

HEINONLINE

Citation: 8 Minn. J. Global Trade 97 1999



Content downloaded/printed from
HeinOnline (<http://heinonline.org>)
Wed Nov 11 17:29:26 2015

- Your use of this HeinOnline PDF indicates your acceptance of HeinOnline's Terms and Conditions of the license agreement available at <http://heinonline.org/HOL/License>
- The search text of this PDF is generated from uncorrected OCR text.
- To obtain permission to use this article beyond the scope of your HeinOnline license, please use:

[https://www.copyright.com/cc/basicSearch.do?
&operation=go&searchType=0
&lastSearch=simple&all=on&titleOrStdNo=1944-0294](https://www.copyright.com/cc/basicSearch.do?&operation=go&searchType=0&lastSearch=simple&all=on&titleOrStdNo=1944-0294)

Notes

The TRIMs Agreement: A Failed Attempt at Investment Liberalization

Paul Civello

The Agreement on Trade-Related Investment Measures¹ (TRIMs Agreement or Agreement) which emerged from the Uruguay Round of Multilateral Trade Negotiations² was the product of a long and contentious negotiating history.³ Yet the result may not have been worth the pains. Indeed, despite the sound of the developed nations' clamor for investment liberalization and the fury of the developing nations' opposition to it, this Agreement may ultimately signify nothing. Two recent controversies involving foreign direct investment⁴ (FDI) in the automobile industries of Brazil and Indonesia⁵ have exposed the inadequacies of the TRIMs Agreement, highlighting the need for more effective protections against host country⁶ restraints on FDI.

1. Agreement on Trade-Related Investment Measures, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS: THE LEGAL TEXTS, GATT Sales No. 1994-4 (1994) [hereinafter TRIMs].

2. See Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Apr. 15, 1994, LEGAL INSTRUMENTS-RESULTS OF THE URUGUAY ROUND vol. 1 (1994), 33 I.L.M. 9 (1994).

3. See generally THE GATT URUGUAY ROUND: A NEGOTIATING HISTORY (1986-1992) (Terence P. Stewart ed., 1995) (discussing at length the negotiations that led to the TRIMs Agreement).

4. Foreign direct investment involves foreign ownership and control—e.g., when a manufacturer operates a facility in a foreign country. It is different from “passive,” or “portfolio,” investment in which a foreign investor may own equity in a company, but exercises no control over it. See Jeffery Atik, *Fairness and Managed Foreign Direct Investment*, 32 COLUM. J. TRANSNAT'L L. 1, 2 n.1 (1994).

5. See John Parry & Ed Taylor, *TRIMs: United States Accuses Indonesia, Brazil of Violating TRIMs Obligations*, Int'l Trade Daily (BNA) (Mar. 18, 1997), available in Westlaw, BNA-BTD Database; Mark Felsenthal, *U.S. Launches Section 301 Investigations Against 4 Nations Regarding Cars, Textiles*, Int'l Trade Daily (BNA) (Oct. 3, 1996), available in Westlaw, BNA-BTD Database.

6. Discussions of foreign direct investment distinguish between the “host country” and the “home country.” The former is the country in which the investment is made; the latter is the country from which the investment is controlled.

The reason for the TRIMs Agreement's failure is simple: it does nothing new. Although intended to bring trade-related investment measures (TRIMs) within the General Agreement on Tariffs and Trade⁷ (GATT), the Agreement merely reiterates what was already in GATT, providing no new protections or remedies for foreign investors. Moreover, the Agreement contains no plan or procedural framework for moving toward investment liberalization and shies away from innovation or experimentation. Hardly a "GATT for Investment"⁸ as some had hoped,⁹ the TRIMs Agreement is at best a transitional arrangement that may serve, at least, as a sign that future trade negotiations will have to address FDI. Other FDI regimes and proposals, however, offer more hope for global investment liberalization.

This Note will examine the TRIMs Agreement and its ineffectiveness in moving toward investment liberalization. Part I will outline justifications for and arguments against trade-related investment measures, review the negotiating history of the TRIMs Agreement, and analyze its main features. Part II will focus on the recent controversies over the national car programs of Brazil and Indonesia, demonstrating that the Agreement fails to prevent or remedy the TRIMs these programs impose. Part III will look at one alternative arrangement that shows greater promise in bringing about global investment liberalization: the Organisation for Economic Co-operation and Development's proposed Multilateral Agreement on Investment.

For example, in the case of the General Motors facilities in Brazil, discussed *infra* Part II.B., Brazil is the host country and the United States is the home country. See Atik, *supra* note 4, at 2 n.1.

7. General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A-11, T.I.A.S. 1700, 55 U.N.T.S. 194 [hereinafter GATT]. GATT 1947 was incorporated into the 1994 World Trade Organization Agreement. See Marrakesh Agreement Establishing the World Trade Organization, *supra* note 1, at 405.

8. See generally Paul M. Goldberg & Charles P. Kindleberger, *Toward a GATT for Investment: A Proposal for Supervision of the International Corporation*, 2 LAW & POL'Y INT'L BUS. 295 (1970) (proposing a GATT-like treaty for FDI).

9. See Patrick Low & Arvind Subramanian, *TRIMs in the Uruguay Round: An Unfinished Business?*, presented at The Uruguay Round and the Developing Economies, A World Bank Conference, Jan. 26-27, 1995, at 5. The United States, which proposed the original negotiating agenda for the TRIMs Agreement, had hoped for such a "GATT for investment." *Id.*

I. HISTORY OF TRIMs AND THE TRIMs AGREEMENT

A. THEORY OF TRADE-RELATED INVESTMENT MEASURES

No provision in GATT prohibits governments from regulating foreign direct investment.¹⁰ Regulations on investment, however, often have trade-distorting effects. By restricting FDI or providing incentives to foreign corporations to invest, governments of host countries can affect trade flows or competitive relationships.¹¹ Such regulations, or TRIMs, take many forms: local content requirements mandating the use of domestically produced products, local equity requirements affecting ownership, foreign exchange restrictions, and export or "trade-balancing" requirements.¹²

Historically, TRIMs have been employed primarily by developing countries, particularly those with abundant natural resources and large labor pools, as a means of extracting concessions from foreign-owned multinational corporations that want to open and operate subsidiaries within their territories.¹³ Local content requirements, for example, can force multinationals to use domestically-produced raw materials and inputs, thereby promoting and protecting domestic industry. Developing host countries have also used TRIMs, in the form of incentives, to enhance regional development, industrialization, export expansion, and technology transfer.¹⁴

The multinationals, based largely in the United States, Europe, and Japan, have historically opposed TRIMs, for these corporations would like to reap the benefits of direct investment in developing nations without being subjected to countervailing

10. See Atik, *supra* note 4, at 1, 6.

11. See Edward M. Graham & Paul R. Krugman, *Trade-Related Investment Measures*, in *COMPLETING THE URUGUAY ROUND: A RESULTS-ORIENTED APPROACH TO THE GATT TRADE NEGOTIATIONS* 147, 147 (Jeffrey J. Schott ed., 1990).

12. See Catherine Curtiss & Kathryn Cameron Atkinson, *The United States-Latin American Trade Laws*, 21 N.C. J. INT'L L. & COM. REG. 111, 127 (1995). Other TRIMs include export performance requirements, foreign exchange balancing requirements, domestic sales requirements, manufacturing requirements, manufacturing limitations, technology transfer requirements, remittance restrictions, licensing requirements, and product mandating requirements. See Low & Subramanian, *supra* note 9, at 4.

13. See Low & Subramanian, *supra* note 9, at 3. See also Graham & Krugman, *supra* note 11, at 149 (discussing TRIMs as a means of extracting surplus from multinationals).

14. See Low & Subramanian, *supra* note 9, at 7.

charges or restrictions.¹⁵ They desire access to the raw materials often found in developing nations, as well as the low cost production that such access and a large labor pool assure.¹⁶ The multinationals may also want market access: FDI can be a means of "tariff-jumping," a way of entering a market without having to surmount a tariff barrier.¹⁷

Yet the arguments on both sides of the TRIMs debate are grounded in deeper soil than short-term self-interest—namely, in competing economic theories and politics. The classic theoretical dichotomy between protectionism and free trade is broad enough to encompass TRIMs, for TRIMs are, in effect, protectionism applied to direct investment.¹⁸ Developing nations have embraced protectionism because they see it as necessary to counterbalance the economic power of the large multinational corporations.¹⁹ Both TRIMs and multinationals are inherently trade-distorting, the protectionist argument holds, and therefore the developing host countries must use the former to neutralize the power of the latter.²⁰

The multinationals and their developed home countries have advanced the opposing free trade argument that trade barriers, however localized, hurt everyone economically.²¹ Trade barriers, including TRIMs, are ultimately "welfare deteriorating," even for those nations erecting them.²² Despite the short-term benefits outlined above, host nations limit their own growth and development by restricting or distorting FDI. Moreover, free trade advocates contend, if all nations were to impose protectionist policies the world economy would suffer. As has

15. Needless to say, the home countries of the multinationals support their corporations' opposition to TRIMs. The United States, the largest home country of multinational corporations, has been the primary opponent of TRIMs over the years. See Graham & Krugman, *supra* note 11, at 147.

