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## An Environmental Remedy to Paralyzed Negotiations for a Multilateral Foreign Direct Investment Agreement

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## COMMENT

# AN ENVIRONMENTAL REMEDY TO PARALYZED NEGOTIATIONS FOR A MULTILATERAL FOREIGN DIRECT INVESTMENT AGREEMENT

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God forbid that India should ever take to industrialism after the manner of the west. . . keeping the world in chains. If [our nation] took to similar economic exploitation, it would strip the world bare like locusts.<sup>1</sup> ~ Mahatma Gandhi

## I. INTRODUCTION

The exponential increase in foreign direct investment (FDI) over the past fifty years has prompted lawmakers to try to establish a comprehensive multilateral governing scheme.<sup>2</sup> Every attempt to create a global FDI agreement has failed, igniting an analytical frenzy to account for the collapse of multilateral negotiations.<sup>3</sup> Most commentators attribute the consistent failure of negotiations for a multilateral investment agreement to flaws in the substantive terms of the agreement itself.<sup>4</sup> This Comment “steps back” from the body of work laying blame to specific maladies in FDI terms, and focuses on the macro-structure of negotiations. Specifically, this Comment will examine the investment relationship between capital-exporting parties from developed nations and capital-receiving developing nations.<sup>5</sup>

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<sup>1</sup> Guardian.co.uk, *A Father Betrayed*, THE GUARDIAN, AUG. 14, 2007, <http://www.guardian.co.uk/india/story/0,,2148286,00.html> (using this quote in a special report article on India).

<sup>2</sup> See Lester Brown et al., STATE OF THE WORLD 2000, 194 (Worldwatch Institute 1997) (noting that from 1982 to 1993 investment flows increased ten-times); see also DAVID HUNTER, JAMES SALZMAN & DURWOOD ZAEKE, INTERNATIONAL ENVIRONMENTAL LAW AND POLICY 1269 (2d ed. 2002) (showing that from 1994 to 1995 alone FDI increased 40%); Howard Mann, *International Investment Agreements: Building the New Colonialism?* 97 AM. SOC'Y INT'L L. PROC. 247, 249 (2003) (identifying the emergence of debate involving multilateral investment agreements).

<sup>3</sup> See Glen Kelley, *Multilateral Investment Treaties: A Balanced Approach to Multilateral Corporations*, 39 COLUM. J. TRANSNAT'L L. 483, 495-96 (chronicling the failure of the MAI, citing multiple concerns ranging from protections of domestic industry to state sovereignty); see also generally Calvin A. Hamilton & Paula I. Rochwerger, *Trade and Investment: Foreign Investment Through Bilateral and Multilateral Treaties*, 18 N.Y. INT'L L. REV. 1, 30 n. 133 (2005).

<sup>4</sup> See Calvin A. Hamilton & Paula I. Rochwerger, *Trade and Investment: Foreign Investment Through Bilateral and Multilateral Treaties*, 18 N.Y. INT'L L. REV. 1, 30 n. 133 (2005) (showing that commentators often assign fault to the absence and/or over-emphasis of key provisions in multilateral FDI agreements); see also Glen Kelley, *Multilateral Investment Treaties: A Balanced Approach to Multilateral Corporations*, 39 COLUM. J. TRANSNAT'L L. 483, 495-96 (citing numerous explanations ranging from protections of domestic industry to state sovereignty).

<sup>5</sup> See U. N. CONFERENCE ON TRADE AND DEVELOPMENT., WORLD INVESTMENT REPORT 2001: PROMOTING LINKAGES 10 (2001) [hereinafter UNCTAD] (showing that most FDI originates from and is destined for developed countries); see also DAVID HUNTER, JAMES SALZMAN & DURWOOD ZAEKE, INTERNATIONAL ENVIRONMENTAL LAW AND POLICY 1269 (2d ed. 2002) (stating that FDI flows from developed to developing nations are increasing exponentially).

Within this paradigm, the vast disparity of wealth between capital-exporting and capital-receiving nations greatly impacts multilateral FDI negotiations.<sup>6</sup> Disproportionate wealth translates into lopsided bargaining power during negotiations because the wealthy investing party is in a position to hold out for terms most favorable to its interests.<sup>7</sup> Likewise, the party lacking wealth is more inclined to acquiesce, due to lack of negotiating resources stemming from poverty.<sup>8</sup> The resulting imbalance in bargaining positions is inflamed by developing countries' suspicion of repeated exploitation by the developed world.<sup>9</sup> This creates

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<sup>6</sup> See FOREIGN DIRECT INVESTMENT IN EMERGING MARKET COUNTRIES: REPORT OF THE WORKING GROUP OF THE CAPITAL MARKETS CONSULTATIVE GROUP (2003) (illustrating the importance of FDI to developing nations, the IMF emphasized: "FDI flows to emerging market countries increased rapidly in the 1990s and have become by far the single largest component of their net capital inflows."); see also ORGANISATION FOR ECONOMIC COOPERATION AND DEVELOPMENT, FOREIGN DIRECT INVESTMENT FOR DEVELOPMENT: MAXIMIZING PROFITS AND MINIMIZING COSTS 3 (2002) [hereinafter OECD] (listing the ways FDI can influence developing countries in ways that would not affect developed nations); Australian Government, Department of Foreign Affairs and Trade, TRADE, DEVELOPMENT AND POVERTY REDUCTION, AUSAID, May 2006, [http://www.ausaid.gov.au/publications/pdf/trade\\_devel\\_poverty.pdf](http://www.ausaid.gov.au/publications/pdf/trade_devel_poverty.pdf) (providing the description under the WTO Doha Development Agenda: "[T]rade has the potential to significantly reduce poverty. But that potential is not being realised because rich countries are rigging international trade rules in their own national interest.").

<sup>7</sup> See Horacio A. Grigera Naon, *Sovereignty and Regionalism*, 27 LAW & POL'Y INT'L BUS. 1073, 1077-78 (1996) (expressing that because countries involved in investments are not economically equal, the benefits from international investment treaties are more likely to go to the wealthier nation); see also William H. Meyer, "Human Rights and MNCs: Theory Versus Quantitative Analysis", HUM. RTS. Q., 18.29 at 373 (1996) (illustrating that 20 of the largest MNCs, have annual incomes greater than 80 of the world's developing countries); UNCTAD, NUMBER OF BILATERAL INVESTMENT TREATIES QUINTUPLED DURING THE 1990S 7 (2004) Media Release TAD/INF/2877, [http://www.iisd.org/pdf/2004/trade\\_bits.pdf](http://www.iisd.org/pdf/2004/trade_bits.pdf) ("the asymmetry of negotiating power between the developed and developing nation . . . developed countries typically exert strong leverage in discussions." This source also observes that bilateral investment treaties, the most common instrument regulating FDI, reflect the different bargaining positions of parties); Patricia McKinstry Robin, Comment, *The BIT Won't Bite: The American Bilateral Investment Program*, 33 AM. U. L. REV. 931, 934 (1984) (discussing the American bilateral investment treaty model and its failure to encourage foreign investment as it does not present an equal balance between American and host country interest).

<sup>8</sup> See UNDP Poverty Report, Chapter 4, Linking Countries' International Politics to Poverty (2000) (stating that developing nations have weak bargaining power in negotiations with rich nations because "they have fewer human and technical resources to deploy in negotiations," which in turn has lessened their bargaining power).

<sup>9</sup> See Jürgen Kurtz, A General Investment Agreement in the WTO? Lessons from Chapter 11 of NAFTA and the OECD Multilateral Agreement on Investment, at 5, available at <http://www.jeanmonnetprogram.org/papers/02/020601.pdf> (stating that past tensions between developed and developing nations "has characterized much of the history of international rulemaking on foreign investment."); see also RTE News Website, "Bolivia laying blame after recent flooding," Feb. 24, 2007, available at <http://www.rte.ie/news/2007/0224/bolivia.html> (reporting the Bolivian president blaming developed nations for global warming and resulting flooding in Bolivia. This is a telling illustration of the suspicion developing nations harbor against the industrial activities of developed countries); "Mexico: After NAFTA Where would You Rather Be, North or South?," rpt.

structural incongruities that severely debilitate multilateral investment negotiations.<sup>10</sup> If these structural inequities are not remedied, multilateral negotiations for FDI will continue to have limited success.<sup>11</sup>

The framework proposed in this Comment attempts to level parties' negotiating abilities in multilateral investment talks by creating an extra bargaining chip for all. By appending parallel negotiations for environmental conditions on FDI to negotiations for the substantive multilateral agreement itself, a second commanding interest is injected into the process. Including another paramount interest in negotiations increases parties' flexibility towards both interests, out of fear that stubborn insistence on one interest will injure prospects for the other. Increasing flexibility in negotiating positions will help cure the imbalance in bargaining positions between developed-nation investors and developing-nation hosts.<sup>12</sup> In this way, an incentive is created for

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in INTERNATIONAL BUSINESS 4th Ed., at 298-299 (describing that NAFTA was looked upon by the exploited people of the Chiapas region of Mexico as another way to be exploited, this time by the U.S. and Canada, which prompted the Zapatista National Liberation Army rebellion on the day NAFTA was signed in 1994).

<sup>10</sup> See Jennifer Tobin & Susan Rose-Ackerman, *Foreign Direct Investment and the Business Environment in Developing Countries: the Impact of Bilateral Investment Treaties*, William Davidson Institute Working Paper Number 587, June 2003, at 2 (describing the apprehensive relationship between foreign investors and developing country: "[I]nvestors may have little trust in the reliability and fairness of property rights and government enforcement, and conversely, local businesses, citizens, and politicians may have little confidence in the motives and staying power of international business. Investors complain that the rules are unclear and variable over time. Critics in the host country worry that international investors will reap most of the gains and will flee at the first sign of trouble. In the extreme, the distrust on both sides can be so large that little or no investment takes place, even when this investment would be beneficial to both parties.").

<sup>11</sup> See Douglas H. Brooks, Emma, Xiaoqin Fan, Lea R. Sumulong, *Foreign Direct Investment: Trends, TRIMs, and WTO Negotiations*, 20(1) ASIAN DEV. REV. 2003, at 1-33, available at <http://www.adb.org/Documents/Periodicals/ADR/pdf/ADR-Vol20-1-Brooks.pdf> (last visited May 9, 2007) ("[t]he tilting of the scales in favor of developed countries reflects a weakness of the international system... it is in the interest of rich countries to level the playing field. Otherwise, negotiations are likely to give poor results or the weaker players will not want to play at all. If developed countries want to ensure the success of negotiations, they need to consider ways to make the game worth-while playing."); see also Statement by the Chinese Delegation at the Fiftieth Session of the Trade and Development Board of UNCTAD under Item 2 - the Interdependence between Trade and Development and the Global Economy: Capital Accumulation, Growth and Structural Change, (Statement made Oct. 7, 2003), available at <http://www.china-un.ch/eng/qtzz/wtothsm/t85640.htm> (last visited May 9, 2007) (stating, "[W]e are of the view that while setting the rules for the international economy and especially during the new round of multilateral trade negotiations...given their unfavorable position...developing countries should receive help to boost their ability to participate in negotiations...[T]he failure of Cancun only highlights the imbalances that exist in the current multilateral trading system...").

<sup>12</sup> See generally Nermeen Shaika, *AsiaSource* Interview with Dr. Supachai Panitchpakdi, Secretary-General of the United Nations Conference on Trade and Development, previously served as Director-General of the World Trade Organization, Sept. 14, 2006, available at [http://www.asiasource.org/news/special\\_reports/supachai.cfm](http://www.asiasource.org/news/special_reports/supachai.cfm) (stating that in educating negotiators,

wealthy investors with dominant bargaining power to make concessions in one phase of talks in order to further their interests in the other. Simultaneously, host developing countries' ingrained suspicion of economic relations with the developed world would be lessened because the appended investment conditions foster ecological protection, not economic exploitation.<sup>13</sup> With these dual phases of negotiations, developing nations would be afforded a more realistic opportunity to guard their investment interests in FDI negotiations, while negotiating a global investment strategy that also incorporates environmental commitments.

Section II of this Comment defines FDI and outlines the environmental implications on capital-receiving nations. Section III discusses bilateral investment treaties' (BITs') potential contributions to comprehensive multilateral investment system and surveys failed negotiation attempts for a global set of investment rules. Section IV expounds the framework outlined in this introduction, with Section V dedicated to explaining parties' incentives to enter into this mode of negotiations.

## II. WHAT IS FDI, AND WHAT ARE ITS ENVIRONMENTAL IMPACTS IN DEVELOPING NATIONS?

### A. WHAT IS FDI?

FDI is the flow of private capital from one nation to another for the purpose of realizing profit.<sup>14</sup> The fundamental reason private investors from industrialized nations go through the trouble and expense of

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UNCTAD stresses flexibility to increase chances for success); *see also* Robert Sharer, *An Agenda for Trade, Investment, and Regional Integration*, FIN. & DEV. (INTERNATIONAL MONETARY FUND), Dec. 2001, available at <http://www.imf.org/external/pubs/ft/fandd/2001/12/sharer.htm> (stating that "[a]lthough it is inevitable that the major trading countries will have more power in the global trading system than African countries, the latter should explore ways to increase their bargaining power to ensure that the key issues affecting them are adequately addressed").

<sup>13</sup> Most developing nations rely heavily on natural resources for gross national product. If developing nations see that foreign investors -- who were previously more concerned with ecological exploitation -- are endeavoring to protect developing countries' natural resources, steps to alleviate a primary cause of the developing world's suspicion of foreign investment activity will be addressed.

<sup>14</sup> *See* UNCTAD website, Press Release, Mar. 9, 1999, available at <http://www.unctad.org/TEMPLATES/webflyer.asp?docid=3074&intItemID=2021&lang=1#endnote2> (providing the definition: "[F]oreign direct investment is defined as an investment involving management control of a resident entity in one economy by an enterprise resident in another economy. FDI involves a long-term relationship reflecting an investor's lasting interest in a foreign entity.").



investing in developing nations is the vastly reduced transaction, production, and operating costs in those markets.<sup>15</sup> Lower labor costs, reduced raw resource costs, tax holidays, laissez-faire health and safety codes, relaxed medical-care requirements, and minimal environmental compliance measures are but a few areas in which multinational business entities (MNEs) save money by investing in or relocating to developing nations.<sup>16</sup>

In exchange for allowing FDI in their economies, host developing countries receive, *inter alia*, advanced technology “that may help developing countries leapfrog over the dirtiest and most damaging phases of the development path,” industry know-how, management skills, new jobs, intensified domestic business competition, and debt-free capital injection that stimulates economic growth.<sup>17</sup> These benefits have hastened the flood of FDI to developing countries, and economists predict this trend will continue despite recessions in many developing economies.<sup>18</sup>

## B. THE ENVIRONMENTAL IMPLICATIONS OF FDI

### i. A Survey of Competing Views

A contentious issue surrounding FDI is its environmental impact on developing nations.<sup>19</sup> For example, the Kuznets Curve<sup>20</sup> describes a

<sup>15</sup> See DAVID HUNTER, JAMES SALZMAN & DURWOOD ZAELE, INTERNATIONAL ENVIRONMENTAL LAW AND POLICY 1269 (2d ed. 2002).

<sup>16</sup> See Jackson B. Browning, *Union Carbide: Disaster at Bhopal 1993*, available at <http://www.bhopal.com/pdfs/browning.pdf> (last visited Nov. 17, 2006) (illustrating that Union Carbide had a lower set of safety standards for its plant in Bhopal, India, than its plant in the United States, which ultimately led one of the largest plant disasters when toxic fumes from the plant were released into the community, killing over 3,800 people).

<sup>17</sup> See HILARY F. FRENCH, ASSESSING PRIVATE CAPITAL FLOWS TO DEVELOPING COUNTRIES, in STATE OF THE WORLD 149-65 (Worldwatch Institute 1998), <http://www.worldwatch.org>; see also DAVID HUNTER, JAMES SALZMAN & DURWOOD ZAELE, INTERNATIONAL ENVIRONMENTAL LAW AND POLICY 1271-72 (2d ed. 2002).

<sup>18</sup> See Eric Burt, *Developing Countries and the Framework for Negotiations on Foreign Direct Investment in the World Trade Organization*, 12 AM. U. J. INT’L L. & POL’Y 1015, 1019 (1997); see also DAVID HUNTER & JAMES SALZMAN & DURWOOD ZAELE, INTERNATIONAL ENVIRONMENTAL LAW AND POLICY 1269 (2d ed. 2002).

<sup>19</sup> A Center for International Environmental Law, Issue Brief, *Going With the Flow: How International Trade, Finance and Investment Regimes Affect The Provision of Water to the Poor* (July 2003), [http://ciel.org/Publications/Waterbrief\\_3Sept03.pdf](http://ciel.org/Publications/Waterbrief_3Sept03.pdf) (expressing the potential for positive influence of FDI in regards to enforcement of existing environmental policy); but see HILARY F. FRENCH, ASSESSING PRIVATE CAPITAL FLOWS TO DEVELOPING COUNTRIES, in STATE OF THE WORLD 149-65 (Worldwatch Institute 1998), available at <http://www.worldwatch.org> (noting

natural, or automatic phenomenon where even without planning, recipient nations enjoy positive environmental effects from FDI.<sup>21</sup> Analysts also focus heavily on the environmental implications of FDI repatriation, which guarantees an investor's right to transfer capital out of an economy.<sup>22</sup> These easily severable ties have been noted as one of the main causes of environmental degradation in developing nations, where investors withdraw their capital once a reasonable return has been realized without incurring the burden of clean-up costs.<sup>23</sup>

Some commentators suggest that the readily available exit option for foreign investors facilitates environmental protections by providing an incentive for host developing nations to enforce their environmental laws with greater tenacity. Foreign investors have an interest in ensuring that all competitors, domestic and foreign, abide by environmental

the danger of distributing potentially environmentally damaging technologies to ill-prepared communities, and that surging FDI in developing countries facilitates the "profligate rates of resource consumption" relating to western consumerism in industrialized countries, and the ominous implications of the "spread of consumer culture").

<sup>20</sup> The curve that appears when graphed, discovered by Kuznets, where one axis is per capita wealth and the other tracks certain types of pollution.

<sup>21</sup> See J.L. Van Zanden, *Tracing the Beginning of the Kuznets Curve: Western Europe during the Early Modern Period*, *ECON. HISTORY REV.* 48 (4) 643-664 (1995) (putting forth a summary of Simon Kuznet's theory: that water and air quality is degraded in the beginning of economic development because little weight is given to environmental concerns overall. However, after basic physical needs are met through the availability of capital, a clean environment becomes a priority, which leads to improved environmental conditions); see also David I. Stern, *The Environmental Kuznets Curve*, *INT'L. SOC'Y FOR ECOLOGICAL ECON.. INTERNET ENCYCLOPEDIA OF ECOLOGICAL ECON.*, (June 2003), available at [http://www.ecoeco.org/publica/encyc\\_entries/Stern.pdf](http://www.ecoeco.org/publica/encyc_entries/Stern.pdf) (describing the Kuznets curve: the more per capital wealth increases, the more certain types of pollution decreases). *But see* William Harbaugh et al., *Reexamining the Empirical Evidence for an Environmental Kuznets Curve*, *NATL. BUREAU ECON. RES. Working Paper No W7711* (May 2000) (commenting that foreign investment does not improve environmental conditions in host-developing nations without direction).

<sup>22</sup> Law No. 7764, art. 7, para. 1., Nov. 2, 1993, 13 FLETORJA ZYRTARE 803 (Nov. 12, 1993); see Scott Norman Carlson, *Foreign Direct Investment Laws and Foreign Direct Investment in Developing Countries: Albania's Experiment*, (1995) 29 *INT'L LAW* 577 (quoting an Albanian law that defines FDI repatriation: "[F]oreign investors have the right to transfer out of the territory of the Republic of Albania all assets and contributions in nature related to a foreign investment, including: (a) returns; (b) compensation pursuant to Article 5 of this law [compensation for expropriation]; (c) payments arising out of an investment dispute; (d) payments made under a contract, including accrued interest payments made pursuant to a loan agreement; (e) proceeds from the sale or liquidation of any or all part of an investment; and (f) the return of shareholder's equity resulting from the diminution of capital when the company has decreased its capital in accordance with Albanian legislation." In sum, foreign investors have the freedom to remove all or part of their investment from a host economy, usually without restriction).

<sup>23</sup> See DAVID HUNTER, JAMES SALZMAN & DURWOOD ZAELEKE, *INTERNATIONAL ENVIRONMENTAL LAW AND POLICY* 1269 (2d ed. 2002) (stating that foreign investor's lack of accountability and consideration at a national level contributed to the isocyanate gas leak in Bhopal, India that killed thousands of people).

standards because environmental compliance measures are expensive.<sup>24</sup> Inconsistent enforcement of environmental laws therefore places businesses that abide by environmental standards at a disadvantage to non-complying competitors who save on compliance costs.<sup>25</sup> This situation hastens FDI repatriation or relocation because foreign investors seek investment settings that promote fair competition, which inconsistent enforcement of environmental standards undermines.<sup>26</sup> In this way, capital repatriation increases pressure on governments to enforce their environmental regulations broadly and consistently.<sup>27</sup>

ii. *Prospects Relating to Sustainable Development*

The current outlook of developmental aid for developing countries is bleak.<sup>28</sup> Development assistance “has never met the levels required for moving developing countries toward sustainable development.”<sup>29</sup> A pessimist would view this disregard for sustainable development as an

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<sup>24</sup> See Environmental Resource Center, *EPA Enforcement Cuts Three Billion Pounds of Pollution; Requires Companies to Spend \$20 Billion* (Nov. 11, 2006), available at <http://www.ercweb.com/resources/viewtip.aspx?id=6895> (noting that in 2006 alone, compliance with US environmental laws has cost industry almost \$20 billion in pollution control equipment).

<sup>25</sup> See CAL. BUS. & PROF. CODE § 17000 (codifying the principle that unfair competition results when competing businesses gain a competitive edge by violating applicable regulations. When a business engages in unlawful activity through non-compliance of environmental regulations, operational costs are reduced, and in subsequence, the violator can offer its products/service at a discounted rate. This bestows an unfair advantage on the violator. Businesses that gain a competitive advantage through an “unlawful, unfair, or fraudulent business act of practice” are considered to have engaged in an “unfair business practice” under Cal. Bus. & Prof. Code § 17000).

<sup>26</sup> See *Barriers and Impediments to Foreign Direct Investment (FDI): Checklist and Recommended Policy Response*, Annex C, ASIA-PACIFIC ECONOMIC COOPERATION, Investment Experts' Group II, May 22-23 2006, available at [http://www.ctasc.org.tw/07ABAC/leader2005C\\_e.doc](http://www.ctasc.org.tw/07ABAC/leader2005C_e.doc) (concluding that “[A]n investor’s ability to rely upon the integrity of the host government, and its ability to maintain local law and order, are both essential to any long-term investment.”); see also *Foreign Direct Investment: A Lead Driver for Sustainable Development?*, TOWARDS EARTH SUMMIT 2002, ECONOMIC BRIEFING SERIES NO. 1, at 2, available at <http://www.earthsummit2002.org/es/issues/FDI/fdi.pdf> (last visited October 19, 2006) (stating that “[W]hilst there is concern that increased regulation could deter new foreign investors, there is evidence, such as in Eastern Europe, that tighter regulation of corporate, environmental and labour standards has not affected FDI growth.”).

