obtain such capital use their best endeavors to create conditions calculated to stimulate the international flow of capital having regard in particular to the importance for this purpose of providing by appropriate methods for security for existing and future investment, the avoidance of double taxation, and facilities for the transfer of earnings upon foreign investments[.]\textsuperscript{196}

The Resolution further urged parties to enter into bilateral and multilateral agreements relating to these matters.\textsuperscript{197} Thus, at a time when the object of the ITO was still fresh in the minds of the Contracting Parties and the nature of the GATT as a tariff agreement was most apparent, the parties appear to have had no difficulty discussing investment in the context of the GATT. By this time it was apparent that there would be no ITO.\textsuperscript{198} It may be that the spark of enlightenment that had originally forged the multilateral trade negotiations had not yet faded into self-interested literalism. In any case, little has been made of those discussions and today we face the question again.

B. Trade-Related Investment Measures (TRIMs)

It is apparent from the preceding section that the GATT, as originally intended, was not designed to do much more than to secure the reduction of tariffs through multilateral negotiations. At the same time, however, the GATT can be fairly said to occupy the field of

\textsuperscript{195} W. Brown, Jr., supra note 184, at 61-62.


\textsuperscript{197} Id. at 50.

\textsuperscript{198} For all practical purposes, the ITO died in 1950. J. Jackson & W. Davey, supra note 11, at 295.
Investment in the GATT

binding multilateral agreements for economic liberalization. The GATT context helps to illuminate the two views presented in this article, literalist and functionalist. Countries seeking to limit the scope of existing GATT obligations or the expansion of GATT subject matter jurisdiction assert the literalist view that the GATT is a wheel of obligations with products at its hub. For these countries, the addition of any spoke of obligations must show a relation to traded products.

The functionalists, however, maintain that the GATT is a forum for the liberalization of economic relations. While the effect of public or private sector acts on trade in goods may be a useful benchmark for assessing discriminatory treatment and injury, such effect does not suffice to capture the universe of undesirable barriers to liberalization. For functionalists, barriers to investment are themselves potential inhibitions to economic development and consequently fall within the purview of the GATT.

In the Uruguay Round, the tension between literalism and functionalism and its effect on the conduct of negotiations is nowhere more apparent than in the TRIMs talks. Functionalists wish to cast these talks as the discussion of investment in the GATT. The U.S. Congress, in fact, listed "foreign direct investment" and not TRIMs as its investment-related concern in the Uruguay Round.199 Literalists reject such a broad discussion of investment in a GATT context.

1. Background

The United States has long sought to expand the purview of the GATT to regulate national controls on foreign investors. The impetus for TRIMs negotiations came ten years ago at a meeting of the Consultative Group of 18 when the United States requested the Secretariat to compile an inventory of investment measures, especially performance requirements.200 The United States asked for the inventory in order to explore the findings of a recent study of the Joint Development Committee of the International Bank for Reconstruction and Development and the IMF that concluded that performance requirements on MNEs could have trade-distortive effects.201 Over the next several years, the United States raised the issue a number of times.

In 1982 the GATT Ministers declined to include the subject in

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201. Id.
their Ministerial Work Programme,\textsuperscript{202} and in 1985 participants at the Senior Officials' Group Meeting again disagreed over the link between trade flows and investment policies.\textsuperscript{203} Finally, in a "last minute compromise" at the Punta del Este meeting launching the Uruguay Round, the Contracting Parties agreed to include TRIMs among the "New Subjects" for negotiation.\textsuperscript{204}

The Ministerial Declaration launching the Round provided that "[f]ollowing 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."\textsuperscript{205}

The language of the Declaration is no clarion call to negotiate investment, but rather limits its mandate to an examination of investment measures with "adverse effects on trade." An early note by the GATT Secretariat underscored the limited mandate of the TRIMs negotiating group. It declared that the language of the Punta del Este Declaration on Trade-Related Investment Measures represented a decision to focus on the direct trade effects of investment measures and the extent to which they are addressed by GATT articles, rather than on the broad relationship between investment, production, and trade.\textsuperscript{206} Thus, while the United States had hoped to include discussions on investment in the GATT, it got something far less.

At the 1989 Mid-Term Review of the Uruguay Round Multilateral Trade Negotiations, the GATT ministers charged the TRIMs Negotiating Group with identifying those "trade-restrictive and distorting" effects of investment measures which are covered by existing GATT articles and those for which adequate provision has not been made. The mandate instructed the Negotiating Group to consider the development needs of countries, the need for new GATT provisions, and such other issues as the modalities of implementation.\textsuperscript{207}

\textsuperscript{202} Id. at 6.
\textsuperscript{203} Id.
\textsuperscript{204} Id.
\textsuperscript{205} Press Communique, GATT/1396, at 9 (Sept. 25, 1986) [hereinafter Ministerial Declaration].
\textsuperscript{207} Mid-term Review: Final Agreement at Geneva, 61 Focus: GATT Newsletter 1, 8-9 (1989) [hereinafter Mid-term Review].
2. What Are TRIMs?

There is no adequate definition of a "TRIM." The concept is a creation of those wishing to rationalize the discussion of investment without broadening the context of an agreement on tariffs and trade. As broadly conceived, a TRIM is any requirement which affects trade applied by a government as a condition to the making or operation of an investment. Generally, TRIMs are of four types: those restricting imports, those restricting exports, those requiring exports, and those which, by their terms, do not explicitly direct trade decisions.

Within the model of national investment controls, TRIMs implicate establishment restrictions (e.g., conditioning market access on a grant by the investor of a certain percentage of equity to nationals of the host country); operating restrictions (e.g., requiring an investor to purchase domestic products); personnel entry restrictions (e.g., requiring a company to utilize local management); and financial restrictions (e.g., limiting an enterprise's access to foreign exchange).

The United States and European Community have suggested the following thirteen measures for coverage by a TRIMs agreement. Because these countries are the strongest proponents of including investment in the GATT, this list arguably represents a very broad interpretation of what might constitute a TRIM.