16. See Djisman Simandjuntak, *Scope of the Trading System: Agreement on Trade-Related Investment Measures*, presented at Uruguay Round Agreements from an Asia-Pacific Perspective, George Washington University, Aug. 1-3, 1994, at 9.

17. See Low & Subramanian, *supra* note 9, at 13; see also Atik, *supra* note 4, at 2 (noting that FDI can provide a mechanism to thwart trade protectionism and provide alternate means of access to host country markets).

18. See Graham & Krugman, *supra* note 11, at 148. "TRIMs may be viewed as back-door mercantilist policies that evade existing disciplines on such policies." *Id.*

19. See *id.* at 148-49.

20. See *id.*

21. "[T]here is a standard GATT-style argument that says that countries should, in the name of the collective interest, deny themselves the right to impose TRIMs." *Id.* at 150.

22. See Low & Subramanian, *supra* note 9, at 6.

been aptly phrased, "[t]he damage done by TRIMs is . . . subtle and, like lead poisoning, cumulative."²³

Politics has also played a significant role in the debate. Sovereignty is a sensitive issue, and many nations, especially those with a history of being colonized²⁴ or with a powerful and perhaps overbearing neighbor,²⁵ feel that unrestricted FDI would threaten their independence.²⁶ As a means of regulating FDI, then, TRIMs have the correlative effect of asserting national sovereignty and pride.

The developed nations have had a political agenda as well. Multinational corporations, with direct investments in several nations around the globe, tend to preserve economic and political stability as an adjunct to their operations.²⁷ Economic self-interest, combined with political power over their home country governments, promotes diplomacy and international cooperation.²⁸ Multinational corporations and developed nations thus advocate greater investment liberalization, including the removal of TRIMs, as a means of furthering political stability and, ultimately, economic prosperity.

B. CANADA'S FOREIGN INVESTMENT REVIEW ACT

It may seem odd that Canada, a developed nation that is home to a substantial number of multinational corporations,²⁹ would pass a TRIMs-laden statute, and that this statute would provide the impetus for bringing TRIMs to the fore of GATT negotiations. But because of its proximity to the United States,

23. Graham & Krugman, *supra* note 11, at 159.

24. The recent crisis in Indonesia has provided at least one example of the threat to national independence many developing nations feel from FDI. The son of former Indonesian President Suharto, Hutomo "Tommy" Mandala Putra, called the recent IMF agreement with Indonesia a form of "neocolonialism." The agreement revoked many of the benefits the Indonesian government had bestowed on Tommy's automobile manufacturing company and loosened restraints on FDI. See *Suharto's Son Calls Accord with IMF "Neocolonialism,"* ASIAN ECONOMIC NEWS, Jan. 19, 1998, available in Westlaw, AECON Database.

25. Canada comes immediately to mind. See *infra* note 30 and accompanying text.

26. See generally MARGARET M. PEARSON, JOINT VENTURES IN THE PEOPLE'S REPUBLIC OF CHINA: THE CONTROL OF FOREIGN DIRECT INVESTMENT UNDER SOCIALISM 9-10 (1991) (discussing the view of some Marxists that FDI is a means of neocolonialism).

27. See Atik, *supra* note 4, at 7 n.26.

28. See, e.g., *id.* at 17 (attributing the success of the European Union on the political links between the member nations).

29. See *id.* at 20 n.95.

Canada has long been highly sensitive to FDI.³⁰ Canada's Foreign Investment Review Act³¹ (FIRA) prompted the United States to file a complaint under GATT Article XXIII³² in 1982. The subsequent panel decision that FIRA violated Article III:4 of GATT³³ galvanized the developed nations and spurred negotiations toward the TRIMs Agreement.³⁴

The Canadian Parliament enacted FIRA on December 12, 1973 in order to ensure that businesses in Canada established or acquired by foreigners would be of "significant benefit to Canada."³⁵ Only after such a finding by a parade of government agencies, commissioners, and ministers, as well as a final determination by the Governor in Council that, yes, the business was of significant benefit, would a foreign-owned business be allowed to begin or continue operations.³⁶ FIRA listed five factors that the Agency would consider in making its determination, one of which adverted to local content and export performance requirements: "the effect [of the foreign business] . . . on the utilization of parts, components and services produced in Canada, and on exports from Canada."³⁷

30. See *id.* at 6. Indeed, Canada is sensitive to any incursion by the United States. The latest fear stems from the OECD's Multilateral Agreement on Investment, a proposal for open FDI discussed *infra*, which some Canadian officials fear will result in American pop culture inundating Canada and obliterating Canadian culture. See Rosanna Tamburri, *Canada Considers New Stand Against American Culture*, THE WALL ST. J., Feb. 4, 1998 at A18.

31. Foreign Investment Review Act, S.C., ch. 46 (1973-74) (Can.) [hereinafter FIRA].

32. See *infra* note 46 and accompanying text.

33. See *infra* note 41 and accompanying text.

34. See Canada—Administration of the Foreign Investment Review Act, Feb. 7, 1984, 30 B.I.S.D. 157 (1984) [hereinafter FIRA Panel Report].

35. FIRA, *supra* note 31, § 2(1). FIRA's statement of purpose posited that "the ability of Canadians to maintain effective control over their economic environment is a matter of national concern." *Id.* The Act, however, did not say why this ability should be "a matter of national concern," but it most surely had more to do with national pride than economics. See *supra* note 30 and accompanying text.

36. FIRA § 7(1) established a Foreign Investment Review Agency "to advise and assist the Minister in connection with the administration of this Act." FIRA, *supra* note 31, § 7(1). It also provided for a Commissioner of the Agency who would respond to the Minister. See *id.* § 7(2). The Minister in turn would report to the Governor in Council whether the foreign-owned business benefited Canada and therefore should be allowed. See *id.* §§ 10, 11. The Governor in Council would then make the final determination and issue an order. See *id.* § 12.

37. *Id.* § 2(2)(a). Section 2(2) of FIRA lists the five factors as follows:

(a) the effect of the acquisition or establishment on the level and nature of economic activity in Canada, including, without limiting the generality of the foregoing, the effect on employment, on resource processing, on the utilization

FIRA permitted, but did not require, foreign investors to submit "written undertakings" outlining their business plan and, presumably, demonstrating how their business would be of "significant benefit to Canada."³⁸ These undertakings became routine and consisted mainly of three types: purchase undertakings, manufacturing undertakings, and export undertakings.³⁹ While submissions were optional, they became legally binding on the business once the Canadian government approved the proposed investment.⁴⁰

In its complaint, the United States argued that the purchase and manufacturing undertakings violated GATT Articles III:4,⁴¹ III:5,⁴² XI:1,⁴³ and XVII:1(c).⁴⁴ The United States further contended that the export undertakings also violated Ar-

of parts, components and services produced in Canada, and on exports from Canada;

(b) the degree and significance of participation by Canadians in the business enterprise or new business and in any industry or industries in Canada of which the business enterprise or new business forms or would form a part;

(c) the effect of the acquisition or establishment on productivity, industrial efficiency, technological development, product innovation and product variety in Canada;

(d) the effect of the acquisition or establishment on competition within any industry or industries in Canada; and

(e) the compatibility of the acquisition or establishment with national industrial and economic policies, taking into consideration industrial and economic policy objectives enunciated by the government or legislature of any province likely to be significantly affected by the acquisition or establishment. *Id.* § 2(2).

38. *Id.* § 9.

39. See FIRA Panel Report, *supra* note 34, at 143-44.

40. See FIRA, *supra* note 31, §§ 19-21.

41. See FIRA Panel Report, *supra* note 34, at 146. Article III of GATT is the Agreement's "national treatment" provision. Article III:4 prohibits non-tax measures that discriminate against imported goods after they have cleared customs. It reads in relevant part:

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

GATT, *supra* note 7, art. III:4.

42. Article III:5 proscribes local content requirements. It reads in part:

No contracting party shall establish or maintain any internal quantitative regulation relating to the mixture, processing or use of products in specified amounts or proportions which requires, directly or indirectly, that any specified amount or proportion of any product which is the subject of the regulation must be supplied from domestic sources.

Id. art. III:5.

43. See FIRA Panel Report, *supra* note 34, at 146. Article XI is GATT's general prohibition against quantitative restrictions—that is, non-tax barriers applied to imported goods at the border. Article XI:1 reads:

article XVII:1(c) of GATT⁴⁵ and that all these violations constituted nullification and impairment under GATT Article XXIII.⁴⁶ Canada countered that the purchase undertakings, since voluntary, were not “laws, regulations and requirements” within the meaning of Article III:4.⁴⁷ Rather, they constituted private contracts between individual corporations and the Canadian government.⁴⁸ Finally, Canada asserted in the alternative that the undertakings fell under the exception of Article XX:(d).⁴⁹

The GATT Panel ruled that FIRA indeed violated GATT Article III:4.⁵⁰ It dismissed Canada’s contention that the purchase undertakings were not “requirements” and held that undertakings obligating a business to purchase products of Canadian origin constituted less favorable treatment to imported like products.⁵¹ The Panel, however, ruled that the purchase undertakings did not violate Article XI:1, for they did not prevent the importation of goods but only discriminated against them once

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

GATT, *supra* note 7, art. XI:1.

