U.C.T.
UNIVERSITY OF CAPE TOWN
2003 - 2004

LL.M. in Commercial Law
Dissertation in International Public Economic Law
Code: CML 640 S
Supervisor: Randall Van Voore

FDI, development and the Multilateral Investment framework

Name: Lacombe Samuel
Student number: LCMSAM001
Email: lacombesamuel@hotmail.com
Address: 13, rue de Seine 91000 Evry - FRANCE

Research dissertation presented for the approval of Senate in fulfilment of part of the requirements for the Master Degree in International Law in approved courses and a minor dissertation. The other part of the requirement for this qualification was the completion of a programme of courses.

I hereby declare that I have read and understood the regulations governing the submission of the Master dissertations, including those relating to length and plagiarism, as contained in the rules of this University, and that this dissertation conforms to those regulations.

Table of contents

I dedicate my thesis to LN

The internationalization of production and consumption has been the defining feature of the world economy since the mid 1980's. Foreign direct investment (FDI),[1] broadly defined as the creation of enterprises abroad or the acquisition of substantial stakes in existing enterprises, now represents a major form of cross border capital flow.[2] More than ever firms and industries in many more countries are expanding abroad through direct investment. It has been estimated [3] that today worldwide some 65000 Multinational enterprises (MNEs),[4] have established more than 850 000 foreign affiliates.[5] Foreign affiliates now account for about one third of world exports.

In 2002, the United Nations Conference for Trade and Development (UNCTAD) identified three main long term factors behind the expansion of international production :

1. an increasing number of countries have introduced policy reforms that facilitates inflows of FDI;
2. rapid technological change reducing communication costs and allowing the risk to be shared among greater markets;
3. and increased competition between firms to reach new markets and to locate production where costs are lower.

Thus, today most countries agree to let in FDI. This can be explained by the acceleration of the liberalization of domestic investment regime during the 1990s, which was particularly significant in the developing countries. However, countries tend not to grant unrestricted rights of entry to all investors and to all types of investment. Restrictions on investment typically remain in those sectors considered of national assets, such as telecommunications,

---

[1] FDI is usually distinguished from portfolio, where a foreign actor purchases securities in a domestic company solely to earn a financial return, without any intent to own, control or manage the domestic firm.

[2] Definition available at www.wti.org (the world trade institute). FDI takes generally one of these three forms : an combination of new equity capital such as a new plant or joint venture; reinvested corporate earnings; and net borrowing through the parent company or affiliates.

[3] These key figures are draws from UNCTAD (2002) and OECD (OECD), World Investment Report, 2002, p.1 of overview

[4] 90 % of which are headquartered in OECD countries

[5] Their combined sales of almost 19 trillion $ is more than twice bigger as world export in 2001 and the worldwide stock of outward FDI has increased from 1,7 trillion $ to 6,6 trillion from 1990 to 2001. World investment report www.imf.org and Doha WTO ministerial conference, briefing on trade and investment, negotiate or continue to study? www-heva.wto-minesterial.org/English/thewto_e/

health services and other public utilities. Developing countries, in particular, impose restrictions on entry and on the operation of foreign firms in order to enhance the economic impact of FDI. Nevertheless, investors often perceived excessive host country regulation as a instrument to protect or restrain access to their market. In this particular issue, risks are very high for both parties of an investment operation to enter into conflict as regard to their obligations.

Therefore some international instruments are currently used to determine the obligations of the parties in such operation. As a result, FDI are currently influenced by Bilateral Investment Treaties (BITs) and by regional trade agreement[6] (EU, NAFTA, ASEAN). These latter agreements are legally binding on signatories and together are covering almost all global FDI flows.

The economic rationale for regulating FDI, instead of granting free market access to foreign operation derives mainly from the fact that FDI typically takes place in concentrated industries and that such FDI generates externalities. As a matter of fact, host countries see here a scope for government intervention so as to close the gap between private and social returns from these investments. National FDI policies are thus, in principle, directed to influence the nature and the impact of FDI particularly regarding to these externalities and spillovers in the domestic economy.

Thus, the principal issue of the debate on the desirability of a Multilateral Investment Framework essentially focus on this long standing and not settled question as to how far government intervention is necessary to improve investment allocation and economic performance, and to what extent such interventions may lead to further distortions and inefficiencies. In theory, the presence of market failures justifies government intervention and may be necessary to improve economic efficiency. In practice, government intervention

---

6 regional economic integration and investment will be discussed in part I, section II, B. However, it could be said that FDI flows are relatively well regulated and protected in regional economic integration as they are a main instrument of an effective economic integration. Also, as a consequence, the economies of such economic communities are becoming largely dependant through FDI flows. See PriceWaterhouseCooper report investment in Europe, 2003.

frequently exacerbates distortions. At present, both theoretical and empirical research in the field of FDI is uncertain[7], failing to clearly sustain a case in favor of or against restrictions on government intervention.

The European Commission (EC) is the strongest proponents of a MIF to be negotiated at the WTO. In contrast, India has been leading the opposition to further extending the international regulation of investment in the WTO. Proponents of a MIF claim that such an agreement would be necessary to overcome the deficiencies of the current patchwork of bilateral, regional and multilateral rules on investment in order to provide international investors with a system of transparent, stable, and predictable set of rules. Such agreement are said to benefit also host countries which would host more investment flows as a consequence of a more favorable business environment.
Opponents to a MIF argue that the current system of international rules on investment and unilateral measures provide all the necessary legal foundations for international investment to take place. Moreover, the present system seems to leave host countries the necessary flexibility to regulate investment so as to meet national development plans.

In sum, today's proposal for further WTO regulations on international investment would represent a significant progress in terms of clarity, but might also represent further expansion on binding multilateral rules for developing countries.

Focusing on the key issues outlined above, the present paper will discuss the question of investment in developing countries on a economic and legal point of view, and examine the opportunity for a multilateral framework regulating investment. By doing so, I will offer an explanation of the main arguments over the ongoing discussions on this subject. Subsequently, the paper will discuss whether there are better prospects for a multilateral framework for investment in the context of WTO negotiations. Finally, some strategic options and policy recommendations are to be addressed in order to evaluate if consensus is reachable.

---

[7] Graham, "International conference on trade and investment", foreign direct investment, economic growth and African interests.

PART I The relation between FDI and Development

Development issues have gained the centre stage of multilateral trade negotiations. The new round of trade talks launched at the Doha Ministerial Conference of the World Trade Organization (WTO) in November 2001 has even *dubbed* the Doha Development Agenda. While the intention is laudable, there is an urgent need to debate in greater depth the development implications of concrete negotiating options. One area where this need is particularly sensitive is investment given the acrimony that has traditionally prevailed into north-south discussions and negotiations on this issue over the years.

I.1 FDI and development : Understanding the challenge

Sustainable development is a multifaceted notion that encompasses many dimensions. A serious review of the literature in this area is beyond the scope of this section. Nevertheless, there are at least three constitutive elements of an emerging consensus on the notion of sustainable development within the international community that are important to stress:

"... three components of sustainable development economic development, social development and environmental protection are independent and mutually reinforcing pillars. Poverty eradication, changing unsustainable patterns of production and consumption, and protecting and managing the natural resources base of economic and social development are overarching objectives of and essential requirements for sustainable development"[8].

FDI has a distinctive impact on the all three. It can be a powerful engine of sustainable development, particularly in developing countries where the need for growth is clear. Indeed, given the pervasive role of MNEs in world trade and in the creation and dissemination of technology and knowledge[9], FDI can contribute to economic growth and technological

---

[8] "plan of implementation", Monterrey consensus, UN : Report on international Conference on financing for development (2002) and "Political Declaration", UN Report of the World Summit on Sustainable Development (2002)

[9] about 90% of R&D expenditures is undertaken in OECD countries, UNCTAD: WIR 1999, p.199; and a small number of very large MNEs account for a large part of such expenditures.

upgrading. In addition to capital inflows, FDI can lead to transfers of technology and know-how, enables countries to link up with the international economy, expands exports and spur competition[10].

However benefits of FDI do **not materialize automatically**. The ability of a country to benefit from inward FDI very much depends on both the type of FDI that is attracted and the host country specific features as the levels of skills, the quality of infrastructure, the capabilities of domestic enterprises and the conduciveness of the policy environment[11]. When it comes to social development and environmental concerns, the impact of FDI is even less clear. On one hand, there are examples of MNEs providing not only employement but also health care, housing facilities, education and training to employes and families[12]. On the other hand, critics argue that MNEs are often engage in the violation of human right, including exploitation of child labour and contribute to pollution. The development dimension of investment is further criticized as regard to incentive based competition to host FDI. Indeed, in an effort to compete for FDI countries may lower environmental and social standards and thus encouraging a "regulatory race to the bottom". There are also concerns that host countries, especially poor ones, for similar reasons are spending too many of their limited resources on investment promotional activities, including financial and fiscal incentives.

The absence of an automatic link between foreign investment and growth sustainable development[13] also relates to the **quality and type of investment** and the domestic

---

10 T. Moran: "The relation between trade, FDI and development: new evidence, strategy and tactics under the Doha development agenda negotiations, paper presented at the seminar organized by the Asian Bank of Development, (Nov. 2002). The world Bank: "global economic prospects and the developing countries: investing to unlock global opportunities"(2003).
For more critical views: B. hoekman and K. Saggi: "Assesing the case for extending WTO disciplines on investment related policies", Journal of Economic Integration, vol. 15, NO. 4 (2000), p.629-653. P. Sauvé: Scaling back ambitions on investment rules at the WTO, JWT, (Sept. 2001), p.529-536

11 On the question of inward FDI, knowledge transfers and spillovers: M. Blomstrom and A. Kakko: "FDI, firm and host country strategies", Blomstrom and E. Stojholm: "Technology transfer and Spillovers"European Economic Review (1999), Vol. 43, p. 915-923.

12 The International Labour Organisation report on MNEs plantation in Kenya, for example, found that they tipically provide for basic health care with special efforts to combat HIV. "The role of MNEs in the plntation in Kenya", working paper, ILO (2002).
See also, Firms participating in the UN Global Compact.

13 Maria Carkovic and Ross Levine, 'Does foreign investment accelerate economic growth?', 2002.

regulatory environment. From a development perspective these argument underlines the need for DCs to adopt adequate policy frameworks to avoid adverse effects on competition, local enterprises, workers and the environment.

If not adequately regulated, FDI can create economic, financial and social problems. For example, developing countries are raising up the idea that FDI deregulation can exacerbate balance-of-payments problems and financial instability created by repatriation of profits, high levels of input-related imports, and transfer pricing. Many multinational companies use developing countries as assembly or distribution points. This practice limit considerably the developing countries ability to take profit of the comparative advantage. In such operations technology transfer to the local economy is not really assured. The activities of multinational companies in developing countries may also have adverse impacts on environment and labour rights.

This does not mean that domestic regulations are a "panacea" for development. In the absence of good governance, domestic regulations can result in adverse development outcomes, such as the concentration of the benefits of FDI and prosperity in the hands of élites. However, the introduction of WTO investment rules would not address the problem of governance[14]. In fact, it would limit the ability of governments to introduce a pro-development regulatory framework for investment. Some developing countries concern is that providing an International regulatory framework would benefit mostly multinationals and consequently reduce the capacity of domestic firms in the host country to realize important investment[15].

How can this objective, realizing the full potential of FDI for development, "the development dimension" of FDI, be attained? For analytical purposes one should try to distinguish the **quantitative aspect** of this challenge- how to attract and facilitate larger flows of FDI to the developing world, from the **qualitative aspect**, which means both how to ensure that the

---

[14] see Doha ministerial conference declaration on investment and the need for regulatory framework.

[15] "Crowding out' effect related to FDI is usually referred to as a situation in which domestic firms are driven out or discouraged to enter the market by the new entry of foreign firms with which they are not able to compete with. Illustrations were found in Latin America. Agosin and Mayer 2000.

potential benefits of increased flows are fully realized and equally important, how the potential costs associated with FDI flows to DCs can be minimized. Such a analysis requires a brief overview of what determines the location of different types of FDI and what is limiting the benefits of FDI into DCs.

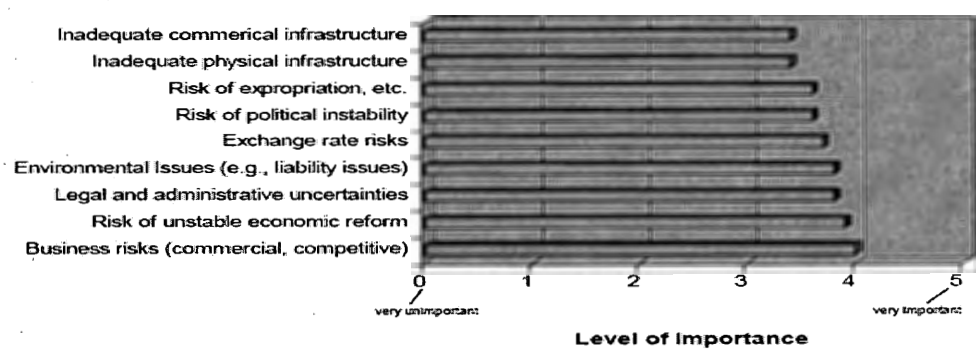
I.2 What Factors Affect Levels of Foreign Direct Investment?

In general, investors are interested in expanding abroad only if the investment can be expected to be profitable at least in the long term, as shown in the FDI[16]survey. In principle, there are three main motives for investing abroad, all heavily influenced by the economic fundamentals of the location[17]:

1. To access materials and natural resources: resources-seeking FDI
2. To penetrate new or expand in existing markets: market-seeking FDI
3. To benefit from lower costs of production: efficiency-seeking FDI

Even if one of the main concern is profitability and competitiveness, investors are also looking for an investment climate that offers stability and predictability over the long term. Thus, if a large number of factors will affect the location of FDI, certain of them are said to be beyond the scope of government policy (they include large markets, natural resources/raw materials and cheap labour, and other largely depends on government policies.

Figure 1: Importance of Key Impediments to FDI



Source: Klavens & Zamparutti (1995).

16 Klavens and Zamparutti, 1995.

17 UNCTAD, 1999b

A comprehensive approach of the main obstacles to FDI will try to address what can be done to create a more favourable investment climate at a national level. The analyse of investors behaviour and government capacity to overcome FDI barriers will therefore constitute the directive line of this section. If an overview of the main obstacles to FDI were to be addressed, three categories of obstacles would be identified:

I.2.1 Economic fundamentals

They cover a wide range of determinants which play out differently in different industries and for different type of FDI. Many, DCs are well endowed with *natural resources* such as minerals and oil which have attracted significant volume of FDI. For example, the African continent possesses large resources and traditionally about 60% of all FDI flowing into Africa has been linked to natural resources[18].

For *market seeking FDI* the key factors are related to the size and the growth of a market. An important point is that many investment projects have been undertaken by manufacturing firms to jump barriers of protected markets or to compete more effectively in the domestic environment like in China, India and Brazil. Also, market seeking FDI has come important in the context of privatisation programmes like in South America and central Europe.

Finally, small and non resources rich country see an opportunity for attracting MNEs in efficiency seeking export orientated FDI. This is the most mobile and thus dangerous type of FDI because exposed to locational competition. In this situation, an attractive combination of key economic factors is requested such as competitive labour costs, efficient infrastructure, and the relative abundance of skilled labour. In sum, the inability to provide competitive economic fundamentals in these areas can be an effective obstacles to attract export orientated FDI.

As regard to economic fundamentals, DCs cannot do a lot. However, many concerns, in the end, such as macroeconomic problems, inflation, high interest rates and exchange rate fluctuations, as well as financial sector reforms seems to be in the realm of government policy.

---

[18] Morisset, 2000, FDI in Africa : Policies also matters, Transnational corporations Vol 9, No 2, p.107-125

I.2.2 Political fundamentals

The risk return ratio of investment is largely influenced by host country policy and regulatory framework. In particular, the presence of political instability, conflicts, disturbance of labour market, lack of good governance, poor protection rights, corruption. Typically investors expectative can be summarized as follow: Are there commitments in place to protect investors against expropriation without compensation, discrimination in favour of domestic competitors, or arbitrary and unfair treatment? Are there restrictions on foreign investors, such as arduous conditions for entry, limitations on repatriation of profits, requirements to purchase domestic inputs, or requirements to export a certain percentage of output? Are there restrictions on foreign currency conversion? The nature of the domestic tax regime is also a major consideration for potential investors. Is it overly onerous? Overly complex? Unfriendly to foreign investors? It should be noted in this regard that a survey[19] of MNEs and African investment promotion agencies, found that extortion, bribery, bureaucratic delays and high costs of doing business represent some of the principal obstacles into Africa.

The regulatory framework may also affects considerably the allocation of FDI. An example, is to be found in the fact that many countries evaluate and discipline FDI at the entry phase and the time required to obtain licences, permit or approvals can negatively influence the allocation of FDI as being very unfriendly long. Some empirical studies reveal that the time needed to open new business vary considerably among DCs from 15 days in Panama to 152 in Madagascar[20]. In fact, low income countries with a lower level of institutional capacity generally impose more regulation on the private sector than in developed countries. Here, the level of administrative costs is highly relevant.

Another political fundamentals is the openness towards FDI. Investment liberalization remains a necessary but far from sufficient condition to attract FDI. Further development on this matter is to be exposed on in Part II, point 2. Although DCs have come a long way in creating a more friendly environment, more can and need to be done to strengthen the institutional capacity to implement reforms, reduce administrative barriers and transaction

---

[19] conduced jointly by International Chamber of Commerce and UNCTAD 2000, see WIR 2000

[20] Schleifer, 2000, 'The regulation of entry', Policy research Working Paper, No 2661

costs. In some cases, the first step should be to offer more efficient environment in specially designated zones (Special Economic Zones in China or Rep. Of Korea) before eventually extending such practices to the whole economy.

Finally, one area showing direct impact on FDI is trade policy, such as trade liberalization and regional integration efforts. Indeed, the size of the national markets has generally become relatively less important over the last few years as a determinant of FDI and trade policies affects the relative ease and costs such as tariffs and non tariffs barriers with which MNEs play to acquired goods. Another relevant example of the importance of trade policies is reflected in the system of Trade Preferences. In fact, while preferred schemes such as General Preferences of free trade areas will remain significant in the short term, their erosion due to progressive tariff reduction creates an additional challenge for a number of small DCs. Those that are not able to upgrade their capabilities to ensure that they will remain competitive in the absence of Trade Preferences risk to lose existing investment, as preferences will be eroded.

I.2.3 Information market failures

When evaluating investment opportunities, investors do not enjoy a situation of perfect information. Managers of MNEs simply do not have the time or capacity to consider investments in DCs. An additional constraint on FDI inflows is that DCs suffer from an 'image problem'[21] although a lot has been done to ameliorate their image. A more differentiated and nuanced assessment would reveal investment opportunities.

In sum, overcoming information market barriers is especially important for small DCs that are not normally on the radar on MNEs when they consider where to invest. Here, one should mention the story of INTEL, the semi conductor manufacturer. This MNE chose to set up in Costa Rica despite the fact that the country had not been on the list of potential locations. But it was not until the Costa Rica promotion agency had alerted Intel's top

[21] media reports and news of developed countries seems to be dominated by images of political and economic disorder.

management that the country was anxious to compete for the investment that the company took Costa Rica into consideration[22].

In conclusion, to expand the opportunities for attracting FDI to DCs, all obstacles related t economic as well as political policy fundamentals and information barriers need to be addressed. Being able to do so effectively holds the promise of increasing the flows to DCs including the most marginalized and therefore could potentially contribute to their development process.

I.3 Benefits of FDI for development: in which circumstances?

