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WTO PLUS

Creating Liberal Investment through Regulating Tax Incentives

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Abstract

The World Trade Organization's (WTO) narrow reading of the Agreement on Trade Related Investment Measures (TRIMs) should be expanded to prohibit specific and targeted tax incentives aimed at attracting foreign investment. These tax incentives restrict investment and trade liberalization. This paper proposes that trade and investment are intrinsically linked, and as such, the WTO is the proper forum to regulate investment measures. This paper argues the case against specific foreign investment attracting tax incentives. These incentives do little to actually attract investment, and are harmful to development. Individual tax incentives also limit the collective global benefits of investment. This paper concludes by arguing that the WTO should use the existing TRIMs Agreement to prohibit the specific tax incentives used to attract foreign investment.

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I. Introduction

Reebok spent six months in China searching for a new site to manufacture sneakers. To much surprise, Reebok found its site in Vietnam. Vietnam offered Reebok tax incentives, but so did China and Malaysia. Vietnam has historically offered tax incentives, but only recently has there has been resurgence in investment. Reebok: a $20 million factory; an Indian pharmaceutical company; polyester chips and yarn: $289 million; printers and beer; overall foreign direct investment in Vietnam totaled over $2.34 billion in 2000.[1]

What makes Vietnam so special? Vietnam increased freedom and protection to foreign investors by creating new and seemingly effective investment incentives. These incentives considered specific concerns, like sweeping areas for landmines. These incentives also address macro economic and political policy. Vietnam devoted itself to providing political stability, sparse competition, good roads, low cost labor and efficient port facilities. Actual tax incentives may have little to do with the resurgence in foreign investment. If so, Vietnam would be better off with the investment ***and*** the tax revenue forgone through incentives. Vietnam may only offer tax incentives because they feel compelled.

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[1] Margot Cohen, *Foreign Investors Take a New Look at Vietnam and Like What They See*, WALL ST. J., Jan. 23, 2003, at A14.

This paper will address the situation illustrated by Vietnam and faced by so many other countries. The paper will begin by giving a brief background on the World Trade Organization (WTO) and its connection with investment. This connection provides the legitimacy pin to the argument that the World ***Trade*** Organization has a role to play in regulating investment. The central argument of this paper is that specific investment attracting tax incentives should be prohibited, mainly because they do little to attract investment, and may actually prove harmful. The paper will conclude by explaining why the WTO and not regional or bilateral institutions is the proper forum for investment negotiations. Not only does the WTO have "jurisdiction", the WTO is the most logical and beneficial place to regulate investment.

II. Linkage Between Trade and Investment

In 1947, the international community placed investment on the table at Bretton Woods in the form of the International Trade Organization (ITO). The United States was the original driving force behind the ITO. However, the United States refused to ratify the Havana Charter for an International Trade Organization, sealing the ITO's fate. The remaining agreement, the General Agreement on Trade and Tariffs (GATT), provided no clear, much less formal, mandate to address investment within the trade context. With the emergence of the WTO in 1996, the Uruguay Rounds established a more concrete relationship between trade and investment.

A. Trade and Investment within the World Trade Organization

The WTO approaches investment in a number of ways. First, the WTO established the Working Group to examine the relationship between trade and investment. Despite the debate as to the exact nature and implications of the relationship there is consensus that trade and investment are linked.[2] The WTO also addresses investment through the General Agreement on Trade and Services (GATS). As the name suggests, GATS addresses foreign investment concerned with services. Another product of the Uruguay Rounds, the GATS became the first set of multilateral legally enforceable rules regarding international trade in services.[3] It is important to note, that the GATS recognized the need for further negotiations and agreements surrounding investment.[4]

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[2] WTO, *Trading into the Future: The Introduction to the WTO, Investment, Competition, Procurement, simpler Procedures,* (visited Feb. 27, 2003) <http://www.wto.org/English/thewto_e/whatis_e/tif_e/bey6_e.htm>.

[3] WTO, *Website Trading into the Future: The Introduction to the WTO, Services: Rules for Growth and Investment,* (visited Mar. 22, 2003) <http://www.wto.org/English/thewto_e/whatis_e/tif_e/agrm5_e.htm>.

[4] WTO, *supra* note 3.

