LINKAGE AND RULE-MAKING:
OBSERVATIONS ON TRADE AND INVESTMENT,
AND TRADE AND LABOR

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One of the consequences of the growth in world trade, the expansion in the jurisdiction of the World Trade Organization ("WTO"), and the new and ongoing experiments in regionalism has been a re-awakening of interest in the linkage between all areas of economic activity. The international community has always been aware of linkage. The International Labor Organization ("ILO") Constitution of 1919 discusses the link between trade and labor rights. The Havana Charter of the International Trade Organization contained an article on labor standards and trade, as well one on investment and trade. The re-awakening of this interest is im-

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1 The International Labor Organization ("ILO") was established by the Treaty of Versailles, June 28, 1919, pt. XIII, 225 Consol. T.R. 188, 112 B.F.S.P. 1, amended on several occasions and current revision reprinted in, Constitution of the International Labour Organisation and Standing Orders of the International Labour Conference 3-23 (1963) [hereinafter Treaty of Versailles]. The Preamble of the ILO Constitution expressly discusses one possible link between trade and labor. It reads, "[w]hereas also the failure of any nation to adopt humane conditions of labour is an obstacle in the way of other nations which desire to improve the conditions in their own countries . . . ." Treaty of Versailles, pmbl.

2 The Havana Charter, which established the International Trade Organization ("ITO") recognized that:

[All countries have a common interest in the achievement and maintenance of fair labour standards related to productivity, and thus in the improvement of wages and working conditions as productivity may permit. The Members recognize that unfair labour conditions, particularly . . . for export, create difficulties in international trade, and, accordingly, each Member shall take whatever action may be appropriate and feasible to eliminate such conditions within its territory.

portant because calls for examining linkage have often been accompanied by calls for the negotiation of new international rules to be overseen by the World Trade Organization. Studying linkage now may, therefore, help to explore how the world’s operating trading system operates, and spur, if necessary or timely, the development of additional international rules.

The addition of the Trade-Related Intellectual Property Rights ("TRIPS") and Trade-Related Investment Measures ("TRIMS") Agreements to General Agreement on Tariffs and Trade as amended in 1994 ("GATT 1994") the formation of the WTO Working Groups on Environment and Investment and the battle

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The Havana Charter also contains provisions related to investment. The Charter recognized that "international investment, both public and private, can be of great value in promoting economic development and reconstruction, and consequent social progress." *Id.* at 35. A signatory country was to pledge not to "take unreasonable or unjustifiable action within its territory injurious to the rights or interests of nationals of other Members in the enterprise, skill, capital, arts or technology which they have supplied." *Id.* at 34. Nevertheless, the Charter did reserve rights of a signatory to "prescribe and give effect on just terms to requirements as to the ownership of existing and future investments." *Id.* at 35. The Charter was never ratified and, therefore, the ITO never came into existence. Instead, the international community signed and ratified the limited portion of the charter that dealt with trade, which was the General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A-3, T.I.A.S. No. 1700, 55 U.N.T.S. 187 [hereinafter GATT].

For further information on the ITO, see William Diebold, Jr., *The End of the ITO*, in *ESSAYS IN INTERNATIONAL FINANCE* (No. 16, 1952); Jacob Viner, *Conflicts of Principle in Drafting a Trade Charter*, 25 *FOREIGN AFF.* 612 (1947); Clair Wilcox, *A CHARTER FOR WORLD TRADE* (1949).


5 The World Trade Organization has confronted the push of some of its Member states for increased linkage by establishing working groups to examine the relationship between trade and environment as well as trade and investment. See Steve Charnovitz, *A Critical Guide to the WTO’s Report on Trade and Environment*, 14 *ARIZ. J. INT’L & COMP. L.* 341 (1997) (discussing the efforts of the Working Group on Trade and the Environment). The Working Group on the Relationship of Trade and Investment held its first meeting in June 1997. At the first meeting, the Group identified a checklist of issues it would pursue in its future work: I. Implications of the relationship between trade and investment for development and economic growth; II. The economic rela-
over linkage preceding and during the WTO’s first Ministerial Meeting\(^6\) reveal that the multilateral body which creates and en-

I. Stocktaking and analysis of existing international instruments and activities regarding trade and investment... World Trade Org., The Growing Impact of Investment and Trade, Focus (June-July 1997) at 2.

The goals of the working party are to identify: (1) common features and differences... as well as possible gaps in existing international instruments; (2) advantages and disadvantages of entering into bilateral, regional and multilateral rules on investment, including from a development perspective; (3) the rights and obligations of home and host countries and of investors and host countries; and (4) the relationship between existing and possible future international cooperation on investment policy and existing and possible future international cooperation on competition policy. See id.

The WTO’s first Ministerial Meeting was held in Singapore in December of 1996. The developing countries, with support from some developed countries, including the United Kingdom, blocked efforts by the United States to get the issue of the relationship between trade and labor standards on the work agenda of the WTO. The argument against inclusion of trade and labor standards in the WTO’s work was that the lack of high standards would lead some developed countries to seek imposition of trade sanctions. See Gary G. Yerkey, Developing Countries Block U.S. Plan to Include Labor Issue in Work Agenda, 13 Int’l Trade Rep. (BNA) 1925 (Dec. 11, 1996). At the end of the Singapore meeting, a Ministerial Declaration was issued which contained the following statement about labor standards:

We renew our commitment to the observance of internationally recognized core labor standards. The International Labour Organization (ILO) is the competent body to set and deal with these standards, and we affirm our support for its work in promoting them. We believe that economic growth and development fostered by increased trade and further trade liberalization contribute to the promotion of these standards. We reject the use of labour standards for protectionist purposes, and agree that the comparative advantage of countries, particularly low-wage developing countries, must in no way be put into question. In this regard, we note that the WTO and ILO Secretariats will continue their existing collaboration.

Singapore Ministerial Declaration, Dec. 13, 1996, 36 I.L.M. 220, 221. This portion of the Ministerial Declaration closely follows the four points for labor consensus that had been suggested by WTO Director-General, Renato Ruggiero, at the beginning of the meeting. Those four points were as follows:

1. All WTO member nations oppose abusive work place practices, through their approval of the United Nations Universal Declaration of Human Rights;

2. The ILO holds primary responsibility for labor issues;

3. Trade sanctions should not be used to deal with disputes over labor standards; and
forces trade rules has begun to recognize and accept some linkages. Activities in other organizations further illustrate the interest of the international community in linkage and rule-making. For example, ILO, energized by the trade-linkage debate, has been rethinking its approach to fostering labor rights. Member states of the Organiza-

4. Member states agree that the comparative advantage of low-wage countries should not be compromised.


See Brian A. Langille, Eight Ways to Think about International Labour Standards, 31 J. WORLD TRADE 27, 49 (1997) (discussing linkage, and how a move to the WTO led to a refocusing on the International Labor Organization and its operations, and to that group refocusing its efforts).

Even before the Singapore Ministerial Declaration, the ILO had set up a working party to discuss how it should respond to demands to link labor and trade. Discussions on the linkage were first held by the ILO Governing Body in 1994. See Virginia A. Leary, Workers' Rights and International Trade: The Social Clause (GATT, ILO, NAFTA, U.S. Laws), in 2 FAIR TRADE AND HARMONIZATION 177, 190 (Jagdish Bhagwati & Robert E. Hudec eds., 1996). Prior to that discussion, the ILO Director-General, Michel Hansenne, had written about linkage in his 1994 Annual Report to the ILO Labour Conference. See Report of the Director-General: Defending Values Promoting Change—Social Justice in a Global Economy, INTERNATIONAL LABOR ORG., International Labor Conference, 81st Sess. (1994). The Director-General expressed concerns about the use of a social clause that allowed trade sanctions to be used in response to substandard labor conditions, and suggested possible ILO responses. Id. at 58-60. After the 1994 Governing Body meeting, a working party was set up to discuss all aspects of the social dimension of the liberalization of trade. The ILO Office produced for that working party a working paper entitled The Social Dimensions of the Liberalization of World Trade, International Labour Office, Governing Body, 261st Sess., ILO Doc. GB. 261/WP/SLD/1 (1994). The ILO Office Report discussed several ways in which social issues could be dealt with in the GATT/WTO framework:

(1) considering abnormally low social conditions to be a subsidy under Article XVI of the GATT; (2) extending the General Exceptions article of the GATT (Art. XX) to cover workers' rights; (3) through use of the GATT art. XXIII dispute settlement provision's concepts of nullification and impairment.

See Leary, supra note 7, at 193-94 (describing the Social Dimensions Report). The Social Dimensions Report was never acted upon.

tion for Economic Cooperation and Development ("OECD") are in what is supposed to be the final stages of negotiations on the Multilateral Agreement on Investment ("MAI").

Some of the areas "linked" to trade have gained rules and enforcement mechanisms for them (i.e., trade-related intellectual property rights). In other areas, linkage as a foundation for rule-making has been more deliberate (i.e., trade and investment) or heavily resisted (i.e., trade and labor rights). Why have some link-

The developing countries strongly resisted some of the suggestions made in the 1997 Director-General's Report, particularly that there be some new ILO supervisory mechanism to assess Member State compliance with the mandates of the ILO Conventions and voluntary "social labeling" of products (to show the products were made under adequate labor conditions). See John Parry, United States Supports ILO Official's Call for Linking Trade and Labor Standards, Int'l Trade Daily (BNA) (June 13, 1997). The ILO Governing Body has put the issue of core labor standards on the agenda for the 1998 International Labor Conference. See infra note 11.

The current status of MAI negotiations and any ultimate agreement is unclear. The OECD member states have issued the February 14, 1998 draft of the MAI. The MAI Negotiating Text, as it is referred to, was made public by its posting on the OECD home page. A proviso on the cover page states that "[t]he text reproduced here results mainly from the work of expert groups and has not yet been adopted by the MAI Negotiating Group." MAI Negotiating Text, available at MAI TEXT (visited Feb. 14, 1998) <http://www.oecd.org/daf/cmis/mail/MAITEXT>PDF>. During the February meeting of the OECD states, the United States argued that the MAI will not be ready for submission to the membership in April 1998, which is the deadline for the MAI. See U.S. Negotiators See No Chance of Signing MAI at OECD April Ministerial, 15 Int'l Trade Rep. (BNA) 251 (Feb. 18, 1998).

The linkage of trade and investment has proven difficult in the GATT/WTO system. The Uruguay Round did adopt two agreements which cover some aspects of investment: the TRIMS Agreement and the GATS Agreement. See Bernard Hoekman, General Agreement on Trade in Services, in THE WORLD TRADING SYSTEM: READINGS 177 (1994); Joseph W.P. Wong, Overview of TRIPS, Services and TRIMS, in THE WORLD TRADING SYSTEM: READINGS 173 (1994).

Nevertheless, it is clear that neither the TRIMS nor the GATS represents a full treatment of investment rights and protections. This is made obvious by the fact that the WTO decided to take up the issue of investment again at the end of the Singapore Ministerial by setting up a Working Party on Trade and Investment. See supra note 5.

The gap between the views of the developing and developed countries over the need for or value of linking trade with labor, has remained wide since the United States got the issue on the agenda for the WTO's first Ministerial Meeting. The setback of the United States on this issue during the 1996 Ministerial Meeting, has consigned the issue to the ILO. See supra note 5. Given the ILO's most recent discussions on trade and labor, however, it is unclear what will occur in that organization. At the conclusion of the International Labor Conference in June 1997, the ILO dispelled both developing and developed
ages been more readily accepted and acted upon by the international community than others? This Article will attempt to arrive at some answers by examining both trade and investment, and trade and labor from several different perspectives.

First, this Article will attempt to explain why linkage does not play out the same for both trade and investment and trade and labor. The first section will examine the essential nature of investment rights and labor rights, along with the implications of this analysis for linkage as well as how investment and labor rights relate to trade. Second, this Article will analyze the current process of multilateral trade and trade-related rule-making and offer an analysis of what trade-related investment and labor rules might look like. Finally, this Article will discuss what would be achieved and who would gain if trade-related investment and labor rules were negotiated and adopted.

countries by leaving the linkage issue on its agenda without specifying what would be done. See John Parry, ILO Balks at Trade, Labor Rights Line; U.S. May Press Harder, Int'l Trade Daily (BNA) (June 24, 1997).

The Asian governments and unions which oppose the linkage concept have asked that the United States and other developed countries refrain from pushing the linkage of trade and core labor standards at either the ILO or WTO until there is consensus between the groups of nations. See Eileen Drage O'Reilly, Asian Governments, Unions Oppose Linkage Between Trade, Labor Standards, Int'l Trade Daily (BNA) (July 2, 1997).

In November 1997, the ILO's Governing Body decided to put a "declaration of principle" concerning fundamental workers' rights on the agenda of the June 1998 International Labor Conference. The proposal will include an ILO "follow-up" mechanism that would allow the organization to review whether countries are in compliance with seven core labor standards which cover freedom of association and collective bargaining, forced labor, non-discrimination and minimum age for employment. See Eileen Drage O'Reilly, Singapore Minister Urges Asian Nations to Reject ILO Proposal on Core Standards, BNA Int'l Trade Daily, Dec. 15, 1997 [hereinafter Singapore Minister Urges].

Although Asian nations remain opposed to the ILO's efforts, the United States has taken the position that the ILO will not be a credible institution if it fails to adopt the declaration and a follow-up mechanism. See Pamela M. Prah, Opponents of Labor Standards Declaration Feed Protectionism, U.S. Tells Asian Nations, Int'l Trade Daily (BNA) (Dec. 15, 1997).

The approach taken towards examining the process of multilateral rule-making is not based on any scheme of international rule-making. Rather, it is based upon a review of how trade-related rules have recently been negotiated in the WTO. See supra Section 2.1. (discussing what may be the theoretical underpinnings for this approach).

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1. LINKAGE OBSERVED: WHY LINKAGE IS NOT ALWAYS THE SAME

1.1. Unpacking the Linkage

Both investment and labor are part of trade; each is a factor of production. Yet an examination of how the world perceives the linking of investment and labor rights to trade reveals that linkage does not always succeed by fully considering and negotiating new rules are fully considered or negotiated. In the case of labor rights, for example, trade linkage has been firmly resisted in the WTO and shows signs of moving slowly, if at all, in the ILO. The linking of trade and investment was turned back or truncated in the GATT, accepted for study at the WTO and is actively being

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12 See supra note 6 (discussing how linkage between trade and labor rights was left at the WTO).
13 See supra notes 8 and 11 (discussing the ILO's efforts regarding linkage).

According to the Omnibus Trade and Competitiveness Act of 1988, which, after The Round, began to set out the negotiating objectives for investment, the focus was to be as follows: (1) reducing and eliminating artificial or trade distorting barriers to investment; (2) expanding the concept of national treatment; (3) reducing unreasonable barriers to the establishment of investment; and (4) developing rules, including dispute settlement procedures. See Omnibus Trade and Competitiveness Act, Pub. L. No. 104-418, Sect. 1101(b)(11), 102 Stat. 1107, 1124.