44. See FIRA Panel Report, *supra* note 34, at 146. Article XVII refers in general to state-trading enterprises, those businesses established and run by the government. Article XVII:1(c) prevents governments from prohibiting any enterprise within its jurisdiction from behaving toward goods in a non-discriminatory manner and with regard for commercial considerations. See GATT, *supra* note 7, art. XVII:1(c).

45. See FIRA Panel Report, *supra* note 34, at 154-55. See also *supra* note 44 and accompanying text (describing Article XVII:1(c) of GATT).

46. See FIRA Panel Report, *supra* note 34, at 146. Article XXIII of GATT is the Agreement’s dispute resolution provision. Violations of the Agreement are considered to involve the “nullification or impairment” of “any benefit accruing to [a contracting party] directly or indirectly under this Agreement” or “the attainment of any objective of the Agreement.” GATT, *supra* note 7, art. XXIII:1.

47. See FIRA Panel Report, *supra* note 34, at 148. See also *supra* note 41 and accompanying text (describing Article III:4 of GATT).

48. See FIRA Panel Report, *supra* note 34, at 149.

49. See *id.* at 155. GATT Article XX contains the general exceptions to the GATT disciplines. The Canadian government was invoking that part of Article XX:(d) which reads:

[N]othing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures: . . . necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement.

GATT, *supra* note 7, art. XX:(d).

50. See FIRA Panel Report, *supra* note 34, at 158-62.

51. See *id.* at 158-59.

imported.⁵² The Panel also found that the export undertakings were not inconsistent with Article XVII:1(c),⁵³ and that Articles III:5 and XX:(d) were inapplicable.⁵⁴

Two aspects of the FIRA controversy stand out. First, from the United States and the developed nations' standpoint, GATT was only partially successful. It disposed of the most egregious TRIM, the local content requirement euphemized as a purchase undertaking. Yet it failed to defeat the export performance requirement, the "export undertaking."

Second, the rift between the developed and developing nations over FDI and TRIMs was brought to the forefront when Argentina intervened in the dispute, ostensibly to protect the interests of developing countries. Argentina asked the Panel to distinguish between the purchase and export undertakings, which it felt fell under GATT competence, and FIRA, which as national legislation did not.⁵⁵ Furthermore, Argentina noted that the FIRA dispute involved developed nations, and therefore the arguments asserted against the Canadian Act did not necessarily apply to similar protective legislation adopted by developing nations.⁵⁶ The Panel acknowledged the special concessions granted to developing countries under GATT, citing in particular Article XVIII:C,⁵⁷ but declined to rule on the applicability of its decision to developing countries.⁵⁸

C. NEGOTIATING HISTORY OF THE TRIMS AGREEMENT

The FIRA controversy and subsequent Panel Report brought TRIMs to the fore of GATT negotiations and exposed the need for clarifying GATT's relationship to investment meas-

52. See *id.* at 162-63. In making this distinction, the Panel followed the accepted interpretation that Article XI applies to the *importation* of goods and Article III to *imported* goods.

53. See *id.* at 163.

54. See *id.* at 162, 164-65.

55. See *id.* at 157. By arguing that FIRA itself remained outside of GATT, Argentina was reasserting the importance of national sovereignty to developing nations. See *supra* notes 24, 25, 26 and accompanying text.

56. See FIRA Panel Report, *supra* note 34, at 157.

57. Article XVIII:C provides "provisions and procedures" that permit developing nations to impose measures inconsistent with GATT in order "to promote the establishment of a particular industry with a view to raising the general standard of living of its people." GATT, *supra* note 7, art. XVIII:C. To fall under Article XVIII:C's protection, a developing nation must have an economy "which can only support low standards of living and is in the early stages of development." *Id.* art. XVIII:4(a).

58. See FIRA Panel Report, *supra* note 34, at 158.

ures.⁵⁹ The controversy also signaled a new direction for free trade analysis, one that had been taking shape since the 1960s.⁶⁰ Rather than focusing on reducing tariff and non-tariff barriers to free trade among nations, barriers which GATT had been quite successful in removing,⁶¹ trade analysts began to turn their attention to the trade-distorting effects of national trade policies.⁶²

This shift in focus was tied to historical developments. With the recovery of Europe and Japan from World War II and the reemergence of their industrial economies, the economic problems of developing nations assumed center stage.⁶³ At first, much of the concern centered on those nations' balance of payment problems, but with the economic crises of the 1970s the entire structure of different nations' economies came under scrutiny, including trade policies.⁶⁴ Even before FIRA, then, trade policy had been identified as a key issue for trade negotiations in the 1980s.

The United States was the primary advocate for bringing TRIMs within GATT,⁶⁵ formally broaching the subject at a meeting of the Consultative Group of 18 in 1981.⁶⁶ After the FIRA controversy and Panel Report in 1984, the United States and other developed nations pushed harder for multilateral negotiations on TRIMs. TRIMs thus became a central feature of the Uruguay Round.

The Negotiating Group on TRIMs convened in March 1987 with a mandate to clarify GATT's relationship to investment measures—essentially, to clarify the FIRA ruling.⁶⁷ Three stages of negotiations were proposed: first, discussions would

59. See Michael Hart, *A Multilateral Agreement on Foreign Direct Investment: Why Now?*, in INVESTMENT RULES FOR THE GLOBAL ECONOMY: ENHANCING ACCESS TO MARKETS 36, 70 (Pierre Sauvé & Daniel Schwanen eds., 1996); Todd S. Shenkin, *Trade-Related Investment Measures in Bilateral Investment Treaties and the GATT: Moving Toward a Multilateral Investment Treaty*, 55 U. PITT. L. REV. 541, 564 (1994).

60. See Stewart, *supra* note 3, at 102.

61. See Atik, *supra* note 4, at 9.

62. See Stewart, *supra* note 3, at 102.

63. See *id.*

64. See *id.*

65. See Low & Subramanian, *supra* note 9, at 1 n.2.

66. See Graham & Krugman, *supra* note 11, at 150.

67. See Stewart, *supra* note 3, at 102-03. The mandate read: "Following an examination of the operation of GATT Articles related to the trade restrictive and distorting effects of investment measures, negotiations should elaborate, as appropriate, further provisions that may be necessary to avoid such adverse effects on trade." *Id.* at 103.

elucidate the relationship of GATT articles to TRIMs; second, contracting parties would propose new provisions regarding TRIMs not covered by GATT articles; and third, parties would agree on new directions the negotiations should take as a result of the Group's inquiry.⁶⁸ The Negotiating Group held twenty-three formal meetings, as well as numerous informal ones, and produced several drafts of an agreement.⁶⁹

From the start, the parties divided along the lines of developed and developing nations, each side with its own agenda.⁷⁰ The developed nations (the United States, Europe, and Japan) wanted investment measures to be unequivocally incorporated within GATT. They felt that GATT as it stood inadequately addressed TRIMs and trade policy, and that the TRIMs Agreement should extend GATT jurisdiction to cover both.⁷¹ Furthermore, the developed nations advocated explicit prohibitions as the means of eradicating TRIMs.⁷²

The developing nations of Asia, Africa, and Latin America, on the other hand, argued that investment measures fell outside GATT competence and that they should remain outside.⁷³ After all, they reasoned, GATT addressed trade in goods only, not investment; therefore, only the trade-distorting effects of TRIMs, not the investment measures themselves, could be brought under GATT discipline.⁷⁴ Moreover, they contended that GATT sufficiently contemplated those effects, and thus no explicit prohibitions were necessary.⁷⁵ Instead the developing nations advocated an "effects test" that would be based on empirical evidence of trade distortion.⁷⁶ They also insisted on a transition period for implementing any provisions of an agreement that might apply to developing countries.⁷⁷

D. THE TRIMS AGREEMENT

The final draft of the TRIMs Agreement was a compromise, a modest attempt to address what had become a highly conten-

68. *See id.*

69. *See id.*

70. *See id.*

71. *See id.* at 104.

72. *See id.* at 105.

73. *See id.* at 104.

74. *See id.*

75. *See id.* at 104-05.

76. *See id.* at 105.

77. *See id.*

tious trade issue.⁷⁸ The polarization of the negotiating parties compelled each side to make concessions.⁷⁹ The developing nations succeeded in limiting the scope of the Agreement to trade in goods only and in incorporating a transition period, but the developed nations were able to set out explicit prohibitions against certain investment measures. However, only the first stage of negotiations,⁸⁰ that which sought to clarify the relationship between GATT and investment measures, resulted in substantive provisions in the Agreement itself. There were no new provisions regarding investment measures that did not already fall under GATT, and no new directions for negotiations were proposed with any specificity.⁸¹

The purpose of the TRIMs Agreement, as stated in the preamble, is "to elaborate . . . further provisions [beyond GATT] that may be necessary to avoid [the] adverse effects [of TRIMs] on trade" and "to promote the expansion and liberalisation of world trade and to facilitate investment across international frontiers so as to increase the economic growth of all trading partners, particularly developing country Members, while ensuring free competition."⁸² The "further provisions" are contained in Article 2 of the Agreement, which requires that all TRIMs be consistent with GATT Articles III and XI.⁸³ An annex appended to the Agreement provides an "Illustrative List" of investment measures that are deemed inconsistent with GATT, including the local content requirements that Canada tried to impose via the purchase undertakings sanctioned under FIRA.⁸⁴

78. See Low & Subramanian, *supra* note 9, at 1.

79. See Jonathan Startup, *An Agenda for International Investment*, in THE NEW WORLD TRADING SYSTEM 189, 189 (Organisation for Economic Co-operation and Development ed., 1994).

