Preaching Against the Choir: An Examination of the Influence of Multinational Enterprises On the Negotiation of Investment Rules at the World Trade Organization

by Brian N. Zeiler-Kligman

In many circles, there seems to be a consensus that multinational enterprises (MNEs) dominate the World Trade Organization, dwarfing the interests of all other groups. Reading literature regarding the WTO, one regularly encounters statements such as "[t]oday's agenda [for the next round of trade talks at the WTO], set by multinational enterprises engaging in foreign direct investment…"[1] or "[g]iven the importance of multinationals in dominating world trade and being major investors in developing countries, further developments in investment policy/rules within the WTO are likely."[2] These commentators, and those echoing such sentiments, take as an article of faith that the economic clout of MNEs compels the WTO to cater to their whims; that what the MNEs want is what determines WTO priorities. As this is an article of faith, the truth of this proposition escapes verification by such commentators.

MNEs appear to be fairly busy outside of their business dealings, for it is not only the WTO that supposedly kowtows to big business. Regional agreements and organizations, such as the North American Free Trade Agreement (NAFTA) and the Organization for Economic Cooperation and Development (OECD), are also accused of serving the interests of MNEs.[3] While some may accept these positions as given, this paper tempts accusations of heresy by testing the extent to which MNEs direct the negotiating agenda of the WTO. Do MNEs really dictate the direction of the trading agenda? Do MNEs appear to have relatively more influence at one organization as compared to another? This paper will show that MNEs in fact do not dominate the WTO or its negotiating agenda. A combination of structural, systemic, and perceptual factors have served to diminish MNEs' influence on the WTO agenda, particularly when compared to their ability to dominate the

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agenda of other international agreements and organizations, such as NAFTA and the OECD.

The issue of investment rules shall be used to demonstrate the above conclusions. Investment is an ideal topic to discuss for a number of reasons. First, logically speaking, without investment in foreign countries, there could not be MNEs. If it were true that MNEs set the WTO negotiating agenda, then it would logically follow that their particular interest in foreign investment would lead to the development of rules encouraging such investment. Second, investment has only recently been recognized as a trade issue.[4] Given its nascent status, influences that mold the treatment of investment can be more easily explored than other trade issues that are already deeply entrenched. Finally, investment has become a contentious issue. Business would like to see progress in this area, while civil society feels otherwise.[5] This diametrical opposition presents a perfect opportunity to ascertain the relative power of each of these interested parties.

The first section of the paper will look at the way investment is currently treated in the WTO agreements. The second section will discuss what MNEs would like to see happen at the WTO in the investment field. The third section will note what is on the current agenda of the WTO, particularly with reference to the Doha Development Agenda. The fourth section will explain the reasons for any gulf between the agendas found in the second and third sections.

Investment as it currently stands in the WTO

Although the link between trade and investment received very little attention prior to the Uruguay Round, it is clear that the General Agreement on Tariffs and Trade (GATT) addressed investment. This was confirmed in the 1984 *Canada – Administration of the Foreign Investment Review Act* panel, which found that local content requirements were inconsistent with the national treatment obligation contained in GATT Article III:4. The panel's decision confirmed that existing obligations under GATT were applicable to performance requirements imposed by governments in an investment context to the extent that such requirements were trade-distorting.[6]

Including investment within the auspices of the WTO is sensible given the extensive impact that investments by MNEs have on the volume of trade. Estimates fluctuate, but anywhere from one-third to one-half of all world trade is intra-firm trade.[7] Even when not trading internally, MNEs have an immense impact on trade patterns. The world's 500 largest companies are responsible for 70 percent of all world trade, with approximately one-third of all world trade involving MNEs trading with unaffiliated firms.[8] Given these statistics, it is not surprising that extensive research suggests that trade and investment are complements, rather than substitutes.[9]

The sorts of performance requirements imposed by governments in the investment context, such as local content requirements as addressed in the *Canada – Administration of the Foreign Investment Review Act* panel, are encapsulated under the rubric "trade-related investment measures" (TRIMs). There is no agreed definition of TRIMs, however at least the following measures are considered to be TRIMs:

i) local content requirements;
ii) export performance requirements;
iii) local manufacturing requirements;
iv) trade balancing requirements;
v) production mandates;
vi) foreign exchange restrictions;
vii) mandatory technology transfers; and
viii) limits on equity participation and on remittances.[10]

A country might impose a TRIM for any number of reasons; the most common justification is to increase the country's share of the gains from foreign direct investment (FDI) or to ensure that the country realizes the desired gains.[11] Often, MNEs undertaking FDI will engage in some practice—frequently a restrictive business practice of some sort—that reduces the host country's benefits from the FDI. It is posited that many TRIMs are a response to these restrictive business practices by MNEs.[12]

FDI inflows to developing countries have increased more than 20 times in absolute terms since 1980.[27] However, these inflows are concentrated in a few developing nations.

