# RESEARCH NOTES

# Towards a multilateral framework for foreign direct investment: issues and scenarios*

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## Introduction: recent developments

The diplomacy concerning the development of a new international legal and institutional framework for foreign direct investment (FDI) has entered a new era during the past two years. Its beginning is marked by the completion of the Uruguay Round of Multilateral Trade Negotiations and the establishment of the World Trade Organization (WTO), progress in the work on a new Multilateral Investment Agreement (MIA) in the Organisation for Economic Co-operation and Development (OECD) and, at the regional level, the establishment of the North American Free Trade Area (NAFTA), the signing of the European Energy Charter and the consideration of an investment code by the Asia Pacific Economic Cooperation forum (APEC).[1]

Individually, each of these is a significant event worthy of serious attention; *in toto*, they mark a watershed in the evolution of the framework of

* This note is a report from an on-going collaborative research project on international institutional arrangements concerning foreign direct investment. Previous and prospective publications from the project are listed in the references. The research for the article is based in part on interviews conducted by the authors during 1994 and 1995 at the GATT/WTO, OECD, UNCTAD and European Union. The authors are indebted to numerous staff members in these organizations and to national governments for their cooperation. The authors are also indebted to their academic institutions for financial support. This included grants from the Georgetown School of Business and its Center for International Business Education and Research and a grant by the Strathclyde Business School for this collaborative research.

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[1] Discussions of the background and/or contents of these agreements are available as follows: for the Uruguay Round agreements and the WTO, see GATT (1994a, 1994b), UNCTAD-DTCI (1994), UNCTAD-DTCI and World Bank (1994); for the OECD, Guertin and Kline (1989), Houde (1994), Ley (1989), Poret (1992), Smith (forthcoming); for NAFTA, Graham and Wilkie (1994), Gestrin and Rugman (1994); for APEC, Bora (1994), Graham (1994), Green and Brewer (forthcoming), Guisinger (1993).

international agreements and institutions affecting FDI. Furthermore, the process of legal and institutional change remains fluid because of the implementation of recent agreements and because additional negotiations towards further agreements are in progress. It is therefore an appropriate time to renew the substantive and procedural issues raised by these recent developments and to consider scenarios for the future. The present note focuses on the outlines of the substantive issues, as well as the institutional contexts in the evolution of the multilateral framework for FDI.[2]

## Substantive issues

### *Obligations and rights*

International investment agreements can establish sets of legal obligations and rights for Governments and firms (Bergsten and Graham, 1992). The balance of the rights and obligations, as between Governments, on the one hand, and firms, on the other, has been a central issue about the provisions of international investment agreements. However, the discussion has shifted from an emphasis on *firms' obligations and governments' rights* to an emphasis on *firms' rights and governments' obligations*. The prospect of further negotiations within the framework of the agreement on Trade-related Investment Measures (TRIMs) may refocus this discussion because the developing countries remain interested in the use of government policies to, among other things, curtail the restrictive business practices of firms and thus insure firms' compliance with certain obligations.[3] The discussion below focuses on elements concerning the obligations of Governments since

[2] The present note is one in a series of publications based on a continuing collaborative research project on FDI issues in international fora. The specifics of the technical substantive issues of FDI agreements are the focus of a companion paper (Brewer and Young, 1995b), which includes a comparative analysis of existing OECD and WTO instruments. A previous paper (Brewer and Young, 1995a) focusses on FDI policies in the European Union. An additional paper in progress focuses on a comparative analysis of policies in NAFTA, the European Union and APEC (Young and Brewer, forthcoming).

[3] More generally, an important trend in the development of international trade law in GATT and WTO has been the expansion from an earlier narrow focus on governments to a broader concern with the rights of firms and more recently the rights of natural persons. This is evident in the inclusion of the movement of natural persons as one of the "modes of supply" of services covered by the General Agreement on Trade in Services (GATS) and in the GATS Annex on the Movement of Natural Persons. This broadening of the legal scope of trade law over time within GATT/WTO is likely to be a precursor to an expansion of international law into the domains of the rights of firms and natural persons as further FDI-related agreements are developed.

those have been the principal concern of international investment agreements in recent years; in particular, the tendency has been to include elements that obligate Governments to liberalise their measures concerning the rights of firms.