Turning the FDI potential into reality remains challenging. Indeed, even when countries do manage to attract FDI, the development benefits from such investments can not be taken for granted. It is thus fundamental that FDI operates in harmony with the development priorities of the host country. As the impact of FDI on a host country depends on the circumstances under which investments are made, (features of the host country and the underlying motives for the investments, also the modes of entry chosen), an adequate policy at different levels can affect the outcome in important ways.

I.3.1 The Comparative advantage theory

The distinguishing feature of FDI as compared to other capital flows is that it involves more than just money. By definition MNEs have some kind of ownership specific advantages over local firms that allow them to compete internationally[23]. This leadership is expressed through different channels: MNEs tend to be more productive, more export orientated, technology intensive and pay higher wages than local firms[24].

Much of foreign investors comparative advantage is portable, 'Know-How', process and technology, but it is also consisting in job creation. Then, if a state offer an administrated protection, there is a possibility of shifting some of the firms comparative advantage to the

---

22 Spar, 1998, 'Attracting high technology investment: Intel's Costa Rica Plant', Foreign Investment Advisory Service Occasional Paper 11.WB

23 J.H.Dunning: "Multinational Enterprisesand the global economy", Harrow, (1993)

24 OECD: "Measuring globalization: the role of multinationals in OECD countries (2001), UNCTAD WIR 2002

host country. The basic example is the car manufacturer who establishes its production within a state with high degree of investment protection. Such investment brings jobs creation, 'Know-How', process and so far constitutes a real comparative advantage. Nevertheless, FDI in such circumstances might be a means of jumping tariffs walls or avoiding border restrictions simply by manufacturing within the domestic market. In such circumstances, the foreign investor " comparative ownership advantage" is not really transferred[25].

I.3.2 Spillovers and distributional effects of FDI in recipient country

Thus, MNEs by **bringing a bundle of assets** can offer important benefits to the host country. Some of these distributional effects are to be examined here.

Job creation and human capital development are two related and important objectives when seeking to attract FDI. MNEs often bring in recent management techniques and provide training and job learning opportunities to staff recruited locally by their foreign affiliates. In some instances, they also engage in the training of staff employed in local supplier firms.

However, the extent to which the training takes place varies considerably depending on the industry characteristics and the MNEs policies and the suppliers will[26]. Obviously the beneficial effects that training by MNEs can offer are only a complement to the more important generic public investments in education and human capital development.

Another main objective of attracting FDI is to **gain access to specific assets of MNEs such as knowledge and technology**. These benefits take the form of various types of externalities or "spillovers". For example, local firms may be able to improve their production capabilities and their productivity as a result of **forward and backward linkages** with the foreign affiliates. They may imitate MNEs technologies and management practices

---

[25] Further development on investors responsibility will be discussed on Part II A. see also'The effects of FDI', Hellmann, Murdock and Stiglitz 1999.

[26] Yet, it remains open to debate to which extent and under which circumstances FDI-related transfers of technology and know-how result in productivity gains

or hire workers trained by MNEs. Thus, FDI spillovers could boost the productivity of all firms, not just the productivity of firms in which foreign investors engage[27].

Given that the **technological gap between domestic and foreign enterprises** is generally more accentuated in DCs, these countries should be interested in attracting FDI. However, weak domestic capabilities also diminish the ability to absorb fully any "spillovers" from inward FDI. In fact, in the absence of competent skills among domestic firms[28], foreign investors are more likely (especially when seeking natural resources) to operates in enclaves with little interaction and few linkages with local firms. This result in limited transfer of management know how, market information and technological knowledge to local economy[29]. As a consequence, many poor developing countries may find themselves in a trap which is difficult to escape: FDI-induced spillovers would be required most urgently in poor countries to narrow particularly wide productivity gaps. However, it is exactly the technological backwardness which tends to constrain the benefits poor countries may derive from spillovers. Local firms often are too far behind in terms of technological and managerial development for imitating technologies applied by foreign investors or becoming involved as input suppliers.

The empirical relevance of **such spillovers are therefore hard to quantify**. Kokko[30], for example, summarises it as follows: "In brief, it seems clear that host country and host industry characteristics determine the impact of FDI and that systematic differences between countries and industries should be expected. There is strong evidence pointing to the potential for significant spillover benefits from FDI, but also **ample evidence indicating that spillovers do not occur automatically**."

---

27 JBIC institute FDI and development: where do we stand? JBIC working paper 15

28 According to De Mello the larger the technological gap between the host and the home country of FDI, the smaller the impact FDI will have in the former. Foreign Direct Investment in Developing Countries and Growth: A Selective Survey. *Journal of Development Studies* 34 (1): 1–34, 1997. Borensztein et al. show that FDI raises growth only in countries with a sufficiently qualified labour force *Foreign Direct Investment Versus Other Flows to Latin America*. OECD,1998

29 On the question of inward FDI, knowledge transfers and spillovers: M. Blomstrom and A. Kakko: "FDI, firm and host country strategies"; m. Blomstrom and E. Stojholm: "Technology transfer and Spillovers"European Economic Review (1999), Vol. 43, p. 915-923.

30 Kokko, Globalisation and FDI Incentives. Paper presented at the World Bank ABCDE Conference in Oslo, forthcoming in conference volume, 2002.

I.3.3 Integration to the world economy

An important objective of many DCs is to become **better integrated into the globalized economy**. MNEs can contribute to this objective in several ways. For example, through their international network, they can help DCs to access foreign markets for products and services already produced or for new activities. Meanwhile, for activities that are part of internationally integrated production networks, it is often equally important to have access markets for sourcing of parts and components at competitive levels of price and quality. Thus, efficiency seeking export orientated FDI often results in a expansion of both imports and exports of a host country. Among the countries that have achieved the largest gains in export markets during the past 15 years, inflows of FDI have generally played a critical role[31]. A challenge is thus for such FDI to develop their domestic supply capability to raise the level of value added being performed in the economy.

I.3.4 FDI and competition

Also, The presence of MNEs should assist economic development if it **spurs competition** with productivity gains and lower prices but FDI can also results in a increased market concentration and then it can affect economic efficiency. The widespread movement of takeovers and M&As with existing firms are more likely to lead to an increased level of market concentration rather than "greenfield investment" that generates such gain.

I.3.5 Volatility

Attracting capital in the form of FDI is highly preferable. Indeed, FDI tend to be more long term orientated and more stable[32] and therefore easier to help achieve some development goals rather than commercial debt and portfolio investment[33]. In periods of financial crisis, such as in East Asia in the late 1990s and in Argentina in 2000s, FDI appeared to be less mobile and volatile[34] than other sources (non-guaranteed) of private finance capital flow[35].

---

31 UNCTAD, WIR 2002

32 FDI is frequently perceived to have the required "bad weather"-quality, even though the stability of FDI may be overstated

33 For example, while Portfolio investment dropped by 23% in the main emerging markets in 2001, FDI remain unchanged the previous year. Institute for International Finance, "capital flows to emerging markets economies" (sept. 2002), www.iif.com

34 see figure 1 in appendices and also OECD 2002b: 23 f

35 World Bank, Global Development Finance, p. 89 (2003)

To conclude it is important to stress that **FDI is by no means a development panacea** . It cannot solve every problem facing DCs. However, the central role MNEs play in the global economy make it imperative for countries to consider how best to maximize the potential benefits of FDI. In many countries, FDI could play a more important role than it currently does in the development process[36].

The existence of a number of potential costs associated with FDI is a concern that host countries need to consider when seeking to encourage FDI. Common concern include risk of crowding out domestics enterprises, anti competitive and increased market concentration, labor exploitation, excessive use of promotional incentives and negative effects on the balance of payment. To increase the chances for positive impacts of FDI, the liberalization of regulations governing the entry of foreign investors must be complemented by regulatory policies that aim at directing the investment according to host country development policy and improve the markets. Such policies may involve the adoption of competition rules and merger review mechanisms, labor laws, environmental and consumer rules. In all the efforts to attract FDI benefits from it and limit the potential costs, there may be a role for international rules and commitments. The part III of the thesis is dedicated to this subject.

---

[36] Contributing to job creation, alleviating poverty, improving living standards

PART II Currents trends in FDI flows

II.1 distribution of FDI flows

The relative weights of different modes of entry have shifted in recent years. M&As has gained importance (8O%) whereas Greenfield investments steadily lost ground. This recent trend seems to be one of the biggest problems for DCs as Greenfield investment are reputated to favor massive job creation and to produce large distributional effects understood as positive spillovers[37]. In fact, widespread privatization in DCs during the 1990s has steadily increased the share of M&As in total FDI. For developing countries as a whole, in 2001 the ratio of M&As sales to FDI amounted 42% compared to13% ten years before. During the last decade the sectoral distribution of cross border M&As has also shifted. Whereas in 1990, 50% of M&As took place in the manufacturing sector and 46% in services, in 2001 the percentage was 33 and 62 respectively[38].

Also, FDI remains highly concentrated among industrialized countries. In 2001, industrialized countries hosted roughly two thirds of global FDI stock. On the same time FDI flows towards developing countries are very unequally distributed (see below point II.1.2). Asia and Latin America receive the bulk of FDI whereas Africa's stock of inward FDI amounted to a mere 2,3% of worldwide FDI in 2001. Also within region, FDI appear to be highly concentrated[39].

The developing countries hosting large amounts of FDI include China, Brazil, Singapore, Hong Kong, South Korea and Mexico. However, it as to be mentioned that the picture changes when FDI is considered as a share of GDP. On average, FDI stocks relative to domestic GDP in developing countries have exceeded the levels recorded in the industrialized economies.

---

37 see part I benefits and spillovers of FDI

38 UNCTAD FDI/TNC database

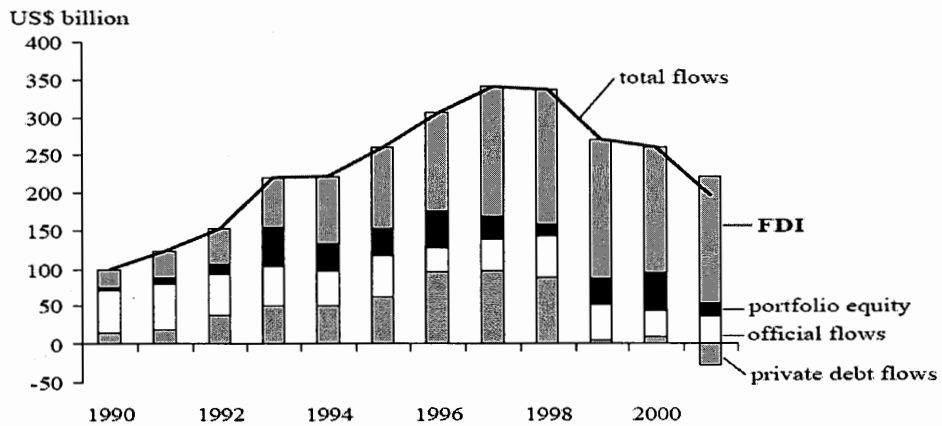
39 UNCTAD WIR 2002

II.1.2 Growing importance of FDI in external financing

Finally, not only is FDI becoming more important for DCs in relation to GDP, it is also overshadowing other capital flows such as Official Development assistance (ODA) and exports credits. Figure 2 reveals the dominance of FDI among different sources of external financing in recent years. By contrast, other private capital flows declined sharply in the aftermath of the Asian crisis. FDI in DCs was 10 times larger than ODA in 2001, in contrast to the latter half of the 1980s when the two were roughly the equal. Regarding this crucial point of comparison between FDI and ODA, it has to be said that for the Least Developed countries (LDCs) where ODA has traditionally been the most important source of external financing, FDI flows are now almost as high (or as low) as bilateral flows[40].

However, the structure of external financing differs significantly between regions and income groups. Even though overall aid stagnated, low-income countries, located mainly in Sub-Saharan Africa and South Asia, still depend heavily on official flows[41]. FDI played a minor role in these countries. Consequently, UNCTAD[42] reckons that the central challenge is to attract FDI to a much larger number of developing countries.

Figure 2 : Composition of Net Resource Flows to Developing Countries, 1990-2001



Source: World Bank, global development finance 2002

---

[40] UNCTAD WIR 2002:12

[41] OECD 2002a: 11

[42] UNCTAD WIR 2002b: 5

II.1.3 Is FDI flowing where it is needed most ?

While it is assumed that FDI flows constitute the most important source of external financing, it is more contentious whether all developing countries can actually draw on FDI as a complementary source of financing investment.

Scepticism in this regard is mainly because of the strong concentration of FDI in a fairly small number of developing countries. For instance, more than 80% of inward FDI stocks in all developing and transition economies were located in just 20 countries in 2000[43]. This group mainly consisted of either very large economies (China, Brazil, Indonesia) or fairly advanced economies (Hong Kong, Singapore, Korea, Czech Rep.). In addition, although FDI flows to the 49 LDCs increased during the 1990s, their combined share of FDI to all DCs amounted to a mere 1,9% in 2001[44]. More importantly, half of the flows to LDCs went that year to three nations, namely, Angola, Sudan and Mozambique into oil-extraction and other natural resources based industries. As being frequently concentrated in resource based industries of low income countries, FDI may be characterised as foreign-dominated enclaves with weak economic linkages to the local economy of host countries as previously quoted[45]. As argued below, economy-wide effects of FDI on productivity and growth may be extremely limited under such conditions.

II.2 Domestic liberalization of FDI policies

During the 1990s there has been an uninterrupted trend towards the liberalization of national FDI regimes (see figure 3). UNCTAD[46] reports some 208 changes in FDI laws by 71 countries in 2001 alone. Of the changes effected in 2001, 194 are said to have created a more favorable investment climate (more than 90%). Examples from some Latin American, Asian and African countries show that DCs have indeed managed to attract and benefit from FDI thanks to liberalization reforms that aim at improving investment climate. Costa Rica[47]

---

43 UNCTAD online data base

44 UNCTAD: WIR 2002 and UNCTAD: The LDCs report 2002

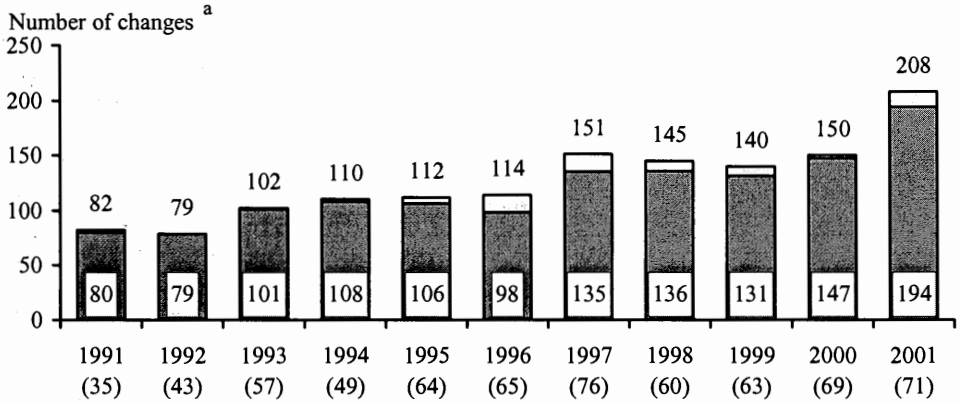
45 see Part I on spillovers

46 UNCTAD, WIR 2002

47 see in point I.2.1

represents an interesting example with its successful attempt to attract the world leading semi conductor manufacturer INTEL. In sum, generally, few countries today maintain formal restrictions on FDI into manufacturing, while notable barriers to investment remain in the primary and services sectors.

Figure 3: Number of Changes in National FDI Regulations 1991–2001



[a]Shaded area: changes considered more favorable to FDI; figures in brackets below years refer to the number of countries that introduced changes in their FDI regime.

Source: UNCTAD, WIR 2002:7

There are two major factors underlying the unilateral liberalization of FDI. First, the declining trend of official long term capital flows and the frequent occurrence of international financial crisis, particularly since the mid-1990s. The second factor is the potentially growth enhancing features widely attributed to FDI. Potential spillovers to the domestic economy from FDI have been described in the literature and evidence presented of their importance in a large number of countries. Given their almost insatiable demand for external finance, few DCs are willing to do without a relatively stable mode of supply of private funds. However, as discussed briefly above, many host countries have also found that FDI needs to be regulated in order to correct the market failures associated with it[48].

[48] UNCTAD 2002, OECD 2002

In sum, the following facts that emerge from recent trends in global FDI flow could be identified as follows:

1. Rather than representing the creation of new enterprises, FDI flows to industrialized economies tends to take form of M&As. This is increasingly true also for FDI towards the developing world. FDI flows increasingly into the services sectors, also and even in developing countries.
2. FDI flows to developing countries is (unfortunately) concentrated in certain countries or regions.
3. The share of FDI in total long-term external financing of all developing countries soared from less than 30% in the early 1990s to almost two thirds in 1998-2001 but is still unequally distributed
4. The incredible increase of FDI liberalization national regimes is mainly due to the scarcity of other financial flows such as ODA and to the potentially welfare effect attributed to FDI

PART III Analytical overview on the international investments instruments governing FDI

III.1 Bilateral Investment Treaties (BITs)

Apart from unilateral regulatory changes, the desire of governments to facilitate FDI flows is also reflected in a dramatic increase in the number of BITs for the protection and promotion of FDI during the 1990s[49]. Less than 400 BITs were reported at the beginning of the 1990s, more than 80 percent of which involved at least one developed country as a partner. The number of BITs rose to 2099 at the end of 2001.

III.1.1 basic features and functions of BITs

Long term overseas investment in an alien territory is full of risks and costs, much more than investment at home. Once invested, the national laws of the host country govern the investor and its operation. Typically, a foreign investor estimation of expected return to capital is strongly influenced by concerns of expropriation or the imposition of unfavourable rules concerning their operations. In certain extreme cases, these perceived risks have kept FDI from flowing to countries[50]. So investors require generally guarantees of protection by means of BITs. To date, BITs constitute the more important instrument for international protection of foreign investment as BITs provide the foreign investors a clear legal framework. At this stage two observations should be done:

- First, if a BITs is concluded between a industrialized country and a developing country, the former will typically seeks to secure higher standards of legal protection for the investments of its firms than those offered under the developing country's laws.

---

49 UNCTAD, *WIR* UNCTAD 1997: 19

50 For instance, the expropriation or nationalization risk in Latin American countries and in the middle east : "Anglo Iranian Oil CO. case".

- Secondly, since the early 1990s, developing countries have begun to sign BITs among themselves, so as to create a favorable climate for reciprocal investment flows. UNCTAD has been active in assisting developing countries in the drafting and in the signing of BITs. Consequently the network is expanding incredibly[51].

It should be mentioned that UNCTAD has highlighted the particularly development-friendly characteristics of BITs since they "do not disregard the special development needs of individual treaty partners" :

> "they (BITS) emphasize the importance of FDI for economic development and they usually recognize the effect of national law on FDI; furthermore they contain exceptions or qualifications to some general principles (exceptions for balance of payments considerations in relation to the principle of free transfer of fund)."[52]

Basically there are number of similarities between the key provisions in BITs as listed in Box 1. BITs establish fundamental principles such as National Treatment, Most Favorite Nation clause and non-discrimination. They also go beyond these basic principles by granting the right of establishment to foreign investors (like for instance the BITs concluded between the US and Canada), or prohibit performance requirements with regard to local content, to exports, and to employment as conditions for the entry by foreign investors.[53]

Box 1- Important Similarities between BITs

- Broad and open-ended definition of foreign investment.
- Entry and establishment subject to national laws and regulations.
- Fair and equitable treatment of foreign investors.
- Principle of national treatment of foreign investors, but often subject to qualifications and exceptions.
- MFN treatment, subject to some standardized exceptions.
- Right of the host country to expropriate foreign investors, subject to the condition that expropriation is non-discriminatory and accompanied by compensation.
- Guarantee of free transfer of payments related to a foreign investment, often qualified by exceptions in case of balance-of-payments problems.
- State-to-state dispute-settlement provisions; investor-to-state dispute settlement becoming standard practice.

source UNCTAD (1998a: 100) and CUTS (2001: 8 f.).