B. The Agreement on Trade Related Investment Measures

For the purposes of this paper, the Uruguay Round Agreement on Trade Related Investment Measures (TRIMs) is the most relevant instrument when dealing with investment within the context of the WTO. Even before the Uruguay Rounds, countries realized that restrictions on investment might encourage purchase of domestic products over foreign products, having trade distorting effects. The TRIMs Agreement was created to end such restrictions.[5]

The TRIMs Agreement regulates investment measures that are trade related which violate GATT Article 3 (national treatment) or GATT Article 11 (quota restriction.) The shortcoming of the TRIMs Agreement is not what it purports to regulate, but rather what it leaves out. The TRIMs Agreement prohibits trade related measures which violate the GATT by using an "illustrative list" found in the annex. Unfortunately this annex has only been used as an exhaustive list, rather than an illustrative one. The TRIMs Agreement is a good beginning to investment regulation and was designed as such, a beginning. The TRIMs Agreement was meant to be reviewed and modified as needed.[6] The international community should take another look at the TRIMs Agreement,

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[5] Paul Civello, *The TRIMs Agreement: A Failed Attempt at Investment Liberalization*, 8 MINN. J. GLOBAL TRADE 97, 99 (1999).

[6] Civello, *supra* note 5 at 109.

interpreting it more broadly to include tax incentives, rather than taking the more narrow approach.

There is a general agreement that trade and investment are linked to some degree. Currently, the international community addresses the linkage in a number of ways outside the WTO. Developed countries continue to reinforce the link between trade and investment. Their efforts manifest in instruments such as NAFTA Article 11 and the negotiations of Multilateral Agreement on Investment within the Organization for Economic Co-Operation and Development (OECD).

By regulating outside the WTO, developed countries may be trying to avoid developing countries' concerns and objections.[7] However, this approach will not produce the most beneficial results, especially for developing nations. Equity suggests that developing nations should be involved in the decision making process, and economic and political reality suggest that they can not afford to be left out of this process. The WTO provides a table which developing nations already have a seat at. Developing countries have too much to loose and so much to gain through investment negotiations.

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[7] Jurgen Kurtz, *A General Investment Agreement in the WTO? Lessons from Chapter 11 of NAFTA and the OECD Multilateral Agreement on Investment*, 23 U. PA. J. INT'L ECON L. 713, 757 (2002).

III. Incentive Decisions and Investment Location

There are two major reasons countries want to attract foreign investment. The first being the actual benefits that the investment ***may*** bring (a general return on investment approach.) The second reason stems from countries' development strategies. In an increasingly globalized world, countries adopt strategies that bring greater involvement with the world economy.[8]

A. Investment Attracting Characteristics

There are a number of factors that contribute to a favorable investment climate. They include political and economic stability, good governance (which include transparency and predictability), the availability of low wage labored – the availability of high skilled labor, adequate infrastructure and access to natural resources are examples. The presence of tax incentives is another factor that can attract foreign investment.

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[8] Richard Blackhurst and Adrian Otten, *Trade and Foreign Direct Investment*, (visited Mar. 23, 2003) <http:www.wto.org/English/news_e/pres96_e/pr057_e.htm>.

B. How Governments Attract Investments with Tax Incentives

Tax incentives can be quite complex in both their purpose and scope. This paper is concerned with specific targeted tax incentives offered by governments to attract foreign investment. These tax incentives are fiscal in nature, designed to reduce the overall tax burden on the investor.

This paper is concerned with the foreign direct investor, actually establishing a presence within a foreign country. The combination of the incentive and the investor creates a "production tax haven." These governments give targeted tax incentives to foreign investors located within their country.[9] This policy can be compared to traditional tax havens that have no corporate income tax across the board, usually attracting corporate headquarters. The production tax haven taxes the foreign investor at a lower rate than the domestic company, if at all. There are 103 nations considered to have production tax havens including Ireland, Israel, Malaysia and India.[10]

Though there may be disputes to the degree, there is a current understanding that trade and investment are linked. The sticking point is not whether there is linkage, or whether

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[9] Reuven S. Avi-Yonah, *Globalization, Tax Competition, and the Fiscal Crisis of the Welfare State,* 113 HARV. L. REV. 1573, 1588 (2000).