80. See *supra* note 68 and accompanying text.

81. Article 9 provides for a review of the Agreement within five years of its implementation and recommends that the review consider new proposals that might complement the Agreement's provisions; however, the Agreement proposes nothing specific. See TRIMs, *supra* note 1, art. 9. See *infra* note 89 and accompanying text.

82. TRIMs, *supra* note 1, Preamble.

83. Article 2.1 reads: "Without prejudice to other rights and obligations under GATT 1994, No Member shall apply any TRIM that is inconsistent with the provisions of Article III or Article XI of GATT 1994." *Id.* art. 2.1. One can legitimately question whether these provisions go "further" than GATT. After all, they really only incorporate GATT Articles III and XI into the Agreement. See *infra* note 111 and accompanying text.

84. The Annex to the TRIMs Agreement states in relevant part:

TRIMs that are inconsistent with the obligation of national treatment provided for in paragraph 4 of Article III of GATT 1994 include those which . . . require . . . the purchase or use by an enterprise of products

The TRIMS Agreement contains several other provisions, many of which merely reaffirm GATT disciplines and reapply them to TRIMs: transparency requirements, exceptions, and dispute settlement procedures.⁸⁵ The Agreement also requires notification to the Council for Trade in Goods of all prohibited TRIMs in existence at the time the Agreement goes into effect and supplies a timetable for their gradual elimination.⁸⁶ The latter stipulates that developed nations must eliminate prohibited TRIMs within two years, developing nations within five years, and "least-developed" nations within seven.⁸⁷ The Agreement also establishes a Committee on Trade-Related Investment Measures.⁸⁸

Perhaps the most unassuming provision in the TRIMS Agreement is the most telling. Article 9 requires the Council for Trade in Goods to review the Agreement within five years to "consider whether the Agreement should be complemented with provisions on investment policy and competition policy."⁸⁹ It supplies no plan or procedure for doing so. As if aware that it should move further into new territory, yet unwilling or unable to do so, the TRIMS Agreement in effect confesses its shortcomings in Article 9. It articulates its own inefficacy.

of domestic origin or from any domestic source, whether specified in terms of particular products, in terms of volume or value of products, or in terms of a proportion of volume or value of its local production.

Id. Annex 1(a).

85. Article 6 reaffirms the transparency and notification obligations of GATT Article X. *See id.* art. 6. Article 3 stipulates that all exceptions under GATT apply to the TRIMS Agreement. *See id.* art. 3. Article 8 appropriates GATT's dispute settlement process embodied in GATT Articles XXII, XXIII, and the Dispute Settlement Understanding of the Uruguay Round Agreements. *See id.* art. 8.

86. *See id.* art. 5. Article 5.4 bars from the transitional arrangement all TRIMs introduced within 180 days before the Agreement takes effect. *See id.* art. 5.4. It also prohibits modifying any TRIMs during the transition period that would "increase the degree of inconsistency with the provisions of Article 2" of the TRIMS Agreement. *See id.* Article 5.5 permits applying TRIMs during the transition period to a new enterprise if established enterprises producing like products are already subject to TRIMs, and competition between the new and old enterprises would otherwise be distorted. *See id.* art. 5.5.

87. *See id.* art. 5.2. Article 5.3 provides some flexibility in the timetable. The Council for Trade in Goods may extend the transition period if a developing nation "demonstrates particular difficulties in implementing the provisions of this Agreement." *Id.* art. 5.3.

88. *See id.* art. 7. This Committee is primarily responsible for consulting with member nations and monitoring for the Council for Trade in Goods regarding "the operation and implementation" of the TRIMS Agreement. *Id.*

89. *See id.* art. 9.

II. TRIMS AND AUTOMOBILE CONTROVERSIES

A. TRIMS AND THE AUTO INDUSTRY

It is fitting that the first test of the power and scope of the TRIMs Agreement should involve the automobile industry, a sector long subject to trade and investment regulation.⁹⁰ Local content requirements, import quotas, and voluntary export restraints have been common throughout the industry in both developing and developed nations.⁹¹ Indeed, Japan recently accused the United States of imposing a local content requirement via "de facto coercion" in seeking to get Japanese automakers in America to use more locally-produced parts.⁹²

The reason for the special treatment of the auto industry in trade and investment lies in the industry's importance to a national economy. A nation's auto industry has enormous impact on its employment, gross national product, and tax revenue, among other things. Nations with either incipient or established auto industries tend to be highly protective of them, while at the same time decrying the protectionist measures imposed by other nations which curtail export markets. Ignoring the United States' own questionable automobile industry policies, U.S. Trade Representative Charlene Barshefsky recently declared: "In the light of the importance of the U.S. auto industry to the U.S. economy, eliminating foreign barriers to U.S. exports of autos and auto parts is of vital importance to the industry's economic growth and to U.S. national economic interests."⁹³

Barshefsky's comment came in response to the automobile trade and investment policies of Brazil and Indonesia. On October 1, 1996, the United States launched a Section 301⁹⁴ investigation against those two nations, alleging violations of the

90. See George Kleinfeld & Deborah Wengel, *Foreign Investment*, 31 INT'L LAW. 403, 404-05 (1997). See also Low & Subramanian, *supra* note 9, at 4 (noting that TRIMs tend to be concentrated in particular industries, including the automobile industry).

91. See Low & Subramanian, *supra* note 9, at 4, 39-42, tbl. 3.

92. See U.S. "Coercion" of Japanese Automakers Raises Legal Issues, *MITI Report Charges*, Int'l Trade Daily (BNA), Mar. 31, 1995, available in Westlaw BNA-BTD Database.

93. Felsenthal, *supra* note 5.

94. See Trade Act of 1974 § 301, 19 U.S.C. § 2411 (1994 & Supp. II 1996). Section 301 of the Trade Act of 1974 delegates authority to the Executive Branch—specifically, to the United States Trade Representative under the direction of the President—to take unilateral retaliatory action if it determines that the rights of the United States under a trade agreement are being denied or violated by a foreign nation. *Id.*

TRIMs Agreement.⁹⁵ Subsequently, during a meeting of the Committee on Trade-Related Investment Measures held on March 17, 1997, the United States formally accused Brazil and Indonesia of violating the Agreement.⁹⁶ The European Union and Japan supported the charge.⁹⁷ To date, no WTO Panel has been formed in the Brazilian dispute, and the Indonesian controversy has been resolved by the exigencies of that nation's recent economic crisis. But both nations' policies, the numerous complaints those policies have elicited, and their resolutions expose the ineffectiveness of the TRIMs Agreement and the need for new directions in international investment policy.

B. THE TRIMs AGREEMENT AND BRAZIL'S AUTO REGIME

Brazil has taken a series of measures in recent years that have provoked sharp criticism from developed nations, including doubling the duty on automobile imports in November 1996 and stipulating a tariff increase to 16% in 2000.⁹⁸ But the auto regime that was first revealed in December 1995 and which took effect in February 1996 has fomented the most controversy. It contains two TRIMs: a local content requirement and a trade-balancing regulation. Under the regime, which will remain in place through 1999, auto manufacturers can receive tariff reductions of up to 90% on imported capital goods, between 40% and 80% on imported raw materials, parts, and components, and 50% on imported assembled automobiles.⁹⁹ In order to qualify for these reductions, producers must meet a local content requirement of 60% domestically produced parts in their domestically produced vehicles.¹⁰⁰ They must also maintain a one-to-one ratio of imported to domestic capital goods and imported to domestic raw materials.¹⁰¹ The trade-balancing regulation requires that, in order to qualify for the tariff reductions, a producer may not permit its imports of raw materials and assembled automobiles to exceed its net exports.¹⁰² In addition, its imports of auto parts may not exceed two-thirds of net exports.¹⁰³

95. See Felsenthal, *supra* note 5.

96. See Parry & Taylor, *supra* note 5.

97. See *id.*

98. See *id.*

99. See Kleinfeld & Wengel, *supra* note 90, at 406.

100. See *id.*

101. See *id.*

102. See *id.*

103. See *id.*

The Brazilian government introduced yet another program in December 1996 which also imposed a local content requirement.¹⁰⁴ Ostensibly enacted as an incentive for automobile manufacturers to set up plants in the impoverished northeast region of Brazil, the program eliminates tariffs on auto parts and raw materials if the manufacturers meet a local content requirement of 60%.¹⁰⁵

Japan submitted the first formal complaint against Brazil to the WTO on July 30, 1996, alleging violations of TRIMs Agreement Article 2, GATT Articles I:1, III:4, and XI:1, Agreement on Subsidies and Countervailing Measures (SCM Agreement) Articles 3, 27.2, 27.4, and nonviolation nullification and impairment under GATT Article XXIII:1(b).¹⁰⁶ Shortly thereafter, on August 8, 1996, the United States asked to join the consultations, the first part of the dispute settlement process under GATT.¹⁰⁷ A day later, the United States filed a formal complaint with the WTO which alleged many of the same violations as Japan.¹⁰⁸ The European Union weighed in with a similar com-

104. See Parry & Taylor, *supra* note 5.

105. See *id.* Tariffs on auto parts and raw materials are currently set between 2% and 18%. See *id.*

106. See *Brazil-Certain Automotive Investment Measures, Request for Consultations by Japan*, WTO Doc. WT/DS51/1 (Aug. 6, 1996) (visited Oct. 12, 1998) <<http://www.wto.org>>.