From the beginning, the United States' agenda, as demanded in the round, was completely different from that of the developing countries. See Trade-Related Investment Measures, in 2 THE GATT URUGUAY ROUND: A NEGOTIATING HISTORY (1986-1992) 2001, 2073 (Terence P. Stewart ed., 1993) (describing the developed countries as seeking a new regime which would prohibit certain behavior of governments towards investment, versus the develop-
pursued by the OECD. The difference in the treatment of trade linkage regarding the two areas seems to spring from two sources: the nature of investment and labor rights and their varying degrees of trade-relatedness.

1.1.1. Examination of the Nature and Reality of Investment Rights and Labor Rights

The response of governments and the international community to labor and investment (and the rights that come from each), as well as any trade linkage, appears to be dictated by the differences in their inherent natures. What follows is a descriptive and comparative catalogue of the essential characteristics of labor and investment, accompanied by a commentary on how each relates to trade.

Capital is a factor of production. Capital is a property which is a commodity under the control of persons. Capital, and investment as a use of this property, exists because legal systems created a medium of exchange and then dictated its uses. Investment exists when capital is devoted to a purpose. The trade-related aspect of investment is its contribution to the creation of goods and services that are traded.

The truncation refers to the GATS Agreement which covers only one aspect of investment, the right to establish. The GATS had to reach this investment issue because commercial presence was recognized by the agreement as one of the four modes by which services are traded. See General Agreement on Trade in Services, Apr. 15, 1994, Marrakesh Agreement Establishing the WTO, Annex 1B, LEGAL INSTRUMENTS—RESULTS OF THE URUGUAY ROUND vol. 31, 33 I.L.M. 142 (1994) [hereinafter GATS].

15 See supra note 5 (describing the WTO Working Party on Trade and Investment).

16 See supra note 8 (discussing the MAI).

17 See Ibrahim F.I. Shihata, Factors Influencing the Flow of Foreign Investment and the Relevance of a Multilateral Guarantee Scheme, 22 INT’L LAW. 671, 675 (1987) (pointing out that foreign direct investment provides “an integrated package of financial resources, managerial skills, technical knowledge and marketing connections”).

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Labor is a factor of production. Yet, the international labor community has frequently reiterated that "labor is not a commodity." Labor derives from the efforts of human beings and, therefore, implicates human dignity. Unlike capital (and investment) human beings and their efforts exist beyond commerce and legal systems.

Limiting the comparison between labor and investment to this level, may suggest some of the reasons why trade linkage provokes different responses. The trade and trade-related rules of the GATT/WTO system as they currently exist can be viewed as responses and prescriptions for economic and governmental policies concerning the commodities, services or property rights that are part of or are related to trade. For example, the core rules of the General Agreement on Tariffs and Trade (GATT "1947") seek the progressive liberalization of trade in goods and elimination of discrimination in that trade. The General Agreement on Trade in Services ("GATS") is devoted to defining the different modes of supply for the services that exist in commerce and the liberalizing of services trade. The TRIPS of GATT 1994 was negotiated to

18 The ILO adopted this American Federation of Labor ("AFL") motto as a basic principle of the organization during its early history. See generally THE ORIGINS OF THE INTERNATIONAL LABOR ORGANIZATION (James T. Shotwell ed., 1934). The 1997 Director-General, reporting on a financial expert's comments that social justice cannot be achieved through unrestrained competition in the market, noted that "[t]hese words are very close to the ILO's basic tenet: labour is not a commodity. Even if it were proved that child labour brings economic advantages to those resorting to it, it must still be abhorred by anyone with a healthy conscience." See 1997 Director-General Report, supra note 7, at 5.
19 See GATT, supra note 2, art. II (discussing tariff binding which provides for countries to lower tariffs and bind them.). The lowering and binding of tariffs have been a crucial part of the eight negotiating rounds of the GATT/WTO.
20 See GATS, supra note 14, arts. I (on defining the modes of supply), XVI, XVII, XVIII (dealing with market access, National Treatment and additional commitments which explain the limitations that countries were allowed to make on the schedules that represented their service commitments).

Specific commitments are scheduled by modes of supply and apply only to listed service sectors and subsectors (that is, a positive-list approach was taken towards sectoral coverage), subject to sector-specific qualifications, conditions and limitations that may continue to be maintained, either across all modes of supply or for a specific mode (that is, a negative-list approach for policies that violate national treatment or market access).

Hoekman, supra note 9 at 178.
create minimum levels of intellectual property rights protection and enforcement. In the case of intellectual property rights, the owner is allowed to exclude others from activities related to their property, the products of their mind, and thereby, gain the true value of that property. The trade-relatedness of intellectual property rights stems from their existence as essential elements in the international trade of technology.

Investment rights and protections fall within the ambit of existing trade and trade-related rules. Investment rights are created when a country chooses to allow foreign investors into its economic system by granting them the right to establish themselves in the market and to control and/or own assets that produce goods or services. Investment protections are designed by governments to

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21 See TRIPS Agreement, supra note 3, pt. II, arts. 9-39 (setting out the substantive minimum standards for the intellectual property rights recognized by the agreement, which include: copyright, trademarks, patents, geographical indicators, layout designs of integrated circuits, protection of undisclosed information (trade secrets) and industrial designs). Part III of the TRIPS Agreement contains provisions regarding the enforcement of intellectual property rights such as, civil and administrative procedures, provisional and final remedies, criminal penalties, and border enforcement. See id. arts. 41-61.


23 According to Jagdish Bhagwati, "[R]ules about intellectual property protection while different in essential respects in economic logic from those regarding trade, do have some essential trade aspects; the transfer and diffusion of technology, and payments for the same, across countries can be legitimately viewed as international trade in technology . . . ." Jagdish Bhagwati, Policy Perspectives and Future Directions: A View from Academia, in INTERNATIONAL LABOR STANDARDS AND GLOBAL ECONOMIC INTEGRATION: PROCEEDINGS OF A SYMPOSIUM 57-58 (Bureau of Int'l Labor Affairs, U.S. Dept. of Labor, eds., 1994) [hereinafter INTERNATIONAL LABOR STANDARDS].

24 Investment rights are those which allow the investment to exist in the first place, such as the right to establish, own and control. The GATS covers investment because one of the modes for the supply of services is commercial presence establishment. See GATS, supra note 14, art. I, 2(c). In the MAI draft text, these rights are combined with the crucial standards of national treatment and most-favored nation ("MFN") treatment. See MAI Negotiating Text, supra note 8, art. 3(1) (setting forth the national treatment standard), and art. 3(2) (setting forth the MFN standard).

25 Investment protections "are generally deemed necessary for the creation of a favourable investment climate," and include provisions on government measures, such as expropriation, which could cause the investor to lose most if not all of the investment and other measures, such as limits on the repatriation of funds, which could cause disruption in an investment. UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT ("UNCTAD"), WORLD INVESTMENT REPORT 1996: INVESTMENT, TRADE AND INTERNATIONAL
secure the continuing existence of or non-interference with the property rights obtained through investment activity. The creation and recognition of international investment rights and protections, therefore, facilitates international trade.

By contrast, the usual focus in a discussion of labor rights is on the human factor. There is emphasis on the premise that labor rights are an aspect of human rights. Labor is not a commodity because acceptance of such a characterization would demean human dignity. Viewing labor rights only in this way, however, cuts off most trade-related dialogue. Labor rights, so viewed, must be protected by a system which focuses on the unique nature of the right.\textsuperscript{27}

\textbf{POLICY ARRANGEMENTS 189, 190 (1996) [hereinafter 1996 WORLD INVESTMENT REPORT].} No WTO agreement currently covers investment protections.

The MAI draft text has provisions listed under Section IV, Investment Protection. Those provisions include: General Treatment (IV, 1.) (Contracting Parties are to accord investments and investors “fair and equitable treatment and full and constant protection and security”); Expropriation and Compensation (IV, 2.). Protection from Strife (IV, 3.). Transfers (IV, 4.) (Contracting Parties are to “ensure that all payments relating to an investment in its territory . . . may be freely transferred in and out of its territory without delay.”). \textit{MAI Negotiating Text, supra note 8, at 57.}\textsuperscript{26}

There is general agreement among scholars that core labor rights are a part of human rights. See Langille, \textit{supra} note 7, at 34 (discussing the importance of defining a core list of labor rights and not simply looking at all labor standards, because if they are rights, they cannot be taken away); see also Steve Charnovitz, \textit{Trade, Employment and Labour Standards: The OECD Study and Recent Developments in the Trade and Labor Standards Debate}, 11 TEMP. INT’L & COMP. L.J. 131 (1997). According to Charnovitz, it is important to argue that the best motive for international labor law is based upon altruism, with the goal of raising labor conditions in all countries. Of all the motivations, including commercial concerns and domestic welfare, “[t]he altruistic motivation is the most compelling of the three motivations since it interweaves labor standards into the larger framework of human rights.” \textit{Id.} at 159; see also Virginia A. Leary, \textit{The Paradox of Workers’ Rights as Human Rights}, in \textit{HUMAN RIGHTS, LABOR RIGHTS AND INTERNATIONAL TRADE} 22 (Lance A. Compa & Stephen F. Diamond eds., 1996) (stating that “workers’ rights are human rights, yet the international human rights movement devotes little time to the rights of workers . . . [a] regrettable paradox: the human rights movement and the labor movement run on tracks that are sometimes parallel and rarely meet”).

\textsuperscript{27} This argument is frequently made to explain why the ILO is the international institution most capable of dealing with labor rights. See Charnovitz, \textit{supra} note 26, at 160-63 (observing that ILO is better suited than WTO to deal with the labor rights issue, although ILO needs to extend its powers); Langille, \textit{supra} note 7, at 49-50 (asserting that the ILO cannot simply rely on its history and record of accomplishment, but rather needs to decide what to do about linkage).
A reconceptualization of labor rights may be necessary, therefore, if there is ever to be a useful trade-related discussion of these rights. A useful alternative description would involve seeing labor rights, like investment rights, as necessary for the creation of a type of property.28 Those entitled to labor rights should be seen as having a property right in the product of their efforts. Such a reconceptualization makes the recognition and protection of “core labor rights,”29 as rules devoted to ensuring minimally acceptable standards for the exploiting of these property rights, more closely akin to investment and intellectual property rights.30 Once such analogies are drawn, it becomes difficult to argue that the international trade community has no interest in labor rules. Expanding the traditional understanding of labor rights to include their consideration as protections for a property right would not undercut the human rights view. Rather than demeaning the nature of labor, a property rights description captures the role labor plays in the commercial world. Defining core labor rights would also establish the limits that must be placed on government’s restrictions of these property rights for human dignity to be ensured.

Other large differences between investment and labor rights affect how each area relates to trade. The capital of investment is inherently mobile.31 Capital can be transferred easily if a currency is freely convertible. The restrictions that exist on this inherent mobility come from government regulation aimed at restricting, attracting and retaining capital or by the market value of the investment. Labor, by contrast, is more likely to be less mobile.32

28 The suggestion for this rethinking of the nature of labor rights came from a question posed during the IELIG Linkages Conference by Steve Charnovitz.

29 Recent academic literature and other studies on labor rights have made a distinction between core labor rights and labor standards. See supra note 7, for the universe of core rights identified by the Director-General of the ILO, and infra notes 78 and 87 for those identified by the OECD.

30 The reconceptualization is not that drastic a step to take. It is commonplace to talk about intellectual property, which simply is a legal characterization of the creative work product of individuals.

31 See generally WORLD BANK, WORLD DEVELOPMENT REPORT 1995: WORKERS IN AN INTEGRATING WORLD 61 (1995) (“[O]ne fact is indisputable: capital crosses borders more easily than labor and despite the best efforts of national governments to control it.”) [hereinafter 1995 WORLD DEVELOPMENT REPORT].

32 Labor is currently less mobile than capital. See id. at 62. This was not always the case. According to Rodrik, “[R]estrictions on immigration were not as common during the 19th century, and consequently labor’s international
People tend to live and work in their own countries because their market value is low, they choose to do so,13 or their options for exiting and working in another country are limited by government policies.34 Assuming that there is a demand for their work, workers frequently choose to limit their mobility because economic goals are not their only considerations. Labor, as discussed earlier, cannot simply be understood as an element of commerce. Work, which is the non-economic name for the productive activity of individuals,35 is a major component of the social structure of a country. Work is so crucial to the individual's sense of identity, and so linked to a particular society's values,36 that workers frequently follow goals other than purely economic ones. Even if this is not true, workers may be limited in their options because other countries' mobility was more comparable to that of capital. Consequently, the asymmetry between mobile capital (physical and human) and immobile 'natural' labor, which characterizes the present situation, is a relatively recent phenomenon.37

DANI RODRIK, HAS GLOBALIZATION GONE TOO FAR? 8 (Institute for Int'l Econ. ed., 1997).

33 There is a difference in labor mobility for certain portions of the labor force. The globalization of the world economy has only intensified this. As Rodrik points out:

[Redacted barriers to trade and investment accentuate the asymmetry between groups that can cross borders (either directly or indirectly, say, through outsourcing) and those who cannot. In the first category are owners of capital, highly skilled workers, and many professionals, who are free to take their resources where they are most in demand. Unskilled and semiskilled workers and most middle managers belong in the second category.

RODRIK, supra note 32, at 4. Not all workers would relocate if they could. They choose to remain in their home country and work there because work is part of their social experience. See infra note 36.

34 Immigration is treated differently by governments from other issues such as trade. Why do governments liberalize trade but manage migration? According to the World Bank, there are non-economic and economic reasons. The non-economic reason is that "large migrations disturb the way a society thinks of itself..." 1995 World Development Report, supra note 31, at 67. The economic reasons are that migrants would not necessarily move to enhance their productivity. Industrial countries with welfare states are afraid of attracting too many migrants, and, therefore, admit them selectively "using instruments ranging from visa restrictions and border controls to legislated criteria for admission." Id.

35 See RICHARD C. HALL, DIMENSIONS OF WORK 13 (1986) ("Work is the effort or activity of an individual performed for the purpose of providing goods or services of value to others; it is also considered to be work by the individual so involved").

immigration policies do not encourage their exit. The crucial distinction between mobility for investment and labor has consequences in any discussion about trade-relatedness and the need for international trade-related rule-making. Given capital's mobility, an international set of standards for investment would provide certainty for investors which would facilitate more investment and ultimately more trade. By contrast, mobility of most workers, particularly the limited mobility of that part of the workforce that suffers most from low labor standards, means that their main connection with the international community is through the products they produce for trade. The existing rules of the international trading regime, however, are not based on how goods are produced. Indeed this is one reason why it is frequently argued that there should not be rules on trade-related labor rights or that we should not use trade sanctions to enforce compliance with such rights.

The final difference between investment and labor is how each is shaped by market forces. Investment is highly responsive to market forces. Given its mobile character, investment would tend to flow where it can obtain the best rate of return. Investment does not flow freely, however, because governments often dictate limits as to its mobility, by either by limiting investment to certain individuals (usually because of nationality) or into certain sectors. Either for reasons of sovereignty or economics no government believes in complete freedom of investment.