<sup>27</sup> See generally, Michael Klein & Carol Aaron & Bitá Hadjimichael, *The World Bank: Foreign Direct Investment and Poverty Reduction*, Private Sector Advisory Services Department (June 2001).

<sup>28</sup> See *Foreign Direct Investment: A Lead Driver for Sustainable Development?*, TOWARDS EARTH SUMMIT 2002, ECONOMIC BRIEFING SERIES NO. 1, at 1, available at <http://www.earthsummit2002.org/es/issues/FDI/fdi.pdf> (last visited Oct. 19, 2006) (stating that total Overseas Development Assistance has dropped by more than half since 1990).

<sup>29</sup> See DAVID HUNTER, JAMES SALZMAN & DURWOOD ZAEKE, *INTERNATIONAL ENVIRONMENTAL LAW AND POLICY* 1270 (2d ed. 2002).

ominous sign for global environmental health, especially considering that 90% of gas and oil reserves are in the developing world.<sup>30</sup> For an optimist, this presents an opportunity for the private sector to shift investment capital toward environmentally sustainable development projects, which some analysts are forecasting to reach \$250 billion in the next two decades.<sup>31</sup> This shift would potentially make FDI one of the largest sources of financing for sustainable development projects.<sup>32</sup>

Additionally, foreign investors have the resources to inspect, monitor, regulate and implement environmental precautions that many developing nations cannot do independently.<sup>33</sup> Foreign investing MNEs also play a pivotal role in transferring environmentally sustainable technology to host developing nations.<sup>34</sup> For example, a MNE can facilitate sustainable development by transferring renewable energy sources to subsidiary entities in host developing nations.<sup>35</sup> In this way,

<sup>30</sup> See HILARY F. FRENCH, *ASSESSING PRIVATE CAPITAL FLOWS TO DEVELOPING COUNTRIES*, in *STATE OF THE WORLD 149-65* (Worldwatch Institute 1998), available at <http://www.worldwatch.org>; see also DAVID HUNTER, JAMES SALZMAN & DURWOOD ZAEKE, *INTERNATIONAL ENVIRONMENTAL LAW AND POLICY* 1273 (2d ed. 2002).

<sup>31</sup> See generally, HEATON, REPETTO, AND SOBIN, *TRANSFORMING TECHNOLOGY: AN AGENDA FOR ENVIRONMENTALLY SUSTAINABLE GROWTH IN THE 21ST CENTURY*, 6-7 (1991); see also DAVID HUNTER, JAMES SALZMAN & DURWOOD ZAEKE, *INTERNATIONAL ENVIRONMENTAL LAW AND POLICY* 1269 (2d ed. 2002); Foreign Direct Investment: A Lead Driver for Sustainable Development?, *TOWARDS EARTH SUMMIT 2002, ECONOMIC BRIEFING SERIES NO. 1*, at 2, available at <http://www.earthsummit2002.org/es/issues/FDI/fdi.pdf> (last visited Oct. 19, 2006) (providing the Secretary General's report "Financial Resources and Mechanisms" to the eighth UN Commission on Sustainable Development investigated how FDI could be applied to support more sustainable development projects "particularly in those countries with burgeoning debts and widening income disparity to the rest of the world.").

<sup>32</sup> See DAVID HUNTER, JAMES SALZMAN & DURWOOD ZAEKE, *INTERNATIONAL ENVIRONMENTAL LAW AND POLICY* 1270 (2d ed. 2002); see also Dr. Mukhisa Kituyi M.P. "Improving the Investment Climate and Participation of the Private Sector in the Economy," Statement Made During the Consultative Group Meeting in Nairobi, April 11-12, 2005, at [http://siteresources.worldbank.org/INTKENYA/Resources/improveing\\_ic\\_Kituyi.pdf](http://siteresources.worldbank.org/INTKENYA/Resources/improveing_ic_Kituyi.pdf) (providing "[I]n recognition that the private sector is key for creation of employment and wealth necessary to put Kenya on a firm sustainable development path...").

<sup>33</sup> *World Investment Report 1999*, UNCTAD (1999), *Foreign Direct Investment and the Challenge of Development*, at [http://www.unctad.org/en/docs/wir99\\_en.pdf](http://www.unctad.org/en/docs/wir99_en.pdf) (stating that Environmental Impact Assessments, Environmental Audits and Environmental Management Systems that assess the potential impacts of FDI ventures, all require large amounts of capital for effective execution); see also Global Trade Negotiations website, CENTER FOR INTERNATIONAL DEVELOPMENT AT HARVARD UNIVERSITY, <http://www.cid.harvard.edu/cidtrade/issues/environment.html> (last visited Nov. 24, 2006) (noting that "[T]he general cost of implementation is also a major barrier[.]" and that "[E]nforcement...is feeble among developing countries because they are short of funding...").

<sup>34</sup> *World Investment Report 1999*, UNCTAD (1999), *Foreign Direct Investment and the Challenge of Development*, at [http://www.unctad.org/en/docs/wir99\\_en.pdf](http://www.unctad.org/en/docs/wir99_en.pdf)

<sup>35</sup> *World Investment Report 1999*, UNCTAD (1999), *Foreign Direct Investment and the Challenge of Development*, at [http://www.unctad.org/en/docs/wir99\\_en.pdf](http://www.unctad.org/en/docs/wir99_en.pdf)

FDI wields considerable power in smoothing the progress of sustainable development for host developing nations.<sup>36</sup>

### C. RACE-TO-THE-BOTTOM CONCERNS

No debate surrounding the environmental implications of FDI in host developing nations is complete without mention of the race-to-the-bottom argument.<sup>37</sup> It is one of the most frequent and persuasive arguments put forth against the liberalization of foreign investment in the developing world.<sup>38</sup> The race-to-the-bottom line of reasoning asserts that governments will relax (expensive) environmental standards in order to attract FDI.<sup>39</sup> A telling example of this phenomenon was the recent litigation pertaining to the Filipino mining industry.<sup>40</sup>

In 1995 the government of the Philippines created the Mining Act.<sup>41</sup> This act was part of a series of pro-mining legislation in the 1990s to

<sup>36</sup> See *Foreign Direct Investment in Emerging Market Countries—Report of the Working Group of the Capital Markets Consultative Group (CMCG)*, INTERNATIONAL MONETARY FUND, (Sept. 18, 2003), available at <http://www.imf.org/external/np/cm/cg/2003/eng/091803.HTM> (“FDI can be helpful in forming policies that strengthen the business environment and support sustainable capital flows.”).

<sup>37</sup> See Michael Klein & Carol Aaron & Bitá Hadjimichael, *The World Bank: Foreign Direct Investment and Poverty Reduction* 14, Private Sector Advisory Services Department (June 2001) (providing a race-to-the-bottom v. race-to-the-top analysis: “a recent study that analyzes air quality trends in...the three largest recipients of foreign direct investment among the developing countries -- China, Brazil, and Mexico. The evidence shows that instead of racing toward the bottom, major cities in these countries have experienced significant improvements in air quality...[T]he improvements in the developing countries have occurred in an era of economic liberalization, industrial growth, and rapid expansion of foreign investment flows, thus contradicting the concerns that...capital flows tend to erode global environmental standards.”).

<sup>38</sup> See HILARY F. FRENCH, *ASSESSING PRIVATE CAPITAL FLOWS TO DEVELOPING COUNTRIES*, in *STATE OF THE WORLD* 149-65 (Worldwatch Institute 1998), available at <http://www.worldwatch.org>; see also DAVID HUNTER, JAMES SALZMAN & DURWOOD ZAEKE, *INTERNATIONAL ENVIRONMENTAL LAW AND POLICY* 1272 (2d ed. 2002) (“[S]ome 70 countries have rewritten their national mining code in recent years with the aim of encouraging investment.”).

<sup>39</sup> See Michael Klein, Carol Aaron & Bitá Hadjimichael, *The World Bank: Foreign Direct Investment and Poverty Reduction* 12, Private Sector Advisory Services Department (June 2001) (describing the race-to-the-bottom theory where “multinational companies tend to locate production in countries...with low wages, low taxes and weak environmental...standards...that FDI thus contributes to a “race to the bottom”, where countries are forced to lower their standards so as not to lose investment and jobs.”); see also GREENWIRE: THE LEADER IN ENERGY AND ENVIRONMENTAL POLICY NEWS, at <http://www.eenews.net> (Feb. 23, 1999) (citing *Journal of Commerce* that describes a 1997 UNCTAD study revealing that 90% of changes in laws governing foreign direct investment “were aimed at creating a more favorable climate for [investment].”).

<sup>40</sup> *La Bugal-B'laan Tribal Ass'n v. Ramos*, G.R. No. 127882, 421 S.C.R.A. 148 (Dec. 1, 2004), (Phil.) available at <http://www.supremecourt.gov.ph/jurisprudence/2004/dec2004/127882.htm>.

<sup>41</sup> An Act Instituting a New System of Mineral Resources Exploration, Development, Utilization, and Conservation, REP. ACT 7942 (1995) (PHIL.).

attract foreign investment in the Filipino mining industry.<sup>42</sup> The Supreme Court of the Philippines held the Act unconstitutional because it violated a clause in the Filipino Constitution that explicitly limits foreign investment capital in natural-resource operations.<sup>43</sup> The Filipino government then persuaded the Court to reverse its decision, under the guise that such a ruling would chill the Filipino mining industry.<sup>44</sup> The Court capitulated to government pressures, reasoning “the Constitution should be construed to grant the President and Congress sufficient discretion and reasonable leeway to enable them to attract foreign investment and expertise.”<sup>45</sup> This decision by the Filipino Supreme Court illustrates the tremendous influence foreign investment yields, and the lengths developing nations will go to make their investment setting as conducive to FDI flows as possible. Here, the clear intent of the Filipino Constitution was subverted in favor of transforming the Philippines into a haven for foreign investment activity.<sup>46</sup>

The race-to-the-bottom theory also applies to the consequences that follow the signing of a BIT between two nations, where individual investors negotiate with the host nation to secure specific investment opportunities.<sup>47</sup> Within these negotiations, host developing nations often surrender considerable resources to powerful MNEs.<sup>48</sup> For example,

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<sup>42</sup> See David G. Scalise & Patricia J. de Guzman, *Foreign Investment in the Philippines*, 29 GEO. WASH. J. INT'L L. & ECON. 145 (1995); see also Van V. Mejia, *The Modern Foreign Investment Laws of the Philippines*, 17 TEMP. INT'L & COMP. L. J. 467 (2003).

<sup>43</sup> CONST. (1987), ART. XII, § 2, (PHIL.), construed in *La Bugal* (Jan. 27, 2004), at text accompanying n.39-40 (resulting from social, economic and environmental uncertainty of having natural resource sectors controlled by foreign capital); see also Ruben James Croft, *Opinion, Free Foreign Investment from the Past, Advance the National Interest*, THE MANILA TIMES, Dec. 6, 2004, available at <http://www.manilatimes.net/national/2004/dec/06/yehey/opinion/20041206opi6.html>.

<sup>44</sup> See Aya Fabros, *The Supreme Court and the Mining Decision Reversal*, MINE MATTERS (Jan. 31, 2005), available at <http://www.ipd.ph/features/2005/MineMatters.html>; see also Press Release, *Has Anyone Been Surprised by the Arroyo Government's Rise to the Most Corrupt List of the World?* KALIKASAN-PEOPLE'S NETWORK FOR THE ENVIRONMENT (Jan. 28, 2005), available at <http://www.minesandcommunities.org/Action/press522.htm>.

<sup>45</sup> *La Bugal-B'laan Tribal Ass'n v. Ramos*, G.R. No. 127882, 421 S.C.R.A. 148 (Dec. 1, 2004). (Phil.) n.5; available at <http://www.supremecourt.gov.ph/jurisprudence/2004/dec2004/127882.htm>.

<sup>46</sup> Lyuba Zarsky, *Havens, Halso and Spaghetti: Untangling the Evidence About Foreign Direct Investment and the Environment*, CONFERENCE ON FOREIGN DIRECT INVESTMENT AND THE ENVIRONMENT, Jan. 29, 1999, OECD Doc. CCNM/EMEF/CIME(98) 5 at 3 (expounding the ‘stuck in the mud’ idiom, in reference to stymied efforts to heighten environmental standards in developing nations).

<sup>47</sup> See Andrew T. Guzman, *Why LDCs Sign Treaties That Hurt Them: Explaining the Popularity of Bilateral Investment Treaties*, 38 VA. J. INT'L L. 639, 643 (1998) (highlighting that host nations make concession to attract foreign investment).

<sup>48</sup> See, Inaamul Haque & Ruxandra Burescu, *Monterrey Consensus on Financing for Development: Response Sought from International Economic Law*, 27 B.C. INT'L & COMP. L. REV.

subsequent to the ratification of the BIT between the United States and Columbia, Texaco began negotiating with the Columbian government for rights to proven fossil-fuel reserves.<sup>49</sup> These reserves were located under rainforests, the most bio-diverse area of Columbia.<sup>50</sup> Pursuant to those negotiations, Texaco obtained de facto control over large sections of rainforest in Columbia, which the Columbian government relinquished in order to attract foreign investment.<sup>51</sup> Texaco also negotiated for the rights to a comparable portion of Ecuadorian rainforests, which have become so severely ravaged under Texaco control that destruction to these rainforests is currently the subject of litigation under the United States' Alien Tort Claims Act.<sup>52</sup> The pressure on the Columbian and Ecuadorian governments to surrender control of their natural resources in order to attract foreign investors, despite the resulting ecological detriment, is the crux of the race-to-the-bottom theory.<sup>53</sup> As developing nations rely heavily on their natural resources for economic prosperity, reducing environmental standards and relinquishing control of natural resources could circumvent the principal incentive in hosting FDI operations: facilitating economic growth.<sup>54</sup>

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219, 252-53 (2004) (illustrating common concessions that host states feel compelled to make to investors).

<sup>49</sup> See generally Steven R. Ratner, *Corporations and Human Rights: A Theory of Legal Responsibility*, 111 YALE L. J. 443, 462-464 (2001).

<sup>50</sup> See Steven R. Ratner, *Corporations and Human Rights: A Theory of Legal Responsibility*, 111 YALE L. J. 443, 462 (2001).

<sup>51</sup> See Cartel Politics in Columbia: An Interview with Pedro Galindo, MULTINATIONAL MONITOR, (Dec. 1990) Vol. 11, No. 12 (providing the quote "[T]he Colombian government protects the multinationals' interests because of the companies' major role in the economy and the government's desperation to attract foreign investment."); see Steven R. Ratner, *Corporations and Human Rights: A theory of Legal Responsibility*, 111 YALE L. J. 443, 462 (2001).

<sup>52</sup> See *Doe v. Texaco, Inc.*, No. C 06-02820 WHA, 2006 WL 2917581 (N.D.Cal. Oct. 11, 2006); see also <http://www.texacorainforest.org/>.

<sup>53</sup> See generally Judge Robert B. Zoellick, REPORT OF THE INDUSTRY ADVISORY COMMITTEE FOR CHEMICALS AND ALLIED PRODUCTS, Mar. 12, 2003 at [http://www.ustr.gov/assets/Trade\\_Agreements/Bilateral/Chile\\_FTA/Reports/asset\\_upload\\_file937\\_4941.pdf](http://www.ustr.gov/assets/Trade_Agreements/Bilateral/Chile_FTA/Reports/asset_upload_file937_4941.pdf) (noting major environmental hazards with respect to BITs); see also Jessica S. Wilrse, *Comment, An Investor-State Dispute Mechanism in the Free Trade Area of the Americas: Lessons from NAFTA Chapter Eleven*, 51 BUFF. L. REV. 1145, 1180 (2003) (stating that foreign investments can jeopardize the host state's environment absent a separate agreement specifically protecting the environment). *But see*, OECD CONFERENCE ON FOREIGN DIRECT INVESTMENT & ENVIRONMENT, The Hague (Jan. 28-29, 1999), available at <http://www.biac.org/statements/env/FDI-Envir-99.pdf> (reporting that a "study by Charles Oman of the OECD's Development Centre [October 1998 draft] finds that the evidence 'provides scant support' for the race to the bottom hypothesis.").

<sup>54</sup> See generally Calvin A. Hamilton & Paula I. Rochwerger, *Trade and Investment: Foreign Investment Through Bilateral and Multilateral Treaties*, 18 N.Y. INT'L L. REV. 1, 6-10 (2005) (summarizing that developing nations primarily enter into BITs to increase their economic well-being).

### III. REPRESENTING DEVELOPED AND DEVELOPING NATIONS' INVESTMENT INTERESTS THROUGH BITS

#### A. BIT INCONSISTENCIES

Inevitably, the presence of thousands of separate BITS creates the risk of inconsistent obligations for states.<sup>55</sup> Harmonizing incompatible investment agreements can require supplemental consultations to remedy conflicts.<sup>56</sup> There can even be clashes between provisions within the same BIT.<sup>57</sup> For example, some BITS include contract claims in conjunction with treaty commitments. This raises jurisdiction and forum selection issues, as BIT-designated arbitration forums often do not have jurisdiction over domestic contract claims.<sup>58</sup> An investor must then decide to pursue a single claim in one forum, or both claims in different forums.<sup>59</sup> Having to file claims in multiple forums discourages foreign investment by increasing litigation costs and making the outcome of

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<sup>55</sup> See *Signature of Bilateral Investment Understanding*, EUR. UNION PRESS RELEASE -- EUR. COMM'N, Sept. 23, 2003, available at 2003 WL 60919499 (providing examples of conflicting obligations created by multiple BITS); see also UNCTAD, *Bilateral Investment Treaties 1959-1999* at iii, U.N. Doc. UNCTAD/ITE/IIA/2 (Internet ed. 2000) (providing statistical data on BITS from the latter half of twentieth century); *World Investment Report 2003*, UNCTAD (2003), *FDI Policies for Development: National and International Perspectives* 89, available at [http://www.unctad.org/en/docs/wir2003light\\_en.pdf](http://www.unctad.org/en/docs/wir2003light_en.pdf) (last visited Oct. 10, 2006) (stating that 2,265 BITS were in existence as of 2003).

<sup>56</sup> See *Signature of Bilateral Investment Understanding*, EUR. UNION PRESS RELEASE -- EUR. COMM'N, Sept. 23, 2003, available at 2003 WL 60919499 (describing the necessary 2003 "Political Understanding" between the United States and the European Commission in order to preserve U.S. BITS with eight candidate countries to the European Union because of conflicts between EU legislation and various BIT provisions.); see also *Signature of Bilateral Investment Understanding*, EUR. UNION PRESS RELEASE -- EUR. COMM'N, Sept. 23, 2003, available at 2003 WL 60919499 (candidate acceding countries included the Czech Republic, Estonia, Latvia, Lithuania, Poland, the Slovak Republic, Bulgaria and Romania).

<sup>57</sup> See UNCTAD, *Media Summary: Bilateral Investment Treaties Quintupled During the 1990s* 2 (Dec. 15, 2000); *World Investment Report 2003*, UNCTAD (2003), *FDI Policies for Development: National and International Perspectives* 8 (2003).

<sup>58</sup> See Emmanuel Gallard, *Introductory Note to International Center for Settlement of Investment Disputes (ICSID): Azurix Co. v. Arg.*, 44 I.L.M. 259, 260 (2004); see also Marian N. Leich, *Bilateral Investment Treaties*, 84 AM. J. INT'L L. 895, 898 (1990).

<sup>59</sup> See Emmanuel Gallard, *Introductory Note to International Center for Settlement of Investment Disputes (ICSID): Azurix Co. v. Arg.*, 44 I.L.M. 259, 260 (2004); see also Jan Paulsson, *The Extent of Independence of Arbitration from the Law of the Situs*, CONTEMP. PROBS. INT'L ARB. 141 (Julian D.M. Law ed., 1987) (summarizing the strategic implications of forum selection under a BIT, where the decision to pursue local arbitral remedies may deprive [or at least severely complicate] an investor's ability to then pursue investor-state remedies under the BIT); Carlos G. Garcia, *All the Other Dirty Little Secrets: Investment Treaties, Latin American, and the Necessity Evil of Investor-State Arbitration*, 16 FLA. J. INT'L L. 301, n. 11 (2004).



litigation less certain.<sup>60</sup>

## B. BIT IMBALANCES IN ARBITRATION

Illustrative of the imbalanced nature of BITs is the oft one-sided nature of arbitration proceedings.<sup>61</sup> Many BITs allow foreign investors to haul host governments into arbitration if, for example, the investor perceives that certain government action interfered with an investment.<sup>62</sup> Disgruntled investors are able to bring these actions regardless of the financial stability of the developing nation.<sup>63</sup> There are currently over 20

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<sup>60</sup> See Carolyn Jenkins & Lynne Thomas, *Foreign Direct Investment in South Africa: Determinants, Characteristics and Implications for Economic Growth and Poverty Alleviation* (Oct. 2002) (providing figure 4.1, illustrating elevated transaction and legal costs as primary considerations in evaluating candidate host nations); see also Luke Eric Peterson, *Bilateral Investment Treaties and Development Policy-Making*, *International Institute for Sustainable Development* 19, (Nov. 2004), available at [http://www.iisd.org/pdf/2004/trade\\_bits.pdf](http://www.iisd.org/pdf/2004/trade_bits.pdf) (stating that “a significant Achilles’ heel of this investor-state arbitration process” is its “potential to generate conflicting rulings, and contribute to considerable uncertainty for investors and host states alike.”); see also Fiona Marshall & Howard Mann, *Revision of the UNCITRAL Arbitration Rules, Good Governance and the Rule of Law: Express Rules for Investor-State Arbitrations Required* (Sept. 2006), available at [http://www.iisd.org/pdf/2006/investment\\_uncitral\\_rules\\_revision.pdf](http://www.iisd.org/pdf/2006/investment_uncitral_rules_revision.pdf) (“[I]nconsistent arbitral awards, i.e. when tribunals make disparate findings on claims with similar facts, make it difficult for other investors and states to predict where their own rights or obligations lie.”).

<sup>61</sup> See Paul Redmond, *Transnational Enterprise and Human Rights: Options for Standard Setting and Compliance*, 37 INT’L LAW 69, 79 (2003) (demonstrating how bilateral investment treaties strongly favor foreign investors and allow them to go straight to international arbitration without getting consent from the host nation); see also The Development Dimension of FDI: Police and Rule-Making Perspectives, Proceedings of the Expert Meeting held in Geneva from 6 to 8 November 2002, New York and Geneva, 2003, at 166 (stating “the WTO can also be adapted to deal with the criticism that international investment agreements are one-sided in granting significant rights to investors without any responsibilities.”).