In the Uruguay Round, investment was dealt with in relation to both goods and services. The agreement covering investment relating to goods is called the Agreement on Trade-Related Investment Measures (TRIMs Agreement).[13] The TRIMs Agreement is a compromise document that essentially interprets and clarifies the application of TRIMs to GATT Article III (national treatment) and Article XI (quantitative restrictions). Article 1 of the TRIMs Agreement states that it applies to investment measures related to trade in goods only. Article 2 stipulates that members are not to apply TRIMs that are inconsistent with Article III or Article XI of the GATT. To clarify which measures might infringe this article, an illustrative list is annexed to the TRIMs Agreement. Basically, a TRIM—whether mandatory, enforceable under domestic law or administrative rulings, or one with which a company must comply in order to obtain an advantage—that creates a local content requirement or that seeks to balance trade is inconsistent with Article III:4 of GATT. In addition, trade balancing TRIMs, foreign exchange balancing TRIMs, and measures restricting an enterprise's exports to its local production are inconsistent with Article XI:1 of GATT. Further, Article 4 of the TRIMs Agreement establishes that developing countries can deviate temporarily from the obligations of the treaty as provided in Article XVIII of GATT, which provides safeguard measures for balance-of-payment difficulties.

Members were to notify the Council for Trade in Goods of any TRIMs in effect in their country that were not in conformity with the TRIMs Agreement.[14]

Elimination of these TRIMs was to take place within two years for developed countries, five years for developing countries and seven years for the least developed countries. The TRIMs Agreement also established a Committee on Trade-Related Investment Measures,[15] and it is subject to the WTO's dispute settlement mechanism.[16]

Although the TRIMs Agreement ostensibly served to merely clarify what Members had already signed on to in the GATT, some commentators felt that the agreement went too far and, further, that it showed the influence of MNEs at the WTO. For example, it was argued that by making an agreement related to TRIMs, but not one addressing competition issues and MNE restrictive business practices, the approach to TRIMs in the GATT amounts to a weakening of the bargaining power of developing countries vis-à-vis MNEs.[17] Essentially, MNEs have been given greater rights, but no constraints have been put on their actions. It should, however, be noted that competition was one of the "Singapore Issues" introduced in 1996 at the behest of the developed countries, principally the European Union (EU). The developing countries resisted the introduction of these issues and ultimately demanded that they not be part of the Doha Development Agenda negotiations.

As a means of comparison to the TRIMs Agreement, one should look at NAFTA's Chapter 11, which is the chapter dealing with investment. Like the WTO's TRIMs Agreement, NAFTA also made curbs on TRIMs a central feature of its investment provisions.[18] As noted above, the TRIMs Agreement outlawed only local content requirements, trade balancing requirements, and partial foreign exchange restrictions. Under NAFTA, not only are these three types of TRIMs disallowed in their entirety, but export performance requirements, local manufacturing requirements and production mandates have been eliminated as well; further, linking performance requirements to investment incentives is also prohibited.[19] However, NAFTA's Chapter 11 also goes well beyond curbing TRIMs. Chapter 11 of NAFTA is a comprehensive investment regime—with a broad definition of investment, expropriation, and investor-state dispute resolution—that reflects the type of investment agreement that MNEs favor developing at the multilateral level, as will be seen in the next section of the paper.

What are the MNEs seeking?

MNEs tend to locate wherever in the world their reward will be greatest.[20] As shown in Hymer's market power model, firms invest abroad when they regard the transaction costs of trade in their current location as greater than the costs of relocation and organizing production through direct managerial control.[21] The presence of impediments to investment or the imposition of costs in addition to the relocation of the business reduces the possible reward available to MNEs. Further, such obstacles will often make the costs of trade cheaper than investment. However, firms seeking to protect and/or to reap the advantages of their proprietary assets will still want to invest in foreign countries, in spite of the cost disadvantage. Thus, theory tells us that MNEs would ideally prefer an investment environment that is unencumbered, so that their investment decisions do not have to be premised on variances in national regulatory schemes, and the profits from their proprietary assets will be diminished as little as possible from such regulatory regimes. Not surprisingly, MNEs desire as few restrictions on investment as possible.[22]

In practice, this outcome would seem to be what business is advocating. In general, business is seeking broad advancement on the investment front. Business organizations, such as the International Chamber of Commerce, are advocating the creation of high-standard multilateral rules within the WTO to protect and liberalize investment.[23]

Some commentators argue that MNEs actually are not powerful agents for liberalization, at least at the multilateral level. MNEs are generally reluctant to reorganize or retool their operations without seeking assurances that sinking capital into new production structures will be profitable. As such, MNEs have incentives to seek credible commitments to the policy regime in place, or to the one that will be put in place. In addition, MNEs tend to desire the creation of entry barriers to compensate for the costs sunk to comply with the outmoded regulations, as well as transitional protection while the restructuring is taking place. Thus, in practice at least, more localized bilateral and regional treaties are better equipped than multilateral agreements to provide the assurances that foreign investors desire. Consequently, MNEs often seek regional arrangements to ensure that regulatory liberalization is durable, gradually implemented, and biased to favor incumbent investors.[24] As a result, MNEs may actually seek to impede, rather than encourage, multilateral investment liberalization.

Despite the desire of the business community to see a broad investment agenda in this round, the Doha Declaration gave the issue of investment a fairly narrow scope.