Labor is affected, but not solely influenced, by market forces. Some governments resist labor rules, or develop certain kinds of

57 See HALL, supra note 35.

38 There are a wide variety of measures that governments can take to restrict investment that can be divided into categories. There are measures that restrict admission and establishment, those that restrict ownership and control, and those affecting how an investment operates. See 1996 WORLD INVESTMENT REPORT, supra note 25, at 174-78 for a comprehensive list of the different types of measures. A large number of these are aimed at protecting local producers. See id. at 175.

39 The reasons for restricting entry and ownership are that a country has made a decision about "the proper apportionment of resources between the public and private sectors;" as a result, some sectors may be closed to private entry or ownership altogether. See id. at 174.

40 The best illustration for this comes in the form of the MAI itself. The text of the agreement is attached to a long list of country specific exceptions that the Member states will be taking to MAI obligations. No OECD Member State of the developed world wants a completely liberalized investment regime. See infra Section 2.2.3. and accompanying notes (discussing the MAI exceptions).
rules, in order to exploit the full comparative advantage of labor costs.\footnote{See David Ricardo, Principles of Political Economy and Taxation 74-76 (1969) (pointing out the comparative advantages of labor). Of course, those advocating protection of core labor rights argue that some countries resist such standards to gain an unfair competitive advantage.} Nevertheless, most government actions regarding labor rights reflect, to some degree, the basic requirements and preferences of the work force since that work force is the body politic.\footnote{See OECD, Trade, Employment and Labour Standards: A Study of Core Workers’ Rights and International Trade (1996) [hereinafter OECD Study] (discussing labor standards); Richard B. Freemen, International Labor Standards and World Trade: Friends or Foes, in The World Trading System: Challenges Ahead 87 (1996); T.N. Srinivasan, International Labor Standards Once Again, in International Labor Standards, Published by Penn Law: Legal Scholarship Repository, 2014} The social values of work are so fundamental that all governments have some rules about labor rights and working conditions that are not focused on the economic benefits of the rules.\footnote{Societies intervene when unfettered labor markets fail to deliver the most efficient outcomes, or when they want to move market outcomes into line with their preferences and values. Four reasons are often given for intervention: uneven market power, discrimination, insufficient information, and inadequate insurance against risk.” 1995 World Development Report, supra note 31, at 70.}

1.1.2. How Investment and Labor Relate to and Interrelate with Trade

1.1.2.1. The Economics of Trade Linkage

The frequent international debates over linkage in the last few years inevitably have begun with some type of economic justification for linking an issue to trade.\footnote{Governments also intervene directly in the labor market to achieve particular social goals. Some of the more common interventions include bans on child labor, protection for women and minority workers, setting of minimum wages, and legislation on workplace safety and health standards.” Id. at 71.} The reason for this focus is
fairly obvious: why should the international trade community add
to or transform existing multilateral rules unless doing so would
further trade and economic efficiency? Accordingly, the linkage
debate has spurred attempts to analyze the economics of trade and
investment, and trade and labor. An examination of these
analyses, and their critiques, reveals that the economics of the two
linkages are not the same.

1.1.2.1.1. Investment

There is a body of academic literature on the general economics
of foreign direct investment ("FDI"). The most recent and com-
prehensive report for the purposes of linkage analysis, however,
was done by the WTO Secretariat and is entitled 'Trade and For-

eign Direct Investment.' This 1996 Secretariat Report focused on
the "interlinkages—economic, institutional, legal—with world
trade." According to the Secretariat Report most of the empirical
work on the economic linkage between trade and FDI has not fo-
cused on causation, but rather on whether trade and FDI are sub-
stitutes (negatively correlated) or complements (positively corre-

supra note 23, at 73; see also 1996 WORLD INVESTMENT REPORT, supra note 25,
at 95-128.

"[T]he trade rules are for economic efficiency, which generally helps
everyone (with internal distribution problems being tackled by other policies);
they are not there simply to assist specific factors of production (i.e., capital) or
economic agents (i.e., multinationals)." Bhagwati, supra note 23, at 57.

The literature on the economics of the linkage between trade and in-
vestment is fairly large. For the best compilation of sources see WORLD TRADE
ORGANIZATION, TRADE AND FOREIGN DIRECT INVESTMENT (Oct.
wto.org/wto/archives/chpiv.htm> [hereinafter TRADE AND FDI].

The most recent study of the economics of the linkage between trade
and labor rights is the OECD Study. See supra note 44. The OECD Study it-
self is not without problems. For a thorough critique and analysis, see Charno-
vitz, supra note 26. Another study on the issue is supposed to be forthcoming
from Rodrik. See RODRIK, supra note 32 (summarizing the author's conclu-
sions).

See generally KAR-YIU WONG, INTERNATIONAL TRADE IN GOODS AND
FACTOR MOBILITY (1995); J.R. Markusen, The Boundaries of Multinational En-

See TRADE AND FDI, supra note 46.

Id. at 2.

"[T]he empirical work . . . has not tried to establish causation—that is,
to determine, for example, whether inflows of FDI cause exports to be greater
than they would otherwise be or if, instead, expanding exports attract increased
FDI." Id. at 7.
The Secretariat Report reviews and analyzes this work from two perspectives: (1) what the driving force (motivation) is behind FDI at the level of the firm; and, (2) the empirical evidence of linkage. Since the motivations for why a firm invests rather than exports or licenses its technology help to explain the phenomenon of FDI, they are examined first. Multinational corporations come about as the result of three circumstances. First, a firm may own assets that can be profitably exploited on a large scale. Second, profitability of the firm is increased if it produces in different countries. Third, the profits to be made from such investments are greater than from licensing the assets.

The empirical evidence on the linkage is far from complete: most of the useful work has been done only on relationship between FDI and trade in goods and there is limited availability and quality of data. Despite these limitations, the Secretariat Report

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52 The WTO Secretariat does not believe that it is important for linkage purposes to establish whether FDI and trade are substitutes or complements since "[a] substitute relationship can create just as strong an interlinkage as a complementary one. And if they are interlinked, it means that trade policy affects FDI flows, . . . and therefore that both sets of policies would benefit from being treated in an integrated manner." Id.

53 See id.

54 See id. at 8. The Secretariat points out that research conducted on why firms invest rather than export or license has been studied for forty years and there is a general consensus on this and the other points.

55 See id.

56 See id.

57 See id. at 12-13

58 Id. at 13. According to the report:

The available statistics on FDI, which are far from ideal, come mainly from three sources. First, there are statistics from the records of ministries and agencies which administer the country's laws and regulations on FDI. The request for a license or the fulfillment of notification requirements allows these agencies to record data on FDI flows. Typically, re-invested earnings, intra-company loans, and liquidation's of investment are not recorded, and not all notified investments are fully realized in the period covered by notification.

Second, there are the FDI data taken from government and other surveys which evaluate financial and operating data of companies. While these data provide information on sales (domestic and foreign), earnings, employment and the share of value added of foreign affiliates in domestic output, they often are not comparable across countries because of differences in definitions and coverage. Third, there are the data taken from national balance-of-payments statistics, for which internationally agreed guidelines exist in the fifth edition of the IMF BAl...
assesses the information available on FDI and its effects on the home and the host countries.\textsuperscript{59} FDI and trade are not simply substitutes or alternative means for reaching a foreign market.\textsuperscript{60} The relationship between trade and the dynamic effects of FDI are more generally complementary.\textsuperscript{61} However, the trade policies of countries can affect whether FDI is a complement or substitute. Low and bound tariffs (the WTO goal) attract export-oriented FDI, while high tariffs serve to induce tariff jumping FDI to serve the local market.\textsuperscript{62} FDI can also be undertaken as a quid pro quo, which would be a way of lessening the impact of protectionist trade policies.\textsuperscript{63} The FDI which responds to low costs of production and a liberal trading regime is likely to be complementary with imports.\textsuperscript{64} By contrast, the tariff-jumping FDI acts as a substitute for trade.\textsuperscript{65} Overall, a combination of liberal trade and investment policies increases FDI.\textsuperscript{66} The Secretariat Report also concludes that FDI adds to overall economic development of states by producing

\textsuperscript{59} See id. at 13-14.
\textsuperscript{60} See id. at 14-18.
\textsuperscript{61} "[T]here is no serious empirical support for the view that FDI has an important negative effect on the overall level of exports from the home country." Id. at 12. Rather, the empirical evidence points to a modestly positive relationship between FDI and home country exports and imports. Id. at 13-15 (which contains a review of the empirical evidence).
\textsuperscript{62} See id.
\textsuperscript{63} See id.
\textsuperscript{64} See id. at 13.
\textsuperscript{65} See id. at 10, 39.
\textsuperscript{66} See id. at 37. Trade policy is only one aspect of which determines whether FDI will enter a country but it plays a special role in assisting with the largest FDI problem at the level of the firm—the degree of risk and uncertainty over time.

It follows that the structure and stability of current and possible future trade policies, both of potential host countries and of potential foreign markets, will be important in influence on the willingness of firms to seek customers in foreign markets, locate production processes in host countries, or separate the production processes into stages located in different countries.

\textsuperscript{Id.}

\textsuperscript{*Ance of Payments Manual.} The three main categories of FDI described above are those used in balance-of-payments statistics.

\textsuperscript{Id.} at 3.
intangibles, particularly the transfer of technology, and by stimulating growth and competitiveness. The economic evidence illustrates that FDI is linked with trade. While FDI is much more than simply another way of trading it clearly facilitates trade with benefits running to countries at all levels of development. The WTO Secretariat believes that taking some measures, such as achieving some form of policy coherence regarding investment, might also assist in boosting the least developed countries.

1.1.2.1.2. Labor

A review of the existing literature on the economics of linking labor rights and trade leads to several conclusions. First, there is an extraordinarily limited base of empirical evidence. Second, there are disagreements between those who have studied the limited empirical data. Third, because of the limited data and disagreements only a few observations can be made.

The first issue—a lack of a thorough empirical study of the links between core labor rights and trade flows—poses a serious problem. The 1996 OECD Study bases its conclusions about the trade linkage solely on statistical evidence about freedom of association and collective bargaining. As a result, it is impossible to calibrate how and to what extent governments discriminate, use forced or exploited child labor, and, consequently, how much these practices

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67 See id. at 7-8. The transfer of technology that occurs through FDI, which is the primary channel for developing countries, leads to greater productivity. See id. at 7. The characteristics of the countries does matter. The more competitive the conditions, the higher the levels of local investment in fixed capital accompanied by the fewest restrictions on affiliates increases in the amount of technology transfer. See id.

68 See id. at 40.

69 See OECD STUDY, supra note 44, at 11, 48, 86; see also Charnovitz, supra note 26, at 138. Charnovitz criticizes the OECD for failing to make estimates of the value of annual trade in products made by violating core labor rights especially given some of its own findings. For example, the Secretariat provides evidence of child labor exploitation in a few export-oriented industries in some countries. See id. at 138, n. 64.

70 OECD STUDY, supra note 44, with the conclusion reached by Charnovitz, supra note 26, at 143 & n.111-12. Rodrik also suggests a different result from the one reported in the OECD STUDY conclusion. See RODRIK, supra note 32, at 45-46.

71 See OECD STUDY, supra note 44, at 86.
affect trade performance.\textsuperscript{72} Prescribing new international rules to encourage the enforcement of minimum standards seems unlikely in the face of limited information about the scope and dimension the “problem.”\textsuperscript{73} Without a clear picture of the extent to which low standards exist and what their effects are, it is unclear whether there will ever be an agreement on the need to develop trade-related rules regarding labor, much less what the proper set of multilateral rules and any enforcement mechanism should look like. This data gap demands that additional studies be conducted which may offer a more complete picture and help resolve the second problem.\textsuperscript{74}

The second problem is the disagreement about what the existing data reveals. The OECD Study, which examines the linking of trade and labor, begins by identifying what it considers to be the limited universe of “core labor rights.”\textsuperscript{75} Some attempt must be made to identify core labor rights in order to compile and make sense of the limited economic data on government practices. The list arrived at by the OECD is identical to that adopted by the World Social Summit in 1995\textsuperscript{76} and by the ILO itself when it has discussed “core” labor rights.\textsuperscript{77} The body of core labor rights identified by the OECD for its economic analysis includes the freedoms of association and collective bargaining, and the prohibitions of forced labor, exploitative child labor, and discrimination.\textsuperscript{78}

\textsuperscript{72} See id. at 11. ("The lack of reliable indicators of enforcement of standards on child labour, forced labour and non-discrimination is especially acute. Available evidence in this area is mostly anecdotal, making any attempt to analyse the economic implications of these standards problematic.").

\textsuperscript{73} The collection of data on labor standards would be a logical job for the ILO. If that organization could set core labor rights identified and put a supervisory mechanism in place there would ultimately be a reliable data base.

\textsuperscript{74} This same observation was made following a symposium on international labor standards in 1994. See Kenneth A. Swinnerton & Gregory K. Schoepfle, Emerging Themes, in INTERNATIONAL LABOR STANDARDS, supra note 23, at 63.

\textsuperscript{75} See OECD STUDY, supra note 44, at 25-73.

\textsuperscript{76} See id. at 25.

\textsuperscript{77} The ILO Office produced a report in 1994 which pointed to the same core labor standards as those the ILO Governing Body has suggested by considered at the 1998 International Labor Conference. See infra note 7.

\textsuperscript{78} All of the core rights, with the exception of exploitative child labor, are embodied in existing ILO Conventions:

\textit{Freedom of Association:} is the right of workers and employers; to establish and join organizations of their choosing without previous authorization; to draw up their own constitutions and rules; elect their representatives, and formulate their programs; to joint in confederations...
The study then proceeds to examine whether protection of these core rights enhances or impairs economic efficiency. It concludes that the protection of the identified core labor rights actually enhances economic efficiency. The reasons for this effect differ

and affiliate with international organizations; and to be protected against dissolution or suspension by administrative authority.


Collective Bargaining (the right to organize and bargain collectively) is the right of workers to be represented in negotiating the prevention and settlement of disputes with employers; to protection against interference with union activities; to protection against acts of anti-union discrimination; and to protection against refusal of employment, dismissal, or prejudice due to union membership or participation.


Forced Labor: "[W]ork or service exacted from any person under the menace of penalty and for which the person has not volunteered. 'Menace of penalty' includes loss of rights or privileges as well as penal sanctions." Lyle, supra at 24; cf. Convention Concerning Forced or Compulsory Labour, supra at 58.

Discrimination in Employment: "[D]iscrimination implies that if discrimination is practiced, employment and earnings opportunities are allocated based on considerations not related to how well someone does a job, intuition suggests that some individuals may end up not employed in jobs to which they are best suited." Kenneth Swinnerton, An Essay on Economic Efficiency and Core Labour Standards, in THE WORLD ECONOMY 73, 78 (1997); cf. Convention (No. 111) Concerning Discrimination in Respect of Employment and Occupation, June 25, 1958, 362 U.N.T.S. 31, 32-33.

The issue of exploitative child labor is more difficult to define. Obviously, the issue of how old a child worker should be is an issue. The ILO does have a Convention on the Minimum Age of Employment. See Convention (No. 138) Concerning Minimum Age for Admission to Employment, June 6, 1973, 1015 U.N.T.S. 297, 298.