---

51 In 2001 alone, a total of 97 countries have concluded 158 BITs.

52 UNCTAD, report 1996.

53 List of performance requirements see UNCTAD report 1996, 1998.

In general, BITs do not affect the formal right to regulate the admission of foreign investors, but they do provide strong rights for investors and a variety of obligations on host governments once the investment has been done. Nevertheless, a host government can continue to exercise its sovereignty to regulate all aspects of the foreign investment in its country, as long as the provisions regulated by the BITs are respected (non-discrimination, expropriation, transfer rules). For instance, foreign investors have to comply with all national legislation related to environment and labor issues.

III.1.2 Some current issues regarding the use of BITs: are they a sufficient instrument?

- **BITs and multilateral investment agreement**

The proliferation of BITs can at least partly be attributed to the absence of a multilateral framework on investment. Yet, it is open to question whether this trend can be reversed by including investment in future WTO agenda. Many developing countries are opposed to binding multilateral investment rules, despite the argument that their bargaining position would become stronger in a multilateral context if they are united. As a matter of fact, the proliferation of BITs is largely because developing countries were eager to conclude BITs, either with developed countries or among themselves. In 2001, 86% of the 158 BITs concluded involved at least one developing partner country (Figure 2). Moreover, the largest share of BITs concluded in 2001 were an intra-developing country affair. It should also be noted that BIT activity was not restricted to relatively advanced developing countries, but involved various least developed countries as well. In 2001, a number of 23 least developed countries concluded 51 BITs, 13 of which least developed countries signed among themselves.

- **BITs and transparency**

As mentioned before, BITs are considered as a means to facilitate FDI flows and to provide foreign investors with a clear legal framework, in order to reduce uncertainty related to the treatment of FDI in potential host countries before and after entry. However, reducing legal uncertainty by concluding a large number of BITs may come at a cost for foreign investors.

An ever increasing number of BITs tends to reduce transparency and may render it difficult for foreign investors, notably relatively small enterprises engaging in FDI, to collect and evaluate the relevant information. Transaction costs related to FDI can, thus, be expected to rise with the number of BITs.

Considering the case of a French investor who wants to outsource relatively labor-intensive parts of his production to a developing country. Apart from evaluating economic fundamentals in potential developing host countries, the investor will have to study various BITs and compare the legal framework laid out there. As of January 2000, France had signed 112 BITs[54] among which 102 BITs had been concluded with developing countries. Even if the investor had short listed some developing countries on the basis of economic fundamentals, information costs might still be substantial when it comes to evaluating the relevant BITs.

Information costs and transparency do not only depend on the number of BITs. Actually, lack of transparency would be a minor problem, if legal and administrative procedures and regulations were the same in all BITs signed by one particular country. This is not the case, even though most BITs do have common features. Furthermore, some BITs go beyond the common general principles. This is particularly in two respects. First, most BITs do not grant the right of establishment to foreign investors, whereas some BITs provide a guarantee of national and MFN treatment on entry and establishment. Second, some BITs prohibit performance requirements with regard to local content, exports and employment, as conditions for the entry or operation of foreign investors.From the perspective of foreign investors, the limitations of BITs are primarily related to transaction costs. In addition to the number of BITs with different regulations and procedures, the reduction in non-economic risk through BITs is sometimes considered insufficient. Major shortcomings of most BITs are seen in lacking protection against violations of intellectual property rights, and in discretionary interventions by sub-national authorities of host countries that are not prevented by BITs.

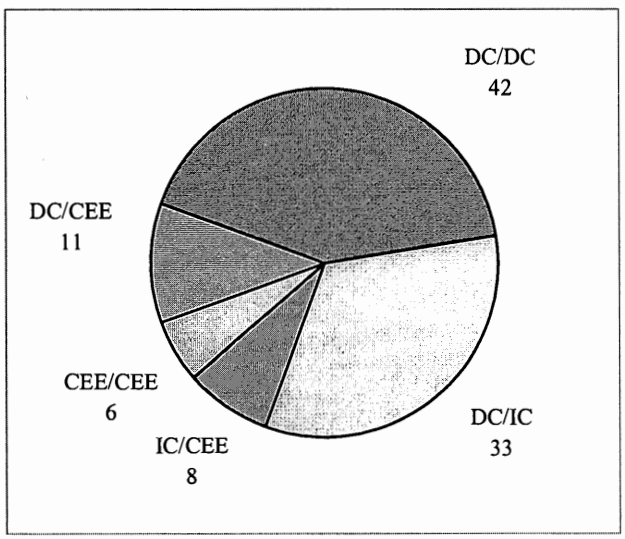
---

54 UNCTAD 2000b: 9

- **BITs and developing countries**

Developing host countries are also concerned about the inadequacy of BITs. This may be surprising since, as mentioned before, developing countries were signatories of most of the recently concluded BITs (as shown in figure 4 below). As it seems, developing countries faced a dilemma: They entered into BITs in order to improve their chances to attract FDI, even though the bargaining position of an individual host country, especially if it was small, in respect of foreign investors and their home countries was too weak to have a word on the exact terms of BITs[55]. Thus, developing countries frequently complain that BITs are unfair in that host countries (have to) agree to binding obligations in various respects, whereas foreign investors benefit from rights without assuming any duties. For example, BITs typically do not include provisions against restrictive business practices; they do not define basic labor standards to which foreign investors shall adhere; and they do not address the issue of binding obligations of foreign investors with regard to social responsibilities and transfers of technology.

Figure 4:BITs Concluded in 2001 by Country Group (%)



DC= developing countries; IC = developed countries; CEE = Central and Eastern European countries.

Source: UNCTAD (2002: 8)

---

[55] The World Bank, 2003: 127 notes: "The negotiating asymmetries that are common to bilateral agreements have led to treaties in which developing countries have taken on substantive obligations without any reciprocity other than the promise of increases in future private investment."

Coordination among developing countries may offer a way to strengthen their bargaining position in dealing with foreign investors and their governments. However, as shown below, the widely perceived prejudice of rights and duties in favor of foreign investors is also underlying the reservation of many developing countries to enter into negotiations on a multilateral framework on cross-border investment issues[56]. Moreover, it is open to question whether FDI would offer more benefits to developing host countries, if investment agreements were to include binding commitments of foreign investors. On the one hand, the "quality" of realized FDI projects may improve, if agreements ensure that FDI helps achieve development objectives of host countries. On the other hand, strict requirements imposed on foreign investors may have as a consequence that the amount of FDI flowing to developing countries declines. Foreign investors always have the option not to undertake FDI projects under conditions they consider unprofitable. **The severity of this trade-off depends on whether or not investment agreements can reasonably be expected to induce more FDI.**

- **BITs determinants and abundance**

The experience with BITs suggests that the amount of FDI flowing to developing countries is largely determined by factors other than investment agreements. UNCTAD[57] argues that: "it would be unreasonable to expect that any improvements in the investment climate brought about by BITs, which relate only to parts of the FDI policy framework, could exert a significant impact on FDI flows." Several empirical analyses confirm the relative insignificance of BITs in determining FDI:

- UNCTAD[58] analyzed time-series data on bilateral FDI flows between the signatory countries of a BIT. It was shown that the host country's share in the outward FDI of the home country increased only marginally after the signing of a BIT. This suggests that BITs do not cause significant change of FDI from host countries not being part of the agreement to host countries being signatories of BITs.

---

56 Kumar, N. (2001). WTO's Emerging Investment Regime: Way Forward for Doha Ministerial Meeting. *Economic and Political Weekly* 36 (33): 3151–3158; and Singh, A. (2001). Foreign Direct Investment and International Agreements: A South Perspective. South Centre, Occasional Papers 6.

57 UNCTAD WIR 1998a 117

58 UNCTAD WIR 1998b

- Hallward and Driemeier, which results are summarized in World Bank[59], compared FDI flows in the three years after a BIT was signed to those in the three years before. No significant increase in FDI was found. The cross-country evaluation of Hallward and Driemeier made use of 20 years of data on bilateral FDI flows from OECD countries to 31 developing countries. **Controlling for a time trend, there was little independent role for BITs in accounting for the increase in FDI.**

Even if, each approach may have its particular econometric deficiencies, it is striking that all available evidence comes to the same conclusion, namely that policymakers are well advised **not to put their faith in BITs as a major stimulus to higher FDI inflows**. Variables such as market size and growth, exchange rates and country risk turned out to be more important than BITs as FDI determinants.

In sum, the proliferation of BITs since the 1990s may have eroded the effectiveness of BITs in attracting FDI. The conclusion of BITs is no longer a distinctive factor signaling host countries' readiness to offer favorable investment conditions by reducing non-economic risk. Rather, foreign investors tend to regard BITs as a standard feature of the institutional structure prevailing worldwide. In other words, the proliferation of BITs could be characterized by "diminishing returns". Nevertheless, BITs should still turn out to be relevant in empirical analyses[60], if the few developing countries not taking part were considered relatively risky locations by foreign investors for this reason, therefore, they suffered negative effects on FDI inflows. However, weak economic fundamentals and markets, rather than the absence of BITs, appear to be the major factors working against FDI flows into these countries. BITs *per se* do little more than enabling multinational enterprises to invest in a partner country. It is a completely different question whether FDI will actually be undertaken as a result of BITs. This is rather unlikely, at least until economic fundamentals are conducive to FDI.

---

59 World Bank, 2003 box 4.4. *Global Economic Prospects*.
60 UNCTAD WIR 2002

III.2 Regional Investment Agreement (RIA)

The universe of regional instruments on investment or including investment rules is not as large as that of BITs but is still vast and diverse. Most of the RIAs have been of recent origin and immediately preceded or followed the conclusion of the Uruguay Round Agreement in 1995[61]. By July 2000, the number of regional free trade and customs union agreements (RTAs) had already exceeded 170 and a large number of them include investment related provisions as do several other trade agreements that do not aim specifically at regional integration like for instance the Energy Charter Treaty (ECT). Nevertheless, there are almost **no multilateral regional agreements which are investment specific.** Rather, investment agreements have largely evolved as chapters or clauses in RTAs[62]. The major examples of RTAs including investment provisions are ASEAN agreement, MERCOSUR, NAFTA, EC treaty.

In contrast to bilateral treaties, investment agreements at the regional level tend to have higher ambitions to liberalise entry and establishment (admission procedures) of FDI with protection issues sometimes addressed. They also try to eliminate discriminatory policies. The extent to which signatories to an RIA attempt to establish wide ranging and ambitious rules on foreign investment is largely a function of their previous experience with liberal investment regimes[63]. The archetype regional example is the North American Free Trade Agreement (NAFTA) which includes in its investment chapter (chap. 11) both liberalization and protection provisions. The provisions in these agreements vary considerably with respect to the definition of investment, right of entry and establishment, transparency, protection standards, disputes settlement, etc. It is not the aim of this paper to describe and compare the key features of these treaties to a great extent. Here, only

---

61 as quoted UNCTAD, WIR 2001 and UNCTAD 1999a: Chapter IV

62 see NAFTA chap. 11 and also the Energy Charter that focuses on trade, transit and efficiency issues apart from investment

63 Thus, for example, provisions very similar to those of NAFTA can be found in the FTAA agenda. Similarly, the OECD's attempt at the MAI came after many years of experience with liberal investment regimes in the OECD countries and NAFTA countries.

NAFTA[64] chapter 11 is briefly considered as it served as the basis for negotiations for the proposed MAI at the OECD and therefore may help to understand the factors that led to the failure of the OECD's attempt (as shown in point III.4 below).

On the contrary to most RTAs, NAFTA provides for a very comprehensive treatment of investment. The dominance of the United States in framing the treaty is reflected in the definition of investment, which is extremely broad and includes, apart from both direct investment and portfolio investment, intellectual property and loans. The scope of the agreement extends MFN and national treatment (NT) to both investors and investment. The application of the non-discrimination principles is extended by the addition of the clause on "fair and equitable treatment (FET)" to foreign investors. The treaty specifically states that no formal and substantive rule can be made which would give advantage to local investors. In addition, it is specified that "in like circumstances" there cannot be any discrimination with respect to any sphere of operation of an investment instrument.

Although investment disputes related to RTAs are increasing, just a few them include comprehensive disputes settlement mechanisms like NAFTA. Indeed, a regional Dispute Settlement Body (DSB) allows for international arbitration of disputes. No appeal to the host country is available for decisions of the DSB, and the treaty requires that there be some international element involved in any investment dispute. In other words, the DSB is only available where the investor and/or the investment belong to two different country jurisdictions. Unlike most RTAs, there is provision of investor-state dispute settlement (except for pure Canadian companies in Canada) and the private party has the right to nominate one of the three members of the DSB (NAFTA Treaty 1994)[65]. The treaty applies also to sub-national authorities. In a controversial clause, investors are entitled to dispute any

---

64 The NAFTA treaty between the US, Canada, and Mexico came into force in 1995 and will become fully operational in 2005

65 The framework for a binational judicial review of tribunal decisions is laid down in Chapter 19 of the NAFTA Treaty.

governmental action that harms their investment ("regulatory takings"). This has been very contentious and widely publicized with the METACLAD and ETHYL[66].

A broader comparison between the key provisions included into major existing RTAs and specially NAFTA regime led to some conclusive remarks of direct concern for any further attempt to establish an WTO investment agreement: It shows, firstly that NAFTA investment treatment regime are not the most convenient instrument to standardize multilaterally FDI as it are highly intrusive into domestic regulation including protection and treatment standards and therefore leaving no space for host country development policy. A short account of major RTAs also suggests that RTAs among developing countries have a limited coverage of issues like dispute settlement and national treatment of foreign investors. Developing countries appear to be more oriented towards promoting trade and supporting national companies, rather than foreign investment. For example, this applies to both MERCOSUR and ASEAN. Finally, a comprehensive treatment of investment in RTAs may be difficult to achieve if a large and heterogeneous set of countries is involved[67]. The efficiency of RTAs among developing countries seem not to be really convincing as their regional trade organization are not the most developed.

---

66 In *METACLAD*, a US investor sued Mexico for an alleged indirect expropriation, because the Mexican authorities had prevented *METACLAD's* Mexican subsidiary from operating a hazardous waste landfill in view of an environmental study concerning its dangerousness. The arbitration tribunal concluded that the prohibition violated NAFTA article 1105 (Minimum Standard of Treatment), since Mexico had not provided for a stable and transparent legal framework for *METACLAD's* investment. At the same time, the tribunal considered that the prohibition amounted to an ***indirect taking***. Mexico, therefore, had to pay compensation in accordance with NAFTA Article 1110. The tribunal paid particular attention to the investor's justified reliance on the government's representation regarding the permit. Finally, the tribunal considered that the award conformed to the principle according to which the NAFTA contracting parties have the right to ensure that foreign investment in their territory does not harm the environment. In *ETHYL,* the case related to a Canadian ban on importing into Canada a gasoline additive (MMT) because of its potential harmfulness to the environment The US company, ETHYL CORP., claimed that this ban amounted to an indirect expropriation since ETHYL was the only provider of MMT to the Canadian market. The dispute was settled out of court by a "voluntary" payment by the Canadian government. From the point of view of some NGOs these two cases provide additional reasons to oppose a MIF that would in their opinion limit the regulatory freedom of states in an unacceptable manner. Both cases can be consulted: METACLAD CORPORATION v. UNITED MEXICAN STATES, ICSID Case No ARB (AF)/91/1. the decision is available on the site of ICSID at www.worldbank.org/icsid; and ETHYL CORPPORATION v. Canada, Award given june the 24, 1998. Foy and Deane give a comprehensive explanation on these cases in 'Foreign Investment Protection under Investment Treaties : recent development under Chapter 11 of the NAFTA', 16 ICSID Rev. FILJ299. 2001

67 In a recent survey, Gestrain, OECD 2002 noted that the extent to which signatories to an RTA attempt to establish wide ranging and ambitious rules on foreign investment is largely a function of their previous experience with liberal investment regimes.

Here it should be considered that investment agreement are really effective in a well integrated and almost homogeneous regional organization[68] (in term of economic development).

III.3 The existing multilateral agreements on investment

The section here will provide a brief discussion of the investment provisions existing within the WTO[69]. The WTO contains two major multilateral agreements [70] that directly refer to investment issues: The agreement on trade related investment measures (TRIMs) and the General agreement on trade in services (GATS).

III.3.1 The TRIMS agreement

Trade Related Investment Measures are frequently imposed by government to either encourage or restrain foreign investors to achieve certain national priorities. They relate to trade distortions and restrictions imposed by the host country on multinational enterprises[71] that operate in their territory.

The most commonly used TRIMs in developing countries are requirements on local content, on foreign exchange balancing, on export performance, on joint venture or equity participation, on manufacturing limitations and finally on payment restrictions transfer.

---

[68] Kentin E., "Prospects for rules on investment in the new WTO rules". 2002, Kluwer law journal.

[69] Nevertheless, outside the WTO, a number of agreements and arrangements have been concluded that deal with regulation of FDI, including MIGA (Multilateral Investment Guarantee Agency) offering insurance coverage to foreign investors for political risks in developing countries. In addition, the International Center on Settlement of Investment Disputes (ICSID) which is also an another U.N institutions, facilitating the settlement of disputes between private investors and host countries. others instruments used but which application appeared quite contentious: the OECD guidelines on Multinational Enterprises and UNCTAD's set of multilaterally agreed equitable principles and rules for the control of restrictive business practice governing the conduct of international enterprises; the tripartite declaration of principles concerning multinational enterprises and social policy containing principles on employment, training, conditiond of work. See UNCTAD 1996.

[70] Three further agreements have indirect effects on investment : the agreement on subsidies and countervailing measures (ASCM), the agreement on trade related aspects of intellectual property (TRIPs)

[71] precisely, the TRIMs agreement is not confined to policies targeted at foreign firms. A panel report on a dispute concerning the Indonesian automotive sector has established that the "TRIMs agreement is not limited to measures taken specifically in regard to foreign investment" but covers also domestically owned enterprises. BORA, "trade investment related measures" in development , trade and the WTO-a handbook, Hoekman, Mattoo, World Bank

The WTO recognizes that some TRIMs might cause trade distortions and violate the principles of the GATT. Consequently the TRIMs was inserted as an annex to the GATT at the conclusion of the Uruguay Round. It requires that TRIMs that has been identified as inconsistent with GATT rules should be phased out. More specifically, the TRIMs agreement dealing exclusively with investment measures related to trade in goods (and not in services) prohibits performance requirements inconsistent with Article III (national treatment)[72] and Article XI (general elimination of quantitative restrictions). Moreover, the agreement contains an illustrative but non exhaustive list of TRIMs considered to be inconsistent with these Articles, including local content and trade balancing requirements and exports limitations. Then, countries are required to notify all non-conforming measures to the Council for Trade in Goods, and there is a commitment to roll back these measures in five years for developing countries and seven years for least developed countries. In this regard, some developing countries were granted a prolonged "phased out period" for existing TRIMs that are not conform with the agreement and article 4 allow developing countries to temporarily derogate from the agreement for balance of payment problems.

Taking consideration of this flexible aspect, it has been argued[73] that TRIMS offers a natural base for consideration of a multilateral agreement on investment. However, the principal problem with TRIMS is that it is restricted to trade in goods and does not cover services in which FDI is prominent. Moreover, TRIMS rules have remained highly contentious and various WTO members appear to have frequently violated them.