[10] Avi-Yonah *supra* note 9 at 1588.

the WTO should be involved, today the question surrounding trade and investment within the WTO is whether it is time to negotiate or continue to study.[11] This paper argues that it is time to negotiate. These specific tax incentives are harmful, and the sooner the tax incentives are prohibited, the sooner the benefits of a truly liberal trading and investment system can be enjoyed by all.

IV. Why Should Foreign Investment Attracting Tax Incentives be Prohibited?

First, tax incentives are artificial barriers to investment. Tax incentives do little to actually attract investment and are even harmful to development. Tax incentives do not increase prosperity for all parties involved. This paper will now address these and other concerns as well.

A. Tax Incentives are Artificial Barriers to Investment

Foreign investments by multinational corporations can be beneficial for both the country and the corporation. In fact, it is the ability to facilitate the benefits of trade that makes

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[11] WTO, *DOHA WTO Ministerial 2001: Briefing Notes, Trade and Investment: Negotiate, or continue to Study?,* (visited Apr. 1, 2003) <http://wto.org/English/thewto_e/minist_e/min01_e/brief_e/brief12_e.htm>.

investment so worthwhile by locating production to countries with a comparative advantage.[12]

However, the tax incentives used to attract the investment can actually create barriers to investment. Specific tax incentives can have negative effects on trade flows and competitive relationships.[13] At first, this seemed counter intuitive, how can a measure designed to attract investment actually become a barrier to investment? Tax incentives given by individual countries to attract particular investment do not increase global investment; there is no increase in the common good put forth under the theory of comparative advantage. One countries' specific tax incentive becomes a barrier to another countries' ability to attract investment. Over the long term, incentives will result in a loss for all competing countries involved, with the benefits going back to the foreign investor.[14]

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[12] Kevin C. Kennedy, *Global Trade Issues in the New Millennium: Foreign Direct Investment and Competition Policy at the World Trade Organization*, 33 GEO. WASH. INT'L L. REV. 585, 595-96 (2001).

[13] Civello, *supra* note 5, at 99.

[14] WTO, *Report of the Working Group on the Relationship between Trade and Investment to the General Council*, WT/WGTI/2 at 81 (1998) [hereinafter Working Group].

1. Tax Incentives Discriminate Amongst Nations.

Tax incentives are artificial distortions and can be seen as protectionist measures of "deep pocket" countries, able to attract then monopolize on foreign investment.[15] The ad hoc basis of investment incentives can result in a distortion of trade flow in favor of countries that can afford to finance the investments.[16] This practice keeps investment linear when investment should be viewed as more liberal and more global.

International agreements can address discriminatory and protectionist measures. A keystone of the WTO is nondiscrimination. The reality is that these incentives are no different from any other subsidy program. The fact that some tax incentives work for some countries does not imply the need for further study as some would suggest.[17] The difference highlights the discriminatory effect these incentives create and perpetuate. There is no mutually exclusive connection between tax incentives and investment. The sooner this policy ends, the sooner the global benefits can be realized.

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[15] Blackhurst and Otten, *supra* note 8.

[16] Working Group, *supra* note 14, at 81.

[17] *Id.* at 100.

2. Tax Incentives Discriminate Within Nations.

Tax incentives should be based on the principle of nondiscrimination.[18] Selective and discretionary incentives may lead to different treatment not only between foreign investors, but between foreign and domestic investors as well. A production tax haven extends tax incentives to foreign corporations to the exclusion of national corporations. This process is a form of reverse protectionism. Just as you can not discriminate ***against*** foreign investors, countries should not be able to discriminate in ***favor*** of foreign investors. Both use the same resources, both avail themselves of the same protections; both should be responsible for their share of the cost. In simplest terms, foreign corporations are able to enjoy the benefits of the host nation without paying for them.[19]

Specific investment attracting tax incentives seen as violating GATT Article 3 should be covered by the TRIMs Agreement. The WTO would have immediate jurisdiction over these investment issues. Because of the political reality within the WTO, this argument is not likely to carry the day. However, the WTO can modify the TRIMs Agreement to include these investment incentives specifically.

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[18] *Id.* at 92.

[19] Avi-Yonah, *supra* note 9, at 1588.