While the evidence of MNE preferences and the emergence of regional liberalization agreements would seem to confirm this hypothesis, the theory does not hold when one examines investment patterns. The US, the EU, and Japan are the principal sources and hosts of FDI. A main reason for this is that much of the FDI flows in the late 1990s were due to cross-border mergers and acquisitions, much of which took place in tertiary industries such as banking, finance, and related services, which are conducted almost exclusively among the developed nations.[25] In fact, over 70 percent of FDI inflows go to developed nations, with only about a quarter of FDI inflows going to developing nations. It should be noted, though, that while the percentages of investment dollars going to developing countries has been falling in recent years,[26] FDI inflows to developing countries have increased more than 20 times in absolute terms since 1980.[27] However, these inflows are concentrated in a few developing nations. For example, while there has been strong growth in inward investment in Latin America, most of it has gone to either Mexico or Brazil.[28] China and India are other developing countries that have greatly profited from increased investment inflows.[29]

Consequently, in developed nations and certain developing countries, MNEs are established investors, and thus might be less than receptive to multilateral investment liberalization that would put them on the same footing as other investors who have not had to bear the MNEs' sunken investment costs. While some MNEs have made investments in developing countries, many of them have not done so or have not done so extensively. The sorts of impediments that would make MNEs liberalization-averse are not present where the MNEs are prevalent. For instance, no developed countries were among those that had TRIMs in place requiring notification to the Council for Trade in Goods.[30] Further, numerous regional and bilateral agreements amongst these countries, such as found in NAFTA, should provide the protections and favoritism that MNEs supposedly would seek. Finally, the trading system has been stagnant in recent years. The uncertain prospects for future trade negotiations have provided an important stimulus for higher levels of FDI,[31] as can be seen by the 1,726 bilateral investment treaties negotiated in the period of 1990–1998.[32]

Essentially, because countries rely more heavily on non-tariff barriers, and because progress in reducing these barriers is likely to be slow, MNEs now have good reason to rely upon FDI as a key means of continuing the expansion of their businesses. Consequently, it would seem likely that MNEs would want multilateral rules on investment to make the investment environment in developing countries—where they have the least amount of presence and which would likely be a desired location for investment and expansion—more accommodating and attractive. This hypothesis is confirmed by the underlying desires of the OECD Member countries negotiating the failed Multilateral Agreement on Investment (MAI). Many felt that, as the OECD countries are largely liberalized in the area of investment, the real payoff of such an agreement would be a significant number of developing countries signing on to the MAI.[33] Given the nature of FDI flows today, though one would expect MNEs to be bullish on regional and bilateral arrangements, one would also expect MNEs to be advocates of multilateral–investment liberalization.

INVESTMENT AS IT WILL PROGRESS AT THE WTO

Although the inclusion of the TRIMs Agreement in the Uruguay Round and Chapter 11 of NAFTA announced that investment emerged as an international trade issue, these agreements have not been the final efforts in the area of investment. Perhaps reflective of the developed countries' displeasure with the Uruguay Round's results in the area of investment, negotiations for a comprehensive investment agreement through the auspices of the OECD, known as the MAI, began in September 1995, shortly after the conclusion of the final Uruguay Round agreement.[34] While the MAI talks began with great optimism, they soon floundered. The Member countries of the OECD failed to conclude an agreement by their self-imposed April 1998 deadline. As a result of this failure, the negotiation of an investment agreement through the WTO has become the avenue of choice.[35]

As a consequence of the above developments, it is not surprising that investment is still being discussed at the WTO. The establishment of the Working Group on the Relationship between Trade and Investment was one of the results of the 1996 Ministerial Meeting in Singapore.[36] Despite its creation, several Members made clear that formal negotiations in the area of investment should not begin until after the completion of the MAI talks.[37] Investment, along with competition, transparency in government procurement, and trade facilitation, was introduced at this meeting, and has come to be known as one of "the Singapore Issues."[38] These issues have been put on the agenda by the developed countries,[39] principally the EU.[40] However, a number of developing countries still see significant problems surrounding investment issues and thus feel that advancing beyond the TRIMs Agreement at this point would be premature.[41]

There were hopes to launch a new trade round at the 1999 Seattle Ministerial conference. Unfortunately, a lack of consensus meant that the "Millennium Round" did not materialize. Despite this setback, a new round of WTO trade talks was agreed to at the 2001 Ministerial meeting in Doha.[42] Reflecting the round's aims of advancing the development of the developing countries, these negotiations have been called "the Doha Development Agenda."[43]

Unfortunately, progress in the Doha Development Agenda negotiations has been lackluster. In fact, the entire round of trade talks nearly ended before it began, due to deadlock at the 2003 Ministerial Meeting in Cancun.

Despite the desire of the business community to see a broad investment agenda in this round, the Doha Declaration gave the issue of investment a fairly narrow scope. The Implementation Decision issued with the Doha Declaration focuses on implementation-related issues and concerns, which is a prime objective of the developing countries. As part of the Decision, the Goods Council is to consider positively requests from least-developed countries to extend the seven-year transition period for eliminating measures that are inconsistent with the TRIMs Agreement.[44] Neither was a great deal of progress made on any of the "Singapore Issues."