III.3.2 The GATS

Foreign investment in the services sector is concerned by the GATS, which covers FDI as it represent a mode of supply of services through "direct commercial presence" in a member state. GATS imposes on all its members transparency [74] and MFN treatment, subject to

---

[72] prohibits performence requirements inconsistent with article III

[73] Hoekman and Saggi 2001

[74] members are required to publish and notify the council for trade in services all laws, regulations and administrative measures relevant to the agreement.

derogations.[75] The so called "positive list" adopted in GATS allows members to provide for national treatment exclusively in sectors in which they have decided to open up to international investors, with conditions or qualifications. GATS has, therefore, been considered as a development friendly approach to liberalization by both developing and developed countries.[76] This development friendly approach to liberalization was quoted by UNCTAD as follow:

> "...each country can strategically negotiate the individual service industries or transaction that it is ready to open up in pursuance of long term progressive liberalization."

The GATS has clearly a different approach of dealing with investment than any other agreements as it does not focus on the protection of investment and investors, but rather on market access and non discrimination as in trade agreements. Nevertheless, important element of almost any investment operation such as expropriation, nationalization and Investor to state dispute settlement, are not addressed.

III.3.3 issues not addressed by the GATS nor the TRIMs agreement

Even though TRIMS and GATS offer a number of provisions relating to investment, the main lacunae are in the context of expropriation, compensation and subrogation. In addition, provisions for investor-state dispute settlement are missing. A multilateral agreement on investment might help fill these gaps. However, following this route involves several critical issues. For instance, a multilateral attempts to constrain a country's sovereignty through redefinition of jurisdiction, as investor-state dispute settlement would do, could be as hotly contested by developed as developing countries.

Another concern is that it also would confer advantages to foreign companies not available to local companies, which could be considered "reverse discrimination". As demonstrated below, this issue contributed to the breakdown of OECD talks on the MAI.

---

[75] Members are allowed to list specific or general exceptions such as public health, bilateral tax treaties, economic integration agreement

[76] UNCTAD 1996: 155

III.4 learning some lessons of a multilateral investment initiative: the OECD's Multilateral Agreement on Investment

Despite recurrent pressures from certain industrialized countries, particularly the US, Japan and the members of the EC, there is today no real comprehensive multilateral investment agreement.[77] The most recent attempt to negotiate an investment agreement, the "so called" Multilateral agreement on investment (MAI), among OECD members failed after a long series of negotiations. As mentioned above (section III.2), the principal features of the proposed MAI were basically the same as those of Chapter 11 of NAFTA including a broad definition of investment[78]. In this regard, It is interesting to note that the OECD ministerial conference had agreed to start negotiation along the lines of the NAFTA type of agreement so as to set "high standards" on investment liberalization and protection including an effective process of dispute settlement. This very same high level of standard defined in the NAFTA agreement seems to be the reasons for the failure of the MAI as the standardization of FDI was perceived by many[79] (participants or observing parties) as too liberal and not taking concern of host country policies priorities.

More specifically, the MAI negotiations broke down on several issues of substantial disagreement among OECD members, including the scope of the agreement and the cultural exceptions.[80] The negotiations has also met a fierce opposition of coordinated group of developing countries and NGOs in regard to the impact of the proposals for a MAI on labour and environmental issues and more generally on the potentially negative effects on development policies. Moreover, many of them were excluded from negotiations or were offered only the "to take it or leave it" choice [81]. Critics opposed that once the basic fundamentals were agreed, the draft could have then been transferred to another forum like UNCTAD. With developing countries being increasingly opposed or rejected to the process,

---

[77] in 2002, the OECD released a comprehensive collection collection of documents relating to the MAI negotiations, which can be seen on the organisation website at www.oecd.org/daf/mai

[78] including intellectual property and portfolio investment

[79] the MAI represented the most ambitious initiative so far, involving the 29 countries of the OECD and eight developing countries including China, Brazil and Argentina. However, the developing countries had only an observer status. In addition, the WTO, World Bank and IMF were represented in MAI negotiations.

[80] Defended by France as refered to "standstill clause" in the audiovisual industry.

[81] The choice of the forum is not predominant. However it was possible for the negotiations of the MAI to have commenced under the auspices of the OECD and still to have the full involvement of DCs. With any participation there would have been no suspicion of underhand tactics.

the MAI came to symbolize all that was perceived to be wrong with globalisation[82]. In the light of all these developments, it would have been political suicide to persist with the MAI.

Consequently, several lessons from the failure to complete the MAI negotiations are of interest for any future multilateral rules initiatives on investment:

1. First of all, the existence of a large number of BITs does not indicate that countries are ready for a comprehensive multilateral treaty on investment. The specific trade-offs that can be negotiated in BITs are not easy to pursue in a multilateral context
2. Collective action by powerful NGOs and DCs growing consciousness of the risks accompanying the conclusion of such MAI type of agreement. Mainly opposed to financial liberalization, it came as a result that such groups were strong factor influencing the negotiation outcome, even if the latter took place in a fora with the exclusive membership of rich industrialized countries. Therefore, it is a matter of interest to underline that any new international attempt on investment that were to assign more rights to the business community at the cost of restricting sovereignty over national development policies is likely to encounter fierce and organized opposition. Consequently, DCs reservations would have to be taken in account.
3. Any agreement that seeks to include financial flows other than long term FDI is likely to be unacceptable not only most countries from the developing world but also to many ICs. More generally, an ambitious multilateral negotiation agenda is unlikely to succeed unless it offers scope for quid pro quo-deals between participating countries pursuing different objectives
4. The large number of reservations by OECD members on proposed MAI provisions demonstrates that even this relatively homogeneous group of countries found it difficult on an sensitive issue that is regulation of international investment. In a sense, the MAI proposal may well have been over ambitious in its scope and it might have been better to allow lighter and progressive approach to reform [83].

---

[82] Sauve, Multilateral Attempts at Investment Rule Making: Why So Difficult? Harvard University, 1998.

[83] relevant observations have been made on this issue by J. KURTS "a general investment agreement on the WTO? Lessons from chapter 11 of NAFTA and the OECD multilateral agreement on investment, draft paper

5. There is an emerging consensus that it may be prudent for the governments of the proponents countries to restrict the scope of any Investment agreement to FDI only. A major reason is commanding this consensus. In the aftermath of the Asian crisis, it has been widely recognised that the volatility of short-term capital flows often leads to serious economic and financial problems for developing countries[84]. Then, it would be much more acceptable to developing countries if only FDI was concerned by future agreement.
6. Finally, there was disagreement on including the 'investor to state' clause in dispute settlement particularly in the context of 'regulatory takings'[85]

Considering that even the relatively small and homogeneous group of OECD countries could not agree on the ambitious agenda, it was all the more unlikely that a larger number of heterogeneous countries, including developing countries, were prepared to join. The situation might be different if investment issues are negotiated under the roof of the WTO, where considerable scope exists for quid pro quo-concessions in different areas of negotiations (see strategic options in last Part). Yet, the MAI experience suggests an important caveat: if multilateral treaties go beyond trade promotion (the basic objective of GATT) attempting to homogenize the pace of liberalization in contracting parties, the process of negotiation and the final settlements may be difficult to sell politically. It also has to be taken in consideration that more recently the wariness about new multilateral initiatives has mounted, especially in developing countries which are dissatisfied with the implementation of the results of the Uruguay Round.

2002; Pant and Nunnenkamp " Pros and Cons of a multilateral framework for cross border investment, draft paper 2002

84 Indeed, one of the world's leading advocates of free trade Professor Bhagwati of Columbia University takes the IMF severely to task for encouraging developing countries to liberalise their capital accounts before they were adequately prepared for it. The IMF has in response changed its stance and is willing to countenance leading emerging countries' use of capital controls for the management of short-term capital flows.

85 Graham, E.M. Regulatory Takings, Supernational Treatment and the Multilateral Agreement on Investment: Issues Raised by Non-governmental Organisations. *Cornell International Law Journal* 31 (1): 599–614. (1998).

CONCLUSION

The Apparent difficulty at reaching agreement on multilateral rules on investment led to a remarkable activism at both bilateral and, more recently, the regional level. However, this existing patchwork, that contrast with the comprehensive system of norms and principles governing international trade, seem to be inefficient when it comes to regulate FDI flows towards developing countries. On one side, Investors are looking for a comprehensive framework related to investment. The main purpose is to avoid different obligations being applicable to the same investment operation. On the other side, Developing Countries, even if not opposed, are seeking to maintain their capacity to direct the impact of FDI. To date, no agreement has yet been found and proponents and opponents are still arguing. The next Part is further dedicated to the arguments of the parties to such agreement.

PART IV The Welfare implications of multilateral rules on FDI: an overview of the mains reasons sustaining the need for a MIF

The system that has emerged from the radical transformations of the 1980s and 1990s is fragile since the liberalization of FDI policy has mainly taken place unilaterally and no comprehensive set of rules, able to mediate the interests of different countries, has emerged. Furthermore, as seen above in Part III, we have had a rapid proliferation of international FDI agreements at different levels (bilateral, regional, multilateral) leading to what has been defined as an *'inefficient patchwork'* of FDI rules[86]. If different elements of fragility of the present system can be easily identified, five principal reasons have been put forward to sustain the need for a MIF. Here, the relevance of these arguments are being discussed.

Thus, five arguments are presented as follow:

1. **The transaction costs and transparency arguments:** firms may confront significant transaction costs and increased uncertainty from differences in national rules governing FDI and the patchwork of existing BITs. The present situation results in an increase of the fixed cost associated with foreign operations, and thus in a lower volume of world FDI. A MIF would lower such transaction costs, leading to improved allocation of FDI and higher welfare.
2. **The uncertainty argument:** investors may avoid a country because it has a history of frequent policy reversals or whose commitments to reform are not deemed to credible. A MIF would anchor investors expectations and lead to increased FDI inflows.
3. **The political economy arguments:** a MIF would serve as a means for governments to overcome the impediments to reform prevented by certain domestic constituencies.
4. **The international spillovers arguments:** domestic law and regulation of FDI may have negative effects (spillovers, externalities) at a global level, leading to distortions

[86] Brewer &Young, 1998, 'The multilateral Investment System and Multinational Enterprises'. Oxford University Press

in the allocation of investment and/or to coordination failures which result in inefficient outcomes. A MIF could overcome these problems increasing global welfare. Moreover, if FDI liberalization takes place unilaterally or due to bilateral agreements, it is not possible to tackle problems such as incentive wars or anticompetitive practices by MNEs, which can be solved only at the multilateral level.

5. **The grand Bargain argument:** it suppose as FDI importers, DCs are unlikely to gain much from a MIF. The latter could consider offering concessions on investments policies and at the same time demand reciprocal concessions in other fields of WTO negotiations where they can gain substantial benefits.

IV.1 The relevance of the transaction costs arguments

A MIF could potentially reduce transaction costs related to FDI by providing for a transparent regime of rules and regulations. As argued in OECD[87], a lack of transparency may deter FDI in several ways:

- It adds to operational risks for MNEs and imposes higher information costs on them.
- It gives rise to information asymmetries which tend to benefit present market occupiers and discourage FDI for new entrants.
- It may lead to adverse selection among foreign investors, by favoring those who possess privileged information and are politically well connected in the host country.

The cost effects of lacking transparency are impossible to quantity. Yet, UNCTAD reckons that unclear rules and regulations "can increase the transaction costs of investment and operations significantly". In a similar vein, OECD stresses that "a lack of transparency will almost certainly discourage foreign investors", even though transparency per se will not induce FDI if other deterrents remain. To support this argument, OECD refers to a recent study by the Asian Development Bank Institute on various aspects of transparency in 55 (industrialized and developing) countries. It turns out that inward FDI is relatively low where transparency is poor. Nevertheless, the relevance of a MIF for enhancing transparency and

87 OECD 2002: 176 f, 'FDI for development: Maximizing the profit, minimizing the costs'

reducing transaction costs is questionable on several grounds. For a start, even if all transaction costs listed in Table 3 were addressed by such an agreement, other FDI-related transaction costs would remain unaffected. Hoekman and Saggi[88] argue in this context that "the major proportion of the transaction costs associated with FDI is likely to arise from differences in language, culture, politics, and the general business climate of a host country rather than from the costs imposed by the multitude of BITs on multinational firms".

Even for cost elements to be addressed in a multilateral agreement, reductions in transaction costs will be less than hoped for by the business community. A far-reaching multilateral agreement might render unnecessary various less comprehensive BITs. However, the Doha Round will at best mark the starting point of a long-term process towards substantive and binding multilateral investment rules. Most, if not all, bilateral, regional and existing multilateral investment agreements will remain in place for the time being. Investment agreements of different sorts with narrow or broad membership will coexist, as is the case in international trade[89]. A multilateral agreement would therefore define the smallest common denominator of WTO members, while regional groupings or bilateral partners would still be free to go beyond commonly agreed rules. In other words, the realistic scenario with regard to investment rules is what trade negotiators labeled a "GATT plus"-framework.

The expected pattern of a "GATT plus" or rather "WTO plus" type framework for international investment is easy to explain in collective action terms. The degree of common interests and perspectives is typically higher among a smaller homogenous group of countries; coordination problems mount with the number of contracting parties. It follows that more and stricter investment rules can be fixed in BITs and regional agreements. As Sauvant[90] put it, "what would be acceptable at the bilateral or even at the regional level may not necessarily be acceptable at the multilateral level." The unpleasant consequence for

---

88 Hoekman, B., and K. Saggi (2000). Assessing the Case for Extending WTO Disciplines on Investment-Related Policies. *Journal of Economic Integration* 15 (4): 629–653.

89 The so-called 'spaghetti bowl' of trade preferences, Bhagwati clearly suggests that such an outcome would be sub-optimal from an economic point of view. Yet, for political-economy reasons, commentators consider it unlikely that a multilateral agreement on investment will achieve what proved impossible so far in trade negotiations.

90 Sauvant, 2000. Rapporteur's Report. German Foundation for International Development, Summary Report: Pre-UNCTAD X Seminar "International Investment Policies: Which Strategies for Developing Countries?"

foreign investors is that they will continue to encounter considerable information needs and transaction costs resulting from a lack of transparency, when planning to invest in a country which is WTO member and, at the same time, contracting party of more far-reaching investment agreements.

However it may actually be the foreign investors themselves who will contribute to the emergence of a "WTO plus"-framework. This could happen if, as widely assumed, multilateral negotiations on investment strengthened the bargaining position of developing countries. As a consequence, the business community may lose interest in a multilateral agreement, and instead prefer the stronger protection of investors' rights in BITs[91].

Table 1: Transaction Costs Related to the Legal and Regulatory Environment for FDI

	Transaction	Entreprise exposure	Effects on:
Business entry	Registration Licensing Property rights Rules Clarity Predictability Enforcement Conflict resolution	Monetary costs fo firm Time costs (including compliance and delays) Facilitation costs Expert evaluations of rules and their functioning Number of rules and formalities	Rate of new business entry Distribution of firms by size, age, activity Size of shadow economy Rate of domestic investment FDI inflows, quantity and quality Investment in R&D
Business operation	Taxation Trade-related regulation Labor hiring/firing Contracting Logistics Rules Clarity Predictability Enforcement Conflict resolution	Cost of compliance Higher costs of operation Costs of conflicts and conflict resolution Search costs and delays Insufficient managerial control "Nuisance" value Problems in making contracts Problems in delivery	Business productivity Export growth Size of shadow economy Growth of industries with specific assets or long-term contracting Rate of innovation and R&D Rate of business expansion Rate of investment in new equipment Subcontracting
Business exit	Bankruptcy Liquidation Severance/layoffs Rules Clarity Predictability Enforcement Conflict resolution	Rate of change of rules Changes in costs and number of rules Availability of rules and documents to firms Rates of compliance and/or evasion Use of alternatives to formal institutions	Rate of exit (and entry) Prevalence of credit Distribution of profitability of corporations

Source: **UNCTAD (1999a: 179 f.) on the basis of World Bank information.**

91 World Bank 2003: 127, *Global Economic Prospects*.

There is another reason for not expecting too much from a multilateral investment agreement in terms of transaction cost reductions. Survey results on investment conditions in 28 developing countries, presented by the European Round Table of Industrialists[92] in cooperation with the United Nations and the International Chamber of Commerce, suggest that impediments to FDI that give rise to transaction costs have already been relaxed substantially, largely on a unilateral basis, throughout the 1990s[93]. It is, thus, debatable whether a multilateral agreement is needed as urgently as suggested by statements on the significance of transaction costs made by the business community[94]. This argument suggest that foreign investors do not have to wait for a multilateral agreement on investment in order to benefit from transaction cost reductions.

This applies especially to some specific factors that figured prominently among investors' concerns in the past. Relevant examples are the risk of nationalization or expropriation and exit restrictions, including restrictions on the repatriation of capital. According to the survey results of ERT, the threat of nationalizations or expropriations has diminished tremendously. A multilateral agreement may help to *lock in* previous liberalization measures undertaken unilaterally, and render such measures more difficult to reverse, as demonstrated in the following paragraph. However, there appears to be little a multilateral agreement can offer in terms of further reducing the risk of expropriation and liberalizing exit restrictions.

In sum, it can be assess that **transaction costs is to be a weak argument for a multilateral agreement on investment.** In fact, it is far from clear that transaction costs would be substantially lower than under current conditions in the counterfactual situation of a multilateral investment agreement. Of course, it cannot be ruled out that FDI in developing countries would have been still higher if multilateral rules had existed. Yet it should be noted that the boom of FDI in developing countries occurred without a multilateral investment

---

92 ERT (European Round Table of Industrialists) 2000, Improved Investment Conditions: Third Survey on Improvements in Conditions for Investment in the Developing World.

93 The small sample of 28 countries may compromise the representativeness of survey results for the developing world. However, the sample accounted for 62 percent of FDI flows to all developing countries in 1997–2000 (UNCTAD online data base).

94 The business community may have had incomplete information on unilateral liberalization in the past. Improved information could then contribute to a fading interest of the private sector in a multilateral agreement. On the other hand, the business community may still consider a multilateral agreement to be the best means to lock in previous unilateral liberalization measures, which would may render them irreversible.

agreement, and some countries, notably China and Malaysia, attracted enormous amounts of FDI despite their relatively restrictive investment regimes.

IV.2 The uncertainty argument: the lack of credibility of unilateral commitments

Basically investors may avoid a country because it has a history of FDI policy reversals or because commitments to reform are not deemed credible. Indeed, the facts that FDI liberalisation has mainly taken place unilaterally makes policy reversals easier. This fact creates uncertainty and increase the risks associated with FDI. The uncertainty argument is therefore strongly in connection with the lack of credibility of unilateral commitments. A MIF would thus anchor investors expectations by making national policies more transparent and lead to increased FDI flows. In this regard some commentators[95] have argued:

"governments seeking to attract FDI may be pursuing all the right policies without generating a significant 'supply response' because of a history of policy reversal. If investors are risk averse, they may avoid the country altogether, impose large risks prima, not transfer sensitive technologies, etc. International agreements may then serve a mechanism through which governments make irrevocable commitments and guarantees against policy reversals thereby anchoring expectations of investors"

Clearly, investors confidence is a necessary condition for FDI particularly in the case of Greenfield investments which generally involve a significant amounts of risks. Once an investment is made, the host country may have incentives to go back on the agreement with the investor and directly or indirectly expropriate rents from the investor. Also, given the costs, MNEs would not have much choice but to accept the new conditions imposed by host country as long as the former continues to offer some positive benefit[96]. For investment to take place, it is thus essential that a commitment mechanism be in place so that the host

---

95 Hoekman and Saggi : "Multilateral disciplines for investment related policies ?" paper presented at the conference Global Regionalism, Instituo Affari Internazionali, Rome, (1999) and Hoekman and Saggi: "multilateral disciplines and natioanl investment policies, in Development, Trade and the WTO-a handbook" Hoekman, Mattoo, English ed., World Bank

96 Such a situation is usually referred to as the 'Hold-up risk' in game theory

country can credibly bind itself not to expropriate or more generally not to degrade investments.

There is therefore, reason to believe that an international agreement would create a strong incentives for signatories to comply particularly by providing for trade sanctions to punish non-compliance.