<sup>62</sup> See Jacob S. Lee, *No “Double-Dipping” Allowed: An Analysis of Waste Management, Inc v. United Mexican States and the Article 1121 Waiver Requirement for Arbitration under Chapter 11 of NAFTA*, 69 FORDHAM L. REV. 2655, 2662 n. 35 (2001) (showing that all U.S. BITs have binding arbitration terms); see also Todd S. Shenkin, *Trade-Related Investment Measures in Bilateral Investment Treaties and the GATT: Moving Toward a Multilateral Investment Treaty*, 55 PITT. L. REV. 541, 586 (1994) (stating that BITs allow foreign investors access to arbitration to immediately confront sovereign governments); Marian N. Leich, *Bilateral Investment Treaties*, 84 AM. J. INT’L L. 895, 897 (1990) (discussing investor rights to go straight to binding arbitration with a host government under a BIT); Paul Redmond, *Transnational Enterprise and Human Rights: Options for Standard Setting and Compliance*, 37 INT’L LAW 69, 79 (2003) (demonstrating how some BITs strongly favor foreign investors and allow them to go straight to international arbitration without getting consent from the host nation).

<sup>63</sup> Nick Mathiason, *Big Food Group Does Big U-Turn: Victory for One Small Poor Country. But It’s Not the End of the Story: Guyana Will Not be Hauled into Court for Debt but Other Nations are Still Vulnerable*, THE OBSERVER, Mar. 23, 2003, at 3, available at <http://observer.guardian.co.uk/business/ethics/story/0,,919892,00.html> (reporting that UK food giant Big Food Group used its BIT to compel Guyana to go to arbitration regarding the £12 million debt

such cases pending against the world's poorest states.<sup>64</sup>

Furthermore, the Organisation for Economic Co-operation and Development (OECD) has criticized BIT arbitration proceedings, calling public-disclosure restrictions of the arbitration results "non-transparent and potentially inefficient."<sup>65</sup> Environmentalists also stress that secrecy in arbitration outcomes, particularly when a national government is involved, frustrates the goal of sustainable development in developing nations.<sup>66</sup>

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owed); see also *Disappearing Profits Will Turn Out for The Good: Where Ford Leads Others Will Follow*, THE GUARDIAN, Mar. 18, 2003, at 22, available at LEXIS, News Library, The Guardian File (assessing Big Food Group's 27 year hunt for Guyana's £12 million debt, regardless of the fact that Guyana is one of the poorest nations in the world); see Calvin A. Hamilton & Paula I. Rochwerger, *Trade and Investment: Foreign Investment Through Bilateral and Multilateral Treaties*, 18 N.Y. INT'L L. REV. 1, 22 nn. 97, 98 (2005).

<sup>64</sup> Nick Mathiason, *Big Food Group Does Big U-Turn: Victory for One Small Poor Country. But Its Not the End of the Story: Guyana Will Not be Hauled into Court for Debt but Other Nations are Still Vulnerable*, THE OBSERVER, Mar. 23, 2003, at 3, available at <http://observer.guardian.co.uk/business/ethics/story/0,,919892,00.html> (reporting that Uganda, Sierra Leone, Nicaragua, Ethiopia, Niger, Honduras, Bolivia, Cameroon, and Congo Democratic Republic as facing such litigation); see Calvin A. Hamilton & Paula I. Rochwerger, *Trade and Investment: Foreign Investment Through Bilateral and Multilateral Treaties*, 18 N.Y. INT'L L. REV. 1, 23 n. 102 (2005).

<sup>65</sup> J (Hans) B. Opschoor, *Multilateral Agreements on Investment and the Environment 9* (OECD Conf. on FDI and the Env't, Jan. 29, 1999) available at <http://www.oecd.org/dataoecd/25/45/2076269.pdf>; see also Carlos G. Garcia, *All the Other Dirty Little Secrets: Investment Treaties, Latin American, and the Necessity Evil of Investor-State Arbitration*, 16 FLA. J. INT'L L. 301, 354 (2004) (illustrating that arbitration proceedings remain confidential, unless the parties to the dispute expressly agree otherwise).

<sup>66</sup> Investment Rules and Arbitrations Negatively Impact Democratic Governance, Development, and the Environment, THE CENTER FOR INTERNATIONAL ENVIRONMENTAL LAW, Nov. 11, 2004, available at [http://ciel.org/Tae/Trade\\_Investment\\_Governance.html](http://ciel.org/Tae/Trade_Investment_Governance.html) (stating "[F]rom a governance perspective, the lack of participation and transparency in the negotiation of investment rules and in the adjudication of investment disputes frustrates sustainable development. In order for general societal concerns to be considered during the negotiation of investment agreements, it is vital that the public have access to relevant information as well as the opportunity to participate."); see also Carlos G. Garcia, *All the Other Dirty Little Secrets: Investment Treaties, Latin American, and the Necessity Evil of Investor-State Arbitration*, 16 FLA. J. INT'L L. 301, 354 (2004) (summarizing Barrister K.V.S.K. Nathan's finding: the call for privacy is a device to keep the public ignorant of the state's actions in the cases where a state entity is involved. Nathan argues there should be maximum transparency particularly in international arbitration proceedings involving a state or and a foreign entity); see K.V.S.K. Nathan, *ICSID Convention: The Law of the International Centre For Settlement of Investment Disputes 2* (2000). *But see* An Introduction: The Shrimp-Turtle Dispute and CIEL's Amicus Brief, THE CENTER FOR INTERNATIONAL ENVIRONMENTAL LAW, available at <http://www.ciel.org/Tae/shrimpturtle.html> (last visited Nov. 17, 2006) (describing the WTO Panel Shrimp-Turtle case between Mexico and USA, which allowed NGO to participate in amicus, although not a right of party).

C. USING BITS AND PAST MULTILATERAL FDI NEGOTIATIONS TO FACILITATE A COMPREHENSIVE SET OF INVESTMENT RULES.

i. *Gauging Developing Nations' Investment Interests*

Fortunately, the attachment of conditions to investment agreements is not a novel concept.<sup>67</sup> Although developed nations' previous attempts to attach conditions to FDI negotiations have been largely unsuccessful, much can be learned from them.<sup>68</sup> Human rights and religious freedom were conditions the United States tried to include in the first-ever attempt to negotiate an international investment treaty.<sup>69</sup> Many developing nations were, however, reluctant to enter into these treaties because they were viewed as an unreasonable interference with state sovereignty.<sup>70</sup> More recently, developing countries have raised similar concerns in FDI negotiations.<sup>71</sup> Thus, if developed countries are interested in overcoming previous failures in attaching conditions to FDI negotiations, past concerns asserted by developing nations against the inclusion of conditions in investment treaties should be addressed.<sup>72</sup> In this way, developed nations are notified of developing countries' FDI interests so that they may be accurately gauged and appropriately addressed in subsequent negotiations. Having notice of as many germane interests as possible prevents repetition of previous mistakes and facilitates negotiations for attaching conditions to future multilateral FDI accords.

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<sup>67</sup> See Mark S. Bergman, *Note, Bilateral Investment Protection Treaties: An Examination of the Evolution and Significance of the U.S. Prototype Treaty*, 16 N.Y.U. INT'L L. & POL'Y 7 (1983) (explaining that conditions have been placed on investment in the past).

<sup>68</sup> *Id.*

<sup>69</sup> *Id.* (noting that these agreements were initially called Friendship, Commerce or Navigation Treaties).

<sup>70</sup> See Kenneth J. Vandeveld, *U.S. Bilateral Investment Treaties: The Second Wave*, 14 MICH. J. INT'L L. 621, 625 (1993).

<sup>71</sup> See Glen Kelley, *Multilateral Investment Treaties: A Balanced Approach to Multilateral Corporations*, 39 COLUM. J. TRANSNAT'L L. 483, 495-96 (citing developing nation's state sovereignty issues as a primary concern in all foreign investment relationships); see Calvin A. Hamilton & Paula I. Rochwerger, *Trade and Investment: Foreign Investment Through Bilateral and Multilateral Treaties*, 18 N.Y. INT'L L. REV. 1 (2005).

<sup>72</sup> See Jan MacDonald, *The Multilateral Agreement on Investment: Heyday or MAI-Day for Ecologically Sustainable Development*, 22 MELB. U. L. REV. 617, 654-56 (1998) (detailing what elements in prior MAIs have failed, reasons for failure, and prospects on how to avoid such failures in future MAI); see also Stephen J. Canner, *Exceptions and Conditions: The Multilateral Agreement on Investment*, 31 CORNELL INT'L L. J. 657, 679-80 (1998) (outlining problems, solutions and other notables in current MAI to be considered in future MAI).

ii. *'If It Ain't Broke, Don't Fix It': Incorporating Previous Successes*

The presence of over two thousand BITs positively impacts future multilateral investment negotiations by establishing a legal framework for FDI and by fostering an awareness of successful elements contained in BITs.<sup>73</sup> For example, the overwhelming majority of BITs contain two non-discrimination principles: national treatment and most-favored-nation principles.<sup>74</sup> The universal approval of these celebrated principles allows parties to incorporate these provisions into a multilateral FDI treaty without fear of unknown adverse effects.<sup>75</sup> Virtually every BIT also includes protections against government expropriation, revoking licenses, breaking of agreements, plus repatriation terms.<sup>76</sup> The sheer frequency of these BIT provisions suggests that a multilateral investment accord must also include these investment terms.<sup>77</sup> In this way, BITs

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<sup>73</sup> See Aziz Choudry, *Bilateral Investment And Trade Deals No Fairytale*, ZNET COMMENTARY, at <http://www.zmag.org/sustainers/content/2003-06/21choudry.cfm> (last visited Oct. 17, 2006) (suggesting that multilateral treaties are a natural consequence of the expanding network of BITs); see also Chris Tollefson, *Games Without Frontiers: Investor Claims and Citizens Submission Under the NAFTA Regime*, 27 YALE J. INT'L L. 141, 148 n. 33 (2002) (postulating that the current web of BITs will eventually spawn a multilateral investment treaty at the WTO); Martin Wagner, *International Investment, Expropriation and Environmental Protection*, 29 GOLDEN GATE U. L. REV. 465, 472 (1999) (describing that the present network of BITs will result in multilateral investment initiatives at the OECD and the WTO); Riyaz Dattu, *A Journey From Havana to Paris: The Fifty-Year Quest for the Elusive Multilateral Agreement on Investment*, 24 FORDHAM INT'L J. 275, 315 (envisioning a multilateral investment system to emerge from the modern network of BITs); United States' President's Statement Announcing United States Foreign Direct Investment Policy (Dec. 26, 1991), 31 I.L.M. 488, 489 (1992) (listing treatment, expropriation and dispute resolution mechanisms as fundamental to U.S. investment interests).

<sup>74</sup> North American Free Trade Agreement, Dec. 8 and 17, 1992, Ch. 11, art. 1102, 32 I.L.M. 638 [hereinafter NAFTA] (describing the NT principle that requires a nation to treat foreign investments as well as or better than it treats domestic investments); NAFTA, Dec. 8 and 17, 1992, Ch. 11, art. 1103, 32 I.L.M. 638 (describing the MFN principle that requires that each nation must treat a foreign investment as well as or better than other foreign investments); see also Marie-France Houde & Katia Yannaca-Small, *Relationships between International Investment Agreements*, OECD, (May 2004), available at <http://www.oecd.org/dataoecd/8/43/31784519.pdf> (stating that U.S. and European BITs all include non-discrimination and national treatment terms).

<sup>75</sup> See generally James Salzman, *Labor Rights, Globalization and Institutions: The Role of Influence of the Organization for Economic Cooperation and Development*, 21 MICH. J. INT'L L. 769, 809-812 (2000).

<sup>76</sup> See A.E.M. Maniruzzaman, *Expropriation of Alien Property and the Principle of Non-Discrimination in International Law of Foreign Investment: An Overview*, 8 J. TRANSNAT'L L. & POL'Y 57, 71 (1998).

<sup>77</sup> *World Investment Report 2003*, UNCTAD (2003), *FDI Policies for Development: National and International Perspectives* 89, available at <http://www.globalpolicy.org/soecon/ffd/fdi/2003/wirlight.pdf> (stating that certain provisions in BITs are so popular that their inclusion into future investment agreements is almost guaranteed); see also Rudolf Dolzer & Margrete Stevens, *Bilateral Investment Treaties* THE INTERNATIONAL CENTER FOR SETTLEMENT OF INVESTMENT DISPUTES 99-100 (1995); Ibrahim F.I. Shihata, *Legal Treatment*

have filled the vacuum of uncertainty relating to potential successes or inadequacies of investment provisions before they are raised in multilateral negotiations.<sup>78</sup> Having already tested the desirability of many investment terms, BITs have thereby increased the likelihood of success of future negotiations for a more comprehensive set of investment rules.<sup>79</sup>

#### D. A MULTILATERAL REMEDY TO BIT LIMITATIONS

##### i. *Balancing Bargaining Positions of Negotiating Parties*

As a result of the imbalances enshrined in many BITs, developed and developing nations are growing disillusioned with the current FDI legal regime and are turning to multilateral investment schemes to regulate foreign investment.<sup>80</sup> Where multilateral negotiations involve several nations, rather than the two in the BIT model, it is more difficult for one nation to dominate treaty benefits.<sup>81</sup> In this way, the multilateral

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of Foreign Investment: "The World Bank Guidelines" 396 (1993).

<sup>78</sup> See Alan Larson, *The Multilateral Agreement in Investment: A Work in Progress*, Statement Before the Subcommittee on International Economic Policy and Trade of the House International Relations Committee (Mar. 6, 1998), in DEP'T OF STATE DISPATCH, April 1998 at 30 (outlining how current BITs were used to formulate the MAI).

<sup>79</sup> See John Dlodlu, *SADC Needs a Regional Accord On Investment*, BUS. DAYS. AFR., Nov. 16, 1998 at 3 (reporting that South Africa will work towards a multilateral investment system through existing BITs).

<sup>80</sup> See Foreign Trade Regulation, 2004 U.S. FED. L. DIGEST (highlighting multilateral stipulations in NAFTA, and likening NAFTA to a multilateral agreement on investment); see also Scott N. Carlson, *Foreign Investment Laws and Foreign Direct Investment in Developing Countries: Albania's Experiment*, 29 INT'L LAW. 577, 581 n. 18 (1995); Andrew T. Guzman, *Why LDCs Sign Treaties That Hurt Them: Explaining the Popularity of Bilateral Investment Treaties*, 38 VA. J. INT'L L. 639, 666 (1998); Paul Rcdmond, *Transnational Enterprise and Human Rights: Options for Standard Setting and Compliance*, 37 INT'L LAW 69, 79 (2003) (demonstrating how BITs strongly favor foreign investors and allow them to go straight to international arbitration without getting consent from the host nation); Calvin A. Hamilton & Paula I. Rochwerger, *Trade and Investment: Foreign Investment Through Bilateral and Multilateral Treaties*, 18 N.Y. INT'L L. REV. 1, 21 n. 91 (2005).

<sup>81</sup> See Pascal Lamy, Member of the European Commission Responsible for Trade Strengthening the Multilateral Trade System: How can the EU and India Cooperate? Confederation of Indian Industries New Delhi, RAPID COMM'N OF THE EUR. COMMUNITIES, Mar. 6, 2000, LEXIS, EC News (showing that multilateral foreign investment agreements create a more balanced international community). *But see* Alan Larson, *The Multilateral Agreement in Investment: A Work in Progress*, Statement Before the Subcommittee on International Economic Policy and Trade of the House International Relations Committee (Mar. 6, 1998), in DEP'T OF STATE DISPATCH, April 1998 at 30 (postulating that the inclusion of numerous states in MAI can lead to disagreements that can inhibit ratification); Calvin A. Hamilton & Paula I. Rochwerger, *Trade and Investment: Foreign Investment Through Bilateral and Multilateral Treaties*, 18 N.Y. INT'L L. REV. 1, n. 123 (2005).

structure has the potential to level the playing field during negotiations.<sup>82</sup> Recent reports even show that developed nations are seeking creative approaches to aid negotiations for a multilateral investment system.<sup>83</sup>

ii. *The Multilateral Approach and Investor Protection*

Various analysts maintain that developed-nation governments favor multilateral participation in investment negotiations because of heightened investor protections.<sup>84</sup> Specifically, greater comprehensiveness in rule making creates superior and less ambiguous investment rules to protect investors than BITs.<sup>85</sup> Other commentators have echoed this view, stating that BIT protections are not widespread enough to protect all FDI,<sup>86</sup> and have advocated the multilateral system as an alternative.<sup>87</sup>

iii. *Uniformity and Long-Term Prospects in Multilateralism*

Some analysts postulate that multilateral agreements are preferred to the “spaghetti bowl” of BITs and regional agreements, because they “facilitate policy coherence in the international investment sphere.”<sup>88</sup>

<sup>82</sup> See Mark Vallianatos, *Exceptions and Conditions: De-Fanging the MAI*, 31 CORNELL INT'L L.J. 713, 717 (1998) (holding that multilateral investment treaties provide equal footing between investors from host developing nations and foreign investors); see also Chris Baumgartner, *Trade and the Environment: The Demise of the Multilateral Agreement on Investment*, 1998 COLO. J. INT'L ENVTL. L. Y.B. 40, 41 (1998) (stating that the Multilateral Agreement in Investment had elements that would have created a ‘level playing field’ between foreign investor and developing government).

<sup>83</sup> See *EU/OECD: European Parliament Weighs into Stalled Investment Pact*, EUR. REP., Mar. 14, 1998, LEXIS, EC News, Sec. 2299 (reporting the EU’s interest in looking for new ideas that will help a new MAI succeed, where past attempts have failed).

<sup>84</sup> See David A Gantz, *The Evolution of FTA Investment Provisions: From NAFTA to the United States-Chile Free Trade Agreement*, 19 AM. U. INT'L L. REV. 679, 700-01 (2004) (noting that developed governments are favoring MAI rather than BITs due to broader investment protections).

<sup>85</sup> See Glen Kelly, *Multilateral Investment Treaties: A Balanced Approach to Multinational Corporations*, 39 COLUM. J. TRANSNAT'L L. 483, 492-93 (2001); see also Thomas J. Schoenbaurn, *The Concept of Market Contestability and the New Agenda of the Multilateral Trading System*, AM. SOC'Y INT'L L. (1996) (describing MAI devices that have the potential to be successful where BITs have failed in the past).

<sup>86</sup> See Todd S. Shenkin, *Trade-Related Investment Measures in Bilateral Investment Treaties and the GATT: Moving Toward a Multilateral Investment Treaty*, 55 PITT. L. REV. 541, 549 (1994).

<sup>87</sup> See *id.*

<sup>88</sup> See Zdenek Drábek, *A Multilateral Agreement on Investment: Convincing the Skeptics* 4-5 WTO Econ. Res. and Analysis Div., Working Paper ERAD-98-05, Feb. 1998) (providing “powerful arguments in favor of MAI”); see also Kevin C. Kennedy, *A WTO Agreement on Investment: A Solution in Search of a Problem?*, 24 U. PA. J. INT'L ECON. L. 77 (2003); see also Asif H. Qureshi, INT'L ECO. LAW 380 (1999).

Others have gone further, claiming that multilateral accords are superior to BITs in creating a stable global investment climate, because of the lack of conformity and consensus in BITs.<sup>89</sup>

The long-term potential of BITs has also been widely questioned.<sup>90</sup> Commentators contend that the multilateral system creates a smoother and fairer flow of investment capital than BITs, and as a result, multilateral accords are more sustainable and have a greater potential for long-term success.<sup>91</sup> These long-term qualities translate into lower administration costs for multilateral agreements, as most BITs expire every five, ten or twenty years.<sup>92</sup> Periodically renegotiating investment agreements inflates transaction costs, which investors weigh heavily in evaluating potential hosts for investment ventures.<sup>93</sup> Establishing one uniform and permanent system would obviate the need to renew expired BITs, thereby lowering FDI administration costs.

#### iv. *Supervising and Administering BITs*

Probably the most convincing evidence of BIT inadequacies in organizing FDI rules is that developed nations and international institutions have deemed it necessary to create supervisory bodies to oversee BIT performance.<sup>94</sup> For example, the United States established

<sup>89</sup> See Glen Kelly, *Multilateral Investment Treaties: A Balanced Approach to Multinational Corporations*, 39 COLUM. J. TRANSNAT'L L. 483, 490 (2001).

<sup>90</sup> See James Salzman, *Labor Rights, Globalization and Institutions: The Role of Influence of the Organization for Economic Cooperation and Development*, 21 MICH. J. INT'L L. 769, 812 (2000).

<sup>91</sup> See James Salzman, *Labor Rights, Globalization and Institutions: The Role of Influence of the Organization for Economic Cooperation and Development*, 21 MICH. J. INT'L L. 769, 812 (2000).

<sup>92</sup> See Calvin A. Hamilton & Paula I. Rochwerger, *Trade and Investment: Foreign Investment Through Bilateral and Multilateral Treaties*, 18 N.Y. INT'L L. REV. 1, 24-25 (2005) (stating that a "BIT and the policies that it mandates will only last as long as the agreement lasts. This could make for a somewhat unstable investment situation when a BIT is due to terminate and it has not been extended."). *But see, e.g.*, Agreement between the Government of the Democratic Socialist Republic of Sri Lanka and the Government of the Swiss Confederation for the Reciprocal Promotion and Protection of Investments, Sept. 23, 1981, art. 12(2), reprinted in 21 I.L.M. 399, 407 (1982) (showing how a treaty can avoid the problem of renegotiating by including a provision that after the initial treaty period, the treaty remains in effect in perpetuity until one party provides written notice of termination).

<sup>93</sup> See Carolyn Jenkins & Lynne Thomas, *Foreign Direct Investment in South Africa: Determinants, Characteristics and Implications for Economic Growth and Poverty Alleviation* (Oct. 2002) (providing figure 4.1 illustrating transactional costs as one of the main consideration in evaluating candidate host nations).

<sup>94</sup> See Pat K. Chew, *Political Risk and U.S. Investments in China: Chimera of Protection and Predictability?*, 34 VAL. J. INT'L L. 615, 670-71 (1994) (maintaining that the creation of OPIC was necessary in order to promote social and economic growth in developing states without harming United States interests); see Calvin A. Hamilton & Paula I. Rochwerger, *Trade and Investment: Foreign Investment Through Bilateral and Multilateral Treaties*, 18 N.Y. INT'L L. REV. 1, 31 n. 135

the Overseas Private Investment Corporation (OPIC) to ensure that the functions of its BITs were being furthered.<sup>95</sup> OPIC is also charged with promoting environmentally sound activities in host developing nations, perhaps because this lies outside the capacity of BITs.<sup>96</sup> Government bodies analogous to OPIC are present in other developed nations around the world.<sup>97</sup> The need for these supplemental administrative agencies is indicative of the inability of BITs to achieve their FDI goals independently.<sup>98</sup>

#### E. EFFORTS PUT FORTH TO NEGOTIATE FOR A GLOBAL INVESTMENT AGREEMENT

The first major attempt to establish an international investment accord was in 1948, when the Charter for the International Trade Organization (ITO) was presented to fifty-six states in Havana, Cuba.<sup>99</sup> At the time the United States accounted for almost 50% of the world's trade, making American participation in any international protocol absolutely necessary.<sup>100</sup> Despite vehement opposition from developing

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(2005).