According to United Nations Children's Fund ("UNICEF"), child exploitation is "characterized by children who work too young, too long hours, for too little pay, in hazardous conditions or under slave-like arrangements." OECD STUDY, supra note 44, at 37. See also Janelle M. Diller & David Levy, Child Labor, Trade and Investment: Toward the Harmonization of International Law, 91 AM. J. INT'L L. 663, 666, n. 24 (Oct. 1997) (noting that while a definition of exploitative child labor has yet to be adopted, the ILO is in the process of working on a new convention, based upon the existing ILO conventions such as forced labor, for a convention that will be considered by the International Labor Conference in 1999).

See OECD STUDY, supra note 44, at 77-82.
according to the type of rights. The core labor rights that are based on prohibitions—of forced labor, exploitative child labor and discrimination—enhance economic efficiency by being the appropriate response to distortions in the allocation of labor resources created by the prohibited practices. For example, in the case of forced labor, such laborers by definition are not allowed to maximize their utility or move to other activities that match their abilities and desires. Similar distortions arise both from the use of exploitative child labor and discrimination in labor laws and regulations.

The other core labor rights, specifically the freedoms, are important because they can produce positive efficiency effects. The freedom to associate and to bargain collectively do this by counterbalancing the market power of employers, providing organizational and legal support for individual workers and providing the channel through which workers share their knowledge of the business with employers. Since the protection of core labor rights enhances economic efficiency, the crucial issue becomes why all countries do

80 See id. at 215-30; Analytical Appendix entitled Core Labour Standards, Economic Efficiency and Trade, 215-230; see also Swinnerton, supra note 78.

81 Employment discrimination unambiguously reduces economic efficiency. The reason is that such a practice causes a misallocation of resources while also reducing the availability of production factors. Forced labour and child labour exploitation also cause a misallocation of resources, thus reducing economic efficiency, but they might also raise the quantity of labour available for production.

OECD STUDY, supra note 44, at 230.

82 See id. at 80.

83 See id. at 79.

84 See id. The OECD concludes that as a result, prohibition is the appropriate policy response for forced labor and exploitative child labor and discrimination. See id. at 80, 82.

85 See id. at 80-81.

86 See id. at 81. The OECD Study, however, points out that there are other issues that arise concerning the freedoms of association and to collectively bargain. It is not clear, for example, what level of bargaining is likely to produce the best results. See id. Unions also produce costs. See id. at 82. As a result the OECD concludes that:

[t]he form of union and employer organization that is conducive to the highest level of efficiency is likely to differ from country to country, as it depends on specific historical and cultural factors. Although freedom of Association is a basic human right and may help reduce certain distortions in the economy, it is no less true that particular forms of union organization an collective bargaining may introduce new ones.

id. at 82.
not act accordingly.\textsuperscript{87} The existing commentary disagrees on the number\textsuperscript{88} of reasons and why.\textsuperscript{89} Among the various reasons for non-compliance, however, it is clear that some are trade-based.\textsuperscript{90} Some countries remain persuaded that protecting core labor rights limits their ability to enhance trade performance.

There is disagreement among those reporting and reviewing the existing data on the correlation between the protection of core labor rights and trade.\textsuperscript{91} According to the OECD, the empirical results of its study fail to support the view that countries with low labor standards have gains in export market share as compared to high standards countries.\textsuperscript{92} The OECD conclusion may have limited value in persuading errant countries, however, because as Steve Charnovitz has pointed out, the conclusion in the study does not appear to fully match the OECD data.\textsuperscript{93} Some of the OECD statistics do, in fact, indicate that countries with low standards have benefited in the shape of increased trade gains.\textsuperscript{94} This OECD data

\begin{footnotesize}
\begin{enumerate}
\item The OECD offers five reasons why states may fail to adopt core labor standards: (1) Public Good Argument: public goods cannot be accomplished by market forces alone because of the free rider problem; (2) Blocking Minority Argument: if a country lacks standards and then takes them on, a significant minority (perhaps powerful) would be worse off and try to block; (3) Endogeneity Argument: that core labor standards are not shaped by policies but by market outcomes that are influenced by economic growth; (4) Economic Development: non-observance of standards is used as a strategy for promoting export trade and attract foreign direct investment. \textit{Id.} at 83-85.
\item Charnovitz argues that the OECD does not consider, at this point, one other argument it does raise later for countries that fail to adopt core standards. It may be argued that they lack the financial and legal resources to enforce such standards. See Charnovitz, \textit{supra} note 26, at 141, n. 101. Charnovitz also offers yet another reason for failure to adopt standards. Countries may want to raise standards but feel constrained because of fears about competing with other countries that will not. \textit{See id.} at 142.
\item Charnovitz points out that the public goods argument makes no sense and that the blocking minority and endogeneity arguments are not proven by the OECD analysis. \textit{See id.} at 140-41.
\item The economic development argument proffered by the OECD and Charnovitz's suggestion about the perception/reality of fear of competition are trade based. Under both theories, governments are failing to adapt core labor rights protections because they believe that acting otherwise will increase trade and economic growth.
\item Compare OECD STUDY, \textit{supra} note 44, at 80-101, \textit{with} Charnovitz,\textit{supra} note 26, at 143, n.112-13.
\item \textit{See} OECD STUDY, \textit{supra} note 44, at 92.
\item \textit{See} Charnovitz, \textit{supra} note 26, at 143 & n.112.
\item \textit{See} OECD STUDY, \textit{supra} note 44, at 92-93, 132-33.
\end{enumerate}
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thus may be more in line with another study which has indicated that "comparative advantage in labor-intensive goods . . . was associated with indicators of labor standards in the expected manner: the more relaxed the standard, the larger the revealed comparative advantage in labour-intensive goods." The disparity between the OECD conclusion and its own evidence could explain why the developing countries cling so fiercely to the belief that the introduction of international labor standards would be harmful to their ultimate economic development. If this is true it is not clear that these same countries will alter their views simply because they engage in trade liberalization. While there appears to be a positive relationship between the liberalization of trade and the actual protection of labor rights, the OECD Study failed to find any causality between them.

The observations that can be reached despite the limited data and disagreements are that: (1) the protection of core labor rights can promote economic efficiency; (2) there may or may not be some link between a low level of labor rights protection and increased trade performance; and, (3) there is a generally positive relationship between the protection of labor rights and trade liberalization. For the purpose of the debate about linking trade and labor rights the second observation could pose the most serious barrier to obtaining trade-based rules on core labor rights. If low standards countries do obtain a trade advantage then those advocating that countries should adopt such rules are robbed of the argument that protecting core labor rights will not impair trade gains or growth.

1.1.2.2. The Interests and Abilities of Governments and the International Community

For both investment and labor, a government has a sovereign interest in regulation. Labor and capital are core components of a country’s wealth, productivity and competitiveness. Whether a government should regulate all aspects of labor and investment, however, is not clear. In some areas to achieve both the most eco-

As Charnovitz points out, the OECD’s statistics reveal that the countries with low and little to no standards had significant increases in exports (44.1% and 45.3%) compared to the groups with high standard and some limitations (2.5% and 5.1% respectively). Charnovitz also points to other evidence. See id. at 143 & n.113.

95 Rodrik, supra note 32, at 46. But see Freeman supra note 44 at 101-04.

96 See OECD Study, supra note 44, at 112.
nomically sound and humane results a government must see a mixture of restrictions and comprehensive intervention and near or total withdrawal from regulation. Whatever a country does regarding investment or labor, however, it cannot insulate its decisions from outside influences.

The interests of the international community in both areas comes from globalization. World wide trade and investment make it impossible for most countries labor and investment rules to be without some consequences both for other countries and for ultimate overall world wide economic growth. The international community has ways of pressing or encouraging change in government laws and regulations. Intergovernmental organizations, like the WTO, the ILO, the OECD, and non-governmental organizations can monitor existing governmental practices and rules while governments can negotiate new multilateral rules (binding or nonbinding) on the protection of investment and labor rights. Any such rule-making process may or may not be accompanied by a mechanism for enforcing the multilateral rules, such as binding dispute settlement and sanctions.

With regard to current international efforts regarding labor rights, there are numerous multilateral conventions that identify rights and standards. The ILO conventions, however, only bind a country if ratified by that country. Moreover, the conventions are voluntary as to scope of convention adoptions and enforcement comes from persuasion exercised by ILO Member states. Regional integration arrangements have identified labor rights as a concern to monitor (National American Free Trade Agreement) or a component of the operation of a single market (European Community) and have acted accordingly. In the sense of investment rights and protections, bilateral, regional, and multilateral efforts exist to liberalize and protect investment. Although they differ in applica-

\footnote{57 See generally 1995 WORLD DEVELOPMENT REPORT, supra note 31, at 70-79; see also Charnovitz, supra note 26, at 139-40.}


\footnote{59 The ILO has adopted over 170 different conventions dealing with labor rights and standards.}

\footnote{60 See TRADE AND FDI, supra note 46, at 23-38 (analyzing the current status of national regulations, bilateral investment treaties, regional and plurilateral agreements and multilateral agreements); see also, 1996 WORLD INVESTMENT REPORT, supra note 25, at 131-59 (surveying the same field). Given the focus of the WTO and UNCTAD, it is not surprising that the WTO report is concerned with policy coherence, while UNCTAD is interested in the devel-}
bility, scope, and enforcement power, all attempt some general harmonization of the basic rights and protections to give some certainty or stability for an investor's decisions.

The interplay between a government's interest in regulating each area and its inability to control completely the consequences of its choices currently spurs arguments about the need for multilateral trade-related rules. Multilateral arguments for trade-related rules on investment and labor have often begun with the statement that the existence of lower standards acts as an unfair trade practice or as an unnecessary restraint on possible trade growth. Nongovernmental organizations and scholars often argue for strong and enforceable multilateral rules because they believe only a worldwide recognition, and agreement on how to combat abuses, will solve the identified problem. 101

2. LINKAGE AND THE PROCESS OF TRADE-RELATED RULE-MAKING

2.1. Possible Rule-Making Preconditions for Trade-Related Rule-Making

Another perspective from which to examine the linkage between trade and investment and trade and labor focuses not on the nature of each, and of its trade-relatedness, 102 but on how linkage is made concrete. When and why should the international community, as represented by the WTO, 103 choose rule-making in re-


102 See supra Sections 1.1. and 1.1.2. (discussing of the nature of labor and investment and the economic linkages each has with trade).

103 The WTO is chosen as the focus for this part of the article because its focus has been on the linkage to trade. As the organization with jurisdiction over trade, and some trade-related rules, the WTO is the logical choice.
response to a suggested linkage? Different approaches exist for finding an answer to that question. One approach would be to examine whether a suggested linkage constitutes a proper subject for consideration by the WTO. This type of examination focuses on the WTO as an institution and can illustrate the desirability of such a linkage. Another approach is to study linkage by examining not the object but the process of trade-related rule-making. This section of the article follows the second approach.

In order to conduct such an analysis some retraction must be done of the past and of how trade-related rules were negotiated in the Uruguay Round. After this review of the history,

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126 Philip Nichols has chosen this approach in recent articles. Drawing upon the theoretical work by Paul Taylor on the typology of international organizations, Nichols points out that the WTO can be best explained as engaging in coordination style of intergovernmental cooperation. See Philip M. Nichols, Corruption in the World Trade Organization: Discerning the Limits of the World Trade Organization's Authority, 28 N.Y.U. J. INT'L L. & POL. 711, 721 (1996).

127 Applying Taylor's coordination model to the WTO leads Nichols to characterize it "as an organization [that] is legally mandated to create a framework for the regulation of international trade, and will supervise the compliance of members' national policies with this framework." Id. It is against this characterization that Nichols poses his question of what issues should be pursued by the WTO. He arrives at four criteria drawn from Taylor's characterization. The criteria are as follows: (1) whether an issue is within the legal jurisdiction of the WTO; (2) whether the issue is substantial; (3) whether the WTO will be able to enforce compliance with any requirements it imposes; and (4) whether the issue requires international coordination by the WTO. See id. at 722-46.

128 While this article does not follow the Nichols' approach his explication of the theory of institutionalism and its relevance to WTO rule-making is quite enlightening and useful. Applied to the issue of whether the WTO should involve itself with labor standards Nichols points out that it should not because the issue of labor standards fails to meet the second and third criteria. If the WTO had supervision of labor rights such a resolution would not significantly increase trade (thus, it is not a substantial issue) and the WTO would have great difficulty enforcing labor rules. See Philip M. Nichols, Forgotten Linkages—Historical Institutionalism and Sociological Institutionalism and Analysis of the World Trade Organization, in Symposium, Linkage as Phenomenon: An Interdisciplinary Approach, 19 U. PA. J. INT'L ECON. L. 201 (1998).

129 This article focuses on the recent past during the Uruguay Round because that set of negotiations marked the first time "new" subjects were proposed for the agenda. The focus on history does appear to be in line with historical institutionalism, a theory of international relations. See Nichols, supra note 106. In designing his criteria for whether a subject belongs before the WTO, Nichols explains that they are drawn from regime theory and examines the characteristics of the World Trade Organization regime and applies them, but states that the WTO fails to constraints imposed upon the World Trade Organization. Id. According to Nichols, attempting such an examination would be an exercise in historical institutionalism. See id.
some analysis must be conducted of the steps and the rule-making process itself. The history of past rule-making is not being examined for its predictive value. How trade-related rules were negotiated in the Uruguay Round does not necessarily predict how future linkages can or should be approached. Rather, examining the Uruguay Round experience is necessary because it marked a critical change in the GATT approach to rule-making.

The history of the GATT is replete with illustrations of the institution's expanding legal jurisdiction. The core rules for trade in goods were followed with the Tokyo Round Codes aimed at non-tariff barriers and later with new rules in the Uruguay Round which either captured areas of trade never properly disciplined (agriculture and trade in textiles) or left uncovered by the old definition of trade (trade in services). 108 The Uruguay Round broke new ground, however, in the area of rule formation because it first tackled, and subsequently struggled with trade-related areas, particularly in the negotiations over intellectual property rights and investment. The tackling of trade-related issues in the Uruguay Round uncovered in stark detail some of the realities of rule-making as conducted by an institution such as the GATT. First, the GATT was regarded as an institution rooted in its primary mission: the liberalization of trade. For many of the negotiating countries, this history required opposition, or at least hostility towards expanding beyond trade as it was then understood. Second, the GATT was comprised of Contracting Parties with drastically divergent levels of economic development, who were inclined to view any expansions of GATT jurisdiction through the eyes of self-interest. 109 Any expansion of GATT rules to cover trade-related

108 See John H. Jackson, The Uruguay Round and the Launch of the WTO: Significance and Challenge, in MULTILATERAL TRADE FRAMEWORK FOR THE 21ST CENTURY, supra note 14, at 5 ("[O]ne of the major Uruguay Round objectives was to extend a GATT-type treaty rule-based discipline to three new subject areas: trade in services, agriculture product trade and intellectual property matters.") Of these three, services and intellectual property were truly new for GATT. GATT had always formally applied to agricultural product trade, but for a variety of reasons agriculture had escaped the GATT discipline.