Table 1 presents, in outline form, the array of issues that have become standard items that can be addressed in international investment agreements; the items in the outline thus represent a checklist of potential elements of such

**Table 1. Issues for international agreements concerning foreign direct investment**

I. *Government policies*

A. Establishment
- Sectoral restrictions
- Ownership-share restrictions

B. Equitable treatment
- National treatment
- Most-favoured-nation treatment
- Regional arrangements

C. Protection
- Nationalisation
- Compensation
- Currency convertibility and funds transfer
- Repatriation of earnings

D. Incentives
- Taxes
- Export subsidies

E. Performance requirements
- Domestic content
- Export performance
- Trade balancing

F. Personnel restrictions
- Nationality of directors and other officers
- Visa requirements for employees

G. Transparency

H. Standstill

I. Rollback

J. Subnational governmental units' obligations

K. Safeguards, derogations
- Public order
- National security
- Balance of payments

II. *Firm conduct*

A. Transfer pricing

B. Restrictive business practices

C. Employment

D. Environmental protection

III. *Enforcement*

A. Procedures
- Notification
- Examination
- Consultation
- Binding obligations
- Sanctions

B. Parties to disputes
- Government-Government
- Government-firm
- Firm-firm

an agreement.[4] It should be noted, however, that the checklist is not necessarily exhaustive, since further detail (i.e., additional elements) could of course be added within each category.

The two principal types of Government policies that restrict the *establishment* of a local presence by a foreign firm are limitations on foreign ownership in particular industries (such as banking, energy, transportation, telecommunications) and limitations on the amount of foreign ownership (such as 49 per cent) in any one local enterprise. *Equitable treatment* similarly has two principal dimensions—national treatment and most-favoured-nation treatment—which are analogous in nature and function to the same concepts in trade agreements. The *protection* of investors' rights to fair, prompt and effective compensation in the event of nationalization and their rights to make remittances of profits and other payments to parent corporations are typically provided in bilateral investment treaties. Host (and home) Government *incentives* that distort firms' location decisions have been a concern of OECD, as reflected in its Decision on International Investment Incentives and Disincentives. *Performance requirements* on domestic content or exports, or other Government measures that link the imports and exports of FDI projects, are the central concern of the Uruguay Round TRIMs agreement. Governments often impose *personnel restrictions* on the nationality of executives and members of local affiliates' boards of directors, and they may restrict the entry of employees through visa requirements—policies that are the objects of liberalization in the General Agreement on Trade in Services (GATS) of the Uruguay Round. The remainder of the items in section I of table 1 represent issues that are generally familiar from international trade agreements and thus require no further elaboration.

Earlier efforts to develop a multilateral agreement in the form of a Code of Conduct through the United Nations Commission on Transnational Corporations focused more on *firm behaviour* rather than government policies, and so, of course, do the OECD Guidelines for Multinational Enterprises. Some of those earlier concerns remain on the informal agenda of international investment agreements, particularly with regard to transnational corporations' (TNC) transfer-pricing practices, restrictive business practices and employment practices.

[4] An extensive survey of principles and policies concerning some of these issues is presented in World Bank (1992a, 1992b).

The *enforcement* issues in section III of table 1 are pivotal in the development of new investment agreements because they establish whether or not an agreement is a binding or non-binding instrument. This is a central issue in the development of a new investment framework in APEC, as it has been in OECD in the work on MIA. The nature of the dispute-settlement procedures in investment agreements is different from trade agreements in one important respect: while trade agreements include provisions for settling only government-government disputes, investment agreements include firm-Government disputes.[5]

This brief survey is only suggestive of the types of issues that commonly arise in discussions concerning international investment agreements. In addition, investment issues are inevitably linked to other issues, and the interactions among those issues are important elements of the politics as well as the economics of international investment agreements.