**IMPORT RESTRICTIONS**

1. *Local Content Requirements* require the investor to purchase or to use inputs from local sources (including itself) in some absolute amount or percentage of production value or quantity.
2. *Domestic Manufacturing Requirements* oblige an investor to manufacture some percentage or fixed amount of production or inputs in the host country.
3. *Trade Balancing Requirements* restrict an investor from importing or from using imported products to an amount corresponding in some way to the amount of its exports.
4. *Exchange Restrictions* limit an investor's access to foreign exchange generally or to that earned from exports.

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208. See Secretariat Note, *supra* note 17, at 4, for a discussion of the controversy regarding the definition of a TRIM. TRIMs are sometimes also referred to as trade-related performance requirements, though these may also be a subcategory of TRIMs. See Fontheim & Gadew, *Trade-Related Performance Requirements under the GATT-MTN System and U.S. Law*, 14 LAW & POL'Y IN INT'L BUS. 129 (1982).

209. See *supra* text at section II.B for a discussion of the five types of investment controls.

EXPORT RESTRICTIONS
5. *Domestic Sales Requirements* require the sale of a certain percentage of output or a minimum quantity or value of production on the host country market.

EXPORT REQUIREMENTS
6. *Export Performance Requirements* oblige an investor to export a specified percentage or amount of production quantity or value.
7. *Product Mandating* requires an investor to grant the investment exclusive rights to specified export markets, or requires the investor to export to certain foreign markets or regions.

NON-TRADE SPECIFIC TRIMS
8. *Technology Transfer Requirements* require an investor to include specified technology in its production process or to conduct some minimum level of research and development in the host country.
9. *Local Equity Requirements* require that local investors hold or control a certain minimum percentage of the equity in an investment.
10. *Licensing Requirements* oblige an investor to license the production, use, or sale of some product or technology to domestic companies.
12. *Remittance Restrictions* limit an investor's transfer of profits, earnings, or capital to the home country.
13. *Incentives* induce investment or acceptance of other TRIMs by the offer of some benefit or advantage to the investor.

3. Incidence of TRIMs

The data on the incidence of TRIMs are limited.\(^{211}\) However, it is clear that TRIMS are most often employed by developing countries and are usually imposed as investment disincentives, balanced by investment, trade protection, and other incentives in a package of terms designed to effect the economic or political objectives of the host country.\(^{212}\) TRIMs vary by sector but are generally most often applied to

\(^{211}\) Secretariat Note, *supra* note 17, at 2 (stating that with respect to TRIMS "[t]here is little empirical analysis to draw on since detailed and comparable information covering a significant sample of investment projects does not exist."). Governments do not like international public scrutiny of their domestic policy tools, and investors subject to TRIMs do not wish to antagonize their host governments. Fontheim & Gadbaw, *supra* note 208, at 131-32,

\(^{212}\) Secretariat Note, *supra* note 17, at 6; Hayes, *supra* note 210, at 5. *See also* Schwarz &
the automobile, mining, electrical machinery manufacturing, and equipment sectors.\textsuperscript{213}

Developing countries are not alone in the use of TRIMs—many OECD Member countries also resort to their use. Local content requirements are the most common TRIM for these countries. Australia, for example, applies this TRIM for automobiles, tobacco, and minerals processing and Norway, for oil and gas operations.\textsuperscript{214} Australia, Japan, Austria, Norway, Switzerland, and the United States are among countries which utilize local equity requirements or requirements related to research and development.\textsuperscript{215} OECD countries impose TRIMs in order to effect three primary objectives: to promote general economic goals (employment, balance of payments, etc.), to insure that enterprises meet the objectives of government-sponsored incentive programs, and to counter the restrictive intrafirm practices of enterprises (RBPs).\textsuperscript{216}

Developing countries, in declining order of frequency, principally utilize TRIMs in the form of requirements: on local content, local equity, export performance, and technology transfer.\textsuperscript{217} Roughly two-thirds of these TRIMs are applied to all investments while the remaining sector-specific requirements are applied largely to the automobile industry and to the computer, informatics, and telecommunications sectors.\textsuperscript{218} The sector-specific requirements are principally local content rules and are most commonly found in Venezuela, Mexico, and Brazil.\textsuperscript{219}

Among less developed regions, Latin America appears to impose the greatest number of TRIMs, especially Venezuela and Mexico, but also Colombia, Brazil, and Ecuador. The next most frequent user is Asia, particularly the Phillipines, Malaysia, Taiwan, and India. Finally, among African states, only such countries as Egypt, Ghana, and Nigeria impose more than a few TRIMs.\textsuperscript{220}

Figures vary on the degree to which foreign affiliates experience TRIMs. The most is known about the foreign affiliates of U.S. corpo-

\textsuperscript{213} Schwarz & Caplan, \textit{supra} note 212, at 59-60. The automobile sector is subject to expansive TRIM protection. \textit{Id.}
\textsuperscript{214} Hayes, \textit{supra} note 210, at 5.
\textsuperscript{215} Id.
\textsuperscript{216} 1984 REVIEW, \textit{supra} note 122, at 51.
\textsuperscript{217} Hayes, \textit{supra} note 210, at 5.
\textsuperscript{218} Id.
\textsuperscript{219} Id.
\textsuperscript{220} Id. at 5, 6.
rations, and even these figures are suspect. A 1977 Department of Commerce Benchmark Survey found that approximately fourteen percent of all U.S. foreign affiliates were subject to TRIMs. However, a 1982 Department of Commerce study found only seven and six-tenths percent were subject to performance requirements.

Finally, even the effect of TRIMs is uncertain; studies have yielded conflicting results. For general investment incentives, a 1981 CIME study found that investment incentives and related preconditions and performance requirements have "only a small influence" on either the decision to invest abroad or on the form of the investment. Such measures can, however, impact location decisions within global regions as well as the size and timing of investments. Similarly, with respect to several TRIMs, a CIME study found that while local content or export performance requirements may discourage greenfield investment, the same measures may actually encourage additional investment by established enterprises. The study concluded that, in the aggregate, TRIMs do not have a major impact on investment decisions though they may significantly affect the behavior of individual enterprises and may influence the choice of location or the form of the investment. They may also have a greater impact on decisions to invest in developing countries rather than in OECD Member Countries.