109 The best illustration for this is the prolonged fight to bring "new" issues into the Uruguay Round. For discussions of the battles between the developed and developing countries over the content of the agenda, see generally Carlos A. P. Biaga, The Economics of Intellectual Property Rights and the GATT: A View from the South, 22 VAND. J. TRANSNAT'L L. 243 (1989); A. Jane Bradley, Intellectual Property Rights, Investment and Trade in Service in the Uruguay Round: Laying Foundations, 23 STAN. J. INT’L L. 57 (1987).
rules was bound to come under attack if viewed as clearly in the interest of one set of GATT parties over another. Third, the GATT process of rule-making with its open-ended agenda, accompanied by need to compromise over the scope or discipline of rules, has created a tradition whereby the content of some agreements are influenced by choices allowed in others.\footnote{The GATT negotiating process is often described as involving trade-offs between the interests of the negotiating countries. See Frederick M. Abbott, Commentary: The International Intellectual Property Order Enters the 21st Century, 29 VAND. J. TRANSNAT'L L. 471 (1996); John H. Jackson, GATT and the Future of International Trade Institutions, 18 BROOK. J. INT'L L. 11, 13 (1992).}

A brief examination of the history of the TRIMS and TRIPS agreements illuminates these points. Both the TRIMS and TRIPS agreements were so named to emphasize the only acceptable linkage: the rules covered in each agreement were “trade-related.” Limiting the agreements to issues that were properly related to trade was regarded as a necessary precondition to their completion.\footnote{In the case of the TRIMS negotiations, the United States had been seeking an expansive set of rules while the developing countries viewed such laws as inimical to their development interests and as a one-sided approach which failed to account for the restrictive business practices of multilateral enterprises.” Price & Christy, supra note 14, at 448. The investment measures issue actually reached the Uruguay Round agenda only as a compromise and was added to the list of “New Subjects.” See Edward M. Graham & Paul R. Krugman, Trade-Related Investment Measures, in Completing the Uruguay Round 147, 150 (Jeffrey Schott ed., 1990). Notably, the Ministerial Declaration for the Uruguay Round provided that “following an examination of the operation of GATT Articles related to the trade restrictive and distorting effects of trade measures, negotiations should elaborate, as appropriate, further provisions that may be necessary to avoid such adverse effects on trade.” Uruguay Round Ministerial Declaration, supra note 14. The declaration had similar language with respect to TRIPS. In order to reduce the distortions and impediments to international trade, and taking into account the need to promote effective and adequate protection of intellectual property rights, and to ensure that measures and procedures to enforce intellectual property rights do not themselves become barriers to legitimate trade, the negotiations shall aim to clarify existing GATT provisions and elaborate, as appropriate, new rules and disciplines. Id.}

The rules on trade-related investment measures and trade-related property rights were developed in similar fashions. Each agreement reached the Uruguay Round agenda in the same way. In both cases the United States, acting as the demander in negotiations, pushed for inclusion of each area in the ministerial meeting that launched
Similarly, both agreements provoked sustained resistance at the time and during the negotiations themselves. Both the TRIMS and TRIPS Agreement negotiations were marked and ultimately defined by the gaps between the positions of the developed and developing countries. Initially, the developing countries wanted neither issue in the Uruguay Round, viewing neither set of rules as in their interest. The developing countries strongly argued that the GATT was not the proper institutional home for TRIPS, claiming that only the World Intellectual Property Organization ("WIPO") had jurisdiction. As the negotiations proceeded, the developed and developing countries compromised. The developed countries moved their negotiating objectives on TRIPS and Services ahead of those for TRIMS. TRIMS emerged as the agreement where both sides limited their initial goals.

Although both TRIMS and TRIPS represent exercises in trade-related rule-making and faced similar obstacles, the agreements reached were quite different. The TRIMS Agreement does not represent a complete set of investment rules. Instead, TRIMS achieved only the following: (1) established which core GATT rules prohib-

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114 The issue of whether WIPO rather than the GATT was the appropriate institutional home for intellectual property issues was not dropped from discussion during the TRIPS Negotiations until 1989, three years after the Uruguay Round began. See Gail Evans, Intellectual Property as a Trade Issue—The Making of an Agreement on Trade Related Aspects of Intellectual Property Rights, 1 WORLD COMPETITION 169 (1994).


ized certain investment measures;\(^\text{117}\) (2) provided for the gradual phasing out of the identified non-conforming measures;\(^\text{118}\) and (3) committed the WTO Member states to a review and possible amendment of the agreement within a short time.\(^\text{119}\) By contrast, the TRIPS Agreement is a comprehensive set of rules that dictates not only minimum international standards for intellectual property rights but also how Member states must align their domestic legislation to achieve these goals.\(^\text{120}\) The WTO process for promulgating trade-related rules appears capable of producing limited agreements that reiterate existing concepts (TRIMS) and equally capable of producing innovative agreements (TRIPS) that set international standards and specify, in a manner never before used in trade agreements, how to guarantee enforcement of those standards.\(^\text{121}\)

The history of the TRIMS and TRIPS negotiations and the contents of the resulting agreements suggest that there may be several preconditions for successful trade-related rule-making. The preconditions constitute three levels of consensus that should be reached before trade-related rules can be successfully promulgated. These three levels of consensus do not have to be reached in any

\(^{117}\) TRIMS Agreement, \textit{supra} note 4, at art. 2 (noting that member states are supposed to refrain from applying a trade-related investment measure that is inconsistent with the GATT obligations of National Treatment (Art. III), and the Prohibition on Quantitative Restrictions (Art. XI)). An illustrative list of TRIMS that are inconsistent with those obligations was attached as an Annex to the Agreement.

\(^{118}\) See \textit{id.} art. 5.

\(^{119}\) See \textit{id.} art. 9 (calling for a review of the operation of the agreement within five years as well as a consideration of whether the agreement should be complemented with provisions on investment policy and competition policy).

\(^{120}\) See TRIPS Agreement, \textit{supra} note 3, at pt. II (covering copyrights, trademarks, geographical indications, industrial designs, patents, lay-out designs of integrated circuits, and protection of undisclosed information in arts. 9-39), and Part III Enforcement of Intellectual Property Rights (arts. 41-60). It was acknowledged that countries had the right to use measures to control anticompetitive practices in contractual licenses. \textit{Id.} art. 40.

\(^{121}\) The portion of the TRIPS agreement dealing with enforcement provides, for the first time, binding international obligations for the effective enforcement of intellectual property both internally and at the border. The importance of this innovative section of the TRIPS agreement cannot be overstated. It will make domestic legal procedure subject to international dispute settlement, not in the context of establishing an appeals procedure for the domestic courts' individual cases but in ensuring the effective operation of each WTO member's domestic system in enforcing intellectual property rights. See John Gero & Kathleen Lannan, \textit{Trade and Innovation Unilateralism v. Multilateralism}, 21 CAN.-U.S. L.J. 81, 91 (1995).
particular order. Practically speaking, it is only after all three levels have been reached that an issue becomes acceptable to the international community as one for trade linkage.

The first consensus is on the core principles that must be vindicated or rights that must be protected. Rule-making must be aware of its subject. To develop rules that will bind and inspire compliance, there needs to be agreement on what problem is being addressed and how best to address it. Illustrations from the TRIMS and TRIPS experience may prove illuminating. One reason why commentators have described the TRIMS Agreement as a failure is because it did not address many of the investment issues raised by the United States and other capital-exporting states as key aspects of investment protection. 122 The history of the negotiations reveals that the limited scope of the TRIMS rules can be traced to the universe of investment rights and protections not being conclusively determined prior to the round. 123 By contrast the TRIPS Negotiating Group had the benefit of a well-defined universe of intellectual property rights as developed by existing international intellectual property agreements and the efforts of WIPO. 124 The TRIPS negotiating group was thereby capable of reaching the issue of what intellectual property rights were and how they should be protected during the first phase of negotiations.

The second consensus that must be achieved is about how the issue or area is linked to trade. No issue has ever been accepted for study by the GATT/WTO, for working group examination, or as an agenda item for a negotiating round unless trade-relatedness was offered as a justification. There is no common understanding of how trade-relatedness must be established. 126 Clearly, if rules have

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123 See Price & Christy, supra note 14, at 455 (comparing the TRIPS experience with that of TRIMS).
124 See id.; see generally Ryan, supra note 112 (arguing that the TRIPS Agreement was possible because it built upon the "function-specific" work already done by the intellectual property community, and because linkage-bargain diplomacy was available in the Uruguay Round to facilitate trade-offs).
125 THE GATT URUGUAY ROUND: A NEGOCIATING HISTORY, supra note 113, at 2265-67; but see Ryan, supra note 112 (pointing out that it was actually the creation of the Draft Composite Text in 1991 by the chair of the negotiating committee that crystallized the form of the final agreement).
126 See Nichols, supra note 104, at 733-34 (acknowledging that there are "many possible indicia of substantial effect" on trade and that it cannot simply
the capacity for liberalizing or distorting trade, they would be trade-related. The GATT has frequently expanded its jurisdiction to include rules on government practices that act as barriers to trade. The newer subjects proposed for linkage, such as labor and investment rights, however, do not fall neatly into this characterization. In the case of both labor and investment, new rules would provide a standard of treatment for those participating in the creation of tradable goods and services. At best, such rules might facilitate trade. There is precedent for this type of trade-relatedness. By negotiating the TRIPS Agreement, the GATT went beyond focusing on liberalization of trade or barriers to trade. Adopting investment standards would appear to facilitate trade given what is understood about the economic inter-linkage between trade and foreign direct investment. By contrast, the adoption of minimum standards in the area of labor rights may or may not facilitate trade given what is currently known about the economics. Rather, the creation of trade-related labor rules would arguably legitimize trade and make it fair trade. Justifying WTO jurisdiction under

be limited to a statistical measurement of trade flows; at the macro level, it is possible that there are issues that cannot be depicted through statistical evidence, but whose resolution is critical to international trade governance; see also Leary, supra note 7, at 220.

It is argued that only “trade-related” issues, and not issues such as workers’ rights, should have a place in trade negotiations (i.e., note the use of the terms “trade-related” intellectual property to justify the inclusion of intellectual property issues in Uruguay Round negotiations). The categorization of “trade-related issues,” however, appears to depend on the eyes of the beholder.

128 See supra Section 1.2.1.1.1. (discussing the relationship between trade and investment).
129 See Langille, supra note 101, at 236 (pointing out the long-held assumption of trade theory, that there is a natural or non-controversial mode of economic ordering and that distortions or perversions of this “normalcy” can be detected, measured and taken into account by trade theory). But this is not the case. This is why the debate over fair trade is so intractable. There is no way for trade policy or its economic principles to be insulated from the political issues at stake. Fair trade is free trade’s destiny. That is, once governmental action or non-action in labor policy (for example) is problematized a potential subsidy, then there is not alternative to engaging in the debate about the appropriate scope of market regulation (of labor relations, for example). Id.
such a theory of trade-relatedness, however, strikes at the heart of
the efficiency model of the trade regime.\textsuperscript{130}

The third level of consensus that must be reached for multilat-
eral rule-making concerns how it should be realized and enforced.
Multilateral rule-making takes place in an institutional framework
and requires institutional oversight and enforcement once the rules
are negotiated. Before reaching this consensus, the international
community must be convinced that there is a need for cooperation
or coordination, and that the issue is best dealt with at the interna-
tional level.\textsuperscript{131} Given the nature and reality of investment and la-
bor, and the current international regime for dealing with both,
there is an argument that such international cooperation and coor-
dination is necessary. Assuming that an international solution is
required, concrete issues of the proper institution to conduct the
rule-making and the proper enforcement mechanism for any rules
that might be developed, must be addressed. Selecting an institu-
tion (along with its enforcement methods) for rule-making, to a
large extent, dictates the form, scope, and content of the interna-
tional rules. What is less clear is what kind of international coop-
eration is needed. Does the area present the case for one exclusive
jurisdiction by one institution, for shared jurisdiction, or for true
collaboration?

2.2. How Investment and Labor Rights Satisfy or Fail to Satisfy
the Preconditions for Trade-Related Rule-Making

2.2.1. First Consensus

Both investment and labor satisfy, in some fashion, the first
consensus by identifying what core rights or principles need to be
protected. With regard to investment, there has been an extensive
attempt to develop a comprehensive understanding of the rights

\textsuperscript{130} Dunoff reaches this conclusion by indicating that as ‘trade and’ disputes
increase, the efficiency model’s welfare for maximizing calculus does not cor-
rectly account for these non-economic values. Dunoff, supra note 127.

\textsuperscript{131} The WTO Secretariat Report on Trade and Investment argues that a
lack of rule and policy coherence, both of which exist in the investment regime,
pose a “danger to security and stability, which are basic goals of trade and in-
vestment agreements.” TRADE AND FDI, supra note 46, at 44; see also Nichols,
supra note 104, at 738-40 (setting this out as one of the criteria for judging
whether the WTO should have jurisdiction over a subject).
and protections necessary to create a liberal investment regime. The views of the capital exporting states have coalesced around several crucial ideas, building from the earliest international investment agreements, the Friendship, Commerce and Navigation treaties, through the European and American bilateral investment agreements, and into regional efforts, such as the Energy Charter Treaty and the NAFTA investment chapter. First, for a set of international investment rules to be effective, there must be an expansive definition of "investment." Second, the traditional investment problem of discrimination against foreign capital and investments must be addressed. Third, a core of investment rights must be included in any investment regime such as the rights of establishment, and operation. Investment protections, such as a thorough standard for expropriation, adequate compensation, and the right to transfer funds, should be included as well. Whether the capital importing countries share the view that all of these elements are required at all, much less in the form represented by an agreement such as NAFTA, is doubtful. During the Uruguay Round, there was active opposition to such ideas and the MAI negotiations by the OECD have had only limited developing country participation.

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132 See 1996 WORLD INVESTMENT REPORT, supra note 25, at 161-200 (compiling the policy issues (i.e., whether there should be a comprehensive multilateral framework) as well as a surveying all the existing international rules).

133 See Price & Christy, supra note 14, at 440.

134 See generally KENNETH J. VAN DEVELDE, UNITED STATES INVESTMENT TREATIES: POLICY AND PRACTICE (1992); see also 1996 WORLD INVESTMENT REPORT, supra note 25, at 134-47 (comparing existing BITs).


136 Compare Model U.S. Bilateral Investment Treaty, art. 1(b), reproduced in 1 Basic Documents of International Law 655 (Stephen Zamora & Ronald A. Brand eds., 1990), with NAFTA, supra note 135, art. 1139.

137 The non-discrimination issues are addressed by adopting National Treatment and MFN provisions. Most bilateral agreements have both. See TRADE AND FDI, supra note 46, at 23. Chapter 11 of NAFTA extends the National Treatment and MFN standards to pre- and post-establishment aspects of an investment. See NAFTA, supra note 135, arts. 1102(1), (2), 1103(1), (2).