The Doha Declaration did not immediately launch negotiations in these issue areas. Rather, negotiations were to take place after a decision to be taken by explicit consensus at the 2003 Ministerial meeting in Cancun on the modalities of negotiations.[45] In spite of this limitation, the Doha Declaration did spell out some of what investment negotiations would entail. The essential point was making progress toward a "positive list" agreement (similar to the structure found in GATT)—rather than making broad commitments and listing exceptions, as was the approach in NAFTA and the MAI—that is mindful of development and developing country concerns. This also included coordination with other international organizations, such as the United Nations Conference on Trade and Development.[46]

Unfortunately, progress in the Doha Development Agenda negotiations has been lackluster. In fact, the entire round of trade talks nearly ended before it began, due to deadlock at the 2003 Ministerial Meeting in Cancun. The "July 2004 Package" contains a new focus on how the talks will progress and what will be negotiated. This agreement, which sets out what will be part of the results of the Doha Development Agenda, emphasizes issues that are of interest to the developing nations: liberalization in agriculture, technical assistance to developing countries, and special and differential treatment for the developing countries. As for the issue of investment, it will not form part of the work program. Therefore, no work towards negotiations on investment—or any of the other "Singapore issues"—will take place within the auspices of the WTO during the Doha Round.[47] That being said, as of October 2006, the Doha talks are officially suspended, creating uncertainty whether any further trade liberalization in any area will occur under the auspices of the WTO for the time being.

Why the Difference?

The second section of the paper demonstrated that MNEs desire a multilateral agreement on investment, or at the very least some advancement of the investment issue, in a new round of WTO trade talks. The section above indicated that investment was included fairly superficially in the Doha Declaration and has subsequently been abandoned altogether in the "July Package." This divergence between desires and outcomes would seem to reflect a lack of influence on the MNEs' part, rather than an abundance of it. Overall, a combination of structural, systemic, and perceptual factors has served to diminish the clout of the MNEs at the WTO.

First, the structure of the WTO restricts the influence of MNEs. Explicitly, members seek to expand the scope of the multilateral trading system on a non-discriminatory and reciprocal basis through the auspices of the WTO. According to economic theory, such a goal is in the best interests of all countries. However, in practice, countries tend to have a mercantilist mindset, pressing for their domestic protectionist interests with any and all available bargaining power.[48] So, even if MNEs vigorously lobby their home and/or host governments to pursue trade policies that are sought by MNEs, it is the states—not the MNEs—that are at the bargaining table and ultimately negotiate the agreements. Unless one can accept that most elected governments in the world are also at the whim of MNEs,[49] such a structure ensures that the agreements that materialize represent a compromise between the interests of all countries.

Another element of the WTO's structure that provides evidence against this discrepancy is its consensually-based organization. As of December 11, 2005, the WTO had 149 Members, the vast majority of which are developing countries.[50] While one might therefore expect the WTO to be skewed in favor of the developing countries, this has not necessarily been the case. In the past, developing countries had been willing to accept much of what was proposed by the developed countries because many developing countries saw global trade liberalization as a kind of fast track to prosperity.[51] The developing countries' acquiescence has diminished as the anticipated gains have not always materialized; according to some commentators, the Uruguay Round agreements have been "GATTastrophic" for the developing countries.[52] Consequently, since the 1999 Ministerial Meeting in Seattle, the developing countries have been more forthright in demanding what they see as being in their best interests.[53] Rightly or wrongly, many developing nations do not feel that they have reaped the benefits anticipated from FDI, and thus they do not feel that liberalizing investment is in their interests at the present time.[54]

As a consensus-based system allows for even a single member to bring about an end to negotiations, the gulf between the views of developed and developing countries has resulted in a stalemate. Because of apparent differing interests between developed and developing countries, it is unlikely that much progress will be made at the WTO, at least in the near future.[55] For example, developing countries are only willing to discuss investment liberalization if a narrow definition of investment is applied,[56] whereas developed countries and business interests seek to give investment a broad definition.

By way of comparison, NAFTA's Chapter 11 has a broad definition of investment, as well as a broad definition of expropriation and a mechanism for investor-state dispute settlement. In addition, the MAI also contained a broad definition of investment, although this was one of the main outstanding issues when the negotiations broke down.[57] Thus, in negotiation contexts where the developed countries outnumbered the developing countries, definitions of investment more in line with what the MNEs would like to see have been attained. In the WTO, however, such a broad definition seems unattainable given the development make-up of its members. Such an outcome would also appear to reflect a lack of influence on the part of the MNEs at the WTO.

The gulf between what is in the best interests of the developed and the developing countries at the WTO may be more perception than reality.

Despite the developing countries' apprehension to the negotiation of an investment treaty, many commentators feel that such an agreement is in their best interests because of the stabilizing influence FDI has on national economies and because the competitiveness of nations is enhanced by inward FDI flows.[58] Thus, the gulf between what is in the best interests of the developed and the developing countries at the WTO may be more perception than reality. Nevertheless, a chasm remains, and given the developing countries' recent flexing of their muscle, it is unlikely that this gulf will soon be bridged.