In contrast to the CIME study, one commentator has read the findings of a recent World Bank study of investment incentives and performance requirements to indicate that these measures are effective for host countries. Dr. Stephen Guisinger concludes that investment incentives do affect the location of new investments and that performance requirements alter both investment and operational decisions of multinational enterprises. However, these conclusions have been identified as contradictory to the results of several studies,

221. Id. at 5.
222. E. GRAHAM & P. KRUGMAN, supra note 36, at 103.
223. 1984 REVIEW, supra note 122, at 49.
224. Id.
225. Id. at 50 (Host country measures included local content or servicing requirements, limitations on imports, export requirements, international product mandate requirements, and technology transfer requirements. Home country measures included buy-national laws and other incentives and disincentives).
226. Id. at 50-51.
227. Id. at 51.
228. Id.
230. Id.
including ones done by the OECD and by the U.N. Centre on Trans-national Corporations. They also have been criticized for their potential to "dangerously mislead" policymakers with respect to the weight given to incentives in the decision-making process of investors.231

4. The TRIMs Debate

The parties to the TRIMs debate are the traditional ones in the GATT: the north (capital exporting countries) seeks greater discipline, while the south (developing countries) seeks freedom to design its own development strategies.232 The United States is a chief proponent of a TRIMs agreement in the GATT. As the world's largest home country for multinational enterprises, the United States has sought discipline over investment measures to protect the interests of its corporations. As expressed by Congress, U.S. objectives for investment in the Uruguay Round are to reduce or eliminate artificial or trade-distorting barriers to investment, to expand the principle of national treatment, to reduce unreasonable barriers to establishment, and to develop rules for the free flow of investment and for the reduction of TRIMs.233 These objectives, however, have had to conform to the limited mandate won at Punta del Este.

The United States seeks the prohibition of certain investment measures both as a means to clarify existing GATT obligations and as a way to broaden the scope of the GATT with respect to investment. For the United States, an unequivocal statement on certain practices would increase predictability in the GATT dispute settlement process and would generally increase the pressure on countries to remove measures inconsistent with GATT. Further, the United States would like to clarify the use of incentives to "buy" TRIMs. It is unclear just how broad GATT coverage is of tax breaks and other incentives used to influence investment or to indirectly modify trade behavior.234 Finally, it may be that the United States desires TRIMs talks, regardless of the eventual scope or substance of commitments reached, because any discussion of investment in a GATT context could operate as a


232. Given changes in the make-up and direction of investment flows, it has been asserted that "the strongest advocates and opponents of new restrictions on TRIMs are representing not so much their present concerns as those of a decade ago." E. Graham & P. Krugman, supra note 200, at 153.


234. But see the discussion of the ITALIAN TRACTORS PANEL, infra notes 261-62 and accompanying text (indicating that such coverage is broad).
symbolic precedent for expanding that discussion in future GATT rounds.

The United States has taken the most aggressive position on TRIMs. It has proposed a two-tiered discipline, prohibiting certain TRIMs and subjecting others to a test for their "effect" on trade ("effects test").235 Prohibited measures would fall into three classes. The first class purports to elaborate existing GATT article III and XI disciplines; it would proscribe domestic content and purchase or use requirements, manufacturing requirements, production or technology use restrictions, technology transfer requirements, domestic sales requirements, and trade balancing requirements.236 The second class would prohibit export performance requirements and product mandating.237 A third class would forbid any other measure which "inherently" restricts or distorts trade.238 Examples include conditions on access to foreign exchange or on remittances tied to the import or export behavior of an enterprise.

All other TRIMs would be subject to the so-called "effects test."239 Under this standard, a party could bring a claim that an investment measure had an adverse effect on its trade, regardless of whether the effect amounted to nullification or impairment of its benefits under GATT article XXIII.240 Domestic equity requirements, company-specific remittance and exchange restrictions, and restrictions on production have been listed as nonexhaustive examples of such measures.241 To prevent such a test from swallowing the GATT altogether, the United States proposes to define "investment measure." The definition is broad and would include establishment and operating restrictions, the most encompassing of the five national investment controls.242

235. Communication from the United States to the GATT Negotiating Group on Trade-Related Investment Measures, MTN.GNG/NG12/W/24, 4-6 (1990) (on file USTR) [hereinafter U.S. Submission].
236. Id. at 4-5.
237. Id. at 5.
238. Id.
239. Id. at 5-6.
240. Id. at 6. See notes 274-76 and accompanying text.
241. Id. at 5.
242. An "investment measure" is any measure maintained (i.e., provided for by laws, regulations, judicial decisions, administrative rulings, or policy statements) or applied by a contracting party
(a) as a term or condition of permitting an investment in its territory;
(b) in connection with the establishment of a company, or the making or expanding of any investment;
(c) as a condition for the receipt of an incentive (*) or services necessary for the conduct of business;
(d) as a condition for the continued operation of a company.
Investment in the GATT

The European Community supports a TRIMs agreement but is less enthusiastic than the United States, in part because of French and British domestic content rules designed to restrain market penetration by Japanese auto and electronics manufacturers, particularly by so-called "screwdriver operations" (low value-added assembly plants).243 The Nordic countries and Japan have both generally favored some form of prohibition of TRIMs.244

Developing countries245 oppose TRIMs disciplines as largely unnecessary, as inimical to their development interests, and as a one-sided approach which fails to account for the restrictive business practices of multinational enterprises.246 India, Egypt, the Philippines, and, to a lesser degree, Australia are the principal TRIMs agreement opponents.247 A TRIMs agreement is considered inappropriate because the mandate of the Negotiating Group is to study "trade-related" investment measures and so, by definition, a TRIM must have a trade effect. In such a case, these countries believe that existing GATT dispute settlement provisions for nullification or impairment of benefits are adequate.248

India has asserted that prohibition is a rarely used discipline in the GATT and beyond the mandate of the Group.249 If TRIMs are to be disciplined at all, India argues, they should be subject only to an "effects test," i.e., a test for their actual effect on trade flows. India concedes only that export performance requirements, local content requirements, and trade balancing requirements may, in some circumstances, adversely distort trade.250 Any party imposing a measure found to distort trade would be required only to eliminate the distorting effect of that measure.