<sup>95</sup> See The Overseas Private Investment Corporation Act, 22 U.S.C.S. § 2191 (2004) (establishing OPIC); see Overseas Private Investment Corp., OPIC's Development Mission, available at [http://www.opic.gov/Mission/DM/Intro\\_asp](http://www.opic.gov/Mission/DM/Intro_asp) (last modified Aug. 20, 2004) (reporting that OPIC ensures "the participation of United States private capital and skills in the economic and social development of less developed countries and areas, and countries in transition from non-market to market economies.").

<sup>96</sup> See Overseas Private Investment Corp., OPIC's Development Mission, available at [http://www.opic.gov/Mission/DM/Intro\\_asp](http://www.opic.gov/Mission/DM/Intro_asp) (last modified Aug. 20, 2004).

<sup>97</sup> See Vicki Been & Joel Beauvais, *The Global Fifth Amendment? NAFTA's Investment Protections and the Misguided Quest for and International "Regulatory Takings" Doctrine*, 78 N.Y.U. L. REV. 30, 111-112 (2003); see Overseas Private Investment Corp., OPIC's Development Mission, available at [http://www.opic.gov/Mission/DM/Intro\\_asp](http://www.opic.gov/Mission/DM/Intro_asp) (last modified Aug. 20, 2004) (evidencing that most developed nations have agencies similar to OPIC); see Calvin A. Hamilton & Paula I. Rochwerger, *Trade and Investment: Foreign Investment Through Bilateral and Multilateral Treaties*, 18 N.Y. INT'L L. REV. 1, 32 n. 141 (2005) (stating that France has the Compagnie Francaise d'Assurance pour le Commerce Exterieur; Spain has the Instituto Espanol do Comercie Exterior; Britain has U.K. Trade & Investment; Holland has Netherlands Foreign Investment Agency; Germany has the KfW Bankengruppe).

<sup>98</sup> See generally, Judge Robert B. Zoellick, REPORT OF THE INDUSTRY ADVISORY COMMITTEE FOR CHEMICALS AND ALLIED PRODUCTS, Mar. 17, 2003, available at [http://www.ustr.gov/assets/Trade\\_Agreements/Bilateral/Chile?FTA/Reports/asset\\_upload\\_file937\\_4\\_941.pdf](http://www.ustr.gov/assets/Trade_Agreements/Bilateral/Chile?FTA/Reports/asset_upload_file937_4_941.pdf) (noting significant environmental concerns with respect to the formulation of BITs); see Calvin A. Hamilton & Paula I. Rochwerger, *Trade and Investment: Foreign Investment Through Bilateral and Multilateral Treaties*, 18 N.Y. INT'L L. REV. 1, 26 n. 115 (2005).

<sup>99</sup> Charter for an International Trade Organization, U.N. Doc. E/CONF.2/78 (1948).

<sup>100</sup> And indeed still is, see [http://www.wto.org/english/news\\_e/sppl\\_e/sppl19\\_e.htm](http://www.wto.org/english/news_e/sppl_e/sppl19_e.htm) ("The multilateral trading system could not have achieved these impressive results without American leadership. The system is at its best when America engages and leads. I am encouraged by the



nations, the United States included sections concerning foreign investment in the ITO Charter.<sup>101</sup> However, the United States Senate never ratified the ITO because of objections over anti-competition clauses.<sup>102</sup> The ITO quietly faded into oblivion without the United States' support.<sup>103</sup>

After the ITO, the only other major multilateral economic agreement in existence was the General Agreement on Tariffs and Trade (GATT), but this agreement did not contemplate multilateral foreign investment rules.<sup>104</sup> Foreign investment talks were again attempted at the 1973-79 Tokyo Round, but developing nations eventually blocked this initiative.<sup>105</sup>

The absence of multilateral investment negotiations persisted until the Uruguay Round,<sup>106</sup> which produced two legal instruments dealing with foreign investment: The Agreement on Trade Related Investment Measures (TRIMS), and The General Agreement on Trade Services (GATS).<sup>107</sup> TRIMS aimed at reducing trade distortions caused by national investment policies, while GATS dealt with foreign investment by clumping it into the definition of "services" in the context of trade.<sup>108</sup>

commitment of the United States to continue its leadership role at this critical juncture.").

<sup>101</sup> SYLVIA OSTRY, *LOOKING BACK TO FORWARD: THE MULTILATERAL TRADE SYSTEM AFTER 50 YEARS. FROM GATT TO THE WTO: THE MULTILATERAL TRADING SYSTEM IN THE NEW MILLENNIUM* (The WTO Secretariat 2000).

<sup>102</sup> *Id.*

<sup>103</sup> *Id.*

<sup>104</sup> General Agreement on Tariffs and Trade, opened for signature Oct. 30, 1947, 61 Stat. 1, 55 U.N.T.S. 187 [hereinafter GATT]; TRIMS Background, WTO website, available at [http://www.wto.org/english/thewto\\_e/whatis\\_e/eol/e/wto05/wto5\\_3.htm](http://www.wto.org/english/thewto_e/whatis_e/eol/e/wto05/wto5_3.htm) (last visited Nov. 25, 2006) (providing a timeline of investment negotiations, and an explanation of each phases); see also SYLVIA OSTRY, *LOOKING BACK TO FORWARD: THE MULTILATERAL TRADE SYSTEM AFTER 50 YEARS. FROM GATT TO THE WTO: THE MULTILATERAL TRADING SYSTEM IN THE NEW MILLENNIUM* (The WTO Secretariat 2000) (Stating that the limited investment provisions in GATT was the only thing signatory members could agree on).

<sup>105</sup> SYLVIA OSTRY, *LOOKING BACK TO FORWARD: THE MULTILATERAL TRADE SYSTEM AFTER 50 YEARS. FROM GATT TO THE WTO: THE MULTILATERAL TRADING SYSTEM IN THE NEW MILLENNIUM* (The WTO Secretariat 2000).

<sup>106</sup> WTO Legal Texts, WTO website, available at [http://www.wto.org/English/docs\\_e/legal\\_e/legal\\_e.htm](http://www.wto.org/English/docs_e/legal_e/legal_e.htm) (last visited Nov. 25, 2006) (reporting that about 60 trade and investment related agreements were signed at the Marrakesh ministerial meeting in April of 1994 that codified the results of the Uruguay Round negotiations).

<sup>107</sup> General Agreement on Trade in Services, in the Uruguay Round Final Act, Dec. 15, 1993, Annex 1B, 33 I.L.M. 1130 (1994).

<sup>108</sup> See SYLVIA OSTRY, *LOOKING BACK TO FORWARD: THE MULTILATERAL TRADE SYSTEM AFTER 50 YEARS. FROM GATT TO THE WTO: THE MULTILATERAL TRADING SYSTEM IN THE NEW MILLENNIUM*. (The WTO Secretariat 2000) (describing GATS and its relationship to FDI); see also Tim Wall, *New WTO Investment Rules Cause Concern, from Africa Recovery*, Vol. 10, No. 3, Dec. 1996, available at <http://www.globalpolicy.org/soecon/bwi-wto/wtoinvst.htm> (outlining TRIMS

Although these two agreements were positive steps toward a global foreign investment protocol, they are by no means all-encompassing.<sup>109</sup>

An attempt to fill the vacancy left by TRIMS and GATS occurred at the OECD in 1995.<sup>110</sup> This body, which consists of the world's wealthiest countries, initiated negotiations for a comprehensive set of investment rules through the Multinational Agreement on Investments (MAI).<sup>111</sup> In 1998, all MAI talks were abruptly ended.<sup>112</sup> Various explanations have been raised to account for the failure of the MAI,<sup>113</sup> the majority of which center around sovereignty concerns, labor rights, and environment and culture protections.<sup>114</sup> Despite suddenly suspending MAI negotiations, the OECD expressed "the need and value of a multilateral framework for investment" and further stated that this

affect on foreign direct investment).

<sup>109</sup> WTO website, *TRIMS Background* (Jan. 19, 2003), available at [http://www.wto.org/english/thewto\\_e/whatis\\_e/eol/e/wto05/wto5\\_3.htm](http://www.wto.org/english/thewto_e/whatis_e/eol/e/wto05/wto5_3.htm) (last visited Nov. 25, 2006) (stating that "negotiations were not intended to deal with the regulation of investment..."); WTO Website, *Trade and Investment*, available at [http://www.wto.org/english/tratop\\_e/invest\\_e/invest\\_e.htm](http://www.wto.org/english/tratop_e/invest_e/invest_e.htm) (last visited Nov. 24, 2006) (specifying that TRIMS only speaks to foreign investment as it relates to inconsistencies with GATT).

<sup>110</sup> OECD Website, *Membership*, available at <http://www.oecd.org/about/general/member-countries.htm> (giving facts about TRIMS and GATS concerning foreign investment).

<sup>111</sup> OECD Website, *Multilateral Agreement on Investment, Fact Sheet Friends of The Earth-US* (Feb. 19, 1997), available at <http://www.globalpolicy.org/soecon/bwi-wto/oecd-mai.htm> (explaining OECD efforts to establish a multilateral investment accord, and describing the proposed investment rules).

<sup>112</sup> Madeleine Drohan, *How the Net Killed the MAI: Grassroots Groups Used Their Own Globalization to Derail Deal*, GLOBE & MAIL, April 29, 1998 (attributing the end of the MAI to quick disseminating capacity of the internet: "[I]f a negotiator says something to someone over a glass of wine, we'll have it on the Internet within an hour, all over the world.>").

<sup>113</sup> BBC News Homepage, *Investment Puzzle for the WTO*, BBC NEWS, Nov. 23, 1999, available at [http://news.bbc.co.uk/2/hi/special\\_report/1999/11/99/battle\\_for\\_free\\_trade/486411.stm](http://news.bbc.co.uk/2/hi/special_report/1999/11/99/battle_for_free_trade/486411.stm) (reporting that the failure of the MAI was a result of lobbying pressure from various non-government organizations concerning the secrecy of the negotiations); see also CEO Website, *The EC and the Multilateral Agreement on Investment: Shameless Corporate Bias*, CORPORATE EUROPE OBSERVATORY, Feb. 2000, available at <http://www.corporateeurope.org/hallofshame/mai.html> (contending that the collapse of MAI negotiations was the result of "the upswelling of civil society protest" and key developed nations, such as France, that withdrew from negotiations because of mass demonstrations); Press Release, OECD New Release (Oct. 23, 1998), available at [http://www.oecd.org/news\\_and\\_events/release/nw98-101a.htm](http://www.oecd.org/news_and_events/release/nw98-101a.htm) (providing the Secretary of the OECD's MAI Negotiating Group statement that MAI failures can be attributed to inaccurate initial assumptions on the part of the drafters that they would not be required to justify the promulgated rules to the international community and, further, that MAI negotiators were investment specialists who were not accustomed to viewing investment concepts from a political perspective).

<sup>114</sup> Jan Hunter, *Environment Regulation and International Agreements: Lessons from the MAI* (paper delivered at the Royal Institute for International Affairs Conference on Trade, Investment and Environment), Oct. 29-30, 1998, available at <http://www.islandnet.com/nfcs/maisite/pov-mai3.htm> (concluding that the MAI was unsuccessful because of a lack of social and environmental protections of the recipient nation).

“goal should still be sought.”<sup>115</sup>

Suggestions to include a comprehensive regulatory scheme for foreign investment have also surfaced in the World Trade Organization (WTO).<sup>116</sup> Arguments have been made that the Working Group on Trade and Investment should be used as a basis to negotiate multilateral investment rules.<sup>117</sup> However, in 2003 at the WTO Fifth Ministerial Conference in Cancun, Mexico, the Conference Chairman “determined that it would not be possible to reach a consensus across the agenda (concerning investment) and closed the meeting. . .”<sup>118</sup> The disagreement that ended the Cancun ministerial meeting was, to a large degree, the result of gaps between developed and developing nations over their

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<sup>115</sup> Press Release, OECD New Release (Oct. 23, 1998), available at [http://www.oecd.org/news\\_and\\_events/release/nw98-101a.htm](http://www.oecd.org/news_and_events/release/nw98-101a.htm).

<sup>116</sup> Press Release, WTO Website, Report by the WTO Secretariat: Trade and Foreign Direct Investment (Oct. 9, 1996), available at [http://www.wto.org/english/news\\_e/pres96\\_e/pr057\\_e.htm](http://www.wto.org/english/news_e/pres96_e/pr057_e.htm) (describing the WTO Secretariat’s support for a multilateral agreement on investment. In a 1996 report, Trade and Foreign Direct Investment the Secretariat noted: “[A]t an institutional level, the growing importance of FDI, coupled with the absence of binding multilateral rules on national policies toward FDI, has created what in many quarters is viewed as an obstacle that could slowdown the pace of further integration of the world economy. The perceived need for multilateral rules on investment is not new--indeed, the Havana Charter for the stillborn International Trade Organization . . . contained provisions on foreign investment--but attempts to reach a comprehensive multilateral agreement with binding rules have thus far not been successful.”); Daniel Pruzin, *EU Advocates GATS Approach to WTO Talks on Investment, Offers Nondiscrimination View*, 19 INT’L TRADE REP. (BNA) 1218, 1219 (July 11, 2002); see also Daniel Pruzin, *EU Official Says Support Growing for Comprehensive Trade Round*, 16 INT’L TRADE REP. (BNA) 1284 (Aug. 4, 1999); Daniel Pruzin, *Japan Discussion Paper Highlights Likely Issues for WTO Talks on Investment Rules*, 18 INT’L TRADE REP. (BNA) 881 (June 7, 2001) (describing Japan’s call for WTO negotiation on investment rules); see also Daniel Pruzin, *Prospects Diminishing for Talks on Rules Covering Investment, Competition*, 16 INT’L TRADE REP. (BNA) 1598 (Oct. 6, 1999); Daniel Pruzin, *U.S. Offers Olive Branch on Talks at WTO on Investment, But Not Inside Seattle Round*, 16 INT’L TRADE REP. (BNA) 1779 (Nov. 3, 1999); Editorial, *Co-operate on Competition*, ECONOMIST, July 4, 1998, at 16 (calling upon the WTO to issue multilateral competition policy); Editorial, *The Borders of Competition*, ECONOMIST, July 4, 1998, at 69 (suggesting WTO including minimum competition policies). *But see* UNCTAD, Report of the Expert Meeting on Existing Agreements on Investment and Their Development Dimensions (1997), circulated by the Working Group on the Relationship Between Trade and Investment, Communication from UNCTAD, WT/WGTI/W/21 (Jan. 6, 1998) (some nations list disadvantages of a multilateral scheme for investment); Kevin C. Kennedy, *A WTO Agreement on Investment: A Solution in Search of a Problem?*, 24 U. PA. J. INT’L ECON. L. U. 77 (2003).

<sup>117</sup> See S.K. Date-Bah, *Facilitating and Regulating Private Investment in a Developing Economy*, 22 PENN. ST. INT’L L. REV. 3, 10-11 (2003) (explaining how the 1996 Singapore Ministerial Conference led to the creation of the “Working Group” to study the relationship between international trade and investment); see also Pierre Sauvé, *Multilateral Rules on Investment: Is Forward Movement Possible?* 9 J. INT’L ECON. L. 325, 326 (June 2006).

<sup>118</sup> WTO, Fifth WTO Ministerial Conference Cancun, Mexico (September 10-14, 2003), DEP’T OF FOREIGN AFF. AND INT’L TRADE, CANADA (2004), available at <http://www.dfait-maeci.gc.ca/tna-nac/WTO-MCD-en.asp>.

dedication to a multilateral investment accord.<sup>119</sup> This result was recently echoed in 2004 at the Doha Conference on Development, where all foreign investment issues were excluded from agenda discussions.<sup>120</sup>

## F. ADDRESSING FAILURES IN MULTILATERAL INVESTMENT NEGOTIATIONS

### i. *Deficiencies in Substantive Investment Terms*

Failures in past multilateral investment negotiations have often been attributed to substantive deficiencies in the material terms of the agreement.<sup>121</sup> An absent provision that developing nations consider essential in protecting their investment interest will significantly diminish the likelihood of successful FDI negotiations.<sup>122</sup> “Extenuating circumstance” safeguards are often considered essential by host developing countries, where the absence of such safeguards would contribute to the loss of confidence in continuing negotiations.<sup>123</sup> For example, regarding the £12 million debt Big Food Group sought to recover from Guyana pursuant to an alleged violation of a BIT between England and Guyana, the President’s office of Guyana commented, “[I]t would have serious implications in our budget capacity. . . [I]t would compromise our social services and economic obligation.”<sup>124</sup> Guyana’s

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<sup>119</sup> See Fiona MacMillan, *If Not This WTO, Then What?* 10(3) INT’L TRADE L. & REG. 41, 42 (2004) (commenting on the differing positions of the developed and developing states towards a multilateral investment agreement).

<sup>120</sup> See Pierre Sauvé, *Multilateral Rules on Investment: Is Forward Movement Possible?* 9 J. INT’L ECON. L. 325, 326-27 (June 2006) (stating “WTO members agreed...that the three other Singapore issues (including investment) ‘will not form part of the...[Doha] Declaration...”).

<sup>121</sup> See Foreign Direct Investment: A Lead Driver for Sustainable Development?, TOWARDS EARTH SUMMIT 2002, ECONOMIC BRIEFING SERIES NO. 1, at 5, available at <http://www.earthsummit2002.org/es/issues/FDI/fdi.PDF> (last visited Oct. 19, 2006) (stating that the MAI gave limited support for the social, economic and environmental concerns of host countries in emphasizing investor rights).

<sup>122</sup> *Id.*

<sup>123</sup> NAFTA, December 8 and 17, 1992, Ch. 11, art. 2101.1 32 I.L.M. 638 (1993) (providing the example, that NAFTA investment provision contain general environmental exceptions to that are necessary to protect human, animal or plant life or health or relating to the conservation of exhaustible natural resources both living and non-living); see also GATT, Oct. 30, 1947, art. XX, 55 U.N.T.S. 194, 262 (showing that the GATT outlines similar environmental measures that can be taken without punitive arbitration proceedings); see also Investor-State Disputes Arising From Investment Treaties: A Review, Feb. 2006, UNCTAD/ITE/IIT/2005/4, at 10, available at [http://www.unctad.org/en/docs/iteiit20054\\_en.pdf](http://www.unctad.org/en/docs/iteiit20054_en.pdf) (providing the UNCTAD estimate that a state will incur US\$1-2 million on average in legal costs alone defending an investor-state proceeding, which does not include arbitrators’ fees or the final award if the tribunal finds against the state).

<sup>124</sup> See Nick Mathiason, *Big Food Group Does Big U-Turn: Victory for One Small Poor*

entire gross national product is £120 million, of which Big Food Group was seeking a tenth.<sup>125</sup> “Extenuating circumstances exemptions can be negotiated to include these types of exuberant compensatory claims. Developing nations can guarantee the inclusion of these specific safeguards by accepting more environmental conditions in FDI negotiations presented in the next section.

ii. *Intrinsic Incongruities*

The central reason for deficiencies in the substantive terms in investment agreements is due to structural maladies in negotiations.<sup>126</sup> The unilateralism employed by the member nations of the OECD in MAI negotiations is illustrative of the systemic inequity that pervades the economic ties of developed and developing nations. Negotiating a global investment strategy without consulting the majority of the world exemplifies the delinquent circumstances of the current economic order.<sup>127</sup>

The gap of wealth and power between industrialized and developing nations has been the hallmark of international economic relationships since the conclusion of World War II.<sup>128</sup> As a consequence of this disparate economic standing, developed and developing nations have incongruent priorities in the foreign investment context.<sup>129</sup> The difficulty

*Country. But It's Not the End of the Story: Guyana Will Not be Hauled into Court for Debt but Other Nations are Still Vulnerable*, THE OBSERVER, Mar. 23, 2003, at 1, available at <http://observer.guardian.co.uk/business/ethics/story/0,,919892,00.html>.

<sup>125</sup> See Nick Mathiason, *Big Food Group Does Big U-Turn: Victory for One Small Poor Country. But It's Not the End of the Story: Guyana Will Not be Hauled into Court for Debt but Other Nations are Still Vulnerable*, THE OBSERVER, Mar. 23, 2003, at 1, available at <http://observer.guardian.co.uk/business/ethics/story/0,,919892,00.html>.

<sup>126</sup> See Robert Sharer, *An Agenda for Trade, Investment, and Regional Integration*, FIN. & DEV. (INTERNATIONAL MONETARY FUND), Dec. 2001, available at <http://www.imf.org/external/pubs/ft/fandd/2001/12/sharer.htm> (stating that richer nations have more power in the global system and that if developing nations want to increase their bargaining power they should explore ways to alter the negotiating structure).

<sup>127</sup> See Danuse Murty, *Helping Towards Global Peace* 12 (2006), available at [http://bodhitree.net/firms.com/Books/Helping\\_towards\\_Global\\_Peace.pdf](http://bodhitree.net/firms.com/Books/Helping_towards_Global_Peace.pdf) (last visited Nov. 17, 2006) (showing the 2002 UNICEF statistics that the population of developing nations is almost five times that of developed nations).

<sup>128</sup> See DAVID HUNTER, JAMES SALZMAN & DURWOOD ZAEKE, INTERNATIONAL ENVIRONMENTAL LAW AND POLICY 169 (2d ed. 2002)); see also Christopher Flavin, *Rich Planet, Poor Planet*, in Lester Brown, et al., eds., *State of the World: 2001*, at 1-20 (Worldwatch Institute, 2001) (providing 1998 statistics of developed and developing nations: Indonesia has 3.5% of the world's population earning \$640/year, while Japan has 2.1% of the world's population earning \$32,350/year).

<sup>129</sup> Press Release, UNCTAD, “Number of Bilateral Investment Treaties Quintupled During the 1990s,” Media Release TAD/INF/2877, available at <http://r0.unctad.org/en/press/pr2877en.pdf>

in reconciling these economic priorities is manifested in every area of FDI negotiations.<sup>130</sup> Concerning the sectors open to FDI in host developing nations, investors seek an unregulated investment climate with the freedom to inject unlimited amounts of capital into any industry.<sup>131</sup> Developing countries are highly suspect of this ideal because of the loss of managerial oversight correlated with foreign investors owning and operating sensitive industry.<sup>132</sup> For example, in 1998, the Indonesian government issued a Negative Investment list that excluded foreign investment in the sectors of freshwater fish, forestry, taxi and bus transport, local shipping, and medical services.<sup>133</sup> By outlawing foreign investment in natural resources, transportation and medical-care industries, the Indonesian government reserved absolute self-determination in these critical segments of the Indonesian economy.<sup>134</sup> Thus, despite international pressure to liberalize its FDI rules, Indonesia emphasized its national sovereignty interests by prohibiting foreign capital in sectors of great public interest.<sup>135</sup> In this fashion, the 1998 Indonesian Presidential Decree typifies the tensions between liberalizing FDI and national sovereignty interests, and highlights the structural incongruities in global FDI priorities.

The following section suggests an alternative framework for FDI negotiations. The goal of the approach provided is to heighten the chances for success in future multilateral foreign investment negotiations. This framework was conceived as a potential remedy to the aforementioned systemic maladies that have permeated past multilateral investment talks, and uses specific examples to illustrate how this

(observing the oft imbalanced BIT provisions reflecting the different interests and bargaining positions of parties).