Second, systemic factors have served to further reduce the influence of MNEs on the bargaining outcome. New actors and considerations have emerged that have fundamentally altered the negotiating environment, causing a drastic impact on the relative influence of each party. The traditional bargaining model for understanding international governance (which includes international institutions such as the WTO) foresaw an interplay between states and MNEs; these were the only actors taken into account. In the investment field, it was perceived that relative power sided with the MNE at the outset until the investment was made. Governments then gained power as local personnel gained technical expertise and managerial capabilities.[59] The new bargaining model has more actors to consider and new forms of power to sway the balance. This explains why MNEs do not always succeed in securing the regimes they desire.[60]

The new bargaining model takes account of civil society actors and softer forms of power, such as moral suasion. Since MNEs are not a monolithic entity with a single goal-set, a political space exists for other actors to emerge and press their agendas. Civil society now has a considerable influence over the regime-building and bargaining processes on account of their organizational capabilities and their ability to resonate with particular ideological and cultural discourses.[61] So, while MNEs wield "hard power" in the form of their economic clout, civil society tends to exercise "soft power" through morals and norms.[62] The presence of civil society in the bargaining process means that both MNEs and governments have less control over the bargaining process and that bargaining outcomes are more uncertain. Further, the newfound importance of soft power means that control of economic and material resources is less important in determining the outcome in institutional bargaining.[63] Such a shift accounts for the current international system of governance's untidy and uneven form.[64]

The power of civil society groups is so immense right now that many in the business community feel that civil society has taken sway.

Currently at the WTO, civil society is making its presence known and felt, sometimes so much so that it is causing business to retreat. Many commentators feel that the influence of civil society has been behind the new radicalization of the developing countries in the Doha Development Agenda negotiations. According to some, a large part of the blame for the collapse of the talks at the 2003 Cancun Ministerial should be pinned on civil society groups. These groups convinced the developing countries to refuse all compromise with the developed countries and made the developing countries believe that they would get what they wanted if they "shout[ed] loudly and long enough."[65]

The power of civil society groups is so immense right now that many in the business community feel that civil society has taken sway.[66] In 1996, the WTO's General Council clarified the framework for relations with nongovernmental organizations (NGOs) by adopting a set of guidelines.[67] Since this clarification, arrangements have been made to have NGOs attend Ministerial Conferences[68] and participate in issue-specific symposia;[69] there is also regular contact between WTO secretariat staff and NGOs. Furthermore, the WTO director-general in 1998 established a number of new initiatives to enhance the dialogue with civil society. Among these initiatives were regular briefings for NGOs by the WTO secretariat, a special NGO section on the WTO website with specific information for civil society, and a monthly dissemination of NGO position papers received by the secretariat to members.[70] By way of contrast, corporations have no similar formal channels of access to the WTO secretariat.[71] As a result of the above overtures to civil society, business has backed away somewhat from the trade round[72] and sought to realize its interests through other means.

Since MNEs are not a monolithic entity with a single goal-set, a political space exists for other actors to emerge and press their agendas.

Unfortunately for the business community, it is not only at the WTO that civil society groups are making their presence known. In the context of the MAI, opposition by civil society groups has frequently been cited as a major reason for the collapse of the agreement.[73] It should be noted that the business community's waning interest was another strong factor that led to the demise of the MAI talks, as the business community removed its support when it saw that no significant liberalization was to ensue from the agreement.[74] Even so, the watered-down liberalization found in the MAI, which caused business to back away from the agreement, owes much to the vocal and fierce opposition by civil society groups.

Finally, a number of problems of perception affect the ability of MNEs to influence the negotiating agenda of the WTO. There is the perception that the developed and developing countries have different interests.[75] At the very least, it is believed that they envision different means of achieving the same end goal. There is also the view that civil society at least has the ear of the developing countries, if not the negotiating agenda of the WTO altogether. It is argued that it is vital to get the developing countries' support, which in turn means getting the support of civil society, in order to start talks on investment.[76] The same is not said of business, and this has caused some business interests to feel that pursuing their objectives at the WTO is a dead end.[77]

While these perceptions present obstacles to MNEs achieving their aims, perhaps the greatest challenge to overcome is the perception that what the MNEs seek in the investment field is unlikely to be attainable within the context of the WTO. There is a belief that investment bargains, such as have been reached in NAFTA or other bilateral or regional agreements, could not have been reached in the GATT or the WTO because multilateral institutions work best with general rules that apply universally. Some believe this "one size fits all" approach does not work in the investment context, as this area requires more detailed bargains, with special provisions, in different sectors, to adapt to the unique trade issues that can arise between countries with high levels of bilateral FDI.[78] Specifically, moving from bilateral to regional, and from regional to multilateral negotiations involves not only quantitative differences (in terms of the number of countries involved), but also qualitative differences (in terms of the nature of the agreements involved).[79] Consequently, progress toward liberalizing TRIMs is likely to continue at the regional rather than the multilateral level,[80] since overly ambitious investment negotiating agendas at the international level may have a lesser likelihood of success than more modest and incremental propositions.[81] Even if this perception has caused MNEs to focus on more local agreements rather than multilateral ones, this shift in focus reflects the MNEs' lack of dominance at the WTO; such considerations would never materialize if the MNEs truly ran the show.

Conclusion

Contrary to many authors' assertions, MNEs do not run the negotiating agenda of the WTO; structural, systemic, and perceptual factors have all served to diminish the power that MNEs exert on the WTO and its negotiating agenda, particularly when one compares the results obtained at the WTO to those attained through NAFTA or the OECD. Despite the MNEs'—and the rest of the business community's—desire to see multilateral investment negotiations take place at the WTO, opposition from the developing countries and civil society groups has kept this issue off the work program of the Doha Development Agenda. Such an outcome only contributes to the perception that culminating an investment agreement at the multilateral level will be next to impossible. Consequently, countries have sought to achieve their aims through bilateral arrangements, as shown by the explosion of bilateral investment treaties negotiated in the 1990s.