*It is understood that this Agreement does not establish disciplines on investment incentives per se.

Id. at 9.

243. See Hayes, supra note 210, at 11.

244. Id. at 17, 19. Given U.S. and EC hostility towards Japanese investment, Japan would be well-advised to take a lead role in pressing for international investment rules. See infra note 36.

245. Opposition to TRIMs is generally voiced by developing countries who maintain that "current GATT TRIMs rules seem to work rather well and that not much modification is needed." This view has been supported by Argentina, Brazil, Cameroon, China, Colombia, Cuba, Egypt, India, Nigeria, Pakistan, Sri Lanka, Tanzania, and Yugoslavia. The Role of Trade-Related Investment Measures, 7 INT'L TRADE REP. (BNA) 568 (1990).

246. See, e.g., Indian Submission, supra note 206.

247. Egypt and India Continue to Oppose TRIMs Agreement Supported by Developed Countries, 7 INT'L TRADE REP. (BNA) 1737 (1990).


249. Indian Submission, supra note 206, at 4-6.

250. See id. at 9, 11, 14.
India views performance requirements as “the basic mechanism for harmonizing the foreign direct investment and technology flows with [a country’s] national development objectives and priorities.” For India, performance requirements are one of several tools necessary for developing countries to improve their economic positions. It argues that in practice these programs are often combined with incentives in a way both to attract industry and to suit a country’s individual development needs. It is in the interest both of the investor and of the host country to strike a deal favorable to each.

Finally, India asserts that the Negotiating Group must also develop a position on the restrictive business practices of multinational enterprises. So-called restrictive business practices include corporate policies which carve out global regions as markets for specified members of a corporate group, or which designate corporate suppliers for foreign subsidiaries based on the global strategy of the corporation, rather than on the economic environment in which the subsidiary operates. Restrictive business practices by parent companies also include limits on technology transfers, restraints on licensing by subsidiaries, and transfer pricing policies which may reduce tax and other revenues to host governments.

V. Negotiating Investment in a Trade Agreement: Struggling with Literalism

The nature of the TRIMs discussions is the result of investment issues forced through the sieve of a trade agreement. As stated above, countries impose five controls on foreign investment in their territories. While the list of thirteen measures suggested by the United States and others includes measures from each of the five classes of national investment controls, the requirement to show the “trade-relatedness” of each of these measures relegates the potential scope of the negotiations from general national investment controls to primarily a subset of operating requirements. performance requirements related to trade. In the Model BIT, these measures are largely covered by a single paragraph.

251. Id. at 4.
252. Id. at 5.
253. Id. at 6-7.
254. Model BIT, supra note 8, art. II, para. 5. See supra part III(A)(2). It is not clear, however, whether the Model BIT proscribes performance requirements achieved by the offer of an incentive rather than a formal requirement. For example, a country might offer a tax holiday to enterprises upon exporting a certain percentage of domestic production. Such an incentive would clearly encourage a company to export but would not necessarily constitute a “requirement” under the BIT.
While the battle for the right to frame the investment question in the Uruguay Round may have been won by the literalists, the war is not yet over. The very significant task remains to reach an agreement on the terms of a TRIMs agreement. Arguably, the success of the conflict will be determined by the specific provisions (and their effect on governmental and private behavior). It is to this struggle that this article now turns.

This part examines the functionalist and literalist approaches to structuring a TRIMs agreement in light of the language and practice of the GATT. The United States has proposed a two-tiered, prohibition and effects test, discipline. Developing countries oppose any change in the GATT and accordingly only support an effects test as provided for by GATT article XXIII. This Part evaluates these approaches and assesses the compatibility of a TRIMs agreement with existing international trade and investment law.

A. Prohibition in a TRIMs Agreement

As seen in part III, agreements for the liberalization of investment achieve their ends by guaranteeing national and MFN treatment to economic actors: people and enterprises. While no measure is applied in a vacuum, i.e., all government measures apply to these actors at some point, the focus of the GATT is products. Thus, from the start, those who would attempt to craft provisions to liberalize investment must pursue unconventional means. Prohibition is such an approach.

1. Prohibition to Improve Predictability

Prohibition is an opportunity to clarify GATT provisions as they relate to investment, and thereby to improve the predictability and efficiency of the GATT dispute settlement process. Prohibition, how-

255. Contracting Parties have recourse to the GATT where the benefits accruing under the agreement have been nullified or impaired by another Contracting Party. GATT, supra note 1, art. XXIII.

256. “[H]aving regard to the objectives of Articles III and XI of the General Agreement,” the U.S. would prohibit measures which:
(a) require a given level or percentage of domestic content, the purchase or supply of goods from domestic sources in preference to imports, or the substitution of domestic goods for imported goods;
(b) require the mixture, processing or use of products in ways which require, directly or indirectly, that a specified amount or proportion of any product be supplied by domestic sources;
(c) require the manufacture of particular foods in the territory of that party;
(d) restrict the production of particular goods or the use of particular technology;
(e) require the transfer, use or licensing of a particular technology or process for local production;
(f) require the sale of a given level or percentage of production in the territory of that party; or
(g) require exports or foreign exchange earnings as a condition for importing.
ever, is a discipline already provided for in the GATT. A complainant alleging a violation of GATT articles benefits from a presumption that measures inconsistent with the GATT nullify or impair benefits under the General Agreement and give rise to article XXIII dispute settlement rights.\textsuperscript{257} Such a presumption is referred to as \textit{prima facie} nullification or impairment and may be relied upon regardless of the actual trade effect of the inconsistent measure.\textsuperscript{258} In effect, this presumption shifts the burden of persuasion from the complainant to the respondent, who must then refute the allegations or justify its inconsistent behavior. The effect of this shift is tantamount to a prohibition discipline. Under this framework it becomes critical to know how GATT practice has defined the contours of GATT obligations.