139 See Joanna R. Shelton, Symposium on the MAI (presented on Oct. 20, 1997), available at OECD/MAI Symposium in Cairo, (visited May 7, 1998) at <http://www.oecd.org/daf/cmis/mai/shelton.htm> (noting that those non-OECD Member states that expressed interest in acceding to the MAI, including
In the case of labor, a review of the recent multilateral discussions and negotiations, as well as scholarly efforts, reveals that a consensus is developing about what constitutes core labor rights. Although different sources exist from which these rights are drawn, such as human rights treaties, domestic legislation with social clauses and ILO Conventions, a small list of rights has increasingly been identified as enumerating core rights. That core list includes: the freedom to associate, the freedom to bargain collectively, the prohibition of forced labor, discrimination in employment, and exploitative forms of child labor. Given the comprehensive nature of what could be described as labor rights, which cover all realities of the workplace from establishment of the basic relationship, to wages, to working conditions and safety, a recognition of this list is a necessary first step towards any contemplated set of internationally mandated labor rights. Not all ILO Member states have yet ratified the conventions which establish these rights; nevertheless, they are among the most ratified. The core list has grown from a recognition that there is a minimum level of labor standards. The freedoms to associate and to bargain collectively are seen as the necessary procedural rights for the labor force. Without the right to meet and discuss common issues and concerns and gain leverage in establishing the terms of employment with management, workers will be without the ability to influence labor standards. The prohibition of forced labor is necessary to enshrine properly the worker’s right to choose his work. The prohibition of discrimination limits the ability of employers and governments to treat workers differently on the basis of some characteristic unrelated to

Argentina, Brazil, Chile, Hong Kong, China and Slovakia, were invited to become observers in the Negotiating Group).

140 See supra notes 7 and 11 concerning recent efforts by the ILO Governing Body regarding core labor rights.

141 See Langille, supra note 7; OECD STUDY, supra note 44. However, there is no universal agreement. See generally Leary, supra note 26 (arguing for a shorter list); R. Michael Gadbaw & Michael T. Medwig, Multinational Enterprises and International Labor Standards: Which Way for Development and Jobs, in HUMAN RIGHTS, LABOR RIGHTS, AND INTERNATIONAL TRADE 141, 153 (Lance A. Compa & Stephen F. Diamond eds., 1996) (arguing for a different set of rights altogether).

142 See supra notes 69-78 and accompanying text.

143 See OECD STUDY, supra note 44, at 33-36.

144 Langille, supra note 7, at 32.

145 See supra notes 69-78 and accompanying notes.
their abilities. The prohibition of exploitative child labor is aimed at restricting, if not curtailing, child labor either by establishing minimum standards or by limiting any activity that resembles forced labor.

2.2.2. Second Consensus

With regard to developing the second consensus, investment and labor differ significantly on how an issue relates to trade. There is a growing consensus on the economics of trade linkage for investment, as witnessed by studies and the numerous attempts to create trade-related investment rules. Nevertheless, the international community has not yet been able to agree upon the need for, or the content of a truly international investment regime. The political reality of the GATT and its manifestation in the Uruguay Round produced limited or structurally-flawed trade-related rules, such as the TRIMS Agreement and the GATS, respectively. Despite these flawed attempts to create some type of trade-related investment regime, the WTO has not abandoned the field. During the Singapore Ministerial, the member states agreed to establish a Working Party on Trade and Investment. The WTO Secretariat also issued its report on Trade and Investment. Although the Working Party has begun its work, which focuses not only on trade-relatedness (i.e., the economics of investment and trade) but also noticeably on the relationship between trade and investment and development, its agenda suggests a lengthy process focusing on educating Member states about investment and its ramifications. Conspicuously absent from the current goals of the Working Party is any mission to modify TRIMS or the promulgate new trade-related investment rules.

Regionally, the OECD has moved ahead of the WTO by working towards the MAI. Given its membership, the OECD is sensitive about the relationship between the MAI and the WTO’s trade-related investment rules. Consequently, the OECD Member states

146 Id.
147 See generally Diller & Levy, supra note 78.
148 See generally TRADE AND FDI, supra note 46, at 23-37.
149 For a discussion of the limits of TRIMS, see supra notes 111-47 and accompanying text. For a discussion of the GATS limitations see generally Hoekman, supra note 9 at 177-83; Richard B. Self, General Agreement on Trade in Services, in THE MULTILATERAL TRADE FRAMEWORK FOR THE 21ST CENTURY, supra note 14, at 523.
have acknowledged that the OECD must work with the WTO, and has formulated MAI obligations which are consistent with the WTO rules.\footnote{See infra Section 3.1. for a discussion of the MAI design and core principles.}

By contrast, there is no consensus on how labor rights relate to trade. Those favoring linkage and those opposing it disagree regarding the economics of the linkage of labor rights to trade.\footnote{See Srinivasan, supra note 44; Van Liemt, supra note 101.} Moreover, these groups also disagree about the value and utility of international trade-related rule-making in this area.

### 2.2.3. Third Consensus

Investment and labor also differ regarding the third consensus. They differ on how international rule-making regarding each area should be realized and enforced. With regard to both areas, the WTO now has a limited or non-existent role despite suggestions that it should be the rule-making institution.\footnote{See supra note 11 and accompanying notes.} The WTO commands this attention because it is currently regarded as a competent and powerful institution. The Uruguay Round succeeded in replacing the GATT with a membership organization that required states to adopt an expansive set of legal commitments and to submit to what is perceived to be an effective dispute settlement system. Given its already extensive jurisdiction and mandate to promulgate additional rules, the WTO is competent to negotiate new trade-related rules.\footnote{See Nichols, supra note 104, at 727-28.} Moreover, the WTO’s Dispute Settlement Understanding is equipped with the most effective method for enforcing its obligations,\footnote{See Understanding on Rules and Procedures Governing the Settlement of Disputes, Apr. 15, 1994, Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Annex 2, app. 1, in THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS 404 (1994) [hereinafter Dispute Settlement Understanding].} which is an adjudicative dispute settlement system\footnote{See Taylor, supra note 112, at 242-49, 296 & n.399 (listing all the major discussions of the adjudicative nature of the DSU System).} backed by the power to authorize trade sanctions.\footnote{See Dispute Settlement Understanding, supra note 154, at art. 22 (recognizing that the Dispute Settlement Understanding authorizes sanctions only if the offending party in a WTO dispute fails to withdraw the non-conforming measure pointed out by a WTO panel report). Id. art. 22.3.} Despite or because of these institutional attributes, however, the
WTO may never be the institution to promulgate comprehensive international rules on investment or labor rights. In the investment area, it is clear that the WTO has jurisdiction because it has investment and investment related agreements. The WTO, however, will not be the first institution to complete a set of international investment rules. Instead, it appears that the OECD, if it does finish the now delayed negotiations, will promulgate such an agreement. Certain consequences flow from this institutional choice. The OECD, as an institution comprised of similarly situated countries, is developing a MAI that represents its members views rather than the compromise of competing visions that marks a WTO agreement. The OECD also has freedom regarding the form of the agreement (a free standing treaty) and how to enforce its obligations (through the state to state methods, as well as private investor versus state methods). This is not available to the WTO unless it adopts several alterations to its current structure and focus.

157 As noted earlier, the WTO Working Party on Trade and Investment lacks any mandate beyond reviewing the linkage issue. The WTO would move ahead of the OECD only if the MAI is never completed, which is a prospect that currently seems unlikely. 158 In the current structure of the WTO, all Member states are subject to all major obligations. This in turn means that any violation of a WTO obligation, whether it is a GATT 1994, TRIPS, TRIMS or GATS obligation, is subject to the Dispute Settlement Understanding ("DSU"). Because the DSU was established for sovereign-sovereign complaints only, the WTO would have to alter the structure of the DSU to offer an additional type of dispute settlement for investment disputes if the investor-state disputes are to be kept directly under WTO supervision. See Edward M. Graham, Direct Investment and the Future of the World Trade Organization, in THE WORLD TRADING SYSTEM: CHALLENGES AHEAD 205, 212 (1996) (suggesting alternative ways to establish standing for investors). Changing the structure of the DSU in such a fashion, however, raises the issue of why investment disputes should be treated differently than other trade and trade-related disputes. The answer that the rights of an individual investor are involved is not sufficient because the rights of individual holders of intellectual property rights are implicated by the TRIPS Agreement, as are those of service suppliers in the GATS, and yet they lack access to the DSU System. Private party-sovereign investment disputes can be characterized as contract disputes. Such a characterization would differentiate them from intellectual property rights which are benefits conferred by a state. Of course, the other option would be to allow such disputes to be handled through ICSID Arbitration or ad hoc arbitration and not give the WTO true jurisdiction. See id. (noting that a U.S. position on the efforts is needed by the WTO). 159 The expansion of the WTO to allow for private parties to have access is a controversial idea, even if it is potentially meritorious. See Andrea K. Schneider, Democracy and Dispute Resolution: Individual Rights in International Trade Organizations, in Symposium, Linkage as Phenomenon: An Interdisciplinary Ap-
The completion of the MAI as a free standing treaty will, if it
can gain membership outside the OECD itself, provide two international institutions with overlapping competence regarding investment rules. Whether and how the two institutions can coordinate their efforts to implement and enforce the rules will become major issues. Ultimately, this dual competence could lead to a WTO decision to adopt the MAI as a beginning, even if not as a basis for its own Trade-related Investment Agreement.

In the labor rights area it is fairly clear that the WTO has no role to play in the short term. The Singapore Ministerial Declaration effectively assigned jurisdiction over labor rights to the ILO. The ILO now has to grapple with having the issue of trade linkage returned to it. Initial moves towards expanding the ILO power further to monitor labor rights protection were stymied in the 1997 International Labor Conference. However, in November, the Governing Body of the ILO agreed to allow a director-general led effort to increase ILO powers regarding core labor rights to be put on the agenda for the 1998 International Labor Conference. For the near future, labor rights advocates will have to see if the ILO can better protect fundamental labor rights. If that organization fails to address the issue in some way, it is likely that pressure to move labor rights onto the WTO agenda, at least from the United States, will not cease.

3. **TRANSFORMING EXISTING AND PROPOSED RULES INTO TRADE-RELATED RULES**

3.1. **Trade and Investment**

Different models for an investment regime exist, including the bilateral investment agreements, APEC guidelines, the existing

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[proach, 19 U. PENN. J. INT’L ECON. L. 201 (1998) (arguing that private access would bring a level of legitimacy to WTO dispute settlement).]


[161] Id.

OEC D codes, NAFTA, and the TRIMS and GATS Agreements. During the MAI drafting process, all of these models were reviewed and studied for common principles and design. The MAI is not completely based on any of these models. In most cases, there were limitations as to the scope of the agreement (either in the definitions or number of commitments) or with their enforcement mechanism. Nevertheless, it is fairly clear that the MAI has been strongly influenced by its models. The most obvious models appear to be the GATT (and the GATS) for structure and NAFTA, Chapter 11 for substance and enforcement mechanism.

In many ways the MAI resembles the GATT and the GATS—the framework agreements of the WTO. A framework agreement for trade rules is one which sets out core general principles (subject to some general and other specific exceptions) and a process for achieving the ultimate goals of the agreement. The trade framework agreements contemplate progress over time with each new negotiating round reaching and fixing a new level of commitments. In the case of the GATT 1947, the core principles were the Most Favored Nation and National Treatment Provisions and the process was contained in the article on Tariff

163 OECD Code on the Liberalization of Capital Movements and the OECD Code of Liberalization of Current Invisible Operations. For a survey of these Codes, see OECD, INTRODUCTION TO THE CODES OF LIBERALIZATION (PARIS, 1987).
164 See NAFTA, supra note 135.
165 See TRIMS Agreement, supra note 4.
166 See GATS, supra note 14.
167 See the analysis of these models in TRADE AND FDI, supra note 46, at 25-28.
168 The GATT and GATS are framework agreements. See id. at 35.
169 Like the GATT before it, the GATS is a framework designed to permit the progressive liberalization of trade in services through further negotiations. Indeed, the GATS contains a built-in commitment in Article XIX to continue to negotiate liberalization through successive rounds of negotiations with the first such negotiation scheduled to begin no later than the year 2000, and to continue periodically afterwards.
170 The scope of the MAI, its provision on performance requirements, and its adoption of the two forms of dispute settlement appear to be heavily patterned after similar NAFTA provisions.
171 GATT, supra note 2, at art. I.
172 Id. art. III.
The framework format has proven remarkably workable for eliminating tariffs and other barriers to trade. In fact, the success of the GATT in lowering tariff barriers ultimately revealed other barriers to trade and subsequently led countries to push for other agreements to deal with areas that the framework did not cover but which clearly impacted on trade, the non-tariff barriers.

During the Uruguay Round, the GATS was also designed, using the GATT model as a basis, as a framework agreement. The GATS has one general principle, scheduled service sector commitments and a commitment to progressive liberalization. Designing an agreement for trade in services as a framework agreement, however, created several problems. The contracting parties were not able to adopt completely either MFN or National Treatment. In addition, the services schedules submitted by many countries were considered to be so inadequate by others that later, sector specific negotiations were required. These departures from the GATT model have led many to view the GATS as structurally flawed. The struggle to fit services trade

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172 Article II was conceived as a device for getting the contracting parties to liberalize trade by conducting an ongoing process of negotiations to lower worldwide tariffs. For this process to work the contracting parties had to negotiate over levels of tariff reduction, submit country-specific schedules which illustrated those commitments, and commit to bind (or keep in place) those tariffs or tariffs of comparable amount. Crucial to the concept of binding is that the countries agreed both to a standstill, not increasing tariffs (unless an exception applied), as well progressive liberalization of tariff commitments. See id. art. II.

173 GATS, supra note 14, at art. II (Most-Favored-Nation). Although the GATS does have MFN as a core principle, it is subject to exemptions contained in an Annex to the agreement. Moreover, unlike the GATT, the Uruguay Round negotiators did not establish national treatment as a general principle. Instead, it falls under the section on specific commitments by Member states, which means that limitations might be placed on the principles for any service sector for which a committee is made. See id. art. XVII.

174 Id. arts. XVI, XVII, XVIII.

175 Id. art. XIX.

176 See Self, supra note 149, at 546-50 (briefly discussing the extended negotiations required for financial services, and basic telecommunications). In addition, there was dissatisfaction with the "positive list" approach taken for scheduling commitments. Under this method, countries only scheduled the sectors they were willing to liberalize and, subsequently, limits were placed on those liberalization commitments. Any sector left off a schedule was not open to liberalization.
into such a model could raise some issues about the MAI attempt at a framework investment agreement.

The MAI legal rules and obligations\textsuperscript{177} are contained in the following parts of the treaty: Section I is a lengthy preamble which sets out the goals of the treaty; Section II sets out the scope and application, which defines investor, investment and the geographical scope of application; Section III addresses the treatment of investors and investments, which lists the core principles of national treatment, MFN and transparency\textsuperscript{178} and other investor rights\textsuperscript{179}; Section IV discusses investor protection; Section V deals with dispute settlement; Section VI codifies exceptions and safeguards; Section VII is the financial services provision, which is a carve out chapter which creates special rules for this type of investment; Section VIII deals with taxation; and Section IX articulates country specific exceptions, which will ultimately be comprised of the schedules of each signatory when negotiations are finished.