The experiences of NAFTA and the MAI further reflect the MNEs' lack of control at the WTO. NAFTA's investment provisions could serve as a template for the type of investment agreement MNEs would like to see agreed to at the multilateral level. The MAI, negotiated through the OECD, incorporated many elements of NAFTA's Chapter 11. While there was not a successful conclusion to the MAI negotiations, the mere presence of such provisions is indicative of the MNEs' ability to get their desires on the agenda at the OECD. However, the strident opposition to the agreement by civil society groups, and the rejection by some OECD Member countries, which ultimately prevented agreement on the MAI, also reveals how MNEs shrink in influence as the stage gets larger and more disparate actors become involved. The recent difficulty in negotiating a Free Trade Area of the Americas is another instance of this phenomenon.

In reality, one of the biggest surprises is the paucity of influence that MNEs seem to have at the WTO. As discussed earlier, MNEs vastly dominate the global flow of trade and investment. Through the WTO, members strive to negotiate agreements to gradually liberalize their trading regimes on a reciprocal and non-discriminatory basis. Essentially, members' discussions determine the trading and investment environment under which businesses operating within their borders will be working. Thus, it would only be logical for those who will be the major operators in these environments to greatly influence such talks. However, that is clearly not the case at the WTO, at least not at the moment. On the other hand, the relative influence of civil society at the WTO presents a public relations opportunity that the WTO should utilize to soften its public image; this openness to civil society participation is a potent counter-argument to those who are antagonistic to the WTO and claim it to be a secretive and non-democratic institution.

Despite their apparent clout, civil society groups still choose to portray themselves as David, to the Goliath of the MNEs. Much like the biblical story, the MNEs tower over civil society economically, but the slingshot of moral persuasion can still fell such giants. Therefore, while money may equal power in some circles, money is clearly not the only—or possibly even the most effective—path to influence at the WTO. Those who purport to spread the gospel of how the WTO operates should heed such observations and should leave their faith to other areas.

NOTES

1 Allan M. Rugman, "The World Trade Organization and the International Political Economy," in *The World Trade Organization in the New Economy: Trade and Investment Issues in the Millennium Round*, ed. Allan M. Rugman and Gavin Boyd (Northampton, MA: Edward Elgar, 2001): 19.

2 Oliver Morrissey, "Investment and Competition Policy in Developing Countries: Implications of and for the WTO," *Centre for Research in Economic Development and International Trade Research Paper* no. 00/2 (Nottingham: University of Nottingham, 2000): 1.

3 See for example, "Ethics in International Economics: The WTO, NAFTA, the IMF and the World Bank," Markkula Center for Applied Ethics (2001). Available at: www.scu.edu/ethics/publications/iie/wtotext.html (Accessed February 9, 2005), and organizations such as Public Citizen <www.citizen.org> with respect to NAFTA. With respect to the OECD, it is often referred to as a "rich nations" club. See, for example, UNICEF 2003, which uses data from OECD countries as the evidence of educational disadvantage in rich nations.

4 Trade-related investment, along with services and trade-related intellectual property rights, comprised the so-called new trade areas that were discussed as part of the Uruguay Round. See, for example, *Trade Rules Behind Borders – Essays on Services, Investment and the New Trade Agenda*, ed. Pierre Sauvé (London: Cameron May, 2003), and the description of the book found at: www.jus.uio.no/lm/man/pdf/1874698295.pdf (accessed October 17, 2006). Arguably, trade-related investment issues were the least developed during the Uruguay Round, as the Agreement on Trade-Related Investment Measures was the least comprehensive of the agreements concerning these new issues.

5 With respect to business' goals on the issue of investment in the Doha Round, see the discussion found in the second section of the paper generally and notes 22 and 23 in particular. With respect to what civil society groups would like to see emerge regarding investment issues, see the Declaration of Non Governmental Groups and Civil Society Movements, "No Investment Negotiations at the WTO" which, as of April 1, 2003 has been signed by over 70 such groups, available on the Public Citizen website: http://www.citizen.org/trade/wto/investment/articles.cfm?ID=9984 (accessed October 22, 2006).

6 "TRIMS: Background," *World Trade Organization* (1998). Available at: www.wto.org/english/thewto_e/whatis_e/eol/e/wto05/wto5_3.htm (Accessed February 9, 2005).

7 See Kerry A. Chase, "From Protectionism to Regionalism: Multinational Firms and Trade-Related Investment Measures," *Business and Politics (Online Version)* 6, no. 2, (2004) 1-36. Available at: www.bepress.com/bap/vol6/iss2/art1 (Accessed February 18, 2005) and Maria L. Cattaui, "Trade Rules after Seattle: A Business Perspective," in *The Role of the World Trade Organization in Global Governance*, ed. G.P. Sampson (New York: United Nations University Press, 2001).