However this argument is not totally compelling. In fact, there are number of alternative ways that a country has to credibly commit to obligations including BITs. Investment protection[97], for instance, in such treaties is guaranteed by provisions on international arbitration. Moreover there is a strong case for arguing that a country will try to keep intact or increase its reputation in international financial markets and so will have a sufficiently strong incentive not to behave in any way that could destabilize the flow of future investment. If a country values its reputation and many do, then the expectations-anchoring argument for a MIF would largely be undermined.

In sum, the arguments in favour of a MIF on credibility grounds have some kind of appeal but is not really compelling. Moreover, there is no hard evidence to support the hypothesis that a MIF would significantly increase FDI flows to countries (and especially DCs) that have entered binding BITs which seems to provide an adequate degree of protection. As far as host country commitments are concerned, nothing really tend to explain why existing international commitments particularly of progressive trade liberalization within the WTO, are not considered by international investors to be a sufficient signal for long term commitment and credibility.

IV.3 The political economy argument

Some have argued that an MIF could represent a necessary means for governments to overcome political impediments and therefore remove costly restrictions on FDI flows. Indeed, it is frequently observed that DCs' are unable to overcome opposition by certain local groups that are powerful enough to protect so called unproductive rents. Such rents may be associated with distortions to the efficient allocation of capital with harmful consequences to host economies. In such a context, the argument goes, with governments lacking power to impose a change, an international agreement can in principle be helpful to overcome such

[97] see Part III.3 for detailed explanations

resistance mainly for three reasons. First, once signed international agreements may offer the necessary political support when reformers face powerful local constituencies. Second, if an MIF is embodied within the WTO framework it could be part of a larger package that offers significant benefits that can help "pay off" or compensate current beneficiaries of investment protection. Thirdly, a MIF could have a stronger binding effects on current and future governments as compared to a BIT. This last point is related to the credibility argument discussed above.

Here again the political economy argument is not really convincing. Indeed, Even if a MIF would be necessary for governments unable to overcome domestic pressures from rents earners that are in fact retarding growth and development, it remains difficult to envisage how this argument would be played out in the context of the WTO. Would those countries opposing a MIF be seen as unable to overcome powerful domestic lobbies? Equally, could this line of argument be extended to implying that those countries demanding a MIF are not able to overcome pressure from their domestic business community in search of rents that may come at the cost of host countries welfare? As a matter of fact even within advanced 'democracies' power and interest usually prevails over social objectives.

In sum, the political economy argument is a sensitive one. Moreover it remains difficult to imagine a MIF that helps reducing unproductive rents while simultaneously maintaining those that are growth enhancing. Rather, all rents would gradually be wiped out to the satisfaction of those who view them as purely distortionary. It appears, from the submissions of countries like India[98] that it is precisely on these grounds that a MIF is being strongly opposed.

All the argument discussed so far all relate to the potential of a MIF to lead to higher degrees of transparency, credibility and commitment as compared to the standards already prevailing in bilateral and regional agreements. Therefore such arguments call for rules negotiated within the WTO and that are primarily meant to 'lock in' the results of unilateral liberalisation of national FDI policies or to adopt standards prevailing internationally.

---

[98] see India's and DCs submission in part V

However, as it has been argued these arguments are not entirely compelling as they do not make a clear case for cooperative action at multilateral level.

IV.4 The International spillovers argument: How do Home Country Operational Measures affect FDI flows ?

In addition to these issues, one of the crucial question[99] in addressing the desirability of a MIF is whether or not its provision are directed at eliminating market distortions and international policy spillovers caused by host countries operational measures on the one hand and at eliminating market distortions created by foreign investors on the other hand.

Typically FDI will only take place if the MNEs perceives the advantage or a gain and these firms attempt to use their market power to appropriate most of the rents (profits) themselves. However, the host nation wants to ensure that it derives benefits from the investment. Hosts Countries respond by using Home Country Operational Measures (HCOMs) to capture the rents for their economy or more generally to ensure that the domestic benefits from FDI are maximized. HCOMs can be justified as attempts to fill the gap between social and private returns from foreign investment that create positive spillovers such as mandatory technology transfers or to deal with other market failures[100]. In theory those interventions can be welfare enhancing but ultimately the outcome from intervention depends on countries specific circumstances. Indeed, empirical evidence[101] tends to demonstrate that only certain HCOMs have benefited host countries implementing them. For example, it has been argued that frequently HCOMs do not stimulate host country growth and can even hinder it particularly if they are directed at protecting inefficient industries. On the contrary, certain HCOMs, **particularly export performance requirements** can increase host country welfare by shifting rents from the foreign investors to the domestic economy.

---

99 pointed out by Hoekman and Saggi, see references above

100 see part I: the relation between investment and development

101 Moran 1998, FDI and development, the new Policy Agenda for DCs and Economies in transition, Institute for International Economics

IV.4.1 The Performance Requirements dilemma

Conflicts of interest between DCs and ICs appear to be particularly pronounced with regard to performance requirements. ICs are widely expected to intensify pressure on DCs to abolish performance requirements when it comes to multilateral negotiations on investment. Taking into account that many BITs do not prohibit performance requirements, it is less likely that DCs will achieve a better deal on performance requirements in multilateral negotiations[102]. In other words, multilateral negotiations may improve the bargaining position of DCs in some respects, but not necessarily in all respects. As a matter of fact, the resistance of developing countries to enter into multilateral negotiations under the WTO umbrella seems to be largely because they regard performance requirements as an essential means to improve the "quality" of FDI inflows even though it should be manipulate with extreme precaution in order to produce welfare effects.

Thus, the opposing objectives of DCs and ICs and the ensuing controversy suggest that performance requirements are widely used and considered as a major bottleneck to FDI by MNEs. However, a survey data on investment conditions in 28 developing countries, presented in ERT[103], indicate that both the proponents and the critics of performance requirements miss an important point: the implicit assumption that performance requirements are highly relevant, seems to be in conflict with the available evidence.

More surprisingly perhaps, the analysis does not support the proposition that more restrictive performance requirements tend to discourage FDI in a significant way. On the contrary, these findings seem to strengthen the case of developing countries attempting to improve the

---

[102] See note in the context of corporate obligations demanded by DCs part V

[103] European Round Table of industrialist on impediments to FDI 2000, Improved Investment Conditions: Third Survey on Improvements in Conditions for Investment in the Developing World. Brussels: European Round Table of Industrialists. The ERT-survey covers various aspects of investment conditions in the 28 sample countries. The following three items, included in the checklist, are of particular interest in the present context: first, performance requirements related to exports, local content, manufacturing and foreign exchange neutrality. Secondly, requirements related to employment conditions (discrimination of foreign investors against comparable local employers) and work-permits for international staff; and thirdly, technology targeting, interventions into the corporate transfer of technology and insistence on R&D efforts in the host country and R&D dissipation

"quality" of FDI inflows by insisting on performance requirements. As it seems, the costs of doing so, in terms of a lower quantity of inward FDI, are marginal at most. Before drawing such a conclusion, however, two issues have to be taken into account. First, it is open to debate if (and which) performance requirements actually help improve the "quality" of FDI. Second, there may be other costs involved, notably special incentives granted to foreign investors, which compensate for restrictive performance requirements and, therefore, prevent FDI from falling. These two issues are discussed in the following paragraphs.

Performance requirements are designed by host countries to enhance the benefits and minimize the costs of FDI[104]. For example, local content requirements are regarded as an important means to strengthen economic links between foreign and local producers and, thereby, create local employment opportunities as well as technological spillovers[105]. Requirements related to local content, exports and foreign exchange neutrality are intended to reduce the risk that FDI leads to a deterioration of the current account. And mandatory technology transfers may help promote the development of an indigenous industry that is competitive internationally. Some proponents of performance requirements tend to take it for granted that reasonable development objectives will be achieved in this way[106]. However, the concern for the quality of performance or its welfare effect, is less clear when through this means foreign investors are sheltered from competition in the host country market and burdened with high domestic content and mandatory joint venture.

As concerns the economic costs of performance requirements, incentives granted to foreign investors by host country governments have to be taken into account. If multinational enterprises undertake FDI in spite of performance requirements, this may be because they perceive such requirements as a quid pro quo for compensatory advantages offered by the host country. Compensatory incentives may have prevented adverse consequences of performance requirements on the quantity of inward FDI, but tend to involve economic costs

---

104 OECD, 2002. *Foreign Direct Investment for Development: Maximising Benefits, Minimising Costs.*

105 Kumar, 2001. WTO's Emerging Investment Regime: Way Forward for Doha Ministerial Meeting. *Economic and Political Weekly* 36 (33): 3151–3158

106 see Kumar 2001 'WTO's emerging Investment Regime-Way forward for Doha Ministerial Meeting, Economical and political weekly 36 (33):3151-3158 and Singh, 2001, 'FDI and International Agreements: a South perspective', the South center, Occasional paper

in terms of allocative distortions and/or budgetary strains. Allocative distortions are likely, if foreign investors are granted privileged access to protected host-country markets and local resources (raw materials).

More apparent costs arise when fiscal and financial incentives are granted to foreign investors as a quid pro quo for performance requirements. FDI in the automobile industry of various countries provides a case in point. As noted by OECD[107], local content requirements are widely used in this industry. At the same time, host country governments incurred huge fiscal or financial costs to attract FDI in the automobile industry. In this regard, Oman[108] notes that "the direct cost of financial and fiscal subsidies paid by governments to attract FDI in major automobile factories rose substantially over the course of the 1980s and 1990s, and amounted to hundreds of thousands of dollars per job-to-be-created in countries as diverse as Brazil, Germany, India, Portugal and the United States."

In conclusion, the issue of performance requirements must not be considered in isolation. In sum, performance requirements are not to be recommended, unless they help achieve development objectives and the direct and indirect costs involved do not exceed the benefits.

IV.4.2 Incentives Competition for FDI: a coordination problem?

Along the line of HCOMs and performance requirements, a strong argument in favour of a MIF derives from the fact that incentives aimed at attracting FDI impose negative spillovers on the rest of the world.

The economic justification of FDI incentives depends on whether they are effective in increasing the amount of FDI inflows and efficient in that the costs of providing incentives do not exceed the benefits to the host country[109]. Thus, the strongest efficiency argument in favor of FDI incentives is based on prospects for economic spillovers. Foreign firms often command over superior technology and knowledge. Local firms may benefit from productivity-enhancing externalities or spillovers, through forward or backward linkages with foreign firms.

---

[107] OECD 2002: 186 f, Foreign Direct Investment for Development: Maximising Benefits, Minimising Costs

[108] Oman, 2001 : 69. The Perils of Competition for Foreign Direct Investment. In OECD, Foreign Direct Investment Versus Other Flows to Latin America. Development Centre Seminars. 63–84.

[109] see Kokko note 30

The "race to the top" in offering FDI incentives is difficult to stop, even though the economic case for not taking part in incentives-based competition may be strong. Politically, it may not be feasible to withdraw incentives unilaterally. Even if economic fundamentals of host countries remain a more important pull factor of FDI inflows, incentives can make a difference in an investor's final locational choice among short-listed countries with similarly favourable fundamentals (as seen in part I). Host country authorities, including sub-national governments, find themselves in a prisoner's dilemma when multinational enterprises start playing the authorities off against each another to bid up the value of incentives. Then, Incentives offered by one particular country may have negative external effects on another country, in terms of either countervailing incentives or forgone FDI inflows.

Policy coordination seems to be the key to escape this dilemma. The scarcity of serious attempts to overcome coordination problems and limit competition for FDI is all the more surprising. However, there is one major exception, namely the European Union, which offers some lessons of how to limit incentives-based competition. Developing countries may find the EU approach fairly attractive, as "development areas" are granted preferential treatment. If this principle was applied in multilateral negotiations on incentives-based competition for FDI, developing countries would probably have more flexibility than developed countries to attract FDI by offering incentives.

However, a multilateral agreement that seeks to discipline incentives designed to attract FDI "will be difficult to achieve and difficult to enforce, given that governments have multiple instruments at their disposal to attract FDI or to retain investment"[110]. Indeed, investments incentives may takes a number of forms and are often delivered by using a combination of fiscal, financial and others instruments. Therefore, an MIF disciplining the use of incentives would necessarily need to be very intrusive by regulating, for example domestic tax policies or competition policies.

Finally, it has to be mentioned that the OECD's MAI largely ignored the incentive issue and today's proponents for a MIF at the WTO seem not to have given much consideration. Arguably, MIF proponents are likely to gain on two fronts from investments incentives. First, they have the financial muscle to compete for those FDI projects where incentives do count.

---

[110] Hoekman and Saggi 2000: 640, on note 95

Second, governments outlays on incentives are partly compensated by the rents accruing to domestic MNEs profiting from the incentives paid to their subsidiaries abroad.

IV.5 the "grand bargain" argument

The "grand bargain" argument suppose that DCs which are unlikely to gain much from a MIF would be opportunist enough to enter such negotiations in order to get reciprocal concessions in others fields of WTO. In this regard, one should note that the present failures of the Cancun Ministerial Conference may favours the climate for a grand bargain as DCs seemed to be relatively united on several issues. According to Hoekman and Saggi[111]:

"the 'grand bargain' argument is one the *raison d'être* of the WTO. In a nutshell, what the WTO process does is to allow countries to define a negotiating set that allows a variety of potential tradeoffs and deals to be crafted that are superior to the *status quo ante.* Because countries are restricted to the equivalent of barter trade in multilateral trade negotiations to achieve Pareto superior (cooperative) outcome, issues must be linked"

This suggest that DCs could make concessions issues as a *quid pro quo* for concessions by ICs in other areas of interest to them, such as market access in agriculture or industrial products. Indeed, policies other than investment, particularly in terms of further concessions under the existing GATT and GATS agreements are likely to be more valuable negotiating chips for DCs.

What is implicit with the "grand bargain" argument is that DCs have little to gain from a multilateral rules on investment. Although this may be the case, if investment policy is one of the main pillars of national industrial policy, then matters differ. From the development perspective, if DCs growth prospects were to be negatively effected by multilateral rules on investment, many possible grand bargains are unlikely to be viewed favourably. This is not to say, however, that in a context of what some have termed the *Realpolitik* of the WTO, the grand bargain argument may well be stronger than any other mentioned in this research paper.

---

111 Hoekman and Saggi 1999 : 18, Multilateral Disciplines for Investment-related Policies?, paper presented at the conference Global Regionalism, Instituto Affari Internazionali

PART V A Multilateral Investment Framework: Proponents and opponents arguments

After the first Meeting in Singapore in 1996, the working group on the relation between trade and investment (WGTI) was set up with the mandate to study the relationship between trade and investment. In November 2001, at the fourth Ministerial Meeting in Doha, WTO members decided to launch negotiations on a multilateral investment framework after the fifth session of the ministerial conference, subject to an agreement on the modalities of those negotiations at the conference in Cancun. It has to be said that investment matters have been put on the WTO agenda by a number of industrialized countries in particular by the European commission (EC) and its members states. A number of developing countries, among them India, Pakistan, Malaysia and Egypt have strongly opposed starting formal negotiations. Thus, the following chapter give an account of the key points of the dispute by summarizing and analyzing the submissions to the WGTI by the EC which remains the main *demandeur*, and India the main opponent. A section is dedicated to the US proposal for a MIF and then compared to the one envisaged by the EC.

V.1 the Doha Mandate on Investment

The Doha declaration specifies that any negotiated commitments considered should be modeled on those made in services (GATS) which means taking a positive list approach rather than making broad commitments and listing exceptions (the so called negative list approach). Paragraph 20-22 of the declaration enumerate the matters for discussion within the working group:

20 "Recognizing the case for a multilateral framework to secure transparent, stable and predictable conditions for long term cross border investment, particularly Foreign Direct Investment, that will contribute to the expansion of trade and the need for enhanced technical assistance and capacity building in this area as referred to in Paragraph 21, we agree that negotiations will take place after the fifth session of the ministerial conference on the basis of a decision to be taken, by explicit consensus at session on modalities of negotiations"

21 "We recognize the needs of developing and least developed countries for enhanced support technical assistance and capacity building in this area, including policy analysis and development so that they evaluate the implications of closer multilateral cooperation for their development policies and objectives and human and institutional development. To this end, we shall work in cooperation with over relevant intergovernmental organizations, including UNCTAD and through appropriate regional and bilateral channels, to provide strengthened and adequately resourced assistance to respond to these needs.

22 "In the period until the fifth session, further work in the Working Group on the relationship between Trade and Investment will focus on the clarification of:
scope and definition, transparency, non-discrimination, modalities of pre establishment commitments based on GATS type, positive list approach, development provisions, exceptions and balance of payment safeguards, consultation and the settlement of dispute between members. Any framework **should reflect in a balanced manner the interest of home and host countries, and take due account the development policies and objectives of host governments as well as their right to regulate in the public interest.** The special development trade and financial needs of developing and least developed countries should be taken into account as an integral part of the Framework which should enables Members to undertake obligations and commitments commensurate with individual needs and circumstances. Due regard should be paid to other relevant WTO provisions. Account should be taken, as appropriate, of existing bilateral and regional arrangements on investments"[112].

Since the second half of 2002 discussions have intensified among WTO members within the WGTI. Although some proposal have been advanced in the submissions by a numbers of countries, a draft agreement or draft modalities for negotiations has yet to be proposed. In the case of the European Commission a clear stance on this issue has been elaborated which could represent the basis for future negotiations on a formal MIF. The following section will thus provide for key points of disputes between the proponents and opponents to such project.

---

112 WT/MIN (01)/DEC/1:5

V.2 Key elements of EC's proposal

The key elements of EC's proposal can be evinced from its recent submissions to the WTGI on the following matters: transparency, definition of investment, development provisions, pre-establishment rules, balance of payment safeguards, dispute settlement between members and non discrimination. These submissions are summarized and commented.

V.2.1 Transparency

In EC's conception: "transparency means information ...and is closely linked to the principle of fairness as well as economic efficiency and legal security"[113]. In sum, the EC claim that there is a case for a MIF to secure transparent, stable and predictable conditions for long term investment, as greater transparency is said to encourage higher flows of FDI by reducing investors perception of risks. Moreover, the lack of transparency creates uncertainty about the existing legal regime on investment in a certain country. Potential investors, therefore, tend to have higher estimates of the risks associated with investment in a non transparent country leading to distortions in the allocation of capital and/or deterring investing into certain countries or sectors.

Based on these considerations the EC argues for a MIF " that would at least match what is applicable for investors in services"[114]. That is, as in GATS, transparency provisions for investment should include elements relating to the publication and notification of "all relevant measures which affect the operation of the agreement" within strict deadlines. Also, WTO members should be obliged to respond promptly to others members inquiries regarding measures of general application and also ensure procedural transparency including the establishment of tribunals and procedure for "prompt and impartial review and remedy of administrative decisions affecting FDI"[115].

An important point is that the EC raises the idea that DCs with insufficient domestic capacity should be granted assistance in their efforts to implement the transparency provisions included in a MIF[116]. Moreover, it is emphasized that transparency should not be seen as of

---

113 WT/WGTI/W/110:1

114 WT/WGTI/W/110:4

115 ibid

116 ibid

additional burdens for the host country as the latter will benefit the most from increased FDI and that it would be possible for DCs to use transparency rules in a 'pro-active' way, for instance as a means to promote their investment regime among the investor community.

V.2.2 Non discrimination

Regarding the non discriminatory treatment of international investment the EC proposes[117] to extent the degree of treatment granted to investment in the services sectors by the GATS to the primary and the secondary sectors. A MIF should include a general MFN obligation, PRE and post establishment and allowing for exceptions, and a general post establishment NT obligations including possible exception and some specific market access related NT obligation for the admission of foreign investments to those sectors listed in each country schedules of commitments, which would also list each member's derogations to the applicability of the provisions of NT. The EC ,finally, envisages the possibility of including general but subject to country specific exceptions to MFN and NT.