<sup>130</sup> See Pierre Sauvé, *Multilateral Rules on Investment: Is Forward Movement Possible?* 9 J INT'L ECON. L. 325, 329-331 (June 2006).

<sup>131</sup> The Egyptian International Trade Point, *Investment in Egypt*, available at <http://www.tpegypt.gov.eg/statistic/invest16.asp> (illustrating the Egyptian incentive of allowing unlimited amounts of capital to be invested).

<sup>132</sup> Ranabir Roy Choudhury, *National Interest and FDI*, Business Line Internet Ed., Financial Daily from THE HINDU PUBLICATION GROUP, July 1, 2002 (describing the sensitivity of the national press in India, and concerns of allowing FDI in the media).

<sup>133</sup> See generally OECD Proceedings, *Foreign Direct Investment and Recovery in SouthEast Asia* (1999).

<sup>134</sup> See [http://www.bkpm.go.id/bkpm/news.php?mode=baca&info\\_id=6404](http://www.bkpm.go.id/bkpm/news.php?mode=baca&info_id=6404) (reporting that Indonesia has gone further in restricting foreign investment in sensitive industries with its new 2007 investment law).

<sup>135</sup> WTO website, available at <http://www.wto.org/wto/environ/tradelib.htm> (stating that both WTO Secretariat AND UNCED held that developing nations are dependent upon trade and investment as the main source of continued growth); JOSEPH STIGLITZ, *MAKING GLOBALIZATION WORK* 16 (2006) (stating that the IMF places conditions on loans to developing nations to liberalize their foreign investment rules).

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framework would operate. In this regard, this Comment is not a comprehensive treatise on the implications of this framework on the substantive issues of FDI, but instead focuses on the core concepts behind this paradigm.

#### IV. PRESENTATION OF THESIS: INCLUDING NEGOTIATIONS FOR ENVIRONMENTAL CONDITIONS WITH NEGOTIATIONS FOR A GLOBAL FDI AGREEMENT

##### A. THE FRAMEWORK

Despite past failures and present hurdles, there is a consensus in the developed world that negotiations for a multilateral set of investment rules should still be pursued.<sup>136</sup> To facilitate multilateral investment talks, this Comment proposes attaching concurrent negotiations for environmental conditions to FDI negotiations.<sup>137</sup> The environmental conditions<sup>138</sup> would be based on a priority list of the prevailing environmental ills in each developing nation, ranging from absent or inadequate environmental standards, to negligent enforcement of existing regulations.<sup>139</sup> The entire scope of environmental conditions would be optional and negotiated in conjunction with a uniform and thorough set of rules governing FDI.<sup>140</sup> The more conditions a developing nation

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<sup>136</sup> Press Release, OECD News Release (Oct. 23, 1998) available at [http://www.oecd.org/news\\_and\\_events/release/nm98-101a.htm](http://www.oecd.org/news_and_events/release/nm98-101a.htm); see also *EU/OECD: European Parliament Weighs into Stalled Investment Pact*, EUR. REP., Mar. 14, 1998, available at LEXIS, EC News, Section 2299 (reporting the EU's interest in looking for new ideas that will help a new multilateral investment accord succeed, where past attempts have failed).

<sup>137</sup> See Robert Sharer, *An Agenda for Trade, Investment, and Regional Integration*, FIN. & DEV. (INTERNATIONAL MONETARY FUND), Dec. 2001, Vol. 38, No. 4, available at <http://www.imf.org/external/pubs/ft/fandd/2001/12/sharer.htm> (highlighting that the attachment of conditions by developed nations on economic relations with developing nations already exists in the form of Preferential Treatment Agreements (PTA) and Generalized System of Preference (GSP), with the example that "in 1996, Brazil, India, Indonesia, Malaysia, the Philippines, and Thailand accounted for 75 percent of all U.S. imports benefiting from preferences."). These mechanisms are used to induce policy change through the granting of economic privileges. In similar fashion, the conditions suggested in this comment would elevate the environmental standards in developing nations, through parallel negotiations concerning foreign investment.

<sup>138</sup> The term 'environmental condition' refers to a precondition on the foreign investment, where the investor commits to maintaining an environmental standard (as created through this framework) in the practices of all operations relating to the investment activity.

<sup>139</sup> The conditions would be strictly of an environmental nature and would not impair the developing country's ability to represent its national interests in unrelated agreements. This would limit developing nation's sense of being coerced by the developed world.

<sup>140</sup> The flexible nature of the conditions would help alleviate instinctual suspicions in economic relations, and add to an atmosphere of compromise between developing and developed

accepts, the more compromising foreign investors must be in parallel investment negotiation.<sup>141</sup> Vice versa, the less environmental conditions a developing nation accepts, the more relenting it must be in negotiations for substantive FDI terms. In this way, developing nations can strengthen their bargaining position during negotiations for investment terms by accepting more environmental conditions.<sup>142</sup> And in rejecting the more arduous and impracticable conditions, foreign investors can still secure their FDI interests. Thus, the environmental conditions would act as a counterbalance to the concessions parties make during the substantive investment negotiations.

This approach has three primary functions: to provide developing nations with more bargaining power to protect their investment interests, to ensure foreign investors will still be able to secure their investment interests, and to effectuate environmental progress in developing nations, where ecological threats are gravest.

#### B. PRIORITIZING ENVIRONMENTAL CHALLENGES AND CREATING CONDITIONS.

In tailoring the conditions to address the location-specific environmental threats in the world, environmental data must be accumulated on every developing nation, focusing on the direst ecological circumstances.<sup>143</sup> For example, storage of toxic/hazardous waste, treatment of radioactive materials, discharge of pollutants into waterways, emission controls, biological diversity, and soil arability would all be measured.<sup>144</sup> A priority list would then be generated of all areas most in need of improvement for each developing nation. This list would also consider the feasibility of implementation and enforcement for each developing nation. The end result will be used to establish the scope of environmental conditions attached to FDI.

Inevitably, a given developing nation will be deficient in many of these areas, because of inadequate resources to cover the financial

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nations.

<sup>141</sup> Such as transparency, non-discrimination principles, agriculture, development issues, technology transfer issues, dispute and settlement procedure, privatization, expropriation, state sovereignty.

<sup>142</sup> When developing nations 'accept' the environmental conditions, they agree to commit state resources to meet the standard set forth in the given environmental condition.

<sup>143</sup> Most developed nations have already accumulated this information for humanitarian aid purposes. Non-Governmental Organizations will also be instrumental in gathering relevant data.

<sup>144</sup> Environmental monitoring and enforcement procedures must also be included, and procedural measures must be established for verifying conformity with agreed to environmental standards.



burden of implementation and enforcement.<sup>145</sup> Executing every environmental condition within the generated scope will therefore be a difficult, if not impossible task for most developing countries.<sup>146</sup> Developing nations must then determine which conditions are immediately viable, and which are untenable. If implementation and enforcement are unequivocally unfeasible for a developing nation, foreign investors may then use the forfeited condition to secure more favorable investment terms or protections in concurrent FDI negotiations. In this way, this framework also allows foreign investors to further their investment interests in negotiating for these environmental conditions.

It is appropriate for the counter-balancing conditions to be environmental for three fundamental justifications. One, the strictness of environmental standards and compliance therewith directly affects the flow of FDI into a host developing economy.<sup>147</sup> Two, FDI projects pose potential environmental dangers to a host developing nation.<sup>148</sup> And

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<sup>145</sup> Global Trade Negotiations Home Page, CENTER FOR INTERNATIONAL DEVELOPMENT AT HARVARD UNIVERSITY, May 2004, available at <http://www.cid.harvard.edu/cidtrade/issues/environment.html> (last visited Nov. 24, 2006) (noting that “The general cost of implementation is also a major barrier” and that “[E]nforcement...is feeble among developing countries because they are short of funding. ...”).

<sup>146</sup> The paramount theme behind this system is that implementation of the conditions cannot destroy the economic viability of the FDI, because the developing nation receiving the FDI must still experience economic benefit from the investment, despite the entailed expense of the environmental conditions. Thus, the developing nation can reject the most unmanageable conditions and will not be expected to accept every condition in the environmental priority list.

<sup>147</sup> See Christer Ljungwall & Martin Linde-Rahr, Environmental Policy and the Location of Foreign Direct Investment in China, CHINA CENTER FOR ECONOMIC RESEARCH, WORKING PAPER SERIES, No. E2005009, Dec. 2005, available at <http://econpapers.repec.org/paper/eabmacroe/681.htm> (“[s]tringent environmental policies may in a similar fashion raise the cost of production and deter foreign firms from investing in China.”); see also Steven Globerman & Daniel Shapiro, *National Political Infrastructure and Foreign Direct Investment*, INDUSTRY CANADA RESEARCH PUBLICATION PROGRAM 42, Working Paper 37 (Dec. 2002), available at [http://strategis.ic.gc.ca/epic/site/eas-aes.nsf/vwapj/wp37e.pdf/\\$FILE/wp37e.pdf](http://strategis.ic.gc.ca/epic/site/eas-aes.nsf/vwapj/wp37e.pdf/$FILE/wp37e.pdf) (“[O]ur results also provide some support for the claim that initiatives to promote environmental protection and remediation encourage, rather than discourage, inward FDI.”); OECD CONFERENCE ON FOREIGN DIRECT INVESTMENT & ENVIRONMENT, The Hague (Jan. 28-29, 1999), available at <http://www.biac.org/statements/env/FDI-Envir-99.pdf> (stating that “because environmental costs are a small part of the total costs of establishing production facilities,” legal and regulatory uncertainty are greater deterrents for investors).

<sup>148</sup> OECD GLOBAL FORUM ON INTERNATIONAL INVESTMENT, *Environmental Impacts of Foreign Direct Investment in the Mining Sector in Sub-Saharan Africa (Especially Heavy Industry Investment Ventures such as Natural Resource Extraction)*, Conference on Foreign Direct Investment and the Environment Lessons to be Learned from the Mining Sector at 22, Feb. 7-8 2002, available at <http://www.oecd.org/dataoecd/44/40/1819582.pdf> (emphasizing that small-scale FDI mining projects are “[A] major [environmental] problem facing sub-Saharan African countries.”).

three, environmental conditions address the race-to-the-bottom concerns that surface in virtually every discussion of FDI.

Increasing the volume of issues to be negotiated to already-chilled talks might seem counter-productive. On the contrary, including another priority, interest, or goal in negotiations diversifies parties' objectives. A previously uncompromising position might seem more flexible when an additional aim enters the picture. The luxury of maintaining nonnegotiable terms in one round of talks is lessened when pressure to protect self-interests in a different round materializes with the same negotiation partner. Formerly immovable requisites in negotiations become flexible when they threaten to sabotage connected negotiations.

### C. INVESTMENT ISSUES TO BE NEGOTIATED

Foreign direct investment issues are ripe for negotiation because they are plentiful and recurring.<sup>149</sup> Predictably, one of the most contentious issues surrounding FDI is scope and definition.<sup>150</sup> Should foreign portfolio investments, speculative flows, debt and loans be excluded from the definition?<sup>151</sup> The United States and other developed nations prefer a broad definition to include portfolio investments and other intangible assets, while Korea and other developing nations want a narrow definition, with no short-term speculative flows.<sup>152</sup>

One area that all parties agree on is the issue of transparency in dispute resolution proceedings.<sup>153</sup> Developed nations universally support this, but many developing nations cited lack of resources in meeting administrative transparency obligations.<sup>154</sup> The need for transparency in

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<sup>149</sup> See 2002 A Record Year for Liberalizing FDI Laws and Regulations, M2 Presswire, Aug. 21, 2003, available at 2003 WL 62358767 (stating that foreign investment issues have not changed over time).

<sup>150</sup> See Art Ridgeway, *IMF Committee on Balance of Payments Statistics and OECD Workshop on International Investment Statistics, Direct Investment Technical Expert Group*, STATISTICS CANADA, Nov. 2004 (showing the IMF attempt to "addresses some principles and processes that could form the basis for ensuring the harmonization of definitions for FDI").

<sup>151</sup> See Jürgen Kurtz, *A General Investment Agreement in the WTO? Lessons from Chapter 11 of NAFTA and the OECD Multilateral Agreement on Investment 3*, available at <http://www.jeanmonnetprogram.org/papers/02/020601.pdf> ("[T]he relatively long-term nature of FDI is often distinguished from portfolio investment..."); see also INTERNATIONAL MONETARY FUND, *BALANCE OF PAYMENTS MANUAL* 409 (4th ed. 1977).

<sup>152</sup> See Pierre Sauvé, *Multilateral Rules on Investment: Is Forward Movement Possible?* 9 J INT'L ECON. L. 325, 330 (June 2006).

<sup>153</sup> *Id.*

<sup>154</sup> See generally Kristina Herrmann, *Corporate Social Responsibility and Sustainable Development: The European Union Initiative as a Case Study* 214, *IND. J. OF GLOBAL LEGAL STUD.* VOL.11, Issue 2, Summer 2004.

these proceedings, because of the public nature of the dispute when the government is a party has been repeatedly raised in past multilateral FDI negotiations.<sup>155</sup>

Opening the more sensitive industries in host developing nations for investment is one of the most delicate FDI issues.<sup>156</sup> Developing nations have expressed aspirations for pre-established GATS-type positive list of sectors allowing foreign investment, or the so called “list it or lose it” approach, where countries list individual sectors they want to reserve for investment.<sup>157</sup> In contrast, developed countries favor a negative-list approach that leaves open all industries for capital investment, except those sensitive sectors expressly prohibited from foreign investment.<sup>158</sup> Because of the criticality of adequate food supplies, and traditions relating to farming and harvest, agriculture has always been one of these sensitive industries.<sup>159</sup> Disagreements over duties, subsidies, and other protective measures on agriculture have spilled over into foreign investment negotiations and have inhibited cooperation in discussion.<sup>160</sup>

Development issues have also divided developed and developing nations in past FDI negotiations.<sup>161</sup> Most nations agree that a development component would have to be added to any multilateral FDI agreement,<sup>162</sup> but developing nations are very hesitant to concede their ability to retain domestic screening procedures.<sup>163</sup> Developed nations are usually willing only to pass along old and obsolete technology, out of fear that transferring the most advanced technology might threaten their competitive edge or compromise intellectual property rights.<sup>164</sup> Other

<sup>155</sup> See Carlos G. Garcia, *All the Other Dirty Little Secrets: Investment Treaties, Latin American, and the Necessity Evil of Investor-State Arbitration*, 16 FLA. J. INT’L L. 301, 354 (2004) (illustrating that arbitration proceeding remain confidential, unless the parties to the dispute expressly hold otherwise).

<sup>156</sup> See Pierre Sauvé, *Multilateral Rules on Investment: Is Forward Movement Possible?* 9 INT’L ECON. L. 325, 349 (June 2006).

<sup>157</sup> *Id.* at 335.

<sup>158</sup> *Id.*

<sup>159</sup> See Robert Sharer, *An Agenda for Trade, Investment, and Regional Integration*, FIN. & DEV. (INTERNATIONAL MONETARY FUND), Dec. 2001, Vol. 38, No. 4, available at <http://www.imf.org/external/pubs/ft/fandd/2001/12/sharer.htm> (stating that “[A]lthough, overall, the trade regimes of the European Union, the United States, and other industrial countries are open, agriculture is a major exception.”).

<sup>160</sup> See Pierre Sauvé, *Multilateral Rules on Investment: Is Forward Movement Possible?* 9 INT’L ECON. L. 325, 340-341 (June 2006) (reporting that the WTO meetings in Doha and Singapore have exemplified the sensitivity of domestic agriculture).

<sup>161</sup> *Id.* at 345.

<sup>162</sup> *Id.*

<sup>163</sup> *Id.* at 350-352.

<sup>164</sup> See Maria Giovanna Bosco, *Integration, technological transfer and intellectual property*

ubiquitous foreign investment issues include compensation for expropriation, compensation for war, compensation for civil disturbances, repatriation rights for investors, limitations on performance standards (for example, quotas or local content), and investor right of choice to fill top management spots.<sup>165</sup> Negotiating environmental conditions on FDI in tandem with these critical FDI issues will help parties reach a consensus that previously eluded developed and developing nations in previous multilateral negotiations.

#### V. WHY INVESTORS FROM DEVELOPED NATIONS WOULD DESIRE ENVIRONMENTAL STANDARDS IN HOST DEVELOPING NATIONS

Four fundamental incentives (discussed in parts A-D below) will be discussed that give foreign investors from industrialized nations reason not merely to tolerate environmental conditions on investments in the developing world, but to seek them. The view that environmental measures such as natural resource conservation, waste management schemes, and sustainable development projects diminish profits is now obsolete.<sup>166</sup> This section will cite evidence that speaks to the potential of environmental standards to create and protract profitable investment ventures.

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*rights: An empirical application to the MENA countries* 11 (2001), available at [http://www.ecomod.net/conferences/ecomod2001/papers\\_web/bosco\\_new.pdf](http://www.ecomod.net/conferences/ecomod2001/papers_web/bosco_new.pdf) (contending that “[E]ven if the MNE would get the maximum earning from transferring and exploiting a high technology...she’d rather transfer an old or obsolete one, not to leak out industrial secrets and lose the competitive advantage...”).

<sup>165</sup> See Catherine Sune, *The E-2 Treaty Investor Visa: The Current Law and The Proposed Regulations*, 11 AM. U.J. INT’L L. & POL’Y 511, 517 n.28 (1996).

<sup>166</sup> See Michael Lufkin, *New Report Highlights Insurance Industry’s Efforts to Address Climate Change*, (Sept. 6, 2006), <http://www.martenlaw.com/news/?20060906-climate-change-addressed> (describing that the international insurance industry incurred \$80 billion in losses in 2006 from weather related property damage, and that Tokio Marine and Nichido Life responded by reforesting over 7,500 acres of mangroves and wetlands in Southeast Asia, in order to mitigate future damage caused by intense weather events); see also generally, Pavit Ramachandran, *The Business Case for Sustainable Development: How to Profit from the Environment*, Issue Memo for a Executive Management Consulting Firm, Jan. 1, 2002 (showing that customers in various markets, particularly Europe, are willing to pay a premium for Environmentally Responsible Production of products).

A. STRONG ENVIRONMENTAL STANDARDS IN HOST DEVELOPING NATIONS INCREASE INVESTMENT PROFITABILITY BY PROMOTING SUSTAINABILITY AND CREATING NEW INVESTMENT MARKETS

i. *Environmental Standards in Host Developing Nations Ensure Long-Term Economic Productivity*

a. The Unprofitability of Environmentally Irresponsible Operations

In March 2005, over thirteen hundred of the world's top scientists completed a four-year comprehensive environmental analysis in the Millennium Ecosystem Assessment (MA). The MA concluded that the necessities humanity depends on are being used in an unsustainable way, and that this trend could 'grow substantially worse' if the status quo is not altered.<sup>167</sup> The MA stressed that humanity's pursuit of economic gain "is putting such a strain on the natural functions of Earth, that the ability of the planet's ecosystem to sustain future generations can no longer be taken for granted."<sup>168</sup> The MA further emphasized that the degradation of the environment is not merely a threat to the quality of human life, but "will also profoundly affect businesses."<sup>169</sup>

The deterioration of the world's environment affects the profitability of a foreign investment in no less than four distinct ways. First, ecological dilapidation intensifies business costs in the particularly vulnerable and devastated locales.<sup>170</sup> For example, the pervasiveness of human sickness greatly increases when a population is exposed to abominable air quality.<sup>171</sup> Poor public health translates into labor

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<sup>167</sup> See Millennium Ecosystem Assessment, *Living Beyond our Means: Natural Assets and Human Well-Being: Statement from the Board 2* (2005), available at <http://www.millenniumassessment.org/proxy/document.429.aspx>.

<sup>168</sup> *Id.*

<sup>169</sup> *Id.*

<sup>170</sup> See generally THE WORLD BANK GROUP, Third Environmental Assessment Review (FY 96-00) (2002) (stating that the World Bank demands performance of environmental risk assessments more often when the surrounding environment appears to be at an elevated risk).

<sup>171</sup> See AEA Technology, CAFÉ CBA: *Baseline Analysis 2000 to 2020*, Apr. 2005, at 109, available at [http://ec.europa.eu/environment/air/cafe/activities/pdf/cba\\_baseline\\_results2000\\_2020.pdf](http://ec.europa.eu/environment/air/cafe/activities/pdf/cba_baseline_results2000_2020.pdf) (last visited April 9, 2007) (providing the European Union's estimate of death per year in the UK, 40,800, caused/hastened by air pollution); see also Mark A. Uhlig, *Mexico Closes Giant Oil Refinery To Ease Pollution in the Capital*, N.Y. TIMES, Mar. 19, 1991, available at <http://query.nytimes.com/gst/fullpage.html?sec=health&res=9D0CE1DD1331F93AA25750C0A967958260> (stating that in 1991, the air pollution in Mexico City was so dangerous to human health,,

absenteeism, a less productive workforce, and therefore, reduced industrial and commercial output.<sup>172</sup>

Second, environmental and resource mismanagement reduces the availability of key natural resources, which jeopardizes foreign investment prospects, as investors lose confidence in the return potential in the most exhausted regions.<sup>173</sup> For example, Zimbabwe's gold reserves are quickly depleting as a result of unfettered mining operations. Jack Murehwa, Zimbabwean Chamber of Mines President commented, "with more than two million operators out there, surface gold is fast running out."<sup>174</sup>

Third, as consumers and stockholders become more environmentally conscious, less investment capital will be available to MNEs that reject or ignore environmentally responsible directives.<sup>175</sup> Indeed, recent reports have noted that MNEs place themselves at financial risk by ignoring shareholder environmental concerns.<sup>176</sup>

President Carlos Salinas de Gortari ordered the city's largest Government-run oil refinery to be closed).

<sup>172</sup> See F. Balducci, C. Boudet, J. Dechenaux, A. Deloraine & D. Zmirou, *Health Effects Costs of Particulate Air Pollution*, 41 J. OCCUPATIONAL & ENVTL. MED., Oct. 1999, at 847-856, available at <http://www.joem.org/pt/re/joem/abstract.00043764-199910000-00005.htm;jsessionid=FhIPbBLLqxtDLnlV63ZIskXHQb1M4DFczn1D9v48TcTpF6rGMXhq!1513079044!-94985614518091!-1> (reporting a French study that conducted "a cross-sectional study in December 1994 in three metropolitan areas of the Rhone-Alpes region in France...to assess the medical costs resulting from exposure to particulate air pollution...annual estimates of the attributable cost of respiratory diseases for a population of 1 million range between 79 and 135 million French francs" every year).

<sup>173</sup> See Millennium Ecosystem Assessment, *Living Beyond our Means: Natural Assets and Human Well-Being: Statement from the Board 2* (2005), available at <http://www.millenniumassessment.org/proxy/document.353.aspx>.

<sup>174</sup> Letter from Jack Murehwa, President of the Mining Association to Mines Minister Amos Midzi, available at [http://www.fin24.co.za/articles/economy/display\\_article.aspx?Nav=ns&lv12=econ&ArticleID=1518-25\\_1878441](http://www.fin24.co.za/articles/economy/display_article.aspx?Nav=ns&lv12=econ&ArticleID=1518-25_1878441) (last visited Oct. 27, 2006).