107. See *Brazil-Certain Automotive Investment Measures, Request to Join Consultations, Communication from the United States*, WTO Doc. WT/DS51/4 (Aug. 15, 1996) (visited Oct. 12, 1998) <<http://www.wto.org>> [hereinafter WT/DS51/4]. GATT Article XXIII calls for consultations between disputing parties "with a view to the satisfactory adjustment of the matter." GATT, *supra* note 7, art. XXIII:1. Article 4 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (Dispute Settlement Understanding) supplies the rules governing consultations. Understanding on Rules and Procedures Governing the Settlement of Disputes, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS: THE LEGAL TEXTS [hereinafter DSU]. The United States asked to join the consultations between Japan and Brazil pursuant to Article 4.11 of the DSU, which permits nations with "a substantial trade interest" to intervene in consultations being held between other nations. *Id.* art. 4.11. In its request, the United States alleged that "[a]s a significant exporter of both motor vehicles and auto parts to Brazil" it had a substantial trade interest in the consultations. WT/DS51/4 (Aug. 8, 1996). The United States noted that in 1995 it exported approximately \$850 million worth of cars and parts to Brazil. *Id.*

108. See *Brazil-Certain Measures Affecting Trade and Investment in the Automotive Sector, Request for Consultation by the United States*, WTO Doc. WT/DS52/1 (Aug. 14, 1996) (visited Oct. 12, 1998) <<http://www.wto.org>>.

plaint on May 7, 1997.¹⁰⁹ None of the complaining parties requested the formation of a GATT dispute panel, preferring instead to try to resolve the conflict through negotiations. No panel has been established.

The Brazilian controversy reveals several reasons for the TRIMs Agreement's ineffectiveness in preventing and remedying TRIMs. All stem from the Agreement's glaring unoriginality, its refusal to confront issues regarding investment measures which have not previously been faced. First, the complaints themselves demonstrate that the Agreement is redundant. Each complaint, in addition to alleging violations of TRIMs Article 2, alleges violations of GATT.¹¹⁰ This should not be surprising, since TRIMs Article 2.1 merely prohibits TRIMs that are "inconsistent with the provisions of Article III or Article XI of GATT 1994."¹¹¹ TRIMs Article 2.2 is perhaps more helpful in that it refers to the "Illustrative List" in the Agreement's Annex which gives concrete examples of inconsistent TRIMs.¹¹² The local content requirement and trade-balancing regulation at issue in the Brazilian controversy form part of this list.¹¹³ But such examples of TRIMs are certainly not beyond the ken of the trade experts who are called upon to serve on GATT panels and surely need not be flagged in order to be noticed.

Furthermore, the FIRA Panel has already ruled that local content requirements violate GATT Article III:4.¹¹⁴ Even though *stare decisis* is not as firm a doctrine in GATT proceed-

109. See *Brazil-Certain Measures Affecting Trade and Investment in the Automotive Sector, Request for Consultation by the European Communities*, WTO Doc. WT/DS81/1 (May 20, 1997) (visited Oct. 12, 1998) <<http://www.wto.org>>.

110. See *supra* notes 106-09 and accompanying text.

111. TRIMs, *supra* note 1, art. 2.1.

112. See *id.* art. 2.2.

113. TRIMs Annex 1(a) expressly prohibits local content requirements that are inconsistent with Article III of GATT. It prohibits TRIMs which require "the purchase or use by an enterprise of products of domestic origin or from any domestic source, whether specified in terms of particular products, in terms of volume or value of products, or in terms of a proportion of volume or value of its local production." *Id.* Annex 1(a).

TRIMs Annex 1(b) prohibits trade-balancing regulations that are inconsistent with Article III of GATT. It prohibits TRIMs which require "that an enterprise's purchases or use of imported products be limited to an amount related to the volume or value of local products that it exports." *Id.* Annex 1(b).

TRIMs Annex 2(a) prohibits trade-balancing regulations as inconsistent with Article XI of GATT. It prohibits TRIMs which restrict "the importation by an enterprise of products used in or related to its local production, generally or to an amount related to the volume or value of local production that it exports." *Id.* Annex 2(a).

114. See *supra* note 50 and accompanying text.

ings as in American jurisprudence, precedent still carries great authoritative weight, especially when embodied in a ruling as clear and unambiguous as the FIRA Panel Report.¹¹⁵ True, the issue of trade-balancing did not arise in the FIRA controversy, and the FIRA Panel declined to hold that Canada's purchase undertakings violated GATT Article XI,¹¹⁶ but its refusal to do so should not be construed to mean that Article XI does not protect against trade-balancing regulations. Indeed, the failure to find an Article XI violation in FIRA should be ascribed to the drafters of the United States's complaint rather than to the FIRA Panel. The United States only alleged that the purchase and manufacturing undertakings violated Article XI;¹¹⁷ the export undertakings—an export performance requirement akin to Brazil's trade-balancing regulation and susceptible to challenge under GATT Article XI—were only alleged to violate GATT Article XVII:1(c).¹¹⁸ Brazil's trade-balancing regulation, which links a foreign-owned corporation's imports to its exports, undoubtedly constitutes a quantitative restriction—that is, an import or export restriction applied at the border. As such, it violates GATT Article XI:1's prohibition against quantitative restrictions,¹¹⁹ and therefore does not need to be brought before the WTO under the TRIMs Agreement.

Regardless of whether the developed nations chose to bring complaints against Brazil's local content requirement or trade-balancing regulation under GATT or the TRIMs Agreement (or both, as was the case), the dispute settlement process would have been the same. The TRIMs Agreement is redundant on this point, too. Article 8 of the TRIMs Agreement merely appropriates GATT's dispute settlement mechanism.¹²⁰ It succinctly states that “[t]he provisions of Articles XXII and XXIII of GATT 1994, as elaborated and applied by the Dispute Settlement Understanding, shall apply to consultations and the settlement of disputes under this Agreement.”¹²¹ In the Brazilian controversy, each complaining party brought both violation and nonviolation nullification or impairment actions against Brazil under GATT

115. See JOHN H. JACKSON, *THE WORLD TRADING SYSTEM: LAW AND POLICY OF INTERNATIONAL ECONOMIC RELATIONS* 89-90 (1989).

116. See *supra* note 52 and accompanying text.

117. See *supra* note 43 and accompanying text.

118. See *supra* note 45 and accompanying text.

119. See *supra* note 43 and accompanying text.

120. See TRIMs, *supra* note 1, art. 8.

121. *Id.* See also *supra* note 107 and accompanying text (discussing the provisions on consultations in the Dispute Settlement Understanding).

Article XXIII.¹²² This action, and any subsequent settlement process under the Dispute Settlement Understanding,¹²³ is sufficient to the complainants' ends.

Redundancy is not the TRIMs Agreement's only flaw. The Agreement does nothing beyond recapitulating Articles III, XI, and the dispute settlement process of GATT.¹²⁴ Indeed, in several ways, the TRIMs Agreement may be fighting the last war, a war already won under GATT and the FIRA ruling. Yet the Brazilian controversy cries out for new, innovative approaches to the problem of TRIMs and FDI, and the Agreement offers no response. The global economic changes that have taken place since the mid-1980s require a rethinking of the historic rift between developed and developing countries and their ossified attitudes toward FDI. The Brazilian controversy highlights two aspects of these economic changes and finds the TRIMs Agreement wanting in dealing with them.

First, the TRIMs Agreement fails to address the salient fact that, in today's international economy, developing nations are hurt by TRIMs *between themselves*; the old paradigm that TRIMs benefit developing nations, and the correlative assumption that unrestrained FDI exploits them, no longer holds true.¹²⁵ Developing nations have increasingly sought to attract FDI for all the reasons discussed previously.¹²⁶ FDI inflows into developing nations have increased dramatically in the past fifteen years.¹²⁷ These increases have fueled competition for FDI among the developing nations, sometimes leading to individual nations unilaterally dismantling their previously-imposed TRIMs.¹²⁸

122. See *supra* note 46 and accompanying text. Nullification or impairment under Article XXIII:1(a) involves a violation of GATT obligations. GATT, *supra* note 7, art. XXIII:1(a). Nonviolation nullification or impairment under Article XXIII:1(b) occurs when a nation applies a measure which upsets the competitive relationship or conditions bargained for by two or more nations, even though the measure itself does not violate GATT. *Id.* art. XXIII:1(b).