8 Chase, "From Protectionism to Regionalism," 1ff.

9 See Richard E. Caves, *Multinational Enterprise and Economic Analysis*, 2nd ed. (New York: Cambridge University Press, 1996), and James R. Markusen, "Multinational Firms, Location and Trade," *The World Economy* 21 no.6 (1998), 733-756. A survey of MNE international economic activity is found in Caves at

chapter 2. Further, Markusen, at pg. 749, suggests that investment liberalization can actually increase the volume of trade.
10 Eden S.H. Yu and Chi-Chur Chao, "On Investment Measures and Trade," *The World Economy*, 21 no. 4 (1998): 549-561.
11 Oliver Morrissey and Yogesh Rai, "The GATT Agreement on Trade Related Investment Measures: Implications for Developing Countries and their Relationship with Transnational Corporations," *The Journal of Development Studies*, 31 no. 5 (1995): 706.
12 Morrissey and Rai, "The GATT Agreement on Trade Related Investment Measures," 704.
13 Investment relating to services is covered as part of mode 3 (commercial establishment) in the General Agreement on Trade in Services (GATS). It is for this reason that the GATS has been referred to as "the MAI by any other name" [see, for example, Steven Shrybman, *The World Trade Organization: A Citizen's Guide* (Toronto: James Lorimer & Company, Ltd.), and Canadian Centre for Policy Alternatives (2001):100], despite the fact that the GATS came into force before negotiations on the MAI even began. Due to GATS' architecture, some of its provisions do not apply uniformly to all Members or to all sectors. Thus, the coverage of services investment is somewhat piecemeal. Further, GATS 2000 negotiations are ongoing as part of the Doha Development Agenda. Further liberalization of services, particularly in reference to mode 3, is being encouraged by some members. However, it is unclear at this time what the results of the negotiations will be. For these reasons, it is beyond the scope of this paper to address investment relating to services.
14 Article 5.1, The General Agreements on Tariffs and Trade. Available at: http://pacific.commerce.ubc.ca/trade/GATT.html (Accessed July 28, 2006).
15 Article 7, GATT
16 Article 8, GATT
17 Morrissey and Rai, "The GATT Agreement on Trade Related Investment Measures," 704.
18 Chase, "From Protectionism to Regionalism," 1.
19 Yu and Chao, "On Investment Measures and Trade," 550-551.
20 Caves, *Multinational Enterprise and Economic Analysis*, 1.
21 John B. Davis and Joseph P. Daniels, "Corporations and Structural Linkages in World Commerce," in *The World Trade Organization in the New Economy: Trade and Investment Issues in the Millennium Round*, ed. Allan M. Rugman and Gavin Boyd. (Northampton, MA: Edward Elgar, 2001): 80.
22 Morrissey, "Investment and Competition in Developing Countries, 13.
23 Cattaui, "Trade Rules after Seattle," 260.
24 United Nations Conference on Trade and Development, 1.
25 Davis and Daniels, "Corporations and Structural Linkages In World Commerce," 75-78.
26 Davis and Daniels, "Corporations and Structural Linkages In World Commerce," 75-78.
27 Amit Dasgupta, "WTO and 'New Issues,'" *Economic Review: Occasional Paper* 13 (April 2001): 93.
28 Nigel Pain, "Openness, Growth and Development: Trade and Investment Issues for Developing Countries," in *The World Trade Organization in the New Economy: Trade and Investment Issues in the Millennium Round*, ed. Allan M. Rugman and Gavin Boyd (Northampton, MA: Edward Elgar, 2001): 229.
29 See generally "The tiger in front: a survey of India and China," *The Economist*, March 5, 2005, and particularly "The insidious charms of foreign investment," 7.
30 "TRIMS: Notifications and Transitional Arrangements," *World Trade Organization* (1998). Available at: www.wto.org/english/thewto_e/whatis_e/eol/e/wto05/wto5_6.htm (Accessed February 8, 2005).
31 Davis and Daniels, "Corporations and Structural Linkages In World Commerce," 75-78.
32 Dasgupta, "WTO and 'New Issues,'" 93.
33 United Nations Conference on Trade and Development, *Lessons from the MAI*. UNCTAD Series on Issues in International Investment Agreements (New York and Geneva: UN. 1999): 25.
34 "The talking FDI blues," *The Economist*, March 14, 1998, 18.
35 See "The talking FDI blues," 19 and "The sinking of the MAI," *The Economist*, March 14, 1998.
36 Rugman, "The World Trade Organization and the International Political Economy," 5-6.
37 Edward M. Graham, "Trade and Investment at the WTO: Just Do It!" in *Launching New Global Trade Talks: An Action Agenda*, ed. Jeffrey J. Schott. (Washington, D.C.: Institute for International Economics, 1998): 151.
38 "Understanding the WTO: Cross-Cutting and New Issues – Investment, Competition, Procurement, Simpler Procedures," *World Trade Organization* (2003). Available at: www.wto.org/english/thewto_e/whatis_e/tif_e/bey3_e.htm (Accessed February 11, 2005).
39 Dasgupta, "WTO and 'New Issues,'" 82.
40 Alexander Böhmer and Guido Glania, *The Doha Development Round: Reintegrating Business Interests into the Agenda*. (Wittenberg, Germany: Institut für Wirtschaftsrecht, Juristiche Fakultät der Martin-Luther-Universität Halle-Wittenberg, 2003): 19.