<sup>175</sup> See generally Catherine Wheatley, *Many Businesses Seek to Promote Corporate Social Responsibility*, SUNDAY BUSINESS, Feb. 20, 2002 (describing the research by Mintel International Group Ltd. that found that 4 in 10 customers worry that products should not involve the exploitation of developing countries); see also *Green America: Waking up and catching up*, ECONOMIST, Jan. 27, 2007, at 24 (quoting the research firm New Energy Finance that "[A]mericans invested almost \$30 billion in the [environmental] sector in 2006).

<sup>176</sup> See generally Erik Assadourian, *Socially Responsible Investing Spreads* 98-99, VITAL SIGNS, 2005 (Lisa Mastny ed., Worldwatch Inst. 2005); see also Stratos, *Corporate Disclosure and Capital Markets: Demand and Supply of Financially Relevant Corporate Responsibility Information*, Dec. 22, 2004, at 13 available at [http://www.nrtee-trnee.ca/eng/programs/Current\\_Programs/Capital-Markets/Documents/Corporate-Disclosure/Corporate-Disclosure\\_E.pdf](http://www.nrtee-trnee.ca/eng/programs/Current_Programs/Capital-Markets/Documents/Corporate-Disclosure/Corporate-Disclosure_E.pdf) (describing a 2003 survey that reported that 80% of Canadians support requiring pension funds to publicly report whether they take the environmental performance of the companies they invest in into consideration.); see also *Cleantech Venture Network, Resources and Information*, available at

And fourth, the deterioration of the global environment impairs foreign investment because host nations are prompted to heighten environmental laws in addressing rising ecological hazards. Environmental laws always affect industrial business interests as a result of the cost of compliance.<sup>177</sup> When these laws are unexpectedly altered, this perpetuates instability and unpredictability in the investment climate. This consequence will be revisited in part *ii* of this section.

#### b. The Profitability of 'Green' Industry Practice

In recognizing the burgeoning relationship between environmental and foreign investment health,<sup>178</sup> the MA held that the previously conflicting goals of maximizing profits and engaging in sustainable development activities could no longer be viewed as mutually exclusive.<sup>179</sup> Corporations must either become environmentally responsible, or face the risk of financial loss as the global environment declines.<sup>180</sup> The global business community has echoed these conclusions. In 2001, DuPont CEO Charles Holliday, Jr., stated: "Business will not succeed in the twenty-first century if societies fail or if global ecosystems continue to deteriorate."<sup>181</sup> A 2003 corporate performance study reinforced this view, finding a positive correlation between financial performance and corporate social and environmental responsibility.<sup>182</sup> This study held that by reducing waste output and

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<http://cleantech.com/index.cfm?pageSRC=ResourcesAndInformation> (last visited Feb. 20, 2006) (stating that "[F]or the ninth consecutive quarter, the amount of capital placed into cleantech companies by equity investors was larger than the previous." Cleantech investments comprise 14.3% of all investments in North America overall, and that "Cleantech maintains the lead over Semiconductors and is behind only Software and Biotechnology.").

<sup>177</sup> Decree No. 185 of 1992 (Chile), referenced in Simon Hobson, *The 1990s: The Environmental Decade*, ENG. & MINING J. (Jan. 1993), at 30 (providing the Chilean environmental law that requires mining companies to spend as much as \$900 million in plant upgrades to be in compliance).

<sup>178</sup> See Matthew Haigh et al., *Financial Markets: A Tool for Social Responsibility?* 52(1) J. BUS. ETHICS, June 2004, at 59-71 (describing the model Integrity Quality Performance: firms that are environmentally responsible feel the rewards in their share prices by environmentally responsible investors).

<sup>179</sup> See Millennium Ecosystem Assessment, *Living Beyond our Means: Natural Assets and Human Well-Being: Statement from the Board 2* (2005), available at <http://www.millenniumassessment.org/proxy/document.429.aspx>.

<sup>180</sup> *Id.*

<sup>181</sup> See Meredith Armstrong Whiting & Charles J. Bennett, the Conference Bd., *The Road to Sustainability: Business' First Steps* 21 (2001).

<sup>182</sup> See Marc Orlitzky et al., *Corporate Social and Financial Performance: A Meta-analysis*, 24 ORG. STUD. 403, 404 (2003) (highlighting previous reports that concluded that negative or insignificant correlations between profits and corporate social/environmental responsibility could be

production inefficiencies, corporations could reduce both overall costs and adverse environmental impacts, thereby increasing market competitiveness.<sup>183</sup> For example, MNEs such as 3M, British Petroleum, DuPont and IBM have cut their operation costs by hundreds of millions of dollars by reducing waste.<sup>184</sup> Indeed, numerous MNEs have discovered the profitability of replacing old production methods with more environmentally friendly industry practices.<sup>185</sup> Fuji Xerox, for example, decreased raw material expenditures and waste production by developing a new photocopier with components that could be reused in future models.<sup>186</sup>

ii. *Strong Environmental Standards Promotes Investment into Environmentally Friendly Industrial Innovation*

Elevated environmental standards in developed nations encourage MNEs to explore alternative, eco-friendly investment opportunities in

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explained by common research error).

<sup>183</sup> Michael E. Porter & Claas van der Linde, *Green and Competitive: Ending the Stalemate*, HARV. BUS. REV., Sept.-Oct. 1995, at 120, 125-126; see also Thomas Wheelan & David J. Hunger, STRATEGIC MANAGEMENT AND BUSINESS POLICY 122-123 (9th Ed., Pearson-Prentice Hall 2007) (outlining Richard D'Aveni's 'Hypercompetition': that more firms are able to compete for a market share because of advances in technology and the easing of trade barriers).

<sup>184</sup> THE CLIMATE GROUP, *Carbon Down, Profit Up* (2004), available at [http://www.theclimategroup.org/assets/Carbon\\_Down\\_Profit\\_Up.pdf](http://www.theclimategroup.org/assets/Carbon_Down_Profit_Up.pdf); see also CONFERENCE ON FOREIGN DIRECT INVESTMENT AND THE ENVIRONMENT. Summary of the Discussion. Emerging Market Forum, The Hague, Jan. 1999, available at <http://www.oecd.org/daf/investment/fdi/fdienv.htm> (stating that greater environmental commitment can facilitate long term corporate gains through greater efficiency and better quality of practices).

<sup>185</sup> Joe Makower, *Inc. Magazine's 'Green 50' Celebrates Green Entrepreneurs*, available at [http://makower.typepad.com/joel\\_makower/business\\_practices/index.html](http://makower.typepad.com/joel_makower/business_practices/index.html) (referencing the Ryzex Group website, which states that the company is now 100% waste free, which has led to profit expectations of over \$75 million); see also Bryan Walsh, *How Business Saw the Light: Smart Companies are using the environment not just to seem virtuous but to crush their rivals*, TIME, Jan. 15, 2007, at 56 (stating that:

[T]he efficiency Toyota brings to all aspect of business, the result of a corporate philosophy that strives to exterminate waste. Today Toyota can use a single production line to make multiple vehicle types, which has helped it reduce energy use in manufacturing 30% since 2000. . . . When an industry leader like Toyota succeeds by going green, its rivals take notice-as Ford's and General Motors's frenzied game of catch-up demonstrates. . . . Toyota is killing Detroit.

<sup>186</sup> See generally Eriko Saijo, *Re-Designing the Office Copier—One Manufacturer's Efforts to Conserve Resources*, JAPAN FOR SUSTAINABILITY NEWS, (June 2005), available at <http://www.japanfs.org/en/newsletter/200506.html>; see also Andrew Griffiths et al., *Corporate Sustainability: Integrating Human and Ecological Sustainability Approaches*, NEW HORIZONS IN RESEARCH ON SUSTAINABLE ORGANISATIONS 166, 179-82 (Mark Starik et al. eds., 2005).



developing markets.<sup>187</sup> Refocusing research and development efforts on environmentally sound technologies creates entirely new, untapped investment markets.<sup>188</sup> For example, in 2004 General Electric, the ninth largest corporation in the world, doubled investments in eco-friendly technologies through its 'Ecomagination' plan.<sup>189</sup> CEO Jeffery Immelt commented, "we are launching Ecomagination not because it is trendy or moral, but because it will accelerate our growth and make us more competitive."<sup>190</sup> In 2005, General Electric reported US \$10.1 billion in revenue from Ecomagination.<sup>191</sup>

Admittedly, General Electric is relatively unique in harmonizing corporate strategy with environmental imperatives.<sup>192</sup> Less forward-thinking companies are not likely to follow suit without more incentive.<sup>193</sup> For these MNEs, elevated environmental regulations

<sup>187</sup> See Joel Makower, *Timberland Reveals Its "Nutritional" Footprint*, (Jan. 7 2006), available at [http://makower.typepad.com/joel\\_makower/business\\_practices/index.html](http://makower.typepad.com/joel_makower/business_practices/index.html) (reporting that in response to a an energy bill in Congress, IMB, Intel, ADM, HP, Dell, and Sun began "competing feverishly on energy efficiency as they do on speed and other characteristics."); see also OECD CONFERENCE ON FOREIGN DIRECT INVESTMENT & ENVIRONMENT The Hague (Jan. 28-29, 1999), available at <http://www.biac.org/statements/env/FDI-Envir-99.pdf> (stating that "[F]oreign investors, particularly global companies, generally standardize technologies and management systems across countries in which their facilities are located. When they maintain a single standard for environmental practices, they nevertheless must meet legal requirements in the most stringent jurisdiction; therefore their single standard is set at a high level, and carried as a practice to the less strict countries.").

<sup>188</sup> See Mark Fontecchio, *Data center efficiency bill passes the House*, NEWS WRITE, July 13, 2006, available at [http://searchdatacenter.techtarget.com/originalContent/0,289142,sid80\\_gci1199068,00.html](http://searchdatacenter.techtarget.com/originalContent/0,289142,sid80_gci1199068,00.html) (reporting that "[T]he U.S. House of Representatives has approved a bill that calls for a six-month Environmental Protection Agency (EPA) study on data center efficiency."); see Jennifer Kho and Adena DeMonte, *Australia Bulb Ban to Spark Startups*, RED HERRING: THE BUSINESS OF TECHNOLOGY, Feb. 22, 2007, available at [http://www.redherring.com/Article.aspx?a=21423&hed=Australia+Bulb+Ban+to+Spark+Startups+](http://www.redherring.com/Article.aspx?a=21423&hed=Australia+Bulb+Ban+to+Spark+Startups) (reporting Australia's ban on incandescent light bulbs, which has prompted investment into eco-friendly light bulbs. This article provides the quote by Gary Trott, vice president of product development for North Carolina-based LED Lighting Fixtures: "[A]nything that happens like the incandescent ban is really going to help push our technology."); BBC News website, *EU agrees renewable energy target*, Mar. 9, 2007, available at <http://news.bbc.co.uk/2/hi/europe/6433503.stm> (reporting that the EU is poised to follow Australia's lead in banning incandescent bulbs).

<sup>189</sup> See Peter Fairley, *The Greening of GE*, IEEE SPECTRUM ONLINE, June 30, 2005, available at <http://www.spectrum.ieee.org/jul05/1565>.

<sup>190</sup> *Id.*

<sup>191</sup> See Bryan Walsh, *How Business Saw the Light: Smart Companies are using the environment not just to seem virtuous but to crush their rivals*, TIME MAG., Jan. 15, 2007, (Magazine), at 56.

<sup>192</sup> But see *Green America: Waking up and catching up*, ECONOMIST, Jan. 27, 2007, at 23 (quoting a recent Cambridge Energy Research Associates poll showing that four-fifths of utility executives polled expected mandatory emission caps within a decade).

<sup>193</sup> See Stratos, *Corporate Disclosure and Capital Markets: Demand and Supply of*

provide motivation to expand operations and investments into previously unexplored, and virtually untapped green industry markets.<sup>194</sup> Put slightly differently, the presence of heightened environmental standards can instigate a shift of investment capital away from environmentally harmful projects toward innovative, sustainable and more efficient green activity.<sup>195</sup> This paradigm shift carries a massive profit potential, which is the fundamental consideration for all investment schemes. In this way, stringent environmental laws improve long-term investment perspectives. As attaching environmental conditions to multilateral FDI negotiations would result in stronger environmental standards, foreign investors should welcome an investment scheme that facilitates that end.

### iii. *Public-Relations Implications*

Eco-responsible MNEs also enjoy better public relations in their host communities.<sup>196</sup> A healthy MNE-host nation relationship limits the risk of being targeted by activist organizations, where a sustained negative publicity campaign could damage the business reputation.<sup>197</sup> A

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*Financially Relevant Corporate Responsibility Information* 13, Dec. 22, 2004, available at [http://www.nrtee-trnee.ca/eng/programs/Current\\_Programs/Capital-Markets/Documents/Corporate-Disclosure/Corporate-Disclosure\\_E.pdf](http://www.nrtee-trnee.ca/eng/programs/Current_Programs/Capital-Markets/Documents/Corporate-Disclosure/Corporate-Disclosure_E.pdf) (describing a 2002 survey of CEOs during the World Economic Forum that the dominant incentive of corporate activity is short-term opportunity and gain, not environmental sustainability).

<sup>194</sup> See Bryan Walsh, *How Business Saw the Light: Smart Companies are using the environment not just to seem virtuous but to crush their rivals*, TIME, Jan. 15, 2007, at 56 (describing an interview with Honda CEO Takeo Fukui in which Fukui stated that as a young engineer he “design[ed] the first engine capable of meeting the 1970 Clean Air Act emission standards without a costly catalytic converter, making Honda one of the first car companies to turn environmentalism into a competitive advantage.”).

<sup>195</sup> See Michael E. Porter & Claas van der Linde, *Toward a New Conception of the Environment- Competitiveness Relationship*, 9(4) J. ECON. PERSP. at 97-118 (1995) (theorizing that “properly designed, environmental standards can trigger innovation that may partially or more than fully offset the costs of complying with them.”). *But see* Karen Palmer, Wallace E. Oates & Paul R. Portney, *Tightening Environmental Standards: The Benefit-Cost or the No-Cost Paradigm* 9(4) J. ECON. PERSP. at 119-132 (1995) (suggesting that environmental regulations operate on pollution firms’ advantage).

<sup>196</sup> See Erik Assadourian, *The State of Corporate Responsibility and The Environment*, 18 GEO. INT’L ENVTL. L. REV. 571, 574 (2006 Focus Issue); *see also* Ellie A Fogarty, et al., “The Body Shop International PLC: Anita Roddick, OBE” rpt. in THOMAS WHEELAN & DAVID J. HUNGER, *STRATEGIC MANAGEMENT AND BUSINESS POLICY* 7.1-7.26 (9th Ed. Pearson-Prentice Hall 2007) (describing that the Body Shop’s emphasis on environmental protection, inter alia, guaranteed positive public relations and negated all need for advertising).

<sup>197</sup> See Jim Murray, *Corporate Codes of Conduct and Labour Standards*, THE INTERNATIONAL LABOUR ORGANIZATION, available at <http://www.itcilo.it/english/actrav/telearn/global/ilo/guide/jill.htm> (last visited Nov. 17, 2006) (reporting that “the vulnerability of this high-profile industry to a concerted negative publicity campaign” is illustrated by efforts of “international trade union/NGO coalition” that publicized that

negative reputation would make it more arduous to attract a higher-quality workforce and would discourage customer loyalty.<sup>198</sup> Advertising and other market promotions are also damaged by negative publicity.<sup>199</sup> Some MNEs' have even spent millions on campaigns to reverse negative public relations.<sup>200</sup> It is therefore in MNEs' financial interests to strive for positive public relations, which environmentally responsible MNEs typically enjoy.

B. A MUSHROOMING TREND OF ECOLOGICAL RESPONSIBILITY BY MNEs, DEVELOPED GOVERNMENTS AND INTERNATIONAL FINANCIAL INSTITUTIONS ILLUSTRATING A DISPOSITION FOR GREATER ENVIRONMENTAL ACCOUNTABILITY

i. *Greater MNE Transparency of Environmental Performance Through the Reporting of Environmental Impact Reports to Stockholders.*

Increasing environmental accountability is evidenced by MNEs' greater transparency through environmental impact reports to stockholders.<sup>201</sup> For example, in 2005, 2043 MNEs filed reports on issues of environmental responsibility.<sup>202</sup> This is a significant increase from 1992, when only 26 such reports were filed.<sup>203</sup> Moreover, approximately 80% of the largest one hundred companies listed on the London Stock Exchange now file an environmental report,<sup>204</sup> and

"a Barbie doll costs as much as a Thai factory worker earns in a month" and that "the negative impact of the charge of exploitation cannot be underestimated.").

<sup>198</sup> See Erik Assadourian, *The State of Corporate Responsibility and The Environment*, 18 GEO. INT'L ENVTL. L. REV. 571 (2006).

<sup>199</sup> See generally Antonio Vives, *The Role of Multilateral Development Institutions in Fostering Corporate Social Responsibility*, 47(3) DEVELOPMENT (2004).

<sup>200</sup> See Ravi Chandiramani, *How can Nestle Begin to Win Over its Critics?*, MARKETING, June 27, 2002, at 13 (describing the required expenditures to remedy to baby formula debacle that caused the death of innumerable new borns); see also Ricky Griffin, et al, *Nike Inc: Developing an Effective Public Relations Strategy*, rpt. in INTERNATIONAL BUSINESS 4th Ed., at 301-303 (showing the considerable efforts by Nike to dispel its negative public image).

<sup>201</sup> Joel Makower, *Timberland Reveals Its "Nutritional" Footprint*, Jan. 7 2006, available at [http://makower.typepad.com/joel\\_makower/business\\_practices/index.html](http://makower.typepad.com/joel_makower/business_practices/index.html) (stating that the footwear company Timberland provides every shoebox with a 'nutritional label' that communicates "information on its environmental and community impacts").

<sup>202</sup> See Erik Assadourian, *The State of Corporate Responsibility and The Environment*, 18 GEO. INT'L ENVTL. L. REV. 571, n.12 (2006) (citing an email from Paul Scott, Director, CorporateRegister.com, Sept. 25, 2006).

<sup>203</sup> *Id.*

<sup>204</sup> CorporateRegister.com website, Non-Financial Reporting Status of the FTSE100,

according to a 2005 survey by KPMG (a global network of professional firms that provide audit and tax advisory services), 52% of the top half of the Fortune 500 corporations files similar reports.<sup>205</sup> The fact that MNEs are voluntarily availing themselves of public scrutiny on their environmental performance reveals a budding environmental consciousness in their decisionmaking processes.<sup>206</sup>

ii. *Developed Government Efforts*

In requiring MNEs to reveal the environmental impacts of their operations, governments of developed countries have supported the growing demand for environmental accountability.<sup>207</sup> For example, in 2001 France passed the Nouvelles Regulations Economiques, which requires every company listed in France's national stock exchange to report, "how the company takes into account the social and environmental consequences of its activities."<sup>208</sup> The United States also seems to be acknowledging the importance of corporate environmental responsibility by moving toward more stringent environmental-disclosure requirements.<sup>209</sup> Before financing a MNE project, the United

CORPORATEREGISTER.COM, available at <http://www.corporateregister.com/charts/FTSE.htm> (last visited Apr. 19, 2006).

<sup>205</sup> KPMG website, KPMG Global Sustainability Servs., *KPMG International Survey of Corporate Responsibility Reporting 2005*, at 4 (2005), available at [http://www.kpmg.com/Rut2000\\_Prod/Documents/7/KPMG%20Intl%20CR%20Survey%202005%20\(web%20version\).pdf](http://www.kpmg.com/Rut2000_Prod/Documents/7/KPMG%20Intl%20CR%20Survey%202005%20(web%20version).pdf); see also Bryan Walsh, *How Business Saw the Light: Smart Companies are using the environment not just to seem virtuous but to crush their rivals*, TIME MAG., January 15, 2007, (Magazine) at 57 (quoting author and Yale law professor Daniel Esty: "I'd say 90% of the business community wants more action on the environment than the Bush administration.").

<sup>206</sup> See *The \$31.5 Trillion Question: Is Your Company Prepared for Climate Change?*, GREENBIZ.COM, available at [http://www.greenbiz.com/news/news\\_third.cfm?NewsID=34028](http://www.greenbiz.com/news/news_third.cfm?NewsID=34028) (reporting on a global coalition of investors worth more than \$31.5 trillion, called the Carbon Disclosure Project, who have successfully demanded disclosure of all environmental risks stemming from their corporate activities from more than 2,000 companies globally including American Express, Boeing, Home Depot, Disney and Wal-Mart, Chevron, Citigroup, and Ford).

<sup>207</sup> Joel Makower, *The Keys to Kyoto: A Climate Change Primer for Business*, Feb. 13, 2005, available at [http://makower.typepad.com/joel\\_makower/business\\_practices/index.html](http://makower.typepad.com/joel_makower/business_practices/index.html) (stating that "California, New Hampshire, New Jersey, Wisconsin, and Chicago, Illinois all have [greenhouse gas] registry programs, and several other jurisdictions are working on them.").

<sup>208</sup> Law No. 2001-420 of May 15, 2001, J.O., May 16, 2001, p. 7776.

<sup>209</sup> See GAO-04-808, *Environmental Disclosure: SEC Should Explore Ways to Improve Thinking and Transparency of Information*, July 2004, <http://www.gao.gov/new.items/do4808.pdf> (describing the statement by the United States Government Accountability Office emphasizing that the Securities and Exchange Commission "is taking steps to increase the tracking and transparency of key [environmental] information," focusing on environmental disclosure.); see also Energy Star: Protect Our Environment For Future Generation, (last visited Nov. 20, 2006) available at <http://www.energystar.gov> (describing the Energy Star system, "a joint program of the U.S. Environmental Protection Agency and the U.S. Department of Energy helping corporations save

States government now requires an environmental impact assessment to be conducted, and periodically imposes environmental standards on MNEs seeking financing.<sup>210</sup> MNEs engaging in overseas mining operations are often subject to these measures.<sup>211</sup>

As developed nations governments use their coercive power to increase transparency and accountability in the environmental affairs of MNEs, they embrace a disposition favoring global environmental health over the traditionally unregulated foreign investment marketplace.<sup>212</sup> A mushrooming trend towards environmentally sustainable investment activity in the developing world is illustrated by these developed nation initiatives.<sup>213</sup> Moreover, as these mandatory environmental requirements are imposed on MNEs operating or investing in developing countries, local enterprises are likely to follow suit as they attempt to match the operations standards of foreign-owned competitors.<sup>214</sup> Hence, by requiring MNEs to behave more environmentally responsible in developing countries, developed governments are reshaping and elevating developing nations' environmental standards.<sup>215</sup>

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money and protect the environment through energy efficient products and practices.”).