V.2.3 Pre-establishment

The EC emphasizes the importance of having clear rules on the admission of foreign investors. Currently, governments have the right to prohibit or restrict the entry of FDI and to impose entry conditions to permitted FDI. However, the EC notes[118] that despite widespread liberalization of FDI regimes by host countries, there still exits significant barriers worldwide preventing foreign investors from entering domestic market.

" Generally speaking, open and transparent admission rules for FDI can significantly contribute to a better allocation of capital by creating a level playing field among potential host countries and investors. At the same time, host country governments usually keep a certain control on the entry of foreign investors in order to preserve national development goals, security, public health... these two objectives are not incompatible and can co-exist in a MIF as they do already in many International Investment Agreements".

Finally, the EC notes that since the GATS already applies to abut one half of worldwide FDI stocks and flows which are in service sectors and considering that it is this sector where

---

117 WT/WGTI/W/122 :2

118 WT/WGTI/W/121:2-3

WTO members impose most market access and discriminatory restrictions, its extension to the secondary sector would not represent a major difficulty to host country. As far as the primary sector is concerned, the EC claims a positive list approach that would guarantee sufficient flexibility to take into account country specific circumstances.

V.2.4 Balance of payment safeguards

Recognizing that DCs financial systems are particularly fragile and exposed to instability the EC proposes the inclusion of a provision allowing members to take safeguard measures in case of a BOP crisis provided that such measures are taken exclusively:

"in exceptional circumstances in a non discriminatory manner, in full compliance with the articles of agreement in the IMF for a limited period of time...they shoul be notified to the WTO and subject to effective multilateral review..."[119]

More specifically, according to the EC a future MIF should provide:

"-as a general rule that all member allow: all current and capital transfers related to investment and as far as the making of new investment is concerned all current and capital transfers related to those investments covered by the countries sectoral list of commitments"

"-as an exception a safeguard clause to preserve members in case of serious BOP difficulties"

A safeguard provisions allowing the imposition of investment restrictions for BOP reasons is an example of "escape clause" particularly relevant for DCs.

V.2.5 Development provisions

Here the EC particularly refers to the concept of "flexibility for development":

" we wish to underline that flexibility for development is an important concept that should be taken into negotiations of a MIF. However, the flexibility is understood as the right of a government to discriminate among investors it will not be effective as a means to enhance development. Flexibility instead can be useful if it is seen as a broader concept which combines an appropriate policy space for governments require to pursue their national development objectives with the quest for an appropriate and stable, predictable and transparent FDI framework through which firms are encourage to operate... flexibility may typically involve lower levels of commitments, asymmetrically phased implementation timetables, exceptions from obligations in certain areas,

---

119 WT/WGTI/W/153:1

flexibility in the application of and adherence to disciplines. As proposed within the WGTI...the MIF can include each or a combination of these approaches and instruments"[120]

" the GATS is probably one of the most development friendly agreements in the WTO...it addresses the concerns and needs of DCs through providing appropriate flexibility on an individual basis which allows each member to undertake liberalisation commitments in a manner consistent with its development needs"

These consideration lead to the EC to recommend that a flexible, GATS type structure (based on positive list commitments) be adopted for a MIF so as to allow some countries to make phased commitments on market access and NT and also to attach to the latter conditions related to country specific development objectives. The right to regulate in order to meet national policy objectives and to include exceptions for public interest should be explicitly recognized.

V.2.6 Definition of investment

The EC submits that the exact definition of investment should depend on the substantive provisions included in the agreement, as noted:

"the need to preserve the development objectives of host countries in a MIF should not be addressed merely by narrowing the scope and definition but rather by including substantive provisions that allow all countries and in particular DCs to pursue their development objectives. In any case WTO ministers have agreed in Doha that a MIF should focus on long term cross border investment. It is under this understanding that the EC presents its views in this paper"

V.2.7 Settlement of disputes

With respect to dispute resolution, the EC argues[121]:

"in line with all other WTO agreements, the EC believes that a future MIF should include the possibility for members to resort to the WTO dispute mechanism where they consider that other members have fails to observe their obligations under the agreement..."

---

120 ibid

121 WT/WGTI/W/115:1

Moreover the EC notes that :

"the WTO system includes a strong and effective consultation and dispute settlement mechanism which contributes to the fair management of disputes...The GATS which already addresses around half of world FDI flows (under services) is covered by the WTO DSU. For the sake of consistency, any possible disputes concerning a future MIF on FDI to be negotiated and agreed in the WTO should also be fully covered by the WTO dispute settlement mechanism"

"the relation between the DSU and the state-state dispute settlement provisions of bilateral or regional investment treaties may have to be addressed"

V.3 key assumptions underlying the EC proposals

It appears that the submissions containing the key elements for a GATS like MIF are based on a number of arguments that can be summarized as follow :

1. A multilateral agreement would secure **transparent, non-discriminatory**, stable and predictable conditions for long term investment. It is only through MIF that host governments are bound to provide the entry conditions that give investors the predictability and security needed.[122]

2. A MIF would **reduce investor perception of risk** and create the necessary conditions among host countries and investors for a level playing field for FDI worldwide, which in turn would encourage higher FDI inflows make the allocation of capital more efficient, reduce distortions, undermine perceived corruption and foster economic positive effects of FDI on economic growth in the host country.

3. **Pre-establishment**: The EC highlights the importance of having clear rules on admission to foreign investors. There are still significant barriers in developing countries related to entry conditions as the governments have the right to restrict the entry of FDI.

---

[122] see WTO report on the MIF proposal WT/WGTI/W/110

4. The GATS represents a **development-friendly** international agreement because it guarantees flexibility, allows countries to open up their economies to FDI in those sectors at a time and in a manner that governments regard as being compatible with national development plans.

5. Therefore the extension GATS type to all economic sectors would not prevent host countries from pursuing domestic policies.

V.4 US proposal for a broad coverage of investment in a MIF

First it should be mentioned that after more than four years without making any formal submission, the US has contributed to the ongoing discussions. In contrast to EC proposal which envisages only the inclusion of FDI inflows in a potential MIF, the US strongly defends the idea of including the portfolio flows.[123] It is important nevertheless to precise that paragraph 22 of the Doha declaration clearly emphasis the insertion of exclusively long term capital flows in a possible MIF. Also, the American proposals are mainly based on a wide liberalization of investment.

Here, some relevant assumption should be highlighted :

1. The NT and MFN should be granted, to both pre and post admission phase of the investment process.
2. The potential MIF should also contain an absolute prohibition of a number of local performance requirement.
3. The members states are required to provide a fair and equitable treatment and a full and constant protection and security while ensuring a minimum standard to host countries.
4. The investment incentives are largely ignored even when they are linked to certain government performance requirements.[124] Such provisions in a multilateral framework would give the opportunity to the stronger party in a BIT to dictate his conditions as regard to local government performance.

---

123 which can be defined as speculative investment.

124 example of incentive link to performance requirements: the state proceed to taxes exoneration but ask for the creation of an amount of job or re-investment of capital return.

V.5 Comparison of EC[125] and US[126] view on a potential MIF

In this section I will try to briefly compare the view of the two majors actors in the proposal for an MIF regarding to some key provisions.

✓ **Definition of investment:**

The MIF proposed by the US will include a wide definition of investment and incorporate portfolio investment on the contrary to EC proposal which only introduce FDI, even if a proper definition will be difficult to find. Also, for EC it is imperative to make clear that the proposal is not a capital liberalization code. It has to be said that the definition would not include short term movement of capital.

✓ **Expropriation:**

According to the US proposal, the future MIF will go further on the international customary law on expropriation by including "indirect expropriation"[127] and NAFTA language like 'measures tantamount to expropriation'. On this particular point, the EC propose, at a maximum, extend the traditional and common rules on expropriation to the MIF which means the actual current regulation contained by BITs. Here, EC seems closer to DCs concern than the US.

✓ **Type of liberalization commitments:**

The US view is to allow a right of admission with the guarantee of a pre-establishment national treatment (subject to exceptions: the so called 'top down pre-establishment national treatment). This approach obviously lead to a 'negative lists' of limited sectors that could be remain unliberalized. On the contrary, the EC adopt a GATS 'bottom up' style approach for the admission of investors which basically means that the host country chooses whether or not to open a sector. Thus, the EC approach implies a 'positive list' which, in others words signify that host countries choose to liberalize when they are ready.

---

125 Source and views expressed are resumed at www.europa.eu.int.comm/trade/miti/invest

126 US government proposal for a MIF issued at Doha ministerial conference.

127 The NAFTA style of language talk about "measures tantamount to expropriation"

✓ **The rights to regulate for state:**

This key provision is to be considered with what has bee mentioned just below. Thus, for the US the right of the host country to regulate the foreign investment must be limited[128]. The EU approach, on the other side allow member states to keep their usual right to regulate but in a manner consistent with principles of transparency, non-discrimination, predictability and taking into account the needs for development.

✓ **Provisions for development:**

As noticed below (see US proposal), the American approach is largely ignoring the flexibility needs for DCs. On the contrary, when the EC were deliberating a possible investment agreement in WTO, the international community expressed his attention to incorporate flexible rules in order to respect developments policies[129]. It should be possible to formulate flexible rules in a manner that respect development policies and binding commitments. Then, the real question is to what extent? A more precise formulation should be submitted in this regard.

✓ **Dispute settlement:**

Europeans consider here that as the agreement will be signed into the WTO regulatory framework, disputes should be settled within the WTO under the auspice of the Dispute Settlement Understanding whereas the American approach would regard the 'investor to state dispute settlement' as more appropriate. The latter wish to maintain is strong bargaining position and the former plead for consistency[130].

---

128 full presentation of US arguments for an MIF in WTO discussions paper (WT/WGTI/W/142)

129 EC concept paper for an MIF, and EC reply to opponents to an MIF "policy space for development" (WT/WGTI/W/154)

130 further comments is provided in next part

V.6 Main arguments for opposing a MIF on development grounds put forward by a group of WTO members

It appears from the submissions to the WGTI that India is the country most strongly opposed a MIF. Although some DCs like Brazil and Malaysia[131] have expressed their support for a GATS type approach to investment, India's position can be regarded as being representative of the concerns of a broader group of low income and LDCs in the WTO. This section will provide for a account of some of the potential costs associated with a MIF according to India and some main commentators[132].

- **WTO Trade type regime seems not to be appropriate for investment.**

FDI is conceived as a trade issue rather than a development and industrialization issue. with exception to trade related investment (already regulated by TRIMs and GATS), there is no justification to include investment in the WTO framework.

Based on US-style patent and copyright rules, the TRIPS agreement prevents much-needed technology transfer to developing countries by ensuring corporate control of knowledge and technology through globally enforced minimum standards, including twenty-year patents.

Finally, the 1995 agreement on TRIMs reduced the freedom of governments to demand that foreign investors use a minimum percentage of local content as inputs, export a minimum percentage of their production, or limit the level of profit repatriation.

In 1997, when governments of rich-countries tried [133] to build on a new Multilateral Agreement on Investment, the main objective was to remove all or most of the remaining restrictions on foreign investment, and ensure that host governments treated foreign investment no less favorably than they treated domestic investment. The definition of investment for the negotiation of this agreement was very broad, including intellectual

---

131 Malaysia said that a GATS type positive list approach would be in favour of DCs but also called for permanent exemptions from any obligations regarding admission of FDI.

132 Singh 2001, Kumar 2001 at note 106 and UNCTAD WIR 2001, 2002

133 OECD governments failed to reach an agreement after protests initiated by NGOs, a growing list of more than 600 exceptions put forward by OECD governments, and the French government's refusal to sign the agreement, in order to protect its cultural sector.

property and portfolio investment.[134] The agreement also included a broad definition of expropriation.

- **Government needs to regulate FDI for it to be beneficial to the process of economic development[135]**

By examining[136] the developmental impact of FDI it could said that developing countries pursuing selective policies towards FDI have generally a greater success regarding their developmental objectives than those pursued with more open policies. So a MIF by providing more binding obligations could seriously prejudice economic development if it prevent any regulation of FDI. Furthermore, the beneficial effects of FDI in terms of technological transfers and spillovers are highest when FDI is carefully regulated.

- **There is even a stronger argument for regulation: if FDI takes the form of M&A.**

FDI to developing countries increasingly takes form of M&A although predominantly 'Greenfield type'. In term of comparative advantage, such FDI entry via acquisition may not represent any addition to the capital stock or employment. In addition, the strong M&A wave is likely to further accentuate the market power and size of MNEs as compared to most DCs corporations. Thus by driving out domestic firms through predatory prices they can exert a sort of monopoly control. Then, as it seems difficult to evaluate how beneficial FDI is to developing countries when it takes the form of simple cross border take over, developing countries might search to regulate M&A effects and may restrain access to foreign investor. This type of regulation is said not being compatible with a multilateral agreement which will be based on liberalization promotion.

---

134 'beyond the traditional notion of FDI to cover virtually all tangible and intangible assets, applying both to pre-establishment and post-establishment'

135 WT/WGTI/W/148

136 UNCTAD conclusion on FDI "the effects of FDI on development depends on the initial conditions prevailing in the host country and on the host government policies, government therefore can not be passive"

- **A MIF could increase the volatility of capital flows.**

FDI has become a predominant source of external finance for DCs. International liberalization of trade and capital flows has greatly increased the needs for DCs for external finance while official capital flows have declined. As a result DCs have become more balance of payment constrained than before, which in turns has resulted in stronger competition to attract FDI. This has shifted the balance of power in the negotiations over FDI projects towards MNEs. Instead of addressing this imbalance, a MIF is likely to make it worse by giving DCs less instruments to attract and discipline investors.

- **If there is a rationale for granting free access and national treatment to capital, it should also apply to labor.**

This argument sustain the idea that with freer mobility of capital provided by a MIF and labor being essentially immobile, the distribution of income would further shifts towards the owners of capital.

- **Efficiency of actual international Instruments**[137]

BITs have proven to be a means assuring investors sufficient protection and host countries an adequate degree of policy flexibility. Moreover, FDI flows to DCs has risen manifold over the last decade. A MIF is not convincing in providing more FDI flows.

- **Investors obligations**[138]

While foreign investors could generate positive changes in the economy through the induction of capital, technology, managerial skills it could also have various negative effects as retaining the main spillovers, Restrictive Business Practice, ownership and control of entities when FDI is not channeled. In this regard a code of conduct on investors should be enforced via a MIF.

---

137 WT/WGTI/W/86

138 WT/WTGI/W/148 and WT/WGTI/W/152

In conclusion, these arguments provide some inside into why opponents of a MIF do not consider the latter to be development friendly. The risk may that opponents would not only reject EC's proposal for a GATS type MIF but any MIF constraining host country policy options. A full degree of flexibility in defining and implementing such policies by host governments is seen as a necessary condition for effectively correcting market failures associated with FDI so as to close the gap between private and social effects from investment. Essentially, these contrasting positions arise from the unsettled debate concerning the optimal degree of government intervention in markets and as to how far governments should be allowed to intervene in their markets? No empirical answer has never really been convincing on this matter, especially when markets are characterized by imperfect competition and market failures. However, some major DCs demands need to be critically addressed.

PART VI A critical review of the Proposals and oppositions arguments to a MIF

In this chapter a critical overview of the argument raised by both parties is to be addressed in order to better understand the chance of success of MIF and to envisage different strategies and policy recommendations for developing countries in a MIF negotiations. Much of the debate within the WGTI has been about whether or not the assumptions of the EC are justified. However, this Part discusses the relevance of both EC and DCs arguments.

VI.1 A critical survey of EC proposals

The critics developed here over the EC proposals have been organized in two lines. First they directly address failings and weaknesses of the EC submissions and secondly they question the opportunity of a GATS style MIF on developmental grounds.

The EC is basing significant reliance for the submissions preparatory work on two pieces of empirical research, the TN SOFRES[139] business survey and the opacity report by PriceWaterhouseCoopers[140]. The EC submission in question does not seem to mention what maybe it is the more interesting results of the two surveys. First, the US is found to have as many obstacles to international investment as Malaysia, Poland and Indonesia. Second, among the 10 most awkward barriers to foreign investment, non transparent national or local laws and regulations are ranked fifth with less than 20% of businesses considering them as awkward enough so as to prevent them from operating abroad. Third, only about 10% of EU based MNEs have working knowledge of GATS, less than 10% of BITs or NAFTA chapter 11and less than 5% of the TRIMS agreement. That is too said that if most business people are unaware of the very investment provisions that are supposed to benefit their companies, it is unlikely that such business people are differentiating between overseas economies on the basis of the investment protection offered. However, one may also interpret this result,

---

139 TN SOFRES SA, 2000, Survey of attitudes of European Business to International Investment Rules, on the behalf of the EC DG trade

140 PriceWaterhouseCoopers, 2001, the opacity index project, www.opacityindex.com

arguably that they do appear to make a particularly case for the proposed multilateral disciplines on transparency in investment.

Also, while it is reasonable to assume that international investors prefer countries offering a higher degree of transparency to invest in and are sometimes deterred from investing at all in countries where transparency falls below a minimum acceptable level, there is no reliable empirical evidence that suggests that transparency is as important as economic fundamentals, like for example national income. For instance, it may argued be that even more FDI would have flowed to China over the last decade although it is not a clear and transparent regime for investment[141]. This may be true or not but it is certain that China would not have received all that FDI if it did not dispose of a Huge domestic market and a vast amount of relatively cheap resources and assets. What is at stake is thus in the investment rationale is mainly economic fundamentals that underline investors preferences to invest in certain countries rather than others.

Likewise are questionable EC 's claims that it is the host countries rather than home countries that would benefit from improvements in transparency. This must be true if a MIF does in fact increase transparency and overall economic efficiency in host countries and the latter are less transparent before the introduction of the MIF than home countries. However, this may not be the true if home and host countries have a similar degree of transparency.
In sum, the evidence on the effects of improving investment related "transparency" alone does not appear to make a strong case for a MIF. This is not to say that EC's claim that a MIF would secure more transparent, non-discriminatory stable and predictable conditions for long term investment is incorrect. What is mainly contested here is the assumption that a MIF would have significant impact on the amounts of FDI flows to DCs.

Although a MIF would increase stability and predictability of rules governing FDI, it is not clear why only a multilateral agreement would achieve this result. A GATS type investment agreement within the WTO framework would certainly provide investors with a clear indication on the market access and conditions set out in each members schedules, and also more leverage to retaliate against non complying members. However, BITs are also

---

[141] this is sustained by clear anecdotal evidence on huge amounts of FDI flowing to notoriously non transparent and corrupted countries such as China and Malaysia which are also suffering corruption allegation. Sing, 2001see note above 106

legally binding and in some case include provisions regulating entry conditions for FDI. Moreover, some of these treaties allow for investor-state disputes while a MIF within the WTO would probably not (see point VI.3 below). Furthermore, even if there were a significant benefits from a MIF in terms of higher FDI inflows due to an increased credibility and stability of rules, then it still has to be demonstrated that such benefits would be more important than the costs associated with the loss of part of flexibility for host countries to choose conditions and organize investment on a case to case basis.