123. See *supra* note 107 and accompanying text.

124. See *supra* notes 111 and 120 and accompanying text.

125. See *supra* notes 13-14 and accompanying text. See also Daniel Schwanen, *Investment and the Global Economy: Key Issues in Rulemaking*, in INVESTMENT RULES FOR THE GLOBAL ECONOMY: ENHANCING ACCESS TO MARKETS, *supra* note 59, at 1 (noting that most countries formerly suspicious of FDI have now become interested in attracting it).

126. See *supra* note 14 and accompanying text.

127. See Low & Subramanian, *supra* note 9, at 11; Simandjuntak, *supra* note 16, at 7.

128. See Simandjuntak, *supra* note 16, at 7-8.

But TRIMs, of course, can also be used to attract FDI, as Brazil has done in granting tariff reductions for meeting its local content requirements.¹²⁹ Such use over the years has led to inequities between developing nations in their current ability to attract FDI to particular economic sectors. In some cases, it has pitted the interests of one developing nation against those of another, destroying the unified front developing nations have traditionally put forth against the incursions, real or perceived, of developed nations.¹³⁰ The Brazilian controversy provides an example. Argentina, a developing nation that stood up for the interests of other developing nations during the FIRA controversy,¹³¹ strongly protested the Brazilian program.¹³² Argentina had implemented its own auto program in the early 1990s, enacting similar investment measures which combined tax and tariff incentives with local content requirements.¹³³ The foreign automakers attracted by these measures invested in local production facilities and as a result helped Argentina develop a trade surplus in automobiles with Brazil.¹³⁴ The Argentine government viewed Brazil's new regime as a threat to its own program and the success it has had in attracting foreign automobile manufacturers.¹³⁵

In other words, by imposing TRIMs as incentives earlier than Brazil, Argentina now has a tremendous advantage over Brazil in the automotive sector—an advantage it would like to preserve. And the TRIMs Agreement will help Argentina preserve it. In fact, rather than remedying the inequalities between the two nations produced by TRIMs, the TRIMs Agreement exacerbates them. Under the Agreement's phase-out provision, Argentina has five years to remove its TRIMs.¹³⁶ Brazil is barred from imposing any. Foreign automakers already have facilities established in Argentina, and it is unlikely they will pull out even if the Argentine tariff reductions were abrogated. Brazil will have a difficult time achieving parity with Argentina on its own.

129. See *supra* notes 99-100 and 104-05 and accompanying text.

130. See *supra* notes 19-20 and accompanying text.

131. See *supra* notes 55-56 and accompanying text.

132. See Parry & Taylor, *supra* note 5.

133. See Kleinfeld & Wengel, *supra* note 90, at 406.

134. See *id.*

135. See Parry & Taylor, *supra* note 5.

136. See TRIMs, *supra* note 1, art. 5.2. See *supra* note 87 and accompanying text.

The TRIMs Agreement also fails to confront the unequal effects of TRIMs on competitors within an economic sector and the ramifications of those effects for a nation's trade policy. Again, the Brazilian controversy illustrates the point. General Motors and Ford already had substantial facilities in place before the Brazilian program went into effect, and consequently both manufacturers easily qualified for the reduced tariffs.¹³⁷ Reduced tariffs on capital goods, auto parts, and raw materials gave them a price advantage in the Brazilian market for their domestically produced cars, and lower tariffs on assembled cars provided an advantage for their imports.¹³⁸

The U.S. government, however, found itself in a quandary. It felt obliged to lodge a complaint with the WTO in order to preserve the TRIMs Agreement and forestall any further TRIMs that other nations might be tempted to impose.¹³⁹ As U.S. Trade Representative Barshefsky noted, the United States complaint reflected not only the importance of the auto industry, but the importance of "preventing the adoption of similar barriers by other countries around the world."¹⁴⁰ In other words, although some U.S. producers benefitted from the Brazilian TRIMs, others were hurt by them, and TRIMs more broadly applied would have overall negative ramifications for U.S. industry. The Brazilian controversy thus illustrates the distorting effects of TRIMs not only on trade and investment, but also on governmental policies toward trade and investment. The TRIMs Agreement, confined to investment measures that affect trade in goods only, stops short of addressing the important policy issues the Brazilian controversy raises.

C. THE TRIMs AGREEMENT AND INDONESIA'S "PIONEER AUTO PROGRAM"

While the Brazilian auto regime applies to foreign automakers operating facilities in Brazil—Brazil having no indigenous automobile industry—Indonesia's auto regime was

137. See Kleinfeld & Wengel, *supra* note 90, at 406. Volkswagen also had facilities in Brazil. See *id.* Honda, however, did not, and the Japanese auto manufacturer's exports to Brazil plummeted after the Brazilian auto regime went into effect. See *id.* Honda's exports from its U.S. plants fell to 821 over the first three quarters of 1996, down from 4,049 during the same period in 1995. *Id.* These statistics probably explain why Japan was the first nation to lodge a complaint against Brazil. See *supra* note 106 and accompanying text.

138. See *id.*

139. See *id.* at 407.

140. Felsenthal, *supra* note 5.

specifically tailored to establishing its own national industry. Frustrated by Japanese control of 90% of Indonesia's car market¹⁴¹ and inspired by Malaysia's success in developing its own national auto industry,¹⁴² President Suharto initiated the "Pioneer Auto Program" in February 1996 to establish a national industry and produce a national car.¹⁴³

From the outset, the program reeked of nepotism and corruption.¹⁴⁴ Only one car company, PT Timor Putra Nasional, qualified for the program's tax and tariff reductions, and that company happened to be owned and operated by one of President Suharto's sons, Hutomo "Tommy" Mandala Putra.¹⁴⁵ Moreover, the company's national car, the "Timor," wasn't even national; it was produced as a joint venture with the well-established Kia Motors of Korea.¹⁴⁶ The plan had originally been for the joint venture, known as PT Kia Timor Motors, to build a manufacturing plant in Cikampek, West Java.¹⁴⁷ The plant would have begun operations in October 1998, producing 70,000 Timor sedans and 50,000 sport utility vehicles.¹⁴⁸ Both state-owned and private Indonesian banks had agreed to finance the project through a five-year \$690 million loan.¹⁴⁹ In the meantime, however, President Suharto decreed in June 1996 that the joint venture could import 45,000 fully-assembled

141. See *Japanese Automakers to Face Sharp Rivalry in Indonesia*, ASIAN ECON. NEWS, Sept. 4, 1995, available in Westlaw AECON Database. Some sources have placed the Japanese share of Indonesia's car market as high as 95%. See Michael Chinworth, *Kia Restructures as It Teeters on Bankruptcy*, AUTOMOTIVE ENGINEERING, Oct. 1, 1997, at 83-84.

142. See *Indonesia: Letter of Intent for Setting-Up National Automobile Industry, Rover Group (U.K.)—Order #:011994*, EXPORT SALES PROSPECTOR, Jan., 1994, available in 1994 WL 2246444.

143. See Parry & Taylor, *supra* note 5.

144. One source called the program "just the sort of cozy deal for the well-connected that Indonesia is known for." Rahul Jacob, *The Perfect Family Car for the Suhartos, That Is, But a Lack of Interest Among Other Indonesians Could Doom Son Tommy's Sedan*, TIME INT'L., Nov. 10, 1997, available in 1997 WL 13376392. President Suharto's son Tommy controlled the only car company to qualify for the program. See *infra* note 145 and accompanying text. Some quipped that the name of the car, the Timor, stands for "Tommy Itu Memang Orang Rakus," which is Indonesian for "Tommy is Indeed a Greedy Man." *Id.*

145. See Parry & Taylor, *supra* note 5; Kleinfeld & Wengel, *supra* note 90, at 409.

146. See S.N. Vasuki, *Kia Rescue Leaves Indonesian Car Project in the Lurch*, BUSINESS TIMES (Singapore), Oct. 23, 1997, available in 1997 WL 7773239.

147. See *id.*

148. See *id.*

149. See *id.*

Timors duty-free from Kia plants in Korea¹⁵⁰—an astounding 200% tariff reduction.¹⁵¹ The only requirement was that the Korean manufacturer use 20% Indonesian parts in its production or purchase an equivalent amount of parts for other purposes, as well as employ a minimum number of Indonesian workers at its Korean plant.¹⁵²

The "Pioneer Auto Program" contained two features that violated the Uruguay Round Agreements: a local content requirement and an import preference. The local content requirement—20% in a manufacturer's first year of production, 40% in its second year, 60% in its third—would qualify the manufacturer for duty-free imports of auto parts and raw materials and exempt it from a 35% luxury tax on each automobile.¹⁵³ The import preference consisted of the concession granted to PT Kia Timor Motors to import 45,000 Timors duty-free.¹⁵⁴

On October 3, 1996, the European Union submitted the first formal complaint to the WTO, alleging violations of Articles I and III of GATT, Article 2 of the TRIMs Agreement, and Article 3 of the SCM Agreement.¹⁵⁵ Within days, Japan and the United States followed suit.¹⁵⁶ In November and December of 1996, the European Union held bilateral consultations with Indonesia but failed to reach an agreement.¹⁵⁷ Unlike in the Brazilian controversy, all three complainants eventually requested that the dispute settlement body establish a panel to hear and rule on their claims.¹⁵⁸ Indonesia tried to block the European Union's re-

150. See Kleinfeld & Wengel, *supra* note 90, at 409.

151. See Parry & Taylor, *supra* note 5.

152. See Kleinfeld & Wengel, *supra* note 90, at 409.

153. See *id.*

154. See *supra* notes 150-51 and accompanying text.

155. See *Indonesia-Certain Measures Affecting the Automobile Industry: Request for Consultations by the European Communities*, WTO Doc. WT/DS54/1 (Oct. 14, 1996) (visited Oct. 12, 1998) <<http://www/wto.org>>.