<sup>210</sup> See Richard A. Westin, *Intergenerational Equity and Third World Mining*, 13 U. PA. J. INT'L BUS. L. 181, 187-91 (1992); see also Luke J. Danielson & Carolynne White, *Environmental Policy and the Mining Industry in Latin America*, in INTERNATIONAL OIL, GAS & MINING DEVELOPMENT IN LATIN AMERICA 13B-1, 13B-25 (Rocky Mt. Min. Law Found. ed. 1994).

<sup>211</sup> See National Environmental Policy Act 42 U.S.C. 4321-4347 (1988) (requiring every U.S. firms receiving financing from the Overseas Private Investment Corporation, U.S. AID's Trade and Development Agency, or any other federal agency, to submit an Environmental Impact Statement; see also Overseas Private Investment Corporation 22 U.S.C. 2199(g) (1988) (requiring a similar environmental impact assessment of projects it insures).

<sup>212</sup> See Kristina Herrmann, *Corporate Social Responsibility and Sustainable Development: The European Union Initiative as a Case Study* 226, IND. J. OF GLOBAL LEGAL STUD., 11. 2 Summer 2004 (detailing the conclusions of the EU summit in Lisbon in 2000, that encouraging MNEs to be environmentally responsible abroad will lead to long-term profitability by creating sustainable markets and giving people in host developing countries greater purchasing power).

<sup>213</sup> U.S. Dept. of State, Bureau of Economic, Energy and Business Affairs, available at <http://www.state.gov/e/eeb/ace/2005/80303.htm> (last visited Nov. 17, 2006) (describing the annual U.S. State Department "Award for Corporate Excellence" given to U.S. firms who conduct exhibit superb corporate responsibility practices in host countries. One of the criteria listed for this award is "Responsible environment protection and practices"); see also Robert B. Zoellick, U.S. Trade Representative, Overview and the 2003 Agenda, March 2003, available at [http://www.ustr.gov/Document\\_Library/Reports\\_Publications/2003/2003\\_Trade\\_Policy\\_Agenda/Section\\_Index.html](http://www.ustr.gov/Document_Library/Reports_Publications/2003/2003_Trade_Policy_Agenda/Section_Index.html) (describing the U.S. trade policy of promoting environmentally sustainable investments with BIT partners).

<sup>214</sup> See OECD CONFERENCE ON FOREIGN DIRECT INVESTMENT & ENVIRONMENT, The Hague (Jan. 28-29, 1999), available at <http://www.biac.org/statements/env/FDI-Envir-99.pdf> (reporting that "The arrival of foreign investors [in a developing nations] can also have a beneficial impact on the environmental operations of domestic companies," as local firms try to match the product and quality standards of foreign-owned operations).

<sup>215</sup> *Id.* (providing the example that "[I]n Mexico, in a period during which the FDI increased

### iii. International Financing Institution Efforts

Perhaps most telling of the trend toward stiffer environmental regulation in host developing nations is that many multinational lending institutions and international insurance companies are beginning to scrutinize corporate business plans' environmental impacts before providing financing.<sup>216</sup> Major project financiers such as the World Bank now require environmental impact assessments to be conducted, in addition to placing environmental conditions on MNEs seeking financing.<sup>217</sup> The World Bank began this policy with mining initiatives, but it now evaluates the potential environmental impacts of every project it considers funding.<sup>218</sup>

To date, thirty-one international financing institutions have followed this practice in adopting Equator Principles, which is a set of guidelines under which banks take into consideration the environmental affects of ventures they fund.<sup>219</sup> In November 2005, Goldman Sachs—one of the largest investment banks in the world—pledged \$1 billion to invest in renewable energy in acknowledging the 'reality' of climate change.<sup>220</sup> Additionally, the global insurance company Swiss Re started scaling insurance rates according to the insured corporations' environmental

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subject to the investment rules of NAFTA, the environmental regulatory system has continued to expand and enforcement activities have increased.”).

<sup>216</sup> Policy Review, INTERNATIONAL FINANCING CORPORATION, available at <http://www.ifc.org/policyreview> (last visited Nov. 26, 2006) (citing the International Financing Corporation's 2006 amendments to its environmental and social standards for entities seeking financing).

<sup>217</sup> See Richard A. Westin, *Intergenerational Equity and Third World Mining*, 13 U. PA. J. INT'L BUS. L. 181, 187-91 (1992); Luke J. Danielson & Carolynne White, *Environmental Policy and the Mining Industry in Latin America*, in INTERNATIONAL OIL, GAS & MINING DEVELOPMENT IN LATIN AMERICA 13B-1, 13B-25 (Rocky Mt. Min. Law Found. ed., 1994).

<sup>218</sup> See Charles E. Di Leva, *The World Bank and Environmental Law: A Post-Rio Summary of Activities*, C883 ALI-ABA 525 (Feb. 1994); see generally *Export-Import Bank Draft Proposed Environmental Procedures*, 17 INT'L ENVTL. REP. (BNA) 485 (June 1, 1994).

<sup>219</sup> Michelle Chan-Fishel, *Unproven Principles: Equator Principles at Year Two, an Anniversary Assessment*, BANK TRACK, June 1, 2005, available at <http://www.banktrack.org/doc/File/equator%20principles/banktrack%20on%20equator%20principles/050606%20Unproven%20Principles,the%20Equator%20Principles%20at%20year%20two.pdf> (describing the social and environmental guidelines financial institutions adopted when financing projects.).

<sup>220</sup> Goldman Sachs website, *Goldman Sachs Environmental Policy Framework* 1, 5 (2005), available at [http://www2.goldmansachs.com/our\\_firm/our\\_culture/corporate\\_citizenship/environmental\\_policy\\_framework/docs/EnvironmentalPolicyFramework.pdf](http://www2.goldmansachs.com/our_firm/our_culture/corporate_citizenship/environmental_policy_framework/docs/EnvironmentalPolicyFramework.pdf) (last visited Sept. 24, 2006); see also Bryan Walsh, *How Business Saw the Light: Smart Companies are using the environment not just to seem virtuous but to crush their rivals*, TIME, Jan. 15, 2007, at 57.

policies and practices.<sup>221</sup> Under these circumstances, if investment ventures do not espouse eco-conscious policies, investor access to capital and project insurance could be in jeopardy. The fact that leading financial and insurance institutions are now examining the environmental impacts of foreign investor activities shows a willingness on the part of these major FDI players to place greater emphasis on the environmental interests of developing nations.<sup>222</sup>

*iv. Signs During MAI Negotiations that the OECD Nations Have Recognized the Need for Environmental Standards in a Multilateral FDI Agreement*

Despite the one-sided nature of MAI negotiations at the OECD,<sup>223</sup> numerous member nations expressed the necessity of attaching environmental standards to any forthcoming international investment agreement.<sup>224</sup> The United Kingdom, under the Labour Party, maintained that the MAI should include environmental standards on investment projects.<sup>225</sup> The United States also proposed an environmental provision in a MAI draft,<sup>226</sup> which was reiterated in the U.S. National Contact Point Information Booklet for OECD Guidelines for Multinational Enterprises.<sup>227</sup> Finally, in his testimony before the United States

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<sup>221</sup> Portfolio 21, *Company Profiles*, <http://www.portfolio21.com/profiles.html> (last visited Sept. 19, 2006) (providing Swiss Re's practice of sliding insurance rates according to environmental practices).

<sup>222</sup> See OECD CONFERENCE ON FOREIGN DIRECT INVESTMENT & ENVIRONMENT, The Hague (Jan. 28-29, 1999), Sec. IV available at <http://www.biac.org/statements/env/FDI-Envir-99.pdf> (stating that foreign investors have not only realized the impact of FDI in developing nations, but are now prioritizing environmental health in evaluating potential investment climates).

<sup>223</sup> See Environmentalists Claim Victory as Talks on Multilateral Investment Pact Founder, 21 INT'L ENVTL. RPTR. No. 22 at 1053 (Oct. 28, 1998) (noting that OECD is composed solely of developed nations, and developing nations were not invited to MAI negotiations).

<sup>224</sup> See OECD CONFERENCE ON FOREIGN DIRECT INVESTMENT & ENVIRONMENT, The Hague (Jan. 28-29, 1999), available at <http://www.biac.org/statements/env/FDI-Envir-99.pdf> (stating that investors "agree that clauses in international investment agreements should prevent negative effects on local or national environmental standards...").

<sup>225</sup> Jan Hunter, *Environment Regulation and International Agreements: Lessons from the MAI* (paper delivered at the Royal Institute for International Affairs Conference on Trade, Investment and Environment), Oct. 29-30, 1998, available at <http://www.islandnet.com/nicfs/maisite/pov-mai3.htm>.

<sup>226</sup> OECD website, MAI Negotiating Text at 123, available at <http://www.oecd.org/daf/cmisis/mai/maitext.pdf> ("[n]othing in the agreement shall be construed to prevent a Party from adopting, maintaining or enforcing any measure otherwise consistent with its Agreement that it considers appropriate to ensure that investment activity in its territory is undertaken in a manner sensitive to environmental concerns.").

<sup>227</sup> The U.S. National Contact Point Information Booklet for OECD Guidelines for Multinational Enterprises, BUREAU ECON. & BUS. AFF., May 2002, available at <http://www.state.gov/documents/organization/11078.pdf> ("[t]he environment section provisions

Congress, Alan Larson, Assistant U.S. Secretary of Economic, Business and Agricultural Affairs, described U.S. interests in MAI: “[T]o ensure that the MAI contributes to the achievement of our goal of fostering stronger global efforts to protect the environment. . . and to achieve sustainable development.”<sup>228</sup>

In accordance with these priorities, various environmental provisions appeared in the negotiating text of the MAI before negotiations were abandoned. For example, the lack of recognition of environmental concerns was highlighted, which led to the acknowledgment of the right of each nation to establish, adopt or alter domestic environmental protections and environmental development policies when needed.<sup>229</sup> These environmentally friendly initiatives and proposed environmental language in the negotiating text of the MAI accentuate the connection between FDI and potential environmental impacts.<sup>230</sup> The fact that OECD members have shown sensitivity and a commitment to environmental health in the specific context of a global FDI framework is indicative that developed nations (and MNEs) will not be averse to the establishment of environmental conditions in host developing countries.<sup>231</sup>

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encourage MNE to promote sustainable development through the adoption of environmental management systems, the use of environmental impact analysis, and precaution in their activities. This section encourages ongoing improvement in corporate environmental performance, environmental health and safety training, and maintenance of contingency plans for preventing and mitigating environmental damage.”).

<sup>228</sup> See Alan Larson, Asst. U.S. Secretary of State for Economic, Business and Agricultural Affairs, Testimony before the House International Regulations Committee, Subcommittee on INT’L ECON. POL’Y AND TRADE, Mar. 6, 1998, at [http://www.state.gov/www/policy\\_remarks/1998/980306\\_larson\\_mai.htm](http://www.state.gov/www/policy_remarks/1998/980306_larson_mai.htm).

<sup>229</sup> Jan Hunter, *Environment Regulation and International Agreements: Lessons from the MAI* (paper delivered at the Royal Institute for International Affairs Conference on Trade, Investment and Environment), Oct. 29-30, 1998, available at <http://www.islandnet.com/nicfs/maisite/pov-mai3.htm>.

<sup>230</sup> Martin Wager, *International Investment, Expropriation and Environmental Protection* 29 GOLDEN GATE U. L. REV. 465, 85 n. 84 (1999) (summarizing and OECD MAI draft of October 6, 1997: “[o]ne draft of the MAI’s preamble reaffirmed the parties’ commitment to sustainable development and expressed their recognition that ‘investment, as an engine of economic growth, can play a key role in ensuring that growth is sustainable, when accompanied by appropriate environmental policies to ensure it takes place in an environmentally sound manner.’”); OECD website, MAI Draft, October 6, 1997, available at <http://www.oecd.org/daf/cm/mai/negtext.htm>.

<sup>231</sup> See generally Nick Mabey & Richard McNally, *Foreign Direct Investment and the Environment: From Pollution Havens to Sustainable Development*, FIN., INVESTMENT & TRADE, Nov. 1999, available at [http://csdngo.igc.org/finance/fin\\_WTO\\_FDI\\_mabey.htm](http://csdngo.igc.org/finance/fin_WTO_FDI_mabey.htm) (stating that foreign investment interests were traditionally opposed to heightened environmental standards in the developing world, but are now becoming align with environmental conservation); see also OECD CONFERENCE ON FOREIGN DIRECT INVESTMENT & ENVIRONMENT, The Hague (Jan. 28-29, 1999), available at <http://www.biac.org/statements/env/FDI-Envir-99.pdf>.



C. TO PROVIDE THE FOREIGN INVESTORS WITH THE OPPORTUNITY TO PARTICIPATE IN THE FORMATION OF FORMAL ENVIRONMENTAL POLICY AND REGULATION IN HOST DEVELOPING NATIONS

i. *No Unexpected Surprises in Elevating Operation Costs*

Multinational investors would benefit from participating in negotiations for environmental regulations in host developing nations because it would remove the possibility of a modification that was not contemplated at the time of the investment.<sup>232</sup> Complying with environmental regulations is expensive, and an unexpected elevation in these laws would raise operation costs.<sup>233</sup> An unanticipated fluctuation in environmental standards augments unknown risks, which reduces the attractiveness of an investment climate.<sup>234</sup> In response to growing environmental threats in developing nations, foreign investors predict that governments will eventually and unilaterally heighten their environmental regulations.<sup>235</sup> This has prompted MNEs to improve their

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<sup>232</sup> See *Climate change: The greening of America*, ECONOMIST, Jan. 27, 2007, at 9 (comparing the changing stances of corporate America, that only five years ago American business “was solidly against carbon controls.” And that environmental considerations “gained momentum “because companies that saw their competitors espouse carbon controls began to fear that once the government got down to designing regulations, they would be left out of the discussion if they did not jump on the bandwagon.”); see also *Green America: Waking up and catching up*, ECONOMIST, Jan. 27, 2007, at 23 (reporting that MNE such as Caterpillar, Alcoa and DuPont called on Congress “to fix the rules [greenhouse cap-and-trade] sooner rather than later to help them plan investments in factories and power plants with long lifespans.”); Sholnn Freeman, WASHINGTON POST, Mar. 15, 2007, at D1 (reporting that Ford Motor Company’s CEO testified to Congress that the auto industry needed “government to be our partners, not our adversaries.”).

<sup>233</sup> See OECD CONFERENCE ON FOREIGN DIRECT INVESTMENT & ENVIRONMENT, The Hague (Jan. 28-29, 1999), available at <http://www.biac.org/statements/env/FDI-Envir-99.pdf> (stating that because environmental costs are a part of the total costs of establishing production facilities, legal and regulatory uncertainty are greater deterrents for investors).

<sup>234</sup> See Carolyn Jenkins & Lynne Thomas, *Foreign Direct Investment in South Africa: Determinants, Characteristics and Implications for Economic Growth and Poverty Alleviation* (Oct. 2002) (figure 4.1 holding regulatory and legal uncertainty as the main consideration in evaluating candidate host nations); see also U.N. CONFERENCE ON TRADE AND DEVELOPMENT, Press Release, *Foreign Investment Rose by 34% in 2006*, Jan. 1, 2007, available at <http://www.unctad.org/templates/webflyer.asp?docid=7993&intItemID=1528&lang=1> (stating “[T]he possibility of additional regulatory changes and of their extension to more countries may have raised uncertainty among investors in the primary sector, resulting in the decrease in FDI flows to the region.”).

<sup>235</sup> See *Green America: Waking up and catching up*, ECONOMIST, Jan. 27, 2007, at 9 (comparing the changing stances of corporate America, that only five years ago American business “was solidly against carbon controls.” And that environmental considerations “gained momentum “because companies that saw their competitors espouse carbon controls began to fear that once the government got down to designing regulations, they would be left out of the discussion if they did

corporate environmental standards, so as to prevent unexpected costs pursuant to regulatory changes in the future.<sup>236</sup>

Various MNEs have already begun to adopt this proactive-participatory strategy.<sup>237</sup> In 2005, Duke Energy, a leading U.S. coal company, announced that it would redirect lobbying resources for the establishment of a tax on carbon emissions. In recognizing the significant threat of climate change, CEO Paul Anderson admitted it was in Duke Energy's interest to participate and shape applicable policy.<sup>238</sup>

Many host developing countries have already surprised industry by strengthening their environmental laws.<sup>239</sup> A 1992 Chilean law, for example, requires copper smelters to further restrict sulfur dioxide emissions.<sup>240</sup> While better for the environment, this more stringent requirement entailed a significant increase in operation costs for the Chilean smelter industry.<sup>241</sup> After this regulatory change, the Chilean copper industry duly decided to join "the process of negotiating environmental regulations with the Chilean government to avoid unexpected recurrence."<sup>242</sup> In the same way, foreign investors could eliminate the surprise heightened operation costs by engaging host

not jump on the bandwagon.").

<sup>236</sup> See Karen T. Litfin, *Ozone Discourses: Science and Politics in Global Environmental Cooperation*, Ch. 4, *The Employment of Knowledge in the Montreal Protocol Negotiations*, (last visited Nov. 21, 2006), available at <http://www.ciaonet.org/book/litfin/litfin14.html> (listing predictability as one of factors that prompted Dupont, the world's top CFC producer, to lobby the US government "for an international protocol that would limit global CFC emissions.").

<sup>237</sup> See Karen T. Litfin, *Ozone Discourses: Science and Politics in Global Environmental Cooperation*, Ch. 4, *The Employment of Knowledge in the Montreal Protocol Negotiations*, (last visited Nov. 21, 2006), available at <http://www.ciaonet.org/book/litfin/litfin14.html> (stating that Dupont proactively sought to open negotiations with the US government for CFC controls, because they were already developing alternatives to CFC, and would thus have an advantage over competing businesses. If they were able to hasten CFC prohibitions, they would enjoy a significant advantage).

<sup>238</sup> Paul Nowell, *Duke Energy CEO Proposes "Carbon Tax,"* ASSOCIATED PRESS, Apr. 7, 2005.

<sup>239</sup> Luke J. Danielson & Carolynne White, *Environmental Policy and the Mining Industry in Latin America*, in *INTERNATIONAL OIL, GAS & MINING DEVELOPMENT IN LATIN AMERICA* (ROCKY MT. MIN. LAW FOUND. ED., 1994) at 13B-24 to 13B-25 (stating that over half of Latin American Nations, including Mexico, Peru, Bolivia, Colombia, and Argentina have changed their environmental laws since 1990).

<sup>240</sup> Decree No. 185 of 1992 (Chile), referenced in Simon Hobson, *The 1990s: The Environmental Decade*, *ENG. & MINING-J.*, Jan. 1993, at 30.

<sup>241</sup> *Id.* (compliance with this law required \$900 million in plant upgrades).

<sup>242</sup> TED Case Studies, *Chile Copper Exports*, available at <http://www.american.edu/ted/copper.htm> (last visited Nov. 20, 2006) (stating that, COLDECO, a Chilean copper mining company, was forced to halt operation for one month in 1994, thereby reducing its yearly output by 40,000 tons. To prevent an unexpected recurrence, COLDECO decided to join "the process of negotiating environmental regulations with the Chilean government.").

developing nations in negotiations for environmental regulations.<sup>243</sup>

ii. *International Law Favors Developing Countries' Ability to Unilaterally Change Domestic Environmental Laws Without Regard to FDI Implications*

There are various international agreements that reinforce developing nations' unfettered sovereign power to adopt or modify environmental regulations. For example, Principle 21 of the 1972 Stockholm Declaration and Principle 2 of the 1992 Rio Declaration reiterate states' sovereign right to exploit their own resources pursuant to their own environmental laws and policies.<sup>244</sup> Also, the GATT expressly allows a country to set its own domestic priorities regarding the level of environmental protection it wants to achieve at home.<sup>245</sup> As these key international environmental accords articulate, international law supports nations' sovereign right to enact environmental regulations regardless of FDI impacts.<sup>246</sup> Foreign investors should heed this warning and become partners with developing countries in drafting their environmental laws to ensure that their investments are protected from legislative surprises.<sup>247</sup>

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<sup>243</sup> Here, MNEs could elucidate possible FDI repercussions of a proposed environmental regulation that were never considered by the enacting host developing governments. Even more, the MNE could then work with the host developing government to achieve the same degree of environmental protection sought, while minimizing the negative impacts on existing and future potential FDI. In theory, no entity can understand the investment consequences of an environmental law better than a MNE, and in practice, a MNE could never be in a better position to protect their investment interests in regard to environmental laws in host developing nations than by participating in their establishment.

<sup>244</sup> Stockholm Declaration of the U. N. Conference on the Human Environment, June 16, 1972, U.N. Doc. A/Conf. 48/14 (1972), 11 I.L.M. 1416, 1420 (1972); Rio Declaration on Environment and Development, June 14, 1992, U.N. Doc. A/CONF. 151/5 (1992), 31 I.L.M. 876 (1992).

<sup>245</sup> GATT, art. xx., available at [http://www.wto.org/english/tratop\\_e/envir\\_e/issu4\\_e.htm#gatt20](http://www.wto.org/english/tratop_e/envir_e/issu4_e.htm#gatt20).

<sup>246</sup> See M. Somarajah, *THE INTERNATIONAL LAW ON FOREIGN INVESTMENT* 294 (2nd. Ed., 2004) (presenting the argument that foreign investors enter a nation voluntarily knowing the risk of environmental regulations being changed, and that the investor should bear the risk of adverse changes; that it should not be the function of international law to insulate the foreign investor from the legal regime of the host state.); see also Martin Wagner, *International Investment, Expropriation and Environmental Protection*, 29 *GOLDEN GATE U. L. REV.* 465, 526 (1999).

<sup>247</sup> The mining sector is a particularly good example of the need for industry to join developing nations in molding environmental policy, because of the inevitable environmental impacts of all mining activities, and subsequent need for environmental regulation. Responding to the Berlin Guidelines (a United Nations-sponsored round table which produced a set of environmental guidelines for the mining industry), *The Mining Journal* cautioned that "mining companies can no longer afford to have the pace of events dictated by outsiders." *Writing Is on the*

D. ATTACHING ENVIRONMENTAL CONDITIONS TO MULTILATERAL FDI NEGOTIATIONS WOULD BE CONSISTENT WITH INTERNATIONAL LAW, AND INTERNATIONAL ENVIRONMENTAL COMMITMENTS UNDERTAKEN BY DEVELOPED NATIONS

The current international legal regime contains many principles of environmental cooperation and responsibility that are analogous to the environmental conditions raised in this Comment. Developed nations are signatories to progressive environmental declarations and have already committed themselves to various international environmental agreements.<sup>248</sup> Endorsing these declarations and treaties manifests an acknowledgment by developed nations that global environmental issues must be addressed by global efforts.<sup>249</sup> Affirmative recognition of this kind alludes to a cooperative disposition in negotiating environmental conditions within a multilateral FDI agreement. The following section builds on this recognition by making the connection between international environmental principles and accords already assented to by developed nations, and how such facilitates combining negotiations for environmental conditions with multilateral FDI talks.

i. *International Environmental Law Principles*

a. Internalizing Environmental Costs and “Polluter Pays” Principle

Internalizing the environmental costs of polluting activities is an accepted “general principle of international law”<sup>250</sup> that requires states to ensure that polluters and users of natural resources bear the full environmental costs of their operations.<sup>251</sup> In this way, the

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Wall, MINING J., Sept. 20, 1991 (Env. Supp.).