The language and practice of the GATT form a "common law" which, for a trade agreement, is surprisingly favorable to the interests of investors subjected to TRIMs.\textsuperscript{259} Article III(4) contains the national treatment obligation, which provides, in relevant part:

The products of the territory of any contracting party imported into the territory of any other contracting party shall be accorded treatment no less favourable than that accorded to like products of national origin in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use.\textsuperscript{260}

In what has been a landmark for establishing the broad reach of the national treatment article, the Italian Tractors Panel\textsuperscript{261} ruled that

\textit{U.S. Submission, supra} note 235, art. I, para. 2. This list obviously ranges in its adherence to the GATT: (a) and (b) follow GATT article III paragraphs 4 and 5 rather closely while (e) is not apparent as an articulation of either article III or XI.

\textsuperscript{257} "In cases where there is an infringement of the obligations assumed under the General Agreement, the action is considered \textit{prima facie} to constitute a case of nullification or impairment." \textit{Contracting Parties to the GATT, Basic Instruments and Selected Documents} Supp. No. 26, at 210, 216; annex I, para. 5 (1978-79) (Understanding Regarding Notification, Consultation, Dispute Settlement and Surveillance, annex I, para. 5, adopted Nov. 28, 1979) [hereinafter Understanding Regarding Notification]. Nullification or impairment of benefits gives rise to a right of recourse under GATT article XXIII. \textit{GATT, supra} note 1, art. XXIII.

\textsuperscript{258} The FIRA Panel, for example, did not undertake an inquiry into the actual "effects" of the measures on trade. Instead, it found this sort of inquiry "not directly relevant" because a violation of the GATT is "presumed to have an adverse impact on other contracting parties." \textit{Contracting Parties to the GATT, Basic Instruments and Selected Documents} Supp. No. 30, at 167 (1982-83) (Canada—Administration of the Foreign Investment Review Act, Report of the Panel adopted on Feb. 7, 1984) [hereinafter FIRA Panel]. \textit{See also} R. Hudec, \textit{Retaliation Against "Unreasonable" Foreign Trade Practices: The New Section 301 and GATT Nullification and Impairment}, 59 Minn. L. Rev. 461, 484, n. 65 (1975).

\textsuperscript{259} \textit{See also} Fontheim & Gadbaw, \textit{supra} note 208, at 143, 158 (asserting that all trade-related performance requirements violate one GATT article or another).

\textsuperscript{260} \textit{GATT, supra} note 1, art. III(4).

\textsuperscript{261} \textit{Contracting Parties to the GATT, Basic Instruments and Selected Documents} Supp. No. 7, at 60 (1959) (Italian Discrimination Against Imported Agricultural Machinery, Report of the Panel adopted on Oct. 23, 1958) [hereinafter \textit{Italian Tractors Panel}] (finding Italian credit program offering more favorable loan terms to purchasers of domestic
the operative word in this provision was "affecting:"

[T]he text of [article III] paragraph 4 referred ... to laws and regulations and requirements affecting internal sale, purchase, etc., and not to laws, regulations and requirements governing the conditions of sale or purchase. The selection of the word "affecting" would imply, in the opinion of the Panel, that the drafters of the Article intended to cover in paragraph 4 not only the laws and regulations which directly governed the conditions of sale or purchase but also any laws or regulations which might adversely modify the conditions of competition between the domestic and imported products on the internal market.262

Thus, while the national treatment article refers to products, the value of the provision for investors should not be underestimated. It is broad enough to cover "any laws or regulations which might adversely modify the conditions of competition between the domestic and imported products." Further, a recent GATT Panel concluded that withholding an advantage (suspension of dumping proceedings) is tantamount to a "requirement" under article III(4). While this decision has not been adopted by the Contracting Parties, it is further evidence that GATT panels give broad reading to article III.263

In addition to a favorable interpretation of the fundamental nature of the national treatment obligation, GATT practice also offers specific guidance. In examining the Canadian Foreign Investment Review Act of 1973 (FIRA), a GATT Panel ruled that undertakings to purchase from domestic manufacturers or suppliers constitute "requirements" inconsistent with GATT article III(4).264

Canada had passed its investment law "in recognition [of] the effect [of foreign control of Canadian industry] on the ability of Canadians to maintain effective control over their economic environment."265 Under the FIRA, only that foreign investment which was likely to be of "significant benefit to Canada" was permitted.266 Accordingly, when Gannett wanted to acquire a Canadian billboard company it committed to purchase its newsprint for its U.S. operations from Canadian sources, and when Apple Computer wished to enter the Canadian market it agreed to buy Canadian-made parts.267

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262. Id. at 64.

263. In the Screwdriver Case, the Panel ruled that the practice of offering to suspend antidumping proceedings on condition of an agreement to purchase goods from domestic sources was tantamount to a requirement under article III(4) and, therefore, GATT-inconsistent. Screwdriver Panel Decision, supra note 37, at 74, para. 5.21.

264. FIRA PANEL, supra note 258, at 158-61.

265. Id. at 142.

266. Id.

267. McCulloch & Owen, supra note 46, at 340. The Panel found that the FIRA did not
While the effect of the FIRA Panel decision was to outlaw domestic purchase requirements on national treatment grounds, the reasoning of the Panel offers less cause for functionalist rejoice. The Panel stressed that its holding was not designed to protect the interests of foreign investors but only to ensure that national treatment was accorded goods originating in any other Contracting Party. The FIRA Panel ruled that domestic purchase requirements infringed the rights of exporters who would otherwise have supplied the investor, rather than the rights of the investor itself. Domestic purchase requirements would appear clearly to violate the GATT after this decision. The decision does not, however, represent a significant ideological endorsement of functionalism.

In contrast to article III(4) and its reference to measures “affecting” sales and purchases, the language of article XI(1) is certain: prohibitions or restrictions on the importation or exportation of products of a Contracting Party are forbidden. Article XI provides in relevant part:

No prohibitions or restrictions other than duties, taxes or other charges, whether made effective through quotas, import or export licenses or other measures, shall be instituted or maintained by any contracting party on the importation of any product of the territory of any other contracting party or on the exportation or sale for export of any product destined for the territory of any other contracting party.