156. See *Indonesia-Certain Measures Affecting the Automobile Industry: Request for Consultations from Japan*, WTO Doc. WT/DS55/1 (Oct. 10, 1996) (visited Oct. 12, 1998) <<http://www.wto.org>>; *Indonesia-Certain Measures Affecting the Automobile Industry: Request for Consultations by the United States*, WTO Doc. WT/DS59/1 (Oct. 15, 1996) (visited Oct. 12, 1998) <<http://www.wto.org>>.

157. See *Japan Pushes for Setup of WTO Panel on Indonesia's National Car Policy*, ANTARA, May 26, 1997.

158. Japan requested a panel on April 17, 1997. *Indonesia-Certain Measures Affecting the Automobile Industry: Request for the Establishment of a Panel by Japan*, WTO Doc. WT/DS55/6-WT/DS64/4 (Apr. 18, 1997) (visited Oct. 12, 1998) <<http://www.wto.org>>. The European Union requested a panel on May 12, 1997. See *Indonesia-Certain Measures Affecting the Automobile Industry: Request for the Establishment of a Panel by the European Communities*, WTO Doc. WT/DS54/6 (May 13, 1997) (visited Oct. 12, 1998) <<http://www.wto.org>>. The

quest,¹⁵⁹ but the dispute settlement body nevertheless established a panel on June 12, 1997.¹⁶⁰ The Panel began hearings in December 1997¹⁶¹ and was expected to make a ruling sometime in April 1998¹⁶²—that is, until the Asian economic crisis intervened.

The economic crisis brought Indonesia's "Pioneer Auto Program" to a swift demise. The crisis first affected the Kia Group, the parent company of Kia Motors.¹⁶³ The Korean government felt that Kia Motors' viability was essential—partly because of its lucrative involvement in the Indonesian car program—and therefore moved to prop up the auto company and separate it from the rest of the Kia Group.¹⁶⁴ A state-owned Korean bank tried to bail out the company,¹⁶⁵ and soon the auto manufacturer was placed in receivership.¹⁶⁶

The Asian economic crisis, of course, hit Indonesia hard, and the "Pioneer Auto Program" soon became a major sticking point in the Indonesian government's negotiations with the International Monetary Fund (IMF) for a multi-billion dollar relief package.¹⁶⁷ One industry analyst commented that the Kia Motors collapse offered the Indonesian government a face-saving way out of its auto program,¹⁶⁸ which by now had become a dis-

United States' request came on June 12, 1997. See *Indonesia-Certain Measures Affecting the Automobile Industry: Request for the Establishment of a Panel by the United States*, WTO Doc. WT/DS59/6 (June 13, 1997) (visited Oct. 12, 1998) <<http://www.wto.org>>.

159. See ANTARA, *supra* note 157.

160. See *Indonesia-Certain Measures Affecting the Automobile Industry: Constitution of the Panel Established at the Request of Japan and the European Communities*, WTO Doc. WT/DS55/7-WT/DS64/5 (Aug. 1, 1997) (visited Oct. 12, 1998) <<http://www.wto.org>>. Under Article 9 of the DSU, "[w]here more than one Member requests the establishment of a panel related to the same matter, a single panel may be established to examine these complaints." DSU, *supra* note 107, art. 9. Accordingly, a single panel was established to hear all the complaints lodged against Indonesia. See *Indonesia-Certain Measures Affecting the Automobile Industry: Constitution of the Panel Established at the Request of Japan, the European Communities and the United States*, WTO Doc. WT/DS55/8-WT/DS64/6 (Aug. 5, 1997) (visited Oct. 12, 1998) <<http://www.wto.org>>.

161. See *WTO Begins Hearing Indonesian National Car Complaints*, ASIA PULSE, Dec. 8, 1997, available in 1997 WL 13574689.

162. See Vasuki, *supra* note 146.

163. See Chinworth, *supra* note 141.

164. See *id.*

165. See Vasuki, *supra* note 146.

166. See Jacob, *supra* note 144.

167. See Vasuki, *supra* note 146.

168. See *id.* The auto industry analyst observed that "[t]his is incredibly good timing for Indonesia. Kia Motors has presented the Indonesian govern-

aster.¹⁶⁹ But the government wanted to continue the program, and so agreed to abide by the WTO ruling as a means of keeping the program out of the IMF negotiations.¹⁷⁰ Further, the Indonesian government consented to eliminating the local content requirement by the year 2000.¹⁷¹ The IMF nevertheless forced the Indonesian government to revoke many of the tax, customs, and credit concessions it had made to PT Timor Putra Nasional.¹⁷² Right now, Indonesia's "Pioneer Auto Program" is moribund, if not dead.

Like the Brazilian controversy, the Indonesian debacle demonstrates the inefficacy of the TRIMs Agreement. The argument advanced regarding the Agreement's effectiveness against Brazil's local content requirement—namely, that such requirements are adequately proscribed by GATT Article III and the FIRA ruling and therefore the TRIMs Agreement's proscriptions are redundant¹⁷³—holds true in the Indonesian case. All three complaints against Indonesia alleged GATT Article III as well as TRIMs Agreement Article 2 violations,¹⁷⁴ and the complainants could have prevailed solely on the former.

But the Indonesian controversy adds two new features about which the TRIMs Agreement is silent: an import preference and an equity requirement. The import preference, like the local content requirement, is sufficiently covered by GATT—in this case, by the most-favored-nation clause (MFN clause) of Article I.¹⁷⁵ By permitting Kia Motors of Korea to import cars into

ment with a wonderful fait accompli. The government can now save face and postpone the project." *Id.*

169. The Timor had been "a bomb in the marketplace." Jacob, *supra* note 144. Even though priced at about half the amount of its competitors, the car sold poorly. *See id.* PT Timor Putra Nasional had set a sales target of 120,000 Timors by 1999, but between January and November of 1997 the company sold only 18,193 cars—40.8% of the market share. *See* ASIAN ECON. NEWS, *supra* note 24. Some analysts attributed the poor showing to a terrible after-sales service network and to fears that if 76-year-old President Suharto died, so would the Timor, thereby adversely affecting the car's resale value. *See* Jacob, *supra* note 144. In other words, the Timor's pricing advantage was offset by its after-sales costs to the consumer. *See id.*

170. *See Decision of National Car Project from IMF Conditions Appropriate*, ANTARA, Nov. 4, 1997, available in 1997 WL 15129302.

171. *See id.*

172. *See* ASIAN ECON. NEWS, *supra* note 24.

173. *See supra* notes 111 and 114 and accompanying text.

174. *See supra* notes 155-56 and accompanying text.

175. Article I states in relevant part:

any advantage, favour, privilege or immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like

Indonesia duty-free, while maintaining its 200% tariff on auto imports from other GATT-member nations,¹⁷⁶ Indonesia discriminated between like products of different nations. Such discrimination violates Article I.¹⁷⁷ Not surprisingly, the complainants all alleged Article I violations in their complaints to the WTO;¹⁷⁸ and, as the TRIMs Agreement makes no mention of import preferences, relief would have to be granted, if at all, under Article I. But again, the TRIMs Agreement would be no stronger if it proscribed import preferences; it would only be more redundant.

Nothing in GATT or the Uruguay Round Agreements, however, prohibits equity requirements, and the TRIMs Agreement's failure to do so is perhaps its biggest shortcoming. The Indonesian car program was part and parcel of the corruption endemic to the Indonesian economy and of the economic crisis in Indonesia. And the program's equity requirement facilitated both the corruption and the poor investment decisions that contributed to the economic crisis. By requiring indigenous ownership and control of an entire industry, the equity requirement furthered the Suharto family's economic cronyism, for only the first family and its inner circle possessed the capital to establish ownership and control of any industry. By locking out foreign capital—except Korean capital—the equity requirement effectively insulated PT Timor Putra Nasional from healthy competition.¹⁷⁹ The IMF bailout may save Indonesia this time, but there has been much debate over the ultimate usefulness of such IMF rescues.¹⁸⁰ The IMF may not be around during the next crisis.

The TRIMs Agreement's self-restriction, its confinement to trade in goods only, prevents it from containing two provisions

product originating in or destined for the territories of all other contracting parties.

GATT, *supra* note 7, art. I.

176. See *supra* notes 150-51 and accompanying text.

177. See *supra* note 175 and accompanying text.

178. See *supra* note 155-56 and accompanying text.

179. As one scholar has observed, "openness to foreign trade and investment is, in the final analysis, only an extension of domestic policy fostering greater competition." Schwanen, *supra* note 125, at 4.