## *Interactions among policy areas*

The relationships of FDI issues to trade policy and other policy areas are of course highly complex. However, they can be briefly summarized as involving two clusters—one with environment, labour and trade policy issues, and the other with policies concerning competition, industry targeting, technology and trade policy.[6] An underlying theme in the first cluster is that FDI is viewed by some as a strategic alternative to trade—an alternative that often entails the shifting of production from countries with relatively effective environmental protection regimes to countries with more lax regimes. Further, in this view FDI typically involves a shift of employment from the home to the host economy, where wages and labour standards are often lower. Because of these assumed effects on the environment and employment, FDI is seen as undesirable and in need of control. A contrary view is that FDI typically increases exports and employment in the home country,[7] and that TNC attempts to escape stringent environmental regimes is not a common problem.[8]

[5] In addition to such provisions in public international institutional arrangements, there are private arbitration centres for settling firm-firm disputes that arise from investment, trade or other private international transactions.

[6] Interactions of FDI and tax policy are also of interest as a third, more narrowly focused, combination of issues.

[7] Econometric studies tend to support this view.

[8] See UN-TCMD (1992), especially pages 226-234, for an analysis of the issues and evidence concerning the relationship between TNCs and environmental pollution and protection.

An underlying issue in the second cluster is that FDI is one element in a mix of international economic relationships that create new and complex public policy problems concerning the roles of national Governments and international organizations in regulating and/or subsidizing TNC activities. For instance, the proliferation of international strategic alliances among TNCs within several industries (such as motor vehicles and telecommunications) raises questions about the ability of national anti-trust authorities to regulate anti-competitive activities of these alliances; there are also questions about the conformity with international agreements, as well as the effectiveness of attempts to restrict international technology transfers through firm national identity criteria imposed on TNCs that would otherwise be potential recipients of government research-and-development subsidies.[9] Governments are sometimes seen as unable to cope with these problems; new international agreements are therefore perhaps necessary to complement and/or restrict national policies in these areas.

## Multilateral policy processes: OECD and WTO

The future of FDI issues at OECD and WTO will be affected by differences in their institutional features—namely their experiences with FDI issues, their approaches to negotiating issues and the size and nature of their memberships. Because of the differences in the extent of their experience with FDI issues, there are substantial differences in the knowledge of FDI issues in both the Secretariats of the organizations themselves and in the respective national ministries that represent their member Governments in the two organizations. Although WTO may increase its FDI expertise by adding staff and/or by establishing a closer working relationship with the Division on Transnational Corporations and Investment of the United Nations Conference on Trade and Development (UNCTAD), there is still a significant FDI experience gap between WTO and OECD, and this difference is likely to persist for a few years.

As to differences in their approaches to negotiations, GATT/WTO has of course been a formal negotiating forum through many rounds, while OECD has been more oriented to analysis and informal discussion of issues, with only occasional negotiations leading to formal agreements, including

[9] See Warner and Rugman (1994) for an extensive analysis of interactions between FDI, anti-trust and research-and-development policies of the United States in the context of its obligations in NAFTA, OECD and WTO.

the Codes of Liberalisation of Capital Movements and Current Invisible Operations. However, the orientation of OECD has been shifting in recent years; it has, for instance, recently completed negotiations on a Shipbuilding Agreement, and it is making progress in the development of a new Multilateral Investment Agreement.[10]

As to membership, the differences between OECD and WTO are as significant as they are well known. In fact, it is precisely these differences that lead many observers (e.g., Julius, 1994; Brittan, 1995) to prefer WTO over OECD for any major new initiatives on FDI issues. The relatively small size and industrial-country bias of OECD's membership, though, is changing: Mexico has joined, the Republic of Korea has indicated an interest in joining, and several countries of Central and Eastern Europe are likely to become members in the coming years. It seems unlikely, however, that the expansion of membership would be sufficient during the next several years for OECD to become a virtually universal organization like WTO,[11] but the possibility of creating "free standing" agreements that include non-members alters this traditional characteristic of OECD.[12]

The net result of these differences between the two organizations can be summarized as follows: OECD is in a better position than WTO to make progress on FDI issues in general for the next year or two. The WTO can, nevertheless, make progress on selected aspects of FDI issues, specifically those that emerge in the implementation of GATS and the Dispute Settlement Understanding (DSU) and, to a lesser extent, the TRIMs and Trade-related Intellectual Property Rights (TRIPs) agreements.[13] New negotiations (and/or uncompleted negotiations transferred from OECD) could be undertaken in WTO within several years.