Some experts suggest that countries should consider offering investment incentives in a nondiscriminatory way, without distinguishing between foreign and domestic investor.[20] This approach would make investment incentives part of a country's overall economic policy. If tax incentives are used, the best option is lower taxes for everyone.[21]

3. As Artificial Barriers, Implementing Tax Incentives are Costly

The cost of tax incentives is more than the price tag on a specific incentive (the loss of revenue.) The added burden to the existing tax regime must be carefully considered. Tax issues in general can be costly, but incentives based on exceptions, given in a bidding atmosphere require substantial human resources.[22] The implementation and monitoring costs of discretionary tax incentives can quickly negate the initial and even long term benefits from foreign investment.

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[20] UNCTAD, *Report of the Expert Meeting on the Development Dimension of FDI: Policies to enhance the Role of FDI in Support of the Competitiveness of the Enterprise Sector and the Economic Performance of Host Economies, Taking into Account the Trade/Investment Interface, in the National and International Context*, at 3, U.N. Doc. TD/B/Com.2/48 (2002).

[21] Piritta Sorsa, *Special Incentives may come at a high cost to the economy*, CAPITAL, Mar. 2003 < http://www.imf.org/external/country/bgr/rr/030803.pdf>.

[22] Blackhurst and Otten, *supra* note 8.

The fact that incentives are artificial should not discredit their usefulness per se. The good news is that because they are artificial they can be dealt with more easily, and arguably by the WTO.

B. Tax Incentives Play a Minor Role in Investment Location; There are More Effective Ways to Attract Investment

The actual ability for tax incentives to attract foreign investment is relatively low compared to the possible negative effects. There are more efficient and effective alternatives to reach the desired results. Such alternatives may include increase spending on human capital in a particular region.[23] Most foreign direct investment not only originates with the developed world, but is destined for it as well.[24] Developing countries only account for 19% of global foreign direct investment inflow.[25] This suggests that there is not the huge flow of investment circulating throughout the world, merely a transfer of resources and benefits between like, developed nations.

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[23] Working Group, *supra* note 14, at 90.

[24] Kurtz, *supra* note 7, at 716.

[25] *Id.*

Foreign investors choose investment location by considering a wide range of factors, including resources and investment protection measures.[26] Foreign investors will typically base their investment location decisions on long term criteria, with specific incentives playing a minor role.[27] It is only when a location is narrowed down to a few sites, do tax incentives play a deciding role.

This is important in two respects. First the obvious: tax incentives have little actual investment attracting power. A developing country would be wiser to improve their rule of law or take other measures like improving the education of their labor force. Developing countries may increase attractiveness by creating a simple and stable tax policy. Foreign investors tend to favor a simple and stable tax policy over generous tax incentives, particularly in governments that might carry with them political or institutional risks.[28] If countries want to improve their attractiveness, studies show they are better off improving their overall tax system with clear, predictable and transparent

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[26] *To Offer or not to Offer Tax Incentives – That is the Question*, IMF Survey (IMF, Washington D.C.), June 10, 2002, at 182.

[27] Working Group, *supra* note 14, at 75.

[28] Jacques Morisset and Neda Pirnia, *How Tax Policy and Incentives Affect Foreign Direct Investment; A Review*, at 23 (Dec. 2000) <http://econ.worldbank.org/files/1321_wps2509.pdf>.

rules.[29] Speaking on behalf of the European Union, a delegate from Greece emphasized the role of the overall investment environment.[30] An attractive investment environment consists of a strong legal framework, adequate infrastructure, an effective judicial system and a strong rule of law.[31] A stable macro-economic framework based on predictability and transparency helps reduce investment risk, thereby increasing a country's attractiveness.[32] It is generally accepted that improving domestic capacity is a key to attracting investment while there still remains concerns regarding specific investment attracting tax incentives.[33]

The second reason it is important to recognize that incentives have a limited effect on investment location, is because it confines competitive usefulness to only similarly situated nations. If tax incentives are a competing factor only when the investment location is narrowed down to a handful of sites, then these sites have comparably similar

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[29] Sorsa, *supra* note 21.

[30] UNCTAD, *Report on the Commission on Investment , Technology and Related Financial Issues on its Seventh Session, UN Conference on Trade and Development*, at 9, U.N. Doc. TB/B/EX(31)/3, (2003).

[31] UNCTAD, *supra* note 30, at 9.

[32] *Id.* at 14.