180. The IMF has come under attack by critics who feel that its bailouts encourage risk-taking by irresponsible governments and industries. These critics believe that international investors alone should bear the risk and suffer the consequences of their investments; such accountability would serve to reign in risky speculation. Former Secretary of State George P. Shultz and others claim that "the IMF's promise of massive intervention . . . has spurred a global meltdown of financial markets." George P. Shultz et al., *Who Needs the IMF?*, THE WALL ST. J., Feb. 3, 1998.

that would make it effective against programs like Indonesia's: a MFN clause and a national treatment clause for investment. FDI liberalization, after all, is the Agreement's *raison d'être*, and its focus on TRIMs is only a roundabout and, as has been demonstrated, ineffective means of achieving that goal. A MFN obligation for investment would have prevented Indonesia from discriminating in favor of Korean capital and therefore favoring a company, Kia, with which the Indonesian government was in collusion. A national treatment obligation would have prevented the Indonesian government from treating FDI less favorably than domestic investment, ensuring that PT Timor Putra Nasional faced salutary competition. By containing neither provision, the TRIMs Agreement failed to prevent or provide a remedy for the Indonesian debacle and will fail to do so should any similar program arise elsewhere in the future. A new agreement, focused on investment, is undoubtedly needed.

III. AN ALTERNATIVE ARRANGEMENT

A. THE OECD AND THE MAI

Once it is acknowledged that the TRIMs Agreement has failed, alternative arrangements can come to the fore of the debate on investment liberalization. One such alternative that shows great promise is the Organisation for Economic Co-operation and Development's¹⁸¹ (OECD) proposed Multilateral Agreement on Investment (MAI).¹⁸² This proposal focuses directly on FDI, eschewing the indirection of the TRIMs Agreement. Moreover, it includes the two provisions that the TRIMs Agreement sorely lacks: a MFN obligation and a national treatment obligation for investment. Although the MAI, if approved, would bind only the wealthy, developed nations that comprise the OECD, it provides a blueprint for future arrangements that may eventually include the developing countries.¹⁸³

181. For a brief history of the OECD, see Hart, *supra* note 59, at 59-61. The OECD began as the Organisation for European Economic Co-operation (OEEC), an organization of Western European countries which hoped to facilitate the rebuilding of their economies after World War II. It became the OECD in 1961 when other developed countries (first the United States and Canada, then Japan, Australia, and New Zealand) were admitted. See *id.* at 59.

182. The OECD agreed in May 1995 to begin negotiations on the MAI. See Schwanen, *supra* note 125, at 1.

183. The MAI is not the only possible blueprint for future investment arrangements. Other possibilities include regional arrangements that permit open-FDI or managed-FDI—for example, the European Union (EU), the North American Free Trade Agreement (NAFTA), and the Australia-New Zealand

The MAI is still a work-in-progress, although at least one draft has thus far been promulgated.¹⁸⁴ In addition to MFN and national treatment obligations, the MAI's main features include explicit prohibitions on performance requirements and regulations on investment incentives. As yet, however, there is no consensus on what types of regulations would be permissible.¹⁸⁵

The MAI's MFN clause would expand the analogous GATT provision, Article I, to FDI.¹⁸⁶ As noted in the analysis of the Indonesian controversy, the TRIMs Agreement is silent on discrimination between home countries supplying FDI. Indonesia's ability to discriminate enabled it to favor FDI from Korea as a means of furthering PT Timor Putra Nasional's shady joint venture with Kia Motors. By providing the joint venture with an enormous tariff reduction and therefore a significant pricing advantage, the Indonesian government effectively locked out FDI from other auto-producing nations such as the United States and Japan. While this, of course, was the government's goal, Indonesia's recent economic crisis demonstrates the folly of such policies.

The MAI's national treatment obligation essentially extrapolates GATT Article III from goods to investments.¹⁸⁷ GATT Ar-

Closer Economic Relations Trade Agreement. See Hart, *supra* note 59, at 66-69; see generally Atik, *supra* note 4 (discussing current open-FDI and managed-FDI arrangements). These arrangements all have the advantage over the TRIMs Agreement in that they actually advance investment liberalization, even though they are necessarily confined geographically (the MAI to the wealthy, developed nations of the OECD, the EU and NAFTA to their respective regions). The theory, discussed *infra*, is that investment liberalization should advance first, then spread beyond certain geographical pockets. In contrast, the TRIMs Agreement is diffuse geographically but shallow to the point of uselessness for investment liberalization.

184. See *The MAI Negotiating Text* (visited Oct.12,1998) <<http://www.oecd.org/daf/cm/mis/mai/negtext.htm>> [hereinafter MAI].

185. Some OECD members felt that investment incentives were adequately covered by other articles in the MAI. See *id.*

186. Article III:1.2 of the MAI reads:

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 investors of any other Contracting Party or of a non-Contracting Party, and to the investments of investors of any other Contracting Party or of a non-Contracting Party, with respect to the establishment, acquisition, expansion, operation, management, maintenance, use, enjoyment, and sale or other disposition of investments.

Id. art. III:1.2.

187. Article III:1.1 of the MAI reads:

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 inves-

title III prohibits discrimination within a country between domestic and foreign like products; the MAI Article III:1.1 would prohibit internal discrimination between domestic and foreign investors and investments. This provision would prevent the type of equity requirements Indonesia imposed in its national car program. It would force domestic enterprises to compete on equal terms with foreign-owned and operated businesses that occupy the same economic sector, weeding out inefficient producers such as PT Timor Putra Nasional. As in the trade arena, a national treatment obligation is essential to investment, since internal restrictions on FDI would undermine the benefits of access guaranteed by the MFN obligation.¹⁸⁸ As in the Indonesian case, internal restrictions on FDI would inhibit FDI inflows.¹⁸⁹

By enumerating specific prohibited measures, the MAI's Article XX is similar in form to the TRIMs Agreement's "Illustrative List."¹⁹⁰ Yet it unequivocally proscribes performance requirements, including the type of trade-balancing regulation Brazil imposed in its auto regime. It prohibits any requirement that relates "in any way the volume or value of imports to the volume or value of exports or to the amount of foreign exchange inflows associated with such investment."¹⁹¹

The MAI has one more feature which the TRIMs Agreement lacks and which makes it a more effective proposal for invest-

tors and their investments with respect to the establishment, acquisition, expansion, operation, management, maintenance; [sic] use, enjoyment and sale or other disposition of investments.

Id. art. III:1.1.

188. See Atik, *supra* note 4, at 10.

189. See *id.* at 11.

190. Article III of the MAI reads:

No Contracting Party may impose, enforce or maintain any of the following requirements, or enforce any commitment or undertaking, in connection with the establishment, acquisition, expansion, management, operation, or conduct of an investment of an investor of a Contracting Party or of a non-Contracting Party in its territory:

- (a) to export a given level of goods or services;
- (b) to achieve a given level or percentage of domestic content;
- (c) to purchase, use or accord a preference to goods produced or services provided in its territory, or to purchase goods or services from persons in its territory;
- (d) to relate in any way the volume or value of imports to the volume or value of exports or to the amount of foreign exchange inflows associated with such investment;
- (e) to restrict sales of goods or services in its territory that such investment produces or provides by relating such sales in any way to the volume or value of its exports or foreign exchange earnings.

MAI, *supra* note 184, art. III.

191. *Id.* art. III(d).

ment liberalization: a forward-looking approach. As noted previously, the TRIMs Agreement is inherently backward-looking; it confines itself to trade in goods only and does no more than recapitulate GATT provisions. As such, it supplies neither a progressive vision nor an implicit or explicit proposal for greater investment liberalization. The MAI, on the other hand, frees itself from trade in goods and focuses directly on FDI. Even though it would only apply to developed OECD-member nations, the MAI has greater potential than the TRIMs Agreement, which binds both developed and developing GATT signatories. The MAI moves forward toward investment liberalization and, if successful, will be able to spread to other nations, particularly if the competition for FDI continues to increase, as is likely. As one scholar has observed, the MAI has "no point" if it does not intend ultimately to advance investment liberalization throughout the international community.¹⁹² This indeed is the MAI's point, and it is an achievable one. It is a point that the TRIMs Agreement fails to comprehend.

IV. CONCLUSION

The TRIMs Agreement began as a legitimate attempt to move toward global investment liberalization. It sought to proscribe investment measures which adversely affect trade in goods, thereby removing one constraint upon the free flow of FDI. Yet the Agreement which emerged after a long negotiating history fell short of its goal. The recent automobile controversies in Brazil and Indonesia have exposed the TRIMs Agreement's inadequacy—specifically, its failure to push beyond GATT toward a comprehensive agreement focused on FDI.

In the new international economy, FDI has become increasingly important to both developed and developing nations, and an effective agreement is necessary to loosen constraints upon it. The OECD's proposed Multilateral Agreement on Investment shows great promise as a model for future investment arrangements. While confined to the developed nations of the OECD, the MAI, if approved and if successful, may become the progenitor of a global agreement that will achieve what the TRIMs Agreement has not: effective investment liberalization.

192. See Startup, *supra* note 79, at 191. Startup also believes that non-OECD members should be "engaged"—that is, apprised and consulted—as the MAI and other investment liberalization measures proceed. *Id.*