In any case, organizational venue establishes only one set of constraints on the evolution of the agenda; the diplomatic context provides another. Although the diplomatic pressures vary across the individual issues

[10] Documents and analyses of OECD agreements and negotiations are available in Brewer and Young (forthcoming), Guertin and Kline (1989), Ley (1989), OECD (1993a, 1993b, 1993c, 1994) and Smith (forthcoming).

[11] It is possible for non-members to become parties to individual agreements, as it has been done with the Shipbuilding Agreement.

[12] At the same time, a "free-standing" agreement would not necessarily include all OECD members—an important, and often overlooked, possibility.

[13] Because the TRIMs agreement uses an "illustrative" list of prohibited measures, it could be subject to early dispute cases, which might clarify the scope of its application in terms of the types of TRIMs that it covers (Raby, 1994, p. 21; Startup, 1994, p. 190).

outlined above, there are several key factors that will shape the diplomacy on FDI issues in both OECD and WTO. The first concerns the United States, which has worked for FDI agreements in OECD since its inception, as it did in GATT/WTO during the Uruguay Round. However, the willingness of the United States to exercise strong leadership for the next two years will be conditioned by two factors. First, any multilateral investment agreement will have to include an unambiguous added value for investors and Governments beyond the existing network of bilateral investment treaties in order to attract the support of the United States administration. Second, the President of the United States may decide to assume a higher profile on international issues generally, including international economic issues in particular, and take advantage of the relative freedom a President enjoys on foreign policy matters compared with the constraints he faces on domestic issues. The majorities the President was able to obtain in the Congressional votes on the Uruguay Round agreements may encourage him to seek further multilateral economic agreements; at the same time, there could be a temporizing ingredient in order to delay any need for Congressional action until after the 1996 election.[14]

Another diplomatic factor concerns the inclinations of the Western European Governments and the European Union. Sir Leon Brittan, Commissioner for External Relations of the European Union, has called for the initiation of negotiations on FDI within WTO, though he endorses progress on MIA in OECD as well (see his article in this issue). Aside from political reasoning, the main arguments in favour of WTO from a European Union perspective are the binding nature of its previous agreements and the wide country coverage of its membership.[15] A desire to facilitate and protect European investments in developing countries, in particular, is a factor in the European interest in making negotiations on FDI issues a central item on WTO agenda.[16]

There is also the possibility of a Japanese leadership role. The surge in outward Japanese FDI in the 1980s has made Japan a much more significant

[14] Making binding commitments for sub-national governmental units is a problematic issue in the United States and, to a lesser extent, in Canada and Australia.

[15] Aaron, David L., "After GATT, U.S. pushes direct investment", *The Wall Street Journal*, 2 February 1995, p. A 18.

[16] The Commission's authority to represent the European Union and its member States in WTO on international agreements relating to goods has been established. But its competence in regard to agreements on services and intellectual property (including issues relating to the movement of people or establishments) is to be shared with member States. Moreover, the European Union is represented in OECD discussions on FDI by its member Governments (Brewer and Young, 1995a, p. 40).

home country and, therefore, one with greater interests in FDI policies of the host countries where its investments are located. The Government of Japan was one of only three (along with those of Australia and Sweden) at the Marrakesh Conference that publicly endorsed further WTO action on FDI issues. In addition, being host to the APEC summit in the fall of 1995 may help to focus Japanese attention on multilateral FDI issues, not only in APEC but also in OECD and WTO.