[33] *Id.*

characteristics.[34] So in respects to developing nations, governments are using tax incentives to take investment away from other developing nations, and not luring it from the developed world. As previously stated, foreign direct investment going to developing countries comprises only a minority of investment worldwide, and even within this subset, investment has become concentrated in particular pockets of the world.[35]

However, there are studies that do suggest that tax incentives play a significant role, suggesting that "[i]n spite of all the other economic and political considerations that are clearly very important, taxation exerts a significant effect on the magnitude and location of FDI."[36] These studies to not detract from the central point, that is: tax incentives are only a factor if other countries do not have them. The problem arises when every country offers tax incentives and each country attempts to make theirs more attractive than their neighbor's. The race to the bottom begins.

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[35] Kurtz, *supra* note 7, at 717.

[36] Avi-Yonah, *supra* note 9, at 1590 (quoting James R. Hines Jr., *Lessons Tax Policy and the Activities of Multinational Corporations, Fiscal Policy: Lessons from Economic Research*, 401, 414-15 (Alan J. Auerbach ed., 1997)).

At a recent conference on trade and development, a delegate from Thailand speaking on behalf of the Group of 77 and China expressed concern regarding the intensifying competition to attract foreign investment.[37] This race to the bottom has direct effects. Developing countries are confronted with a prisoner's dilemma, feeling compelled to forgo revenue in order to attract investment.

This prisoner's dilemma present's another reason why the WTO has a role to play in regulating investment. Individual countries are unable to form truly binding agreements prohibiting negative investment incentives. Without binding agreements, countries are compelled to offer incentives based on their neighbors' tax incentives. Countries will inevitably choose domestically less desirable incentives in attempts to attract foreign investment.[38]

C. Tax Incentives are Harmful to Development

A delegate from Morocco speaking on behalf of the African Group noted the importance for policies not only to attract investment, but to benefit from investment as well.[39] The

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[37] UNCTAD, *supra* note 30, at 6.

[38] Daniel P. Petrov, *Prisoners No More: State Investment Relocation Incentives and The Prisoner's Dilemma*, 33 CASE W. RES. J. INT'L L. 71, 82-83, (2001).

[39] UNCTAD, *supra* note 30, at 8.

European Union and the OECD have stated that this specific tax competition is harmful to member countries.[40] They agree that investment attracting tax incentives are harmful to the modern developed state.

1. Tax Incentives Reduce Government's Revenue

The modern developed state is not the only state that needs tax revenue; developing countries need tax revenue as well. Some may argue that developing countries do not need the revenue because they do not outlay the services that developed countries do.[41] This circular logic may actually halt true development, leaving little opportunity for growth. Developing countries may face different challenges, but their needs are as real as developed ones. Often government expenditures need to be increased in developing countries because the private resources are not available.

2. Tax Incentives May Actually Contribute to Corruption

The argument follows that developing countries may be inefficient and corrupt and as such should not be rewarded with tax revenue. True, there are inefficient and corrupt regimes. But the entire developing world should not be denied needed and earned, not

[40] Morisset and Pirnia, *supra* note 28, at 20.

[41] Avi-Yonah, *supra* note 9, at 1640.

rewarded, revenue because of a few bad seeds. Where tax incentives are eliminated across the board, developing countries can promote greater transparency and predictability, two important factors when addressing corruption and attracting investment. Overtime, investment will gravitate to those governments that are less corrupt and inefficient, and the added revenue may help improve good governance.[42]

The ad hoc basis which tax incentives are granted actual could lead to greater corruption. Not only do tax incentives have a direct effect on the revenue, they can, and frequently do create an atmosphere for "suspicious behaviors" from governments and investors alike.[43] This is particularly harmful in developing nations where "suspicious behavior" can be used to offer specific tax incentives due in part to less than good governance conditions. Furthermore, corruption has the dangerous potential to become entrenched, attracting the wrong type of investments.

D. Tax Incentives do not Increase Prosperity for all Parties Involved

If there is a winner in the discussed investment environment, then it is the foreign investor. The foreign investor enjoys the tax incentives while poorer developing nations compete amongst themselves. The OECD argues that tax competition should be curbed

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[42] *Id.* at 1641.

[43] Morisset and Pirnia, *supra* note 28, at 4.

to prevent revenue loss of OECD nations (developed nations).[44] It seems that tax competition among developing nations should be curbed as well to prevent revenue loss among developing nations.