A GATT Panel found that “restrictions” is broad enough to include administrative guidance as practiced by the Japanese Ministry of International Trade and Industry and other informal practices. However, the FIRA Panel rejected an argument that the article also

expressly require undertakings by investors but that as a matter of practice nearly all major proposals included such undertakings. FIRA PANEL, supra note 258, at 166.

268. For the Panel, “[t]he purpose of article III(4) is not to protect the interests of the foreign investor but to ensure that goods originating in any other contracting party benefit from treatment no less favorable than domestic (Canadian) goods, in respect of the requirements that affect their purchase (in Canada).” FIRA PANEL, supra note 258, at 160. The panel concluded that “the national treatment obligations of article III of the General Agreement do not apply to foreign persons or firms but to imported products and serve to protect the interests of producers and exporters established on the territory of any contracting party.” Id. at 167.

269. Id. at 158-61, 165-67.

270. GATT, supra note 1, art. XI(1).

271. In its review of Japan’s implementation of the Japan/US Arrangement on Trade in Semi-Conductor Products, the Panel found that, by its intricate system of administrative guidance and monitoring, the Government of Japan had instituted a “complex of measures [that] exhibited the rationale as well as the essential elements of a formal system of export control.” The lack of binding legal obligations was a distinction “in form rather than substance because the measures were operated in a manner equivalent to mandatory requirements.” CONTRACTING PARTIES TO THE GATT, BASIC INSTRUMENTS AND SELECTED DOCUMENTS Supp. No. 35, at 116, 157-58 (1987-88) (Japan—Trade in Semiconductors, Report of the Panel adopted on May 4, 1980).
prohibits export requirements. 272

The above decisions indicate substantial rights for investors subject to discriminatory investment measures. In terms of national treatment, there may be some value to a provision in a TRIMs agreement which expressly forbids domestic purchase requirements. The FIRA Panel ruled against these measures in the interest of forgone imports, not to protect investors. In theory, therefore, a per se prohibition would relieve a party subject to a domestic purchase requirement from the burden of showing that the requirement had infringed the GATT rights of another. As a practical matter, an express prohibition of domestic purchase requirements would be of value only to those investors who would otherwise import from countries not party to the GATT. GATT article III already protects the products of other Contracting Parties from this sort of discrimination.

With respect to incentives, the Italian Tractors and FIRA Panels indicate that an incentive to encourage an investor to discriminate in its trade is actionable under article III. If a TRIMs agreement provides for incentives, drafters would be well advised to note the flexibility of past GATT panels and not to attempt to specify prohibited incentives. To define specifically the scope of the word "requirement" would probably do more to aid those wishing to circumvent their commitments than to clarify GATT obligations.

For article XI, a TRIMs agreement could provide security to investors if certain measures were specifically proscribed as nonexhaustive examples of "prohibitions or restrictions." To list measures under this article would not do violence to its terms, nor would it confuse the integrity of the article with patches of functionalist improvements. Accordingly, as proposed by the United States, it would be useful to investors to prohibit technology transfer requirements, domestic sales requirements, and restrictions on access to foreign exchange (and on importation) tied to export levels. 273

A danger exists that prohibition of specific measures in a TRIMs agreement could imply that unlisted investment measures do not violate the agreement. This interpretation would effectively eliminate the right of a party to argue prima facie nullification or impairment of GATT rights for any unlisted measures, and the complainant would then shoulder the burden to persuade a panel that a measure has nullified or impaired its GATT benefits. To be effective, any list of proscribed measures must therefore be expressly nonexhaustive.

272. FIRA PANEL, supra note 258, at 164.

2. Prohibition as a Surrogate for Functionalist Investment Rules

In addition to predictability, prohibition offers functionals an opportunity to circumvent their GATT literalist mandate. By prohibiting a measure outright, no proof of trade-relatedness would be needed, and investment liberalization could be achieved. For example, agreement might be reached to proscribe certain technology transfer requirements or exchange restrictions having only tenuous effects on trade. While this approach is facially appealing, it is largely *ad hoc* and lacks a conceptual framework to support substantive discussions of investment in the future. The result may be to freeze future investment discussions as literalists reject attempts to revisit the investment question in a non-TRIMs framework. In such a case, the victory of prohibition would be pyrrhic. The solution to this problem is for functionals to stress that any TRIMs agreement is *not* an investment agreement. As conceived, a TRIMs agreement would be a *trade* agreement.

Functionals would be justified in not taking too aggressive a position on prohibition, lest a more aggressive position confuse the difference between TRIMs and investment for the future. The United States has proposed both export performance requirements and product mandating for prohibition under the agreement. Prohibition of these measures would expand existing GATT obligations — the FIRA Panel found no GATT obligation violated by export requirements — but, as measures *per se* affecting exports, these prohibitions would nonetheless be consistent with the traditional role of the GATT.

**B. Effects Test in a TRIMs Agreement**

Both literalists and functionals have proposed the inclusion of an effects test in a TRIMs agreement. Each camp has a different instrumental end for including such a test; neither camp should prevail.

1. Effects Test as a Functionalist Tool

The United States and others have proposed to subject all investment measures not prohibited *per se* by a TRIMs agreement to a test for an effect on trade. The GATT, however, already protects against the nullification or impairment of trade benefits, and as concluded by the FIRA Panel, this coverage includes the adverse trade effects of investment measures. In order to expand upon the GATT, therefore, proponents of an effects test propose to reduce the burden of

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274. *Id.*, art. I(3).
275. The effects test is articulated in article II of the U.S. Submission. *Id.*, paras. 5-6.
proof for complainants below that of GATT article XXIII. Under the
U.S. proposal, parties would violate the agreement by applying an in-
vestment measure which “adversely affects . . . trade,” defined to in-
clude an investment measure which:

a. restricts or displaces imports;
b. restricts, displaces or requires exports; or

c. nullifies or impairs any benefits accruing directly or indirectly
to a contracting party under the General Agreement or this
Agreement, taking into account imports or exports which would
have occurred had the measure not been imposed.276

This construction would effectively add a new injury test to the
GATT, according to which a party, to prevail, need only show that a
measure is an investment measure277 and that it has had some effect on
imports or exports. Not only is the GATT already overburdened with
injury tests, but also the legitimacy of this test is suspect. If a measure
neither per se violates the GATT or the TRIMs agreement nor nulli-
fies or impairs GATT benefits, then why prohibit its effects?278 The
answer is clear. By minimizing the “trade-relatedness” of covered in-
vestment measures, such an effects test would act as a back door to
expand the coverage of the TRIMs agreement despite the TRIMs Ne-
gotiating Group’s limited mandate. This approach would enable func-
tionalists to reach investment and would establish the foundation for a
presumption that a TRIMs agreement is an investment agreement
rather than simply a clarification of the GATT.