A final factor in the diplomatic context concerns the countries in Central and Eastern Europe, the newly industrializing economies of Asia and Latin America and other developing countries. Among this diverse group of countries, the widespread shift towards more open FDI policies during the past decade marks an important change in the international climate of opinion for investment agreements.[17] There is a diplomatic window of opportunity for multilateral liberalization efforts in this respect. Within the specific contexts of WTO and OECD policy making/negotiating processes, though, there are questions concerning the future policy positions and the activities of key countries within this group. At OECD, the admission of Mexico and the application for membership by the Republic of Korea obviously make their positions on investment issues germane.[18] The question remains, however, whether Brazil, India and perhaps a few other large developing countries will actively oppose efforts to bring additional FDI measures under WTO discipline, or decide not to sign a free standing OECD-sponsored agreement.

## Scenarios for the future

The future of FDI issues in OECD and WTO can be seen in terms of four principal scenarios—each with a time horizon of approximately five years and each with a mix of both predictive and prescriptive elements. Although the scenarios provide a convenient way to structure and focus the analysis, they should not be taken necessarily as either mutually exclusive or exhaustive.

[17] Despite the obvious need to be cautious in generalizing about such a large and diverse group of countries, the strong tendency towards more liberalized FDI policies among developing countries during the past decade has been documented by many studies (e.g., UNCTAD-DTCI, 1994b, pp. 277-278).

[18] The OECD's interest in outreach to newly industrializing economies regarding MIA was manifest, for instance, in a workshop on foreign direct investment in New Zealand in April 1995, to which a number of countries in East, South and South-east Asia and Latin America were invited.

### *Scenario 1: discussion at OECD and implementation at WTO*

This scenario, which is a minimalist one, entails the continuation of discussions on an MIA at OECD, but without moving to negotiations (or with negotiations not being successful within a certain time period), and implementation of GATS and DSU at WTO, without further negotiations. It is a scenario of drift and temporizing—in the absence of leadership by the "quad". In this scenario, governments continue to consider the possibility of a new MIA at OECD, but they are averse to progress in negotiating a new binding MIA. At WTO, the implementation of the FDI elements of GATS and the entry of FDI cases in the dispute-settlement process will attract much attention and controversy; officially, further consideration of FDI issues will be deferred to the five-year review of TRIMs, and FDI issues will be substantially subsumed under competition policy issues. This is a plausible scenario but, in our view, not an attractive one, since it would postpone serious progress on FDI issues.

### *Scenario 2: negotiations at OECD and preparation for negotiations at WTO*

In this scenario, OECD progresses to negotiations on a free-standing MIA, with non-member Governments involved in a consultative process. The WTO acquires greater familiarity with FDI issues from the implementation of GATS, DSU, TRIMs and TRIPs and augments its expertise on FDI issues. Negotiations are undertaken at WTO after completion of OECD-centred negotiations on a free-standing MIA. Compared with scenario 1, this is a more active approach, though still an essentially incremental one. It is, however, diplomatically feasible, if there is leadership by the "quad"; it is also, in our view, a more desirable scenario than scenario 1.

### *Scenario 3: negotiation of new agreements in both WTO and OECD*

In this yet more active scenario, Governments negotiate a free-standing MIA at OECD—one that includes significant non-member involvement in the consensus-forming process. The two organizations coordinate the beginning of a process in which both organizations develop significant responsibilities for a wide scope of FDI-related issues. This

as a desirable approach because it combines the pragmatism of building on existing institutional arrangements and, at the same time, entails significant progress beyond the current regime. There are, however, issues about possible contradictions or gaps in the relationships between OECD-sponsored negotiations and WTO-sponsored negotiations.

### *Scenario 4: creation of an entirely new legal framework and organization for FDI*

This highly unlikely scenario is undesirable in our view—at least for the next five years. It would probably not be a cost-effective approach in the sense that significant diplomatic resources would be expended; additional uncertainty that could deter investment would be created; and the end result would not necessarily be much different from the third scenario above.