The core concepts regarding the treatment of investors and investments are National Treatment and Most Favored Nation.\textsuperscript{180} Aside from the use of the legal term of art, these two MAI provisions are worded exactly the same as one another. The general principles of the MAI are, therefore, the same as those of the GATT. Legal terms that focus on non-discrimination such as national treatment and Most Favored Nation, however, take on different meaning when aligned to the specific goals of a commercial agreement. In the trading regime, the crucial form of non-

\textsuperscript{177} Other portions of the MAI are devoted to the Relationship to other International Agreements (Section X), Implementation and Operation (Section XI), and Final Provisions (Section XII).

\textsuperscript{178} The MAI, like newer trade agreements, has raised transparency to the level of core principles.

\textsuperscript{179} Other investor rights specified by the MAI include temporary entry for investors, a prohibition of nationality restrictions for executives, managers, officers and board members, prohibitions on performance requirements. See MAI Negotiating Text, supra note 8, at Section III.

\textsuperscript{180} The National Treatment provision is as follows:

\begin{quote}
Each Contracting Party shall accord to investors of another Contracting Party and to their investments, treatment no less favourable than the treatment it accords (in like circumstances) to its own investors and their investments with respect to the establishment, acquisition, expansion, operation, management, maintenance, use, enjoyment and sale or other disposition of investments.
\end{quote}
discrimination is between trading partners. As a result, MFN is the cornerstone of the GATT. By contrast, in an investment agreement, the most common discrimination is against outside investors or investments. Consequently, the most important concept in the MAI is National Treatment. Using these concepts to explain how investment and investors must be treated, however, necessarily involves specifying some level of investment rights. In the MAI, the two general principles are linked to the broadest possible scope of investment rights. Investors are given rights to establish, acquire, expand, operate, manage, maintain, use, enjoy, sell, or otherwise dispose of investments in a fashion no less favorable than that of a country's nationals or any other country's citizens. Investors and investments are also to be entitled to the better national treatment or MFN. This latter provision is important since any derogation from national treatment would still provide the investor with the same treatment offered to other outsiders.

Given the breadth of rights established by the national treatment and MFN provisions of the MAI, they cannot be viewed in isolation from the list of country-specific exceptions. The MAI employs the negative list approach for the exceptions schedules where any exceptions that a country plans to take must be scheduled. In its current form, the MAI has opted for strong general principles and many exceptions. The list of country-specific

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181 The MAI text recognizes that true national treatment is not possible in some areas, such as financial services and taxation, and so it has taken a carve-out approach with respect to these concepts. See MAI Negotiating Text, supra note 8, at Sections VII-Financial Services and VIII-Taxation. See also OECD, MAI Briefing for non-OECD Countries: Scope of the MAI (Sept. 17, 1997) (presentation by Xavier Musca, Treasury Directorate, Ministry for the Economy and Finance, France) <http://www.oecd.org/daf/cmis/mai/musca.htm> (“Total and unconditional liberalism of international investment could lead to economic destabilization and would have been counterproductive. The MAI negotiators thus established limits to its scope of application.”).

182 Id. The scope of the MAI, therefore, gives investors and investments pre- and post-establishment rights.

183 See id. Each Contracting Party shall accord to investors of another Party and to their investments the better of the treatment required by Articles 1.1 (National Treatment) and 1.2 (MFN), whichever is the more favorable to those investors or investments. See id.

184 This is in contrast to the GATS positive list approach that had been heavily criticized. See Hoekman, supra note 9.

185 See Sol Picciotto, Linkage in International Investment Regulation and the Multilateral Agreement on Investment, presented at the Linkage as Ph-
exceptions still being negotiated is several times the size of the treaty itself. Negotiations slowed over the need for OECD states to find acceptable levels of country-specific exceptions, as well as to determine what the other general exceptions will be allowed, and their form. Even more controversial has been the fight over whether there will be exceptions for such things, such as ones for regional economic integration arrangements and cultural industries.

Extensive exception scheduling, as well as carve-outs, are also necessary given what unconditional national treatment would mean in the investment context. Investment measures tend to be internal. Some, but not all, of a country's rules that limit or restrict investment are designed to discriminate. Other measures are aimed at ensuring the proper functioning of the market, the economic security of the country, or efforts by governments to achieve certain industrial policy goals. True national treatment would mean treating outside investors no less favorably than nationals, but for the purpose of some of such rules and regulations, differentiation in treatment is necessary.

The country-specific exceptions schedules also play a role beyond limiting the reach of the national treatment and MFN obligations. The schedules will serve as the framework for how future liberalization will take place. The MAI, as drafted, allows countries to grandfather in existing non-conforming measures, or any amendments to them that do not increase the non-conformity

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186 The current proposal for General Exceptions in Section VI has only been proposed for discussion by the Chairman. MAI Negotiating Text, supra note 8.

187 Two different proposals have been submitted on Regional Economic Integration Organizations. Neither is included in the draft text at this point. See id.

188 See id. There is one proposal for an Exception Clause for Cultural Industries. It also has not been included in the draft text to date. See also Investment Talks Continue at OECD; MAI Now on Course for 1999 Completion, 15 INT'L TRADE REP. 525 [hereinafter Investment Talks] (describing this impasse over the cultural industries and regional integration exceptions).

189 See Graham, supra note 158, at 210 & n.10 (noting that none of the countries of the OECD, which is certainly the group with the most liberal investment regimes, grant “full national treatment to all foreign controlled firms in all industries”).
of the measure. A decision has been unreached as to whether to keep this as a standstill measure that does not allow new non-conforming measures to be issued by countries once the MAI goes into effect. If there is standstill, then the next issue would logically be rollback, an indicator of how the exceptions list would shrink over time as countries adjust to the new liberalized investment regime. The MAI currently has chosen a method for rollback which requires countries to list any commitment to future liberalization on the exceptions schedule itself. Conducting rollback in this manner means that any commitments to reduce and eliminate non-conforming measures would be made at the time the MAI goes into force. In this respect, the current MAI draft does not have one element of a GATT/WTO framework agreement: the commitment to later rounds of negotiations concerning future liberalization. The MAI, as drafted, has no provisions for successive rounds of negotiations, or for monitoring of signatories' compliance.

Beyond the breadth issue, the MAI differs from the existing WTO agreements on investment in two ways that are bound to affect its consideration as a potential model for a comprehensive WTO investment agreement. The MAI covers not only the liberalization of investment rules, but also investment protection. These provisions and the method used to ensure them in some ways appear to put the interests of investors in a privileged position. The content of the provision on expropriation and adequate

190 MAI Negotiating Text, supra note 8, at Section IX, A, which contains the following provision:

a. Articles X (National Treatment), Y (Most Favored Nation Treatment), [Article 2, . . . and Article . . . ] do not apply to:

(a) any existing non-conforming measure as set out by a contracting Party in its Schedule to Annex A of the Agreement, to the extent that the measure is maintained, continued or promptly reserved in its legal system.

191 The draft text reveals that the negotiators are still considering whether to allow new non-conforming measures to be introduced after the MAI comes into force. See id., at X, (B) and (C). According to an explanatory note for this, there are two views. "[O]ne view is that such a provision might undermine the MAI disciplines to which it applied. The other view is that Part B would make it easier to preserve high standards in the disciplines of the agreement by allowing flexibility to countries in lodging their exceptions." Id.

192 See id. at X, Annex A, 1.

193 These are the other methods that were discussed by the negotiating group. See MAI Commentary (on file with author).
compensation closely resembles the high standard set in NAFTA,\(^\text{194}\) as does the provision on free transfer of funds.\(^\text{195}\) Moreover, the MAI drafters have specified two methods for dispute resolution which are traditional state to state procedure, and the more controversial investor versus host state arbitration. While there is precedent for the investor/state dispute in bilateral investment agreements and NAFTA, including such a method in the WTO might require extensive readjustment of that institution's traditions regarding dispute settlement.

3.2. Trade and Labor

To date, there have been only proposals about how to create trade-related labor rules. This section of the article will therefore concentrate on explaining the three existing proposals, and offering one new one. This analysis is not offered as a prescription for what should be done or considered. Rather, attempting to set out what labor rights rules might look like seems necessary for revealing their amenability to trade-related rule-making. All of the proposals have limitations that arise either from the nature of labor rights themselves or from the institutional efforts that would be required to negotiate and enforce such rules. The proposals will be discussed in order of least complex (although not necessarily the least feasible) to most complex.

The first proposal, espoused by Steve Charnovitz, is to expand ILO competence to include the power to authorize trade controls. Charnovitz argues that the ILO organic act, the Treaty of Ver-

\(^{194}\) Compare NAFTA, supra note 135, at art. 1110, with MAI Negotiating Text, supra note 8, at IV.2. Both require that expropriation be direct or indirect or be by a measure having an equivalent effect. In addition, both give the same exceptions of public purpose and non-discriminating basis, in accordance with due process and accompanied by adequate compensation. The only major element of the expropriation and compensation section that does not match NAFTA's is that there is currently no valuation criteria specified for the MAI's fair market value ("FMV") provision. Most of the countries did not want the kind of explicit options set out in NAFTA. However, in order to avoid possible uncertainty about the definitions of FMV, the Negotiating Group chairman has suggested that an interpretive note could be added so that "in the case of undue delay in the payment of compensation on the part of a Contracting Party, any exchange rate loss arising from this delay should be borne by the host country." MAI Negotiating Text, supra note 8, at n.2.

\(^{195}\) Compare NAFTA, supra note 133, at art. 1109, with MAI Negotiating Text, supra note 8, at IV.4.
sailles,\(^\text{196}\) interpretations of it\(^\text{197}\) and the history of several ILO conventions\(^\text{198}\) suggest that such power could be available. Charnovitz goes on to suggest that if the ILO were to claim such competence, it could focus on drafting at least one new convention on forced labor that committed states not to trade in products made in violation of the convention.\(^\text{199}\) Charnovitz argues that his suggestion is for trade controls on odious products, particularly if pre-approved by the ILO, rather than trade sanctions.

Several limitations exist with regard to this proposal. First, the ILO membership would have to approve any such expansion of its powers. Given the ILO history on trade-related rights to date, this seems unlikely.\(^\text{200}\) Second, even if politically feasible, a system of trade controls, such as a total ban on the odious products, would be a trade measure subject to WTO scrutiny.\(^\text{201}\)

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\(^{196}\) See Treaty of Versailles, supra note 1, at art. 405. The treaty contains no limits for the scope of ILO Conventions.

\(^{197}\) See Charnovitz, supra note 26, at 160-61.

\(^{198}\) See id. at 161-62.

\(^{199}\) See id. at 162.

\(^{200}\) There have already been sharp objections to Director General-Hansenne's proposal that the ILO adopt a declaration of principle identifying core labor rights and a follow-up mechanism to review Member State compliance. See supra note 10.

\(^{201}\) A trade ban would qualify as a quantitative restriction under Art. XI of the GATT. While it is true that a country could unilaterally deploy such a measure, there is always the possibility of a response by the target country. None of the GATT's general exemptions would provide a defense if the target country took its case to the WTO's Dispute Settlement Body. The only Article XX exception that deals with labor is (e), which allows a country to take measures relating to the products of prison labor. While an analogy can be drawn to prison labor from some core rights, for example, forced labor or exploitative child labor, that would not necessarily mean that the state using the ban would prevail. The GATT general exceptions have been construed strictly. See generally Jan Klabbers, Jurisprudence of International Trade Law: Article XX of GATT, 26 J. WORLD TRADE L. 63 (1992). It is, therefore, far from clear that any reasoning from analogy would be accepted when the wording of Article XX(e) itself is precise. A recent interpretation of Article XX by the first WTO Appellate Body panel report also gives another reason to avoid relying upon Art. XX as a defense. In the Reformulated Gas case, the panel found a measure that fit a XX exception to be unavailable because it failed the test of the article's chapeau which states that:

Subject to the requirement that such measures are not applied in a manner which would constitute a means of unjustifiable discrimination between countries where like conditions prevail, or a disguised restriction on trade in goods, nothing in this Agreement shall be con-
Third, the argument assumes that the issue of trade-relatedness has been resolved in favor of those pushing labor rights. As established earlier, there is no consensus on whether labor rights are related to trade. Finally, this proposal would be of true value in protecting labor rights only if it covered all core labor rights. In that instance, the ILO would have to consider redrafting all of the conventions dealing with the core labor rights to equip them with this power. Moreover, this proposal would require either monitoring by the ILO or an expansion of the ILO's system for reviewing complaints about Freedom of Association.


This suggests that even if an art. XX defense is available, a country must make efforts not to discriminate in how it applies a measure. For the purposes of Charnovitz’s proposal, that would mean that there would have to be some method for verifying all trading countries that used forced labor so as to apply the ban appropriately.

In this light, it is interesting to note the ILO’s decision to consider at this year’s International Labor Conference setting up a “follow-up” mechanism to check whether countries are providing the core labor rights. See supra note 10. It is not clear whether this would actually be monitoring by the ILO, it may be a complaint procedure. See infra note 204.

There is reason to believe that the proposed follow-up supervision, currently being proposed by Director-General Hansenne, is based on his 1997 report suggestion that the Freedom of Association process be expanded. If a declaration of principles establishing core labor rights was adopted, which required that all ILO Member states had to adhere to the rights as a membership obligation, then review could be done as it is under the Freedom of Association process.

Under this special procedure, governments or workers’ and employers’ organizations may submit complaints concerning violations of trade union rights by States, irrespective of whether or not they have ratified the Conventions on freedom of association. These complaints are examined by the Committee on Freedom of Association, a tripartite body of the Governing Body with an independent Chairperson. The Committee carries out a preliminary examination of the complaints taking into account the observations submitted by the governments. It may recommend to the Governing Body, as appropriate: that a case requires no further examination; that it should draw the attention of the government concerned to the problems that have been identified and invite it to resolve them; or attempt to obtain the agreement of the government concerned for the case to be referred to the Fact-Finding and Conciliation Commission, which would be a much more cumbersome procedure which is used sparingly.

1997 Director-General Report, supra note 7, at 9.
The second proposal, suggested by one country, various scholars, and international labor unions, has been to establish a collaborative ILO/WTO process. Not all of the proposals are exactly the same. What follows is a summary of the major elements of the proposals. The first ILO/WTO collaboration proposal would involve the ILO and WTO acting together as the screening body for complaints about violations of core labor rights. If the complaint process used by the ILO/WTO Joint Advisory Committee leads to the conclusion that there were violations, the Joint Advisory Committee would ultimately make recommendations to the WTO Council for consideration of possible trade measures. A second variation on this scheme, sug-

Director-General Hansenne believes that such a procedure could be effective. In describing the Freedom of Association process, he notes the following:

Since it was set up in 1951, the Committee has examined more than 1,900 cases, which has enabled it to build up a very full body of principles on freedom of association and collective bargaining, based on the provisions of the ILO Constitution and the relevant Conventions, Recommendations and resolutions, and to take action which, even in the eyes of the outside world, is considered "reasonably effective."