Exactly how much revenue lost is debatable, particularly when viewed with benefits gained from foreign investment. Ireland is often given as an example of the positive connection between tax incentives and investment. Ireland offered tax incentives to attract high technology foreign investment. Ireland's estimated revenue loss from its tax incentives was about $1.2 billion in 1991 and 1992.[45] It may be argued that this forgone revenue was worth it, given Ireland's economic prosperity resulting from foreign investment. However, it is still forgone revenue. There were other factors that made Ireland an attractive place to invest, like highly skilled labor. Despite having offered tax incentives beginning in the early 1980's, Ireland's foreign investment did not grow until the mid 1990's after the economy had stabilized and education had improved.[46] If tax incentives were taken out of the competitive process, then in essence Ireland could have their cake and eat it to.

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[44] Avi-Yonah, *supra* note 9, at 1597.

[45] *Id.* at 1601.

[46] Sorsa, *supra* note 21.

There is another fear that foreign investors may become victims of double taxation, from both the home and host countries.[47] In reality, there is often a foreign tax credit available in the home country. If that is the case, the host country is merely giving away revenue to the home country.[48] If their repatriated profits are taxed, the incentive becomes less attractive.[49] However because traditional and production tax havens coexist, a large amount of revenue may go untaxed.

Considering political and economic realities within countries, specific incentives often create a situation where the benefits of the investment are realized by a few elite.[50] Foreign investment is more likely to benefit a specific community or politically persuasive group within the host country than the country as a whole. Nevertheless the cost is spread among all the people in an increase tax burden or loss of services.

E. Other Concerns with Tax Incentives

In theory, incentives make sense only if they cover the difference between the private gains for the investor and the social gains for the host country. However, it is very

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[47] Avi-Yonah *supra* note 9, at 1642.

[48] *Id.*

[49] Avi-Yonah, *supra* note 9, at 1644.

[50] Blackhurst and Otten, *supra* note 8, at 22.

difficult to determine the difference between private and social gains, especially when viewed over a period of time.[51] Data is not always readily and reliably available. Countries often offer tax incentives without a complete understanding of the foreign investment and the benefits that will come with it.[52] The problem is more pronounced in developing countries, where there are not the same resources available. The result is nations bet big. The investment goes to the biggest bid, even if the bid is a gross overestimation. The winning nation is the one that is the most overoptimistic.[53]

Investment attracting tax incentives also raise distributional concerns. By competing among themselves, developing countries are transferring part of the value of the investment back to the investor.[54] The foreign investor is able to exclude tax considerations in the decision making process. Since a majority of countries offer tax incentives, investors no longer need to weigh the cost of greater government services against the benefit of lower tax accompanied by reduced services. Host countries are spending valuable resources neutralizing other countries advantages without actually

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[51] Working Group, *supra* note 14, at 75.

[52] Blackhurst and Otten, *supra* note 8, at 22.

[53] *Id.*

[54] *Id.*

increasing their own investment potential.[55] Since the tax concession represents a constant among equally desirable states, it is a pure windfall for the foreign investor.[56] The host country's resources are not spent to attract foreign investment in so much as they reestablish the unique characteristics each nation had prior to the incentives.

The WTO wants to liberalize global trade. Though there may be individual losers in this process, the world as a whole will be better off by creating greater prosperity for all. The same principal of liberalization can be applied to investment. Looking at developing nations in general and not any one specifically, forgone revenue from tax incentives is not likely to be offset by the benefits of foreign investment because developing countries are not competing amongst all other countries. Developing countries are competing among a limited subset of countries with characteristics similar to themselves.[57]

V. The WTO Should Include Tax Incentives in the TRIMs Agreement

For all the above reasons, the WTO should begin negotiations that focus on investments. These negotiations should address tax incentives, and specifically prohibit the targeted tax incentives used to attract foreign investment.

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[55] *Id.*

[56] Avi-Yonah, *supra* note 9, at 1592.

[57] *Id.* at 1646.

A. Regulating Investment is within the WTO's Jurisdiction

The GATT does not formally address foreign investment. However, with the realization that investment affects trade, the Uruguay Rounds made sure investment could be addressed by the WTO. Trade and investment are linked, and as such should be addressed by the WTO. Even the OECD feels a need for a rules based system dealing with investment within the WTO.[58]

True, the WTO is all ready a contentious subject, and expanding the WTO's reach to include ***more*** investment issues may actually lead to greater contention. However, the "it's not the right time, and the WTO is not the right place for a multilateral agreement on investment" argument does not make sense when considering the alternatives.