## Conclusion: priorities and determinants of success

A useful starting point in the development of the specifics of further international agreements is a comparative analysis of best practice in existing bilateral, regional and multilateral agreements. In that regard, a central issue requiring attention is the use of reciprocity measures as exceptions to national treatment, a practice allowed by the current national treatment instrument of OECD and a common tendency of recent years despite the more general liberalization trend. The inclusion of standstill and rollback provisions concerning reciprocity, therefore, warrants high priority. Another priority item concerns the obligations of sub-national governmental units, a particularly nettlesome issue for federal political systems (the United States, Canada and Australia), where the central Governments are reluctant to bind regional and local governmental units. Government procurement is another area in which progress needs to be made, because existing agreements are weak and because there is extensive FDI in industries in which there is significant Government procurement activity, such as in telecommunications and motor vehicles. Finally, the substantial increases in international mergers, acquisitions and strategic alliances during the past decade suggest that the linkages between competition policy and FDI require clarification.

The evolution of these priority issues at both OECD and WTO—and the interplay between them—will be central ingredients in the emergence of a new multilateral investment regime. The momentum created in recent years

by the activities within these and other institutional arrangements will continue, and new agreements are likely to materialize. Whether they will represent significant or only marginal progress will be determined by the leadership of the "quad" countries and some of the newly industrializing economies as well.

Success will depend on three factors: the *inclusiveness* of the process, the multilateral *forum* for negotiations, and the relationship of multilateral negotiations to developments in *regional* organizations. The *inclusiveness* factor, in turn, has two dimensions: the opportunities for non-OECD countries to be included in the consensus-building process in a way that they feel they have had significant involvement in making policy; and the inclusion of relevant international organizations so that the negotiation and implementation of any agreements take full advantage of their legal and technical competence on FDI-related matters.

The *forum* factor interacts with the inclusiveness factor. If negotiations shift to WTO from OECD before or after an OECD agreement has been completed without significant involvement by at least some non-OECD countries, progress in WTO on other agreements would be difficult. An agreement among only OECD members which is viewed as a *fait accompli* of the industrial countries and is proposed as the basis for further negotiations within either OECD or WTO is not likely to receive much support among non-OECD countries.

The relationship of *regional* agreements to multilateral OECD and WTO agreements interacts with both the inclusiveness and timing factors. The relationship of developments in APEC to negotiations in OECD and WTO is especially important. Because APEC includes several newly industrializing economies that are significant FDI host countries (and some of them increasingly important home countries as well) and because there is interest in the development of a new international investment regime for that region (Green and Brewer, 1995), the provisions of new multilateral agreements in OECD and WTO, on the one hand, and a regional agreement within APEC, on the other, obviously need to be consistent.

A policy process that is sensitive to these three factors for success and that follows scenario 2 or scenario 3 above, or some combination of them, could yield historically significant agreements. In fact, several of the developments mentioned in this article indicate that there is much sensitivity to these factors and that there is considerable progress along the lines suggested. *A tangible step that can facilitate further movement is the creation of*

*an Inter-agency Working Group on International Direct Investment consisting of the International Monetary Fund (IMF), OECD, UNCTAD, World Bank Group and WTO.*[19] Such a Working Group can establish linkages with organizations that represent the private sector as well. The Working Group could be most appropriately chaired by OECD since that is where the staff expertise and diplomatic activity on international investment agreement issues are currently centred. The particulars of the tasks and relationships of the five organizations can be established through different organizational modalities that can be worked out among the interested parties. Specific organizational arrangements materializing from the discussions among those agencies could significantly expand both the analytic range and the diplomatic scope of the policy process without interrupting the momentum in the consensus-building process. ■

[19] The World Bank Group should be included because of the relevant experience and expertise of its International Centre for the Settlement of Investment Disputes (ICSID), the Multilateral Investment Guarantee Agency (MIGA), and the International Finance Corporation (IFC); the International Monetary Fund (IMF) should be included because of its responsibilities concerning capital and foreign exchange restrictions. The proposal to create an Inter-agency Working Group on International Direct Investment is also discussed in Brewer (1995), more specifically in relation to the agenda for investment dispute-settlement procedures.

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