A crucial assumption underlying EC's proposal for a GATS type MIF is that the latter by allowing progressive liberalization of FDI flows, is necessarily development friendly. In order to make sense to this assumption it is essential to distinguish between what is define in EC's submissions as development friendliness or "relative flexibility" and "absolute flexibility"[142]. The latter refers to full determination of national polices relating to FDI both to pre and post establishment phase. In contrast, the concept of relative flexibility refers to the maximum flexibility that can be reach with a multilateral agreement in place. By definition, a MIF does constrain to some extent the degree of policy flexibility of adhering countries as it aims at removing policy related obstacles to what is though to be the proper functioning of markets. It is doubtful whether a MIF can be designed in a way so as to distinguish between governments interventions that are efficiency enhancing and those which are not. It seems worth, here, to repeal that the development friendliness of a multilateral investment agreement is measured in terms of the degree of flexibility it leaves to host countries in pursuing their development plans and policies. More specifically, UNCTAD defines the concept of flexibility as:

"the ability of IIAs to be adapted to the particular conditions prevailing in DCs and to the realities of asymmetries between these countries and developed countries"[143]

---

[142] Morissey 2000, 'Investment and competition policy in DCs : Implications of and for the WTO, Credit research paper

[143] UNCTAD 2000b: 1

UNCTAD has further defined the flexibility of an International Investment Agreement as largely depending on the combination of:

1. "the development objectives set out in the text, usually the preamble,
2. "the overall structure of an IIA, particularly with regard to special principles and rules and modes of participation relating to DCs
3. "the substantive content of an IIA which needs to reflect development concerns and an overall balance of rights and obligations
4. "the application of an IIA and particularly the interpretation of its provisions"

Among the number of international trade and investment agreements analyzed by UNCTAD on the above criteria, it finds the positive list approach adopted by GATS as the framework providing the highest degree of flexibility. Indeed, the GATS type approach for a MIF appear to be allowing for a relatively high degree of flexibility as it permit countries to decide the preferred timing, subjected to sectors and the conditions of liberalization to FDI. This is particularly evident when a GATS MIF is compared to the highly inflexible OECD proposal for a MAI as discussed in point III.4.

In sum, EC's argument for a MIF are not all ultimately compelling. This has left 'plenty room' for opponents to reject a MIF on fundamental grounds with the key disputed matter of development friendliness aspect of a MIF. The view of such opponents are thus to be considered with even more attention in the next section.

VI.2 how sensible are Developing Countries' Demands ?

It is for several reasons that developing countries are urged to monitor and regulate the amount, structure and timing of FDI. Firstly, to avoid financial fragility, secondly to prevent crowding-out of domestic investment, and thirdly to promote economic development by technology transfers and economic spillovers.

As well, the request for a more balanced multilateral agreement to include corporate obligations is meant to improve the developmental impact of FDI in DCs. Corporate obligations are thus also considered as a vital element of a multilateral agreement, as MNEs

"often only aimed at maximizing their own profits"[144]. "The profit motives of MNEs may conflict with development needs of the FDI host countries and thus provides for a rationale for restrictive FDI policies if market failures is prevalent"[145].

In sum, DCs have two major requests which they consider essential for improving the development impact, or in other words the "quality" of FDI. As concerns their own FDI policies, DCs insist on **flexibility** which would allow them to pursue selective and targeted FDI policies. At the same time, DCs argue that a balanced MIF must include **binding corporate obligations**, ranging from precautions against unfair business practices to obligatory technology transfers. **In essence, developing countries demand more flexible rules with regard to their own behaviour and more binding rules with regard to corporate behaviour in order to improve the developmental impact of FDI.**
Both requests are meant to foster the development friendliness of FDI. However, developing countries should take into account that their demands also give rise to some economic questions. In the following paragraphs, I will address possible trade-offs and opportunity costs, and discuss the effectiveness of "development clauses" in a multilateral investment agreement.

VI.2.1 Corporate obligations

DCs do have a point when they regard existing bilateral, and existing multilateral investment agreements as biased in favour of business interests. According to the World Bank:[146]

"the negotiating asymmetries that are common to bilateral agreements have led to treaties in which developing countries have taken on substantive obligations without any reciprocity other than the promise of increases in future private investment."

---

144 DSE Forum,2002: 39, The Development Dimensions of World Trade: Implementing the Doha Development Agenda. International Policy Dialogue. Berlin: German Foundation for International Development

145 Hoekman and Saggi, 2000. Assessing the Case for Extending WTO Disciplines on Investment-Related Policies. *Journal of Economic Integration* 15 (4): 629–653

146 World Bank, 2003 1-27: . *Global Economic Prospects*

Thus it is mainly with regard to corporate obligations that developing countries may achieve a better deal by negotiating multilaterally on investment. As BITs typically do not include provisions against restrictive business practices (RBP) which creates market distortions in host economies, then the Bargaining asymmetries, as mentioned above, should be easier to overcome if the request for corporate obligations is coordinated among developing countries.

MNEs, indeed, can have strong distortions effects on host countries. Such distortions mainly result from anti competitive behaviour on the part of MNEs including RBP such as transfer pricing, price fixing market allocation agreement and tied selling. Binding rules on RBPs do not exist at a multilateral level. Recently china, Cuba, India, Kenya Pakistan and Zimbabwe have co sponsored a submission to the WGTI demanding rules on RBPs to be put on the negotiation agenda and therefore reinforcing DCs long standing demand for constraints on MNEs action as a *quid pro quo* for further liberalization on their part. ICs on the other hand, do not seem particularly inclined to consider such a proposal in accordance with MNEs desire to face as few restrictions on investment as possible. This is thus another case where no cooperative international arrangement would be preferred by all parties except in a context of issue linkage with other provisions of a potential MIF. However, if a wish-list of multilateral rules on corporate behaviour were to assess it could includes the following[147]:

- observance of human rights, labor rights and environmental protection;
- corporate disclosure and accountability;
- respect for national laws;
- social responsibility, with regard to illicit payments and product safety;
- transparency in transfer pricing;
- promotion of technological dissemination, local entrepreneurship and local workers.

Yet, it is questionable whether development objectives would be easier to achieve, and higher quality FDI be attracted, if a MIF contained binding corporate obligations. If corporate obligations really bite, by rendering technology transfers mandatory, foreign investors always have the option not at all to invest, especially where they consider the

147 CUTS, 2002, Regulating Corporate Behaviour. Briefing Paper 4/2002

protection of intellectual property rights to be deficient. Consequently, DCs should be aware that they face a trade-off: the more binding corporate obligations become, the less FDI they may get. In a sense this might not be a problem for recipient countries if only "development-unfriendly" FDI projects were discouraged in this way. It cannot be ruled out, however, that foreign investors would generally become more reluctant. Almost by definition, the profits of MNEs and, thus, their incentive to undertake FDI will decline to the extent that developing countries succeed in shifting rents from MNEs to host countries by imposing binding obligations on the former.

VI.2.2 The need for flexible rules?

A similar trade-off exists when DCs insist on **flexible and selective FDI policies**. It comes at the cost of transparency and predictability if DCs are not prepared to tie their own hands. In other words, the transaction-cost argument (discussed in Part IV) might become irrelevant altogether if FDI rules were to become rather flexible. In sum, MNEs confront significant transaction costs and increased uncertainty from differences in national rules governing FDI and the patchwork of existing BITs. Thus more flexibility that would result in more national rules to discipline FDI will add supplementary cost for MNEs. Such an uncertain investment climate might deter MNEs to invest.

More importantly, the argument for **flexibility and** selectivity rests uncertain, namely that "development clauses", **performance requirements** and the like are effective in promoting economic development. Previous experience with performance requirements such as local-content rules, technology-sharing obligations and local equity participation in the form of joint ventures suggests that enhancement effect of such policies is not granted. A detailed account[148] of performance requirements found FDI to be harmful to the growth and welfare of developing host countries when foreign investors were burdened with high local content, mandatory joint ventures and technology-sharing requirements.

---

[148] Sauvant, 2000. Rapporteur's Report. In: German Foundation for International Development, Summary Report: Pre-UNCTAD X Seminar "International Investment Policies: Which Strategies for Developing Countries?"

There is another aspect of **performance requirements** that many DCs tend to ignore. When FDI is undertaken in spite of restrictive performance requirements, it is frequently because foreign investors are granted compensatory advantages in the form of tax **incentives** and financial subsidies. For example, subsidies to attract FDI in automobile factories amounted to hundreds of thousands of dollars per job to be created in various countries, including in several DCs. Moreover, as noted in point IV.4.2, for most FDI projects DCs are competing with each other[149].

Also, the insistence of DCs on preferential treatment is highly unlikely to deliver the desired results. The preferential treatment DCs have "enjoyed" for decades in the GATT[150] framework for trade is a clear reminder in this regard. Various studies[151] show that trade preferences, well-intended as they were, did the poorest GATT members no good in promoting their world-market integration. Rather, the special treatment appears to have discouraged African countries, for example, from actively participating in trade negotiations by committing themselves to binding trade liberalization. **As a consequence DCs insisting on preferential treatment were no relevant negotiation partners for industrialized countries in various trade rounds** as Bhagwati[152] notes: "The rich countries, denied reciprocal concessions from the poor countries, wound up concentrating on liberalising trade in products of interest largely to themselves". The implication for multilateral negotiations on incentives-based competition for FDI is obvious: DCs cannot achieve much unless they are prepared to forgo a little flexibility on their own part.

Finally, the general skepticism on whether flexibility and selectivity will help promote development-friendly FDI may be specified in regard to administrative capabilities to channeled the FDI effect.

---

149 Oman, 2001. The Perils of Competition for Foreign Direct Investment. In: OECD, *Foreign Direct Investment Versus Other Flows to Latin America.* Development Centre Seminars.

150 Special treatment of developing countries was codified in GATT through the so-called Part IV Extension in 1965 and the Enabling Clause on "Differential and More Favorable Treatment, Reciprocity and Fuller Participation of Developing Countries" in 1979

151 Bhagwati, 2002: 26, The Poor's Best Hope and Sauvant, 2000. Rapporteur's Report. In: German Foundation for International Development, Summary Report: Pre-UNCTAD X Seminar "International Investment Policies: Which Strategies for Developing Countries?"

152 ibid

For instance, developing countries in Asia (Korea and Taiwan) chose to restrict FDI and instead to rely on domestic investors in technologically advanced industries, in order to strengthen local technological capabilities. However, according to UNCTAD[153], selective FDI policies paid off in some of these countries; "in many cases, the emergence of successful domestic producers in a new, technologically-advanced industry is unlikely or might take a long time with uncertain results. An example of a costly intervention in favor of domestic firms in high-technology industries is the Brazilian informatics policy of the early 1980s, which involved restrictions on FDI."

In other words it cannot be simply assumed[154], that some success stories of flexible and selective FDI policies could be easily copied by all developing countries. Poor developing countries in particular, may lack administrative capabilities to effectively screen FDI and channel foreign investors into activities which foster national economic development. Government failure may then hamper economic development even more seriously than market failure.

Finally, in this Part dedicated to the review of the main arguments opposing and sustaining the need for a MIF, I will assess the critical question of Dispute settlement. The main reason for focusing on this particular point is that inevitably the effectiveness of any future agreement will be measured by Members' adherence to the rules and by its enforceability in the event of breach. As it seems, Members 'submission shows that it exist firm opposition on this subject whereas the issue is highly determinant.

VI.3 The long standing (and not settle) question of Dispute resolution in a Multilateral Investment Framework

The question of the most appropriate dispute resolution system for an MIF in general becomes critical and more particularly difficult when it comes the moment of enouncing

153 UNCTAD WIR 1999a: p.173

154 Singh, 2001. Foreign Direct Investment and International Agreements: A South Perspective. South Centre, Occasional Papers 6.

whether or not the MIF will be subject to the WTO dispute settlement procedures along with the rest of the WTO family of agreements.

VI.3.1 Dispute settlement in a MIF, more questions than answers

There is some divergence of views regarding whether or not a MIF should be part of the WTO "covered agreements"[155] and therefore subject to the WTO dispute settlement process. As shown in part IV, the EC takes the view that '...future MIF should include the possibility for Members to resort to Dispute settlement mechanism where they consider that other Members have failed to observe their obligations under the agreement'[156].

In general such an outcome will have implications on the flexibility that exists to submit investment disputes to arbitration. One may well anticipate a situation where state-to-state arbitrations will come to an end being taken over as it were by the WTO mandated procedures. On the other hand, for investor-to-state disputes a huge and potentially different gap will be left unfilled. Whereas the MIF will essentially regulate the relation between investors (through their home governments) and their host states, it will not be extended to the disputes resolution between them in quite the same way. An aggrieved investors can always approach its home governments to commence dispute proceeding against the host country on its behalf, through subrogation for instance, but there are concerns in this regard that it may prevent the system from working as perfectly. One of these concerns is potential governments bureaucracy which could significantly slow down the process. It should be acknowledged however that as the system operates presently, private sector interests and influence through home governments are quite prominent[157].

Others reasons are sustaining the idea that a MIF would not be subject to WTO dispute settlement. Firstly, a number of ICs consider the risk of being sued by a foreign investor is too high if a multilateral investment agreement provide for investor-state dispute settlement. In the past, investor-state arbitration has been almost exclusively agreed upon IIAs between

---

155 « covered agreements » is the term used in the Dispute Settlement Understanding (DSU) to describe the agreements under its supervision and refers to the agreements under ANNEX 1 of the General Agreement.

156 WT/WGTI/W/115 at p.1

157 as was the case EC-Bananas (WB/DS27/AB/B) and, Shaffer, 2003, 'how to make the dispute settlement system work for developing countries: some proactive strategies for developing countries', in International center for trade and sustainable development, toward a development supportive dispute settlement system in the WTO, ICTSD resource paper.

industrialized and developing countries. Investments in this relationship flew in principle in one way (from ICs to DCs). Accordingly the risk of ICs to be taken by an investor of a DC to international arbitration was low. This situation would significantly change under a global investment agreement. It would, to a large extent, cover investment flows between ICs. Consequently, the risk of being sued may increase enormously. The NAFTA demonstrates this situation. Since it entered into force it has already given rise to a considerable number of investor-state dispute settlement procedures[158].

The second concern is related to costs for DCs. It is now well accepted in the literature that WTO disputes settlement process is forbiddingly expensive and technical, and therefore out of reach for most DCs[159]. According to Schaffer, these countries are not even "developing human and technical know how in WTO law. Most DCs have few laws schools and no professors to teach WTO law". In this regard, the African group pointed out in its proposal for DSU review that:

"the DS is complicated and overly expensive which has institutional and human resource as well as financial implications. This has not supported most developing country members in readily using the DS. (a) DCs members will need supplementary resources and means to be provided to develop both the institutional and human capacity for using the DS. While this may be part of the technical assistance program specific measures will be necessary to address this issue such as the establishment of a permanent standing fund in the form of , for instance, small cess on Membership contributions or otherwise within the framework of the Doha Development Agenda Global Trust Fund. (b) the advisory center for WTO law should not be considered as panacea for all institutional and human capacity constraints of DCs. Its terms of reference are equivocal in certain instances and it does not cover all DCs. (c) it needs to be clearly recognizes that every decent legal system ensures that parties that would not be able to exercise their rights in the judicial system for financial constraints are provided means to do so. We will be happy to work with all delegations for further discuss specific issues delegations may wish to raise"[160]

In any circumstances, this may not change soon. Thus, subjecting a MIF to the compulsory WTO dispute settlement process will some kind of strategic failures for two reasons. Firstly,

---

158 As in METACLAD CORP. v. United Mexican Union and ETHYL CORP v. Canada see note 66

159 Ibid see Shaffer note 157

160 WTO/DS/W/15

it will deny poor countries the current opportunities to resolve disputes in an amicable and cheaper way through the arbitration procedures provided by BITs and secondly, maybe denying them an opportunity to have an hand in resolving completely disputes because many of them will be locked out of the process by its level of technicality and expense.

Nevertheless the EC supports its proposal for a WTO disputes settlement mechanism that would covered the MIF by linking to the desire for consistency[161] between the family of WTO agreements and most especially GATS. It is a good and convincing argument in that sense that in general there is much to gain from consistency in international standards. Indeed, the WTO is about policy and rules coherence which makes the process of global integration easier. However the argument falls short regarding the concerns of poor economies as mentioned above. In fact, the proposal does not take in account the negative experience of DCs and ignored the largely ineffective special and differential treatment provisions in the DSU.

Thus, these are some of the concerns that should form a background for such a proposal if it is to reflect the interests of DCs. Most BITs in force at the moment allow for investor-state disputes. In fact, these comprise the bulk of the investment related disputes that has been submitted before most competent institutions such as ICSID. On the other hand, the WTO dispute settlement system is inter governmental by nature and many poor economies insist that it should remain so[162]. In this case, a MIF will credibly be a strictly inter-governmental agreement and will be enforced through the WTO disputes procedures as such. The consequences of this is that private investors will not have access to the dispute settlement process of the WTO in a potential investor-state disputes. If this is a negative thing it could on the other hand be positive in the sense that WTO will thereby avoid a flood of litigation with which it has no capacity to cope[163].

---

161 WT/WGTI/W/115

162 see the proposal from the African Group and the LDC group on dispute settlement

163 Japan notes in this regard : "the administration bodies of WTO agreement are states parties and even if a MIF were to be set out it would be inappropriate to recognize private individuals as having a standing in dispute settlement. Otherwise, there would a high possibility of a sharp increase in lawsuits being filed by investors creating a large burden for member governments. From the point of view of flexibility, stipulations are made to pay special considerations to LDCs in dispute settlement procedures in WTO agreement", WT/WGTI/W/104

Finally, the present system of investment dispute settlement relying on international arbitration seem to offer a number of advantages for both ICs and DCs. These include: foreign arbitral awards might be enforced with greater ease than foreign judgment; the parties to the dispute may determine the language, choose a site of mutual convenience and overall arbitration is much faster than procedures in local courts[164].

VI.3.2 The potential threat of Non Violation Complaints

The usual practice is that Multilateral dispute settlement systems address or resolve differences between the parties in interpretation or application of the respective treaties. However, the scope of the GATT Article XXIII is broad and allows members to deal with non GATT violating measures and situations[165]:

"nullified or impaired...that the attainment of any objective of the Agreement is being impeded as a result of: (a) a failure of another contracting party to carry out its obligations under this agreement; or (b) the application by another contracting party of any measures, whether or not it conflicts with the provisions of this agreement or (c) the existence of any other situation".

In fact, non violation has been a problematic issue in trade law. The heart of it, in the GATT, is that the defending party has not in actual fact violated GATT or any other legal provisions. The basis of the claim is usually that, for some entirely different reasons, the defendant's action have deleterious effects on the complaining party[166]: In other words, perfectly GATT consistent policies could be subject to challenge if they in some way defeat the fundamental trade policy aspirations of the GATT.

Is it conceivable thus that a MIF could include a non violation complaints provisions? If the consistency and coherence in the family of WTO agreement is a lesson that could be borrow the answer is yes. As a MIF would constitute the fourth of WTO principal Agreement, it would be a surprise if non violation complaints was not included in it. Therefore, this could

---

164 Bowman, Dispute Resolution Planing for the Oil and Gas industry, 16 ICSID Rev. FILJ 332, 364. 2001

165 Sungjoon Cho, 2003, 'Non violation issues in the WTO framework : are they Achilles heel of the dispute settlement process. Harvard International Law Journal, Vol. 39 No.2.

166Frieder Roessler 1999, 'should principles of competition policy be incorporated into WTO law through non violation complaints ? Journal of International Economic Law, p.413-421, see also UN Doc E/PC/T186 at 53 : " Article XXIII was considered necessary because the provision of the GATT do not realize the objectives of the GATT completely ...the main purpose of the GATT framework is to ensure that the value of tariff concessions is not impaired by non tariff measures".

be one of those issue that will come to haunt poor countries at the moment of negotiations[167]. The problem is that such possibility makes the country non really sure around their policy decisions, not knowing whether a particular policy decisions could be subject to challenge.