Id.

Even if the Freedom of Association process were expanded to cover core rights by the ILO, it would not actually provide a way of verifying, for the purposes of applying a trade ban, which countries were not in compliance. This kind of process relies on parties submitting complaints rather than monitoring. See OECD STUDY, supra note 44, at 158-60, which contains the following criticisms of the ILO Freedom of Association process: (1) since the system is complaint driven, it does not reach countries where unions have no power to complain; (2) the Freedom of Association Committee does not properly distinguish between major and minor problems; and (3) even if the Committee makes findings, it does not publicize them widely.


207 See Leary, supra note 7, at 202-03 (describing the proposal by the International Confederation of Free Trade Unions ("ICFTU"), the World Confederation of Labour ("WCL"), and the European Trade Union Conference ("ETUC")).

208 The labor union proposal does not contemplate that trade sanctions would be the first response. Instead, if violations were found, the Joint Advisory Committee would be charged with recommending measures to be taken within a certain time frame. Only if the country failed to take action would trade sanctions be applied. Id. (quoting the ICFTU, WCL and ETUC proposal).
gusted by a 1995 ILO Working Paper on “The Social Dimensions of World Trade,”\(^{209}\) argues that adhering to core labor rights could be adopted as membership requirements for the WTO. If a WTO member then violated these rights it would be subject to dispute settlement under Art. XXIII of the GATT under the concept of nullification and impairment.\(^{210}\) A third variation on the collaborative idea is based on using the WTO’s Dispute Settlement Understanding (“DSU”). Under this proposal, the ILO would accept complaints (by an ILO or WTO member state or an employers’ or workers’ association from such a state) about “a pattern of gross and persistent practices of labor rights violations.”\(^ {211}\) A joint ILO/WTO committee would then decide on the admissibility of complaints. If found admissible, a complaint would then be submitted to a joint ILO/WTO Dispute Panel which would issue a report. As a final step, an offending state would become subject to an ILO remediation committee established to determine what corrective measures should be taken, a timetable for the state’s response and a timetable for possible sanctions if the state did not comply.\(^ {212}\)

Most, if not all, of these proposals are based on the assumptions that there is a clearly established universe of core labor rights, that there is a consensus on whether labor rights are related enough to trade to command WTO participation, and that ILO and WTO collaboration is politically achievable or practically feasible. As this article suggests, the first two assumptions are far from clear. With regard to ILO/WTO collaboration for such an effort to occur, there would have to be a major shift in the GATT/WTO tradition of standing alone. Although the Uruguay Round ended with suggestions that the WTO coordi-

209 See supra note 7.

210 See GATT, supra note 2, at art. XXIII, 1(a); see also Leary, supra note 7, at 194-96. Actually, this is one of the three proposals suggested by the Social Dimensions Report. The other two proposals (1) making low labor standards a subsidy under GATT article XVI; or (2) extending GATT article XX on general exceptions to cover labor rights, were considered ill-founded. Both were objected to because either would allow a WTO Member to make a unilateral determination of when to take action against a trading partner. See Leary, supra note 7, at 202.

211 Id. at 167.

212 See Ehrenberg, supra note 206, at 167-75. Ehrenberg’s proposal for ILO/WTO collaboration tracks all of the major aspects of the DSU System, including panel reports, negative consensus, and appeal (only this is to the ICJ instead of the Appellate Body).
nate with other international organizations, the WTO has not yet done much in this respect.

The two other proposals would give jurisdiction to the WTO rather than the ILO. One possibility would be for the WTO to adopt a list of core rights as general exceptions to GATT obligations. This would require amending Article XX so that products made in violation of core labor rights were treated like products made from prison labor. Another possibility would be the promulgation of a WTO Trade-Related Labor Rights ("TRLR") Agreement linked to trade in goods.\(^\text{213}\) Assuming that any such agreement is ever politically possible, it would focus on establishing the minimum labor standards necessary for fair trade. There is a model for such a treaty in the TRIPS Agreement.\(^\text{214}\) Any TRLR Agreement would have to have a section on minimum standards, which are based upon core labor rights around which a consensus appears to exist, as well as a section on domestic enforcement measures. A TRLR Agreement could be made subject to the existing DSU, as was the TRIPS Agreement. However, in this instance, there is a serious problem created by only states having access to dispute settlement. Workers in a state not providing such rights would have to rely upon other states to pursue their cause.

The WTO-based proposals suffer from many of the problems pointed out with regard to the other proposals. First, they assume that any negotiations would begin with a list of well-defined core labor rights as the minimum standards. The ILO does have conventions on all the core rights, but they would need to be re-drafted from a WTO perspective; at least with regard to the prohibition of exploitative child labor, some complete definition would first have to be developed. Second, such proposals would never be considered without some understanding of trade-relatedness which currently does not exist. Finally, it is not clear that such an agreement would really improve labor conditions in errant WTO Member states. A large measure of the TRIPS Agreement's value as a model for future trade-related rule-making remains unrealized. It is one thing to establish minimum interna-

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\(^{213}\) Any such agreement would have to be linked to trade and goods in order to satisfy the basic requirement of trade-relatedness. Besides, the core labor standards are important precisely because they would establish a minimal level of acceptability for products produced by workers.

\(^{214}\) See supra Sections 1.1.1. and note 21 (discussing the TRIPS Agreement).
tional standards, as arguably the TRIPS and any TRLR Agreement could do. It is yet another thing to ensure that the Member states enforce those minimum standards. Since the transition period for TRIPS has not yet run for the developing countries, it is impossible to judge whether they can or will comply. Thorough compliance under TRIPS may not be achieved unless other states make frequent use of the WTO's dispute settlement system. 216

4. Disputed Goals/Gains/Institutions

4.1. Whose Goals?

The actors in the process of international rule-making are many: governments, inter-governmental organizations, regional organizations and economic integration arrangements, non-governmental organizations and interest groups, the affected constituencies, and scholars. States, behaving as unitary actors and acting strategically, are not the only, or even necessarily, the driving force behind rule-making. The ongoing debate regarding linkages is symptomatic of a world having to come to grips with "globalization and its discontents." While institutions provide a forum in which rule-making takes place, the cooperation and coordination within that institution and its traditions and/or process for rule-making change the nature of rules adopted. Moreover, as the process of rule-making proceeds, through the consensus levels suggested above, the goals of some if not all of the actors can change. Given the nature of the arguments for

215 See TRIPS Agreement, supra note 3, at arts. 65-66. The developing countries and countries in transition from a centrally planned economy were given five years from the time the WTO Agreement went into effect (1995) to meet TRIPS obligations. See id. art. 65.2. Least developed countries were given eleven years. See id. art. 66.

216 In the earliest tests of developing country compliance, the United States brought cases under the DSU against both India and Pakistan for their failure to set up "mail boxes" during the TRIPS transition period. The mail boxes, to receive patent applications, were required because under TRIPS art. 65(4), developing countries were given an additional five year period to extend patent protection to areas of technology that had been previously unpatentable under their laws. India lost before the dispute settlement panel and appealed.


218 See Langille, supra note 7, at 29.
linkage and the wide variety of linkages being argued for such as trade and environment, trade and labor rights, trade and investment, trade and competition law, trade and anti-corruption the goals of some groups will be altered by the linkages ultimately accepted\(^\text{219}\) for trade-related rule-making and acted upon. It is simplistic to argue that developed countries alone are pushing certain agendas only for the strategic advantage of protectionism, although, both trade and labor rights and trade and investment do qualify, in some aspects, as developed-country issues in this respect. Characterizing the advocacy being done for linkage and trade-related rule-making in such a narrow fashion, however, requires one to ignore the human rights concerns many groups have

\(^{219}\) An illustration of this came from the OECD's process for negotiating the MAI. After a text on the core investment rights and protections was drafted, the OECD consulted with non-governmental organizations, particularly environmental groups. This interaction led the MAI Negotiating Groups to consider some of the issues they raised about linkage. The MAI draft text now contains two alternative proposals on "Not Lowering Standards" which read as follows:

**Alternative 1**

The Parties recognise that it is inappropriate to encourage investment by lowering [domestic] health, safety or environmental [standards] [measures] or relaxing [domestic] [core] labour standards. Accordingly, a Party should not waive or otherwise derogate from, or offer to waive or otherwise derogate from, such [standards] [measures] as an encouragement for the establishment, acquisition, expansion or retention in its territory of an investment of an investor. If a Party considers that another Party has offered such an encouragement, it may request consultations with the other Party and the two Parties shall consult with a view to avoiding any such encouragement.

**Alternative 2**

A Contracting Party [shall] [should] not waive or otherwise derogate from, or offer to waive or otherwise derogate from [domestic] health, safety or environmental [measures] [standards] or [domestic] [core] labour standards as an encouragement for the establishment, acquisition, expansion or retention of an investment of an investor.

*MAI Negotiating Text, supra* note 8, at 50.

The MAI draft, therefore, has apparently accepted a linkage, at some level, between investment and the environment, and between investment and labor. *See Investment Talks, supra* note 188. In addition, the delegations have been considering an "additional clause" on labor and environment. The form of that clause, if adopted, has not yet been determined. Among those forms officially proposed by delegations, one would involve a variation of GATT Art. XX language and another would be based on NAFTA Chapter 11's provision (Art. 1114(1)) on not lowering standards. *See id.*
regarding core labor rights 220 and the developmental interests expressed by non-governmental organizations concerning trade and investment. 221

4.2. What Gains?

What exactly would be the gains to the States and all the other actors of the international community from the creation of international trade-related rules for labor and investment rights? It is not possible to catalogue all of the suggested gains from the two linkages examined in this article. Nevertheless, it is possible to identify some gains from the protection of core labor rights: moral (from the promotion of human dignity by protecting core labor rights); the long term economic interests of the state involved; 222 and legitimacy (for the world trading system as it grapples with the growing arguments that economic gains are not the only value). For investment rights, examples of some gains would be facilitating investment, trade, and business by providing some measure of certainty/stability in the rules (rule coherence); and contributing at some level to the economic growth and potential development for all countries.

4.3. Which Institution?

Given the process-oriented focus of this article, any profitable institutional discussion should be limited to analyzing the existing alternatives. Consequently, what follows will be a short summary of the advantages and disadvantages of the institutions currently in play. In the investment area, the two institutions are the OECD and the WTO. The OECD advantages would appear to be that it has been negotiated by a group of countries with similar interests and goals, which may be able to come up with a coherent set of

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220 See supra nn.26, 119-20 and accompanying text.

221 See Investment Talks, supra note 188 (describing how the MAI negotiating group adopted a provision on Not Lowering Standards (see supra n.219) in response to reactions from environmental groups and labor unions).

222 See Langille, supra note 7, at 39.

There is really no interesting economic argument as to whether it is in a nation’s long-term interest to pursue policies of utilizing child labour, forced labour, or discrimination in the labour market. It is not. The only economic issues here are difficult issues of transition from current conditions to a better world.
rules representing those views. Since the OECD will be a stand-alone treaty, other countries will have the freedom to accede if they believe, or later, obtain evidence that it would be in their best interests. During the drafting process itself, the OECD Secretariat has made efforts to educate non-OECD States about the MAI’s goals and its scope. Since there are no plans to create an institutional structure around the MAI, at least not as currently drafted, it can easily deal with the establishment of a two-track dispute settlement system built around international arbitration.

The advantages of the WTO as the institution for international investment rule-making, is that it is a global organization. Any rules it adopts will represent a wider, if not deeper, consensus. The WTO has the authority to make any agreement part of the membership obligation of the organizations, if the Member states so choose. The GATT/WTO process of rule-making in negotiating rounds creates the possibility of other agenda items that can be traded off to gain an investment agreement or an investment agreement with a particular level of standards. Finally, WTO has had historical experience with drafting framework agreements that have proven successful over time.

The disadvantages of the two institutions involved are reverse images of the advantages of the other. For example, since the MAI is not being negotiated by a global group, any OECD set of rules will not reflect the consideration and potential accommodation of the views of developing countries. Given the limited OECD membership and the content of the MAI, it may have difficulty get-

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223 This has been an issue during the negotiations.

The Parties Group will come into operation when the MAI comes into force. There is still some uncertainty about its character. Some see the MAI as simply a framework of rights and obligations together with a procedure for settlement of disputes. The Parties Group would therefore concentrate on the important task of handling new accessions. Others see the Parties Group as a new institution to act as a forum for debate and for carrying forward a wider policy agenda. In practice, it is probable that its character will evolve to suit the actual future needs of MAI members.

Statement of Nick Griffiths, U.K. Permanent Delegation to the OECD (on file with author).

224 See MAI Negotiating Text, supra note 8 at Section V—Dispute Settlement, State-State Procedures and Investor-State Procedures. The dispute settlement section is still undergoing further elaboration. According to explanatory notes “different options remain in the field of multilateral consultations and scope of dispute settlement.” Id. at n.1.
ting other nations to accede. In the case of the WTO, one perceived disadvantage, but not a necessarily a universally held one, could be that the global membership will adopt a less ambitious set of investment rules. Consequently, liberalization will take longer. The WTO would also have to grapple with what to do with the issue of dispute resolution.225

In the case of trade-labor rights, the two institutions are the ILO and the WTO. It is important to note here that none of the discussions about international competence regarding trade-related labor rights have imagined the ILO going on as it has in the past.226 As a result, the discussions about the ILO’s advantages relate to its inherent strengths. The ILO advantages are that it is an institution devoted to labor issues and the promotion of labor rights. Moreover, the ILO’s tripartite membership structure actually means that labor, through representation by the unions and management, through representation of that group, each has a voice in the negotiations and deliberations of the organization. Both of these aspects together make the institution sensitive to the human rights and commercial aspects of trade-related labor rights.

The WTO may or may not have any advantages acting as the sole competent institution in this area over the ILO. Most of the proposals made for trade-related labor rights involve the WTO and ILO working in some collaborative form.227 The WTO, however, has taken over jurisdiction from another function specific organization, WIPO, for the purposes of developing trade-related rules. As a result, there is precedent for such a step.

The disadvantage of sole ILO jurisdiction appears to be limited powers of ensuring compliance. The ILO tradition of voluntarism has, in the views of many, left core labor rights at substantial risk. Nevertheless, there are equally serious concerns about turning to the WTO, whether it stands alone or acts in some collaborative effort, solely to obtain the rules compliance power that would come from WTO authorized trade sanctions since labor has two aspects (involving human rights and its role as a factor of production). In

225 See supra notes 154-55 and accompanying text.

226 Currently, the constituencies pushing such a view are the most outspoken of the developing countries. See supra note 10. Director-General Hansenne has been signaling his strong belief that some alteration and expansion of the ILO role regarding core labor rights is needed. See id.; see also supra note 204 (discussing the limitations of the most active ILO process).

227 The only exceptions are the Charnovitz proposal, which does raise trade issues, and the TRLR proposal which was made largely to reveal its limits.
the near term it is the ILO which must struggle with linkage. Whatever happens in the next phase of ILO negotiations and discussions the issue of linkage is unlikely to disappear.