2. Effects Test as a Literalist Tool

Opponents to the discussion of investment in the GATT argue that
a test for adverse trade effects is the only appropriate standard for
regulating a measure under the GATT and that such a test is already
adequately expressed for TRIMs by existing GATT articles.279 These
countries would reject the reduced effects test proposed by the United
States. Instead, they would limit the regulation of investment meas-

276. Id., art. II(5).

277. See the U.S. Proposal’s definition of “investment measure,” supra note 242. This defini-
tion is broad and would cover many aspects of the five national investment controls. It can be
asked whether the lower “effects test” standard would also swallow the GATT.

278. Under the TRIMs agreement, the GATT would no longer operate solely to protect the
tariff concessions of the parties from circumvention, but by also prohibiting the effects of meas-
ures that do not rise to the level of an infringement of a tariff concession, the TRIMs agreement
would begin to protect investors rather than products. This is an attempt to achieve functionalist
ends by literalist means, but it is misguided because the link to a simple change in the trade
behavior of an investment is neither a rational nor an easily measurable way of identifying objec-
tionable discrimination.

279. See, e.g., Indian Submission, supra note 206, at 1-3; Also in the News, supra note 248.
ures to those with a trade effect inconsistent with the GATT. This approach, however, would eviscerate a TRIMs agreement entirely because any measure, whether applied to investment, services, immigration, or any other area is already potentially subject to GATT scrutiny if it has an effect on goods trade. A TRIMs agreement limited in the manner proposed by India would contribute nothing to the GATT.

More important, a literalist effects test threatens to weaken existing GATT dispute settlement provisions. This is so because the GATT allows complaining parties to shift the burden of persuasion to the respondent upon a showing of a GATT-inconsistent practice. Violation of a GATT obligation is deemed *prima facie* nullification or impairment of the GATT under article XXIII.280 If the TRIMs agreement were to subject all investment measures to an effects test, this could effectively shift the burden back to the complainant by making a trade effect a necessary element of its complaint. If the TRIMs agreement also elaborates existing GATT articles, *e.g.*, article III, complainants might lose the benefit of the *prima facie* nullification or impairment presumption.

Whether framed by functionalists or literalists, an effects test is inappropriate for a TRIMs agreement. An effects test would be contrary to the general proposition found in the agreements discussed in part III that an investment agreement should minimize discriminatory treatment regardless of the effect of the discrimination on an enterprise's trade behavior. In the GATT context, an effects test would be a redundant and weak discipline which could threaten an already frail dispute settlement process.

**C. Compatibility of a TRIMs Agreement with Other Trade and Investment Agreements**

A TRIMs agreement must operate both as an agreement within the GATT and as an addition to existing international trade and investment law.

1. **A TRIMs Agreement in the GATT**

The literalist orientation of the TRIMs mandate makes it likely that the provisions of the agreement will, subject to the possible effects on *prima facie* presumptions, comport with the GATT as it exists today. A possibility does exist, however, that the agreement would conflict with GATT rules on antidumping and subsidies.

Dumping occurs when the "products of one country are intro-

duced into the commerce of another country at less than the normal value of the products";281 export performance requirements oblige a company to export and may cause it to engage in dumping, at least in the short-run. Antidumping proceedings entail the burdensome task of showing material injury to domestic industry as well as proving less than normal-value pricing. Prohibition of export performance requirements in a TRIMs agreement could encourage parties experiencing competitive difficulties to charge other Contracting Parties with "inducing" enterprises to export as an easier alternative. There is also some potential for overlap between TRIMs and subsidies commitments if the TRIMs agreement should cover TRIMs bought by incentives. While an incentive may not rise to a subsidy under the relevant GATT provisions and Subsidies Code, it may constitute a "requirement" to export and be forbidden by a TRIMs agreement.

Suffice it to say that services are clearly outside a literalist's view of the GATT and yet are being negotiated in the Uruguay Round. A bifurcated effort (TRIMs and Services) to reach investment controls may lead to forum shopping problems, particularly because investment measures are often applied by countries across the board. Developed countries will press hard to include investment in services within the scope of an agreement. A more effective approach would establish an umbrella agreement covering goods, services, and investment and would emphasize non-discriminatory treatment of nationals and enterprises. It appears, however, politically necessary at this point to continue to package investment controls as services issues.282 Difficult questions might arise, however, for dual output enterprises. When IBM's access to foreign exchange in Brazil is limited to its export earnings, is this a restriction on trade in computers, or is it a limitation on the enterprise's ability to deliver its management services, or both? Should the United States bring a complaint under the TRIMs agreement or the GATS agreement? Does it have a right to retaliate against the goods of Brazil, the services, or both? The output orientation of the TRIMs and services discussions leads to these types of questions.

2. A TRIMs Agreement in International Law

In addition to the need for a TRIMs agreement to be internally consistent with the GATT, the agreement must also function as a part of existing international law. If the GATT MFN clause applies to a TRIMs agreement (as it will if the agreement is incorporated as an

281. GATT, supra note 1, art. VI.
282. See sources cited supra note 3 and accompanying text.
amendment to the GATT), then Contracting Parties maintaining BIT and FCN programs, as well as those adhering to the OECD Codes, might be required to extend certain of the benefits of these agreements to all GATT Contracting Parties.