<sup>248</sup> The two strongest declarations are the 1972 Stockholm Declaration on the Human Environment, and the 1992 Rio Declaration on Environment and Development. The Convention on Biological Diversity, the 1985 Vienna Convention for the Protection of the Ozone Layer, the 1987 Montreal Protocol, and the Climate Change Convention are other examples of international environmental accords entered into by developed nations.

<sup>249</sup> This is best exemplified in the recent Intergovernmental Panel on Climate Change (IPCC) Working Group I Contribution to the Fourth Assessment Report of the IPCC Climate Change 2007: The Physical Science Basis, available at <http://www.ipcc.ch/SPM2feb07.pdf>.

<sup>250</sup> *International Convention on Oil Pollution Preparedness, Response and Cooperation*, Nov. 30, 1990, pmbl., 30 I.L.M. 733, 735-736.

<sup>251</sup> See DAVID HUNTER, JAMES SALZMAN & DURWOOD ZAELE, *INTERNATIONAL ENVIRONMENTAL LAW AND POLICY* 412 (2d ed. 2002); Recommendation on Guiding Principles Concerning International Economic Aspects of Environmental Policies, OECD, C (72) 128 par. 4 (1972) (this principle was created to encourage rational use of scarce natural resources and to avoid

environmental burdens of these activities are internalized as much as possible.<sup>252</sup> States apply various tools in effectuating the internalization of environmental costs, for example, environmental regulation, allocation of property rights, taxes, and liability regimes.<sup>253</sup> Despite the expense of compliance measures,<sup>254</sup> heightened regulations are the most common way states internalize environmental costs.<sup>255</sup> Under such regulations, polluters internalize environmental burdens by initiating necessary compliance measures, irrespective of foreign or domestic ownership.<sup>256</sup>

It is noteworthy that the “polluter pays” principle was conceived by the OECD,<sup>257</sup> which is composed solely of developed nations.<sup>258</sup> It is

distortions in international trade and investment by reflecting the costs of the polluting activities in of the goods/services produced.)

<sup>252</sup> Rio Declaration on Environment and Development, United Nations Conference on Environment and Development, U.N. Doc. A/CONF.151/5/Rev. 1 (1992), princ. 16, *reprinted in* 31 I.L.M. 876, 879 (expounding the polluter pays principle: “[N]ational authorities should endeavor to promote the internalization of environmental costs and the use of economic instruments, taking into account the approach that the polluter should, in principle, bear the cost of pollution.”).

<sup>253</sup> See Theodore Panayotou, *Economic Instruments for Environmental Management and Sustainable Development* 17-23, 31 (UNEP, 1994) (stating that “Taxes are among the most effective ways to implement environmental protections because they can transfer the cost of environmental damage directly to the person responsible for causing the damage.”); see also DAVID HUNTER, JAMES SALZMAN & DURWOOD ZAEKE, *INTERNATIONAL ENVIRONMENTAL LAW AND POLICY* 130 (2d ed. 2002).

<sup>254</sup> TED Case Studies, Chile Copper Exports, available at <http://www.american.edu/ted/copper.htm> (last visited Nov. 20, 2006) (stating that “[T]hese environmental regulations are no doubt costly...”).

<sup>255</sup> See DAVID HUNTER, JAMES SALZMAN & DURWOOD ZAEKE, *INTERNATIONAL ENVIRONMENTAL LAW AND POLICY* 131 (2d ed. 2002) (stating that environmental standards often control pollution through toxin limitations, technology or process standards).

<sup>256</sup> See Khalid Abdul Rahim, *Unilateral Environmental Regulations and the Implications for International Commodity-Related Environmental Agreements*, Presented at the Nautilus Institute Workshop on Trade and Environment in Asia-Pacific: Prospects for Regional Cooperation 23-25 September 1994, East-West Center, Honolulu, available at <http://www.nautilus.org/archives/papers/enviro/trade/envregcom.html> (stating that Malaysia enacted The Environmental Quality Regulations Act of 1977, then amended in 1992, in order to control pollution from the growing Palm Oil Industry. This act entails a licensing procedure, with appropriate conditions, such as effluent standards, attached to each license.)

<sup>257</sup> See Executive Summary, *Joint Working Party on Trade and Environment*, THE POLLUTER PAYS PRINCIPLE AS IT RELATES TO INTERNATIONAL TRADE, OECD Doc., Dec. 23, 2002, available at [http://webdomino1.oecd.org/olis/2001doc.nsf/43bb6130e5e86e5fc12569fa005d004c/988d25625e791068c1256c98003a2fcb/\\$FILE/JT00137174.PDF](http://webdomino1.oecd.org/olis/2001doc.nsf/43bb6130e5e86e5fc12569fa005d004c/988d25625e791068c1256c98003a2fcb/$FILE/JT00137174.PDF) (stating that “[T]he 1972 OECD Council Recommendation on Guiding Principles concerning International Economic Aspects of Environmental Policies incorporates the first formulation, at the international level, of the Polluter-Pays Principle”); see also DAVID HUNTER, JAMES SALZMAN & DURWOOD ZAEKE, *INTERNATIONAL ENVIRONMENTAL LAW AND POLICY* 413 (2d ed. 2002).

<sup>258</sup> OECD website, Member Nations, (last visited Oct. 18, 2006) available at [http://http://www.oecd.org/document/58/0,2340,en\\_2649\\_201185\\_1889402\\_1\\_1\\_1\\_1,00.html](http://http://www.oecd.org/document/58/0,2340,en_2649_201185_1889402_1_1_1_1,00.html) (proving a list of all OECD members, which are among the world’s richest nations).

therefore reasonable to conclude that the priorities of developed nations dominate this international economic body.<sup>259</sup> It logically follows that because the “polluter pays” principle was initiated in the OECD, the underlining assumptions thereof have been endorsed by its member nations. Since the vast majority of FDI originates in OECD nations,<sup>260</sup> this Comment argues that foreign investors from OECD nations have implicitly accepted heightened environmental standards in host developing nations, because developed nations established the internalization of costs through the “polluter pays” principle in the first place. Under this reasoning, investors from developed nations would not oppose the marriage of FDI to environmental standards because the fruit of such a combination would be equal to that of the “polluter pays” principle: the presence of stronger environmental regulations in developing nations. The heightened environmental standards born out of this Comment’s proposed framework would increase the internalization of costs for FDI projects in host developing nations, thereby facilitating the OECD-created “polluter pays” principle. That the OECD created the “polluter pays” principle signifies that investors from OECD nations would not balk at the prospect of having environmental conditions incorporated into a multilateral FDI agreement.

#### b. The Precautionary Principle

The precautionary principle is based on the premise that science does not always provide all relevant information to take protective steps against environmental harm, and that potentially hazardous effects may occur if humanity waits for science to provide the required insights.<sup>261</sup> Significantly, this principle has been a part of international law for much

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<sup>259</sup> Negotiations for the MAI occurred in the OECD, and the ultimate demise of these negotiations has been traced to the fact that developing nation interests were absent from MAI considerations. This is indicative that the interest of developed nations dominates the OECD.

<sup>260</sup> Hans Christiansen & Ayse Bertrand, OECD, *Trends and Recent Developments in Foreign Direct Investment*, INTERNATIONAL INVESTMENT PERSPECTIVES 11 (2005) (describing OECD traditional role as “net providers of FDI to the rest of the world”).

<sup>261</sup> See Rio Declaration on Environment and Development, U. N. Conference on Environment and Development, U.N. Doc. A/CONF.151/5/REV. 1 (1992), princ. 15. (providing the following definition of the precautionary principle: “where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.”). Other agreements embodying the principle include the Convention on Biological Diversity, June 5, 1992, pmb., 30 I.L.M. 818; The Framework Convention on Climate Change, U.N. Doc. A/AC.237.18 (PartII)/Add.1 (1992), 31 I.L.M. 849; The Ministerial Declaration of the Second World Climate Conference, Nov. 7, 1990, 1 Y.B. INT’L ENVTL L. 473 (1990); and The World Charter for Nature, G.A. Res. 37/7, U.N. GAOR, 37<sup>th</sup> Sess., Supp. No. 51, U.N. Doc. A/Res/37/7 (1982), 22 I.L.M. 455 (1983).

of the later half of the twentieth century, and has become a “broadly accepted basis for international action.”<sup>262</sup> In this way, the precautionary principle underscores the need for authorities to protect the environment from potential risks even if the degree of environmental danger is unknown.<sup>263</sup> The attachment of environmental conditions to multilateral FDI negotiations is aligned with the precautionary principle, because like the precautionary principle, elevated environmental standards in developing nations prevent environmental hazards from occurring in the first instance.<sup>264</sup>

ii. *Common Responsibility and Commitments to Global Environmental Health and Sustainability in Accordance with International Law*

In addition to the preceding principles, negotiating environmental conditions with a multilateral FDI accord would be also consistent with broader commitments under international law, such as common responsibilities to global health and sustainable development.<sup>265</sup> For example, the 1985 Vienna Convention for the Protection of the Ozone Layer,<sup>266</sup> the 1987 Montreal Protocol,<sup>267</sup> the Convention on Biological Diversity<sup>268</sup> and the Climate Change Convention all express notions that environmental principles should be integrated into international

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<sup>262</sup> See Philippe Sands, *The Greening of International Law: Emerging Principles and Rules*, 1 GLOBAL LEGAL STUD. J. 293, 301 (1994).

<sup>263</sup> See DAVID HUNTER, JAMES SALZMAN & DURWOOD ZAELE, INTERNATIONAL ENVIRONMENTAL LAW AND POLICY 405 (2d ed. 2002).

<sup>264</sup> *Id.* (stating that European Commission has invoked the precautionary principle as a justification for its decision to regulate genetically modified organisms in food, even in the absence of scientific evidence that [such] is harmful to human health); see also China National Tourism Administration, Environmental Protections, 2002, available at <http://www.asiaplanet.net/china/environmental.htm> (illustrating China’s “putting prevention first, and combining prevention with control” policies); Critical Issues: Novartis Positions, Jan. 2002, available at <http://www.globalreportingtools.com/Novartis/Docs/Precautionary%20principle%20Novartis%20position%2002.pdf> (describing the healthcare provider Novartis’ position on the precautionary principle that: “[T]here must also be a sufficient degree of urgency.”).

<sup>265</sup> GATT, MULTILATERAL TRADE NEGOTIATIONS FINAL ACT EMBODYING THE RESULTS OF THE URUGUAY ROUND OF TRADE NEGOTIATIONS, Apr. 15, 1994, 108 Stat. 4809, 4815, 33 I.L.M. 1125, 1144 (1994) (this act is also known as the agreement establishing the World Trade Organization. The WTO Preamble states: “...expanding the production of and trade in goods and services, while allowing for the optimal use of the world’s resources in accordance with the objective of sustainable development, seeking both to protect and preserve the environment...”).

<sup>266</sup> Vienna Convention for the Protection of the Ozone Layer, Mar. 22, 1985, UNEP Doc. IG.53/5, 26 I.L.M. 1529 (entered into force Sept. 22, 1988).

<sup>267</sup> Montreal Protocol on Substances that Deplete the Ozone Layer, Sept. 16, 1987, S. TREATY DOC. NO. 100-10, 26 I.L.M. 1541 (1987).

<sup>268</sup> Convention on Biological Diversity, June 5, 1992, 31 I.L.M. 818 (1992).

economic initiatives.<sup>269</sup> The United States has also included common environmental responsibility principles in numerous investment treaties.<sup>270</sup> The 1967 Outer Space Treaty and the 1982 Law of the Sea Declaration both further this idea of collective responsibility, proclaiming their respective jurisdictions as “the province of all mankind,”<sup>271</sup> and “the common heritage of mankind.”<sup>272</sup>

The fundamental international environmental declarations, the 1972 Stockholm Declaration on the Human Environment and the 1992 Rio Declaration on Environment and Development entail a specific commitment for common environmental concerns.<sup>273</sup> In signing these declarations, states have explicitly recognized the importance of international cooperation in protecting the global environment.<sup>274</sup> (As China, the world’s largest recipient of FDI, has already incorporated numerous Rio Declaration principles into domestic Chinese law, there is a strong likelihood that FDI policies will reflect states’ acknowledgment of the imperative of international collaboration to protect the global environment.<sup>275</sup>) These treaties and declarations, taken as a whole,

<sup>269</sup> U N. Framework on Climate Change, May 9, 1992, S. TREATY DOC. No. 38, 31 I.L.M. 849 (1992).

<sup>270</sup> See U.S. INT’L TRADE COMM’N, USITC Pub. No. 2351, *International Agreements to Protect the Environment and Wildlife* (1991) (stating that the U.S. International Trade Commission has identified over 160 multilateral and bilateral agreements for the protection of the environment and wildlife).

<sup>271</sup> Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies, Jan. 27, 1967, 18 U.S.T. 2410.

<sup>272</sup> Declaration of the Principles Governing the Sea-Bed and Ocean Floor, and the Subsoil Thereof, Beyond the Limits of National Jurisdiction, Dec. 17, 1970, U.N. GAOR, 25th Sess., Supp. No. 28, at 24, U.N.Doc. A/8028 (1971), reprinted in 10 I.L.M. 220 (1971). The concept is reaffirmed with regard to these resources in Article 136 of the United Nations Convention on the Law of the Sea, United Nations Convention on the Law of the Sea, Dec. 10, 1982, U.N.Doc. A/CONF 62/122, reprinted in 21 I.L.M. 1261 (1982).

<sup>273</sup> Stockholm Declaration of the United Nations Conference on the Human Environment, June 16, 1972, U.N. Doc. A/Conf. 48/14 (1972), 11 I.L.M. 1416 (1972); Rio Declaration on Environment and Development, June 14, 1992, U.N. Doc. A/CONF. 151/5 (1992), 31 I.L.M. 876 (1992).

<sup>274</sup> Rio Declaration on Environment and Development, June 14, 1992, U.N. Doc. A/CONF. 151/5 (1992), 31 I.L.M. 876 (1992) (including Principle 27, which states: “states and people shall cooperate in good faith and in a spirit of partnership in the fulfillment of the principles embodied in the this Declaration and in the further development of international law in the field of sustainable development); Stockholm Declaration of the United Nations Conference on the Human Environment, June 16, 1972, U.N. Doc. A/Conf. 48/14 (1972), 11 I.L.M. 1416 (1972) (including Principle 2, which expresses the ‘global commons’ theory that “[t]he natural resources of the earth must be safeguarded for the benefit of present and future generations through careful planning or management, as appropriate.”).

<sup>275</sup> See Press Release, UNCTAD, *Foreign Direct Investment rose by 34% in 2006*, Jan. 9, 2007, available at <http://www.unctad.org/templates/webflyer.asp?docid=7993&intItemID=1528&lang=1> (stating that



indicate the emergence of a set of generally recognized values that stress ecological health. As the majority of the world's rain forests and fossil fuels are located in developing nations, emphasizing environmental protection in developing countries is therefore logical and appropriate.<sup>276</sup> Including environmental conditions on FDI activities in developing nations would be consistent with international law and international environmental commitments already undertaken by major FDI players, developed and developing nations alike.<sup>277</sup>

## VI. CONCLUSION

Of all the competing views noted on FDI implications for global environmental health, there is a thin ray of consensus: economics and environmentalism are enmeshed in a symbiotic-type relationship.<sup>278</sup> Now that investment flows to developing nations have reached over \$647 billion worldwide, the environmental and developmental implications of FDI are undeniable.<sup>279</sup> Neglecting the policy implications of this massive source of funding is both irresponsible and naïve.<sup>280</sup> Reshaping

China was the largest recipient of FDI in 2006); *see also* Jun Bia, Dong Caob, Genfa Luc, Yuan Wang, Hua Wanga, Jinnan Wangb & David Wheelera, *Environmental performance rating and disclosure: China's Green Watch*, DEVELOPMENT RESEARCH GROUP, WORLD BANK (Jan. 2004) (reporting that China has incorporated multiple principles espoused in the Rio Declaration into domestic Chinese law). *But see* Adam Briggs, *China's Pollution Victims: Still Seeking a Dependable Remedy*, 18 GEO INT'L ENVTL. L. REV. 305 (2006) (outlining China's inability to administer and enforce environmental laws).

<sup>276</sup> *See* HILARY F. FRENCH, ASSESSING PRIVATE CAPITAL FLOWS TO DEVELOPING COUNTRIES, in STATE OF THE WORLD 149-65 (Worldwatch Institute 1998), available at <http://www.worldwatch.org>; *see also* DAVID HUNTER, JAMES SALZMAN & DURWOOD ZAEKE, INTERNATIONAL ENVIRONMENTAL LAW AND POLICY 1271-72 (2d ed. 2002).

<sup>277</sup> *See* EU/OECD: *European Parliament Weighs into Stalled Investment Pact*, EUR. REP., Mar. 14, 1998, available at LEXIS, EC News, Section 2299 (expressing the EU's interest in a new multilateral investment accord).

<sup>278</sup> *See Foreign Direct Investment for Development: Maximizing Profits and Minimizing Costs*, OECD, 2002, at 19 (OECD report holding that "While responsibility rests largely with the host-country authorities, FDI has a strong potential to benefit the environment..."); *see also* Andrew Kuper, *Harnessing Corporate Power: Lessons from the UN Global Compact*, 47(3) DEVELOPMENT (2004) at 9-19 (stating that the connection between development and the environment was recognized and adopted by the international community in the UN. Global Compact).

<sup>279</sup> *See Capital Flows to Developing Countries*, ECONOMIST, June 2, 2007, at 93 (stating that "inflows [to developing nations] have risen from \$169 billion in 2002 to \$647 billion" in 2006).

<sup>280</sup> *See Foreign Direct Investment in Emerging Market Countries—Report of the Working Group of the Capital Markets Consultative Group (CMCG)*, INTERNATIONAL MONETARY FUND, Sept. 18, 2003, available at <http://www.imf.org/external/np/cm/cg/2003/eng/091803.HTM> (stressing that:

[I]t is more important than ever to improve the monitoring of trends in FDI flows to EMCs [emerging market countries] and gain insights into investment decisions and structural changes that may affect the trends and direction of such flows, especially since they have

the sway of private capital flows to the world's poor and ecologically vulnerable countries is necessary to secure the most economically and environmentally sustainable outcome possible.<sup>281</sup>

Thus far, BITs have been the primary tools governing foreign direct investment. Overall, the limited applicability of these vehicles has rendered BITs disinterested or impotent in engineering over-arching policy. In this regard, commentators assert that the multi-dimensional, comprehensive, and more equitable characteristics of the multilateral approach encompasses a greater potential than small-scale BITs to harness the impacts of FDI on the global environment.<sup>282</sup> What is more, some nations have explicitly held that they will be working toward a multilateral investment system through existing BITs,<sup>283</sup> and are even willing to consider new methods that will aid negotiations for a multilateral investment accord.<sup>284</sup>

In expanding on this headway, this Comment contends that integrating environmental conditions into a multilateral foreign investment scheme is both necessary to remedy past failures in multilateral negotiations and prudent, because environment considerations are inseparably linked to FDI activities. Attaching negotiations for environmental conditions to multilateral FDI negotiations presents an extra bargaining chip that can be negotiated

increasingly become the dominant factor in net private flows to emerging markets and can potentially be a source of stability at times of volatility in global capital markets.)

<sup>281</sup> *Foreign Direct Investment for Development: Maximizing Profits and Minimizing Costs*, OECD, 2002, at 5 (providing a OECD study that outlines the economic benefits of higher FDI flows, and its positive environmental impacts in the form of cleaner technology transfers).

<sup>282</sup> See Madeline Stone, *NAFTA Article 1110: Environmental Friend of Foe?*, 15 GEO INT'L ENVTL. L. REV. 763, 789, n. 112 (2003); see also Calvin A. Hamilton & Paula I. Rochwerger, *Trade and Investment: Foreign Investment Through Bilateral and Multilateral Treaties*, 18 N.Y. INT'L L. REV. 1, 20 n.90, 27 n.118 (2005); Scott N. Carlson, *Foreign Investment Laws and Foreign Direct Investment in Developing Countries: Albania's Experiment*, 29 INT'L LAW. 577, 581 n.18 (1995); Timothy A. Canova, *Banking and Financial Reform at the Crossroads of the Neoliberal Contagion*, 14 AM. U. INT'L L. REV. 1571, 1616-18 (1999) (noting that BITs produce lopsided results favoring capital-exporting nations); Seymore J. Rubin, *Transnational Corporations and International Codes of Conduct*, 10 AM. U. J. INT'L L. & POL'Y 1275, 1281 (1995) (showing how transnational corporations have been seen as disseminating an uneven distribution of benefits such that the less developed countries lose); Linda W. Tai, Comment, *Music Piracy in the Pacific Rim: Applying a Regional Approach Toward the Enforcement Problem of International Conventions*, 16 LOY. L.A. ENT. L. J. 159, 186-88 (1995) (stating that some experts have even held that BITs break up existing trade structures into competing nation-modules, all vying for beneficial agreements with developed nations).

<sup>283</sup> See John Dlodlu, *SADC Needs a Regional Accord On Investment*, BUS. DAYS. AFR., Nov. 16, 1998 at 3.

<sup>284</sup> See EU/OECD: *European Parliament Weighs into Stalled Investment Pact*, EUR. REP., Mar. 14, 1998, at LEXIS, EC News, Section 2299 (reporting the EU's interest in looking for new ideas that will help a new MAI succeed, where past attempts have failed).

away by each party. This balances parties' bargaining positions, which provides a genuine opportunity for developing nations to protect their interests as FDI recipients. This Comment's dual negotiation approach also preserves foreign investors' ability to secure their interests, as developing nations invariably lack the necessary resources to implement and enforce every condition in their respective environmental priority lists. And finally, because the additional phase of negotiations is for environmental conditions, environmental commitments will be incorporated into the resulting multilateral FDI agreement.

These parallel negotiations for an international FDI accord and environmental conditions thereto would produce a legal instrument that weaves together foreign investment considerations and environmental imperatives in a way that fosters the independent and inter-dependant goals of each.<sup>285</sup> The system suggested in this Comment would ensure that the growing influence of foreign direct investment will be constructively and conscientiously.

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<sup>285</sup> See William G. Parrett, "Globalization's Next Frontier: Principled Codes of Conduct That Bolster the Rule of Law," Executive Speeches, Dayton: Aug/Sept. 2004, 19(1), at 6-9 (providing a concurring view by William Parrett, CEO of Deloitte Touche Tohmatsu, that it is critical corporations show the same degree of concern for promoting sustainable conditions in a host country that they show towards making a profit); see also Data fact Sheet of UNAID Mission to Dominican Republic, Strategic Objective: 517-008, available at <http://www.usaid.gov/policy/budget/cbj2006/lac/pdf/dr517-008.pdf> (detailing the need for United States aid to the Dominican Republic because of the connection between economic prosperity, security, and natural resources); WTO website, available at <http://www.wto.org/wto/enviro/tradelib.htm> (stating that the WTO Secretariat and UNCED maintain that developing nations are dependent upon trade and investment as the main source of continued growth and prosperity).

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