[41] Dasgupta, "WTO and 'New Issues,'" 96.
[42] "Understanding the WTO – The Doha Agenda," *World Trade Organization*, (2001). Available at: www.wto.org/english/thewto_e/whatis_e/tif_e/doha1_e.htm (Accessed February 11, 2005).
[43] "Understanding the WTO – The Doha Agenda."
[44] Ibid.
[45] Ibid.
[46] Ibid.
[47] "Text of the 'July Package' – the General Council's Post-Cancun Decision," World Trade Organization (2004). Available at: www.wto.org/english/tratop_e/dda_e/draft_text_gc_dg_31july04_e.htm (Accessed February 11, 2005).
[48] Rugman,"The World Trade Organization and the International Political Economy," 1.
[49] "Ethics in International Economics: The WTO, NAFTA, the IMF and the World Bank."
[50] "Understanding the WTO: The Organization – Members and Observers," *World Trade Organization* (2004). Available at: www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm (Accessed December 12, 2005). Least Developed Countries are classified according to the countries that have been designated as such by the United Nations. Currently, 32 of the 50 countries designated as least developed are WTO members. Further, a country self-identifies as "developing" or "developed" since there are no WTO definitions for these terms. However, such designations are not automatically accepted in all WTO bodies. For more information on designation, see "Understanding the WTO: The Organization – Least Developed Countries," *World Trade Organization* (2004). Available at: www.wto.org/english/thewto_e/whatis_e/tif_e/org7_e.htm (Accessed February 12, 2005).
[51] Dasgupta, "WTO and 'New Issues,'" 83.
[52] Dasgupta, "WTO and 'New Issues,'" 83.
[53] Ibid.
[54] Morrissey and Rai, "The GATT Agreement on Trade Related Investment Measures," 707-708.
[55] Davis and Daniels, "Corporations and Structural Linkages In World Commerce," 89.
[56] Böhmer and Glania, *The Doha Development Round*, 22.
[57] United Nations Conference on Trade and Development, 1.
[58] Davis and Daniels, "Corporations and Structural Linkages In World Commerce," 87.
[59] David L. Levy and Aseem Prakash, "Bargains Old and New: Multinational Corporations in Global Governance," *Business and Politics (Online Version)* 5 no. 2 (2003),146. Available at: www.bepress.com/bap/vol5/iss2/art1 (Accessed February 18, 2005).
[60] Levy and Prakash, "Bargians Old and New," 140.
[61] Ibid, 143.
[62] Ibid, 144-145.
[63] Ibid, 147.
[64] Ibid, 143-144.
[65] "The WTO under fire," *The Economist*, September 20, 2003, 18. See also the post-Cancun analysis by Pierre Sauvé, who notes that the intransigent stance of many developing countries, who received significant advisory assistance from civil society groups advocating generally absolutist positions, as a source of blame for the collapse of the Cancun Ministerial "The WTO After Cancun: Crisis or Teething Problems?" (2004), available at: http://www.iai.it/pdf/DocIAI/iai0414e.pdf (Accessed October 22, 2006).
[66] Böhmer and Glania, *The Doha Development Round, 5*. The business community's support for the opening of a new round of trade negotiations was somewhat mild in the run-up to the Doha Ministerial in 2001. The inclusion of "trade-related" issues, such as the environment and social standards, led some in the business community to believe that civil society actors were having more influence on the trade agenda than were corporations.
[67] "The talking FDI blues," *The Economist*, March 14, 1998, 18.
[68] "647 Non-Governmental Organizations Eligible to Attend the Doha Ministerial," *World Trade Organization*. Press Release, Press/240 (August 13, 2001).
[69] "Relations with Non-Governmental Organizations/Civil Society," *World Trade Organization* (1998). Available at: http://www.wto.org/english/forums_e/ngo_e/intro_e.htm (Accessed March 30, 2005).
[70] Ibid.
[71] MNEs can still wield some influence through this channel, as corporations can form industry-supported NGOs to take advantage of this avenue of consultation. Even so, it is clear that groups that, in general, oppose the aims of the WTO comprise the vast majority of activity in this area, potentially having a larger impact. For example, the WTO posts on its website NGO position papers received by the WTO secretariat (http://www.wto.org/english/forums_e/ngo_e/pospap_e.htm). The majority of such papers are critical of international trade. Similarly, NGO participation in Ministerial conferences is highly skewed to those groups that are critical of the WTO and/or international trade (for an example, see the list of NGOs that

participated in the 2005 Hong Kong Ministerial at http://www.wto.org/english/thewto_e/minist_e/min05_e/list_ngo_hk05_e.pdf). When combined with the fact that numerous civil society groups are providing significant advisory assistance to developing country members (see note 65 and related text), it is clear that civil society actors have a much greater ability to directly influence the direction of the WTO than do similarly-oriented business-minded groups.

72 Böhmer and Glania, *The Doha Development Round, 5-7*.

73 United Nations Conference on Trade and Development, 1-2.

74 Ibid.

75 Davis and Daniels, "Corporations and Structural Linkages In World Commerce," 89.

76 Böhmer and Glania, *The Doha Development Round, 25*.

77 Ibid, 35.

78 Chase, "From Protectionism to Regionalism," 30-31.

79 United Nations Conference on Trade and Development, 28.

80 Chase, "From Protectionalism to Realism,"32.

81 United Nations Conference on Trade and Development, 28.