In order to highlight the problematic issue of non violation complaint, I will briefly exposed the Panel decisions in *Korea-measures affecting Government procurement*[168]as this particular dispute reflects the possibility that panelists could expand Members obligations beyond what an Agreement require and that it may not work necessarily in favor of DCs. In this case the US addressed a complaint against the Rep. of Korea over the procurement for the Inchon Airport construction project alleging that the country was in violation of its obligation under the General Procurement Agreement to which both parties are signatories[169]. Also, and more important, the US introduced a non violation complaints to the effect that South Korean measures in respect of bidding and contract requirements violated the "reasonable expectations" of the US in accordance with the GPA commitments of both parties. In its decision the panel expanded the GATT XXIII 1 (b) article concept of nullification or impairment of "reasonable expectation" of a benefit accruing from negotiated concession and agreement. So, according to the Panel, a members "reasonable expectations" could indeed be nullified or impaired by the conduct of another Member not only due to the lack of good faith in the implementation but also due to a lack of good faith in the negotiation negotiations or treaty error.

---

167 Geneva based Agency for international Trade Information and cooperation (AITIC) Which does some brillant monitoring of issues in the negotiations that are of relevance to LDCs and unrepresented missions in Geneva

168 see report of the Panel WT/DS163/R

169 According to the US the Ministry of construction has imposed illegal bid deadlines for the receipt of tenders

PART VII Conclusion: What are the Strategic recommendations and policy options left for a MIF

VII.1 The collapse of the Cancun Ministerial Conference

If there is any lesson to be learnt from the failure of the fifth WTO Ministerial Conference in Cancun it is that the remaining "give and take" process is an absolute requirement in WTO negotiations. The meeting collapsed because no compromise could be reached on the Singapore. Thus, the fate of the Doha round in general and the possibility of an MIF continue to hang in the balance. When the discussions on investment will get revived remains unknown and there are number of issues that DCs may want to carefully ponder. Whether or not they eventually agree to proceed with negotiation relates to a series of question of high interest that should be ponder with care. As regard to the precedent failures, it is worth to remember that the future negotiations on these issues will be infinitely more intense and will involve more preparation. More support will be needed and DCs have to be tactically in order as the MIF issue is complex and heavy. In any case and under no circumstances should DCs agree on a *carte blanche* basis in terms of the modalities for negotiations. The modalities of each issues should be clear.

VII.2 Why the case for a MIF is not really convincing

In sum, Several arguments suggest that multilateral negotiations on an investment agreement should not figure high on the WTO agenda. Investment rules do exist already in BITs, RIAs and even at the multilateral level in TRIMS and GATS. Existing rules may be far from perfect, but it is difficult to conceive that a clearly superior set of rules could be agreed upon under the roof of a WTO agreement on investment.

Also, a MIF may raise to reach a global investment welfare but does not represent a desirable option for all countries as it would largely undermine developing countries flexibility to regulate foreign investment in the domestic economy.

From a broad field of studies on the effects of FDI in developing countries, a strong consensus has emerged to recognize that FDI requires an active government regulation to maximize the benefits and reciprocally to minimize the negative effects for host countries[170]. Then transferring away the control over FDI from developing countries appears not to be a valuable option as long as corporate behavior are not subjected to binding multilateral rules while host country actions are.

Indeed, an evaluation on whether or not the benefits from multilateral rules on FDI are likely to be more important than the costs associated with the partial loss of scope and flexibility of government intervention in regulating FDI will depend on developing countries specific instances to evaluate the efficiency of such measures. It is clear that, developing countries continue to view host country operational measures (HCOMs) as a necessary instrument to ensure that FDI contributes positively to their country economic growth.

Developing countries are strongly relying on the principles enounced in the Doha declaration. Indeed, paragraph 22 states that 'any framework should reflect in a balanced manner the interest of home and host countries, and take due account of the development policies and objectives of host government as well as their right to regulate in the public interest'. This paragraph requires that a MIF should be as development-friendly as possible. Having said that, if a MIF confines the national policies space of host countries, then it should also include binding provisions to regulate multinational enterprises practices.[171]

VII.3 Then, what could be a future scenario ?

The most likely outcome of multilateral negotiations on investment will be a "WTO-plus" framework. Any WTO member could move beyond the multilaterally defined smallest common denominator, by concluding more far-reaching agreements either by using BITs or RIA. This has an important implication for one of the widely perceived strong-points of a multilateral agreement, the reduction of transaction costs. Whatever the relevance of FDI-related transaction costs might be under current conditions (the available evidence

[170] As discussed in Part I. 'the regulation of international trade' : trade and investment p. 274, Trebilock and Howse.

[171] see above Part II Section I

suggests that they are frequently overstated), the complexity of different investment rules and regulations would persist, unless BITs and investment rules in RIAs were to be replaced entirely by a multilateral agreement. This cannot reasonably be expected from the Doha Round, which may at most mark the starting point of WTO negotiations on investment.

The chances to effectively constrain incentives-based competition for FDI do not appear promising either. Here, policy coordination seems key to escape the prisoner's dilemma. In this regard, it would be an important first step to develop an inventory of the extent and costs of FDI incentives granted by all WTO members. However, due to strong opposition, especially from sub-national authorities, the critical issue of incentives-based competition for FDI had been removed from the agenda of OECD countries even before the attempt to agree on the MAI among themselves failed completely. It seems highly unlikely that developing countries unwilling to tie their own hands can achieve binding concessions from industrialized countries to cut FDI subsidies. Apart from quid pro quo-considerations, the practical consequences of a multilateral agreement would remain limited at best, unless negotiations enter deeply into the taxation regulations of host countries and developing countries were prepared to constrain incentives-based competition among themselves.

Also it is, difficult to determine, changes in the volume and allocation of FDI resulting from changes in the regulatory environment as the World Bank expressed it:

"new international agreements that focus on establishing protections to investors cannot be predicted to expand markedly the flow of investment to new signatory countries"[172].

Yet, there are several reasons why the effects of a multilateral agreement on FDI flows to developing countries are likely to fall short of high expectations:

- ✓ The absence of such an agreement has not prevented the recent boom of FDI in developing countries.
- ✓ Likewise, substantial unilateral liberalization of FDI regulations was undertaken in the past even though multilateral obligations to do so did not exist.

---

[172] World Bank 2003: 118

- ✓ The coverage of protections to investors in various BITs goes beyond what can be expected from the Doha Round. Nevertheless, BITs do not appear to have had a significant impact on FDI flows to signatory countries.

It is in this surroundings that developing countries have to decide on their negotiation strategy when it comes to investment-related issues in the current WTO round.

VII.4 Which Options Do DCs have?

In light of the reasoning in the previous sections, DCs may be tempted to resist any mandate of the WTO to negotiate on investment. Yet, policymakers in DCs should think twice before drawing such a conclusion. Even though the case for a MIF is fairly weak in strictly economic terms, it may make sense for DCs to agree to multilateral negotiations on investment. In deciding on strategic options, various political-economy factors should be taken into account. The following questions deserve particular attention:

1. Could DCs strengthen their bargaining position by negotiating investment under the roof of the WTO, rather than bilaterally with major ICs?
2. Do DCs have a reasonable chance to block multilateral negotiations on investment?
3. What are the economic costs of making investment-related concessions, and what could DCs achieve in terms of reciprocal concessions from ICs?

As concerns the bargaining strength of DCs, the experience with BITs provides a relevant counterfactual. As noted in Part III, negotiating asymmetries are common to BITs, which typically do not include provisions against restrictive business practices. For this reason, DCs may be more successful in pushing for rules on corporate behaviour by coordinating their request for corporate obligations to be included in a MIF. On the other hand, many BITs do not prohibit performance requirements, even though small developing host countries have less bargaining power than the industrialized home countries of foreign investors. This is in contrast to the multilateral agreement on Trade Related Investment Measures (TRIMS), which bans certain types of performance requirements (notably, export requirements and local content obligations). Indications are that the pressure on DCs to

abolish performance requirements will mount when it comes to multilateral negotiations on investment. This suggests that multilateral negotiations may improve the bargaining position of DCs in some respects, but not necessarily in all respects.

The answer to the second question is less ambiguous: DCs do not have a reasonable chance to block multilateral negotiations on investment altogether. Critics of a MIF, like Kumar and Singh[173] and India, who argue for a united front of DCs against a MIF seems to ignore that conflicts of interest are not only between ICs and DCs, but also within the heterogeneous group of DCs. As mentioned in Part II, the prospects of deriving economic benefits from FDI differ considerably across DCs. The demand of ICs for clearly defined multilateral rules may be rejected at no cost by DCs anticipating that they will not attract growth-enhancing FDI, no matter what investment agreement they sign. By contrast, countries for which FDI has more to offer will be more inclined to accept what ICs propose. Moreover, once it comes to multilateral negotiations on investment, many DCs have little choice but to join eventually. DCs with particularly large markets and strong economic fundamentals such as China could possibly afford to remain outsiders. But smaller and less attractive DCs probably cannot, even though a MIF is unlikely to result in more or higher-quality FDI. The reason is that not taking part could effectively close the door to FDI for these DCs.

It could be also legitimately expected from this strategy that would DCs and ICs would block each other. To the extent possible under current conditions, the former could still pursue flexible FDI policies deemed necessary to achieve developmental objectives. The latter could take this as an "excuse" for not offering concessions as to the demands of developing countries.

It is for several reasons, thirdly, that DCs should consider the option to commit themselves to rule-based FDI policies as a *bargaining chip*, rather than engaging in attempts to block multilateral negotiations on investment altogether. The economic costs of giving up

---

[173] Singh, 2001. Foreign Direct Investment and International Agreements: A South Perspective. Occasional Papers 6 and Kumar WTO's Emerging Investment Regime: Way Forward for Doha Ministerial Meeting. *Economic and Political Weekly* 36 (33): 3151–3158.

a little of flexibility in FDI policies are substantially less than other benefits. Financially, DCs may even gain from such a move as compensatory FDI incentives would no longer be needed and are at the end highly expensive to them. They could also take the opportunity to obtain some friendly transfer of technology and not mandatory as they would have gone for some concessions. The question for DCs in such circumstances relate more to understand not whether to offer anything, but what to offer and what to demand as a quid pro quo.

Furthermore, an offensive strategy is superior to the currently prevailing defensive attitude of DCs since it would provide incentives for quid pro quo-concessions by ICs. The basic logic of WTO negotiations implies that DCs will become relevant negotiation partners only by offering something on their own. Cross-issue linkage is an important consideration in this regard. The economically valid argument advanced by many DCs that labor mobility is the logical counterpart of capital mobility may be the most relevant case in point[174]. The reluctance of ICs to enter into negotiations on labor mobility so far provided the justification for DCs to reject the demands of ICs for rule-based FDI policies. DCs may obtain better by changing strategy, like in presenting rule-based FDI policies as a carrot and, thereby, increasing the pressure on ICs to agree to negotiations on labour mobility.

The offensive strategy outlined so far is defined as cross-issue linkages or opportunity for 'grand bargain'. Thus DCs may be well advised to look beyond negotiations on investment, especially when it comes to concessions demanded from industrialized countries. Concessions from industrialized countries would be easier to achieve, if developing countries made additional offers related to trade under existing agreements like the GATT and GATS or vice versa. Yet, rules-based FDI policies are an important negotiating chip for developing countries. Far-reaching offers related to FDI policies would render it increasingly difficult for ICs to block negotiations in other areas that are of vital interest to DCs.

---

174 Hoekman and Saggi (2000) show that the economic arguments for labor mobility are not weaker than those for capital mobility.

As it seems, whether or not WTO members will engage in negotiations on a MIF is a matter of time. Depending on who is addressing the question, such a MIF may not be a desirable outcome. However, this paper takes the position that such a decision a decision should be informed by a full account of what eventually could the different issues in a MIF. For the time being, I could safely conclude on several mains concern that DCs should not ignored when entering into a MIF negotiation.

The most central of the concerns should be the level of flexibility that is left to governments and policy makers to channel FDI in a manner that accords with development needs. The extent of this policy space will to a large extent depends on what the MIF will contain in submissions and what is left after negotiation. Also, the demands for obligations of the investors must not be ignored and on the same time not be over realistic. Thirdly, if any MIF is to be on the way for negotiations, DCs would have to assess carefully the issue of settlement of investment disputes and particularly, ways of lessening their negative effects identified. If this is not done the potential problems of a MIF will be further complicated by the introduction of rules on investment that DCs would be able to enforce through the dispute settlement mechanism due to structural difficulties. Finally, DCs should always feel that they a bargaining strength as by virtue of their markets they do.

Finally, In my opinion, instead of talking past each other, it would be desirable if further discussions in or out of the WTO organization are initiated to have a dialogue on the most equitable ways of creating and expanding multilateral rules, having in mind that an increasing worldwide system of production and services will require stability. A best way of conciliating stability and prosperity should then be look in an international agreement. In my view using a multilateral framework is definitely a positive option as opponents and proponents would have the opportunity first to mediate their tensions and conciliate their interest. Secondly, for developing countries, such framework should allow them to introduce specific regulation to ensure the benefit of FDI flows.

Bibliography

Most of the works referred to are accessible on line. However, a particular and affective thanks is directed to the UCT LIBRARY TEAM who helped me to find my way in its gigantic and well furnished shelves. I have to precise, in this regard that some of the present references were available in the library. Finally, a grateful thanks is aimed at those that have been interviewed, especially Johnny V.V.Veeder and the members of the International Economic Disputes Conference. Their advices and Knowledge were extremely precious for the realization of this paper.

Bhagwati, J. (2002). The Poor's Best Hope. *The Economist*, June 22: 25–27.

Blomström, M., and A. Kokko (1997). How Foreign Investment Affects Host Countries. Policy Research Working Paper 1745.

Blomström, M., R.E. Lipsey and M. Zejan (1994). What Explains Developing Country Growth? National

CUTS (2001). All About International Investment Agreements. Monographs on Investment and Competition Policy 7.

CUTS (2002). Regulating Corporate Behaviour. Briefing Paper 4/2002.

DSE Forum (2002). The Development Dimensions of World Trade: Implementing the Doha Development Agenda. International Policy Dialogue. Berlin: German Foundation for International Development.

ERT (2000). Improved Investment Conditions: Third Survey on Improvements in Conditions for Investment in the Developing World. Brussels: European Round Table of Industrialists.

France, le Premier Ministre (1998). Discours et Interventions, 14 Octobre 1998, http://www.premier-ministre.gouv.fr/PM/D141098.htm

Gara, J. (2002). Investment: Scope and Definition. Paper presented at the Brainstorming Meeting on Competition and Investment organised by CUTS

Graham, E.M. (1998). Regulatory Takings, Supernational Treatment and the Multilateral Agreement on Investment: Issues Raised by Non-governmental Organisations. *Cornell International Law Journal* 31 (1): 599–614.

Henderson, David (1999). The Multilateral Agreement on Investment: A Story and Its Lessons.

Hoekman, B., and K. Saggi (2001). From TRIMs to a WTO Agreement on Investment? In B. Hoekman and W. Martin (eds.), *Developing Countries and the WTO: A Pro-active Agenda*. Oxford: Blackwell: 201–214.

Hoekman, B., and K. Saggi (2000). Assessing the Case for Extending WTO Disciplines on Investment-Related Policies. *Journal of Economic Integration* 15 (4): 629–653.
ICC (1996). Multilateral Rules for Investment. Document No. 103/179 Rev. Paris: International Chamber of Commerce.

Kokko, A. (2002). Globalization and FDI Incentives. Paper presented at the Annual Bank Conference on Development Economics in Europe available on line.

Krueger, A.O. (2000). NAFTA's Effects: A Preliminary Assessment. *World Economy* 23: 761–775.

Kumar, N. (2001). WTO's Emerging Investment Regime: Way Forward for Doha Ministerial Meeting. *Economic and Political Weekly* 36 (33): 3151–3158.

Langhammer, R.J. (1999). The WTO and the Millennium Round: Between Standstill and Leapfrog. Institute for World Economics, Kiel Discussion Papers 253.

Ley, R. (1997). The Scope of the MAI. Multilateral Agreement on Investment: State of Play in April 1997.

Low, P., and A. Subramaniam (1995). TRIMS in the Uruguay Round: An Unfinished Business? In W. Martin and L.A. Winters (eds.), *The Uruguay Round and the Developing Economies*. World Bank Discussion Papers 307.

Moran, T.H. (1998). Foreign Direct Investment and Development. The New Policy Agenda for Developing Countries and Economies in Transition. Institute for International Economics.

Moran, T.H. (1999). Foreign Direct Investment and Development: A Reassessment of the Evidence and Policy Implications. In: OECD, *Foreign Direct Investment, Development and Corporate Responsibility*. Paris: 41–55.

Nunnenkamp, P. (2001a). Foreign Direct Investment in Developing Countries: What Policymakers Should Not Do and What Economists Don't Know. Kiel Discussion Papers 380. Institute for World Economics
Nunnenkamp, P. (2002). To What Extent Can Foreign Direct Investment Help Achieve International Development Goals? Kiel Working Papers 1128. Institute for World Economics

Nunnenkamp, P., and J. Spatz (2002). Determinants of FDI in Developing Countries: Has Globalization Changed the Rules of the Game? *Transnational Corporations* 11 (2): 1–34.

OECD (1995). A Multilateral Agreement on Investment: Report by the Committee on International Investment and Multinational Enterprises (CMIE) and the Committee on Capital Movements and Invisible Transactions (CMIT).

OECD (1996). *OECD Benchmark Definition of Foreign Direct Investment, third edition.*

OECD (2002). *Foreign Direct Investment for Development: Maximising Benefits, Minimising Costs.*

Oman, C.P. (2001). The Perils of Competition for Foreign Direct Investment. In OECD, *Foreign Direct Investment Versus Other Flows to Latin America*. Development Centre Seminars: 63–84.

Pant, M. (2002). The Millennium Round of Trade Negotiations: A Developing Country Perspective. *International Studies* 39 (3): 213–226.

Read, P. (1999). International Investment in the WTO: Prospects and Challenges in the Shadow of the MAI. www.bond.edu.au/law/blr/vol11-2/Read.doc

Rugman, A.M., and A.D.M. Anderson (1997). NAFTA and the Dispute Settlement Mechanisms: A Transaction Cost Approach. *World Economy* 20 (7): 935–950.

Sauvant, K.P. (2000). Rapporteur's Report. In: German Foundation for International Development, Summary Report: Pre-UNCTAD X Seminar "International Investment Policies: Which Strategies for Developing Countries?" Berlin: 7–12.

Sauve, P. (1998). Multilateral Attempts at Investment Rule Making: Why So Difficult? Harvard University, mimeo.

Sciarra, V.P. (1998). The World Trade Organisation: Services, Investment and Dispute Resolution. *International Lawyer* 32 (3): 9–23.
Singh, A. (2001). Foreign Direct Investment and International Agreements: A South Perspective. South Centre, Occasional Papers 6.

Stiglitz, J.E. (2000). Capital Market Liberalization, Economic Growth, and Instability. *World Development* 28 (6): 1075–1086.

UNCTAD (1996) *International Investment Instruments. A Compendium, Vol. II.*
UNCTAD (1997). *World Investment Report.*
UNCTAD (1998a). *World Investment Report.*
UNCTAD (1998b). *Bilateral Investment Treaties in the Mid-1990s.*
UNCTAD (1999a). *World Investment Report.*
UNCTAD (1999b). *Lessons from the MAI.*
UNCTAD (2000a). *World Investment Report.*
UNCTAD (2000b). Bilateral Investment Treaties, 1959–1999. UNCTAD/ITE/IIA/2. http://www.unctad.org/en/docs/poiteiiad2.en.pdf
UNCTAD (2001). *World Investment Report.*
UNCTAD (2002). *World Investment Report.*

Vandevelde, K.J. (1998). The Political Economy of a Bilateral Investment Treaty. *American Journal of International Law* 92 (4): 621–630.

Witherell, W.H. (1995). The OECD Multilateral Agreement on Investment. *Transnational Corporations* 4 (2): 1–14.

World Bank (2002). Globalization, Growth, and Poverty: Building an Inclusive World Economy.
World Bank (2003). *Global Economic Prospects*. Washington, D.C.

WTO (2001). Doha WTO Ministerial Declaration. WT/MIN(01)/DEC/1.