This creates a tension for those who would view a TRIMs amendment as a functionalist advance. The more the amendment is considered an investment agreement, the less leverage countries with liberal investment rules have to encourage potential free-riders to change. National and MFN treatment for investments might be required of many Contracting Parties regardless of whether the home countries of the investors reciprocate such treatment.283

VI. CONCLUSION

The reference to the effects on trade in the mandate for the Negotiating Group has doomed the TRIMs negotiations to insignificant advances in liberalizing its namesake "investment."284 The limit on the scope of the TRIMs negotiations is a literalist victory. For capital-exporting countries, the prohibition of export performance requirements alone may be sufficient reason to endorse an agreement on TRIMs as an adequate attempt to regulate investment in the GATT. However, such a position would threaten the very future these countries desire.

To view the likely result of the TRIMs talks as an investment agreement would be to grant that investment can be discussed in literalist terms. This is not the case. It would be better to concede to the

283. The cost of such a loss in investment leverage is far less than a comparable loss of rights would be for trade in products. This is so because it would be difficult for a country to threaten another with more restrictive investment policies if the other fails to liberalize its investment laws. Once an investment is made, it is relatively difficult to restrict, and any restriction may in fact harm domestic employment or economic performance. In the case of products, however, it is very useful to be able to threaten to restrict the importation of certain products in order to force the exporter of those products to liberalize its trade policies, and even its investment policies. Nevertheless, the call for reciprocity in investment is growing, and so is the tension. See, e.g., Bergsten, Coming Investment Wars?, 53 FOREIGN AFF. 135 (1974) (proposing a New International Economic Order in part to stem possible future investment wars); H.R. 1396, 102d Cong., 1st Sess., 137 CONG. REC. H1669 (daily ed. Mar. 12, 1991) (bill to amend the Trade Act of 1974 to require reciprocity for investment).

284. This was not a necessary result of the relationship to trade inherent in the words "trade-related investment measures." The GATT Contracting Parties are also discussing trade-related intellectual property rights (TRIPs). While intellectual property is also considered a "new topic" in the GATT, in contrast to the mandate given to the TRIMs Group, the mandate for the TRIPs Negotiating Group anticipates progress. TRIPs negotiators are charged with clarifying GATT provisions and with elaborating, as appropriate, new rules and disciplines "taking into account the need to promote effective and adequate protection of intellectual property rights." See Ministerial Declaration, supra note 205, at 9. In contrast, no mention is made in the TRIMs mandate of an obligation to consider the need to promote protection of investment rights — only the effects on trade are to be considered by the TRIMs group. See supra notes 205-207 and accompanying text.
literalists their victory — blocking the introduction of investment rules into the GATT — and to declare a successful agreement on trade-related performance requirements, than to allow literalism to shape the future discussion of investment in the GATT. For those wishing to modernize the rules of economic relations, to add a TRIMs agreement to the GATT would be akin to improving transportation by putting wings on a train — despite an advancement in apparent form, little improvement would be made to function. The hulk would continue to lumber its familiar route, its inadequacies now glaring. What is required is an attitudinal change by the Contracting Parties to embrace functionalism.

Other functionalist movements are afoot in the GATT with both direct and indirect value for investors. Services talks not only symbolize a dramatic shift away from a products orientation in the GATT, but also are likely to include investment in services in the scope of the final agreement. Both of these subjects are clearly outside a literalist conception of the GATT. Countries with an interest in broad investment rules may do well to allow the services talks to operate as their "Trojan horse." To continue to press investment in a TRIMs context might add rigidity to the distinction between goods and services rules, and thereby artificially constrain the evolution of the General Agreement. Also, intellectual property is being discussed in the so-called Trade-Related Intellectual Property (TRIPs) talks. It appears that this agreement will contain an obligation to accord both national and MFN/non-discriminatory treatment to persons rather than products, a significant functionalist advance representing a move away from an output orientation towards a focus on the treatment of economic actors.

Investment is a reality of the age of the multinational enterprise.

285. The agreement would ideally be called "Agreement on Trade-Related Performance Requirements," rather than "investment measures," so that there would be no mistake that this agreement neither addresses nor forecloses the future discussion of investment in the GATT.

286. To a significant extent, services negotiations appear to be an attempt to package investment issues in a manner analogous to the GATT treatment of goods. Thus, while the subject of services is new to the GATT, the framework for discussing this subject comports with the GATT framework's orientation towards the output of enterprises (goods in a GATT context; services in the GATS) rather than protection of the enterprises themselves (as done in the BITs and FCNs). While the subject is progressive, the approach is literalistic. As the BITs and FCNs demonstrate, many of the problems faced by service firms would be solved by an agreement on investment containing non-discrimination provisions. See sources cited supra note 3.

287. Nicolaides points out that an obstacle to the discussion of services in the GATT context is the fear in developing countries that "multilateral negotiations on the right of establishment will prove to be the Trojan horse for circumventing national controls on foreign investment." P. NICOLAIDES, supra note 2, at 92.

In addition to its role as an agreement for the negotiation of trade and tariffs, the GATT has become the principal vehicle for the maintenance of peaceful economic relations in the post-war era. If nations are to continue to minimize the political tensions that arise from economic frictions, they must be willing to adapt their conventions for such purposes to the changing patterns of economic behavior. It is time to recognize reality and to free the GATT from its moorings as a trade agreement. If a literalist view of the GATT is so entrenched as to prevent this progress, then it is time for a new agreement. 289

289. Twenty years ago Goldberg and Kindleberger proposed a "GATT for Investment." Goldberg & Kindleberger, Toward a GATT for Investment: A Proposal for Supervision of the International Corporation, 2 Law & Pol’y Int’l Bus. 295 (1970). The proposal would cover “taxation, antitrust policy, balance of payment controls, export controls, and securities regulation.” Id. at 298. These authors would leave much to the sovereign discretion of nations and are “unsympathetic” to pressures by countries to have others open their markets to foreign direct investment. Id. at 297. Van Themaat takes perhaps the more circumspect view in supporting Professor Jackson’s call for an attempt to formulate a new World Trade Charter:

we all know that foreign investments may be both a corollary and an alternative to international trade in goods and services. It would therefore be logical, I submit, to have both of these two subject-matters covered also by a new organization, which then would become an organization for trade, services and investments.