Using the OECD framework to negotiate Multilateral Agreements on Investment excludes developing countries from having input at the creation. Developing countries are not members of the OECD, and are less likely politically to accept an agreement that may be viewed as economic colonialism, an edict handed down from the developed

[58] Robert Madelin, *An Investment Framework for Development Needs: The WTO Contribution, Global Forum on International Investment*, (December 2002) <http://www.oecd.org/pdf/M00037000/M00037910.pdf.>

countries. Bilateral agreements such as NAFTA do not offer the comprehensive approach needed to remove the prisoner's dilemma. Nor can these frameworks offer the strong dispute resolution mechanisms already established and accepted by the WTO. Governments have reported that restraint on the use of incentives, though desirable, was difficult to achieve in unilateral or bilateral contexts.[59]

B. The TRIMs Agreement is the Logical Place to Regulate Tax Incentives

The existing TRIMs agreement would be a logical place for regulating tax incentives aimed at attracting investment. It is often easier to reach an agreement by amending existing regulations, rather than creating an entirely new regulatory regime. The existing TRIMs Agreement, with its acceptable WTO dispute resolution built in, can adequately address the problem with minimal changes to the actual Agreement.

As stated above, the TRIMs Agreement does not define the trade related measure it seeks to regulate, rather it gives examples that violate principles of GATT. These examples are illustrative, not exhaustive. Thus the TRIMs agreement should be viewed more organically, with the ability to respond as needed to trade related investment concerns. In reality, the TRIMs agreement does not need to be changed all that much. Simply adding an additional sentence to the annex, giving another example may be all that is needed.

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[59] Working Group, *supra* note 14, at 86.

C. Issues of Sovereignty

There will always be concerns over sovereignty and discomfort with developed countries or the WTO assuming they know what is good for developing countries. However, informal pressures created by the prisoner's dilemma already significantly limits sovereignty. A perceived limitation is a limitation nonetheless. These pressures are no worse than formal WTO rules that all nations must abide in. Thus restricting a country's ability to compete for investment by offering tax incentives does not impinge their sovereignty anymore than all ready has been.[60]

The decision to limit sovereignty is never easy, but that is exactly what countries have decided to do through their participation in WTO. They have opted to limit decision making power for the predictability and the benefits of a liberal trade regime.[61] It is becoming clearer, if not already, that foreign investment is part of trade, making the decision to regulate tax incentives a little more palatable.

Developing nations indeed would refrain from granting tax incentives if they could be assured that other countries would not grant incentives as well. Bilateral and regional

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[60] Avi-Yonah, *supra* note 9, at 1646.

[61] Blackhurst and Otten, *supra* note 8, at 45.

agreements can not make such assurances, however the WTO can. Even without regulations many countries are abandoning specific investment attracting tax incentives for a more improved overall tax policy.[62]

Regulation within the WTO answer can be beneficial for both developed and developing countries. Developed countries are concerned with opening market and protecting their investments. Since these specific tax incentives do not significantly affect a corporation's investment decision, they can be used as a bargaining chip by developing countries. Regulating tax incentives through the WTO has very little cost, while the potential benefits are great, particularly in developing nations where the need is great. Since the developed nations are advocating for the inclusion of investment regulation, here is a way for the developing world to benefit from these negotiations.

VI. Conclusion

Trade and investment are linked. Cooperation is needed among countries, in the form of binding agreements, or regulations, to realize the benefits of a liberal global trading system. The same approach should be taken with investment. The WTO can provide the harmonization needed to end harmful practices and restore the comparative advantage, both in trade and investment.

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[62] Sorsa, *supra* note 21.

Foreign investment can be a great benefit to a country. However, there are smarter ways to attract investment other than specific tax incentives. Foreign investors would prefer these alternatives (stability, predictability and transparency). Developing nations would prefer these alternatives (high skilled labor, improved infrastructure and an effective judicial system). By addressing investment, a "WTO Plus" can provide the forum needed for ***all*** countries to realize the prosperity found with the alternative.